

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BRIGHTON HALL COMPANY, d/b/a )  
WEST BAY NURSING CENTER, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 91-4632  
 )  
DEPARTMENT OF HEALTH AND )  
REHABILITATIVE SERVICES, )  
 )  
Respondent. )  
\_\_\_\_\_)  
 )  
SHIVE NURSING CENTERS, INC., )  
d/b/a SUNSET POINT NURSING )  
CENTER, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 91-4634  
 )  
DEPARTMENT OF HEALTH AND )  
REHABILITATIVE SERVICES, )  
 )  
Respondent. )  
\_\_\_\_\_)  
 )  
GHF, INC. d/b/a OAKHURST MANOR )  
NURSING CENTER, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 91-4635  
 )  
DEPARTMENT OF HEALTH AND )  
REHABILITATIVE SERVICES, )  
 )  
Respondent. )  
\_\_\_\_\_)  
 )  
GHF, INC. d/b/a ORCHARD RIDGE )  
NURSING CENTER, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 91-4636  
 )  
DEPARTMENT OF HEALTH AND )  
REHABILITATIVE SERVICES, )  
 )  
Respondent. )  
\_\_\_\_\_)

SPRINGWOOD NURSING CENTER, LTD., )  
 )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO. 91-4637  
 )  
 )  
 DEPARTMENT OF HEALTH AND )  
 REHABILITATIVE SERVICES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to written notice a formal hearing was held in this case before Larry J. Sartin, a duly designated Hearing Officer of the Division of Administrative Hearings, on December 5, 1992, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Darrell White, Esquire  
 Christopher Barkas, Esquire  
 McFarlain, Sternstein, Wiley &  
 Cassidy, P.A.  
 Post Office Box 2174  
 Tallahassee, Florida 32316-2174

For Respondent: Gordon B. Scott  
 Senior Attorney  
 Department of Health and  
 Rehabilitative Services  
 1317 Winewood Boulevard  
 Building 6, Room 233  
 Tallahassee, Florida 32399-0700

STATEMENT OF THE ISSUES

May the Respondent recapture Medicaid reimbursements for depreciation of assets on the sale of those assets by the Petitioners?

PRELIMINARY STATEMENT

In June, 1991, the Respondent, the Department of Health and Rehabilitative Services, sent a letter to each of the Petitioners informing the Petitioners that the Respondent had determined that there had been a gain on the sale of the depreciable assets of the Petitioners and that the Respondent intended to recapture Medicaid reimbursements for depreciation for the period of time the Petitioners participated in the Florida Medicaid program. In July, 1991, the Petitioners filed separate Petitions for Formal Administrative Hearing contesting the Respondent's proposed action. The Petitions and the Notices from the Respondent were filed with the Division of Administrative Hearings on July 25, 1991.

On August 7, 1991, a Motion to Consolidate these cases was filed by the Petitioners. Consolidation was ordered on August 8, 1991.

On August 9, 1991, the formal hearing of these cases was scheduled for September 10-12, 1991. A motion for a continuance of the hearing was granted and the hearing was rescheduled for October 28-29, 1991, by Order entered September 6, 1991. A second motion for a continuance was granted and the formal hearing was rescheduled for November 5-6, 1991, by Order entered October 22, 1991. Finally, a third motion for continuance was granted and the formal hearing was rescheduled for December 5-6, 1991, by Order entered October 24, 1991.

A Motion for Leave to Amend Letter Requesting Depreciation Recapture filed by the Respondent on October 21, 1991, in case number 91-4634 was granted by Order entered October 23, 1991.

At the formal hearing the Respondent presented the testimony of Carlton Dyke Snipes and Frank Hughes. Five exhibits were offered by the Respondent. All five exhibits were accepted into evidence.

The Petitioners presented the testimony of Joseph Mitchell and Craig L. Smith. The deposition testimony of Wayne Shive was also read into the record. Eleven exhibits of the Petitioners were identified. Petitioners' exhibits 1-9 and 11 were accepted into evidence. Petitioners' exhibit 11 was not offered into evidence.

Official recognition was taken of Rules 10C-7.0482 and 10D-29.103, Florida Administrative Code, the Florida Title 19, Long-Term Care Reimbursement Plan, 42 C.F.R. 413.20 and 413.24. A ruling on a request to take official recognition of 42 C.F.R. 413.134 and Chapter One of the Provider Reimbursement Manual was reserved. Chapter One of the Provider Reimbursement Manual was subsequently accepted as DHRS exhibit 3. Official recognition of 42 C.F.R. 413.134 has not been taken because these provisions are not relevant.

