

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROOKWOOD-EXTENDED CARE)
CENTER OF HOMESTEAD,)
)
Petitioner,) CASE NO. 95-2319
)

vs.)
)

AGENCY FOR HEALTH CARE)
ADMINISTRATION, and MOUNT)
SINAI MEDICAL CENTER OF)
GREATER MIAMI, INC., d/b/a)
MOUNT SINAI MEDICAL CENTER,)
)
Respondents.)
)

FLORIDA CONVALESCENT ASSOCIATES)
d/b/a PALM GARDEN OF NORTH)
MIAMI,)
)
Petitioner,) CASE NO. 95-2322
)

vs.)
)

AGENCY FOR HEALTH CARE)
ADMINISTRATION, and MOUNT)
SINAI MEDICAL CENTER OF)
GREATER MIAMI, INC., d/b/a)
MOUNT SINAI MEDICAL CENTER,)
)
Respondents.)
)

MIAMI JEWISH HOME AND HOSPITAL)
FOR THE AGED, INC.,)
)
Petitioner,) CASE NO. 95-2326
)

vs.)
)

AGENCY FOR HEALTH CARE)
ADMINISTRATION, and MOUNT)
SINAI MEDICAL CENTER OF)
GREATER MIAMI, INC., d/b/a)
MOUNT SINAI MEDICAL CENTER,)
)
Respondents.)
)

MOUNT SINAI MEDICAL CENTER OF)	
GREATER MIAMI, INC., d/b/a)	
MOUNT SINAI MEDICAL CENTER,)	
)	
Petitioner,)	CASE NO. 95-2997
)	
vs.)	
)	
AGENCY FOR HEALTH CARE)	
ADMINISTRATION, FLORIDA)	
CONVALESCENT ASSOCIATES (PALM)	
GARDEN OF NORTH MIAMI) and)	
BROOKWOOD EXTENDED CARE CENTER)	
OF HOMESTEAD,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

This case was heard by Eleanor M. Hunter, the Administrative Law Judge, the Division of Administrative Hearings, in Tallahassee, Florida, from January 8-12, 16-19, 22, 23, 26, 29-31, 1996.

APPEARANCES

For Petitioner, Brookwood- Extended Care of Homestead:	Theodore E. Mack, Esquire Cobb, Cole and Bell 131 North Gadsden Street Tallahassee, Florida 32301
For Petitioner, Florida Convalescent Associates:	Frank P. Rainer, Esquire Gerald B. Sternstein, Esquire Ruden, Barnett, McClosky, Smith Schuster and Russell, P.A. Monore-Park Tower, Suite 815 215 South Monroe Street Tallahassee, Florida 32301
For Petitioner, Miami Jewish Home and Hospital for the Aged, Inc.:	Paul H. Amundsen, Esquire Rodolfo Nunez, Esquire Richard Moore, Esquire Amundsen and Moore 502 East Park Avenue Tallahassee, Florida 32301

For Respondent: Lesley Mendelson, Esquire
Agency For Mark Thomas, Esquire
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For Respondent, Geoffrey Smith, Esquire
Mount Sinai R. Terry Rigsby, Esquire
Medical Center F. Philip Blank, Esquire
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STATEMENT OF THE ISSUES

Whether the CON application of Brookwood, Mount Sinai, or FCA should be approved to meet the need for 60 additional community nursing home beds in Dade County, Florida.

PRELIMINARY STATEMENT

In October 1994, the Agency For Health Care Administration (AHCA) published a fixed numeric need for 70 additional community nursing home beds in District 11, Subdistrict 1, for Dade County, Florida. Following the review of a number of applications, AHCA preliminarily approved the issuance of CON 7982 for a 10-bed hospital-based skilled nursing unit for Miami Beach Healthcare Group, Ltd. d/b/a Miami Heart Institute ("Miami Heart"). Eight petitioners voluntarily dismissed their petitions in this proceeding, and all remaining parties withdrew challenges to the issuance of the Miami Heart CON, agreeing that the fixed numeric need is reduced to 60 nursing home beds.

AHCA also preliminarily approved the issuance of CON 7978 to Mount Sinai Medical Center of Greater Miami, Inc., d/b/a Mount

Sinai Medical (Mount Sinai) to construct a 60-bed free-standing skilled nursing home on a campus which includes an acute care hospital. Miami Jewish Home and Hospital for the Aged, Inc., (MJH) filed a petition challenging the preliminary approval of the Mount Sinai application.

AHCA preliminarily denied two applications by Brookwood-Extended Care Center of Homestead (Brookwood) for CON 7984 to add either 60 or 30 beds to an existing nursing home. At the final hearing, Brookwood withdrew its 30-bed partial application. AHCA also preliminarily denied the application of Florida Convalescent Associates d/b/a Palm Garden of North Miami Beach (FCA) for CON 7980 to add 60 skilled nursing beds and 19 assisted living beds to an existing nursing home.

At the final hearing, Brookwood presented the testimony of Kenneth Gummels, expert in development, management, operations, and financing, including the cost of construction of nursing homes; Allen Ray McGinnis, expert in architecture and construction costs; Steven Jones, expert in nursing home accounting and costs; Gene Nelson, expert in health planning; and Carmen Telot, expert in nursing home administration and quality of care. Brookwood's exhibits 1-5 were received in evidence.

Mount Sinai presented the testimony of Fred Hirt, expert in the operation and administration of nursing homes and of acute care hospitals; Jerome Goebel, expert in architectural design for health care related projects and nursing homes, and construction

cost estimating; Gloria Bass Weinberg, M.D., expert in internal medicine, geriatrics, and medical education; Deborah Hurwitz, expert in clinical social work, gerontological social work, and social work for Alzheimers' patients; Ellen Redick, R.N.; Betty Ann Taylor, R.N., expert in nursing education and nursing quality of care; Charles William Kipp, Ph.D., expert in social work, social work education, and gerontological social work; Carl Eisdorfer, M.D., Ph.D., expert in geriatric psychiatry, care of patients with Alzheimer's disease and related dementia, and medical education; Virginia B. Goldman, R.N., expert in nursing, nursing supervision, staffing, and quality of care; Robert Danielson; Daniel Sullivan, expert in health planning, health care finance, and financial feasibility analysis. In addition to witnesses who testified in the case-in-chief, Mount Sinai presented the testimony on rebuttal of Yehuda Ben-Horin and James L. Bernier, expert in disaster preparedness and emergency management, with particular expertise in hurricane preparedness. Mount Sinai's exhibits 1-4a, 6-28 and 30-42 were received in evidence. The parties were allowed to brief the admissibility of Exhibit 5, letters of support in Mount Sinai's application, and their admissibility is to be resolved in this Recommended Order.

AHCA presented the testimony of Elizabeth Dudek, expert in health planning and CON review. AHCA's exhibits 2-7 were received in evidence.

MJH presented the testimony of Daniel T. Brady, expert in health care administration and adult day care administration; Charles Beber, M.D., expert in geriatric medicine and teaching programs in geriatric medicine; Brenda McKenzie, expert in geriatric nursing, nurse education and training, and nursing administration; Guy E. Daines, expert in emergency management and hurricane evacuation planning and preparedness with special expertise in evacuation planning and preparedness for medical facilities; Sara A. Bishop, expert in hurricane evacuation planning and preparedness, with expertise in medical facilities; Francine Foley Hennessey, R.N., expert in nursing and nursing home administration; Christopher Macey, expert in site planning and site assessment, including cost analysis; Marilyn Goldaber, expert in gerontological social work; Loudes A. Boue, expert in health care finance and nursing home finance; Jose Estevez, expert in health care architectural designs; Sharon Gordon-Girvin, expert in health care planning, including CON review and health care planning for nursing homes; Terry Goodman, expert in nursing home administration; and Darryl Weiner, expert in health care finance, including financial feasibility. MJH's exhibits 2-4, 7, 9-13, 15-18, 20-23, 25-32, 34, 37, 40-48 and 52-55, were received in evidence.

