

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EIGHTH FLORIDA LIVING OPTIONS,
LLC,

Petitioner,

vs.

Case No. 15-1897CON

LAKELAND OAKS NH, LLC AND AGENCY
FOR HEALTH CARE ADMINISTRATION,

Respondents.

_____/

LAKELAND OAKS NH, LLC,

Petitioner,

vs.

Case No. 15-1903CON

EIGHTH FLORIDA LIVING
OPTIONS, LLC,

Respondent.

_____/

RECOMMENDED ORDER

An administrative hearing was held in this case on October 27 through 29, and November 2, 5, and 10, 2015, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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For Eighth Florida Living Options, LLC:

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For the Agency for Health Care Administration:

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STATEMENT OF THE ISSUE

Which certificate of need application seeking to establish a new 120-bed community nursing home in Nursing Home District 6, Subdistrict 5 (Polk County), on balance, best satisfies the statutory and rule criteria for approval: Lakeland Oaks NH, LLC's CON Application No. 10309, or Eighth Florida Living Options, LLC's CON Application No. 10303.

PRELIMINARY STATEMENT

Lakeland Oaks NH, LLC (Lakeland Oaks) and Eighth Florida Living Options, LLC (Eighth Florida) are competing applicants for a certificate of need (CON) to construct a 120-bed community nursing home in Nursing Home District 6, Subdistrict 5 encompassing Polk County.

On October 3, 2014, the Agency for Health Care Administration (the Agency or AHCA) published a need for 203 additional community nursing home beds in Nursing Home Subdistrict 6-5 for the July 2017 planning horizon. After reviewing the applications, on February 23, 2015, the Agency published notice of its intent to preliminarily approve Lakeland Oaks' CON Application No. 10309 and to preliminarily deny Eighth Florida's CON Application No. 10303. The notice also addressed other applications not at issue in this proceeding, including the Agency's preliminary approval of applications submitted by Florida Presbyterian Homes, Inc. (14 beds) and Lakeland Investors, LLC (69 beds), and denial of the remaining applications submitted in Nursing Home Subdistrict 6-5.

On March 16, 2015, Eighth Florida timely filed a petition for formal administrative hearing to contest the Agency's preliminary denial of its application and the approval of Lakeland Oaks' application. On March 27, 2015, Lakeland Oaks

timely filed a cross-petition supporting the Agency's preliminary decision. The petitions were referred to the Division of Administrative Hearings (DOAH) on April 8 and April 9, 2015, respectively.

These cases were consolidated by Order entered May 7, 2015, and initially scheduled for a final hearing to be held September 29 through October 2 and October 6 through October 9, 2015. Thereafter, Eight Florida filed a Motion to Reschedule Final Hearing which was granted and the final hearing was rescheduled and held on October 27 through 29 and November 2, 5, and 10, 2015.

At the final hearing, Lakeland Oaks presented the testimony of Robert Yandek, Vice President for Ancillary Services and Development for Greystone Healthcare Management; Patches Bryan, Chief Executive Clinical Officer of Greystone Healthcare Management, who testified as an expert in skilled nursing facility clinical operations; Christopher Masterson, Senior Vice President of Care Innovations for Greystone Healthcare Management; Connie Bessler, Chief Executive Officer of Greystone Healthcare Management, who testified as an expert in skilled nursing facility administration; Mark D. Miller, corporate director for rehabilitation at Greystone Healthcare Management; Robert Hill, a principal at Veralon Partners, who provided testimony as an expert in health care planning; Bo Russ,

president of Architectural Concepts, Inc., who testified as an expert in healthcare architecture, facility planning and design, and project costs; and Ronald J. Swartz, Chief Financial Officer of Greystone Healthcare Management, who testified as an expert in healthcare finance. Lakeland Oaks Exhibits 1-14, 16-22, 24, 26-35, 35A, 36-41, 43-47, 49, 51-77, 79-82, 91, 99, 100, and 112 were admitted into evidence.

Eighth Florida presented the testimony of Deborah Franklin, Chief Operating Officer of Florida Living Options, Inc., who testified as an expert in nursing home administration; Steven Jones, who testified as an expert in healthcare finance; Sharon Gordon-Girvin, who testified as an expert in health planning; Marilyn Holt, who testified as an expert in rehabilitation; Kevin J. Bessolo who testified as an expert in architecture and nursing home design and construction; and Kim Broom, who testified as an expert in risk management and quality assurance. Eighth Florida Exhibits 1-5 and 6A were admitted into evidence.

The Agency called as a witness Marisol Fitch, the supervisor of the certificate of need program, who was accepted as an expert in healthcare planning and certificate of need. AHCA Exhibit 1 was admitted into evidence.

The Transcript of the final hearing, consisting of six volumes, was filed at DOAH on November 23, 2015. Following an Order Granting a Motion to Extend Time for Filing Proposed

Recommended Orders, the original deadline for filing proposed recommended orders was extended from January 15, 2016, until February 1, 2016. On February 1, 2016, Lakeland Oaks and Eighth Florida filed their respective Proposed Recommended Orders, and AHCA filed a notice adopting the Proposed Recommended Order submitted by Lakeland Oaks. The parties' Proposed Recommended Orders were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

I. The Parties

A. Lakeland Oaks NH, LLC

1. Lakeland Oaks, LLC, is a Delaware, limited-liability company formed by Greystone Healthcare Management Corporation (Greystone) for the purpose of filing its certificate of need application at issue in this proceeding. Greystone is a Delaware, for-profit, corporation which operates 26 skilled nursing facilities, two assisted living facilities, and six home health branches in Florida. It also operates 10 nursing homes in Ohio. Recently, Greystone constructed and opened a new nursing home known as The Club Health and Rehabilitation Center at the Villages (The Club Villages) in Marion County, Florida. Greystone is headquartered in Tampa, Florida adjacent to Polk County.