The parties have filed proposed recommended orders containing proposed findings of fact. A ruling on each proposed finding of fact has been made either directly or indirectly in this Recommended Order or the proposed finding of fact has been accepted or rejected in the Appendix which is attached hereto.

#### FINDINGS OF FACT

##### A. The Parties.

1. The Petitioner in case number 91-4632, Brighton Hall Co. (hereinafter referred to as "Brighton"), is a general partnership.

2. Prior to March 6, 1990, Brighton owned and operated West Bay Nursing Center (hereinafter referred to as "West Bay"), a 120-bed nursing home in Oldsmar, Florida.

3. The Petitioner in case number 91-4634, Shive Nursing Centers, Inc. (hereinafter referred to as "Shive Nursing"), is a corporation.

4. Prior to March 6, 1990, Shive Nursing owned and operated Sunset Point Nursing Center (hereinafter referred to as "Sunset Point"), a 120-bed nursing home located in Clearwater, Florida.

5. The Petitioner in case numbers 91-4635 and 91-4636, GHF, Inc. (hereinafter referred to as "GHF"), is a corporation.

6. Prior to March 6, 1990, GHF owned and operated Oakhurst Manor Nursing Center (hereinafter referred to as "Oakhurst") and Orchard Ridge Nursing Center (hereinafter referred to as "Orchard Ridge"), two 120-bed nursing homes located in Ocala and New Port Richey, Florida, respectively.

7. The Petitioner in case number 4637, Springwood Nursing Center, Ltd. (hereinafter referred to as "Springwood"), is a Florida limited partnership.

8. Prior to March 6, 1990, Springwood owned and operated Springwood Nursing Center, a 120-bed nursing home located in Sarasota, Florida.

9. All of the Petitioners owned and operated nursing homes which participated in the Florida Medicaid program, provided services to Medicaid patients and received reimbursement for Medicaid services from the Respondent.

10. The Respondent in these cases, the Department of Health and Rehabilitative Services (hereinafter referred to as the "Department"), is the state agency charged with administering the Florida Medicaid program.

B. The Florida Medicaid Program.

11. The Florida Medicaid program is a program for the reimbursement of the costs of providing medical care to certain patients in Florida.

12. The State of Florida enters into contracts with nursing homes for the treatment of Medicaid patients. Nursing homes agree to provide medical care and the State of Florida agrees to reimburse the nursing homes on a per diem basis for those services.

13. One of the components of costs which are considered in determining the Medicaid per diem rate is the property cost component.

14. Included within the property cost component is a reimbursement for depreciation expense.

15. Generally, depreciation is the allocation of the cost of certain assets over the useful life of those assets. For example, if an asset cost \$100,000.00 and it will be useful for 10 years, it is reasonable to assume that 10% of its cost, or \$10,000.00, will be attributable to each year of the asset's useful life.

16. Only assets considered to have a limited useful life are considered depreciable. For Medicaid purposes, those assets generally include tangible assets, such as buildings, equipment and furnishings. Land is not a depreciable asset.

17. Medicaid recognizes that assets with a limited useful life which are used in providing medical services constitute part of the costs which should be reimbursed to providers of Medicaid services. Therefore, depreciation expense is included as part of the property component of the Medicaid per diem reimbursement rate.

C. Sale of the Nursing Home Facilities.

18. When a change of ownership of a nursing home facility which has participated in the Florida Medicaid program takes place, the nursing home terminates its participation in the Medicaid program.

19. Any amounts which were paid for depreciation to the former owner of a nursing home may be recovered (hereinafter referred to as "depreciation recapture").

20. Depreciation recapture may occur to the extent that there is a gain realized by the former owner of the nursing home facility on the sale of the facility's depreciable assets.

21. There is a gain realized on the sale of depreciable assets when the amount received for a depreciable asset exceeds the net book value (cost less accumulated depreciation) of the asset. To the extent that a gain is realized on the sale of a depreciable asset, the owner may be receiving a reimbursement for amounts the Medicaid program has already paid the owner for depreciation.

22. On or about November 29, 1989, Brighton, Shive Nursing and GHF entered into an Asset Purchase Agreement with Krupp I, Inc., a Massachusetts corporation, for the sale of West Bay, Sunset Point, Oakhurst and Orchard Ridge.

23. On or about November 29, 1989, Springwood entered into an Asset Purchase Agreement with Krupp Yield Plus Limited Partnership, a Massachusetts limited partnership, for the sale of Springwood Nursing Center.

24. The sale of the five nursing home facilities was part of the sale of nine facilities by the principal owner of the facilities.