The final volume of the transcript was filed on April 30, 1996. On May 20, 1996, Brookwood, Mount Sinai, MJH and AHCA filed proposed recommended orders. FCA filed a proposed

recommended order on May 21, 1996, technically a day late, but considered because of the issues raised concerning the fairness of the timing of the disposition of Mount Sinai's Motion For Summary Recommended Order.

Mount Sinai's Exhibit 5

During the final hearing, ruling was reserved on the admissibility of Mount Sinai's exhibit 5. Mount Sinai filed a Memorandum of Law On The Admissibility of the exhibit, on May 20, 1996. MJH filed a memorandum of law in support of its hearsay objection to exhibit 5, on June 3, 1996. Exhibit No. 5 consisted of letters of support for Mount Sinai's CON application from persons who serve both MJH and Mount Sinai as officers and directors. Mount Sinai contends that exhibit 5 represents an exception to the hearsay law, as admissions by or on behalf of MJH, based on the fiduciary relationship of officers/directors of the corporation. Mount Sinai also contends that the letters corroborate its witnesses' and/or impeach MJH's witnesses' testimony regarding the adverse impact on MJH from the approval of Mount Sinai's CON.

MJH argues that the letters, dated November and December 1994, do not constitute admissions against interest because none of the letter writers claims to be representing MJH, because the statements are not made within the scope of their employment, and because they cannot be used both to represent MJH and Mount Sinai (to corroborate Mount Sinai's officers/directors and to impeach

MJH's). MJH also describes the letters as inherently unreliable based on the dates written and the available information on the Mount Sinai proposal at that time.

Based on the arguments of counsel at hearing and in memoranda, Mount Sinai's exhibit 5 is received in evidence, as hearsay which cannot be the basis for a finding of fact without corroboration.

Mount Sinai's Motion For Summary Recommended Order Dismissing FCA

On December 28, 1995, Mount Sinai filed a Motion For Summary Recommended Order dismissing FCA. Mount Sinai moved to dismiss FCA for failing to include the cost for the first floor of its two story addition on schedule 2 of the application, the listing of planned capital projects. FCA filed a response in opposition to the motion on January 5, 1996.

The motion was heard on the first day of the final hearing, January 8, 1996. FCA, in its proposed recommended order, notes that the Prehearing Stipulation was altered by counsel for AHCA after it was signed by counsel for FCA. AHCA's attorney inserted Mount Sinai's Motion To Dismiss under the heading of Pending Motions when the Prehearing Stipulation was circulated to her for her signature. FCA contends that the Prehearing Stipulation was an improper substitute for a notice of hearing. Counsel apparently failed to meet together to prepare the Prehearing Stipulation as required by paragraph 3 of the Prehearing Order and Order of Consolidation issued on May 12, 1995. Rule 60Q-

2.016, Florida Administrative Code, authorizes rulings on motions after the time for responses, with or without oral argument. The rule also authorizes rulings on dispositive motions to be incorporated in the recommended order.

FCA did not dispute the facts that (1) its CON proposed a two story addition to an existing nursing home with 60 nursing beds on the second floor, and therapy spaces and assisted living beds on the first floor; (2) that the total building cost shown on schedule 1 is \$1,931,000 with a total project cost of \$2.7 million; (3) that the cost is estimated at \$85 a square foot for 19,352 square feet; (4) that FCA's architectural plans show 19,352 square feet for the second floor of the addition and, on the first floor, an additional 3,865 square feet for therapy areas, and 17,487 square feet for the 19 adult congregate living beds; and (5) that the cost for the first floor project is not included in the \$2.7 million shown on schedule 2.

FCA asserted that there was factual dispute concerning whether FCA's Board of Directors had approved the first floor project and had given authorization to execute the ACLF portion, because " . . . the architect in this matter basically took this on his own initiative to propose this ACLF project" (Transcript, p.43). In addition, FCA noted that the schematic design included in a CON application will have changes prior to construction, and that ACLF beds do not require CON approval. In this application, the ACLF beds are not offered as a condition

for approval of the 60-bed addition. FCA " . . . would not dispute that those - - the cost of the build-out of those [ACLF] beds had not been included, but the question is whether there were sufficient funds, sufficient project costs, to construct a first floor and then a completed second floor for this project." (Transcript, p. 48).

The statutory requirement for a list of capital projects is as follows:

408.037 Application content. - An application for a certificate of need shall contain:

(2) A statement of the financial resources needed by and available to the applicant to accomplish the proposed project. This statement shall include:

(a) A complete listing of all capital projects, including new health facility development projects and health facility acquisitions applied for, pending, approved, or underway in any state at the time of application, regardless of whether or not that state has a certificate-of-need program or a capital expenditure review program pursuant to s.1122 of the Social Security Act. . . . This listing shall include the applicant's actual or proposed financial commitment to those projects and an assessment of their impact on the applicant's ability to provide the proposed project.

Rule 59C-1.008(h) requires the listing of projects approved via authorization to execute. The fact that a project was not CON-reviewable did not excuse the applicant from including a project on schedule 2 in Central Florida Regional Hospital v. DHRS, 13 FALR 350, DOAH Case No. 90-1526 (1990). The fact that a project might later be changed or require additional approval

before expenditures were made was not a valid basis for omitting a project from schedule 2 in University Community Hospital v. DHRS, et al., DOAH Cases Nos. 91-1510 and 91-1511 (R.O. 3/19/92). "While the Executive Committee required an additional review of individual budget items costing more than \$25,000 prior to actually being purchased, [the hearing officer concluded that] these purchases are nonetheless planned, and thus pending, at the time that UCH filed its application by virtue of being included in final UCH budget, the hospital's planning document." (R.O. at p. 9).

AHCA supported Mount Sinai's Motion To Dismiss, arguing that any evidence on the factual issues raised by FCA - whether the ACLF is authorized or would also be constructed, whether the entire project could be built for the cost estimated for the second floor - would be inadmissible, impermissible amendments to the application. AHCA relied on Manor Care, Inc. of Sarasota v. DHRS, 558 So.2d 26 (Fla. 1st DCA 1989), in which the applicant's proposal to redesign a nursing home from three to two person bedrooms with a twenty percent increase in square footage was deemed an impermissible amendment. AHCA has promulgated Rule 59C-1.010(2)(b), which prohibits application amendments once AHCA deems an application complete. In light of the decision in Manor Care, FCA's offers of proof that the ACLF and therapy spaces were not approved, or that it could build over 38,000 square feet rather than 19,352 square feet for approximately \$2 million

dollars are impermissible amendments to the FCA application. The first floor was integral to the proposal FCA submitted to AHCA, as was the \$85 per square foot construction cost. Evidence at final hearing of changes such as those suggested by FCA undermines the ability of AHCA to take any meaningful preliminary agency action and are impermissible.

FCA's Motion For Summary Recommended Order Dismissing Mount Sinai Medical Center of Greater Miami, Inc.

On January 5, 1996, FCA filed a Motion For Summary Recommended Order to dismiss the application of Mount Sinai, based on Mount Sinai's failure to include a computer grant application on schedule 2 as a pending capital project. Mount Sinai refused to waive the time for response and argued, subsequent to the favorable ruling on Mount Sinai's Motion to Dismiss FCA, that the granting of Mount Sinai's Motion To Dismiss FCA precluded consideration of FCA's motion. On January 11, 1996, FCA filed as a supplemental exhibit to its motion. Mount Sinai filed a response in opposition to the Motion and MJH filed a request to participate in arguments in support of FCA's Motion, both on January 11, 1996. On January 12, 1996, FCA filed a supplemental memorandum of law on the Motion and, on January 16, 1996, a notice of hearing. Following the hearing, a ruling on the Motion was reserved for determination in this Recommended Order.

