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July 23, 2013

BY FEDERAL EXPRESS

Michael Constantino  
Supervisor, Project Review Section  
Illinois Health Facilities and Services Review Board  
525 West Jefferson Street, 2<sup>nd</sup> Floor  
Springfield, IL 62761  
ATTN: Courtney R. Avery, Administrator

**Re: Opposition to Project No. 13-018**

Dear Ms. Avery:

We represent both Heritage Enterprises, Inc. (“Heritage”) and Petersen Health Care Companies (“Petersen”), and would like to thank the Illinois Health Facilities and Services Review Board (“HFSRB” or “Board”) for the opportunity to submit these substantive comments **in opposition** to Project 13-018 (“Project”), Luther Oak’s proposal to add a new 36-bed skilled nursing facility to its existing continuing care retirement community (“CCRC”).

The Project, as designed, reveals many issues we would implore the Board to consider in evaluating the Project. Doing so should result in the Board concluding the Project to be an unnecessary duplication of services that will adversely impact existing providers, the notable majority of whom are operating below the requisite State standards necessary to justify establishment of a new facility.

**The Project presents itself as if it were fulfilling the CCRC variance, but Luther Oaks is proposing an open admission facility.**

A substantial portion of the justification for the Project relates to the internal needs for skilled nursing services to serve existing residents on the Luther Oaks campus. Repeated reference is made to Luther Oaks having “referred approximately 19 of its residents off-site to other skilled nursing facilities” and to the benefits of providing “the full continuum of care to its existing residents on its campus.” See, e.g., Project Application, p. 63.

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Luther Oaks, whatever its reasoning, established itself in the Bloomington community as a CCRC to be a source of independent living and assisted living, but without offering skilled nursing care. Health care delivery in Health Service Area (“HSA”) 4 developed accordingly, with other providers establishing facilities to provide skilled nursing care. This Project threatens to adversely impact the balance established within this community.

HFSRB regulations related to the unnecessary duplication of facilities and the maldistribution of services require an applicant to document that “within 24 months after project completion,” the proposed project:

1. Will not lower the utilization of other area providers below the occupancy standards specified in Section 1125.210(c); and
2. Will not lower, to a further extent, the utilization of other area facilities that are currently (during the latest 12-month period) operating below the occupancy standards. 77 Ill. Admin. Code 1125.580.

It is impossible to present any such documentation, as the majority of other area facilities are operating below utilization standards, and the one facility being utilized above the 90% standard is precariously perched at 90.5%. Nevertheless, Luther Oaks’ Project Application does include a representation that “the project will not lower the utilization of other area facilities.” See Project Application, p. 163. This is not possible.

Luther Oaks primarily utilizes other area providers for its residents requiring skilled nursing care. As the Project Application reflects, last year 19 of its residents were referred for skilled nursing care, the notable majority to facilities within the area. If the Project is approved, Luther Oaks will no longer refer these patients to other area facilities and, as discussed more fully below, the vast majority of these facilities are operating below occupancy standards. Moreover, since the Project proposes to establish 36 skilled nursing beds, it is clear that the impact on existing facilities would be even greater than the loss of 19 annual referrals from Luther Oaks. If the Project were to be successful, the inevitable effect would be to further reduce the residents available to be served by already existing underutilized area facilities.

The narrative portions of the Project Application blur the line of whether this Project is truly a CCRC project; it is not. Despite the fact that the Project does not propose to utilize the continuum of care variance, which would justify its addressing only the internal needs of Luther Oaks, Luther Oaks extols the virtues of the Project as if it were addressing the continuum of care variance requirements. Section 1125.560 of the Code, in relevant portion, provides:

The proposal shall be for the purposes of and serve only the residents of the housing complex and shall be developed either after the housing complex has been established or as a part of a total housing construction program, provided that the entire complex is one inseparable project, that

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there is a documented demand for the housing, and that the licensed beds will not be built first, but will be built concurrently with or after the residential units.

77 Ill. Admin. Code 1125.560(a)(2). Any project designed solely to meet the needs of Luther Oaks would be smaller in its scope. Nineteen annual referrals cannot sustain an independent nursing facility. Moreover, a project designed to meet the needs of Luther Oaks would inherently minimize the adverse impact on other area providers because the “admissions to the LTC unit will be limited to current residents of the independent living units and/or congregate housing.” 77 Ill. Admin. Code 1125.560(a)(3)(C). No such limitation is proposed.

