

## Constantino, Mike

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**From:** Lawler, Daniel [daniel.lawler@klgates.com]  
**Sent:** Monday, November 28, 2011 4:16 PM  
**To:** Avery, Courtney  
**Cc:** Constantino, Mike  
**Subject:** Project #10-089, Mercy Crystal Lake Hospital: Written Comment on SSAR  
**Attachments:** Response to Mercy SSAR.pdf

Dear Ms. Avery,

Attached please find the written comment on the Supplemental State Agency Report for Project No. 10-089, Mercy Crystal Lake Hospital and Medical Center, which I submit on behalf of my client Centegra Health System.

We have been advised by the Review Board's staff that the time for submitting written responses was extended from 9:00 am to 5:00 pm due to the Thanksgiving holiday, and that email transmission was acceptable.

Dan Lawler

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November 28, 2011

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**VIA EMAIL**

Courtney R. Avery  
Administrator  
Illinois Health Facilities and Services Review  
Board  
525 West Jefferson Street  
2nd Floor  
Springfield, IL 62761

**Re: Project No. 10-089, Mercy Crystal Lake Hospital and Medical Center  
Response to Supplemental State Agency Report**

Dear Ms. Avery:

I represent Centegra Health System and respectfully submit on its behalf this written response to the Supplemental State Agency Report ("SSAR") for Project No. 10-089, Mercy Crystal Lake Hospital and Medical Center pursuant to Section 6(c-5) of the Illinois Health Facilities Planning Act(20 ILCS 3960/6(c-5)).

**I. The SSAR should be corrected in the body of the report to show non-conformance with Criterion 1110.3030(a)**

The SSAR correctly states in its Executive Summary that the project does not meet the standards of Criterion 1110.3030(a), Clinical Service Areas other than Categories of Service. The reasons for this negative finding are more fully explained in the body of the SSAR which notes, among other things, that the project will negatively impact existing facilities based on the applicants' physician referral letters. However, the SSAR erroneously states in the capitalized, bold sentence following Table Ten that the Staff finds the proposed project appears to be in conformance with the Criterion. The finding under this Criterion should be corrected to state that the Staff finds the proposed project does not appear to be in conformance with the Criterion.

**II. Table Seven should be corrected to show the requested med/surg beds**

The SSAR correctly states in its Executive Summary that the applicants have requested 56 medical/surgical beds. However, Table Seven in the SSAR indicates that the applicants have requested 70 medical/surgical beds. Table Seven should be corrected to show that the applicants have requested 56 medical/surgical beds.

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**III. The Numbers in Table Five far exceed Mercy's Charity Care and Safety Net services to Illinois residents**

The applicant Mercy Alliance, Inc. is a Wisconsin corporation that operates a number of health care entities in Wisconsin, and one licensed acute care hospital in Illinois, namely, Mercy Harvard Memorial Hospital in McHenry County. The Charity Care and Medicaid dollars listed in Table Five of the SSAR apparently reflect Mercy Alliance's entire operation because IDPH's Hospital Profiles show that the Charity Care and Medicaid provided by Mercy's Illinois facility is a tiny fraction of the amounts in the Table. For example, the 2010 Hospital Profile for Mercy Harvard Memorial Hospital shows a Total Charity Care Expense of \$276,744 as compared to Table Five which shows over \$6 million in Total Charity Care Expense for 2010. In addition, the Cost of Charity Care as % of Net Patient Revenue in Mercy Harvard's 2010 Hospital Profile is 1.2% while Table Five shows a percentage twice that at 2.4%. A copy of Mercy Harvard Memorial's 2010 Hospital Profile is included as Attachment 1.

**IV. Mercy's Arguments Relating to a Claimed "Physician Shortage" and to the Review Board's Minimum Bed Rules Were Previously Raised by Mercy and Rejected by the Court in Mercy's prior CON Application**

The SSAR notes that Mercy's lead argument for its proposed hospital is to address a supposed physician shortage in McHenry County. The SSAR further notes that Mercy's proposed 56-bed medical/surgical unit does not meet the minimum standard of 100 beds (nor does its 10-bed OB unit meet the minimum standard of 20 beds). Mercy raised the identical physician shortage argument in its 2003 Mercy Crystal Lake Hospital application and similarly challenged the Board's rule on minimum bed sizes. That project was approved in 2004 as a result of a much publicized scandal with criminal consequences that are still being played out. (See recent Sun Times article dated November 23, 2011 included as Attachment 2 hereto). The permit approved in 2004 was reversed by the Circuit Court of McHenry County on the grounds that the project did not comply with the State Board's Review Criteria, and that the decision to approve the project was against the manifest weight of the evidence, and was arbitrary and capricious. In its decision to reverse the Board's decision that granted Mercy's permit, the Circuit Court considered and rejected Mercy's physician shortage argument and its challenge to the minimum bed rule.

**A. Mercy's "physician shortage" argument was rejected by the Court**

In the analysis of Criterion 1110.230(b), the SSAR references Mercy's claim of a physician shortage in McHenry County. This is the same contention that Mercy pushed in its 2003 Mercy Crystal Lake Hospital application that was expressly rejected by the Circuit Court.

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The Circuit Court stated in its written decision that, "Much was made by the Board at the April 21, 200[4] hearing about the 45 physicians Mercy Hospital would bring to staff its hospital and adjacent offices" and that "Board member, Mr.[Stuart] Levine, commented at the April 21 meeting how impressed he was that these physicians would help make a dent in the shortage of physicians in the area." (Memorandum Opinion and Order dated May 6, 2005 at page 14. A copy of the Memorandum Opinion and Order is included at Attachment 3 hereto.) The Court further noted that, "Mr. Levine did not offer any explanation or justification for the Board's approval in the instant case, other than he was impressed with the 45 new physicians who would be coming to McHenry County and who would make a dent in the physician shortage." (*Id.* at page 16.) Further, the Court observed that while Mercy claimed a 45 physician shortage in the region, its own documentation showed that "Crystal Lake, the location of the proposed hospital, has no physician shortage." *Id.* at page 16. In reversing the Planning Board's decision, the Circuit Court found that the Board had no criteria addressing physician shortages and that its reliance on this factor in issuing a permit to Mercy was "arbitrary and capricious." (*Id.* at pages 15 to 18.)