Mount Sinai's Motion For Attorneys Fees

On May 20, 1996, Mount Sinai filed a Motion For Attorneys' Fees And Costs from MJH, alleging that MJH's petition for an administrative hearing was frivolous, and filed to harass, delay, and increase the costs to Mount Sinai. Mount Sinai also filed a Memorandum of Law in Support of Proposed Recommended Order and Motion For Attorneys' Fees.

MJH filed a Response, on June 3, 1996, arguing that Mount Sinai's Motion For Attorneys' Fees, and Memorandum are vehicles to bolster its arguments in support of the CON application and comes too late after the petition, pre-hearing stipulation, and conclusion of the formal hearing.

On June 5, 1996, Mount Sinai filed a reply to MJH's response to correct what it termed a "gross mischaracterization" of the testimony of one witness, with attached excerpts from the transcript. For the reasons stated in Mercedes Lighting v. Department of General Services, 560 So.2d 272 (Fla. 1st DCA 1990), the Motion For Attorneys' Fees is denied.

Brookwood's Motion To Reopen The Record

At the same time that proposed recommended orders were filed, Brookwood filed a Motion To Reopen The Record, Submit Evidence of Misstatement of Fact, And Supplement The Record To Reflect The True Facts. In the Motion, Brookwood quoted the January 16, 1996 testimony (from page 942 of the formal hearing transcript) of Mount Sinai's President/Chief Executive Officer ("CEO") stating that Mount Sinai was having discussions, but had

no agreement to establish a relationship with St. Francis Barry Nursing Home (St. Francis). Brookwood also asserted that, on November 6, 1996 (which must have been intended to be 1995), Mount Sinai's President/CEO signed a change of ownership licensure application to allow Mount Sinai to acquire an ownership interest in St. Francis. The appendix to the motion shows the licensure application dated November 6, 1995, and a January 1, 1996 license changing the name of the nursing home to Mount Sinai-St. Francis Nursing and Rehabilitation Center.

Mount Sinai's response to Brookwood's Motion To Reopen The Record, filed on May 30, 1996, included pages 941-945 of the formal hearing transcript, in which the witness testified about discussions with St. Francis, and described the nursing home. In addition, Mount Sinai's Vice President for Patient Services also testified, on cross examination, about on-going negotiations between Mount Sinai and St. Francis to jointly operate the St. Francis nursing home. (Transcript, p. 1588-1590). The negotiations were also the subject of deposition cross-examination of Mount Sinai's Senior Vice President and Chief Financial Officer. (See, Mount Sinai exhibit 15, p. 51-59). Mount Sinai also attached to its response the affidavit of Mount Sinai's general counsel asserting that discussions between Mount Sinai and St. Francis began in June 1995; that the November 1, 1995 notice to AHCA of an intended partnership agreement was filed 60 days in advance of the proposed ownership and name

changes as required by rule; that AHCA was notified on December 11, 1995 that the proposed partnership would not be formed; and that Mount Sinai's Board, on February 8, 1996, approved the acquisition of an interest in the corporation which owns St. Francis. Mount Sinai also cited portions of the final hearing transcript in which arguments were made over the admissibility of MJH's Exhibit 51, correspondence and documents from AHCA licensure files related to Mount Sinai's proposed acquisition of an ownership interest in St. Francis as of January 1, 1996, but without any document to confirm that the changes had actually occurred, as of the date of the final hearing.

Brookwood's reply of June 3, 1996, notes that Mount Sinai's general counsel's affidavit does not deny that there was an agreement prior to February 9, 1996, just that the agreement was finalized on that date, following Mount Sinai's Board approval on February 8. Brookwood also relies on the fact that a license reflecting the changes that were only proposed in MJH's Exhibit 51, was issued (apparently, in March 1996) with a retroactive effective date of January 1, 1996. The license, according to Brookwood, properly reflects the relationship of Mount Sinai and St. Francis as of that date of and during the final hearing.

On June 5, 1996, MJH filed a Response to Brookwood's Motion To Reopen The Record and to Mount Sinai's Response, and a Request

For Official Recognition of certain documents, pursuant to Rule 60Q-2.020, Florida Administrative Code and Section 120.61, Florida Statutes.

On June 10, 1996, Mount Sinai filed a response to MJH's response, complaining that while MJH's response is timely, its request for official recognition is untimely, cumulative, and includes inadmissible matters occurring subsequent to the conclusion of the hearing.

The relationship between Mount Sinai and St. Francis having been the subject of testimony at the final hearing, the Motion To Reopen The Record and Request For Official Recognition are denied.

FINDINGS OF FACTS

1. The Agency For Health Care Administration ("AHCA") is the state agency responsible for the administration of the certificate of need (CON) program in Florida. AHCA published in Volume 20, Number 41, of the Florida Administrative Weekly, on October 14, 1994, a need for an additional 70 community nursing home beds in AHCA District 1, Subdistrict 1, for Dade County. A numeric need for 60 beds remains after the issuance of a CON for 10 beds to Miami Beach Healthcare Group, Ltd. d/b/a Miami Heart Institute.

2. Brookwood-Extended Care Center of Homestead, d/b/a Brookwood Gardens Convalescent Center (Brookwood), Mount Sinai Medical Center of Greater Miami, Inc. d/b/a Mount Sinai Medical

Center (Mount Sinai) and Florida Convalescent Associates d/b/a Palm Garden of North Miami Beach (FCA), among others, applied for CONs in this batching cycle. Miami Jewish Home And Hospital For The Aged, Inc., (MJH) opposes the issuance of a CON to Mount Sinai.

3. In a joint prehearing stipulation, the parties agreed that the CON applications were timely submitted, with complete and admissible audited financial statements. In addition, all applicants met the newspaper publication and notice requirements. The parties agreed that CON review criteria pertaining to special equipment not available in adjoining area, in subsection 408.035(1)(f), and to geographically underserved areas, in Rule 59C-1.036(2)(g), are not applicable to this case.

Brookwood

4. Brookwood is a 120-bed nursing home with a superior license, which will increase to 180 beds if its CON application number 7984 is approved. At hearing, Brookwood withdrew its application for approval of a partial CON for 30 additional beds. Brookwood is located in Homestead, in southern Dade County. Currently, Brookwood has 110 occupied beds, including 7 of its 12 Medicare certified beds. Brookwood informally serves adult day care clients, accommodates residents with Alzheimers' and related dementia (ARD) through the end stages, and currently provides hospice services to 4 patients despite the absence of a formal hospice agreement. Brookwood also has and can provide subacute

services with portable equipment and with some staff retraining. Brookwood can provide, but has not ever provided, services to persons who are HIV positive.

5. Brookwood Investments, Ltd. secures CONs, then develops nursing homes before transferring ownership to other Brookwood-related companies. Brookwood Investments manages the five Brookwood-related company nursing homes in Florida, one each in Walton, Jackson, Washington, and two in Dade County. All of nursing homes hold superior licenses.

6. Brookwood was constructed in 1986-1987 on approximately a 3 plus acre site. In 1992, Brookwood was one of 10 Dade County nursing homes, or approximately 1500 nursing home beds, severely damaged by Hurricane Andrew. Brookwood remained structurally sound, was repaired and reoccupied in March 1994. The cost of rebuilding was reimbursed by Brookwood's insurer in May 1994. Brookwood's employees were paid while nursing home operations were interrupted. The employees retrieved and returned resident's belongings, participated in training programs, and assisted in the clean-up and restoration of the facility.

