

MARK J. SILBERMAN  
DIRECT DIAL: 312.499.6713  
PERSONAL FAX: +1 312 277 6957  
E-MAIL: MJSilberman@duanemorris.com

www.duanemorris.com

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August 2, 2013

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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: Comments in Response to State Board Staff Report for Project No. 13-018,  
Luther Oaks, Inc.**

Dear Ms. Avery:

Heritage Enterprises, Inc. (“Heritage”) and Petersen Health Care Companies (“Petersen”) would like to jointly present the following comments in response to the State Board Staff Report for Project 13-018 (the “Project”) as prepared by the staff for the Illinois Health Facilities and Services Review Board (“HFSRB” or “Board”). We commend the staff for its efforts and for its presentation of the conclusion that the Project does **not** appear to be in conformance with the provisions of Part 1125. These substantive comments are submitted for the Board’s consideration and evaluation of the Project and should be accepted as being **in opposition** to Project 13-018, Luther Oak’s proposal to add a new 36-bed skilled nursing facility to its existing continuing care retirement community (“CCRC”).

It is important for the Board to consider the aspects of this application that fail to meet the criteria established by HFSRB regulations. Specifically, the Staff Report reflects that the Project is deficient in the following areas:

- Service Accessibility (Are these services already available?);
- Unnecessary Duplication/Maldistribution (Are there underutilized facilities, thus existing capacity, in the HSA?);
- Financial Feasibility (Does the Project conform to the Board’s established financial standards?); and
- Reasonableness of Project Costs (Does the Project, as designed, cost too much?).

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However, the Executive Summary of the Staff Report (p. 4-5) fails to reflect that the Project **also failed to meet the Criterion for Impact of Project on Area Providers**. This is correctly reflected on p. 13-14 of the Staff Report. This is an important correction because the inevitable impact on other area providers is one of the most significant factors to consider in evaluating the Project.

The Board must acknowledge the fact that **there is not a single facility within 30 minutes of the Luther Oaks campus that meets the Board's utilization standard to justify establishing a new facility**. It is difficult to imagine what reasoning the Board could present to justify establishing a new facility when every single facility within 30 minutes has existing capacity to take on additional residents. The 13 facilities identified in Table 1 of the Staff Report, p. 3, represent 1,376 skilled care beds. Given the average occupancy percentage of 71.01%, as identified on p. 7 of the Staff Report, this translates to there being **399 unoccupied beds within 30 minutes** of the proposed facility. Even if this Board were to disregard the current statutory mandate to convert to a five-year projection of need, it is premature to address a purported need for 188 beds in 2018 when there are nearly 400 unutilized beds within 30 minutes of Luther Oaks. The Executive Summary, p. 3, reflects comments from an attorney claiming that "it is occasionally difficult to find a room for elderly persons." However, the Board's own data showing there to be hundreds of unutilized beds undermines this claim.

It is undeniable that the addition of a brand new facility boasting a compliment of 36 new beds would further exacerbate the underutilization of existing facilities. It would result in the unnecessary duplication of services, exacerbate already existing issues of maldistribution, and adversely affect the existing providers in the immediate area. Approving the Project would be inconsistent with the Board's responsibility to ensure the "orderly and economic" development of healthcare in Illinois.

**There Are Several Areas Where Issues Exist  
Despite Technical Conformance With Board Criteria**

Just because an aspect of a project is in conformance with the Board's criteria does not mean the Board should not evaluate the information presented by the applicant. There are areas where compliance only requires presentation of any information or there are no criteria by which the Board staff can evaluate compliance. The following areas warrant specific attention of the Board in evaluating this Project.

**Alternatives**

The Staff Report concludes that the Project complies with the criterion addressing alternatives to the Project. However, the only technical requirement for complying with this criterion is to identify alternatives that were considered and dismissed. It remains, however, **the responsibility of the Board to evaluate: (1) if all legitimate alternatives have been considered; and (2) if the alternatives identified were sufficiently considered**. Comments

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previously submitted in opposition to the Project clearly demonstrated that there are other alternatives that should have been considered and were not.

The Executive Summary, p. 2, reflects that the purposes of the Project are: (1) to allow Luther Oaks to provide a full continuum of care; (2) to provide a person-centered care model; and (3) address a predicted bed need in 2018. Both options 1 and 2 could have been addressed by a smaller facility designed to serve only the Luther Oaks community utilizing the continuum of care variance. No such alternative seems to have been considered, evaluated, or presented.

As for meeting the need for beds in 2018, even if the Board accepted the inflated 10-year prediction of need, there is no consideration of the fact that basic expansion of existing facilities could meet the entire 188-bed need. The thirteen facilities within 30 minutes of Luther Oaks could add over 140 beds before the Project, if approved, were operational, and could do so without ever triggering the need for HFSRB review. Therefore, any contention that these 36 beds are integral to meeting the purported need for 188-beds in 2018 simply cannot be sustained.

**The Financing, Zoning, and Referrals for this Project  
are Sufficiently Tenuous To Warrant Further Examination by the Board**

These comments are not intended to suggest that the Project, if approved, could not obtain financing, will not obtain the necessary zoning variances, or would not be referred patients. Given the substantial uncertainty, detailed below, the Board should obtain clarity about the accuracy of Luther Oaks' representations regarding financing, zoning, and patient referrals before considering the Project.

