

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In re: :
The Avenue at Aurora, : No. 12AP-151
(ODH No. 9022-01-10X)
(Norton Brothers Holding Company, :
R&G Nursing Care, Inc., and Anna : (REGULAR CALENDAR)
Maria of Aurora, Inc., :
Appellants). :

D E C I S I O N

Rendered on March 26, 2013

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

Bricker & Eckler LLP, *James F. Flynn*, and *David M. Johnston*, for appellee Progressive Aurora Real Estate, LLC.

Dinsmore & Shohl LLP, *Thomas W. Hess*, and *Alicia M. Stefanski*, for appellants.

APPEAL from the Ohio Department of Health.

BROWN, J.

{¶ 1} This is an appeal by appellants, Norton Brothers Holding Co. ("Norton Brothers"), R&G Nursing Care, Inc. ("R&G Nursing"), and Anna Maria of Aurora, Inc. ("Anna Maria"), from an order of appellee, Director of the Ohio Department of Health ("director"), granting a certificate of need ("CON") to appellee, Progressive Aurora Real Estate, LLC ("Progressive").

{¶ 2} On July 28, 2010, Progressive filed an application for a CON with the Ohio Department of Health ("ODH"), proposing to construct a 98-bed long-term care facility in

Aurora, Ohio, to be operated under the name "The Avenue at Aurora." On February 28, 2011, ODH declared the application complete. On March 25, 2011, Norton Brothers, R&G Nursing, and Anna Maria filed an objection to the CON application, and requested an adjudication hearing. The matter was referred to a hearing examiner, who conducted a two-day hearing and subsequently issued a report.

{¶ 3} The following facts, summarized from the hearing examiner's report, reflect that Progressive seeks to construct The Avenue at Aurora on an undeveloped parcel of land in the city of Aurora, located in Portage County. In order to acquire the beds for the facility, Progressive proposes to relocate 30 long-term care beds from Parma Care Center, located in Cuyahoga County, and 68 long-term care beds from Green Meadows Health and Wellness Center ("Green Meadows"), located in Stark County. Progressive is the owner of both Parma Care Center and Green Meadows. Progressive and the operator of The Avenue at Aurora, Progressive Health Care, are related companies, owned by members of the Flank family, with Eitan Flank serving as the managing member. Progressive currently owns and operates eight nursing home facilities.

{¶ 4} The Avenue at Aurora is projected to cost \$14,846,416, and the Flank family will be personally obligated for funding of the project. The Flank family total equity contribution to the project is \$3,940,000, including \$1 million in cash.

{¶ 5} Norton Brothers, R&G Nursing, and Anna Maria (collectively "appellants") operate Anna Maria (of Aurora) and Kensington Care Center ("Kensington"), long-term care nursing facilities. The proposed facility will be located approximately 2.5 miles from Anna Maria and Kensington. Anna Maria is a 90-bed facility, built in 1964, and certified for both Medicaid and Medicare. The typical occupancy rate for Anna Maria is 90 percent to 91 percent, and the overall occupancy rate for providers in the project's proposed service area is 91 percent.

{¶ 6} On December 27, 2011, the hearing examiner issued a report, recommending that the director approve Progressive's CON. On January 17, 2012, appellants filed objections to the report and recommendation. On February 13, 2012, the director issued an adjudication order approving the CON application of Progressive.

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

First Assignment of Error - The Adjudication Order is not supported by reliable, probative, and substantial evidence and is not in accordance with the law because the Ohio Department of Health gave excessive weight to the statutory formula.

Second Assignment of Error – The Adjudication Order is not supported by reliable, probative, and substantial evidence and is not in accordance with the law because the Director failed to properly consider the evidence of the CON project's impact on surrounding facilities, lack of unique services, and the impact on area staffing.

Third Assignment of Error – The Adjudication Order is not supported by reliable, probative, and substantial evidence and is not in accordance with the law because the Director failed to properly consider the evidence that the project is not financially feasible and relied upon improperly submitted evidence.

{¶ 8} Pursuant to R.C. 3702.52(C)(1), if a project proposed in a CON application meets all of the applicable CON criteria for approval under R.C. 3702.51 to 3702.62, 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 specified in division (C)(4) of this section or any extension of it under division (C)(5) of this section." This court's standard of review in considering an appeal from the director is set forth under R.C. 3702.60(F)(3), which states as follows:

The court shall affirm the director's order if it finds, upon consideration of the entire record and any additional evidence admitted under division (F)(2) of this section, 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.