7. When ordered to evacuate for Hurricane Andrew, Brookwood's administrator was unable to implement the transfer agreements with various area hospitals, which had already taken residents from other nursing homes. Most residents were transferred to a shelter in a school, while more critical care patients were transferred to a senior citizens center. As a

result of Hurricane Andrew, nursing homes no longer use disaster transfer agreements with hospitals. More recently, during Hurricane Erin, Brookwood transferred all of its residents to the other Brookwood-related company nursing home in Dade County, Waterford, which has 180 beds in Hialeah. Activity rooms at Waterford were set up like dormitories to accommodate the additional residents and staff.

8. Brookwood proposes to construct approximately 21,000 square feet for the additional 60 beds at a total project cost of \$1,983,600. Its CON would be conditioned on adding beds at the existing site, serving a minimum of 90 percent Medicaid in the addition and 2 percent Medicare in the facility, establishing an 8-bed area for ARD residents, and establishing a subacute care program. The only other nursing home in the Homestead area is Homestead Manor Nursing Home, which has 54 beds at 93 percent occupancy.

9. Brookwood is located on a dead-end street, within three miles of a hospital and two miles of a Florida Turnpike exit. It is in the Villages of Homestead, a 300 acre planned unit development. The same Brookwood entity which owns the 3 acre nursing home site also owns an adjacent 7 acres, zoned for the development of a retirement community offering various levels in a continuum of care. The four phases of the development include phase one - the existing 120-bed nursing home, phase two - the 60-bed expansion proposed in Brookwood's CON application, phase

three - an \$8 million residential community for 100 elderly residents needing medical services, and phase four - a \$4 million independent living facility for 100 elderly residents in need of medical monitoring. Brookwood did not list the projects in phases three and four or any routine capital expenditures as capital projects in schedule 2 of the CON application. The managing general partner testified that phases three and four will not be developed by the applicant, but by another Brookwood-related company. Having been rebuilt and refurbished in 1994, Brookwood has largely new equipment which is under warranty and, therefore, included no allowance for routine capital equipment expenditures. Brookwood also filed a CON application six months after the application at issue in this proceeding. In that application, Brookwood included \$20,000 as a contingency for routine capital expenditures.

10. On schedule 1 of Brookwood's CON application, \$1,595,000 in construction costs are listed. Other estimated costs are \$1200 for a site survey and soil investigation report, \$2400 for site preparation, \$3,000 for water, sewer and other utility systems, and \$3,000 for landscaping. There are no separately listed costs for roads and walks, although the plans include a new road connecting the current entrance to a new 40 space parking lot. Brookwood presented evidence that the cost of roads and walks is included in the construction costs and that the other four items, although separately listed, are also

included. Construction costs also include a 3 percent contingency. Brookwood also projected an expenditure of \$2,000 a bed or \$120,000 in movable equipment.

11. There was a construction cost overrun of approximately 20 percent during initial construction of Brookwood in the mid-1980's. Another company initially secured the nursing home CON, then transferred that CON for 360 beds to Brookwood Investments, which resulted in the development of both Brookwood and Waterford.

12. Prior to Hurricane Andrew, Brookwood was virtually 100 percent occupied in the 120 beds. After Brookwood reopened, 42 of its previous residents returned. Brookwood projected 95 percent occupancy for the fourth quarter of the first year, and 98 percent occupancy in the fourth quarter of the second year of operation with 180 beds. In its subsequent application, Brookwood reduced its projection by 2 percent in the first year and 3 percent in the second year, based on its experience subsequent to Hurricane Andrew. Greater than projected Medicare use has caused more frequent movement of patients in and out of the facility, resulting in logistical obstacles to having beds continuously filled, and reduced occupancy rates. In addition, Brookwood holds beds for the return of hospitalized Medicare patients. Brookwood also projected 95 percent Medicaid, 2.5 percent private pay, and 2.5 percent Medicare in the facility in this batching cycle. In the CON application filed six months

later, however, Brookwood projected 80.37 percent Medicaid, 18.9 percent Medicare, and 1.5 percent private pay, which is consistent with the trend after the hurricane.

13. Brookwood's staffing plan does not show staff for housekeeping and laundry services. At the time the CON application was filed, housekeeping and laundry services were provided by an independent contractor, whose contract was terminated subsequently. In the next batching cycle application, Brookwood included positions for housekeeping, laundry and approximately \$80,000 for an ARD unit director and an ARD activities coordinator. Brookwood also failed, in this application, to include a position for an assistant director of nursing, which is required when its size expands from 120 to 180 beds.

14. Brookwood's initial construction was financed with long term debt at an interest rate of 13.65 percent. After refinancing in 1994, the interest rate was reduced to 8.5 percent, reducing payments by approximately \$350,000 a year. The property costs, however, continue to exceed the Medicaid property reimbursement ceiling by \$6 a Medicaid patient day or, with approximately 40,000 Medicaid days a year, a total of \$240,000 - 250,000 a year.

15. Brookwood plans to construct single rooms of 150 square feet, as compared to the state requirement of 80 square feet, and double rooms of 235 square feet, as compared to the state

requirement of 160 square feet. AHCA's architect criticized Brookwood's plans for having the toilet area door opening into bedroom space, but AHCA has approved essentially the same design which is currently under construction at a Brookwood-related company facility in Marianna, Florida.

MOUNT SINAI

16. Mount Sinai is a 707-bed tertiary acute care hospital in Miami Beach, located on a 55-acre campus. It has a hospice program, an accredited 60-bed comprehensive medical rehabilitation unit, an accredited outpatient rehabilitation department, a 50-bed inpatient geriatric psychiatric unit, and the Wien Center For Alzheimers' And Memory Disorders. In a joint venture with MJH, Mount Sinai also operates a home health agency. Mount Sinai is one of six teaching hospitals designated by Florida Statutes, affiliated with the University of Miami Medical School, and accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) and the Accreditation Council for Graduate Medical Education. Over 150 teaching fellows are in training in over 15 separate disciplines at Mount Sinai. Mount Sinai is a disproportionate share provider of Medicaid services, providing approximately 5 percent of total patient days to Medicaid, second in Dade County, only to Jackson Memorial Hospital.

17. Mount Sinai is the applicant for a CON to establish a 60-bed nursing home of approximately 40,000 square feet in Miami

Beach, for an estimated total project cost of \$5.8 million. The nursing home will be constructed on a site on the western edge of the 55 acre medical campus on Biscayne Bay at the Julia Tuttle Causeway, which is one of five routes connecting Miami to Miami Beach. The proposed nursing home site is currently a parking lot. Mount Sinai's CON would be conditioned on the provision of 65 percent of total patient days to Medicaid, and the establishment of a subacute program, a 12-bed geriatric assessment and dementia treatment unit, a dementia specific adult day care program, respite care, and a training and research center. Subacute care, including rehabilitation programs will be conducted in 48 beds. The adult day care will operate 7 days a week for 14 hours a day.

18. At the time of hearing, approximately 530 to 540 of the hospital's 707 beds were occupied. The average annual occupancy in 1994 was 65 percent in all licensed beds, and over 90 percent in the 50-bed geriatric psychiatry unit, the 60-bed rehabilitation unit, and the intensive care unit. Mount Sinai considered conversion of existing beds to nursing home beds, but rejected that alternative. There was, according to Mount Sinai's President, no area to establish a 60-bed distinct teaching nursing home with an appropriate environment for long term patients.

19. Mount Sinai will use the hospital's existing kitchen and laundry services, necessitating transportation of food and

linen to and from the hospital by truck. It will also use existing administrative staff and management systems. The existing case management methodology and multidisciplinary plan of care, called "Critical Pathways", will be extended to establish standards of care, and to provide research samples in areas related to long term care.