25. The November 29, 1989, Asset Purchase Agreements referenced in findings of fact 22 and 23 (hereinafter referred to as the "Asset Purchase Agreements"), included as an attachment a schedule titled the "Purchase Price Allocation" allocating the purchase price to the assets of each nursing home facility sold.

26. The total purchase price of \$42,239,650.00 was allocated on the Purchase Price Allocation among the nine nursing homes and the corporate offices which were the subject of the sale.

27. The purchase price allocated to each nursing home facility was further allocated on the Purchase Price Allocation to the various assets of each facility, including land (a non-depreciable asset), buildings and improvements, furniture, fixtures and equipment, computer software, supplies and inventory, certificate of need, patient lists, covenant not to compete, assembled work force, favorable lease and enterprise/going concern.

28. The closing of the Asset Purchase Agreements took place on March 6, 1990.

D. The Department's Treatment of the Sale of the Nursing Home Facilities.

29. When the Department was informed of the sale of the five nursing home facilities at issue in this proceeding, the Department made a determination of whether depreciation recapture was due on the sale.

30. The Department, in determining the amount of gain on the sale, utilized the amounts allocated to the various depreciable assets of each nursing home facility on the Purchase Price Allocation as the amount realized for those assets.

31. The amount realized for depreciable assets reported by the Petitioners less the net book value for the depreciable assets was determined to be the gain realized on the sale of the Petitioners' nursing homes facilities. This gain, which was less than the depreciation of the depreciable assets, was determined to be the amount subject to depreciation recapture.

32. After calculating the amount of depreciation recapture for each facility, the Department notified each Petitioner by letter that depreciation recapture was due in the following amounts:

Date of Letter	Petitioner	Recapture
June 25, 1991	Brighton	\$175,627.00
June 5, 1991	Shive Nursing	94,631.00
June 15, 1991	GHF (Oakhurst)	278,169.00
June 14, 1991	GHF (Orchard)	115,492.00
June 7, 1991	Springwood	231,320.00

33. On July 5, 1991, the Petitioners challenged the Department's proposed action.

34. Following discussions with Department officials by a representative of the Petitioners, the Department amended the amount of depreciation recapture on October 10, 1991, by reducing the amount of recapture for the following Petitioners:

Petitioner	Recapture Reduction
Brighton	\$3,485.00
Shive Nursing	69,370.00
GHF (Orchard)	36.00

The parties stipulated that these proceedings would take into account these amended amounts and a Motion for Leave to Amend Letter Requesting Depreciation Recapture was granted by Order entered October 23, 1991.

E. The Manner in Which the Department Determined the Amount of Depreciation Recapture.

35. Rule 10C-7.0482, Florida Administrative Code, provides the framework for the operation of the Medicaid program in Florida. This Rule specifically incorporates Florida Title XIX Long-Term Care Reimbursement Plan, Version IV, as a part of the Rule.

36. The manner in which depreciation recapture is determined by the Department is governed by Section III.H.1. of Florida Title XIX Long-Term Care Reimbursement Plan, Version IV (hereinafter referred to as "Title XIX"), which provides, in pertinent part:

Recapture of depreciation resulting from sale of assets. The sale of depreciable assets,

or substantial portion thereof, at a price in excess of the cost of the property as reduced by accumulated depreciation, resulting in a gain on sale, and calculated in accordance with Medicare (Title XVIII) Principles of Reimbursement, indicates the fact that depreciation used for the purpose of computing allowable costs was greater than the actual economic depreciation. . . .

(a) The gross recapture amount shall be the lesser of the actual gain on the sale allocated to the periods during which depreciation was paid or the accumulated depreciation after the effective date of January 1, 1972 and prior to the implementation of payments based on FRVS to the facility. . . . [Emphasis added].

37. The terms "Medicare (Title XVIII) Principles of Reimbursement", are defined in Section IX of Title XIX as "Health Insurance for the Aged, Blind or Disabled (Medicare), as provided in the Social Security Act (42 U.S.C. 1395-1395pp)."

38. Medicare (Title XVIII) Principles of Reimbursement, do not contain specific provisions governing how gain on a sale of depreciable assets is to be calculated. The federal regulations to implement Medicare (Title XVIII), however, including the following:

(iv) If a provider sells more than one asset for a lump sum sales price, the gain or loss on the sale of each depreciable asset must be determined by allocating the lump sum sales price among all the assets sold, in accordance with the fair market value of each asset as it was used by the provider at the time of sale. If the buyer and seller cannot agree on an allocation of the sales price, or if they do agree but there is insufficient documentation of the current fair market value of each asset, the intermediary for the selling provider will require an expert to establish the fair market value of each asset and will make an allocation of the sales price in accordance with the appraisal.