{¶ 9} Under the first assignment of error, appellants challenge the director's approval of the hearing examiner's conclusions of law Nos. 7 and 21, in which the hearing examiner found that appellants failed to prove, by a preponderance of the evidence, that the project is not needed in Portage County. Appellants contend that ODH improperly focused on the statutory bed need formula, while ignoring evidence regarding lack of need in the area for the proposed facility.

{¶ 10} As noted by testimony presented during the administrative hearing, the state legislature approved, beginning in 2010, the inter-county relocation of long-term beds from counties with excess beds to counties identified as having a need. R.C. 3702.593(A) provides that the director shall accept for review, under R.C. 3702.52, CON applications for the approval of beds "if the proposed increase in beds is attributable solely to relocation of existing beds from an existing long-term care facility in a county with excess beds to a long-term care facility in a county in which there are fewer long-term care beds than the county's bed need." Under this provision, the director is required to determine (a) the "long-term care bed supply for each county," (b) the "long-term care bed occupancy rate for the state at the time the determination is made," and (c) the "county's bed need by identifying the number of long-term care beds that would be needed in the county in order for the statewide occupancy rate for a projected population aged sixty-five and older to be ninety per cent." R.C. 3702.593(B)(1), (2), and (3). Further, "[i]n determining each county's bed need, the director shall use the formula developed in rules adopted under section 3702.57 of the Revised Code." R.C. 3702.593(B)(3).

{¶ 11} In the present case, the applicant, Progressive, sought to relocate long-term care beds from counties with excess beds (i.e., Cuyahoga County and Stark County) to a county with fewer beds than the county's bed need. The hearing examiner noted that the bed need formula resulted in a bed need for Portage County of 378 beds and, therefore, in excess of the 98 beds to be relocated. The hearing examiner recognized that the bed need formula "does not take into account the distribution of beds or the proximity of other providers," but nevertheless found that the formula, as calculated by ODH, was in accordance with R.C. 3702.593. We agree. This court has previously observed that, "although the bed-need formula is not the only factor to be considered by the director, it is, nonetheless, an important factor in determining overall need for a CON project, and the director is required by statute and rule to consider it when determining need." *In re: Green Village Skilled Nursing Ctr.*, 10th Dist. No. 12AP-91, 2012-Ohio-3769, ¶ 18.

{¶ 12} Further, contrary to appellants' argument, the record does not indicate that the director focused solely upon the statutory formula to the exclusion of other statutory criteria. Ohio Adm.Code 3701-12-20(E) states in part as follows:

(E) The director shall consider the need that the population served or proposed to be served has for the services to be 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.

{¶ 13} In his report and recommendation, the hearing examiner cited the above provisions of Ohio Adm.Code 3701-12-20(E), noting that the director is required to consider "the need that the population served or proposed to be served has for the services to be provided upon implementation of the project," and that the factors to be considered include "the current and proposed primary and secondary service areas and their corresponding population, travel times and the accessibility of the project site and of the sites of similar services to the proposed service area population and current and projected patient origin data, by zip code." (Conclusion of Law No. 20.) In consideration, the hearing examiner made findings that there are "large projected population increases for the Aurora area" (Finding of Fact No. 70), that "a high demand for private rooms" exists (Finding of Fact No. 75), and that there is a "correlation between private rooms and higher acuity residents." (Finding of Fact No. 76.) Thus, the record indicates that the hearing examiner and director considered evidence "beyond the statutory bed-need formula." *See In re: Green Village* at ¶ 17 (hearing examiner's findings that applicant offered testimony as to the bed need in county, the projected demographic trends in area, and testimony that private rooms are preferred by prospective residents, established that hearing examiner considered evidence beyond just bed need formula).

{¶ 14} Appellants argue that the bed need formula should take into consideration exactly *where* in a county the beds will be relocating. During the hearing, appellants presented the testimony of Daniel Sullivan, a health care consultant. Sullivan testified that, in looking at the impact of a project, "you really need to look at where the project is going to be, what's in proximity to that proposed site irrespective of what the county boundaries are." (Tr. 66.) On cross-examination, however, Sullivan agreed that the bed need methodology calculated a bed excess in Cuyahoga County, as well as a fairly significant bed need in each of the six surrounding counties. He also agreed that the data was consistent with a shift away from urban locations in Cuyahoga County to outlying counties.