20. Mount Sinai proposes to use the nursing home and its existing teaching staff to train doctors, nurses, social workers, and other health care professionals, to care for patients in non-acute care settings. Mount Sinai's proposal will enhance the placement and continuity of care for patients discharged from its hospital to its nursing home, particularly those patients leaving with higher acuity levels, lower reimbursement sources, and more medically complex illnesses, such as those with AIDS or ventilator-dependence. Mount Sinai applied for a \$7 million grant from the Department of Defense for a computer system. At the time the CON application was filed, the grant application had been denied. Mount Sinai's administrator testified that Mount Sinai intended to reapply for a grant of \$300,000. FCA and MJH argued that the grant application should have been disclosed on schedule 2 of the Mount Sinai CON application.

21. Initially, the proposed nursing home location was closer to the energy center on the Mount Sinai campus. In the CON application narrative, the energy center is described as the nursing home's source of chilled water for the air conditioner

system, hot water, medical gases, and emergency generators. At the time the application was filed, the plan was to build the nursing home at a more remote location on the Mount Sinai campus. MJH's expert testified that the increased cost for connecting over a greater distance is \$108,000. Mount Sinai plans to use a package chiller for the air conditioner, self-contained medical gases, bottled tank oxygen for 48 rooms (excluding the dementia unit), and an emergency generator, which can be covered in \$109.00 per square foot construction cost. MJH's expert's conclusion that an additional \$345,000 will be needed to construct 1000 square feet to enclose the additional equipment is inconsistent with the projected construction costs, which MJH criticized as extravagant. The difference in the narrative and the actual plan for the energy source from one connected to the existing energy center to a separate power source at the nursing home was challenged as an impermissible amendment to Mount Sinai's application.

22. MJH contends that the schedule 1 estimated project costs, omit approximately \$6,000 for traffic studies, \$412,800 for site preparation cost, and \$140,000 for lighting and site furnishings. MJH also asserted that costs were understated for soil investigation, utility systems, and landscaping. Mount Sinai has a master campus traffic study, which includes the nursing home site. MJH estimated site preparation costs erroneously assuming the entire site will be filled. The

construction cost includes sufficient dollars to cover site preparation costs, utility systems, and lighting.

23. Mount Sinai's design is described, in its application, as more akin to a hotel environment. Brookwood and MJH described it as lavish and unnecessarily expensive. The rooms are designed to enhance patient privacy by using an entertainment console as a room divider in semi-private rooms. The arrangement requires two television sets in each room. Residents also have separate bathroom doors, from each side of the room, into a shared bathroom.

24. Mount Sinai has a master campus plan to guide development over the next fifteen years. Among the items included in the plan are a 100,000 square foot staff office building, a conference center, and a comprehensive rehabilitation center. According to Mount Sinai's administrator for finance, estimates of future project costs for these master plan items have not been made, nor any expense items associated with them included in capital budgets, nor has the Board approved the projects. The projects are not included on schedule 2 of Mount Sinai's CON application.

25. Despite orders to evacuate for Hurricane Andrew, Mount Sinai was able to transfer approximately 10 of 450 to 500 patients to other hospitals. Mount Sinai's transportation plan was inadequate because no emergency vehicles were available. In addition, Mount Sinai was unable to locate facilities providing

comparable levels of care, particularly for critically ill patients. Mount Sinai commits to completely evacuate the nursing home in the event of an evacuation order, and has a transfer agreement with a 150-bed nursing home, St. Francis. Mount Sinai has acquired 20 passenger vans to use for the evacuation. The Mount Sinai hospital buildings are 11 feet above sea level, the highest point on Miami Beach, and have shutters over windows in all patient areas. Its location is the only one on Miami Beach projected to withstand a Category 5 Hurricane. The nursing home, at 5.5 feet above sea level, with an acre of fill to raise the site 3 feet will have a floor level of about 9 feet.

26. At the final hearing, hurricane preparedness and evacuation experts opposed the construction of any medical facilities in high hazard coastal locations and on barrier islands. Coastal high hazard areas are those which have to be evacuated for category one hurricane. There is, however, no legal prohibition to the development of medical facilities on barrier islands.

MIAMI JEWISH HOME AND HOSPITAL (MJH)

27. MJH is a 462-bed nursing home, which includes an outpatient clinic, a 32-bed specialty acute care geriatric hospital, a 68-bed subacute unit, 120-bed ARD unit (with 40 of those for late stage ARD patients) in three separate units, in which patients are grouped according to their functional cognitive levels. MJH also operates an 120-bed assisted living

facility, and two adult day care programs on campus and two off campus. MJH is located approximately 7 to 8 miles, or a 15 to 20 minute drive from Mount Sinai. The occupancy of the nursing home is 95 percent, with a waiting list.

28. The hospital, subacute unit, and dementia programs at MJH are JCAHO-accredited. MJH holds a superior license from the state. At MJH, training programs include two week clinical rotation for medical students in geriatrics, elective rotations for post graduates in internal medicine and family practice, two year fellowships for geriatrics specialists, including geriatric psychiatry. In addition to medical students and physicians, MJH also has training programs for psychologists, nurses, physicians assistants, physical therapists, and nursing home administrators. The medical fellowship is accredited by the American Council of Graduate Medical Education. Participating institutions include the University of Florida, University of Miami, Barry University, Florida International University, Columbia University School of Social Work, Yeshiva University, Mercy Hospital School of Nursing, Lindsey Hopkins Vocational School, and two Miami high schools.

29. MJH also operates the Gelvan and Fischer Adult Daycare Centers on the campus of MJH, under a single license with a capacity of 70 and an average daily census of 45 to 50. Fischer is dementia specific and averages 12 participants a day. Gumenick Alzheimer's Center, in North Miami Beach, has a licensed

capacity of 40, with an average daily census of 27 to 30 participants. The Legion Park has a capacity of 40 and an average daily census of 32. One-half of the referrals to Fischer, one-fourth of the referrals to Gumenick, and one-third of the referrals to the Galvin Center come from the Wien Center at Mount Sinai.

30. Approximately one-half of the \$210,000 budget for Fischer is provided by charitable contributions from a group known as Alzheimer's Care Notables. Charges in the Gumenick Center are \$35-40 a day, although costs are \$52 a day for each participant. Transportation is provided to and from adult day care for approximately 100 participants a day, consistent with state guidelines for dementia sufferers who must not be on a bus more than 45 minutes. The center transports 50 percent of Gumenick and 75 percent of Fischer participants. Gumenick operates two buses on two routes, with drivers trained as geriatric assistants, accompanied by a nursing assistant. The annual operating cost of transportation is estimated at \$50,000 per vehicle per year. The Galvin Center is predominately Jewish, serving primarily patients from Miami Beach. Fischer is approximately 20 percent Jewish. Gumenick draws a variety of ethnic participants from older parts of Miami. MJH operates an AHCA-approved and administered program called "Channelling", a community-based alternative to nursing homes, serving from 1000 to 1300 clients funded through a Medicaid waiver program.

31. The Stein Gerontological Institute at MJH focuses on research on physical design to facilitate the functioning of older persons in apartments, housing developments, and cars. The Stein Institute and the University of Florida School of Aging, through a collaborative arrangement to study human engineering, held a world conference on aging and technology, in November 1994. Other areas of research includes geriatric patient nutrition, overuse of drugs, and the effects of exercise.

Subsection 408.035(1)(a) - need in relation
to district and state health plans

32. The District 11 CON Allocation Factors Report lists twenty-one preferences for consideration in determining if an applicant should be issued a CON for nursing home beds. The applicable state health plan is the 1989 Florida State Health Plan which lists twelve preferences applicable to nursing home CONs, some of which overlap those in the local health plan and the statutory review criteria.

