

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In re: :
Altercare of Stow Rehabilitation Center, : No. 12AP-29
(Fairchild (MD) Leasing Co., LLC, : (File No. ODH 9021-01-10X)
Appellant). : (REGULAR CALENDAR)

D E C I S I O N

Rendered on September 18, 2012

Rolf Goffman Martin Lang Co., L.P.A., Ira S. Goffman, and Michele Conroy, for appellee Schroer Properties of Stow, Inc.

Benesch, Friedlander, Coplan & Aronoff LLP, Harry M. Brown, and Gregory J. Lucht, for appellant.

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

APPEAL from the Ohio Department of Health.

SADLER, J.

{¶ 1} Appellant, Fairchild (MD) Leasing Co., LLC, appeals from an order of the Director of the Ohio Department of Health ("director"), granting a certificate of need ("CON") to appellee, Schroer Properties of Stow ("Schroer"). Because the director's order is supported by reliable, probative, and substantial evidence and is in accordance with law, we affirm.

I. BACKGROUND

{¶ 2} In July 2007, Schroer submitted a CON application seeking to relocate a total of 80 licensed nursing home beds from three nursing homes in Stark County to a new 80-bed nursing facility in Summit County named Altercare of Stow Rehabilitation

Center ("Altercare of Stow"). Of the three Stark County facilities, Schroer sought to relocate 31 beds from Altercare of Alliance Center for Rehabilitation and Nursing Care, Inc. ("Altercare of Alliance"), 35 beds from Country Lawn Center for Rehabilitation and Nursing Care, Inc., and 14 beds from Altercare of Navarre Center for Rehabilitation and Nursing Care, Inc.. The Ohio Department of Health ("ODH") declared the application complete on February 28, 2011.

{¶ 3} Appellant, the owner of Kent Care Center, located within four miles of the proposed Altercare of Stow facility, objected to the CON application and requested a hearing. The hearing took place over three days in June 2011. On November 2, 2011, the hearing examiner issued a report recommending that the CON application be denied. As the sole reason for his decision, the hearing examiner concluded that the relocation of beds from one of the three source facilities, Altercare of Alliance, would cause the number of remaining beds in that service area to fall below the state bed need rate, in contravention of R.C. 3701.593(E)(4)(b). Aside from this deficiency, the hearing examiner stated that the CON application withstood appellant's objections in all other respects.

{¶ 4} Both parties filed objections to the hearing officer's report and recommendation. By adjudication order dated December 9, 2011, the director modified several of the hearing examiner's findings of fact and rejected the hearing examiner's conclusion that there would be an insufficient number of beds remaining in the service area of the three source facilities. After accepting the hearing examiner's remaining conclusions of law, the director approved the CON application.

II. ASSIGNMENT OF ERROR

{¶ 5} On appeal, appellant presents the following assignment of error for our consideration:

The Adjudication order of the Director of Health is not supported by reliable, probative and substantial evidence and is not in accordance with the law.

{¶ 6} Appellant's single assignment of error raises a variety of challenges to the director's decision to grant the CON application. Disputing various findings and conclusions made by the director and hearing examiner, appellant claims that the project

proposed in the CON application violated R.C. 3702.593(F), was financially infeasible, adversely affected other providers of similar services, and failed to satisfy the needs of Medicaid residents. We find appellant's arguments unpersuasive for the following reasons.

III. DISCUSSION

{¶ 7} 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).