In the present application, Mercy now claims there is a 49 physician shortage in McHenry County based on Thomson Reuters data. As before, this still is not a factor that would justify a new hospital under the Review Board's criteria. While the Board has a criterion addressing federally designated Health Professional Shortage Areas, there are no such areas in McHenry County.

**B. Mercy's challenge to the Board's 100-bed rule was rejected by the Court**

The SSAR notes that Mercy's proposed 56-bed medical/surgical unit does not meet the minimum standard of 100 beds, and its 10-bed OB unit does not meet the minimum standard of 20 beds. Mercy attempts to justify its disregard of the State's minimum requirements by arguing that the Review Board's rules are outdated relics of the 1980s. Mercy argues that patient length of stays have shortened over the decades and that today a 70 bed hospital can efficiently handle what required many more beds in the days of old. (*See* Mercy's Modified CON application at pages 103-105.)

Once again, Mercy has dug up an argument from its prior application that was rejected by the Circuit Court of McHenry County. In its first Mercy Crystal Lake application, Mercy also had proposed building a 70-bed hospital and challenged the rule that new hospitals in MSAs must have a minimum of 100 beds. Mercy argued that the rule was established in 1980, that patient length of stays had declined, and that a hospital of 70-beds or less could deliver the same level of care as a 100-bed hospital of the 1980s. The Circuit Court rejected this argument noting, among other things, that the Board's rule was established in 1992 and not in 1980 as Mercy claimed.

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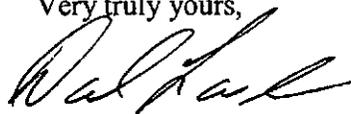
Since the first Mercy application and the Circuit Court's decision sustaining the 100-bed minimum rule, the Review Board evaluated and affirmed its minimum bed rules when it amended the review criteria in 2009. Prior to the amendment, the Board's criteria included a subsection on the "Establishment of Additional Hospitals" which stated that a proposed "general hospital to be located within a Metropolitan Statistical Area (M.S.A.) must contain a minimum of 100 MS beds." 77 Ill. Admin. Code 1110.320 (Repealed at 33 Ill. Reg. 3312, effective February 6, 2009). This subsection was included in a regulation entitled "Bed Related Review Criteria."

In February 2008, the Board proposed deleting the "Bed Related Review Criteria" section and incorporating minimum bed requirements into an amended section entitled "Medical/Surgical, Obstetric, Pediatric and Intensive Care—Review Criteria." (32 Ill. Reg. 1575, 1632 (Feb. 8, 2008).) In this regulation, the Board included a new "Performance Requirements" subsection that stated that the minimum bed capacity for a medical/surgical category of service within an MSA is 100 beds. Significantly, the final regulation corrected a typographical error in the proposed regulation that indicated a minimum of only 75 medical/surgical beds instead of 100. (See 33 Ill. Reg. at 3312, 3319 included as Attachment 4 hereto.) The same amendment also specified that a minimum unit size for a new obstetric unit within an MSA is 20 beds and the minimum unit size for an intensive care unit is 4 beds.

Contrary to Mercy's arguments, the Review Board's minimum bed requirements are not holdovers from the 1980s. They are regulations enacted in 2009. In the litigation over Mercy's first permit, the Court sustained a minimum bed requirement that was enacted 12 years before the Planning Board considered Mercy's first application. The current regulations on minimum bed requirements would certainly be sustained.

Like its 2003 predecessor, Mercy's current CON application for a 70-bed hospital in Crystal Lake fails to substantially comply with the Review Board's rules and should be denied.

Very truly yours,



Daniel J. Lawler

DJL:dp

<u>Ownership, Management and General Information</u>		<u>Patients by Race</u>	<u>Patients by Ethnicity</u>		
ADMINISTRATOR NAME:	Sue Ripsch	White	97.8%	Hispanic or Latino: 7.7%	
ADMINISTRATOR PHONE:	815-943-8671	Black	1.7%	Not Hispanic or Latino: 92.1%	
OWNERSHIP:	Mercy Alliance Inc.	American Indian	0.1%	Unknown: 0.3%	
OPERATOR:	Mercy Harvard Hospital, Inc.	Asian	0.1%	IDPH Number: 4911	
MANAGEMENT:	Not for Profit Corporation (Not Church-R)	Hawaiian/ Pacific	0.0%	HPA A-10	
CERTIFICATION:	Critical Access Hospital	Unknown:	0.3%	HSA 8	
FACILITY DESIGNATION:	General Hospital				
ADDRESS:	901 South Grant Street	CITY:	Harvard	COUNTY:	McHenry County

<u>Facility Utilization Data by Category of Service</u>										
<u>Clinical Service</u>	Authorized CON Beds 12/31/2010	Peak Beds Setup and Staffed	Peak Census	Admissions	Inpatient Days	Observation Days	Average Length of Stay	Average Daily Census	CON Occupancy 12/31/2010	Staff Bed Occupancy Rate %
Medical/Surgical	17	17	12	595	1,470	235	2.9	4.7	27.5	27.5
0-14 Years				11	15					
15-44 Years				142	330					
45-64 Years				169	421					
65-74 Years				92	245					
75 Years +				181	459					
Pediatric	0	0	0	0	0	0	0.0	0.0	0.0	0.0
Intensive Care	3	3	3	36	104	0	2.9	0.3	9.5	9.5
Direct Admission				4	12					
Transfers				32	92					
Obstetric/Gynecology	0	0	0	0	0	0	0.0	0.0	0.0	0.0
Maternity				0	0					
Clean Gynecology				0	0					
Neonatal	0	0	0	0	0	0	0.0	0.0	0.0	0.0
Long Term Care	45	45	45	171	9,476	0	55.4	26.0	57.7	57.7
Swing Beds				0	0		0.0	0.0		
Acute Mental Illness	0	0	0	0	0	0	0.0	0.0	0.0	0.0
Rehabilitation	0	0	0	0	0	0	0.0	0.0	0.0	0.0
Long-Term Acute Care	0	0	0	0	0	0	0.0	0.0	0.0	0.0
Dedicated Observation	0					0				
Facility Utilization	65			770	11,050	235	14.7	30.9	47.566	

