

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of: :
Doylestown Parke Rehabilitation Center, : No. 09AP-694
(Doylestown Healthcare Center, : (ODH No. 8991-01-09)
Appellant). : (REGULAR CALENDAR)

D E C I S I O N

Rendered on May 11, 2010

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APPEAL from the Ohio Department of Health.

McGRATH, J.

{¶1} Appellant, Doylestown Healthcare Center, appeals from an order of appellee, Ohio Department of Health ("ODH"), granting approval of an application for a certificate of need ("CON") filed by appellee, Doylestown RE, LLC ("appellee").

{¶2} On December 7, 2007, appellee filed a CON application with ODH for the relocation of 12 beds from Orrville Pointe to Doylestown Parke Rehabilitation Center, a new facility to be built in Doylestown, Ohio. According to the application, the new facility

would be a continuing care campus encompassing independent living, assisted living, skilled nursing, and rehabilitation.

{¶3} The CON application was deemed complete on May 30, 2008. After an adjudication hearing, the hearing examiner issued a report and recommendation dated April 30, 2009, in which he recommended granting the CON application. Specifically, the hearing examiner recommended that appellant failed to show by a preponderance of the evidence that the proposed project is not needed or would not be in accordance with law. Additionally, the hearing examiner recommended that there is a preponderance of the evidence indicating the proposed project is the only feasible alternative for cost-effective correction of physical plant deficiencies found at Orrville Pointe, thus satisfying the waiver requirement of Ohio Adm.Code 3701-12-23(F)(2).

{¶4} Appellant filed objections to the hearing examiner's report and recommendation. After consideration, the director issued an adjudication order on June 18, 2009, approving the CON application. This appeal followed, and appellant brings the following two assignments of error for our review:

Assignment of Error No. 1:

The Ohio Department of Health erroneously concluded that there is a need in Doylestown, Ohio, for a twelve-bed, boutique-style skilled nursing facility to provide rehabilitation services to the highest paying Medicare-eligible and private-pay patients only and which will not accept or treat the poor, Medicaid patients, or other medically underserved groups.

Assignment of Error No. 2:

The Ohio Department of Health erroneously concluded that the Project qualifies for a waiver of the prohibition against the building of a new nursing facility with less than 50 beds embodied in O.A.C. § 3701-12-23.

{¶5} Pursuant to R.C. 3702.60(F)(3), in an appeal to this court from a decision of the director, "[t]he 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."

{¶6} In an appeal such as this, we may engage in a very limited weighing of the evidence; however, we may not substitute our judgment for that of the ODH as to the credibility of witnesses and the weight to be given the testimony. *In re Manor Care of Parma*, 10th Dist. No. 05AP-398, 2005-Ohio-5703, ¶9, citing *In re Knolls of Oxford*, 10th Dist. No. 02AP-514, 2003-Ohio-89, ¶13. Rather, a reviewing court must give due deference to the administrative resolution of evidentiary conflicts. *Id.*, citing *In re Christian Care Home of Cincinnati, Inc.* (1991), 74 Ohio App.3d 453. 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. *Id.*

{¶7} Pursuant to R.C. 3702.52 and Ohio Adm.Code 3701-12-08(E), the director, upon receipt of an application, reviews the application to determine if the information is complete. If the director feels more information is necessary, the director may make up to two requests for additional information needed to complete an application. R.C. 3702.52(B). After a second request for information, the director must either send a notice of completeness to the applicant or deem the application incomplete. Here, the director made additional requests for information, and the CON application was deemed complete on May 30, 2008.

{¶8} If the director receives written objections to an application within 30 days after mailing the notice of completeness, the director must notify the applicant and assign a hearing examiner to conduct an adjudication hearing in accordance with R.C. Chapter 119. R.C. 3702.52(C)(3). In the case sub judice, the required adjudication hearing commenced on September 26, 2008. R.C. 3702.52(C)(3) provides that the party challenging the CON bears the burden of proving by a preponderance of the evidence that the project is not needed or that granting the CON would not be in accordance with R.C. sections 3702.51 to 3702.62 or the rules adopted under R.C. 3702.57.