42 C.F.R. 413.134(f)(2)(iv).

39. The Department of Health and Human Services, the agency responsible for administering the federal Medicaid program, has also promulgated a Provider Reimbursement Manual for guidance in the federal Medicare reimbursement program. Of pertinence to this proceeding is Chapter One, Section 104.14.B, which contains language similar to the provisions of 42 C.F.R. 413.134(f)(2)(iv), quoted in finding of fact 38.

40. The terms "fair market value" are defined in Medicare (Title XVIII), as follows:

Fair market value is the price that the asset would bring by bona fide bargaining between well-informed buyers and sellers at the date of acquisition. Usually the fair market value is the price that bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition.

42 U.S.C. 413.134(b)(2).

41. The federal regulations implementing Medicare (Title XVIII), and the Provider Reimbursement Manual are not specifically incorporated by reference in the Department's rules or in Title XIX.

42. As a matter of policy, the Department relies upon the federal regulations and the Provider Reimbursement Manual in determining the amount of gain on the sale of depreciable assets. To the extent that an issue involving depreciation recapture is not resolved by the foregoing rules and policies, the Department relies on Generally Accepted Accounting Principles. These policies are reasonable.

43. The Department, in applying 42 C.F.R. 413.134(f)(2)(iv), treats a written allocation of the sales price between a buyer and a seller included in a sales and purchase agreement as sufficient documentation of the fair market value of each asset sold. Absent other evidence which would cause some question about the reasonableness of relying upon such an allocation, this policy is reasonable. Absent such contrary evidence, there is no reason why the Department should not assume that the parties to a sales and purchase agreement have reached an arms length agreement as to the fair market value of the assets being sold and that a schedule or other document setting out the agreement of the parties is sufficient documentation of that agreement.

44. In this case, the Department has utilized a written allocation of the sales price (the Purchase Price Allocation) to determine gain on the sales at issue despite other documentation indicating that the allocated amounts may not constitute fair market value and raising a question as to whether the Purchase Price Allocation is sufficient documentation.

45. It may be reasonable for the Department to conclude that a sale of assets does not involve "insufficient documentation" if the only evidence of the allocation of the sales price to the assets being sold is a written allocation of the sales price included as part of the sales and purchase agreement. But where other documentation of the fair market value of the assets is provided to the Department which is inconsistent with the written allocation included in the sales and purchase agreement, it is unreasonable for the Department to ignore that additional evidence.

46. Absent a specific rule to the contrary, if other documentation is provided to the Department that calls into question the accuracy of a written allocation of the sales price, the Department should review and consider that documentation in determining whether the written allocation alone constitutes "insufficient documentation".

47. In this case, the Department reasonably relied upon the Purchase Price Allocation originally provided to it to determine the amount of depreciation



recapture. It was not reasonable, however, for the Department to ignore appraisals of the depreciable assets at issue performed on behalf of the Petitioners or to ignore other information concerning industry averages for new nursing home equipment in Florida on a per bed basis once this information was provided to the Department.

F. Information Provided by the Petitioners.

48. The Petitioners do not dispute that the Department is entitled to depreciation recapture on the sale of the facilities at issue in this proceeding. They dispute the amount of depreciation recapture, however.

49. During the hearing of these cases, evidence was presented concerning industry averages for new nursing home equipment in Florida: generally, a Florida nursing home facility can be equipped with new equipment for \$1,500.00 to \$3,500.00 per bed. The cost of equipping the nursing home facilities at issue in these cases with used equipment based upon the allocation of values included in the Purchase Price Allocation is between \$8,000.00 and \$10,000.00.

50. During 1988 and early 1989, prior to the time that the Asset Purchase Agreements were entered into, Craig Smith, appraised twelve nursing home facilities, including the nursing home facilities at issue in this proceeding. Mr. Smith holds a M.A.I. (Member Appraisal Institute) designation.

51. The appraisals conducted by Mr. Smith were provided to the Department's Office of Licensure and Certification as required by Rule 10D-29.103, Florida Administrative Code. The appraisals were provided by the purchasers of the nursing home facilities as part of the process of obtaining a license from the Department to operate the nursing homes facilities. The Department did not, however, rely upon or take into account the appraisals in determining the amount of depreciation recapture even though they were provided to the office responsible for making that determination. The Department, for purposes of determining the amount of recapture relied only on the Asset Purchase Agreement.

52. The disparity between the amounts allocated to the depreciable assets of the nursing home facilities in the Purchase Price Allocation and the appraised values is significant.