B. Eighth Florida Living Options, LLC

2. Eighth Florida Living Options, LLC, is a Florida, limited-liability company formed by Florida Living Options, Inc. (Florida Living Options) for the purpose of filing its certificate of need application at issue in this proceeding. Florida Living Options is a Florida not-for-profit corporation which operates three skilled nursing facilities, three assisted living facilities, and two independent living facilities in Florida. Among them, Florida Living Options operates an assisted living facility known as Hawthorne Lakeland in Polk County, Florida, and recently constructed and opened a new nursing home in Sarasota, Florida, known as Hawthorne Village of Sarasota. Florida Living Options is headquartered just outside of Tampa about six miles from the Greystone headquarters.

C. Agency for Health Care Administration

3. AHCA is the state agency that administers Florida's CON program.

II. Procedural History

A. The Fixed Need Pool

4. On October 3, 2014, the Agency published a need for 203 additional community nursing home beds in Nursing Home Subdistrict 6-5 encompassing Polk County, for the July 2017 Planning Horizon. In response, eight applicants, including

Lakeland Oaks and Eighth Florida, filed CON applications seeking to establish new community nursing home beds in Polk County.

5. On February 23, 2015, the Agency published official notice of its decisions on those applications. The Agency awarded all 203 beds from the fixed-need pool, approving applications filed by Florida Presbyterian Homes, Inc.

(14 beds), Lakeland Investors, LLC (69 beds), and Lakeland Oaks (120 beds). The Agency denied the remaining applications; including Eighth Florida's CON Application No. 10303 seeking 120 beds from the fixed-need pool.

6. Eighth Florida initially challenged all three awards, but voluntarily dismissed its challenge to Florida Presbyterian Homes, Inc. and Lakeland Investors, LLC's awards prior to the final hearing. As a result, only 120 of the 203 beds in the fixed-need pool are at issue in this proceeding.

B. The Proposals

(i) Greystone's Lakeland Oaks

7. Lakeland Oaks' CON Application No. 10309 proposes to develop a 120-bed skilled nursing facility (SNF) in Sub-district 6-5, Polk County, consisting of 60 private rooms and 30 semi-private rooms.

8. Lakeland Oaks proposes to offer high quality, short-term rehabilitation services and long-term care services in a country club style atmosphere. Some of the services Lakeland

Oaks plans to offer include physical, occupational, and speech therapy; wound care; pain management; and lymphedema therapy.

9. Lakeland Oaks' proposal is partially modeled after a new SNF established by Greystone called The Club Villages in Marion County, Florida.

10. Greystone developed The Club Villages in 2012 through the transfer of 60 beds from New Horizon NH, LLC, d/b/a The Lodge Health and Rehabilitation Center, an existing 159-bed skilled nursing facility in Ocala, Marion County.

11. The Club Villages provides short-term rehabilitation to patients in a resort-style environment. The Club Villages has been successful since its opening, achieving full utilization within less than six months of operation. It recently added eight additional beds, resulting in a total bed complement of 68 beds, through a statutory exemption for highly utilized nursing home providers.

12. The Club Villages was awarded the LTC & Senior Living LINK Spirit of Innovation Award, which recognizes facilities with innovative and inspirational designs.

13. As of the final hearing, Greystone had not made a formal decision on site selection for the proposed Lakeland Oaks project. However, the evidence at hearing showed that Greystone plans to construct the proposed Lakeland Oaks facility in Polk County at one of four potential sites located near the I-4

interstate and major roadways for easy accessibility in an area with a high concentration of residents age 65 and older.

14. The potential sites are in close proximity to the existing acute care hospitals in Polk County, which, from a health planning perspective, would promote a coordination of care. Given the number of available potential sites, it is not expected that Greystone will have difficulty securing a location for the proposed Lakeland Oaks project.

(ii) Eighth Florida Living Options

15. Eighth Florida's CON Application No. 10303 proposes to establish a 120-bed SNF next to Hawthorne Lakeland, Florida Living Options' existing assisted living facility in Polk County. The proposed facility will consist of two 60-bed pods, consisting of private and semi-private rooms.

16. If approved, Eighth Florida's proposed SNF will be part of a campus known as Hawthorne Village. In addition to the proposed SNF and Hawthorne Lakeland, Eighth Florida affiliates also plan to construct and operate a second assisted living facility and an independent living facility on the Hawthorne Village campus.

17. An important part of Florida Living Options' business model is to provide skilled nursing, assisted living, and independent living services on the same campus. By providing different levels of care on the same campus, it is envisioned

that residents of Florida Living Options' facilities can transition among the facilities as their care needs change.

18. Eighth Florida plans to model its proposed skilled nursing facility on Hawthorne Village of Sarasota (Hawthorne-Sarasota), which opened in January 2013. Compared to Greystone's The Club Villages, Hawthorne-Sarasota had a slow ramp up and only achieved 85 percent utilization after 24 months of operation.

C. The Agency's Preliminary Decision

19. On February 23, 2015, in Volume 41, Number 36 of the Florida Administrative Record, the Agency for Health Care Administration (AHCA) announced its intent to award 83 of the beds identified to be needed in Polk County to other applicants not involved in this hearing; to approve the application of Lakeland Oaks for CON 10309 for 120 beds; and to deny the application of Eighth Florida for CON 10303 for 120 beds.

III. Statutory and Rule Review Criteria

The statutory review criteria for reviewing CON Applications for new nursing homes are found in section 408.035, Florida Statutes, and Florida Administrative Code Rule 59C-1.036.^{1/} Each statutory and rule criterion is addressed below.

A. Section 408.035(1)(a): The need for the health care facilities and health services being proposed

20. There is a need for additional community nursing home beds in Nursing Home Subdistrict 6-5, Polk County. Both Lakeland Oaks and Eighth Florida's CON applications seek to fulfill a portion of the published need for additional beds in Polk County. In addition to the published fixed-need pool, both Lakeland Oaks and Eighth Florida have stipulated to the need and performed their own needs assessment that verified the need for additional community nursing home beds in Nursing Home Subdistrict 6-5, Polk County.

21. At present, Polk County has 24.7 nursing home beds per 1,000 residents. Even with the addition of 203 beds as projected by the fixed-need pool, population growth will cause Polk County's bed ratio to decline to only 23.6 beds per 1,000 residents by the end of the planning horizon. Accordingly, there is a need for additional community nursing home beds in Polk County.