{¶ 15} Appellants' contention that county boundaries provide an artificial mechanism for determining bed need has been previously addressed by this court. Specifically, citing R.C. 3702.593(B)(1) and (3), this court concluded that the hearing examiner "properly rejected" such a contention as the director is statutorily required to determine bed need by county. *In re: Green Village* at ¶ 14. In that case, this court noted that the appellant's own expert witness "confirmed that CON legislation mandates the use of county borders in determining bed need." *Id.*

{¶ 16} Upon review, we conclude that the director did not give excessive weight to the statutory formula, and that the record supports the hearing examiner's determination that appellants failed to prove, by a preponderance of the evidence, the project is not needed. Accordingly, appellants' first assignment of error is without merit and is overruled.

{¶ 17} Under the second assignment of error, appellants challenge the hearing examiner's conclusions of law Nos. 28, 30, and 32, arguing that the hearing examiner ignored evidence as to the proposed project's impact on surrounding facilities, a lack of unique services, and the impact on area staffing. Appellants maintain that the evidence indicates the proposed project would not meet any need, but instead would only serve to redistribute existing residents, resulting in an unnecessary duplication of services.

{¶ 18} Ohio Adm.Code 3701-12-20(F) provides that "[t]he 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." Ohio Adm.Code 3701-12-20(K) states: "The director shall consider the impact of the project on existing staffing levels, if applicable, and the availability of personnel resources to meet the applicant's projected requirements."

{¶ 19} Appellants first argue there is an inconsistency in the hearing examiner's findings regarding the impact of the project on appellants' census. Specifically, in the report and recommendation, the hearing examiner noted that "[t]he evidence indicates and the parties agree that there will be an impact on the Objectors from the Project." (Conclusion of Law No. 28.) The hearing examiner found, however, that appellants failed to prove, by a preponderance of the evidence, "that there will be a sustained, materially negative impact on their utilization, market share, or financial status." (Conclusion of Law No. 28.) Rather, the hearing examiner concluded, appellants' "testimony and experience indicates that the impact of the Project will be negligible and of short duration." (Conclusion of Law No. 28.)

{¶ 20} At the hearing, appellants presented the testimony of Aaron Baker, the administrator of Anna Maria, who testified that he believed the proposed project would have an impact in lowering the census of Anna Maria and Kensington. On cross-examination, Baker was questioned about other nursing homes that had opened in the service area during the approximately nine years Baker had worked at Anna Maria. Baker testified as to the addition of beds or the opening of new facilities in five different locations in the service area. When asked whether Anna Maria's census suffered as a result, Baker responded: "We've remained pretty constant, around 90 percent." (Tr. Vol. II, 228.)

{¶ 21} Baker was also questioned about the impact on another area provider, Aurora Manor, following Anna Maria's addition of a 20-bed short-term rehabilitation unit in 2007. Baker agreed that the addition of beds at its facility did not adversely impact the census of Aurora Manor on a long-term basis.

{¶ 22} In considering this evidence, the hearing examiner noted: "Over the past nine years, new facilities have been constructed or existing facilities have added beds in the Objector's service area. Anna Maria's and Kensington's census have remained constant." (Finding of Fact No. 69.) The hearing examiner further found that the recent addition of short-term rehabilitation beds by Anna Maria "did not adversely affect Aurora

Manor's occupancy rate." (Finding of Fact No. 73.) Those findings are supported by reliable, probative, and substantial evidence.

{¶ 23} With respect to appellants' argument that the proposed facility would not bring anything unique to the area, the hearing examiner cited testimony that there existed a high demand for private rooms and that there was a correlation between private rooms and higher acuity residents. There was also evidence presented that the project would serve residents who are admitted for short-term rehabilitation prior to discharge to their own homes. Appellants' own witness, Sullivan, acknowledged that "there's probably a greater demand for private rooms than there's ever been." (Tr. Vol. I, 82.) He also noted a clinical need for private rooms.

{¶ 24} Appellants also contend they presented a preponderance of evidence that staffing for the proposed project is not available. Appellants cite Baker's testimony as to the difficulties of recruiting and retaining nursing staff, and argue that the director ignored this evidence. Specifically, Baker testified that he thought it was "tough for us to recruit right now in Aurora," noting the fact that "[w]e're not on a bus route," and that "[p]eople have to drive a long way" and "[t]hey're paying a lot of money for gas." (Tr. Vol. II, 245.) Baker was also questioned about steps he had taken to reduce turnover. He noted that "just by tightening up policies and procedures, better recruitment we were able to significantly reduce it." (Tr. Vol. II, 242.) In considering the testimony presented, the hearing examiner concluded that the evidence "indicates that staffing levels and staff recruitment issues are not necessarily negatively impacted by this Project but are endemic to the industry as a whole." (Conclusion of Law No. 32.)

