BEFORE THE MARYLAND HEALTH CARE COMMISSION

IN THE MATTER OF ADVENTIST HEALTHCARE, INC. D/B/A WASHINGTON ADVENTIST HOSPITAL	Matter No. 13-15-2349

APPEAL BY MEDSTAR MONTGOMERY MEDICAL CENTER FROM DENIAL OF REQUEST FOR EVIDENTIARY HEARING

Interested Party, MedStar Montgomery Medical Center ("MMMC"), pursuant to COMAR 10.24.01.10D(6), appeals from the denial of its request for an evidentiary hearing on the Certificate of Need ("CON") application filed by Adventist HealthCare, Inc. d/b/a Washington Adventist Hospital ("WAH").[1] The Reviewer denied MMMC's request for an evidentiary hearing on November 18, 2015, contemporaneously with the issuance of the Recommended Decision to approve, with conditions, WAH's CON application to: (1) relocate WAH from Takoma Park in Montgomery County and replace its existing facility with a 170-bed general hospital on a site in a corporate campus adjacent to the United States Food and Drug Administration ("FDA") Complex in the White Oak/Fairland area of the County; and (2) renovate the inpatient psychiatric facilities on the existing WAH campus and relicense those facilities as a special hospital-psychiatric.

MMMC has filed exceptions to the Reviewer's recommended findings that WAH satisfied: (1) COMAR 10.24.01.01B(13) and COMAR 10.24.01.08G(3)(d) (financial feasibility and viability); (2) COMAR 10.24.10.04B (impact of the proposed relocation on the access of the indigent and medically underserved to care); (3) COMAR 10.24.01.08G(3)(b) (need of the

[1] See Request by MedStar Montgomery Medical Center for an Evidentiary Hearing or, in the Alternative, For Oral Argument dated February23, 2015 (DI#58).

population to be served); and (3) COMAR 10.24.10.04B (availability of more cost effective alternatives). As set forth in MMMC's Exceptions and summarized below, MMMC submits that a more detailed and complete investigation should be conducted through an evidentiary hearing to determine financial feasibility and viability, the impact of the proposed relocation on the underprivileged population, access to care, the need for a new hospital in White Oak/Fairland area to meet the needs of the population served by WAH, and whether a site could be assembled in Takoma Park that would continue to serve the needs of this population.

COMAR 10.24.01.01B(13) and COMAR 10.24.01.08G(3)(d) (Financial Feasibility and Viability)

An evidentiary hearing should be held to explore serious and substantial questions regarding the financial feasibility and viability of the project. In finding the project financially feasible and viable, the Reviewer relied heavily on the HSCRC's November 6, 2015 Memorandum ("HSCRC Memorandum") reviewing and commenting on the financial feasibility and underlying assumptions of WAH's proposed project. The HSCRC Memorandum, however, raised a number of significant concerns with the feasibility and viability of WAH's project and the assumptions made by WAH. The chief concern expressed by the HSCRC is that WAH's financial projections are based on an assumption that its volumes will increase despite a consistent decline in volumes in recent years. The HSCRC Memorandum noted this decline in volumes in the context of the fact that "there has been a steady decline in inpatient hospital utilization over decades, in spite of an aging population." (HSCRC Memorandum at 5). Further, the HSCRC pointed out that the assumptions regarding the financial viability are reasonable (at 12):

> … depending on WAH attaining the volumes projected in the CON. The current environment of change in health care financing and delivery increase the probability that inpatient volumes will decline.

Based on this data, the HSCRC cautioned the Commission to revisit the issue of the size

10325038-v1

of the bed need for WAH's proposed facility and the consequences to feasibility if excess capacity should be constructed (*id.* at 5). The Reviewer's Recommended Decision was issued close on the heels of the HSCRC Memorandum and did not address in detail the express recommendation of the HSCRC that a further investigation be conducted as to WAH's projected utilization and the size of the facilities proposed by WAH.

WAH's contention that its proposed project is economically feasible and viable is based on an optimistic assumption that utilization will increase in the face of evidence that WAH's utilization in its most important service areas has declined precipitously in recent years. The viability of WAH's proposal turns on assumptions as to future utilization that do not reflect the substantial changes that have profoundly affected hospital utilization since 2012 that have occurred in the current Maryland regulatory and economic environment. The HSCRC has urged caution as to the validity of this assumption and the need for the facilities that WAH proposes.

WAH's unsupported utilization projections are the basis for its projected financial "turnaround" from a $12.6 million loss in 2013 to a $2.6 million positive margin in 2014 and projected positive margin of $7.6 million in WAH's ability to borrow over $300 million is highly uncertain in light of WAH's financial ratios. Even with the benefit of WAH's tenuous improvement of its margins in 2014 and 2015, the key financial ratios as reported by WAH have not significantly improved since the initial projections in this case. As discussed in MMMC's Exceptions, WAH's financial ratios are considerably lower than industry standards and not supportive of a major (over $300 million) debt issue.