Nevertheless, the narrative description continues to describe the project as a CCRC, including representations such as “twenty of the proposed skilled nursing beds will be dedicated to serving Luther Oaks’ long-term care patients. . . .” Project Application, p. 63. The Project is described as being designed to address various “problems” including establishing nursing beds “so that residents of Luther Oaks can receive the full continuum of care in their community.” Project Application, p. 64. The Project Application describes the Project allowing “Luther Oaks to provide skilled nursing care to residents of its assisted living and independent living units.” Project Application, p. 64. Multiple references are made throughout the Project materials to Luther Oaks providing services to “residents of its community” without ever clarifying whether the reference is to members of the CCRC or the community at large. Virtually every letter of support<sup>1</sup> appended to the Project Application references “completing the continuum of care” or providing Luther Oaks’ residents “a full continuum of care.” Project Application, pp. 178-190.

The Project Application materials reveal that the proposed facility would be an open admission facility that will not be “dedicated” to service Luther Oaks’ residents. In evaluating the Project Application, the Board should inquire as to what plans Luther Oaks has in place to ensure that the facility is available for the benefit of existing residents of the CCRC. Are there agreements in place that will afford preference to existing residents of the CCRC over other residents of community? If there are specific portions of the facility designated for existing residents of the CCRC, this should be clearly delineated and addressed before the Board. This information will be necessary in evaluating what real benefit the Project might have for the community and what impact the proposed facility would have on existing providers.

**A meaningful analysis of alternative options should be performed, if not by Luther Oaks, then by the Board.**

It would be worthwhile for the Board to inquire and to understand why, in identifying available alternatives (as is required by 77 Ill. Admin. Code 1125.330), the option of a smaller

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<sup>1</sup> It is worth noting that the Project Application utilizes almost exclusively form letters to illustrate its support, as well as form letters to demonstrate potential patient referrals.

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facility designed and dedicated to serve the needs of the CCRC was neither identified as an option nor considered by Luther Oaks. The identification and evaluation of “alternatives” seems to have been given only a cursory evaluation. Project Application, pp. 83-87. Luther Oaks raised the notion of undertaking a project of lesser scope and dismissed it because “36 beds is needed to support the overall costs of the Project.” Project Application, p. 83. There is no evidence of Luther Oaks performing an assessment into the potential for modifying the overall cost of the Project rather than utilizing the substantial cost to justify the proposed scope of the Project.

The analysis claims that “one of the primary purposes of the project is to provide a continuum of care for the residents on the Luther Oaks existing campus.” Project Application p. 84. Again, we see the Project being described as a fulfilling CCRC variance requirements, rather than addressing the needs of the community (which is the relevant analysis for an open admission facility). There is no mention of any discussions, efforts, or analyses regarding the pursuit of a joint venture. Rather, a joint venture seems to have been simply dismissed out of hand.

In dismissing the possibility of utilizing of other existing health care resources, Luther Oaks focused upon its internal needs and its preferences for healthcare delivery, rather than the needs of the community at large. While a person-centered care model may offer various benefits, there is no reason to believe it could not be achieved (or may not already be available) at other facilities. Just as Luther Oaks failed to meaningfully analyze the possibility of a joint venture, so too was the potential for better use of existing facilities ceremoniously dismissed as an option without being meaningfully evaluated. Certainly, had it been, Luther Oaks would have referenced Heritage having recently added 43 private suites to accommodate the market (19 at its Bloomington facility and 24 at its Normal facility) or addressed the capacity of other existing facilities to make similar modifications.