22. Polk County has a large, fast growing elderly population. According to population data published by AHCA, from 2010 to 2014, the 65 and older population in Polk County grew by nine percent, which exceeded the statewide growth rate of six percent. For the time period 2014 to 2017, the 65+

population in Polk County is expected to grow at an even faster rate of 10 percent, which is substantial.

B. Section 408.035(1)(b): The availability, quality of care, accessibility, and extent of utilization of existing health care facilities and health services in the service district of the applicant

23. Polk County currently has twenty-four (24) nursing home facilities with 2,945 licensed beds. Polk County's existing nursing home beds are highly utilized. For the 12-month period ending June 2014, Polk County's existing nursing home beds had a total average occupancy rate of 90.29 percent. That occupancy rate is higher than the national rate and Nursing Home District 6's average occupancy rate as a whole.

24. At such high utilization, Polk County's existing nursing home beds are not sufficiently available to Polk County residents. Further, Polk County's existing nursing home beds are not adequate to meet the projected increase in demand for skilled nursing services in Polk County over the planning horizon.

25. Eighth Florida proposes to locate its skilled nursing facility in Zip Code 33813, co-located with Florida Living Option's existing assisted living facility. The need for additional community nursing beds in Polk County, however, is countywide and not specific to a particular zip code or assisted living facility. In contrast, Lakeland Oaks' proposed project

is located and designed to address the needs of Polk County residents as a whole with access designed to locate near a major hospital, and, as such, will better ensure access to short-term rehabilitation and long-term care services in Sub-district 6-5.

C. Section 408.035(1)(c): The ability of the applicant to provide quality of care and the applicant's record of providing quality of care

26. Both applicants go to great lengths to provide and improve their quality of care. Both applicants propose to use an electronic health record (EHR) system called Point Click Care (PCC). All of Florida Living Options' facilities currently use PCC. Eighteen (18) of Greystones facilities use PCC, and, by the end of 2016, all Greystone facilities will use PCC.

27. In addition to PCC, both Greystone and Florida Living Options use "Casamba," a rehab-specific electronic medical record that enables the facilities to maintain electronic plans of care and track patients' progress in real-time throughout their stay.

28. Greystone and Florida Living Options have implemented Quality Assurance Performance Improvement (QAPI) plans in their facilities. The QAPI program is a rigorous program for the improvement of quality of care and overall performance. It addresses the full range of services offered by a nursing home and is designed to promote safety and high quality with all clinical interventions while emphasizing autonomy and choice in

daily life for residents. A QAPI plan is now mandated for use in all nursing homes. Both Greystone and Florida Living Options initiated the QAPI program in their facilities before mandated to do so.

29. Both Greystone and Florida Living Option have developed a range of policies and programs designed to promote quality of care in their respective facilities. Greystone, for example, develops "Centers of Excellence" within its facilities. A Center of Excellence has specialized expertise in treating patients with certain conditions such as stroke, pulmonary, cardiac, or orthopedics. Greystone has developed Centers of Excellence that relate to short-term rehabilitation and therapy, and partners with health systems to develop initiatives to reduce hospital readmissions.

30. In addition to Centers of Excellence, Greystone develops other specialized programs in its facilities tailored towards common diagnoses of patients discharged from area hospitals. All Greystone facilities have an internal Risk Management/Quality Assurance program overseen by a committee that includes the medical director of each SNF. The committee meets on a monthly basis to assess resident care and facility practices as well as to develop, implement, and monitor plans of action.

31. Greystone also routinely conducts on-site mock surveys of its facilities to ensure that they are in compliance with all federal and state laws and regulations.

32. Greystone employs a variety of organization-specific quality improvement policies and programs, including the Believe Balance Assessment Tool, the Operation Make a Difference Policy, the Care Line Policy, and the Culture of Care Program, to promote quality of care within its facilities. The Believe Balance Assessment Tool is a scorecard that enables facilities to monitor their performance with respect to such criteria as patient satisfaction and clinical care.

33. The Operation Make a Difference Policy is intended to help Greystone facilities identify opportunities for improvement and implement positive change to improve the facilities' quality of care and patient well-being.

34. Greystone's Care Line is a toll-free number that is staffed 24 hours a day and allows Greystone to quickly address resident and/or family member concerns.

35. Greystone's Culture of Care program is designed to ensure that Greystone patients receive patient-centered care that meets their individual needs.

36. Greystone also provides voluntary patient satisfaction surveys to its short-term rehabilitation patients upon discharge. For the period December 2014 to July 31, 2015,

92 percent of former residents indicated that they would recommend a Greystone facility to patients in need of short-term rehabilitation care. In sum, Greystone has developed strategies that help its facilities provide quality care.

37. Florida Living Options is also working constantly to improve the quality of care in its facilities. Personnel in its facilities hold regular meetings with their hospital partners to track and reduce readmissions and work with hospitals to develop protocols for dealing with the diagnoses that result in most readmissions.

38. Florida Living Options develops particular protocols for treating conditions that it sees and treats regularly in its nursing homes. Internally, they hold daily quality assurance meetings to discuss recent developments and immediate resident needs, and hold weekly "at-risk" meetings to evaluate particular cases and assure that the residents are being treated in the most appropriate manner.

39. Florida Living Options' facilities include physician treatment rooms in their nursing homes, which encourage physicians to come to the nursing home more often and to examine patients regularly. In addition, Florida Living Options has Advanced Registered Nurse Practitioners in each of its buildings to provide enhanced nursing services as directed by the doctor.

40. In order to provide for each resident's specific needs, residents in Florida Living Options' facilities are fully evaluated and an individual care plan is prepared immediately upon admission, together with a discharge plan that identifies anticipated discharge so that care can best prepare residents for that event.

41. Finally, Florida Living Options continues to follow a discharged resident to confirm that they are doing well and access any continuing needs.