MMMC respectfully requests that this application should be returned to the Reviewer for further investigation and an evidentiary hearing on (1) the impact of declining volumes at WAH on the feasibility and viability of the proposed project, (2) WAH's utilization projections and the

need for the size of the facilities proposed by WAH, and (3) whether WAH's project can be financed given its ratios that are far below industry standards.

COMAR 10.24.10.04B (Impact on Access of Indigent and Medically Underserved to Care)

WAH is required under this review criterion to demonstrate that its proposed relocation from Takoma Park to White Oak/Fairland will not have an unwarranted impact on the availability of, or access to, health services needed by the population in the current primary service area, including access for the indigent or uninsured. U.S. Health Resources and Services Administration data shows that the current WAH site is surrounded by areas that are designated as Medically Underserved Areas/Populations or Health Professional Shortage Areas. Likewise, U.S. Census Bureau data by census block groups (CBGs) show that the current population for which WAH is the closest hospital has a high rate of poverty. These areas are inside the Capital Beltway, and WAH proposes to move outside the Beltway, leaving no Maryland hospital inside the Beltway proximate to the underprivileged population it has traditionally served.

As described in its Exceptions and in its request to the Reviewer for an evidentiary hearing (DI#58), the problem presented in attempting to analyze the effect of WAH's proposed relocation on this population is that patient information is available only on the Zip Code Area level and is not available to allow an analysis of the people that actually rely on this hospital, and for which existing WAH is the closest hospital. This data is the key to hospital utilization analysis and thus an analysis on the impact on the indigent.

Accordingly, MMMC retained Dr. Kenneth Thorpe of Emory University, a nationally-recognized expert in the field of public health policy, to design a research study to assess the impact of WAH's proposed relocation on the indigent, uninsured and vulnerable persons for which WAH is the closest hospital. The study that Dr. Thorpe designed, however, would require detailed

patient-specific data that the Commission has not utilized in the past.[2] With the benefit of this information and the appropriate statistical analysis, the impact on the indigent and medically underserved persons in WAH's community could be determined in a complete and effective manner.

The Reviewer recognized that an attempt to analyze the impact on the indigent and medically underserved which is conducted at the zip code area level may obscure the impact given the size and diversity of the zip code area populations. (Recommended Decision at 36). Accordingly, the Reviewer analyzed the travel time and utilization of the top 20 CBGs by volume of emergency department ("ED") visits to WAH and the CBGs sending more than 50% of their total ED visits to WAH. The Reviewer's findings are listed on page 37 of the Recommended Decision and were consistent with the relationship between proximity and utilization established by the scholarly studies described above. The Reviewer found that in the present case the impact on the indigent and medically underserve will not be unacceptable because none of the CBGs proximate to existing WAH will be more than 15 minutes from a hospital ED if the project is implemented. (*Id.* at 36-37).

The Reviewer did not address MMMC's request that WAH be required to produce patient-specific information and that the impact on the underprivileged and medically vulnerable population can be analyzed. With the benefit of patient-specific information relating to the frequency of use across inpatient and outpatient services of indigent and medically underserved patients, an analysis can be conducted in far greater depth than an analysis of the travel time to the nearest hospital ED from certain CBGs. Average travel time changes to the ED are not descriptive of the experience of most residents of a CBG. The appropriate analysis, on the other hand, would

[2] The Thorpe study would require WAH to produce this patient information, pursuant to procedures approved by federal privacy laws which would conceal the identity of the patients.

include a tabulation of the distribution of chronic medical conditions and the need for frequent use of medical management and consider the impact of lack of proximity and the fact that underprivileged persons simply may not seek, or may forego continued, chronic care and management if a hospital is no longer proximate.

The necessity of an evidentiary hearing in order to address the issues created by WAH's application is perhaps most acute in connection with this review criterion. The impact on the community WAH currently serves with a large and growing indigent and uninsured population could be devastating. Under these circumstances, the more in-depth analysis design that MMMC requested be conducted and examined in an evidentiary hearing is appropriate.

COMAR 10.24.01.08G(3)(b) (Need of the Population to be Served)

At the core of its mandate, the Commission's statute and regulations governing certificate of need review require an assessment of the "public need" for a proposed project. MD. CODE ANN. HEALTH GEN., §19-114(c). MMMC requested an evidentiary hearing, to investigate where the hospital should be located to serve the needs of those people that need it most -- the population for which WAH is the closest hospital, which population, as discussed in MMMC's Exceptions, is clearly distinguishable by census block group (CBG) and not by Zip Code Area. Thus, the threshold issue is whether a location in White Oak/Fairland or Takoma Park is most appropriate to meet the needs of this population.