District 11, preference 1 - projects which exceed average district Medicaid percentage; see, also subsection 408.035(1)(n), Florida Statutes; and state health plan preference 2 - service to Medicaid in proportion to subdistrict average, except in multi-level care systems

33. The Dade County subdistrict average for Medicaid was 71.4 percent from January to June 1994. Brookwood proposed 90 percent Medicaid service in the additional beds. Currently, Brookwood has a condition to provide 41 percent Medicaid, which is significantly lower than Brookwood's actual experience of 95 percent. Mount Sinai proposes to serve 65 percent Medicaid in

its nursing home. Mount Sinai is a disproportionate share Medicaid provider, second only in Dade County to Jackson Memorial Hospital, and is a multilevel provider. Consequently, Brookwood and Mount Sinai meet the statutory and state health plan criteria for service to Medicaid patients and residents.

34. With regard to district preference one, however, the 65 percent proposed by Mount Sinai does not meet the subdistrict average of 71.4 percent. The 90 percent Medicaid proposed by Brookwood meets the preference.

District 11, preference 2 - service to mentally ill under OBRA - 87; and state preference 3 - mentally ill, and Alzheimer's residents

35. Brookwood has psychiatric services available by contract and will establish an 8-bed ARD unit. Mount Sinai will establish a 12-bed unit and an adult day care center for 30 ARD patients, and currently operates a 50-bed inpatient geriatric psychiatric unit and the Wien Center for Alzheimer's Disease and Memory Disorders, an outpatient diagnostic and research facility on the Mount Sinai campus. The center also provides counseling and referral services for caregivers. Mount Sinai meets the preference by having established, extensive resources for the care of mentally ill and ARD residents.

District 11, preference 3 - service to mentally retarded

36. Consistent with federal requirements, neither applicant will treat persons with only mental retardation as a diagnosis. The preference is inapplicable.

District 11, preference 4 - to meet unmet needs for special services, e.g. ventilator, AIDS, pediatric patients; preference 5 - HIV positive patient; and state health plan preference 3 -AIDS residents

37. Brookwood has staff capable and trained to follow appropriate protocols to care for ventilator and HIV positive patients, but has never served an HIV positive patient. Brookwood also currently has no ventilator patients, and its staff will have to be retrained to treat ventilator patients. Portable ventilators can be used at Brookwood.

38. Mount Sinai can serve ventilator, and HIV+/AIDS patients. Mount Sinai operates an inpatient AIDS unit and is equipped with forward and reverse isolation significantly more capable of serving medically complex patients, including AIDS patients, than Brookwood.

District 11, preference 6 - areas of geographic need based on population 75 plus and occupancy rates; preference 9 -additional beds at facilities with an existing average occupancy rate of 90 percent or higher, and state plan preference 1 locations in subdistricts exceeding 90 percent

39. Prior to Hurricane Andrew, Brookwood exceeded 98 percent occupancy, but has not reached previous occupancy levels after reopening. Brookwood's occupancy rate was 83 percent at a time when Miami Beach nursing homes exceeded 95 percent occupancy. Mount Sinai meets the preferences.

40. Occupancy rates in the Homestead area are 95 percent at Homestead Manor and 77 percent at Brookwood, for a Homestead area average of 89.4 percent. Four nursing homes on Miami Beach averaged occupancies of 95 percent in 1944-1995. The

concentration of persons over 75 on Miami Beach is more than three times that of Dade County as a whole and more than twice that of the State. Brookwood presented evidence of a lower bed to population ratio in south Dade County as compared to all of Dade County. By comparison, however, Homestead has a declining population and a lower concentration of persons over 75. The preferences, with emphasis on occupancy rates and the concentration of the 75 and older population, are met by Mount Sinai.

District 11, preference 7 - sharing services and resources with other facilities

41. The Brookwood-related facilities share a centralized purchasing and management company. Mount Sinai would also benefit from centralized resources and purchasing power. In addition, therapeutic program linkages are enhanced by locating a nursing home on the medical campus, including the inter-generational therapies for the nursing home and a child care center. Due to its size and extensive resources, Mount Sinai has more services to share with a nursing home. Mount Sinai prepares and delivers all of the meals to South Shore Hospital, and will also provide meals and linens to the nursing home. See, also, subsection 408.035(1)(e).

District 11, preference 8 - indigent care

42. The parties agree that indigent nursing home residents usually qualify for Medicaid. Brookwood has historically served large proportions of Medicaid patients and, correspondingly,

virtually no indigent care. Mount Sinai proposes to provide .5 percent indigent care in its nursing home. The preference does not distinguish between the applicants.

District 11, preference 10 - nursing homes of at least 120 beds in Dade County

43. Brookwood's application is consistent with the preference for a minimum of 120 beds in Dade County nursing homes, and Mount Sinai's is not consistent with the preference.

District 11, preference 11 - comprehensive scope of five or more services in addition to basic skilled nursing care; and state preference 6 - innovative therapeutic programs

44. Brookwood proposes traditional nursing home services, while Mount Sinai proposes a comprehensive range of services which are available due to its co-location and relationship within a medical teaching complex and a child care center.

District 11, preference 12 - facilities which exceed federal safety requirements, state nursing home rules and JCAHO; preference 13 - superior ratings; and state preference 8 - for a history of superior programs in existing facilities; See, also, subsection 408.035(1)(c) - quality of care

45. Brookwood has held a superior license since 1992, when first eligible under its current management. Mount Sinai is accredited by the JCAHO. Both applicants meet the preference.

District 11, preference 14 - conversion of under utilized beds to nursing home beds

46. The preference is not applicable to proposals to construct either a freestanding nursing home or an addition to a nursing home.

District 11, preference 15 - cost-effective design or additions;
subsection 408.035(1)(m) - less costly more effective
construction; (2)(c)- alternatives to new construction.

47. Brookwood's design is cost-effective by adding 60 beds and a third courtyard, using the same kitchen, laundry, and administrative areas. Brookwood's semi-private rooms have half-baths, necessitating the use of common showers and tubs for all residents except for those in the four private rooms. Brookwood's total cost per bed is \$26,000. The mean per bed nursing home cost per bed in Florida is \$32,400, as compared to

the Medicaid ceiling of \$36,000 per bed. The total project cost is approximately \$2 million for the additional 21,000 square feet.

48. Mount Sinai is larger than necessary to accommodate services for a 60-bed nursing home, but the evidence demonstrates that the size is justified for the use of the facility as a teaching nursing home for training residents, fellows, nurses, social workers, and other health care professionals. Mount Sinai's construction cost per bed is \$97,500. The total project cost is \$5.8 million for approximately 40,000 square feet. MJH notes that Mount Sinai's wainscoting, marble window sills and fireplaces are elaborate. The higher cost is also attributable to classrooms and other student spaces.

District 11, preference 16 - one full-time direct staff person speaking the language expected of every 25 residents; state preferences 9 and 10 - for staffing exceeding minimums, particularly nurses, and multi-disciplinary staffing

49. Both Brookwood and Mount Sinai meet the preference for having bilingual staff to care for residents. Both applicants propose staffing levels above the minimum required in licensure rules. Mount Sinai's nursing staff exceeds that of Brookwood. In addition, Brookwood included in workpapers, but omitted from its application a position for an assistant director of nursing, which is required when a facility expands from 120 to 180 beds. Mount Sinai also has health care specialists from a wider variety of disciplines on staff as compared to the disciplines with which Brookwood contracts.

District 11, preference 17 - outside recreational opportunities and adequate visitor parking; state preference 5 - design and special features to maximize resident comfort

50. Brookwood meets preference 17 by proposing to construct a third entirely enclosed courtyard. Mount Sinai's plans also include an enclosed courtyard, other outdoor recreational areas, and adequate parking. Both applicants meet preference 17 of the district health plan.