{¶ 25} Based upon the testimony presented, the hearing examiner made findings that appellants had failed to prove the project would have a "material, negative effect on the cost and quality of health services in the relevant geographical area" (Conclusion of Law No. 23), or that the project "will not increase the availability and accessibility of the type of services proposed in the application." (Conclusion of Law No. 25.) The hearing examiner also found that appellants had failed to prove the project "will not bring any unique services to the market." (Conclusion of Law No. 30.) Finally, the hearing examiner considered and found unpersuasive appellants' contentions that the project would

"decrease existing staff levels" (Conclusion of Law No. 32), or that "there are strong alternatives to the Project." (Conclusion of Law No. 37.)

{¶ 26} This court has previously noted that "any 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 Parke Rehab. Ctr.*, 10th Dist. No. 09AP-694, 2010-Ohio-2064, ¶ 15, citing *In re: Application of Manor Care of Parma*, 10th Dist. No. 05AP-398, 2005-Ohio-5703, ¶ 51. *See also In re: Altercare of Stow Rehab. Ctr.*, 10th Dist. No. 12AP-29, 2012-Ohio-4243, ¶ 22 ("This court has recognized that some negative impact does not necessarily require denial of a CON application"). Upon review, we find that the director properly considered the impact on the surrounding facilities, the types of services proposed, and the impact on area staffing, and that the record contains reliable, probative, and substantial evidence to support the director's determinations as to those issues.

{¶ 27} Accordingly, appellants' second assignment of error is overruled.

{¶ 28} Under the third assignment of error, appellants challenge the director's acceptance of conclusions of law Nos. 34 and 35, regarding the financial feasibility of the project. Appellants maintain they met their burden of demonstrating the project is not financially feasible, and also contend that the director improperly considered an exhibit submitted after the CON application was deemed complete.

{¶ 29} Ohio Adm.Code 3701-12-20 states as follows:

(J) 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.

{¶ 30} Appellants argue that the evidence demonstrates the applicant's financial feasibility study had many unexplained inconsistencies, resulting in hundreds of thousands of dollars in error. Appellants also cite evidence that there will be a first-year loss of \$552,000, and argue that the CON application excluded direct care costs, resulting in an inflated projected net income. Further, appellants cite the testimony of their expert witness (Robert M. Pumphrey), who opined there is not enough information to show whether the project is financially feasible.

{¶ 31} The record indicates that Progressive utilized an in-house certified public accountant to prepare financial information as part of the CON application, but that the applicant hired an outside accounting firm, Goldberg Advisory Services, to prepare a financial feasibility study. The feasibility study projected expenses and income for three years following anticipated completion of the project; the study, however, failed to include certain direct care and ancillary costs for 2014 and 2015, thereby inflating net income for those same years. On July 19, 2011, Progressive submitted a corrected restatement of operations, admitted at the hearing as applicant's Exhibit No. 1.

{¶ 32} Pumphrey, a certified public accountant, testified on behalf of appellants. According to Pumphrey, there was insufficient information to determine whether the project was financially feasible, and he testified: "I can't tell that from the financial feasibility study. I have more questions." (Tr. 173.) As noted above, however, Progressive prepared and submitted a corrected restatement of operations, in which the outside accounting firm indicated that, in compiling Progressive's financial statements, "several underlying numbers were deleted in a formula." The corrected restatement of operations listed expenses not included in the original projections.

{¶ 33} During cross-examination, Pumphrey acknowledged that subsequent changes by Goldberg Advisory Services "reconcile * * * the differences" identified in a hearing exhibit. (Tr. Vol. II, 195.) He also noted that the reconciliation alleviated his concern that the applicant was cutting staffing. Based upon the fact that earlier differences had been reconciled, Pumphrey was questioned whether there was "anything in the total dollars that gives you pause or concern about this particular project?" (Tr. Vol. II, 197.) Pumphrey responded: "As I sit here today, no." (Tr. Vol. II, 197.) Pumphrey indicated he did not have any questions about the profitability of the project based upon the income statement, but he was unable to opine as to the financial feasibility of the project.