(Includes ICU Direct Admissions Only)

<u>Inpatients and Outpatients Served by Payer Source</u>							
	Medicare	Medicaid	Other Public	Private Insurance	Private Pay	Charity Care	Totals
Inpatients	37.0%	7.3%	1.4%	25.8%	24.4%	4.0%	770
Outpatients	27.4%	17.4%	0.3%	47.8%	6.2%	1.0%	21,471

<u>Financial Year Reported:</u>	7/1/2009 to	6/30/2010	<u>Inpatient and Outpatient Net Revenue by Payer Source</u>					<u>Charity Care Expense</u>	<u>Total Charity Care Expense 276,744</u>
	Medicare	Medicaid	Other Public	Private Insurance	Private Pay	Totals			
Inpatient Revenue (\$)	33.8%	9.5%	0.0%	49.6%	7.1%	100.0%	144,829	Totals: Charity Care as % of Net Revenue 1.2%	
	2,996,117	846,737	0	4,397,247	629,589	8,869,690			
Outpatient Revenue (\$)	23.3%	7.2%	0.0%	66.5%	3.1%	100.0%	131,915		
	3,285,275	1,009,636	0	9,372,283	434,888	14,102,182			

<u>Birthing Data</u>		<u>Newborn Nursery Utilization</u>		<u>Organ Transplantation</u>	
Number of Total Births:	0	Level 1 Patient Days	0	Kidney:	0
Number of Live Births:	0	Level 2 Patient Days	0	Heart:	0
Birthing Rooms:	0	Level 2+ Patient Days	0	Lung:	0
Labor Rooms:	0	Total Nursery Patientdays	0	Heart/Lung:	0
Delivery Rooms:	0			Pancreas:	0
Labor-Delivery-Recovery Rooms:	0	<u>Laboratory Studies</u>		Liver:	0
Labor-Delivery-Recovery-Postpartum Rooms:	0	Inpatient Studies	10,031	Total:	0
C-Section Rooms:	0	Outpatient Studies	37,219		
CSections Performed:	0	Studies Performed Under Contract	5,400		

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## **A Tony Rezko timeline**

Last Modified: Nov 23, 2011 02:16AM

- Fall 2003-early 2004: Tony Rezko and Stuart Levine scheme to split a kickback off a \$50 million state pension deal.
- Early May 2004: Rezko used his influence to reappoint Levine to state pension board. Around this time, Rezko served as a fund-raiser on Barack Obama's Senate campaign finance committee.
- May 2004: FBI visits Stuart Levine at home after hearing criminal activity over a wiretap since April.
- June 2004: Sun-Times breaks story involving a shakedown scheme tied to the proposed Edward Hospital and a federal probe into Mercy Crystal Lake Hospital. The Mercy deal is later part of Rezko's indictment.
- Jan 2005: Sun-Times reports on a spat between Gov. Rod Blagojevich and his father-in-law, the powerful Ald. Dick Mell (33rd). Mell triggers a probe after charging in a Sun-Times story that Chris Kelly "trades appointments to commissions for checks for \$50,000" to the governor's political fund.
- March 2005: Blagojevich brags about his "testicular virility" in Mell battle and invites a probe into his administration, saying it is: "Clean as a hound's tooth."
- May 2005: Levine indicted in connection with state hospital board business. Feds make clear this is just the beginning.
- June 2005: In a controversial purchase, Rezko's wife, Rita, buys vacant lot same day Sen. Barack Obama buys abutting \$1.65 million home.
- Aug 2005: Levine indicted on Teachers Retirement System board charges.
- Early 2006: Levine secretly cooperates, wears wire.
- Sept. 2006: Rezko indicted in two separate cases while overseas.
- Sept. 2006: Levine pleads guilty to litany of crimes, working out a 67-month deal. The plea document exposes a dirty underworld involving a Who's Who of Illinois political players.
- Dec. 2007: Blagojevich aide Chris Kelly indicted on tax charges related to personal gambling debts.
- March 2008: Rezko trial begins.
- June 2008: Jury convicts Rezko.
- Summer 2008: Rezko begins cooperating with federal authorities.

Attachment 2

- Nov. 2008: Obama elected president.
  - Sept. 2009: Kelly commits suicide.
  - Aug. 2010: Blagojevich convicted of lying to FBI but jury deadlocks on all other counts.
  - June 27: In retrial, Blagojevich convicted on 17 counts.
  - Tuesday: Rezko sentenced to 10 1/2 years in prison.
  - Dec. 6: Blagojevich set to be sentenced.
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IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT  
McHENRY COUNTY, ILLINOIS

NORTHERN ILLINOIS MEDICAL  
CENTER, MEMORIAL MEDICAL  
CENTER, AND CENTEGRÁ HEALTH  
SYSTEM,

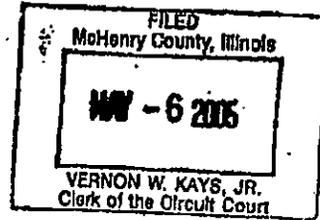
Plaintiff

vs.

ILLINOIS HEALTH FACILITIES  
PLANNING BOARD, ILLINOIS  
DEPARTMENT OF PUBLIC HEALTH,  
MERCY CRYSTAL LAKE HOSPITAL  
AND MEDICAL CENTER, INC.  
MERCY HEALTH SYSTEM  
CORPORATION, ELI L. BEEDING JR.  
AND THE BEEDING GROUP,

Defendants

CASE NO: 04 MR 106



COPY

MEMORANDUM OPINION AND ORDER

This cause came before the Court on Count I of the Complaint filed by the Plaintiffs' Northern Illinois Medical Center, Memorial Medical Center and Centegra Health System for Administrative Review of the Decision of Illinois Health Facilities Planning Board ("State Board") pursuant to 735 ILCS 5/3-110, 5/3-111 20 ILCS 3960/11. Plaintiffs seek reversal of the Administrative Decision of the State Board which granted a permit to the Mercy Crystal Lake Hospital and Medical Center, Inc. ("Mercy Hospital") to construct a new hospital in Crystal Lake. Plaintiffs contend that the State Board's actions in approving the issuance of the permit were against the manifest weight of the evidence and arbitrary and capricious, particularly in light of the negative reports of the Illinois Department of Public Health ("State Agency").