51. Brookwood and Mount Sinai also meet state preference five. Brookwood's nursing home includes much larger rooms than required by rule and vaulted ceiling corridors with clerestory windows. Mount Sinai also has an enclosed courtyard and large resident rooms, divided by entertainment consoles in semi-private rooms to enhance privacy for the residents.

District 11, preference 18 - formalized patient transfer mechanisms

52. Brookwood is already well-integrated into the health care system, and Mount Sinai has the advantage of its proposed location on the campus of a tertiary level teaching hospital. Both applicants meet preference 18.

District 11, preference 19 - facilities located in Monroe County

53. The preference is not met by the applicants. Brookwood does serve an average census of 15 Monroe County residents, but is not located in Monroe County.

District 11, preference 20 - natural or other disaster evacuation plans and agreements

54. Evacuation plans and arrangements made by Brookwood, subsequent to Hurricane Andrew, were tested and successfully executed during Hurricane Erin in 1995. All residents, necessary staff, medications, charts, and linens were quickly and efficiently transferred to and accommodated at the other Dade County Brookwood facility, Waterford. Mount Sinai was unable to evacuate more than 10 of 400 to 450 patients during Hurricane Andrew, and was unable to evacuate during Hurricane Erin, due to the absence of agreements with comparable providers and an inadequate supply of emergency vehicles. Mount Sinai is revising its evacuation plan for acute care patients, has entered into a nursing home resident transfer agreement with St. Francis, and has purchased 20 patient passenger vans, 14 of which are wheelchair equipped. Mount Sinai failed to prove that it can successfully evacuate its hospital, although the arrangement with St. Francis and the acquisition of passenger vans support a conclusion that it could evacuate a 60-bed nursing home. The arrangement is comparable to that which exists between Brookwood and Waterford. Based on its tract record, Brookwood better meets the requirements of preference 20.

District 11, preference 21 - locations which are not on major highways

55. Brookwood's location at the end of a dead end street within a planned unit development in Homestead is a preferable nursing home setting to Mount Sinai's location on the Julia Tuttle Causeway in Miami Beach.

State preference 4 - continuum of care; see, also, subsection 408.035(1)(o) - continuum of care in multilevel system

56. Brookwood is the first phase of a planned continuing care retirement community. The organizational structure, funding sources, and timetables for the residential and independent living developments have not been established. Brookwood provides some informal adult day care, but included no plans for a more formal program in its CON application. By contrast, Mount Sinai is able to plan extensively for a continuum of care ranging from acute care, comprehensive rehabilitation, subacute and rehabilitation in the nursing home adult day care, respite to outpatient care.

State preference 7 - charges not exceeding highest Medicaid per diem in subdistrict

57. Brookwood and Mount Sinai meet the preference with proposed charges not exceeding the highest Medicaid per diem rate in the subdistrict (inflated forward to the proposed second year of operation).

State preference 11 - residents rights and privacy, residents' councils, quality assurance and discharge planning

58. Both applicants will ensure residents' rights and privacy, and will establish residents' councils. They also have appropriate quality assurance and discharge planning programs.

State preference 12 - lower administrative costs and higher resident care costs than district average

59. Brookwood meets the preference for lower administrative costs and higher resident care costs than the district average.

Mount Sinai's resident care and administrative costs exceed the district average.

60. In general, Brookwood meets the state and local health plan criteria for Medicaid service, the size and location of the facility, the ability to evacuate in case of natural disaster, cost-effectiveness of the design, and costs. Mount Sinai meets the preferences for Medicaid in a multilevel facility, for the scope of services it can provide to residents with ARD, AIDS/HIV positive, and ventilator-dependence, for the multidisciplinary professional staff to provide those services, and for an extensive continuum of care. In addition, the need for a nursing home, as determined by occupancy levels and population 75 years old and older, is greater on Miami Beach than in Homestead.

Subsection 408.035(1)(b) - like and existing facilities in the district; (d) - alternatives; (g) need for research and educational facilities; (2)(a) - patient access problems; (2)(b) - efficient use of existing nursing homes

61. The parties agree that, for some residents, there are no alternatives to nursing home care. In the Homestead area, given the occupancy level at Homestead Manor, once Brookwood reaches occupancy levels experienced prior to Hurricane Andrew, the most appropriate response is the proposed 60-bed expansion of Brookwood. That expansion will also allow Brookwood to meet the needs for more specialized ARD and subacute care. Brookwood has limited internship and training programs.

62. Mount Sinai contends that its proposal will meet the need for a teaching nursing home and provide a facility for

medically complex residents who are currently difficult to place. There are, however, no standards for teaching nursing home, no requirements that any health care professional receive training in a teaching nursing home, and no methodology for determining the need for teaching nursing homes.

63. MJH asserts that its educational and research programs offer an alternative to the Mount Sinai proposal, and that it accommodates patient referrals from Mount Sinai. MJH's Director of Social Work and Admissions testified that the only patients excluded because of their condition are ventilator patients. She also testified that Medicare patients are always accepted, if necessary by relocating an HMO or private pay patient from a Medicare bed to the 32-bed hospital unit. MJH will not, however, allow short-term Medicare residents to use the Medicare admission as an avenue to circumvent the waiting list for long term care beds. The age restriction for "elderly" has been lowered from 65 to 55. Persons diagnosed with Alzheimer's also have to go on the long term waiting list. The designated Alzheimers' units are frequently full.

64. MJH has a total of 68 Medicare certified beds, 18 of which are also dually certified for Medicaid. MJH has a waiting list for the 18 dually certified beds. Medicaid patients cannot be accepted in the other 50 beds. MJH also uses the 32-bed hospital for private pay patients waiting for long-term beds, but has no Medicaid provider number for the acute care beds. MJH

admissions is generally restricted to residents of Dade, Broward, and Palm Beach Counties, although that policy has recently been relaxed. Occupancy rates in the 68 short term rehabilitation beds at MJH have ranged from 95 to 100 percent, since 1993, with the average daily census reaching up to 69 patients. Considering appropriate diagnostic and gender groupings optimal occupancy in short term beds is 85 percent.

65. The teaching programs at Mount Sinai are significantly different from those at MJH. Even if they were not, MJH is not a viable alternative for the placement of patients because of the limitations on its service to certain patients, including ventilator-dependent, and those with AIDS/HIV positive, and its high occupancy levels, particularly in ARD and other long term care units. The occupancy rates at MJH and other Miami Beach nursing homes pose a serious obstacle to access, particularly for Medicaid residents.

Subsection 408.035(1)(h) - available personnel and other resources; and (i) - financial feasibility

66. Brookwood and Mount Sinai have the ability to recruit and train staff to operate a nursing home. Brookwood has access to sufficient funds for construction and start-up of the project and is, therefore, financially feasible in the short term.

67. Brookwood is also financially feasible in the long term, considering its debt restructuring, increasing Medicare and declining Medicaid, and improved management. The economics of scale from operating 180 beds rather than 120 would assist

Brookwood financially, except that the fill rate experience would be slower than projected. Brookwood projected sufficient staffing above state requirements to create a position for an assistant director of nursing.

68. MJH's expert agreed, on cross examination, that Mount Sinai's proposal is also financially feasible in the immediate or short term. Because of its dependence on charitable contributions and understated expenses, MJH's expert opined that Mount Sinai's proposal is not financially feasible in the long term. In determining the financial feasibility of projects at not-for-profit health care facilities, which reasonably rely on charitable contributions, it is reasonable to include contributions in evaluating financial feasibility. Otherwise, a CON would never be issued to a not-for-profit institution which relies on contributions to compensate for operating deficits. That result is contrary to all the preferences and statutory criteria for disproportionate share and other Medicaid or indigent care providers.