The capacity for existing facilities to address any need reveals an additional alternative that Luther Oaks did not take into consideration. Even if the projected need of 188 beds were accurate,<sup>2</sup> given the notable volume of existing beds in HSA 4, 188 beds reflects a volume that could easily be added through mere expansion of existing facilities in a way that would not require HFSRB approval. *See* 20 ILCS 3960/5(c) (requiring a permit for “changes the bed capacity of a health care facility by increasing the total number of beds . . . by more than 20 beds or more than 10% of total bed capacity as defined by the State Board, whichever is less, over a 2 year period”). Simply considering the 1,118 existing beds in McLean County, it would be possible to add over 100 beds to existing facilities and, again in two years, add 110 more. Luther Oaks never evaluated whether any purported need could be met by better utilization and expansion of existing facilities. Moreover, even if the Board were to approve the Project,

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<sup>2</sup> The inaccuracy of the 188-bed projection is addressed more fully below.

nothing would prohibit these facilities from adding these 210 beds in the coming two years, which would result in the area being notably over-bedded. Before approving this Project, the Board or the applicant should perform an evaluation of what capacity exists for area facilities to expand to meet any future need.

**Questions should be presented regarding the conditional referrals presented by Luther Oaks.**

As revealed by the referral letter from OSF St. Joseph Medical Center (Project Application, p. 107), the largest portion of estimated referrals are conditioned upon Luther Oaks maintaining a certain overall “Star Rating.” This is a condition reasonably outside the control of the facility. It seems likely that this is a condition that has been agreed to so as to facilitate allowing Luther Oaks to participate as part of an established accountable care organization (“ACO”).<sup>3</sup> However, no such agreement is referenced in the Project Application, nor is a copy provided in the accompanying documents. Again, it is worthwhile for the Board to inquire as to the terms of any agreement entered into on behalf of this proposed facility and, specifically, whether any preferential treatment will be afforded to referrals from these entities.

**Existing facilities within the HSA 4 are notably underutilized.**

Luther Oaks acknowledges that “overall occupancy in the area is below 90%,” but seeks to minimize the import of this criteria by focusing on a patient preference for private rooms and by utilizing a “weighted average occupancy” (which is not a standard reflected in the Board’s regulations). Moreover, Luther Oaks acknowledges that “the occupancy at the existing facilities within the 30 minute drive time of Luther Oaks has improved dramatically over the past two years.” Project Application, p. 112. This statement is provided without any basis to believe this trend will continue or acknowledgement that the majority of facilities remain underutilized.

By facility, the most recent Long-Term Care Profile data reveals that the facilities referenced in the Project Application possess the following occupancy percentages:

- 60.1%
- 70.3%
- 59.9%
- 80.4%
- 51.9%
- 87.8%
- 68.4%
- 90.5%
- 36.2%
- 81.4%
- 81.8%
- 89.5%
- 73.8%
- 85.7%
- 85.5%
- 62.1%

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<sup>3</sup> Luther Oaks presents being able to decrease readmissions to the hospital as a justification for this Project. In reality, this is reflective of hospitals being penalized for readmissions as part of the ACO reimbursement model. Critics of this model question whether penalizing re-hospitalization truly yields improved care or simply discourages readmitting residents in need of more acute care.

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This reflects only 1 out of 20 facilities meeting the Board's target utilization standard to allow for or justify the establishment of a new facility. Moreover, most of the facilities possessing higher utilization rates provide a significant amount of care to Medicaid residents. The Project only proposes to certify 6 of the 36 beds for use by Medicaid residents. The Project seems more designed to serve private pay and Medicare residents, raising the question of whether a new facility entering this marketplace should be required to exhibit the commitment to Medicaid reflected by other providers and needed within the community.

Fully understanding that the Board evaluates need and utilization by HSA and not by the market defined by an individual facility, Heritage and Petersen performed an informal survey of existing facilities to evaluate current utilization in the Bloomington market. Inquiry into only 9 facilities revealed a current complement of **185 open beds** not currently being utilized for patient care. Among these facilities surveyed are multiple facilities that Luther Oaks currently refers its residents to (see Project Application, p. 102), further undermining any claim that the Project would not further reduce the utilization of already underutilized facilities.