The Court has reviewed all the relevant pleadings, including Count I of the Complaint for Administrative Review, Plaintiffs' Motion to Reverse Administrative Decision, the Memorandum in support of said Motion, the Response of Mercy Hospital and Mercy Health System Corporation and Reply of Plaintiffs thereto. The Court has further reviewed the entire certified record of administrative proceedings which includes the Application for Permit, documents in support of the application, the State Agency reports, the Record of Public Hearing on September 29, 2003 and the transcripts of hearings before the State Board on December 17, 2003 and April 21, 2004, with corrections made at the June 15, 2004 State Board meeting. The Court has reviewed the case law cited by the parties in their written submissions and has had the benefit of the oral arguments of the attorneys for the Plaintiffs and Defendants.

## BACKGROUND

The Illinois Health Facilities Planning Act was instituted "to establish a procedure designed to reverse the trends of increasing in costs of health care resulting from unnecessary construction or modification of health care facilities ... and to improve the financial ability of the public to obtain necessary health services and to establish an orderly and comprehensive health care delivery system which will guarantee the availability of quality health care to the general public". 20 ILCS 3960/2 To that end, the Planning Act provided for the creation of a Board and defined its duties and functions. The powers and duties of the State Board include the prescribing of rules, regulations, standards, criteria and procedures to carry out the provisions of the Act. 20 ILCS 3960/12 The regulations and criteria are contained in Sections 1110 through 1260 of Title 77 of the Illinois Administrative Code. A health care facility cannot be modified or constructed unless the Board issues a permit. 20 ILCS 3060/5.1 In evaluating an application for

permit or Certificate of Need, the Board is assisted by Illinois Department of Public Health which serves as administrative and staff support for the Board. 20 ILCS 3960/4

On July 11, 2003, Mercy Hospital filed an Application for Certificate of Need (CON) with the Illinois Health Facilities Planning Board. The application requests a permit for establishment and construction of a new 70 bed hospital with adjacent office facilities for 45 physicians in Crystal Lake, Illinois. The proposed hospital would have 56 medical/surgical beds; 10 obstetrics beds and 4 intensive care beds. The hospital site is located within a MSA, known as area A-10. The initial application was deemed incomplete on July 24, 2003 and by letter of that date, additional information was requested. That information was provided on July 30, 2003, which included a listing of all hospitals within 45 minutes of the proposed facility.

A public hearing was conducted on September 29, 2003 in Crystal Lake, Illinois. In addition to persons associated with Mercy Hospital and its parent corporation, Mercy Health System, hundreds of interested persons testified or offered written submissions both in favor of and in opposition of the proposed project.

The Illinois Department of Public Health issued its initial report evaluating Mercy Hospital's application. The report found that overall, Mercy Hospital did not meet the review criteria of Illinois Administrative Code, Sections 1110 and 1120. The State Agency submitted its report to the Board on December 17, 2003 and the Board conducted a hearing on that same date. At the meeting the Board denied the application.

Thereafter, Mercy Hospital submitted additional information for the project to the State Agency and requested another hearing date before the State Board. A Supplemental Agency Report was prepared based on the new materials and submitted to the State Board at its April 21, 2004 meeting. The report did change some of its findings in the supplemental report dealing

with financial and economic considerations under Section 1120 of the Illinois Administrative Code. The evaluations pertaining to Section 1110 remained unchanged. At the Board meeting on April 21, 2004, the Board approved Mercy Hospital's application. The State Agency issued a letter on May 15, 2004 informing the applicant of the State Board's approval of the project.

On May 26, 2004, the Plaintiffs filed its Complaint for Administrative Review of the State Board's decision to grant the CON to Mercy Hospital. The Plaintiffs assert that the decision of the State Board should be reversed because (a) it is against the manifest weight of the evidence; (b) the issuance of the permit was arbitrary and capricious; (c) the vote of the Board on April 21<sup>st</sup> did not specify the action proposed and the Board did not make any findings; and, (d) the voting process was improper and evidence of arbitrary conduct.

## REVIEW OF THE BOARD'S DECISION

### A. MANIFEST WEIGHT OF THE EVIDENCE:

The Plaintiffs contend that the Decision of the Board to issue the permit to Mercy Hospital for the establishment and construction of a new hospital in Crystal Lake, Illinois was against the manifest weight of the evidence.

If factual findings are made by an administrative agency, they are viewed as prima facie correct and a reviewing court will not disturb those findings, unless they are contrary to the manifest weight of the evidence. BRIDGESTONE/FIRESTONE, INC. vs. DOHERTY, 305 Ill. App. 3d 141 (1999).

At the administrative hearing on April 21, 2004, no factual findings were made by the State Board. On May 14, 2004, the executive secretary of the Board issued a letter notifying Mercy Hospital that the State Board had approved the Application for Permit. That letter

indicated that Board based its approval upon the project's substantial conformance with the applicable standards and criteria of Part 1110 and 1120. It further stated that, "In arriving at a decision, the State Board considered the findings contained in the State Agency Report, the application material, the State Agency's Report of Public Hearing held on September 29, 2003 and any testimony made before the State Board".

The aforesaid letter does not set forth specific findings of fact. It does state the Board's conclusions and the basis therefore. Section 10 of the Planning Act does not require the Board to specify its findings of facts and conclusions unless negative action on an Application is taken. 20 ILCS 3960/10 In addition, Section 1130.680 of the Administrative Code requires the Board to specify its "finding of fact and conclusions of law" only when the Board denies an application.

ACCESS CENTER FOR HEALTH, LTD. Vs. HEALTH FACILITIES PLANNING BOARD.  
283 Ill App 3d 227 (1996).

In the case at bar, the State Board did not deny Mercy Hospital's Application for Permit or CON. Even if findings were necessary, that may not be enough for the trial court to reverse the Board's decision. If the record contains competent and sufficient evidence that supports the agency's decision, the decision should be affirmed. CATHEDRAL ROCK OF GRANITE CITY, INC. vs. ILLINOIS HEALTH FACILITIES PLANNING BOARD. 308 Ill App 3d 529 (1999).