69. The Mount Sinai Foundation has received over \$90 million in contributions over the past ten years, or an average of \$9 million a year. It is reasonable to expect grants and charitable donations of \$125,000 in the first year, and \$300,000 in the second year, to make the nursing home financially feasible.

70. MJH's expert in health care finance, including financial feasibility testified that a number of costs were omitted from schedule 1. Land costs, he asserted, although an asset of the hospital, represents an opportunity cost when transferred to the nursing home. MJH's expert, however, also prepared a CON application for a nursing home site at a hospital which omitted land costs. Cash flow statements are omitted because, as of this batching cycle, they are not required by AHCA.

71. Mount Sinai was also criticized because schedules 10 and 11 show physical, occupational and speech therapies, but not revenues or expenses associated with therapies for medically complex patients, such as intravenous, wound care, or ventilator services. These expenses and revenues are properly omitted because they will be billed directly.

72. MJH's expert also testified that Mount Sinai should have allocated a portion of the hospital's fixed costs to the nursing home. There is no requirement that fixed costs be allocated to the nursing home. To the extent that any incremental increases in dietary, laundry, and administrative staff are attributable to the nursing home, those are included on the schedules and taken into account in the pro forma. Mount Sinai's proposal is financially feasible in the long term.

Subsection 408.035(1)(j) - needs of HMOs

73. There is no evidence that either proposal is intended to or will meet the needs of a health maintenance organization.
Subsection 408.035(1)(k) - needs of entities serving individuals not residing in the district

74. The criterion is not at issue in this proceeding.
Subsection 408.035(1)(l) - Adverse impact on Miami Jewish Home

75. There is no evidence of any adverse impact from the approval of the Brookwood CON application. By contrast, MJH projects an adverse impact from the approval of the Mount Sinai CON. MJH expects to lose all of its referrals from Mount Sinai and to lose charitable contributions as a result of the competition from the 60-bed facility at Mount Sinai.

76. MJH runs a deficiency from operations ranging between \$7 million to \$8 million a year, relying on philanthropic support from the Greater Miami Jewish Federation and the United Way to meet the deficits. The Medicaid reimbursement rate is \$3 million less than the actual cost for Medicaid care. Medicare, by contrast, is a cost-reimbursed system. For the 1994 fiscal year, 77 of 125 MJH's new Medicare admissions or 62 percent came from Mount Sinai. MJH's chief Financial Officer assumed a loss to Mount Sinai of 100 percent of new referrals from Mount Sinai, 10 percent of MJH residents temporarily hospitalized at and returning from Mount Sinai, and 5 percent of the private pay market. Assuming that Medicaid patients replace from 60 to 100 percent of the Medicare patients lost to Mount Sinai, MJH estimated increases in a \$600,000 deficit to a deficit ranging

from \$887,000 to \$921,000. As compared to MJH's total revenue gains from public and other sources of \$37 million to 45 million, the adverse impact projected by MJH is mathematically less than one percent, but it does represent an increase in net losses from operations of 19 to 20 percent.

77. It is not reasonable to assume that the effect of a Mount Sinai nursing home be disproportionately greater on MJH than on any other current nursing home recipient of Mount Sinai referrals. It is not reasonable, therefore, to assume that Mount Sinai will never make referrals to MJH. Using a more reasonable proportional impact analysis, MJH can reasonably expect a loss of up to 26 Medicare referrals a year, and \$90,000 in revenue. Mount Sinai will not be competing with MJH for the same patients when it moves patients from the acute care hospital into the nursing home sooner than it would have made an outside referral, or by providing services to ventilator, AIDS, and Medicaid recipients who are not currently served due to the area's high occupancy rates.

78. MJH is also concerned about declining charitable donations, although somewhat speculative and not quantified, the concern is valid. There is no evidence from which to conclude that the presence of a 60-bed nursing home at Mount Sinai will make it any more difficult for MJH or any less difficult for Mount Sinai to attract charitable contributions. MJH and Mount Sinai have a history of cooperation, including having overlapping

Board members. They have both been successful at fundraising even though they are receiving contributions from some of the same sources.

79. On balance, Mount Sinai better meets the statutory criteria for a CON than Brookwood, primarily because of the unmet need which exists in the population 75 and older on Miami Beach.

CONCLUSIONS OF LAW

80. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding, pursuant to subsections 408.039(5) and 120.57(1), Florida Statutes.

81. The applicants have the burden of proving entitlement to a certificate of need. Boca Raton Artificial Kidney Center, Inc. v. DHRS, 475 So.2d 260 (Fla. 1st DCA 1985).

82. In its CON application FCA failed to include on schedule 2, the capital costs for therapy spaces and ALF beds on the first floor of its two story addition. The omission made it impossible for AHCA to determine whether FCA has the ability to fund the project as proposed. Central Florida Regional Hospital v. DHRS, 13 FALR 35, DOAH Case No. 90-1526 (1990) and Manor Care, Inc. of Sarasota v. DRHS, 558 So.2d 26 (Fla. 1st DCA 1989).

83. The future development phases of the Brookwood retirement community and the conceptual master campus development plan for Mount Sinai are not capital projects which the applicants have approved via authorization to execute within the

meaning of Rule 59C-1.002(8), Florida Administrative Code, and were not required to be listed on schedule 2 of the CON applications.

84. It was reasonable for Brookwood to rely on warranties on new equipment rather than expect routine capital budget expenditures on to speculate on unexpected expenditures to list on schedule 2.

85. Mount Sinai was not required to list its Department of Defense computer grant application on schedule 2. Applications to receive grant funds are not "capital projects" for which a capital expenditure has been approved within the meaning of Rule 59C-1.002(8), Florida Administrative Code. In addition, at the time of the CON, the only information Mount Sinai could have disclosed to AHCA was that it was planning to reapply for the grant after having been denied previously, which is not required by the rule.

86. The undisputed need for 60 nursing home beds is confirmed by the fixed numeric need. No special circumstances to exceed that number have been demonstrated.

87. On balance, the state and local health plan preferences favor slightly the application of Mount Sinai, particularly those preferences related to concentrations of elderly population and occupancy rates. Subsection 408.035(1)(a).

88. An analysis of like and existing providers demonstrates the need for Mount Sinai's proposal. The extent of utilization

of Miami Beach nursing homes, the undisputed high demand for subacute care, and waiting lists for Medicaid and Alzheimers care are persuasive. Subsections 408.035(1)(b), (d), (n), (2)(b) and (d).

89. In addition to meeting a demonstrated need, Mount Sinai's proposal offers the advantage of establishing a superior research and a teaching facility in a multilevel setting offering an expansive continuum of care. Subsection 408.035(1)(c), (g) and (o).

90. Mount Sinai's high cost are a matter of concern, but given the space necessary for its teaching and research activities, and its history of substantial fundraising, the project can be accomplished and is financially feasible in the immediate and long term. Subsections 408.035(1)(h), (i), (m), (2)(a), and (c).

91. On balance, the application of Mount Sinai better meets the statutory CON review criteria.

RECOMMENDATION

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

RECOMMENDED that the Agency For Health Care Administration enter a Final Order denying the applications of FCA for CON 7980, and of Brookwood for CON 7984, and issuing CON No. 7978 to Mount Sinai to construct a 60-bed freestanding nursing home on its medical campus, on condition that Mount Sinai establish a 12-bed

geriatric assessment and dementia treatment unit, a dementia-specific adult day care program, respite care, and a training and research center; and that it provide 65 percent of total annual patient days to Medicaid recipients.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 13th day of March, 1997.

ELEANOR M. HUNTER

Administrative Law Judge
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2727 Mahan Drive
Tallahassee, Florida 32308

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.