53. Based upon the weight of the evidence, the appraisals conducted by Mr. Smith and his determination of the fair market value of the depreciable assets of the nursing home facilities at issue in this proceeding are more reflective of the fair market value of those assets.

54. The Petitioners presented evidence as to the amount of depreciation recapture which should be paid to the Department based upon the appraised value of the assets at issue in this proceeding. These amounts were not refuted by the Department.

55. The amount of depreciation recapture the Department may reasonably receive from the Petitioners, based upon appraised fair market value, is as follows:

Petitioner	Recapture
Brighton	\$ 95,915.00
Shive Nursing	27,502.00

GHF (Oakhurst)	229,222.00
GHF (Orchard)	78,141.00
Springwood	161,762.00

G. The Treatment of the Purchaser of Nursing Home Facilities.

56. Prior to the change of ownership of a nursing home facility in Florida which intends to continue participating in the Medicaid program, the new owner must file an application with the Department's Office of Licensure and Certification for approval of the change and issuance of a license to operate the facility.

57. Among the things to be reported by the new owner, is a fair market value appraisal of the nursing homes assets conducted by an appraisal expert. This requirement is specified, however, by the specific provisions of Rule 10D-29.103(7)(i)9.b., Florida Administrative Code. This Rule does not specifically apply to the determination of depreciation recapture.

58. The amount (known as "basis") which may be used by the new owner in the determination of the amount of depreciation expense entering into the new owner's per diem reimbursement rate is determined by a comparison of the fair market value appraisal required by Rule 10D-29.103(7)(i)9.b., Florida Administrative Code, the sales contract price and the cost of the facility for the owner of the facility on July 18, 1984.

59. The manner utilized by the Department in its determination of depreciation recapture on the sale of a nursing home facility and the determination of the basis for the assets of the same facility for the new owner pursuant to Rule 10D-29.103, Florida Administrative Code, can result in the use of different amounts as the amount paid for those assets.

60. In light of the conclusion concerning the invalidity of the Department's policy in these cases, it is not necessary to determine whether the Department's difference in treatment of the Petitioners and the buyers of the Petitioners' nursing homes was improper.

CONCLUSIONS OF LAW

61. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes (1991).

62. The burden of proof in administrative proceedings is on the party asserting the affirmative of the issue before the administrative tribunal. Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981); and Ballino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977). It is the Department in these proceedings that is asserting the affirmative: that the Petitioners owe the Department depreciation recapture. The burden of proof in these proceedings was, therefore, on the Department.

63. Rule 10C-7.0482, Florida Administrative Code, provides the framework for the operation of the Medicaid program in Florida. This Rule specifically incorporates Florida Title XIX Long-Term Care Reimbursement Plan, Version IV, as a part of the Rule. Section III.H.1. of Title XIX provides, in pertinent part, the following guidance concerning the determination of depreciation recapture:

Recapture of depreciation resulting from sale of assets. The sale of depreciable assets, or substantial portion thereof, at a price in excess of the cost of the property as reduced by accumulated depreciation, resulting in a gain on sale, and calculated in accordance with Medicare (Title XVIII) Principles of Reimbursement, indicates the fact that depreciation used for the purpose of computing allowable costs was greater than the actual economic depreciation. . . .

(a) The gross recapture amount shall be the lesser of the actual gain on the sale allocated to the periods during which depreciation was paid or the accumulated depreciation after the effective date of January 1, 1972 and prior to the implementation of payments based on FRVS to the facility. . . . [Emphasis added].

64. The terms "Medicare (Title XVIII) Principles of Reimbursement", are defined in Section IX of Title XIX as "Health Insurance for the Aged, Blind or Disabled (Medicare), as provided in the Social Security Act (42 U.S.C. 1395-1395pp)." Medicare (Title XVIII) Principles of Reimbursement, do not contain specific provisions governing how gain on a sale of depreciable assets is to be calculated.

65. The federal regulations implementing Medicare (Title XVIII), however, including the following:

(iv) If a provider sells more than one asset for a lump sum sales price, the gain or loss on the sale of each depreciable asset must be determined by allocating the lump sum sales price among all the assets sold, in accordance with the fair market value of each asset as it was used by the provider at the time of sale. If the buyer and seller cannot agree on an allocation of the sales price, or if they do agree but there is insufficient documentation of the current fair market value of each asset, the intermediary for the selling provider will require an expert to establish the fair market value of each asset and will make an allocation of the sales price in accordance with the appraisal.

42 C.F.R. 413.134(f)(2)(iv). Chapter One, Section 104.14.B of the Provider Reimbursement Manual implementing Medicare (Title XVIII), contains nearly identical language.