An administrative agency's decision is against the weight of the evidence only if the opposite conclusion is clearly evident. The mere fact that the opposite conclusion is reasonable or that the reviewing court may have ruled differently does not justify reversal of an administrative decision. A trial court may not reweigh the evidence or make an independent

determination of the facts. ABRAHAMSON vs. ILLINOIS DEPARTMENT OF PROFESSIONAL REGULATION, 153 Ill. App 2d 76 (1992)

In order to approve and authorize the issuance of a permit if it finds the State Board must find that the proposed project is consistent with the orderly and economic development of such facilities and is in accord with standards, criteria or plans of need adopted and approved pursuant to provisions of Section 12 of 20 ILCS 3960.

Section 12 of the Illinois Health Facilities Planning Act authorizes the State Board to prescribe rules, regulations, criteria and procedures to carry out the purposes of the Act. That section further enumerates certain factors the Board shall consider in developing health care facility plans. Those factors include the number of existing and planned facilities offering similar programs, the extent of utilization of existing facilities, the availability of facilities which may serve as alternatives or substitutes and the availability of personnel necessary to operate the facility, 20 ILCS 3960/12(1) and (4).

Acting as an administrative and support arm of the State Board, the State Agency prepared two reports for the Board's review and consideration. Those reports consider the application and supporting documentation submitted. The State Agency evaluated Mercy Hospital's application with respect to financial and economic criteria set forth in Section 1120 of Title 77 of the Illinois Administrative Code and the general review criteria and needed related criteria set forth in Section 1110 of the Illinois Administrative Code 77 Illinois Adm. Code. The Administrative Code has the force and effect of law. MEDCAT LEASING CO. vs. WHITLEY, 253 Ill App 3<sup>rd</sup> 801 (1993).

The Agency report completed for submission to the State Board Hearing on December 17, 2003 found that the Mercy Hospital Application, was in conformity with three of the four

applicable economic feasibility criteria and that the financial feasibility criteria were not applicable. The Agency report found that aside from meeting the background of applicant criterion (1110.230), that Mercy Hospital met none of the other criteria under Section 1110, the general or need related criteria, including the criteria for a variance to bed need.

At the December 17, 2003 State Board Hearing, Mercy Hospital had various representatives present who presented testimony regarding the application and in response to questioning by Board members. Those present for Mercy were Javon Bea, President of Mercy Hospital; Richard Gruber, Vice President of Mercy Hospital; Dan Colby, President of mercy Harvard Hospital and three attorneys representing Mercy. The Board addressed concerns regarding the bed variance, the shortage of obstetrical beds in the M.S.A., the additional physicians that Mercy would bring to staff its proposed hospital and the impact of the hospital on staffing in other area hospitals. At the conclusion of the hearing, the State Board denied Mercy Hospital's application. No findings were made. However, before the Notice of Intent to Deny was sent on January 27, 2004, Mercy Hospital on January 15, 2004 sent a letter with supplemental information requesting leave to reappear before the Board at the February meeting.

After receipt of the supplemental information from Mercy Hospital, the State Agency issued another report for submission to the Board at its April 21, 2004 meeting. No hearing was held regarding Mercy's application between December 17 and the April 21<sup>st</sup> meeting. The report of the State Agency for the April hearing contained the same findings regarding the general criteria and needed related criteria; that being that except for applicant meeting the background criteria, Mercy Hospital did not meet the other 1110 criteria. The State Agency found that with the change in cost submitted by Mercy in the supplemental materials, Mercy now met all of the economic feasibility factors.

At the hearing on April 21, 2004 before the Board representatives of Mercy appeared as well as its legal counsel. With respect to bed need, Mercy Hospital had submitted data from the Center for Disease Control which indicated that 76% of the hospitals in the United States have less than 100 beds. Upon questioning, hospital personnel acknowledged that this study was not Illinois or McHenry County based but rather reflected nationwide statistics. Documentation regarding the decrease in average patient stays was discussed using 980 figures versus today. Testimony was received regarding the 45 new physicians Mercy would bring to the proposed hospital, which physicians would be in their employ. Mercy representatives opined that with these new doctors in place, patients who resided in the M.S.A. who sought treatment outside of the M.S.A. would return for care. There was discussion concerning the findings by the State Agency on the general criteria and need criteria not being met. Board member Levine believed that the rules were outdated and needed to be revised to reflect current data. He was particularly impressed with the 45 physicians who would be moving to McHenry County to staff the proposed hospital. At the conclusion of the hearing, the Board voted to approve the application and the motion passed. On May 14, 2003, a letter advising of the approval of the application for permit was sent to Mercy Hospital.

Plaintiffs assert that the decision of the State Board is against the manifest weight of the evidence because the proposed project was not in accordance with the standards, criteria or plans of need adopted and approved pursuant to the provisions of the Illinois Health Facilities Planning Act. In particular, the Plaintiffs direct the Court to the State Agency reports wherein it was noted that Mercy Hospital's proposed project was not in conformity with the general review criteria and need related criteria under Sections 1110 of the Illinois Administrative Code.

The Defendants counter Plaintiffs assertions by directing the Court to the standard of review and the discretionary authority the State Board has under 1130.660 of the Illinois Administrative Code. That provision states in pertinent part the follows:

"The State Board shall consider the application and any supplemental information or modification submitted by the applicant, IDPH report(s), the public hearing testimony, if any and other information coming before it in making its determination whether to approve the project. The applications are reviewed to determine compliance with review criteria enumerated in 77 Ill. Adm. Code 1110 and 1120. The failure of a project to meet one or more review criteria, as set forth in 77 Ill. Adm. Code 1110 and 1120 shall not prohibit the issuance of a permit."

