

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PRUITTHEALTH-ALACHUA COUNTY,
LLC,

Petitioner,

vs.

Case No. 16-1696CON

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent,

and

ALACHUA COUNTY HRC, LLC,

Intervenor.

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RECOMMENDED ORDER

Pursuant to notice to both parties, a final hearing in this matter was held in Tallahassee, Florida, on June 8 through 10 and 13 through 15, 2016, before the Honorable R. Bruce McKibben, Administrative Law Judge with the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUE

This proceeding involves Certificate of Need ("CON") Application No. 10400 filed by Petitioner, PruittHealth-Alachua County, LLC ("PruittHealth"), and CON Application No. 10397 filed by Alachua County HRC, LLC ("Alachua HRC"). The applicants each seek to establish a new community nursing home in District 3/subdistrict 3-2, Alachua County, Florida. PruittHealth is seeking a 94-bed nursing home, consistent with the projected bed need for that subdistrict; Alachua HRC seeks to aggregate nine additional beds from subdistrict 3-3 for a total of 103 beds. The nature of the controversy is whether, on

balance, PruittHealth's or Alachua HRC's application best satisfies the applicable criteria for approval.

PRELIMINARY STATEMENT

On October 2, 2015, Respondent, Agency for Health Care Administration (the "Agency" or "AHCA"), published a need for 94 community nursing home beds in subdistrict 3-2 and a need for nine community nursing home beds in subdistrict 3-3. PruittHealth and Alachua HRC filed their CON applications, which were co-batched for review by the Agency. On February 22, 2016, the Agency announced its preliminary approval of Alachua HRC's application and the denial of PruittHealth's application. PruittHealth timely filed a Petition for Formal Administrative Hearing to challenge the Agency's decision. Alachua HRC timely filed a cross-petition in support of the Agency's decision. The petitions were consolidated into the instant proceeding.

The final hearing in this matter was held on the dates set forth above. Each party was represented by counsel as noted. At the final hearing, PruittHealth called eight witnesses: Patti Greenberg, accepted as an expert in health care research and resources, health planning, and health care finance; Aneel Gill, director of health and financial planning, accepted as an expert in health planning; Jodi Barrows Felix, community relations and market survey distribution; Dr. Dan Wyman, chief medical officer, accepted as an expert in medicine and quality

of care; Steven Ward, director of external reporting, accepted as an expert in health care finance and financial reporting; Ali Momin, director of acquisition analytics, accepted as an expert in health care finance and pro forma and operating financials; Steven Jones, chief executive officer, accepted as an expert in nursing home operations and administration; and Tracy Adams, vice president of therapy services, accepted as an expert in geriatric special and rehabilitative therapy services in skilled nursing facilities. PruittHealth's Exhibits 1, 2, 4 through 12, 14 through 19, 22 through 26, 28, 32 through 35, 37 through 41, 45, 46, 48, 54 through 56, 58, and Rebuttal Exhibit 1 were admitted into evidence. The Agency called one witness, Maricel Fitch, accepted as an expert in certificate of need and health care planning. Alachua HRC called eleven witnesses: Mark Richardson, accepted as an expert in health planning; William Tsukalas, senior vice president of regional corporate banking for BB&T, accepted as an expert in banking; Jeff Cleveland, president of Clear Choice Health Care, LLC ("Clear Choice"); Jason Canlas, regional vice president, accepted as an expert in nursing home administration; Dr. Jose Medina-Sanchez, accepted as an expert in psychiatry; Debbie Kennedy, executive vice president and co-owner of Clear Choice, accepted as an expert in health administration with emphasis in risk management, project development, and finance; Orrin Whitten, accepted as an expert

in physical therapy; Taylor Huston, regional rehabilitation director, accepted as an expert in rehabilitation management, speech and language pathology, and audiology; Dennis Robinson, executive vice president of the Douglas Company, accepted as an expert in construction management; Geoff Fraser, senior vice president and co-owner of Clear Choice, accepted as an expert in nursing home administration; and Thomas Davidson, president of Davidson Consulting Company, accepted as an expert in health care finance. Alachua HRC's exhibits 1 through 17, 20 through 24, 28 through 35, 45, 48, 49, and 55 through 62 were admitted into evidence.

By rule, the parties are given 10 days from the date the final hearing transcript is filed at DOAH to submit proposed recommended orders (PROs). However, the parties requested and were granted 20 days from the transcript filing to submit their PROs. The Transcript was filed on July 25, 2016; each party timely submitted a PRO and each were considered in the preparation of this Recommended Order. Just prior to filing their PROs, the parties jointly requested that the page limit be extended from 40 pages to 50 pages. Although the undersigned was not able to rule on the motion prior to the PRO filing date, the request was granted after the fact. The parties' PROs were accepted as filed.