66. The terms "fair market value" are defined in Medicare (Title XVIII), as follows:

Fair market value is the price that the asset would bring by bona fide bargaining between well-informed buyers and sellers at the date of acquisition. Usually the fair market value is the price that bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition.

42 U.S.C. 413.134(b)(2).

67. The Petitioners have argued that the Department may not rely upon the provisions of 42 C.F.R. 413.134(b)(2) or (f)(2)(iv) or the nearly identical provision of the Provider Reimbursement Manual because these provisions have not been specifically adopted by reference in any rule of the Department. See Section 120.54(8), Florida Statutes, which allows agencies to incorporate material by reference in a rule. The Petitioners have argued that the Department, although adopting by reference Title XIX, has not adopted directly or by reference 42 C.F.R. 413.134(b)(2) or (f)(2)(iv) or the Provider Reimbursement Manual and, therefore, may not apply these provisions with the force of a rule. See Rule 28-3.035 and Rule 1S-1.005(2), Florida Administrative Code.

68. It is not necessary to decide whether the federal provisions of law relied upon by the Department have been properly incorporated in the Department's rules. Even if the federal provisions of law relied upon by the Department had been incorporated, the Department's application of those provisions in these cases is not supported by the language of the federal provisions. And if the federal provisions of law relied upon by the Department have not been incorporated and are being relied upon as a matter of policy, the Department's interpretation constitutes an unreasonable policy. Therefore, whether the federal provisions are being applied with the same force as a rule or as a non-rule policy, the Department's application of the federal provisions in these cases is unreasonable.

69. The Department, in applying 42 C.F.R. 413.134(f)(2)(iv), treats a written allocation of the sales price between a buyer and a seller included in a sales and purchase agreement as sufficient documentation of the fair market value of each asset sold. Absent other evidence which would cause some question about the reasonableness of relying upon such an allocation, this policy is reasonable.

70. In these cases, the Department utilized the Purchase Price Allocation to determine the amount of gain on the sales at issue despite other documentation indicating that the allocated amounts may not constitute fair market value. The Department ignored other documentation of the fair market value of the assets which was provided to the Department which calls into question the sufficiency of the Purchase Price Allocation.

71. Absent a specific rule to the contrary, the Department should have reviewed and considered all the documentation provided to it in determining whether the written allocation alone constituted "insufficient documentation". It was unreasonable for the Department not to consider the information provided

to it and other information already available to the Department concerning the value of nursing home assets generally.

72. To the extent that the Department has a policy of ignoring other reliable information, its policy is unreasonable. To the extent that it may be concluded that the Department has adopted the federal laws at issue in this proceeding as part of its rules, the Department's interpretation of the federal law in support of its position in this case is also unreasonable.

73. Based upon the weight of the evidence, the appraisals conducted by the Petitioners' appraiser, Mr. Smith, and his determination of the fair market value of the depreciable assets of the nursing home facilities at issue in this proceeding are more reflective of the fair market value of those assets for purposes of depreciation recapture in these cases. The amount of depreciation recapture the Department may reasonably receive from the Petitioners, based upon their appraised fair market value, is set out in finding of fact 55.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Department requiring the Petitioners to pay to the Department the amounts set out in finding of fact 55 as depreciation recapture owed as a result of the sale of depreciable assets utilized by the Petitioners in the Florida Medicaid program.

DONE and ENTERED this 20th day of February, 1992, in Tallahassee, Florida.

---

LARRY J. SARTIN  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of February, 1992.

#### APPENDIX Case Number 91-4632

The parties have submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Recommended Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

#### The Petitioner's Proposed Findings of Fact

Proposed Finding of Fact Number	Paragraph Number in Recommended Order of Acceptance or Reason for Rejection
------------------------------------	--

1 1-2, 9 and hereby accepted.  
2 3-4, 9 and hereby accepted.  
3 5-6, 9 and hereby accepted.  
4 7-9 and hereby accepted.  
5 10 and hereby accepted.  
6 11-12 and hereby accepted.  
7 See 13-14.  
8-11 Not relevant.  
12 35.  
13 15-16.  
14 13-14 and 16.  
15 18-19.  
16 56 and hereby accepted.  
17 57.  
18 58.  
19 19.  
20 20-21.  
21 36.  
22 Hereby accepted.  
23 Not relevant.  
24 See 36-41.  
25 See 38-39.  
26 41.  
27 42.  
28 22-25.  
29 50 and hereby accepted.  
30 25.  
31 26-28.  
32 Not relevant.  
33 Not supported by the weight of the  
evidence.  
34-35 Not relevant.  
36-37 51.  
38 32.  
39 34 and hereby accepted.  
40 34.  
41 33.  
42 42-44.  
43 38-39.  
44 40.  
45 42-43. The last sentence is not  
relevant to this proceeding.  
46 43.  
47 52  
48-51 Not relevant to this proceeding.  
52-54 See 42-47.  
55 49 and 51.  
56 Not supported by the weight of the  
evidence.  
57 49 and 52.  
58 See 42-47.  
59 Hereby accepted.  
60 42-47 and 54-55.  
61 Not supported by the weight of the  
evidence.  
62 See 42-47 and 54-55.  
63 Not relevant to this proceeding.