WAH's application attempts to satisfy need only by addressing "bed need" in its total proposed service area and jurisdiction. Its analysis does not attempt to analyze the needs of the population in and near WAH's core service area of Takoma Park, relative to the population in White Oak/Fairland. In the Recommended Decision, the Reviewer accepted that, following WAH's relocation, Holy Cross Hospital ("HCH"), not WAH, would be the most proximate

hospital for the CBGs in the vicinity of existing WAH. (Recommended Decision at 36-37). The Reviewer also concluded that the areas surrounding WAH's proposed, new location are already well served by more than three acute care hospitals. (*Id.* at 46-3) However, the Reviewer disagreed with MMMC's position that the needs of the population currently served by WAH should be the focus of the need analysis under COMAR 10.24.01.08G(3)(b). The Reviewer found that a general hospital in White Oak/Fairland replacing a general hospital in Takoma Park will in all likelihood result in some changes to the catchment areas of general hospitals in the region. (Recommended Decision at 131). Indeed, the Reviewer had earlier concluded that the ED at HCH would be the most appropriate choice for CBGs in the vicinity of existing WAH. (*Id.* at 36-37). The Reviewer found, however, that the region was marked by multiple hospitals within reasonable travel times for the vast majority of the region's population.

In an evidentiary hearing, the parties can fully develop the best place for a hospital to meet the public health needs of the State in general and the specific needs of the community for which WAH is the closest hospital. Further, the need for a new hospital in White Oak/Fairland in relation to Takoma Park can be fully explored.

In light of the pivotal and precedent setting public policy issues presented by WAH's proposed relocation, MMMC respectfully submits that the Commission should grant an evidentiary hearing as requested by MMMC to determine whether the proposed relocation is consistent with public need and the needs of the population WAH currently serves -- the population for which WAH is the most proximately-located hospital.

COMAR 10.24.10.04B (Availability of More Cost Effective Alternatives)

MMMC requested an evidentiary hearing to address whether a new hospital in the White Oak/Fairland area is the most cost-effective alternative to addressing public need. The City of

Takoma Park has in the past adamantly stated that it supports retaining the hospital and would work with WAH to find a solution. Both the State and the County could exercise eminent domain to assemble a new site for WAH, with WAH funding the required acquisitions. Such a teamwork approach to determining a more appropriate location would be consistent with a common goal of improving and retaining health care services for the Takoma Park community. Finally, a replacement hospital in Takoma Park will contribute to the economic development of this area of the County.

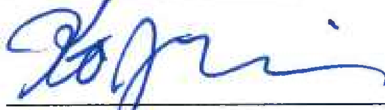
In the Recommended Decision, the Reviewer accepted WAH's representation that no other site was available and found that assembling a new site in Takoma Park is likely to be "divisive, litigious and expensive." (Recommended Decision at 44).

MMMC respectfully submits that the unprecedented relocation proposed by WAH in the present case necessitates a careful, detailed analysis of whether a site can be assembled in Takoma Park that can only be undertaken through an evidentiary hearing. WAH should not be able to set up its abandonment of Takoma Park as a foregone conclusion. The location that will best meet the public need for the proposed project, also necessitates a full investigation and presentation in an evidentiary hearing.

CONCLUSION

For the reasons stated, MMMC's request for an evidentiary hearing should be granted.

Respectfully submitted,



Kurt J. Fischer
Marta D. Harting
VENABLE LLP
750 East Pratt Street
Suite 900
Baltimore, Maryland 21202
410-244-7400
kjfischer@venable.com

Counsel for the Interested Party,
MedStar Montgomery Medical Center

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December, 2015, a copy of the Appeal by MedStar Montgomery Medical Center from Denial of Request for an Evidentiary Hearing was sent via electronic mail and by first class mail, postage prepaid, to:

John F. Morkan III, Esq.
Howard L. Sollins, Esq.
John J. Eller, Esq.
Ober, Kaler, Grimes & Shriver, P.C.
100 Light Street
Baltimore, Maryland 21202
jfmorkan@ober.com
hlsollins@ober.com
jjeller@ober.com
Counsel for Adventist HealthCare, Inc. d/b/a Washington Adventist Hospital

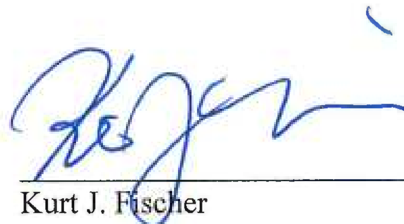
Susan C. Silber, Esq.
Kenneth Sigman, Esq.
Silber, Perlman, Sigman & Tilev, P.A.
7000 Carroll Avenue, Suite 200
Takoma Park, Maryland 20912-4437
silber@sp-law.com
sigman@sp-law.com
Counsel for the City of Takoma Park

Thomas C. Dame, Esq.
Ella R. Aiken, Esq.
Gallagher Evelius & Jones LLP
218 North Charles Street, Suite 400
Baltimore Maryland 21201
tdame@gejlaw.com
eaiken@gejlaw.com
Counsel for Holy Cross Hospital of Silver Spring, Inc.

Marta D. Harting, Esq.
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202
mdharting@venable.com
Counsel for Laurel Regional Hospital

Catherine S. Tunis, SOSCA President
South of Sligo Citizens' Association
907 Larch Avenue
Takoma Park, Maryland 20912
tunis.catherine@erols.com

Ulder Tillman
Montgomery County Health Department
401 Hungerford Drive
Rockville, Maryland 20850
ulder.tillman@montgomerycountymd.gov



Kurt J. Fischer