**The purported bed need is rooted in calculations that no longer reflect the statutory demand of the Planning Act.**

The lynchpin holding the Project Application together is the purported need for 188 long-term nursing care beds in McLean County. Constant reference is made to the need for 188 beds to justify various shortcomings of the Project. Absent this need, there would be no basis by which to justify this proposal. However, the projection of need for 188 beds does not reflect the need today – or even tomorrow. Rather, it reflects a projected need for 2018 – a projection that was made in 2008. The projection Luther Oaks is utilizing to exhibit a need for a new facility is a leftover ten-year projection that grossly exaggerates the eventual need for care. It was the inaccuracy of these projections that contributed to recent statutory changes to the Illinois Health Facilities Planning Act, adding Section 12.5, effective 8-27-12, and providing the following, as of yet, unfulfilled mandate:

**Update existing bed inventory and associated bed need projections.**

While the Task Force on Health Planning Reform will make long-term recommendations related to the method and formula for calculating the bed inventory and associated bed need projections, there is a current need for the bed inventory to be updated prior to the issuance of the recommendations of the Task Force. Therefore, the State Agency shall immediately update the existing bed inventory and associated bed need projections required by Sections 12 and 12.3 of this Act, using the most recently published historical utilization data, 5-year population projections, and an appropriate migration factor for the medical-surgical and pediatric category of service which shall be no less than 50%. The State Agency shall provide written documentation providing the

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methodology and rationale used to determine the appropriate migration factor.

20 ILCS 3960/12.5 This revised bed projection has not yet been completed. The Board should be wary in evaluating and certainly in approving any project based upon these inflated assessments of need that are inconsistent with the recent statutory instructions to the Board from the Illinois legislature.

Nevertheless, the Board needs to consider the need of the HSA as a whole, not just the purported need of McLean County. Even with this exaggerated need determination, the overall conclusion is that HSA 4 has an excess of 134 beds. Need is calculated by HSA, not by individual community. The overall excess of beds in this HSA is only likely to increase once more appropriate need calculations are performed. Moreover, the lack of need is clearly reflected in the amassing of underutilized facilities (19 out of 20) in both the immediate area of the proposed Project and throughout the HSA.

**The proposed financing of the Project warrants discussion and explanation.**

It will undoubtedly be reflected in the staff report that there are multiple aspects of the financial ratios that the proposed applicants and the Project fail to meet. The specifics of this analysis will be performed by the Board staff. One specific detail that seemed worthy of note was the determination to utilize an adjustable rate mortgage to finance the vast majority of the Project. The description contained within the Project Application reflects that Luther Oaks anticipates obtaining “a 30-year loan of \$9,100,000 with an initial fixed rate of interest between 2 and 7 percent, which would be reset every 5 years.” Project Application, p. 235. Given the recent issues the Board has experienced in projects being unable to obtain and maintain financing, and given the notable latitude in the financing being discussed, it would be worthwhile for the Board to obtain additional clarity regarding intended financing of the Project.

**The Project is “seeking a zoning variance” which means, even if approved, the Project could be impossible to complete.**

Despite the statement that “Luther Oaks does not anticipate any issues in obtaining a new special use permit,” it would be sensible for the Board to evaluate this aspect of the Project. Luther Oaks recounts that it has obtained such zoning changes before, but prior success with governmental regulatory processes is not necessarily an indicator of future success. Perhaps the Board could obtain some verification from the relevant zoning board as to the likelihood of success or, alternatively, Luther Oaks could address whether or not an application for variance has even yet been prepared and/or submitted.

We appreciate that there is a purported need for beds in HSA 4. However, the need assessment is outdated and inconsistent with the recent statutory direction provided by the legislature. Given the Board’s goal of orderly and economic development, we request that the

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Board properly evaluate the scope and cause behind the underutilization of existing facilities. Such notable capacity at existing facilities could be seen as an indicator that it would be worthwhile to reevaluate the Project after a proper assessment has been made of the need in HSA 4. Given the overwhelming majority of facilities being underutilized, it would be irresponsible to approve the establishment of a new facility. Alternatively, if the goal of Luther Oaks is to meet the needs of its current CCRC residents, it should submit an application utilizing the continuum of care variance. Otherwise, the Project needs to be considered as would any other open admission facility and, given the evidence available, there is ample reason to deny the Project. Accordingly, Heritage and Petersen request that the Board seek the appropriate clarification from Luther Oaks of the issues raised herein, request the necessary documentation to address those concerns, and assess these issues in evaluating Project No. 13-018.

Best regards,

A handwritten signature in black ink, appearing to read 'Mark J. Silberman', with a large, sweeping flourish extending to the left.

Mark J. Silberman