FINDINGS OF FACT

(Facts 1 through 6 are as stipulated by the parties.)

1. On October 2, 2015, the Agency published a need for 94 additional community nursing home beds in Nursing Home Subdistrict 3-2, which consists of Alachua County. In that same publication, the Agency published a need for nine additional community nursing home beds in subdistrict 3-3, which consists of Putnam County. See Florida Administrative Register, Vol. 41, No. 192 (Oct. 2, 2015); Fla. Admin. Code R. 59C-2.200(3)(f)5. Putnam County is adjacent to Alachua County.

2. In response to the October 2, 2015, fixed need pool announcement, Alachua HRC filed CON Application No. 10397 and PruittHealth filed CON Application No. 10400.

3. Alachua HRC's and PruittHealth's applications were co-batched and comparatively reviewed.

4. On February 19, 2016, the Agency preliminarily approved Alachua HRC's CON Application No. 10397 and preliminarily denied PruittHealth's CON Application No. 10400. The Agency published official notice of its decision on February 22, 2016, in the Florida Administrative Register, Vol. 42, No. 35.

5. On March 7, 2016, PruittHealth timely filed a petition for formal administrative hearing to contest the Agency's preliminary approval of Alachua HRC's CON application.

6. On March 18, 2016, Alachua HRC timely filed a cross-petition supporting the Agency's preliminary decision to approve its CON application and to preliminarily deny PruittHealth's CON application.

(The following findings of fact are based on the evidence presented at final hearing, both oral testimony and documentary in nature.)

The Parties

Alachua County HRC, LLC

7. Alachua HRC was established to apply for a CON in Alachua County. Alachua HRC will be supported by its management company and operator, Clear Choice. Alachua HRC was formed by experienced nursing home administrators and health planning professionals with significant experience in the establishment, construction, and operation of nursing homes.

8. Alachua HRC is primarily owned by Samuel B. Kellett, an owner of several nursing homes in Florida which contract with Clear Choice for management. Through his companies, including SBK Capital, Mr. Kellett has a long track record of successful nursing home ownership and operation. Mr. Kellett, through predecessor and subsidiary companies, originally obtained certificates of need for most of the nursing homes now operated by Clear Choice, primarily in central Florida. Mr. Kellett has never failed to build and operate a nursing home after receiving a CON.

9. Mr. Kellett has continuously invested in renovations and maintenance of his nursing homes. Since 2013, Mr. Kellett has invested millions of dollars in renovations and expansion construction at his Florida nursing homes. Several more facilities are planned for similar renovations in the near future.

10. The expansions typically include the addition of upscale amenity space, an increase in the number of private rooms, outdoor living spaces, and significantly enhanced gym and rehabilitation areas. These renovations have attracted higher numbers of short-term rehabilitation patients, while continuing to allow Clear Choice to offer long-term care, primarily to Medicaid nursing home residents, in Mr. Kellett's facilities.

PruittHealth-Alachua County, LLC

11. PruittHealth is likewise a single purpose entity formed for the purpose of pursuing a CON to operate a skilled community nursing facility in Alachua County. PruittHealth is affiliated with PruittHealth, Inc. That company was founded in 1969 as the Toccoa Nursing Center in Toccoa, Georgia. PruittHealth, Inc. provides administrative related services to all of its affiliated healthcare providers in Florida, Georgia, North Carolina, and South Carolina. PruittHealth (the applicant) would benefit from those same services. The parent company of PruittHealth, Inc. is United Health Services, Inc.,

which includes in its structure 94 skilled nursing and rehabilitation centers, four assisted living facilities, one independent living facility, 29 hospice agencies, 19 home health agencies, one adult day care center, six pharmacies, and several other health care related businesses.

12. PruittHealth, Inc. is a family-owned health care provider. It is the 11th largest provider of skilled nursing services in the United States. It cares for about 24,000 nursing home residents and has about 16,000 employees, referred to as "partners." Because PruittHealth, Inc. is family-owned, it does not have the pressures (or, conversely, the oversight) associated with reporting to shareholders or meeting outside expectations. Among the skilled nursing facilities operated by PruittHealth, Inc. are five facilities dedicated to caring for war veterans, a facility dedicated to caring for the medically underserved, and a facility that serves the developmentally-disabled children population.

13. PruittHealth, Inc.'s corporate philosophy centers around its continuum of care by which one provider that is really good at providing services across a multitude of service lines can do a better job than a lot of different providers that have to transition the same patient across the service line(s). PruittHealth, Inc. currently owns and operates one nursing home

in Florida, PruittHealth - Santa Rosa, and has received certificates of need to construct three more.