42. Both applicants propose rehabilitative facilities and equipment for its residents. Eighth Florida proposes to equip its facility with state of the art HUR equipment with the capability to transmit patient performance directly to the Casamba electronic records program. The equipment can be used for strength conditioning, transfer improvement, and balance improvement, among other things.

43. Florida Living Options has developed specific protocols for treating rehabilitative conditions. Eighth Florida's therapy gym will include two types of "zero G" devices: ceiling track and hydro track. These devices allow persons who are not weight bearing (or who are partially weight bearing) to develop strength and balance without having to put all of their weight on their legs. Two additional specific pieces of equipment proposed for Eighth Florida include a

VitaStim device that provides electrical stimulation that helps a person relearn how to swallow, and a device called Game Ready. Game Ready is popular with football trainers and orthopedic patients that use ice and pressure to reduce swelling and pain around elbow and knee joint replacement sites.

44. Greystone outfits the gyms in its skilled nursing facilities with a variety of rehab equipment, including high-low tables, mats, hand weights, leg weights, and modern strengthening machines. In addition, many Greystone SNFs have additional high-end, state-of-the-art equipment such as the AlterG and Biodex. The AlterG is an anti-gravity treadmill that enables patients with weight-bearing restrictions to use their muscles, preventing disuse atrophy. A Biodex is used for balance re-training.

45. If approved, Lakeland Oaks proposes to have separate therapy gyms for its short-term rehabilitation and long-term care programs. By having two therapy gyms, Lakeland Oaks would be able to offer therapy services tailored to both patient populations' needs. In contrast, Eighth Florida proposes to have one centralized therapy gym for its entire facility.

46. Although quality may be measured by many metrics, the five-star rating system published by the Centers for Medicare and Medicaid Services (CMS) has become the most commonly used

measure of quality among nursing homes. CMS is the federal agency that oversees the Medicare and Medicaid programs.

47. CMS developed the five-star rating system for nursing homes in 2008. The ratings are scaled on a statewide basis and provide a mechanism to compare nursing homes within a state. Only 10 percent of nursing homes in a state receive a five-star rating. Seventy percent receive a two through four-star rating. The bottom 20 percent receives a one-star rating. A nursing home's score is derived from a variety of criteria, including the results of its health inspection surveys, staffing data, and quality measure scores. A nursing home's star rating is available on the CMS Nursing Home Compare website.

48. As of July 2015, Greystone's average star rating for its Florida facilities was 3.3 stars, which is above average. For the same time frame, Eighth Florida's average rating was 2.6 stars or slightly below average. Further, several Greystone facilities, including The Club Villages, received five-star ratings.

49. Greystone has also received other quality-related awards. In 2015, seven skilled nursing facilities operated by Greystone in Florida received the American Health Care Association National Quality Award Program Bronze Award. The Bronze Award is awarded to SNFs that have demonstrated their commitment to quality improvement. In addition, Greenbriar

Rehabilitation and Nursing Center, a Greystone facility located in Bradenton, Florida, was awarded the Silver Award in recognition of its good performance outcomes. In contrast, only one Florida Living Options' skilled nursing facility has received the Bronze Award. Florida Living Options explained that it decided not to pursue additional bronze awards believing that these awards reflect more of a paperwork compliance than an actual measure of quality. The greater number of awards received by Greystone, however, has not been ignored.

D. Section 408.035(1)(d): The availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation

50. Lakeland Oaks' total project costs, as reflected in Schedule 1 of its CON application, are \$22,877,084. The total project costs are based upon a detailed budget and workpapers underlying the numbers contained in the financial schedules to Lakeland Oaks' CON application. Because of its size, Greystone is able to purchase equipment at a lower cost than other smaller providers. The project costs include \$1.2 million for equipment. The equipment list is based upon consultation with Greystone's purchasing department and identification of what items are needed, along with the cost of those items. The project costs set forth in Lakeland Oaks' Schedule 1 are reasonable and appropriate.

51. Schedule 2 of Lakeland Oaks' CON application sets forth an accurate and reasonable listing of Lakeland Oaks' capital projects (i.e., only the proposed Lakeland Oaks SNF).

52. Schedule 3 of Lakeland Oaks' CON application identifies the source of project funds, and reflects the two sources included in Schedule 2: cash-on-hand and non-related company financing. Based on the audit of the parent organization of Lakeland Oaks, Greystone has a large amount of cash-on-hand, totaling \$21,972,271. This greatly exceeds the projected \$4,575,414 cash-on-hand needed for the project.

53. With respect to non-related company financing, Lakeland Oaks included a letter from The Private Bank, an outside lender that previously has worked with Greystone in the financing of its skilled nursing facility projects. The letter indicates the bank's interest in funding the Lakeland Oaks project. Greystone previously has obtained approximately six mortgages from this outside lender to acquire properties and develop projects. The lender has never declined to finance a project proposed by Greystone. The lender typically funds between 75 and 80 percent of the cost of a project. Lakeland Oaks will be able to obtain the necessary outside financing to fund the remainder of the cost of the Lakeland Oaks project.

54. Lakeland Oaks' projected staffing for its facility is set forth on Schedule 6A of its CON application. In projecting

its staffing, Greystone considered its other skilled nursing facilities that are comparable in size to Lakeland Oaks and the projected payor mix of Lakeland Oaks. Facilities with higher Medicare populations, such as the proposed Lakeland Oaks facility, generally require higher levels of staffing in light of the acuity of Medicare patients recently discharged from hospitals. In addition, Medicare patients often require physical therapy services. Lakeland Oaks specifically considered the higher resource utilization required by Medicare patients in developing its projected staffing. Additionally, Lakeland Oaks considered the needs of managed care patients and long-term Medicaid patients in connection with its projected staffing.

55. To calculate the projected wages, Lakeland Oaks considered the actual wages paid at comparable Greystone facilities, adjusted those wages using a Medicare wage index that accounted for inflation, and utilized the wage index applicable to Polk County facilities. The projected staffing, and the annual salaries associated with staffing the facility, are reasonable and appropriate. Lakeland Oaks will be able to staff the facility at the projected salaries.