The applicability of Section 1130.660 has been addressed in a number of cases, which cases have been cited by the parties herein. With the exception of the Court in SPRINGBOARD, the Courts have recognized that the State Board does have the authority to approve an application where one or more of the review criteria were not met. DIMENSIONS MEDICAL CENTER, LTD. vs. SUBURBAN ENDOSCOPY CENTER, 298 Ill App 3d 93 (1998). ACCESS CENTER FOR HEALTH LTD. vs. HEALTH FACILITIES PLANNING BOARD, 283 Ill App 3d 227 (1996), CATHEDRAL ROCK OF GRANITE CITY vs. ILLINOIS HEALTH FACILITIES PLANNING BOARD, 308 Ill. App 3d 529 (1999) and MARION HOSPITAL CORPORATION vs. ILLINOIS HEALTH PLANNING BOARD, FACILITIES SPRINGWOOD is distinguishable from the aforementioned cases because the Court did not consider the applicability of 1130.660 in that case. SPRINGWOOD ASSOCIATES vs. HEALTH FACILITIES PLANNING BOARD, 269 Ill App 3d 944 (1995).

However, in each of the cases where the Courts upheld the Board's decision to exercise its discretionary authority, the courts looked to the record to determine if there was adequate evidence to support the Board's decision. None of the cases cited by the Defendants have State

Agency Reports that found lack of conformity with essentially all of the need related and general criteria as in the case at bar.

The letter of May 14, 2004, issued on behalf of the State Board found substantial conformance with the applicable standards and criteria of part 1110 and 1120 based on its consideration of the findings contained in the State Agency reports, the application material, the report of public hearing on September 29, 2003 and any testimony made before the State Board.

At the public hearing the majority of those who testified were in opposition to the proposed project. Almost 2000 letters were submitted both in support of and in opposition to Mercy Hospital. More letters were in opposition. Many of the letters submitted were form letters used by supporters of Plaintiffs' and Defendants' respective positions. Some of the letters were from Mercy's website, which did not allow negative input.

The State Agency Reports submitted to the State Board for hearings on December 17, 2003 and April 21, 2004 found that the proposed project was not in conformity with the following general review and need related criteria: 110.320(a): Establishment of Additional Hospitals, 110.320(b); Allocation of Additional Beds, 1110.520(a); Unit Size; 1110.520(b); Variances to Bed Needs, 110.520(b)(2); Medically Underserved Variance, 1110.230(a); Location, 1110.230(c); Alternatives, 1110.230(d); Need for the Project, 1110.230(e); and Size of the Project. The project was in conformity with 1110.230(b), Background of Applicant, which provided that the applicants complied with the necessary licensure and certification information required and are fit, willing, able and have the necessary background to provide a proper standard of healthcare service for the community.

In response to the adverse reports of the State Agency, Mercy Hospital addressed the growing population trends in McHenry County, the shortage of physicians in McHenry County

and the changes in the practice of medicine that have reduced the average length of patient stays in hospitals. Mercy Hospital asserts that as a result of the decline in the patient length of stays, there is no longer a need for the requirement of 100 medical/surgical beds as established in 1980 and that only 67 beds are needed to serve the same number of patients.

Section 1110.320(2) of the Illinois Administrative Code requires that hospitals within a M.S.A. must have a minimum of 100 medical/surgical beds. Hospitals situated outside a M.S.A. do not have such a limitation. Mercy Hospital proposes 56 med/surg. beds with initially 32 of the entire 70 beds being built out and the remaining 38 being shells for later construction. The Defendant hospital did not identify how the 32 beds would be allocated. At the Board hearing of April 21, 2004, Mr. Glaser, on behalf of Mercy Hospital stated that all 70 beds would immediately be built out, contrary to the data in the application and earlier testimony. (R3541) (R.14) Section 1110.230.530(a)(1)(A) provides that a new obstetric unit with a M.S.A. must have 20 beds. Mercy proposal is for 10 obstetric beds.

Mercy Hospital submitted material based on average length of patient stays in 1980 to the present, claiming that 67 beds would now provide care for the same number of patients in a 100 bed facility in 1980. The documentation presented gives nationwide figures with no specific data for Illinois.

The 100 bed standard was established in 1992 and not 1980 and is applicable only to hospitals within a Metropolitan Statistical Area, such as the proposed location. Furthermore, according to the bed inventory data, the A-10 planning area (M.S.A.), where the proposed facility would be located, has 35 excess medical surgical beds and 7 excess ICU beds. Assuming that the present average length of patient stays reduces the need for beds, then the proposed additional beds at Mercy Hospital would only increase the surplus but also affect the target

utilization rates at neighboring hospitals, which is also taken into account under the need related criteria. Presently the hospitals in proximity to the proposed project are generally not operating at the State's target utilization rates.

The only shortage of beds in the M.S.A. is obstetrical beds, which shortage is 20 beds. Mercy's application proposes 10 obstetrical beds. Mercy Health System Corporation operates Mercy Harvard Hospital, which is within M.S.A. 10. Mercy Harvard Hospital closed its obstetrical unit approximately three years ago and has not reopened since Mercy acquired the hospital approximately two years ago.

There are located within planning Area 10 three hospitals which offer the same services as the proposed project. Two of these three hospitals are within 30 minutes of the proposed facility. These are Northern Illinois Medical Center in McHenry and Memorial Medical Center in Woodstock. The third hospital, Mercy Harvard is within 45 minutes of the proposed facility. Additionally, there are four other hospitals not within the planning area, but within 30 minutes of the site of Mercy Hospital. They are Advocate Good Shepherd, Barrington, St. Alexius Medical Center, Hoffman Estates, Sherman Hospital, Elgin and Provena St. Joseph Hospital in Elgin. Each of these health facilities offer the same services as the proposed hospital.

Defendant acknowledges the presence of these other hospitals and that Mercy will offer no services not already provided by these facilities. However, Mercy contends that with the growth of population within the county, the travel times will increase in the future and thereby increasing the travel times in excess of 30 minutes to those hospitals. The estimates of future travel times do not take in account road expansion projects which might be undertaken. The evidence on the travel times and future projections offered by the Defendant are in some instances inaccurate and other instances speculative.

Mercy opines that a significant percentage of patients are leaving the planning area for health care and that with the establishment of a new hospital, a good percentage of those patients will return to the area for treatment. Competent evidence is lacking to support this opinion. Evidence at the public hearing and elsewhere in the record shows that approximately 75% of the residents within zip code targeted area received care at existing hospitals and that other patients leaving the target area are doing so for specialized or tertiary care. It is also unclear if Mercy's opinion takes into account the services received at the hospitals located within 30 minutes but outside of area A-10.