64-65

54-55.

The Respondent's Proposed Findings of Fact

Proposed Finding of Fact Number	Paragraph Number in Recommended Order of Acceptance or Reason for Rejection
1-2, 5-8, 14-16	Summary of some of the rulings during the final hearing. Facts which primarily relate to credibility or weight of the evidence.
3	9.
4	48.
9	30-31 and 43-44.
10-13	See 43 and 45-47.
17-19	See 30-31 and 43-44.
20	32.
21	30-32.
22	42.
23	38.
24	Hereby accepted.
25-26	See 43 and 45-52.
27	30-31.
28	43.
29	Not relevant to this proceeding.

COPIES FURNISHED:

William B. Wiley, Esquire  
Darrell White, Esquire  
600 First Florida Bank Building  
Tallahassee, Florida 32301

Gordon B. Scott, Esquire  
Department of Health and  
Rehabilitative Services  
1317 Winewood Boulevard  
Building 6, Room 230  
Tallahassee, Florida 32399-0700

Sam Power  
Agency Clerk  
Department of Health and  
Rehabilitative Services  
1323 Winewood Boulevard  
Tallahassee, Florida 32399-0700

John Slye  
General Counsel  
Department of Health and  
Rehabilitative Services  
1323 Winewood Boulevard  
Tallahassee, Florida 32399-0700

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

=====
AGENCY FINAL ORDER
=====

STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

BRIGHTON HALL COMPANY d/b/a
WEST BAY NURSING CENTER,

Petitioner,
vs.

CASE NO.: 91-4632
RENDITION NO.: HRS-92-33-FOF-MDC

DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Respondent.
\_\_\_\_\_/

SHIVE NURSING CENTER, INC. d/b/a
SUNSET POINT NURSING CENTER,

Petitioner,
vs.

CASE NO.: 91-4634

DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Respondent.
\_\_\_\_\_/



GHF, INC. d/b/a OAKHURST MANOR  
NURSING CENTER,

Petitioner,  
vs.

CASE NO.: 91-4635

DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES,

Respondent.  
\_\_\_\_\_ /

GHF, INC. d/b/a ORCHARD RIDGE  
NURSING CENTER,

Petitioner,  
vs.

CASE NO. : 91-4636

DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES,

Respondent.  
\_\_\_\_\_ /  
SPRINGWOOD NURSING CENTER, LTD.,

Petitioner,  
vs.

CASE NO.: 91-4637

DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES,

Respondent.  
\_\_\_\_\_ /

FINAL ORDER

This cause came on before me for the purpose of issuing a final agency order. The Hearing Officer assigned by the Division of Administrative Hearings (DOAH) in the above-styled case submitted a Recommended Order to the Department of Health and Rehabilitative Services (HRS). A copy of the Recommended Order is attached hereto.

RULING ON EXCEPTIONS FILED BY PETITIONERS

Petitioners except to the Hearing Officer's conclusion that the department's policies on depreciation recapture are reasonable. The record supports the Hearing Officer's conclusion. Additionally, the case of Professional Medical Care Home vs. Patricia Harris, Secretary of Health Education and Welfare discussed in the ruling on the department's exceptions is a discoverable precedent supporting the reasonableness of the department's policies. See also endnote 1 to the department's exceptions.

Based on the foregoing, the exceptions to findings of fact 42, 43, 45, and 47 are denied.

Petitioner excepts to finding of fact 48. The finding is supported by competent, substantial evidence; therefore, the exception is denied.

Petitioner excepts to the Hearing Officer's rulings on petitioner's proposed findings of fact 8 through 11, 23, 32, 33, 34 through 35, 45, 48 through 51, 61, and 66. The rulings of the Hearing Officer are accepted. The exceptions are denied.

## RULING ON EXCEPTIONS FILED BY THE DEPARTMENT

The department's motion for extension of the time for filing exceptions is granted. Counsel disagrees with the Hearing Officer's statement of the issue. It is clear from a reading of the entire Recommended Order that the Hearing Officer was not under any misimpression as to the issue. The issue in this case is how nursing home assets are to be valued for purposes of calculating depreciation recapture from a former provider of nursing home services in the Medicaid program after the sale of the nursing homes.