Agency for Health Care Administration

14. AHCA is the state agency responsible for, inter alia, regulating the CON program and monitoring CON approvals. As recognized by AHCA, both the applicants are more than able to successfully and appropriately operate their project if approved.

The Proposals

Alachua HRC/Clear Choice

15. Alachua HRC proposes to build a 103-bed nursing facility to be located in Alachua County on the eastern side of Gainesville. The facility would meet the need of subdistrict 3-2 (94 beds in Alachua county) and the need of subdistrict 3-3 (9 beds in Putnam county). Subdistricts 3-2 and 3-3 are contiguous, and Alachua HRC proposes to build the project in subdistrict 3-2, as close to subdistrict 3-3 as practicable.

16. Alachua HRC's proposed site is reasonably located to provide services to both Alachua County and Putnam County. The proposed site is on Highway 20, which is the main road between Gainesville and Palatka, the major city in eastern Putnam County. The site was chosen to promote ease of access to both Alachua County and Putnam County residents by auto and via bus route.

17. In Alachua and Putnam counties, existing nursing homes are clustered in western Alachua County around Gainesville, and in eastern Putnam County around Palatka, a significant distance apart. There are currently no nursing homes located between downtown Gainesville and Palatka.

18. Alachua HRC's skilled nursing facility will be located in this geographic gap and will meet the needs of nearby populations. A large over-age-sixty-five population resides on the western side of Putnam County adjacent to Alachua County. Some therapy patients from Putnam County are already receiving care at hospitals in Gainesville. Alachua HRC's facility will provide care to patients in Alachua County, as well as patients on the western side of Putnam County.

19. Regardless of the ease of access to the proposed site, Alachua HRC proposes to provide transportation for residents and families who are not able to reach the facility on their own.

20. Alachua HRC is proposing to construct a facility consisting of 75,641 square feet of new construction with a construction cost of \$12,586,662 and a total project cost of \$19,675,000. The proposal envisions over 55 percent of the patient days being provided to Medicare residents and 41 percent of the patient days being provided to Medicaid residents. Seventy-four percent of the beds (i.e., 77) will be private, i.e., single-bed rooms. Alachua HRC proposes to condition its

CON on having a left ventricular assist device program; providing the Lee Silverman Voice Treatment Loud and Big programs; having two hydrotherapy pools; providing infusion therapy services; having an anti-gravity treadmill; obtaining HUR therapy equipment; having a wellness check program; performing home assessments, medication reconciliations, and rehabilitation team assessments, as necessary; and transportation as needed from home to therapy treatment.

21. Alachua HRC's architectural design focuses on providing a variety of destinations under one roof so that patients are encouraged to get out and about, rather than spending time solely in their rooms. Destinations include a second-floor gym, a number of bistro options, a theater, a chapel, and attractive outdoor living spaces. Though most of the rooms are private rooms, even the semi-private rooms have walls separating the beds. Alachua HRC also designed its facility to be a more appropriate setting for hospice care.

PruittHealth

22. PruittHealth applied for a CON to construct a 94-bed nursing home in Alachua County, Florida. The facility would involve 66,077 square feet at a construction cost of \$9,449,739 and a total project cost of \$15,873,409. Sixty-two percent of its beds (58 beds) would be in private, single-bed rooms. PruittHealth proposes to provide 66 percent of its

patient days to Medicaid patients. The proposed Medicaid projection is slightly above the current Alachua County average. Twenty-nine percent of its patient days would be for Medicare patients.

23. PruittHealth proposes to condition its CON on seeking Joint Commission accreditation of its facility; implementing a program to reduce hospital readmissions; having a minimum of 62 percent of its beds located in private rooms; participation in a corporate-wide quality assurance and performance improvement initiative; implementing a medical records system with point right technology and clinical kiosks throughout the facility; installation of resident safety features such as Wanderguard and Call Guard; and implementation of the top five special amenities and the top five clinical initiatives identified as needed in the Alachua County market.

Statutory and Rule Review Criteria

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

Rule 59C-1.030(2)(a): The need that the population to be served . . . and the extent to which all residents of the district, and in particular . . . the elderly, are likely to have access to those services.

24. There is no argument that the fixed need pool established a need for additional nursing home beds in District 3, subdistricts 3-2 and 3-3. PruittHealth seeks to

satisfy the need in subdistrict 3-2, i.e., 94 beds; Alachua HRC seeks to address the need in both subdistricts (103 beds).

25. Alachua HRC relied on its management company's experience and on letters from the proposed locality to identify specific needs in the area.