{¶ 34} The hearing examiner made findings regarding the financial feasibility of the proposed project, including the following:

In evaluating the testimony and the exhibits that were admitted into the record regarding financial feasibility and cost-effectiveness, the testimony of Eitan Flank was particularly persuasive. Mr. Flank has a great deal of hands-on experience not only in the nursing home industry but with similar, prototype construction projects, particularly the Avenue at Warrensville Heights. Mr. Flank demonstrated a thorough understanding of the Medicaid reimbursement rates, acuity, nursing home demand, construction costs and was proficient in financial and risk analysis. In addition, the successful completion of a construction project very similar to the Avenue at Aurora is a good indicator of the success of the Avenue at Aurora. Mr. Flank's testimony regarding the unprecedented cuts as a result of HB 153 and the Applicant's anticipation of those cuts was particularly credible. The Objectors have failed to prove, by a preponderance of the evidence, that the Project is not [financially] feasible or cost-effective.

(Conclusion of Law No. 34.)

{¶ 35} In general, while 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: Altercare of Stow* at ¶ 8, quoting *In re: The Knolls of Oxford*, 10th Dist. No. 02AP-514, 2003-Ohio-270, ¶ 13. The record in the instant case indicates that there was

competing evidence presented as to the financial feasibility of the project, and that the hearing examiner found persuasive the testimony of the applicant's witness, Flank.

{¶ 36} The fact that appellants' expert, Pumphrey, was unable to opine as to whether the project was financially feasible does not, standing alone, constitute evidence that the project is not financially feasible. *See In re: Progressive Medina Real Estate*, 10th Dist. No. 11AP-141, 2012-Ohio-1071, ¶ 58 (even accepting expert's statement that the financial feasibility of the project was "questionable," appellants' expert did not render an opinion that the project was financially unfeasible, and other evidence supported director's determination that project was feasible); *In re: Altercare of Stow* at ¶ 21 ("without any evidence that the project was financially *infeasible*, [expert's] mere disagreement with the correctness and reasonableness of the projections does not carry appellant's burden") (emphasis sic); *In re: Manor Care*, 10th Dist. No. 05AP-398, 2005-Ohio-5703, ¶ 41 (although appellants disagreed with the overall projections the applicant submitted, they did not demonstrate the proposed project was otherwise financially infeasible).

{¶ 37} While the feasibility study, as submitted, failed to include certain direct care and ancillary costs for the years 2014 and 2015, the hearing examiner found that the applicant's subsequent submission of Exhibit No. 1 corrected this error "so that the feasibility study was consistent with the Applicant's original projections." (Finding of Fact No. 51.) During the hearing, Flank explained the corrected restatement of operations, including testimony as to the expenses not included in the original projections. As a result of the corrections, the net income figures were lowered for the years 2014 and 2015. While appellants point to a loss in the first year of operation, applicants for a CON are required to submit operating statements for the first three years following project completion. Although the net income figures were lowered due to the corrected restatement of operations, the projections still indicated positive net income of \$565,796 for the second year of operations, and \$713,514 for the third year. Upon review, there was substantial evidence to support the determination of the hearing examiner and director that the project was financially feasible.

{¶ 38} Appellants also contend that the director erred in accepting Progressive's Exhibit No. 1 (the letter containing the corrections to the financial feasibility study) during

the hearing. Appellants maintain that it was improper to consider evidence submitted after the CON application was deemed complete. We disagree.

{¶ 39} At the outset, we note that no objection was made during the hearing to the introduction of this exhibit, nor did appellants challenge the admission of this exhibit by way of objections to the hearing examiner's report. In general, "the failure to raise procedural or evidentiary objections at the administrative level waives those objections for purposes of a subsequent administrative appeal." *In re: Green Village* at ¶ 51. Further, this court has previously held that R.C. 119.09 "implies, and the ODH has so interpreted it, that the adjudication hearing is a de novo review of the application," and "the director has discretion to 'order additional testimony to be taken or permit the introduction of further documentary evidence' even after the hearing examiner issues its written report." *In re: Manor Care* at ¶ 18.

{¶ 40} In the present case, the record indicates that appellants' expert, Pumphrey, was shown the exhibit and questioned about it during the hearing. Again, no objection was made by appellants during the hearing, nor did appellants challenge the admission of the exhibit by way of objections to the hearing examiner's report. Upon review, we conclude that appellants' acquiescence as to the manner in which the material was presented "constitutes a waiver of that issue for purposes of these administrative appeal proceedings." *In re: Green Village* at ¶ 51. Further, even absent waiver, we fail to see error in the admission of the exhibit. *In re: Manor Care*.

{¶ 41} Appellants' third assignment of error is without merit and is overruled.

{¶ 42} Based upon the foregoing, appellants' first, second, and third assignments of error are overruled, and the order of the director of ODH, granting Progressive's CON application, is hereby affirmed.

Order affirmed.

SADLER and DORRIAN, JJ., concur.