56. While Florida Living Options explained its recruitment program and generous benefits package to attract qualified employees, its proposed funding is unconvincing. Schedule 3 of

Eighth Florida's CON application shows that Eighth Florida proposes to fund its project with \$250,000 cash-on-hand and \$24,452,400 in related company financing. Schedule 3 does not reflect any non-related company financing. The CON application requires an applicant to attach proof of the financial strength to lend in the form of audited financial statements. The only audited financial statement Eighth Florida included in its application is the financial statement of the applicant entity, which reflects only \$250,000 cash-on-hand. Eighth Florida omitted the audited financial statements of any related entity that would reflect the ability to fund the approximately \$24 million to be obtained from the related party. As a result, Eighth Florida failed to prove its ability to fund the project, and the project does not appear to be financially feasible in the short term.

57. While there was a letter within its application discussing the possibility of outside financing, Eighth Florida's CON application is premised upon funding by affiliate reserves. Indeed, Schedule 1, lines 32-41, indicates that information pertaining to outside financing is inapplicable because the project is 100 percent funded by affiliate reserves and no fees or interest charges are anticipated. If Eighth Florida had proposed outside financing, it would have had to complete those lines of the application.

E. Section 408.035(1)(e): The extent to which the proposed services will enhance access to health care for residents of the service district

58. While both applicants argue that their proposed projects will improve access to health care for residents of Subdistrict 6-5, Lakeland Oaks' proposed project will better enhance access. Eighth Florida's zip code analysis and focus on serving residents of Hawthorne Village is myopic when compared to Lakeland Oaks' proposed project designed to provide access to Polk County as a whole.

F. Section 408.035(1)(f): The immediate and long-term financial feasibility of the proposal

59. Schedule 3 of Lakeland Oaks' CON application sets forth an accurate and reasonable source of funds to develop the project. As previously explained, Greystone is financially capable of funding the project, partially from cash-on-hand and partially from outside financing. The project is financially feasible in the short term.

60. Lakeland Oaks' projected utilization of its skilled nursing facility is reflected on Schedule 5 of its CON application. The projected utilization is reasonable and achievable. Greystone has been able to achieve a high rate of utilization at The Club Villages in a short period of time. Greystone also has a process to inform hospitals and physicians of its skilled nursing services, including the placement of

clinical liaisons in hospitals and physician offices. Greystone also enjoys a good reputation that serves to attract patients, including specifically Medicare patients, to its facilities. Finally, the Lakeland Oaks facility will house long-term care residents, which generally are easier to attract to a facility than patients in need of short-term rehabilitation.

61. With regard to long term financial feasibility issues, Schedule 7 of Lakeland Oaks' CON application sets forth revenues based on patient days and an assumed payor mix. The payor mix assumptions and projected revenues are accurate and reasonable. The assumed payor mix is based on the experience of other Greystone facilities.

62. Specifically, Lakeland Oaks projects in its second year of operation 7.96 percent self-pay patient days; 29.2 percent Medicaid days; 41.59 percent Medicare Part A days; 15.04 percent "Other Managed Care" days. Medicare Advantage, or Medicare Part C, accounts for 90 percent of the "Other Managed Care" days. Finally, Lakeland Oaks projects 6.19 percent in "Other Payer" patient days, including VA and hospice patients. Based on Greystone's experience at other, similar facilities, the forecast is reasonable.

63. Schedule 8 of Lakeland Oaks' CON application sets forth its projected income statement for the facility, including total revenues and expenses. For year two of operations,

Lakeland Oaks will have a projected total net income of \$1,997,665. This is an accurate and reasonable projection, and the project will be financially feasible in both the short-term and long-term.

64. With regard to the reasonableness of Lakeland Oaks' fill rate, Greystone facilities have experienced an average occupancy in excess of 91 percent for the years 2010-2013. Greystone has demonstrated the ability to obtain a 94 percent occupancy level in many of its facilities, and it is reasonable to project that it will be able to achieve the 94-percent occupancy projected for the Lakeland Oaks facility within two years. Eighth Florida's expert, Sharon Gordon-Girvin, agreed that Lakeland Oaks' projected 94-percent occupancy is achievable.

65. Lakeland Oaks' projected Medicare census is in line with the Medicare population served by Greystone at its other facilities, including a 150-bed home in Miami-Dade County (39 percent Medicare), a facility in Marion County (42 percent Medicare) and The Club Villages (83 percent Medicare).

66. Eighth Florida's own expert, Ms. Gordon-Girvin, prepared three CON applications for Greystone that reflected substantial levels of Medicare utilization and did not object to the projected Medicare population. Additionally, CMS data shows that Polk County has a high number of Medicare beneficiaries in

comparison to the entire State of Florida, with 119,643 Medicare beneficiaries. Polk County is ranked in the top 10 counties in Florida in terms of the number of Medicare Part A beneficiaries. Finally, a facility in Polk County, Spring Lake, which serves a substantial number of Medicare patients in need of rehabilitation services, experiences a Medicare utilization rate of 64 percent. In sum, Lakeland Oaks' projected Medicare utilization is reasonable and achievable.

67. Lakeland Oaks projected \$150,000 for property taxes as part of its CON application. While Eighth Florida's financial expert, Steve Jones, opined that Lakeland Oaks' projected property taxes were understated, his analysis computed the property tax based on certain components of Lakeland Oaks' projected project costs. Property taxes, however, are based on an assessed value of property, not the costs to construct a facility. Lakeland Oaks' financial expert, Mr. Swartz, examined the 2015 property taxes at Greystone's other facilities. The highest property tax rate for any of the Greystone facilities, when inflated forward one year, is \$149,381.62. This is consistent with Lakeland Oaks' projected property taxes of \$150,000. Thus, the projected property taxes as set forth in the application are reasonable and accurate.

68. In its CON application, Eighth Florida projected a year one loss of \$1,646,400 and a year two profit of \$502,945.

However, Eighth Florida's CON application reflects erroneous financial projections and financial deficiencies, some of which were acknowledged by Eighth Florida's financial expert, Mr. Jones.