{¶9} Appellant first argues the director's decision is in error because, according to appellant, the evidence does not demonstrate need for the project but, rather, establishes the project will harm existing providers and not serve the poor or medically underserved. Pursuant to Ohio Adm.Code 3701-12-20(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 the project, that section provides that the the director shall consider:

- (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;
- (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.

{¶10} Appellant asserts the conclusion that the project is needed was based on (1) testimony from the mayor of Doylestown, Terry Lindeman, demonstrating project need; (2) the growing population of those 65 years of age or older in the service areas; (3) occupancy rates approaching 93 percent; and (4) the rise of Medicare usage. However, it is appellant's contention that each of these conclusions is irrelevant, taken out of context, or simply wrong.

{¶11} With respect to the testimony of the mayor, we initially note the hearing examiner's determination of project need was not based solely upon this testimony. Rather, the testimony was only one of several factors considered. During his testimony, the mayor acknowledged he had never operated a nursing home, but explained it was his belief that there was a need for additional assisted living and skilled nursing home beds in his community. The mayor also testified that he was aware of persons who were unable to get into appellee's center on occasion because it was full. The hearing examiner expressly noted that he found the mayor's testimony to be credible and substantial on the community's opinion as to the need for the proposed projects. However, the hearing examiner also expressly noted that the mayor was not an expert in long-term care, nor did he hold himself out as such. We cannot say the mayor's testimony is completely irrelevant to the matter at hand, or that either the hearing examiner or director afforded

improper weight to the same as the record indicates the testimony was treated for what it was, i.e., the mayor's opinion regarding the needs of his community.

{¶12} Appellant next contends it was error for ODH to conclude that current local occupancy rates of 92 to 93 percent and increases in local population support a finding of need. Appellant suggests that because current occupancy rates fluctuate dramatically, they do not provide an accurate measurement of future access to services. According to appellant, ODH's "blind emphasis" on current occupancy rates constitutes clear error. The hearing examiner duly noted that such occupancy rates may fluctuate wildly, and appellee seemingly concedes the same. However, we do not find this equates with a conclusion that such evidence should be summarily disregarded. Rather, it remains a piece of evidence to be given the weight the hearing examiner and director deem appropriate. Further, while there was testimony that it will take more residents coming through a facility to maintain current occupancy rates, there was also testimony that population projection numbers reflect an increase in the population of 65-year olds and older between 2006 and 2012. This evidence, coupled with the current occupancy rate figures, even viewed with the awareness that current occupancy rates are subject to fluctuation, still constitutes evidence that is reliable, probative, and substantial and supports the director's findings.

{¶13} Next, appellant contends there is no evidence of an increase in Medicare usage rates in the proposed service area. The record, however, reveals otherwise. Though appellant did submit a report from the Medicare Payment Advisory Committee stating that the number of admissions remained flat between 2006 and 2007, Patrick McCormick, a certified public accountant, testifying as an expert in long-term care and

skilled nursing home trends for Ohio facilities, explained that Medicare days and Medicare length of stays for nursing home residents are increasing. Though appellant may disagree with Mr. McCormick's opinion, such is not a basis for a finding that his testimony does not constitute reliable, probative, and substantial evidence supporting the director's determination.

{¶14} Lastly, appellant contends the project is not needed because it will harm existing providers and not serve the poor or medically underserved. The hearing examiner noted the fact that appellee would not be serving Medicaid patients and that the project was intended to serve "exclusively, higher paying Medicare and private pay patients," with no provision for providing services to the poor, the medically underserved or those receiving Medicaid. Thus, it is clear the hearing examiner and the director both were aware of this fact and considered the same as required by the Ohio Administrative Code. As pointed out by both the hearing examiner and appellee, this is only one factor to be considered, which it was, and there is no mandate in Ohio law that a CON application be denied on this basis.

{¶15} Appellant did present evidence via the testimony of its expert witness, Barb Edwards, that the project can only succeed at the expense of others, but there was contrasting testimony from appellee's expert that the project would likely have little or no effect on appellant's facility and other providers in the service area. Credibility of witnesses and the weight to be given the testimony is within the province of the director and the hearing examiner. Additionally, as this court has recognized, 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 Manor Care of Parma*, supra, ¶51.