The review criteria does provide for variance for bed need. 77 Ill. Adm. Code 1110.530(b)(2). In order to satisfy the variance to bed need requirements, Mercy Hospital had to document that access to the proposed service is restricted in the planning area by documenting at least one of the following: (i) the absence of service within the planning area; (ii) limitations on government funded or charity patients; (iii) restrictive admissions policies of existing providers; (iv) the area population and existing care system exhibits indicators of median care problems such as an average family income level below the state poverty level, high infant mortality or designation as a "Health Manpower Shortage Area"; or (v) the project will provide for a portion of the population who must currently travel over 45 minutes to receive service. Mercy Hospital was found to have documented none of the aforesaid criteria in order to receive a variance. Evidence presented showed that seven hospitals are within 45 minutes and all offer the same services Mercy will offer, if not more. Travel studies submitted by mercy were in some ways misleading as they included round trip travel times which is not the standard for review or were based on future projections. No evidence whatsoever was submitted to document items (i) through (iv).

Much was made by the Board at the April 21, 2003 hearing about the 45 physicians Mercy Hospital would bring to staff its hospital and adjacent offices. It is unclear from the evidence where these physicians will come from. However, Mercy did indicate that with the opening a new hospital, it would close three of its physician staffed facilities now located in and Cary and Crystal Lake. Board member, Mr. Levine, commented at the April 21<sup>st</sup> meeting how impressed he was that these new physicians would help make a dent in the shortage of physicians in the area. There was a chart provided showing a physician shortage in McHenry County. The underlying data for the information in the chart is unknown. While the Board addressed the shortage of physicians in the area, it appears not to have adequately considered the shortage of healthcare support staff. The evidence in the record reflects that there is a shortage of health care personnel needed to staff hospitals. There are not enough nurses, medical technicians and laboratory technicians to staff hospitals nationwide and in McHenry County. Testimony at the public hearing expressed a concern that the new hospital would not be able to adequately staff its facility and would have to recruit medical personnel from other area hospitals, thereby causing shortages of necessary and required staff in those facilities. Area hospitals have experienced staffing problems which have resulted in their not being able to maximize the use of their facilities.

The record further documents that the proposed hospital would adversely impact the utilization rates at hospitals within the M.S.A. and nearby. Mr. Ryder, of Advocate Health Care in Barrington testified at the public hearing that more than 25% of its patients are from the towns targeted by Mercy Hospital. A study submitted at the public hearing by Plaintiffs and prepared by Deloitte and Touche, at Plaintiff's instance concluded that Northern Illinois Medical Center and Memorial Medical Center, both in A-10 would lose approximately 9,500 cases annually.

Upon a review of the record, there is not sufficient and competent evidence supporting the State Board's decision to grant the issuance of the permit to Mercy Hospital. While the Board has the authority to issue a permit when all of the criteria under 1110 are not met, there needs to be some rationale basis to excuse compliance with the criteria. The record does not reflect that Mercy Hospital presented sufficient evidence showing that the proposed hospital facility was needed, was the most effective or least costly alternative and was in a medically underserved planning area. Sufficient evidence did not establish that the project warranted a variance to bed need.

Mercy Hospital's application did not meet the necessary general review and need related criteria and the factors set forth in 20 ILCS 3960/12. The written submissions and oral testimony did not rebut the Agency's findings that Mercy Hospital's application was not in conformity with the criteria set forth in 77 Ill. Adm. Code 1110. This Court finds that the State Board's decision is against the manifest weight of the evidence.

#### B. ARBITRARY AND CAPRICIOUS

The Plaintiffs also contend that the Board's decision was arbitrary and capricious. The Illinois Supreme Court in GREER vs. ILLINOIS HOUSING DEVELOPMENT AUTHORITY, 122 Ill 2d 462 (1988) set forth guidelines to be applied by the Court in determining whether the decision of an Agency is arbitrary and capricious. Those guidelines direct the Court to consider: 1. Did the Agency rely on factors the legislature did not intend the agency to consider; 2. Did the Agency fail to consider an important aspect of the problem, or 3. Did the Agency offer an explanation for its decision which runs counter to the evidence before the agency or which is so

implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The State Board in the case at bar excused the mercy Hospital's failure to comply with essentially all of the general and need related criteria. The only rationale for the Board's actions capable of being gleaned from the hearing on April 21<sup>st</sup> was that the rules and review criteria are outdated and that this new facility will help fill the shortage of physicians in the service area.

At that April Board meeting, Board members expressed concern about the Board's decision being termed "arbitrary and capricious" if it approved the Mercy Hospital Application for Permit in light of the State Agency's two reports showing non conformity with the 1110 criteria. In response thereto, Board member Stuart Levine stated that the rules and criteria are "woefully out of date". He further stated that he has participated in "a lot of applications that were granted that had complete negative findings. And those occurred in instances where there were valid reasons and justifications given in each of the areas that, of course, are in the Board's discretion to do". R 3264. Yet, Mr. Levine did not offer any explanation or justification for the Board's approval in the instant case, other than he was impressed with the 45 new physicians who would be coming to McHenry County and who would make a dent in the physician shortage.

The Board hearing on April 21 focused in large part on the new physicians who would be employed by Mercy Hospital. However, the rules governing the Board's decisions do not provide for criteria which address physician shortages. The documentation provided by Mercy regarding physician shortages was done by Solucient and is in the record at page 2913. The chart shows that Crystal Lake, the location of the proposed hospital, has no physician shortage. Lake in the Hills, Cary and Algonquin are the other target service areas. No data is provided for

physicians in Lake in the Hills. On Solucient's documentation, Cary and Algonquin do show physician shortages. The source for the data is not disclosed. Even with these claimed shortages, Mercy System Corporation is going to close its two physician offices in Crystal Lake and one in Cary.