26. Alachua HRC's application suggests the existence of a gap in the availability of high intensity rehabilitative services and equipment in Alachua County. Because hospitals are now incentivized to discharge patients "quicker and sicker," a majority of nursing home patients discharged from hospitals are patients that require robust rehabilitative care. As a result, nursing homes are now required to provide a stronger and broader portfolio of services to maximize their patients' potential.

27. PruittHealth conducted a survey and met with local citizens to identify what it considered the most needed design features, special operational initiatives, clinical services, and special amenities that formed the basis of what would be offered at its proposed Alachua County nursing home. The top bed and program mix factors it identified were offering a high percentage of private rooms, providing Medicare and short-term rehabilitation services, and providing Medicaid services. The top five special operational initiatives that were identified were offering a high percentage of private rooms; implementing programs to reduce hospital readmissions; providing electronic

medical records; possessing resident safety technologies; and maintaining a high ratio of total nursing hours per patient day. The top clinical programs identified as needed were providing mental health/behavioral services; diabetes care; medication management; hospice care; and HIV/AIDs care. Finally, the top special amenities that were identified as needed were providing specialized care staff; possessing state-of-the-art rehabilitation suites and a therapy pool; and offering custom meal planning and multiple dining options. The survey also had a specific question in regard to access issues by payor source; it was observed that that 60 percent of the Respondents believed that subdistrict 3-2 residents currently have access issues for Medicaid services. No other competent or persuasive evidence was presented to substantiate that survey finding.

28. Neither of the methods utilized by the parties was particularly helpful in determining whether there was a specific need for one proposal over the other. Alachua HRC supplied support letters from past users or persons knowledgeable about its provision of services. Not surprisingly, the letters included glowing reports about Clear Choice. PruittHealth, on the other hand, did some informal surveys of the public in general, including some persons generally associated with the provision of health care services. It also conducted a "meet and greet" session where informal conversations about long-term

care in general were conducted. Again, it is not surprising that the people who attended the free food and drink sessions were supportive of PruittHealth. Neither of the "need determinations" had a high degree of sophistication or statistical validity. Nonetheless, the findings by both parties were considered in the decision rendered herein.

29. The conclusion that can be drawn from the information provided by the parties is that there is a desire for certain services or amenities in the service area, including: 1) A high percentage of private rooms within the facility; 2) Short-term, robust rehabilitative services; 3) A high ratio of nurse hours per patient day; 4) State of the art rehabilitation suites, including therapy pools; and 5) Provision of service to persons whose care is paid by Medicaid.

30. Each of the applicants, to some extent, proposed to meet those desires expressed within the community. Both propose a high percentage of private rooms, although Alachua HRC has more private rooms than PruittHealth (77 to 62, respectively). Both project the provision of intensive short-term rehabilitation care. Again, Alachua HRC has a larger focus in this area than does PruittHealth. Each of the applicants proposes a ratio of nurse hours per patient day that is admirable. Both applicants include rehabilitation suites, though the equipment proposed by Alachua HRC seems more state of

the art than does PruittHealth's equipment. And while both propose therapy pools, Alachua HRC will have two pools (in recognition of the fact that pools can often be soiled by human accident or be out of service due to maintenance. Having two pools provides assurance that there will not be a loss of that service when something such as that occurs).

31. Both applicants propose to serve Medicaid residents. PruittHealth projects that 66 percent of its patients will be Medicaid eligible, closely matching the existing Medicaid percentage in the service area (64 percent). Alachua HRC proposes to serve a lower percentage of Medicaid residents due to its primary focus on short-term rehabilitative care, i.e., those with a payor source of Medicare. The Agency no longer accepts Conditions in a CON application relating to Medicaid, so the proposals are not as strictly monitored as they once were.

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.

Rule 59C-1.030(2)(d): When determining accessibility, consideration of service to the medically underserved, Medicare, Medicaid and the indigent, and "the extent to which the applicant offers a range of means by which a patient will have access to its services".

32. There is no real dispute that either of the applicants can provide exceptional care in the facilities they propose.

Though they each raised questions of whose facilities had the most awards or recognitions, which had experienced bad surveys, and that kind of thing, the differences were insignificant. Both can provide a high quality of care to residents.

33. The range of services proposed by each applicant is similar, as they are in most skilled nursing facilities. Some facilities concentrate more on one area, some on another, but all the services generally exist. The applicants here are no exception.

34. Other providers in the area will compete for residents in all payor classes and all levels of care. Each of the applicants will likely realize its projected payor mix as it directs its marketing efforts accordingly.

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.

35. As noted in the previous section, both applicants are capable of and expected to provide quality care to their residents. Some of the support for this was set forth in the CON applications and via testimony at final hearing. Some examples follow.