69. First, Eighth Florida's projected Medicaid rate is erroneous. Eighth Florida assumed an incorrect occupancy rate in calculating its Fair Rental Value Rate (FRVS) rate, which is the property component of the Medicaid rate paid by the State of Florida. Specifically, Eighth Florida assumed a 75 percent occupancy in year two of its operation, while the Medicaid allowable rate is 90 percent occupancy in year two. Eighth Florida's financial expert, Steve Jones, acknowledged the error in the assumed Medicaid rate related to the occupancy factor.

70. In addition, Eighth Florida will not qualify for principal and interest in its FRVS calculation. A provider must have 60 percent mortgage debt in order to receive principal and interest in its FRVS computation. Eighth Florida does not meet the 60 percent test because it relies upon related-party financing, which is not considered a mortgage. Further, Eighth Florida utilized an erroneous interest rate. Because it does not project any outside financing, nor a mortgage, it should have used the Chase Prime Rate, which is about 2.25 percent less than what Eighth Florida assumed in its Medicaid rate calculations. These errors are material in that they result in

approximately \$135,000 in overstated Medicaid revenue and overstated net income for year two, during which Eighth Florida's financial schedules project a net profit of approximately \$500,000.

71. In response to the opinion that Eighth Florida would not be entitled to principal and interest in its assumed FRVS rate, Mr. Jones maintained that the financing of the project would qualify for treatment as a mortgage, even though the application is premised upon related-party financing. However, AHCA's rate setting department concluded that borrowing from a related party against reserves, as proposed by Eighth Florida, cannot be considered a mortgage. Mr. Jones conceded that he had never seen AHCA recognize affiliated entity debt as a mortgage. Considering the facts and opinions offered at the final hearing, it is concluded that related party borrowing cannot be treated as a mortgage.

72. Moreover, Schedule 1 of Eighth Florida's CON application did not include any construction period interest. Lakeland Oaks' healthcare financial expert, Ronald Swartz reasonably estimated that approximately \$700,000-\$750,000 in construction period interest was omitted from Eighth Florida's project costs. As a result, Eighth Florida would require more cash-on-hand to fund the extra costs. This, in turn, affects

the income statement, resulting in understated expenses and overstated net income.

73. Mr. Jones acknowledged that construction period interest is normally included. In this application, he did not include that item based upon a cost/benefit analysis and his conclusion that the inclusion of construction period interest would not provide "useful" financial information. Based upon Generally Accepted Accounting Principles and relevant financial standards pertaining to the capitalization of interest, whether construction period interest should be included in financial projections generally turns on concepts of time and materiality. Here, the construction project will take nearly two years, and construction period interest will total approximately \$700,000 to \$750,000. Thus, construction period interest is material and the interest charge should have been included in Eighth Florida's financial schedules.

74. Next, Eighth Florida projected a utilization or "fill" rate that is higher than the fill rate Florida Living Options was able to achieve when it opened Hawthorne-Sarasota. A fill rate describes how quickly a facility reaches an anticipated occupancy level. It is appropriate to consider Florida Living Options' prior history of filling its new facilities. With regard to Florida Living Options' experience at Hawthorne-Sarasota, that facility reached 85 percent occupancy by the end

of its second year of operation. The Sarasota facility had approximately a 35 percent occupancy level at the end of year one, which translates to a first year average occupancy of 16 or 17 percent. At the beginning of year two, it experienced approximately 43 percent occupancy.

75. In contrast, Eighth Florida's CON application projects an 89 percent occupancy level by month 11. Based on Florida Living Options' experience in Sarasota, the projection is unreasonable. If Eighth Florida's proposed facility fills at the same rate as the Sarasota facility, year two of Eighth Florida's operation would result in a larger financial loss and a greater need for working capital. Given that, Eighth Florida's year two projected net income would actually become a net loss, and additional working capital would be needed. While Eighth Florida's expert, Mr. Jones, sought to distinguish the Sarasota market from the Polk County market, nonetheless, it is relevant to examine the occupancy level Florida Living Options was able to achieve in connection with the opening of a new facility in the Sarasota market.

76. The financial feasibility of a skilled nursing facility is an important consideration. Considering the issues surrounding Eighth Florida's fill rate at the end of year one, construction period interest, and the erroneous Medicaid rate, it appears likely that Eighth Florida would experience a year

two net loss, bringing into question the long-term financial feasibility of Eighth Florida's CON application.

G. Section 408.035(1)(g): The extent to which the proposal will foster competition that promotes quality and cost-effectiveness

77. It stands to reason that approval of either application will foster competition due to the fact that additional nursing home beds with new amenities are proposed to be added in Polk County. The extent of that competition, however, is not evident, and the undersigned agrees with the determination of AHCA on page 93 of its State Agency Action Report submitted in this proceeding that "These projects are not likely to have a material impact on competition to promote quality and cost-effectiveness."

H. Section 408.035(1)(h): The costs and methods of the proposed construction, including the costs and methods of energy provision and the availability of alternative, less costly, or more effective methods of construction

78. The Florida Building Code (Building Code) governs the design and construction of skilled nursing facilities. Under the Building Code, a skilled nursing facility may be designed based on either an "institutional" design model or a "household" design model. To obtain AHCA's approval of a proposed SNF, AHCA requires parties to designate which design model has been selected.

79. An institutional design model involves centralized services. By contrast, the household design model involves decentralized services contained within a "neighborhood" or unit.

80. Section 420.3.2.2 of the Building Code regulates the household design model, and requires that dining activity in social areas be decentralized and included within the resident household. Section 420.3.2.2.1 further provides that "each resident household (unit) shall be limited to a maximum of 20 residents." Additionally, section 420.3.2.2.2 requires that two individual households be grouped into a distinct neighborhood with a maximum of 40 residents who may share the required residential core areas.

81. Lakeland Oaks' architectural expert, Bo Russ, and his firm, Architectural Concepts, created the schematic design used in Lakeland Oaks' CON application. In addition, Mr. Russ and Architectural Concepts provided cost estimates, systems descriptions, and the construction timeline for the project. Architectural Concepts has worked with Greystone in the development of other skilled nursing facilities in Florida, including the design and construction of The Club Villages, The Club at Ocala, and The Club at Kendall.