Furthermore, while there may be a shortage of physicians in the area, the Board did not discuss and apparently did not consider the evidence in the record of the shortages of registered nurses, laboratory technicians and medical technologists in the area. The public hearing record is replete with testimony of medical personal on the shortage of such personnel. These personnel are needed to staff a hospital. Mercy Hospital offered no evidence where this staff would come from other than stating they would recruit medical personnel who worked outside of the area. Nothing in the record indicates a surplus of such personnel in other areas of the state. No evidence was presented on the number of resident medical personnel who worked outside of the M.S.A. or beyond the 30 minute travel time. Testimony at the public hearing showed a concern among McHenry County health care workers that Mercy would recruit staff from area facilities thereby affecting the viability of those hospitals.

Upon a review of the record, the Court finds that State Board relied on factors not intended by the legislature and that they failed to consider important aspects of the problem concerning the shortage of medical support staff and the impact the proposed hospital would have on the hospitals within the M.S.A. and within 30 minutes travel time. When the Board first denied the Mercy Hospital's application, it had information on the 45 new employee-physicians who would be at the physician offices adjacent to the hospital. Yet, at the April 21<sup>st</sup> meeting, the new physicians appeared to be the primary basis for the affirmative vote.

The Court finds that the actions of the State Board, in approving the application for permit for the Mercy Hospital project, was arbitrary and capricious.

### C. NECESSARY PARTIES

Plaintiffs contend that the decision should be reversed because the proper party was not joined as a party to the application. Particularly, Plaintiffs claim that Section 1130.220(b) of the Illinois Administrative Code requires that Mercy Health Systems Corporation be a co-applicant.

Section 1130.220 provides in pertinent part as follows:

"The following person(s) must be the applicant(s) for permit or exemption, as applicable:

(b)(3) any related person who is or will be financially responsible for guaranteeing or making payments on any debt related to the project."

It is undisputed that Mercy Health System falls within that classification and that they were not parties to the application. The State Agency Report, however, reflects that is considered that entity to be a co-applicant even though it wasn't. Documentation was submitted verifying the bond rating of Mercy Health System Corporation and other data was provided regarding its corporate structure and related entities.

The non inclusion of Mercy Health System as an applicant may have affected the economic review criteria under 1120.310(a). The State Agency found that Criterion 1120.310(a) was "not applicable as the applicant's document proof of an "A "bond rating". Mercy Health System should have been a party to the application for permit. However, the failure to include Mercy Health System Corporation as a co-applicant, standing alone, would not be a basis for a finding of the State Board's decision being against the manifest weight of the evidence.

#### D. THE VOTING PROCESS

The Plaintiffs claim that the voting process was improper by the Board not specifying the nature of the motion voted on and Board members engaging in off the record discussions. It is apparent from the record that the Board on motion knew that it was voting to approve the permit. While formality is lacking, the record reflects that in the other proceedings that day, which are part of the record the Board used the same methodology in voting.

While the off record comments by Board members may be irregular, they do not constitute ex parte communications. The Court can not attribute any significance to the off record comments in this review.

Based on a review of the record and for the foregoing reasons, the Court hereby finds that the Decision of the Illinois Health Planning Board to grant the issuance of the permit to Mercy Hospital and Mercy Health Systems was against the manifest weight of the evidence and arbitrary and capricious.

IT IS HEREBY ORDERED that the Decision of the Illinois Health Planning Board to issue a permit in Project No. 03-049 is reversed.

DATED: May 16, 2005

ENTERED

*Maureen P. McIntyre*

MAUREEN P. McINTYRE  
CIRCUIT JUDGE

## HEALTH FACILITIES PLANNING BOARD

## NOTICE OF ADOPTED AMENDMENTS

- 1) Heading of the Part: Processing, Classification Policies and Review Criteria
- 2) Code Citation: 77 Ill. Adm. Code 1110
- 3) 

<u>Section Numbers:</u>	<u>Adopted Action:</u>
1110.10	Amended
1110.30	Repealed
1110.40	Amended
1110.50	Repealed
1110.55	Repealed
1110.60	Repealed
1110.65	Repealed
1110.110	Repealed
1110.120	Repealed
1110.130	Amended
1110.210	Amended
1110.220	Repealed
1110.230	Amended
1110.234	New
1110.310	Repealed
1110.320	Repealed
1110.410	Repealed
1110.420	Repealed
1110.510	Repealed
1110.520	Repealed
1110.530	Amended
1110.610	Repealed
1110.620	Repealed
1110.630	Amended
1110.710	Repealed
1110.720	Repealed
1110.730	Amended
1110.1410	Repealed
1110.1420	Repealed
1110.1430	Amended
1110.1710	Repealed
1110.1720	Repealed
1110.1730	Amended
1110.2310	Repealed

## HEALTH FACILITIES PLANNING BOARD

## NOTICE OF ADOPTED AMENDMENTS

documentation as to how sufficient staff shall be obtained to operate the proposed project, in accordance with licensing requirements."

and replaced with:

"The applicant shall document that relevant clinical and professional staffing needs for the proposed project were considered; and licensure and JCAHO staffing requirements can be met. In addition, the applicant shall document that necessary staffing is available, by providing: letters of interest from prospective staff members; completed applications for employment; or a narrative explanation of how the proposed staffing will be achieved."

24. In Section 1110.530(f)(1), "75 beds" was changed to "100 beds", as the correction of a typographical error and the subsection was reformatted.
25. In Section 1110.530(f)(1)(E), the following language was deleted:
  - "E) New Hospital: The minimum bed capacity for the establishment of a new acute care hospital within an MSA, except for federally designated critical access hospitals, is 75 beds."
26. In Sections 1110.530(f), 1110.630(f), 1110.730(f), 1110.1430(f), 1110.1730(f), and 1110.2930(f), the following was deleted, since length-of-stay data is no longer relevant since reimbursement changed:
  - "2) Length of Stay
    - A) An applicant proposing to add beds to an existing acute care bed service (Med/Surg, OB, Pediatrics and ICU) shall document that the average length of stay (ALOS) for the subject service is consistent with the planning area's 3-year ALOS.
    - B) Documentation shall consist of the 3-year ALOS for all hospitals within the planning area, as reported in the Annual Hospital Questionnaire.
    - C) An applicant whose existing services have an ALOS exceeding 125% of the ALOS for area providers shall document that the