36. One measure of the ability to provide quality of care is the staffing being proposed. It is generally recognized that the more nursing hours of care that are provided per patient

day, the better the care is likely to be. PruittHealth proposes to provide 1.72 hours of nursing care and Alachua HRC is proposing 1.70 hours per patient, so the difference is negligible. The fact that Alachua HRC proposes a higher level of services and should be expected to have higher levels of nursing care gives PruittHealth the advantage in this one area. There are some differences in other areas of staffing as well: Alachua HRC has considerably more therapy staff, 30.5 to 9.3 full-time equivalent employees ("FTEs"), which is to be expected based on the applicants' different payor mix projections. Alachua HRC also has more administrative staff, 19 to 6.4, but some of that may be attributable to the fact that some of the FTEs in PruittHealth's nursing staff could also be deemed administrative. The total nursing staff, including RNs, LPNs, and aides, is 82.5 for Alachua HRC and 72.2 for PruittHealth. The total FTEs for the applicants is 165 for Alachua HRC and 113 for PruittHealth.

37. PruittHealth, Inc.'s lone Florida facility, PruittHealth - Santa Rosa, is rated 5 stars by both the Center for Medicaid and Medicare Services ("CMS") and AHCA. It has been recommended for the Gold Seal award by AHCA. It has been awarded the Silver Star by the American Health Care Association. PruittHealth - Santa Rosa's most recent survey, and three of its past five surveys, have been deficiency free. Its administrator

was named Administrator of the Year for Florida in 2013. Its hospital readmission rate is consistently lower than the state and national average. Finally, it was recently named as one of the "Best Nursing Homes in the U.S." by U.S. News & World Report. This facility will be the template for the PruittHealth project in Alachua County.

38. The PruittHealth, Inc. consolidated group of companies have a well-developed corporate headquarters infrastructure that provides regional oversight and consulting and management systems to monitor, correct and improve quality of care throughout the chain. The company has been growing steadily over the years and has developed effective programs and human resources to ensure quality of care.

39. PruittHealth, Inc.'s efforts in other facilities have resulted in it delivering a high quality of care. This is demonstrated by PruittHealth, Inc.'s pursuit and receipt of industry-quality awards, its licensure record, and its survey history.

40. As part of its management practices for facilities, PruittHealth, Inc. has several well-defined and effective programs to promote quality; significant evidence and testimony was provided as to its "Go for the Gold," "Committed to Caring Campaign," and "Quality First Pledge" initiatives and company-wide goals.

41. The PruittHealth, Inc. chain does regularly pursue quality designations through recognized industry quality award programs or designations, such as:

(1) The American Health Care Association's national quality award program is one such program to which PruittHealth, Inc. has made a firm commitment. PruittHealth, Inc. has been able to achieve the Silver Award for its facility in Santa Rosa County, Florida. For its other facilities, it has obtained nine silver awards and 65 bronze awards.

(2) The PruittHealth, Inc. companies have achieved Joint Commission accreditation at 12 of their facilities. PruittHealth has offered as a Condition on its CON a requirement that the proposed facility shall achieve such designation.

(3) Lastly, the PruittHealth, Inc. facilities have obtained the distinction by the U.S. News & World Report by having 22 of its facilities designated "Best Nursing Homes in the U.S."

42. PruittHealth, Inc. has an excellent regulatory survey history. It has a significant number of its facilities which have been deficiency free in the last four years. While PruittHealth, Inc. has had some facilities in the past which have received I and J-tags, i.e., those which indicate immediate jeopardy, it was demonstrated that (1) for several of the facilities, those tags were incurred before PruittHealth, Inc.

owned the facilities, and (2) in all instances, it responded promptly and corrected the matters or events which generated such tags.

43. Clear Choice operates three facilities that have received the Governor's Gold Seal designation. Only five percent of all nursing homes obtain a Gold Seal designation. A fourth Clear Choice facility was eligible for Gold Seal status and was making its application complete at the time of final hearing.

44. Clear Choice provides higher quality care than PruittHealth, Inc. according to CMS's star rating system, especially in the area of staffing. On a scale of 1 to 5, Clear Choice offers better ratings than PruittHealth, Inc. for health inspection rating (3.2 to 3.1), staffing rating (4.4 to 2.6) and RN staffing rating (4.3 to 2.9). On average Clear Choice rates at 3.8 stars and PruittHealth, Inc. at 3.4. Clear Choice has a higher percentage of five-star facilities than PruittHealth, Inc. Conversely, PruittHealth, Inc. has a higher percentage of one-star and two-star facilities than Clear Choice.