Counsel excepts in whole or in part to findings of fact 44, 45, 46, 47, 49, 51, 52, 53, 54 and 55. In summary the Hearing Officer concluded that the department acted unreasonably by relying on the purchase and sale contract in which the assets sold were valued (the purchase price was apportioned to all assets sold) by the buyer and seller "... for all purposes including tax, reimbursement, and other purposes" (emphasis added). The Hearing Officer accepted other evidence of value which conflicted with the valuations agreed to by the buyer and seller. 1/ The Hearing Officer made no finding that the sale of the subject nursing homes was not an arms-length transaction. Without a conclusion that the purchase-sale agreement was not an arms-length transaction, evidence of appraisals made for other purposes is irrelevant. The evidence of record supports a conclusion that the deal was arms-length. (Transcript p. 52 and 102, and Petitioner's Exhibit 2, page 6 and 7). Under these circumstances the findings made regarding valuations, other than the values agreed to by the buyer and seller, are irrelevant. The irrelevant portions of the challenged findings are therefore stricken. Counsel cites the case of Professional Medical Care Home vs. Patricia Harris, Secretary of Health Education and Welfare, 644 F.2d 589 (7th Circuit 1980). The court sustained the Secretary's depreciation recapture determination which was made on the same basis as in the present case. The court noted that the purchase and sale contract was an arms-length transaction and that the appellant could properly be held to the values to which it-had agreed in the contract of sale.

Likewise, I conclude that the department acted reasonably here to hold petitioners to the values they agreed to in the contract of sale.

Counsel excepts to findings of fact 56 through 60 on the grounds that the findings are irrelevant. These findings deal with the determination of the amount of depreciation allowable to the purchaser of a nursing home. At issue in the present case is recapture of depreciation from a seller. I conclude that the findings are irrelevant; therefore, they are stricken.

Counsel excepts to the Hearing Officer's conclusions of law which reiterate the findings that the department was unreasonable as discussed above. The exceptions are granted.

### FINDINGS OF FACT

The department hereby adopts and incorporates by reference the findings of fact set forth in the Recommended Order except where inconsistent with the ruling on the exceptions.

### CONCLUSIONS OF LAW

The department hereby adopts and incorporates by reference the conclusions of law set forth in the Recommended Order except where inconsistent with the ruling on the exceptions. The entire record was reviewed.

Based upon the foregoing, it is

ADJUDGED, that the petitioner's are liable to the department for depreciation recapture as follows:

Oakhurst Manor Nursing Home	\$278,169.00
Orchard Ridge Nursing Home	\$115,456.00
Springwood Nursing Home	\$231,320.00
Sunset Point Nursing Home	\$ 25,261.00
West Bay Nursing Center	\$172,142.00

DONE and ORDERED this 16th day of March, 1992, in Tallahassee, Florida.

Robert B. Williams  
Secretary  
Department of Health and  
Rehabilitative Services

---

Deputy Secretary for Human  
Services

ENDNOTE

1/ The parties in an arms-length purchase and sale of a health care facility have opposite and competing interests in allocating the purchase price to the assets included just as they have in the total price. If a depreciable asset is overvalued, the seller will be liable for depreciation recapture. If the asset is undervalued, the buyer has a lower cost basis for purposes of depreciation. In other words, the seller would benefit by low valuations of depreciable assets so as to minimize or eliminate liability for recapture. The buyer would benefit by high valuations of depreciable assets so as to maximize the amount of allowable depreciation. See Valleio General Hospital vs. Otis Bowen, Secretary of Health and Human Services, 851 F.2d 229, 232 (9th Circuit 1988)

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF HRS, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

Copies furnished to:

Darrell White, Esquire  
Christopher Barkas, Esquire  
McFARLAIN, STERNSTEIN, WILEY & CASSEDY, P. A.  
Post Office Box 2174  
Tallahassee, FL 32316

Gordon B. Scott, Esquire  
Medicaid Counsel  
1317 Winewood Boulevard  
Building 6, Room 233  
Tallahassee, FL 32399-0700

Larry J. Sartin, Hearing Officer  
DOAH, The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, FL 32399-1550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forego in was sent to the above named people by U. S. Mail this 18th day of May, 1992.

---

R. S. Power, Agency Clerk  
Assistant General Counsel  
Department of Health and  
Rehabilitative Services  
1323 Winewood Boulevard  
Building One, Room 407  
Tallahassee, FL 32399-0700  
(904)488-2381