82. The design of The Club Villages is based on a hospitality model (i.e., the resident-centered culture change

model). The social and dining areas of The Club Villages are located within individual neighborhoods. Each neighborhood has a private dining room. Patient rooms surround the dining area. The Club Villages includes a Bistro Restaurant located at the center of the facility for family members and guests. The Club Villages also has space for the provision of rehabilitation services, including two large gyms within the physical therapy suite. The facility has skylights throughout the structure and other features to retain residential elements.

83. In preparing the architectural design for Lakeland Oaks' proposal, Architectural Concepts incorporated certain aspects of the design of The Club Villages. The Lakeland Oaks design is based on the "institutional model," but with certain embellishments intended to give the facility a "household," residential feel. The proposed Lakeland Oaks facility is approximately 84,000 square feet. The facility has 10-foot ceilings, a residential-oriented interior design, residential lighting, residential furniture, a large porte cochere, a lobby area similar to The Club Villages, a Bistro, a central dining area within the community that is divided into four dining rooms with unique interior vernacular, a movie theater, a satellite therapy gym, offices for staffing, a separate Activities of Daily Living suite, a doctors lounge, and three nursing units.

84. With regard to physical therapy services, the proposed Lakeland Oaks facility will include two large gyms at the center of the therapy suite, a private outpatient therapy entrance, a large classroom, and space for other ancillary services. The design will allow for a concierge approach to therapy to treat patients in need of those services. The proposed Lakeland Oaks facility is reasonably and appropriately designed for use as a skilled nursing facility, and promotes high quality of care.

85. In developing the design of the facility, Mr. Russ considered the fact that Lakeland Oaks proposes to offer both short-term and long-term care.

86. Greystone has developed two similar skilled nursing facilities, The Club at Kendall, a 150-bed skilled nursing facility, and The Club at Ocala, a 154-bed facility, both of which are similar in design to Lakeland Oaks. Greystone has received AHCA approval of the design and construction for both of those facilities.

87. Lakeland Oaks' proposed construction costs are \$17,289,054, or \$185 per square foot. The estimated construction costs are based on similar projects, including The Club at Ocala at \$178 per square foot. The construction costs are reasonable and appropriate.

88. The architectural plan, design, and features presented by Lakeland Oaks satisfy the architectural criteria applicable

to skilled nursing facilities in Florida. The facility complies with all applicable construction, design, and life safety code requirements.

89. Lakeland Oaks also presented a reasonable timeline for completion of the project. The timeline is based on Greystone's prior experience in constructing similar skilled nursing facilities.

90. Mr. Russ reviewed Eighth Florida's architectural plans and schematics for conformity with applicable criteria. Eighth Florida's architectural plans and schematics were prepared by Bessolo Design Group (Bessolo Group). Because of design flaws inconsistent with the Building Code, the architectural plans and design proposed by Eighth Florida and Bessolo Group should not be approved by AHCA.

91. Eighth Florida's proposed design will be reviewed by AHCA based on the provisions governing the institutional design model. The design fails to meet certain distance requirements found in the Building Code provisions governing an institutional design. Specifically, Florida Building Code section 420.3.2.1.2 (now renumbered as Building Code section 450.3.2.1.2) provides that the travel distance from the entrance door of the farthest patient room to the nurse's station cannot exceed 150 feet. In addition, the distance from a patient room to a clean utility and soiled utility room cannot exceed 150 feet. Based on the

schematic plan presented by Eighth Florida and Bessolo Group, the distance from the most remote patient room to the nurse's station well exceeds 150 feet. In addition, the distance from the most remote patient room to the soiled/utility rooms well exceeds 150 feet. These flaws cannot be remedied without substantial design changes.

92. In addition, the Eighth Florida/Bessolo Group design includes deficiencies related to smoke compartments, nourishment stations, and other items. These more minor flaws can be remedied without substantial changes.

93. However, as to the 150-foot limit, Eighth Florida's non-compliance makes the design a failed model. The facility cannot be approved in its current design. In order to be approvable, the facility would need to undergo a major redesign, including a change in the size and configuration of the building. This, in turn, would impact all of the financial assumptions contained in Eighth Florida's CON application.

94. In response to Mr. Russ' opinions, Eighth Florida's architectural expert, Kevin Bessolo, contended that the deficiencies related to the 150-foot distances from the patient room to the nurses station and soiled/clean utility areas were not fatal because the plan was based upon the "household model."

95. Mr. Bessolo acknowledged that, if the design is considered to be "institutional," then the travel distances

would exceed the 150-foot distance requirements. Mr. Besselo also acknowledged that a skilled nursing facility can either be an institutional design model or a household design model, but not both. Mr. Bessolo further acknowledged that his position that the plan is approvable is contingent upon the design being considered under the household design model in accordance with the Building Code. Mr. Bessolo disagreed with the criticism offered by Mr. Russ regarding the 150-foot distance requirements because he contended that his design presents a household model.

96. Eighth Florida's schematic design, however, does not comply with the Building Code's requirements for a household design model. Eighth Florida's proposed building is divided into 30-bed neighborhoods that exceed the Building Code's 20-bed maximum for the household design. In addition, Eighth Florida's plan presents three households sharing a central services area. Finally, the dining area presented in the Eighth Florida plan is centralized, rather than decentralized as required for the household design model. Because the proposal does not qualify as a household model, AHCA should review it under the institutional plan provisions.

97. In turn, Mr. Bessolo offered criticisms of Lakeland Oaks' proposed architectural plan. These included issues related to the distance to soiled utility exceeding 150 feet, resident storage areas, central bathing area, no emergency food

storage, smoke compartment issues, secondary exit issues, and the planned movie theater. However, unlike Eighth Florida's major deficiencies related to the 150-foot distant limits from the nurse's station and from the clean and soiled utility rooms, the criticisms offered by Mr. Bessolo are easily rectifiable by Lakeland Oaks without substantial change.