45. Clear Choice has a track record of providing state-of-the-art rehabilitation equipment, gyms, and pools that are not provided by other nursing homes. As noted above, the application contains strong documentation of the rehabilitative services and equipment Alachua HRC will provide.

46. Specifically, Alachua HRC conditioned its application on the provision of an array of rehabilitative services and equipment. It also conditioned its application on provision of clinical staff to support such services and on providing at least \$150,000 of charity care annually, as in common in its facilities.

47. Clear Choice offers therapy programs in pulmonary rehabilitation, physical therapy and respiratory therapy. It offers a stroke program with nine certified specialists and plans to certify more specialists. Clear Choice offers LVAD for cardiac care; mist therapy for wound care; Lee Silverman Voice treatment focused on the Parkinson's population; a program with certified specialists in lymphedema treatment; VitalStim to strengthen muscles for swallowing; aquatic therapy; and FEES therapy to assess swallowing capability. Clear Choice expends substantial funds providing continuing education and training to its therapy staff and certified specialists for facilities it manages. That will include the project at issue here for Alachua HRC.

48. Alachua HRC proposes an array of state-of-the-art rehabilitation equipment such as wheelchair-accessible HUR equipment for building strength; two therapy pools by Hydroworx; an AlterG Anti-Gravity Treadmill which allows patients to exercise while only bearing a portion of their body weight

instead of their full body weight; a portable BioSway for balance training; a wheelchair accessible Kinesis pulley system for exercise; NuStep and SCIFIT systems and an Omnicycle for cardiac rehabilitation; and E-Stim and VitalStim for swallowing treatment.

49. Alachua HRC plans to offer all of its therapy services and its equipment to both long-term and short-term patients.

50. Because it offers several options and a fresh Bistro-style dining approach, Clear Choice facilities spend more per patient on food than the average nursing home.

51. Clear Choice facilities implement robust quality assurance programs such as welcome meetings to go over medications and therapies, Care Plan meetings, AdvaCast program, Team TSI, and medication reconciliation. During Care Plan meetings, specialist physicians, such as Dr. Medina-Sanchez, collaborate with facility staff regarding the results of their patient visits. They also discuss outcomes, prognoses, goals, and other medical issues, to assure that patients, families and physicians all understand the same expectations after discharge. These Care Plan meetings occur for both short-term and long-term care patients.

52. Clear Choice has also been selected as a nursing home partner to hospitals paid under a bundled system. Clear Choice

was selected for the bundled programs based on its quality measures and readmission rates.

53. During quality surveys, PruittHealth, Inc. has received 50 J and K-tags and 36 G-tags across 19 facilities, or roughly 20 percent of PruittHealth, Inc. facilities. Of 20 PruittHealth, Inc. facilities, 17 have received I-tags and J-tags under PruittHealth, Inc.'s watch.

54. Since its inception nine years ago, only one Clear Choice facility has ever received an immediate jeopardy tag, and it was from a single incident and survey.

55. There was considerable testimony at final hearing concerning readmission rates, i.e., the external benchmark utilized by CMS to measure the number of hospital-discharged patients admitted to a skilled nursing facility who return to a hospital within 30 days. CMS has developed sophisticated statistical techniques to adjust raw data (observed rates) for the acuity of the patients seen at different facilities and management styles (adjusted rates). Unfortunately, CMS has not disclosed exactly how it makes the adjustments, so it is virtually impossible to make comparisons between different providers.

56. In the present case, PruittHealth provided credible evidence that its readmission rates are measurably better than Clear Choice's readmission rates for existing facilities. This

could be, in part, due to Clear Choice's patient mix which includes considerably more short-term intensive rehabilitation residents.

57. Clear Choice conducts a number of activities to avoid readmissions. Clear Choice's interdisciplinary team reviews all admissions and discharges within the 30-day readmission time slot. Clear Choice partners with the Medicare-contracted group advising on readmissions, Health Service Advisory Group, and the Nursing Home Collaborative to track data used to track readmissions.

58. Clear Choice has achieved relatively low readmission rates for the medically complex patients it serves. Clear Choice has concerns about PruittHealth's policies on readmissions to the extent they appear to incentivize holding patients longer in skilled nursing facilities rather than releasing them to a hospital for care. Specifically, the statement by PruittHealth's medical expert that "part of our bonus structure . . . is based on readmission rates," could lead to conclusions that patients' needs are being manipulated.

59. However, in general, both applicants had reasonable and seemingly effective plans for keeping their admission rates at or near the State average.

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.