{¶ 8} In an appeal from the director's decision granting or denying a CON application, this court "shall affirm the director's order if it finds * * * that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 3702.60(F)(3). Absent such a finding, we must reverse, vacate or modify the order. R.C. 3702.60(F)(3). This standard of review affords due deference to the director's resolution of evidentiary conflicts. *In re Green Village Skilled Nursing Ctr.*, 10th Dist. No. 12AP-91, 2012-Ohio-3769, ¶ 24. "Although this court may engage in a very limited weighing of the evidence upon an appeal of this nature, we may not substitute our judgment for that of the [director] as to the credibility of witnesses and the weight to be given the testimony." *In re The Knolls of Oxford*, 10th Dist. No. 02AP-514, 2003-Ohio-270, ¶ 13, citing *In re Manor Care of Kettering*, 10th Dist. No. 92AP-208 (Dec. 31, 1992); *In re Mill Run Care Ctr. & New Albany Care Ctr.*, 10th Dist. No. 94APH04-591 (Dec. 20, 1994). Analysis of whether the director's decision is supported by the evidence is essentially a question of the absence or presence of the requisite quantum of evidence. *In re Doylestown Parke Rehab. Ctr.*, 10th Dist. No. 09AP-694, 2010-Ohio-2064, ¶ 6.

{¶ 9} We begin by addressing appellant's argument that the director's decision granting the CON application violated R.C. 3702.593(E)(4). That statute provides, "[t]he

director shall approve relocation of beds from a health care facility only if, after the relocation, the number of beds in the facility's service area is at least equal to the state bed need rate." R.C. 3702.593(E)(4). As pertinent here, a facility's service area is "[t]he area that is within a fifteen mile radius of the facility's location." R.C. 3702.593(E)(4)(b).

{¶ 10} Appellant claims that the director erred by granting the CON application because the evidence from the hearing established that the proposed relocation of 31 beds from Altercare of Alliance caused the number of beds within that service area to fall below the state bed need rate. In its CON application, however, Schroer submitted information indicating that, of the facilities located within a 15-mile radius of Altercare of Alliance, a total of 2,045 beds would remain in that service area after relocation. At the hearing, Joel Kaiser, supervisor of the CON program with ODH, testified that his department reviewed the CON application and determined that sufficient beds would remain after relocation in all three service areas listed in the CON application. Regarding Altercare of Alliance's service area, Kaiser testified that his department determined that a minimum of 2,017 beds would need to remain within a 15-mile radius of that facility. Kaiser's department presented a report concluding that there were actually more beds remaining in Altercare of Alliance's service area, 2,117, than the number represented in the CON application.

{¶ 11} To verify the distances, Kaiser's department used a combination of Google Maps, Yahoo Maps, a GPS visualizer, and the Medicare website, which listed the number of beds and distances. Kaiser stated that his department had an obligation to verify whether the beds fell within the service area, and that the verification process was "a substantial undertaking in some cases because there were thousands of beds that we had to verify." (Tr. 383.) Kaiser added, "[i]n good faith we determined that they were within 15 miles of that facility or we wouldn't have included them." (Tr. 383.)

{¶ 12} Appellant's only evidence to refute Kaiser's testimony came from Tracey Hughey, a legal secretary for the firm representing appellant. Hughey testified that, of the facilities claimed to be in Altercare of Alliance's service area, five fell outside a 15-mile radius, which caused the remaining number of beds within that service area to fall below the state bed need rate to 1,657. However, Hughey acknowledged that she had no special training in finding distances between two sites and that she did not know whether the maps she created were accurate. When asked, she was unable to reproduce the maps and

distances for two of the five facilities. Moreover, Hughey measured the distances of the five facilities by using the website <http://www.gpsvisualizer.com>, but she did not confirm the distances with any other measuring tool or website.

{¶ 13} The director concluded that, based on Kaiser's testimony, the CON application satisfied R.C. 3702.593(E)(4). Although Hughey testified there was a shortage of beds in Altercare of Alliance's service area, the director noted Hughey's lack of expertise in measuring distances, her failure to verify those distances with other measuring tools, and her inability to recreate some of the measurements at the hearing. Comparing her methods to the more extensive mapping and verification process described by Kaiser, the director chose to rely on Kaiser's testimony and the information provided in the CON application. Given the deference we must give to the director's resolution of evidentiary conflicts, we find that reliable, probative, and substantial evidence supports the director's decision to rely on Kaiser's testimony, and that the director's application of R.C. 3702.593(E)(4) was in accordance with law.