{¶16} Upon review, we find the record sufficiently supports the determinations of the hearing examiner and the director that appellant did not meet its burden of establishing by a preponderance of the evidence that the project was not needed or that granting the CON application would be contrary to law. Because we conclude there was reliable, probative, and substantial evidence supporting the director's decision and that such decision is in accordance with law, we overrule appellant's first assignment of error.

{¶17} In its second assignment of error, appellant contends the CON application should have been denied because the project is for less than 50 beds, and appellee failed to demonstrate it was entitled to a waiver under Ohio Adm.Code 3701-12-23(F), which provides:

The director shall not grant certificates of need for establishment, construction, or development of new long-term care facilities, including replacement facilities, other than hospitals that are long-term care facilities, with a long-term care bed capacity of less than fifty beds. The director may waive the criterion prescribed by this paragraph if the applicant demonstrates that the proposed facility of less than fifty beds can be operated in a cost-effective manner, and:

- (1) The proposed facility's size is essential to serve a special health care need that otherwise will not be served, or will serve a special health care need in accordance with current, evidence-based standards of care;
- (2) The proposed facility is the only feasible alternative for cost-effective correction of physical plant deficiencies; or
- (3) The proposed facility is part of a continuing care retirement or life care community and the application demonstrates the following:

(a) The applicant will be contractually obligated to provide long-term care to current residents of the continuing care retirement or life care community; and

(b) The continuing care retirement or life care community currently provides and will continue to provide preference in admission to contractual residents of the community.

{¶18} Hence, under this rule if the applicant meets the requirements of Ohio Adm.Code 3701-12-23(F), ODH may grant a CON for a facility of less than 50 beds. It is appellant's contention, however, that appellee failed to demonstrate that it met the requirements for a waiver under this rule, and, in the alternative, even if the waiver requirements were satisfied, the director nonetheless abused his discretion in granting the CON.

{¶19} First under this assigned error, appellant argues the proposed facility cannot be operated in a cost-effective manner, and the director erred in finding otherwise. Initially, appellant asserts we should not consider the revised financials submitted by appellee because not only were they untimely but, also, they were not properly admitted. According to appellant, allowing an applicant to submit new financials, which appellant alleges materially changed the application, was both "unfair and wasteful."

{¶20} Indeed, the record establishes appellee moved to admit 22 exhibits after the conclusion of the hearing. In granting the motion, the hearing examiner noted that appellee attempted to move for admission of these exhibits at three different times during the proceedings, but because of the hearing examiner's own error, formal admission was not effected. The hearing examiner also noted the exhibits were provided to appellant during the proceedings and that revised financials are contemplated by the Ohio Administrative Code as it explicitly permits such revisions. Indeed this court has stated:

"Ohio Adm.Code 3701-12-08(G) provides that after notice is mailed indicating the application is complete, 'the applicant may supply and the director may request additional information pertinent to review of the application in relation to the criteria established by this chapter.' " *In re Manor Care*, supra, ¶14. In *In re Manor Care*, the appellant argued the director's decision was not in accordance with law because the applicant was permitted to supplement the CON application with evidence introduced at the adjudication hearing. The director in that case, relying on Ohio Adm.Code 3701-12-08(G), permitted the applicant to introduce supplemental evidence. Noting the director's interpretation of said administrative rule was not at odds with the regulation itself and that the rule's language suggested the director could request additional information at any time if such would assist the director in making a determination, this court deferred to the director's interpretation of the rule.

{¶21} Because we are presented with an analogous circumstance, we find no reason not to defer to the hearing examiner's decision to allow appellee to supplement the record with the additional evidence presented at the hearing, nor do we find the agency's interpretation of the applicable rule to be unreasonable.

{¶22} Appellant next contends that regardless of which set of financials is used, the project is not financially viable because appellee cannot generate the number of admissions needed to meet occupancy projections, and Medicare rates are expected to be reduced. We have already determined that the director's findings regarding projected occupancy rates were supported by reliable, probative, and substantial evidence. Additionally, the financial feasibility of the project was supported by the testimony of Mr. McCormick, who reviewed both the original and revised financial projections. Mr.