60. AHCA determined that both applicants fulfilled this criterion equally. However, PruittHealth points out that it provided the audited financial statements of its parent company even though it was not required. PruittHealth questioned the commitment of Mr. Kellett to the Alachua HRC project because his personal or business financial statements were not included with the application. The totality of the evidence and testimony by Ms. Kennedy proves otherwise.

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

61. Both applicants will provide services to persons within the service area who require skilled nursing care, whether it is traditional long-term care, subacute care and rehabilitation, or other kinds of care.

62. Alachua HRC's proposed location, east of the existing cluster of nursing homes in Alachua County, will be in closer proximity to residents of Putnam County.

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

63. Both of the applicants (through parent companies or affiliates) are experienced in the business of owning and operating skilled nursing facilities. While the single purpose

entities which filed the CON applications have not independently financed construction of a facility, they are each related to companies with vast experience and financial wherewithal. Notwithstanding, each applicant raised concerns about the other, some of which will be discussed herein.

64. PruittHealth, on the Source of Funds form in Schedule 3 of the CON application, chose section 2 - Operating Cash Flows, and Section 4 - Non Related Party Financing, as its source of funding for the project. As documentation in support of its source of funds, PruittHealth provided: (1) a letter from an institutional lender, Synovus Bank indicating an interest in financing the project; (2) a letter from PruittHealth, Inc.'s senior vice president of Treasury Management and Treasurer addressing a \$36 million working capital line of credit which, as of the date of the CON application, had an unused balance of \$26,100,000 and had \$19.8 million at the time of the hearing; and (3) another letter of its senior vice president formally committing the funds of PruittHealth under the capital line of credit to finance the equity portion (25 percent) of the Synovus Bank financing, and also the internal cash flow and cash on hand of PruittHealth, Inc. as shown on its audited financial statement.

65. There is some evidence that PruittHealth's estimated land costs and construction costs, and therefore its

amortization and depreciation expenses, are understated. Further, PruittHealth is in the midst of a large nursing home bed expansion, including three CONs approved in the State of Florida: a 77-bed facility in Bay County; a 97-bed CON in Clay County; and an 86-bed facility in Leon County. The Bay and Clay County projects have a commence-construction deadline of September 2016, but neither project is currently financed. The Leon County project is scheduled to commence construction within nine months, but financing, land purchase, permitting, and such have not yet been accomplished.

66. The three facilities will require a total of about \$33 million, with two thirds of that required almost immediately. Obtaining those loans may be impaired by PruittHealth's need to refinance approximately \$150 million in debt during the next three years. Further, its debt ratios seem to exceed the benchmarks set forth in the Dodd-Frank Act, creating a potential impediment to acquiring additional loans.

67. Although the size and strength of PruittHealth, Inc. seem sufficient to handle the financial concerns set forth above, the existence of three pending CONs in Florida creates some doubt. That those projects are on such short timelines for construction also indicates a need for PruittHealth, Inc. to focus on them without incurring additional obligations.

Long Term Financial Feasibility

68. Both applicants, with support from their respective mentor organizations, will likely realize long-term financial feasibility in their proposed projects. However, neither of the applicants' proposals was without fault.

69. PruittHealth used reasonable methodologies and assumptions for its project cost, utilization and fill-up rates, staffing, and pro forma financial statements, i.e., Schedules 1, 4, 5, 6, 7, and 8 of the application. Using its actual operating results at other related facilities is reasonable and demonstrates a legitimate basis for legitimacy of the projections.

70. However, many of the financial projections relied upon by PruittHealth were derived from unverified information. While the projections appear reasonable from an overview perspective, there were many items that appeared to be guesstimates or plucked from other, perhaps dissimilar types of projects. There appears to be insufficient nursing staff to cover both the skilled and long-term patients, but the numbers could be increased as needed (but would require additional costs). And, because the salaries for nurses were pulled from a public website, they may be suspect.

71. Alachua HRC's financial schedules were based on Clear Choice's actual experience at another Clear Choice facility, Sun

Terrace, which is very similar to the Alachua HRC proposal. The pro forma presumably captured every expense Alachua HRC is expected to incur and appears reasonable. On the revenue side, the pro forma is also based on actual experience of Clear Choice facilities.

72. A projection of 97-percent occupancy is unusual. But, due to Alachua HRC's high percentage of private rooms, the projected occupancy of 97-percent is reasonable and achievable. Two Clear Choice facilities, Melbourne Terrace and Spring Lake, currently experience over 97-percent occupancy. Both facilities recently underwent renovations to add the private rooms and large gyms like the ones planned for the Alachua project. Additionally, several other Clear Choice facilities achieved greater than 95-percent occupancy, even in facilities that do not yet boast a compliment of private rooms. Clear Choice's projected occupancy rate is only three percent higher than PruittHealth's and is reasonable.