{¶ 14} Next, appellant presents several challenges to the director's determination that the project was financially feasible. Ohio Adm.Code 3701-12-20(J) requires the director to "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." The director must evaluate (1) the availability of financing for the project, (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 on 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, (4) the costs and charges associated with the project compared to those associated with similar services of other providers, and (5) the historical performance of the applicant and related parties in providing cost-effective health care services. Ohio Adm.Code 3701-12-20(J)(1) through (5).

{¶ 15} At the outset, appellant contends that the financial feasibility study submitted by Schroer did not comply with section 10.21 of the CON application. For projects exceeding \$10 million, section 10.21 asks the applicant to "provide a financial

feasibility study for the project that conforms to a compilation as defined by the American Institute of Certified Public Accountants and that has been prepared and reviewed by an independent accounting firm." (CON Application, 22.)

{¶ 16} According to appellant, Schroer's financial feasibility study did not comply with the American Institute of Certified Public Accounts ("AICPA") standards because it was compiled in accordance with ODH requirements, which differ from the attestation standards established by the AICPA. However, expert testimony established that Schroer's feasibility study did comply with the AICPA even though it contained forms that differed from the AICPA guide. According to John Fleischer, the certified public accountant ("CPA") who prepared the feasibility study for Schroer, the AICPA permits such a compilation so long as it contains a disclaimer alerting the reader that some of the schedules differ from the attestation standards established by the AICPA. Fleischer explained that "[t]he word 'feasibility study' under accounting literature does not exist," and some of the forms required by the ODH in the CON application differ from the attestation standards established by the AICPA. (Tr. 291.) Because the feasibility study submitted by Schroer contained the AICPA required disclaimer, Fleisher testified that the study "conforms to the AICPA definition of compilation" as required by section 10.21 of the CON application. (Tr. 294.)

{¶ 17} Appellant argues that Fleischer's testimony is outweighed by that of appellant's expert CPA, Tracy Mitchell, who testified that the feasibility study contained forms that did not comply with AICPA standards. However, Mitchell agreed that the AICPA requires a disclaimer whenever a financial projection does not conform to the AICPA and that Schroer's feasibility study provided such a disclaimer. Accordingly, reliable, probative, and substantial evidence establishes that the financial feasibility study submitted by Schroer satisfied section 10.21 of the CON application.

{¶ 18} Appellant also relies on Mitchell's testimony to argue that Schroer failed to provide complete and accurate information of financial feasibility. Mitchell could not, however, conclude that the project was financially *infeasible*. Appellant construes his uncertainty as evidence that Schroer failed to present sufficient proof of feasibility; however, the record revealed a number of reasons why Mitchell may have been unable to opine on the feasibility of the project. For instance, Mitchell did not discuss the financial

projections or the CON application with anyone from Schroer, he did not study the labor market in Summit County or the Stow area, and he had only performed a total of three CON feasibility studies in his career, two of which occurred some time between the late 1980s and early 1990s.

{¶ 19} Although Mitchell could not opine on the issue, multiple witnesses did testify that the project was financially feasible. Schroer's Chief Financial Officer Brenda Woods believed the project was "very feasible" and expected the new facility to perform better than what her projections indicated. (Tr. 578.) Woods stated that many of the assumptions underlying her projections were conservative and actually reflected a lower profit in the third year than what the company averaged in its six newest facilities. Moreover, Woods testified about the availability of financing, stating, although it had not received a firm commitment from Premier Bank, the bank indicated that the project would be viewed favorably in terms of financing.

{¶ 20} Fleischer also concluded that the project was financially feasible. Fleischer, who had been involved in the preparation or review of approximately 50 CON feasibility studies in his 28-year accounting career, had provided professional accounting services to Schroer for approximately 15 years, and compared the projections with the three-year history of Schroer's most recent facilities. After discussing the projections with Woods, Fleischer determined the projections were reasonable. Additionally, Schroer's Chief Operating Officer Dennis Conley testified that, even with the anticipated cuts in Medicaid and Medicare, the proposed project is "going to be a very viable project." (Tr. 126-27.)