McCormick opined: "So the nursing home component has a heavy Medicare population, which again, with the targets of how they're looking at going after the market between Medicare and private pay, given their cost structure, it's financially feasible." (Tr. 617.) Accordingly, we cannot conclude the record does not contain reliable, probative, and substantial evidence that supports the director's determination that the project is financially feasible.

{¶23} Next under the this assigned error, appellant contends the proposed facility does not meet the requirements of subsection (F)(2) of Ohio Adm.Code 3701-12-23 because the proposed facility is not the only feasible alternative for cost-effective correction of physical plant deficiencies at Orrville Pointe. Here, it is appellant's contention that appellee provided no evidence pertaining to this issue but, instead, made the conclusory assertion that Orrville Pointe was too old and too small to accommodate the 12 beds. The record belies appellant's position.

{¶24} Martha Griffiths, records custodian for appellee, testified Orrville Pointe, the facility from where the 12 beds are being relocated, is not owned by appellee and is approximately 50 to 60 years old and "landlocked." Ms. Griffiths stated:

So for us to try to renovate that, it would be virtually impossible to add the square footage that we would need to add these rooms there – these beds back in there. In addition to all the other issues we would run into with, you know, the facilities and maintenance and things like that to service that.

(Tr. 468.)

{¶25} Additionally, Ms. Griffiths explained Orrville Pointe cannot be added on to "in any sort of feasible way." (Tr. 602.) In considering this issue, the hearing examiner stated:

There is evidence in the record, primarily through the testimony of Ms. Griffiths, of the physical plant deficiencies at the Orrville Pointe facility, the facility from which the twelve long-term care beds intended for the proposed project are to originate. This evidence refers to the fact that the transferring facility was originally designed and constructed sixty years ago to operate as an acute care hospital; the land upon which the Orrville Pointe facility is sited does not permit additions to the structure; the retention of the twelve long-term care beds at the Orrville Pointe would impede the reconfiguration of Orrville Pointe to a facility offering private rooms, eliminating three-bed wards.

(Report and Recommendation at 136.)

{¶26} Again, reiterating the particular circumstances presented by the Orrville Pointe facility, the lack of space necessary to accommodate the 12 long-term care beds at the transferring facility, and the lack of evidence as to an alternative that is feasible to the proposed project containing 12 long-term care beds from the Orrville Pointe facility, the hearing examiner concluded the language of Ohio Adm.Code 3701-12-23(F)(2) had been satisfied. While appellant takes issue with appellee's failure to provide a "detailed study" of the cost and feasibility of renovation versus relocation, this court has rejected similar arguments stating:

"While appellants take issue with appellees' failure to provide a mandatory comparative analysis ('detailed study') of the cost and feasibility of renovation versus relocation, substantial documentary and other evidence was presented which indicated that the cost of renovation would be so extensive than an ordinary person could easily make the determination that renovation was not feasible."

In re The Gables at Green Pastures (Dec. 2, 1999), 10th Dist. No. 99AP-431, quoting *In re Mill Run Care Center* (Dec. 20, 1994), 10th Dist. No. 94APH04-591.

{¶27} Upon review, we find appellee presented evidence that renovation is neither feasible nor cost-effective, and appellant provided no evidence to the contrary. Thus, there is reliable, probative, and substantial evidence to support the director's finding that the language of Ohio Adm.Code 3701-12-23(F)(2) had been satisfied.

{¶28} Appellant has also argued under this assigned error that the proposed facility is not part of a continuing care retirement or life care community under Ohio Adm.Code 3701-12-23(F)(3). However, because we have affirmed the director's finding that subsection (F)(2) of Ohio Adm.Code 3701-12-23 has been satisfied, the argument pertaining to subsection (F)(3) is moot. For all the foregoing reasons, appellant's second assignment of error is overruled.

{¶29} Having overruled both of appellant's assignments of error, we hereby affirm the order of the director of the Ohio Department of Health.

Order affirmed.

BRYANT and SADLER, JJ., concur.