73. Clear Choice projects a total of 165 FTEs to staff the Alachua HRC project versus only 113.1 FTEs that PruittHealth projects for its project. Clear Choice's staffing projection is also based on the Sun Terrace facility, which is similar to the Alachua HRC proposal. The projected staffing is based on actual Florida experience and is reasonable.

74. There is little difference between the applicants for the per diem projections for the larger payor groups of Medicare and Medicaid. The difference in the overall revenue between the two applicants is primarily a function of Clear Choice's higher proportion of Medicare patients. Its higher expenses than PruittHealth are due to the higher level of care being offered to the Medicare/short-term rehabilitation patients.

75. However, on aggregate, both of the applicants would likely achieve positive long-term financial results.

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

76. Neither applicant currently has a nursing home in Alachua County. Therefore the approval of either applicant will, to some extent, increase competition. Both applicants propose high-quality nursing home programs at competitive costs.

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

Rule 59C-1.030(2)(a) . . . The need that the population to be served . . . and the extent to which all residents of the district, and in particular low income persons . . . and the elderly, are likely to have access to those services.

77. This criterion no longer holds the weight it once held in nursing home CON cases. The advent of Medicaid managed care for nursing home residents changed the dynamic of traditional

Medicaid care, and AHCA no longer views this criterion as vastly important.

78. Clearly, PruittHealth proposes a higher Medicaid census (64 percent) than does Alachua HRC (41 percent). However, when including dual eligible residents (i.e., those patients who are admitted into the facility as Medicare patients but would qualify for Medicaid at the end of their qualifying stay), Alachua HRC's percentage of Medicaid residents increases to about 58 percent. Presumably, employing the same stratagem for PruittHealth would increase its Medicaid census as well.

79. AHCA no longer accepts conditions on the CON for provision of a specified percentage of Medicaid care. Unlike days of yore, applicants are not granted any special consideration on the basis of their Medicaid projections.

80. PruittHealth points out that it is attempting to be consistent with the percentage of Medicaid care currently extant in the service area. It did not provide persuasive evidence that meeting that percentage was especially significant.

CONCLUSIONS OF LAW

81. The Division of Administrative Hearings has jurisdiction over this matter pursuant to sections 120.569, 120.57, and 408.039(5), Florida Statutes (2016).

82. Each of the applicants has standing to participate in the proceeding. § 408.039(5)(c), Fla. Stat.

83. The petitions in this case commenced a de novo proceeding intended to formulate final agency action. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981); § 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).

84. The award of a CON must be based on a balanced consideration of all 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 1341 (Fla. 1st DCA 1986). The appropriate weight to be given to each criterion is not fixed, but varies upon the facts of each case. Collier Med. Ctr., Inc. v. Dep't of HRS, 462 So. 2d 83, 83 (Fla. 1st DCA 1985).

85. Where, as here, mutually exclusive applications seek a limited number of beds, the applications are reviewed on a comparative and competitive basis to determine which application is superior to the other(s) based on a balanced consideration of applicable statutory and rule criteria. Humana, Inc., d/b/a Cypress Cmty. Hosp. v. Dep't of HRS, et al., 492 So. 2d 388 (Fla. 4th DCA 1986).

86. Both applicants filed applications that met all of the criteria for issuance of a CON. Both are good providers that

would be able to develop and operate a high quality nursing home in Alachua County. Any deficiency in either application is not cause to dismiss that application. See 408.039(5)(d), Fla. Stat. However, this is a case of comparative review.

87. Considering all the evidence, and upon consideration of the Agency's review and findings concerning the applicants (which have no presumptions of correctness but are based on considerable knowledge of the subject matter), it is clear that the application of Alachua HRC best complies with the statutory and rule requirements.

88. Neither applicants' ability to provide quality care is in question, and neither has negative survey findings which raise significant concerns about their operations.

89. Alachua HRC proposes a facility that is more attuned to the changing world of skilled nursing facilities. PruittHealth's proposal is more of a traditional long-term care facility, focused on the current level of payor mix in the area.

90. As for funding required for the projects, either applicant could likely obtain the funds needed for their project, but PruittHealth, Inc. is stretched a bit thin with its three pending and rapidly approaching projects. And, there is some legitimate concern that PruittHealth, Inc.'s current financial ratios may impede further loans.

91. On balance, the application of Alachua HRC should be approved.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Respondent, Agency for Health Care Administration, approving CON Application No. 10397 filed by Alachua County HRC, LLC, for a 103-bed skilled nursing facility in Alachua County, AHCA District 3, subdistrict 3-2.

DONE AND ENTERED this 16th day of September, 2016, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
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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.