{¶ 21} Notwithstanding the testimony of Woods, Fleischer, and Conley, appellant maintains that Mitchell's testimony established several flaws and inaccuracies in Schroer's financial projections. However, without any evidence that the project was financially *infeasible*, Mitchell's mere disagreement with the correctness and reasonableness of the projections does not carry appellant's burden under R.C. 3702.52(C)(3). *See In re Application of Manor Care of Parma*, 10th Dist. No. 05AP-398, 2005-Ohio-5703, ¶ 41 (witness's testimony regarding potential overstatements in financial projections does not necessarily prove financial infeasibility). Given the multiple witnesses who opined that the project was financially feasible, and in the absence of

testimony to the contrary, we find that the director's determination was supported by reliable, probative, and substantial evidence and was in accordance with law.

{¶ 22} We now turn to appellant's argument that the proposed facility would adversely impact its Kent Care Center facility. Ohio Adm.Code 3701-12-20(F) provides that the director must 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." This court has recognized that some negative impact does not necessarily require denial of a CON application: "[A]ny new facility will initially impact existing providers to some extent, and if some impact was sufficient to deny a CON, then few, if any, would ever be approved." *In re Doylestown* at ¶ 15, citing *In re Manor Care of Parma* at ¶ 51.

{¶ 23} Appellant relies on the testimony of Natalie Walczak, the executive director of the Kent Care Center, who stated that the new facility would negatively impact Kent Care Center's ability to attract new residents, particularly skilled (Medicare or managed care) residents. Walczak testified that Kent Care Center experienced a drop in its skilled census when Schroer opened a facility in Brimfield, Ohio, within six miles from Kent Care Center. However, Walczak's testimony revealed a number of independent reasons for the census drop at the Kent facility. She stated that the facility is approximately 30 years old, has six private rooms, does not have a separate activity room, and contains approximately one shower for every 25 residents. Furthermore, Walczak admitted that the Kent facility received citations in 2010 for failing to properly care for pressure wounds and for failing to properly administer medications through feeding tubes. Walczak stated that the Kent facility faces "a lot of competition in the area already," not only from other nursing homes, but from home health care, assisted living, and independent living. (Tr. 415.)

{¶ 24} The hearing examiner found that, because Walczak's testimony suggested a number of independent reasons for a low census at the Kent Care Center, and because appellant failed to provide any financial studies or projections to support its claim, appellant failed to establish, by a preponderance of the evidence, an adverse impact sufficient to warrant denial of the CON application. Appellant claims that this reasoning impermissibly heightened its evidentiary burden by requiring financial studies to provide proof of adverse impact; however, the hearing examiner imposed no such requirement.

Rather, the hearing examiner determined that Walczak's testimony alone was insufficient and that appellant could not satisfy its burden without some additional evidence in support of her testimony. Upon review of Walczak's testimony, we agree with this rationale and find that the hearing examiner's conclusion was supported by reliable, probative, and substantial evidence and was in accordance with law.

{¶ 25} Appellant also claims that the director erred in considering "the effectiveness of the project in meeting the health-related needs of medically underserved groups such as low-income individuals, individuals with disabilities and minorities," as required by Ohio Adm.Code 3701-12-20(I). According to appellant, the proposed facility would not meet the needs of Medicaid residents because Schroer had a "history of discriminating against Medicaid residents" and plans to violate "Medicaid regulations." (Appellant's Brief, 31.) Upon review of the record, however, we find nothing to support these allegations. To the contrary, the CON application indicates that Schroer anticipates Medicaid occupancy at 37 percent, the highest percentage of any payor classification in the projections. According to Woods, this percentage fell within the average Medicaid occupancy percentage for Schroer's three newest facilities. Accordingly, nothing suggests that the director erred in considering need under Ohio Adm.Code 3701-12-20(I). Therefore, appellant's sole assignment of error is overruled.

IV. CONCLUSION

{¶ 26} Having overruled appellant's sole assignment of error, we hereby affirm the order of the director of ODH granting applicant's CON application.

Order affirmed.

KLATT and CONNOR, JJ., concur.