I. Section 408.035(1)(i): The applicant's past and proposed provision of health care services to Medicaid patients and the medically indigent

98. Greystone has a strong history of serving Medicaid patients in Florida. On a company-wide basis, 53.65 percent of all patient days in Greystone SNFs were provided to Medicaid patients during calendar year 2014.

99. Lakeland Oaks plans to treat Medicaid patients at its proposed facility. In its second year of operation, Lakeland Oaks projects that almost 30 percent of its patient days will be Medicaid days. Additionally, if "dual eligibles" (i.e., patients with Medicare as a primary payer but also eligible for Medicaid) are taken into account, Lakeland Oaks' provision of services to Medicaid patients will be even higher. Lakeland Oaks' payor mix assumptions were based on Greystone's actual experience at comparable SNFs in Florida and are reasonable.

100. Eighth Florida projects in its second year of operation that approximately 40 percent of its patient days will be Medicaid days. As previously explained, that projection is

questionable. The evidence at hearing showed that Hawthorne-Sarasota, the facility upon which Eighth Florida's proposal is based, had only eight percent Medicaid utilization after one and a half years of operation.

IV. Factual Summary

101. The facts set forth above demonstrate that Greystone has proposed a well-funded, financially feasible, well-designed skilled nursing facility that will improve Polk County access to short term and long term skilled nursing care for residents of Polk County. Greystone has demonstrated a proven record of providing high quality of care and the ability to assure quality of care for the Lakeland Oaks proposal. In contrast, Eighth Florida's application was largely focused on improving access to those services within a certain zip code and for residents of the Hawthorne Village community and not residents of Polk County as a whole.

102. Greystone, Lakeland Oaks' parent company, has a long, well-established history of providing high quality care at over two dozen skilled nursing facilities in Florida. On the other hand, Florida Living Options, Eighth Florida's parent, only operates three skilled nursing facilities in Florida and does not have as extensive of a track record in providing high quality care.

103. Moreover, Greystone has a well-established history of providing skilled nursing services to a large volume of Medicaid patients. On a company-wide basis, over 50 percent of Greystone's patient days consist of Medicaid patients. Conversely, Hawthorne-Sarasota, the facility upon which Eighth Florida's proposed project is based, had only eight percent Medicaid utilization in its first year and a half of operation, calling into question Eighth Florida's projection of 40 percent Medicaid utilization in its application.

104. Further, Eighth Florida has proposed to build a nursing home with questionable inter-company financing and uncertain financial feasibility. Eighth Florida's facility design does not meet code requirements and is unlikely to be approved as proposed without substantial changes.

105. Considering both applications and the facts submitted at the final hearing as outlined above, it is found that Lakeland Oaks' CON application, on balance, best satisfies the applicable statutory and rule criteria.

CONCLUSIONS OF LAW

106. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. See §§ 120.569, 120.57(1) and 408.039(5), Fla. Stat.

107. The petitions in this case commenced a de novo proceeding intended to formulate final agency action, "not to review action taken earlier and preliminarily." Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981) (citing McDonald v. Dep't of Banking and Fin., 346 So. 2d 569 (Fla. 1st DCA 1977)); § 120.57(1), Fla. Stat. Each applicant for a CON has the burden of demonstrating that its application should be approved. Boca Raton Artificial Kidney Ctr. v. Dep't of HRS, 475 So. 2d 250 (Fla. 1st DCA 1985).

108. Amendments to CON applications are prohibited by both rule and Florida decisional law. See Fla. Admin. Code Rule 59C-1.010(3)(b); Gulf Court Nursing Ctr. v. Dep't of Health and Human Servs., 483 So. 2d 700, 707 (Fla. 1st DCA 1986).

Substantial changes to CON applications are not permitted. Manor Care, Inc. (Sarasota), and Health Quest Corp. v. Dep't of HRS, 558 So. 2d 26 (Fla. 1st DCA 1989). "As to matters within an applicant's control, significant changes to a completed application are not permitted." Id. at 29. In Manor Care, the Court held that changing from a three-bed-per-room facility to a two-bed-per-room facility was a prohibited amendment because the change was substantial and within the control of the applicant. Thus, any attempts to explain away architectural and financial concerns by offering alternative proposals that substantially amend Eighth Florida's application are prohibited.

109. The decision over which of the two applications should be approved or denied for a CON must be based upon a balanced consideration of applicable statutory and rule criteria. Dep't of HRS v. Johnson and Johnson Home Healthcare, Inc., 447 So. 2d 361 (Fla. 1st DCA 1984); Balsam v. Dep't of HRS, 486 So. 2d 1315 (Fla. 1st DCA 1988). The weight to be given to each criterion is not fixed, but instead varies depending on the facts of each case. Collier Medical Ctr., Inc. v. Dep't of HRS, 462 So. 2d 83 (Fla. 1st DCA 1985).

110. In this case, the need for additional community nursing home beds in Nursing Home Subdistrict 6-5, Polk County is undisputed. The parties have stipulated that the applicable fixed-need pool consists of 120 remaining beds. Both Lakeland Oaks and Eighth Florida seek to establish nursing home beds with exactly 120 beds, so the question presented in this proceeding is which of the two applicants best meets applicable review criteria.

111. Upon weighing and balancing all applicable criteria, Lakeland Oaks' application is superior. Although all criteria were weighed, persuasive criteria include the superior quality of care offered at Greystone's existing nursing homes in Florida, the superior architectural design and equipping of the Lakeland Oaks proposed facility, Lakeland Oaks' more reliable assurances of financial feasibility, and service to all

residents in need of skilled nursing services in Polk County. All these criteria weigh in favor of approval of Lakeland Oaks' application over Eighth Florida's proposal.

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 approving Lakeland Oaks NH, LLC's CON Application No. 10309 and denying Eighth Florida Living Options, LLC's CON Application No. 10303.

DONE AND ENTERED this 22nd day of February, 2016, in Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of February, 2016.

ENDNOTE

^{1/} All statutory and rule references are to current versions.

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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.