**Financing**

After the public comment period for this application, Luther Oaks submitted three different documents to the Board staff regarding the potential financing for the Project. The first is a loan commitment letter for \$8,900,00 from the Mission Investment Fund. It has various requirements, including that Lutheran Life Ministries, a co-applicant, maintain a significant cash investment. There is no indication that this cash commitment has been evaluated by Board staff to determine any effect on the applicants compliance with established financial review criteria. Moreover, it is an adjustable loan, making the real cost impossible for the Board to evaluate.

Finally, and most importantly, this proposal reflects a mortgage in the amount of \$8,900,000 while the application itself describes a mortgage of \$9,100,000. **This change would constitute an alteration or modification** of the Project (depending on whether the change takes place prior to or subsequent to approval by the Board) and is inconsistent with the description provided in the application materials. Luther Oaks makes an effort to address the proposed difference in financing by submitting a commitment letter for additional financing from co-applicant Lutheran Life Ministries. However, Lutheran Life Ministries willingness to dedicate more finances to the Project does not address the issue of modifying or altering the application in

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violation of the Board's rules. Furthermore, there is again no indication that this further commitment of cash has been evaluated by the Board staff. These circumstances warrant further explanation when Luther Oaks appears before the Board to facilitate the Board properly evaluating the financing envisioned.

Luther Oaks also submitted an alternative proposal that involved obtaining \$9,100,000 in financing from Wintrust. This second proposal involves another adjustable rate mortgage and does not appear to include a commitment of financing. Interestingly, letters accompanying both financing proposals mention that "the applicants are still in the process of evaluating other financing options...." This language, and the existence of already competing options being considered, makes it unclear how the Board staff was able to conclude that the application is in conformance with Criterion 1125.800(b) – Conditions of Debt Financing. This criterion requires an applicant to "**certify that the selected form of debt financing the project will be at the lowest net costs available....**" Staff Report, p. 20. How is it that Luther Oaks could have made such a certification and how could the Staff Report reflect the conclusion that this criteria has been met? The ongoing uncertainty in the actual or potential financing to be obtained warrants further evaluation and substantial scrutiny by the Board.

### Zoning

Strict compliance with the regulations only requires that an applicant plans to obtain a zoning variance, thus there is no basis by which to quarrel with the Board staff's evaluation that the Project is in conformance with this criteria. However, this does not mean the questionable zoning is not an issue the Board should be certain and careful to evaluate. Other projects have appeared before the Board confident in their ability to obtain zoning variances only to find themselves unable to obtain the necessary approvals. This creates the potential that the Project would become impossible to complete which would undermine all of the purposes the Project purports to fulfill. The land is already owned by applicants. There is no discernible reason why the necessary zoning variances have not already been obtained or should not be obtained prior to the consideration of this application. At a minimum, the applicant should be questioned as to why the necessary variance has not yet been sought.

### Referrals

At one point, the Staff Report incorrectly states that there is a commitment to refer 1,100 individuals to the facility on an annual basis (addressed more fully below). Elsewhere, the Staff Report correctly describes that attached referral letters denote the potential referral of approximately 280 residents to the facility. However, nowhere does the Staff Report address the **conditional nature of the vast majority of these referrals**. If you discount the referrals which are contingent upon the facility maintaining a four-star rating (something 10 of the 13 facilities within 30 minutes have been unable to do despite being quality facilities providing quality care) the appended referral letters only represent 58-76 referrals per year. This is certainly not enough

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to justify establishing a brand new 36-bed facility, even if you factor in Luther Oaks' historical 19 annual referrals.

This further highlights the lack of need because even with these 1,100 referrals already going to other facilities in the area, not a single facility is being utilized enough to justify creation of a new facility. Serious consideration is warranted as to the existence of patients to be referred to this proposed facility. Otherwise, the likelihood is that approving the Project will result in simply adding a 14<sup>th</sup> underutilized facility to the immediate area.

**There Are Several Technical Errors  
in the Staff Report Warranting Correction**

On page 2 of the Executive Summary, it inadvertently states that "all of the providers of the LTC services in a 30-minute drive radius are operating at the 90% target occupancy" when, in fact, **none** of the 13 providers within a 30-minute drive radius are operating at the 90% target occupancy.

On page 3 of the Executive Summary, it incorrectly states that "applicants have had no adverse actions" when, as correctly noted on page 10 of the Staff Report, **one adverse action** has been reported against an applicant-owned facility.

On page 4 of the Executive Summary, the Conclusion reads that the applicants addressed a total of 20 criteria and did not meet the following three criteria. The Staff Report should be corrected to reflect that the applicants **did not meet the following five (5) criteria**, and the Project's failure to meet the criterion for Impact of Project on Area providers should be added.

On page 12 of the Staff Report it states that "the applicants provided 7 referral letters from physicians indicating that they would refer approximately 1,100 individuals to the proposed facility annually." This is incorrect, but is correctly reflected on page 11 where it references referral letters "having referred approximately **1,100 patients to other facilities** in the area, and projecting to refer approximately 280 residents to the facility within 24 months of project completion."

On page 14 reference is made to staff being available for "the replacement facility" where the Project proposes the establishment of a brand new open-admission facility.

**Conclusion**

The justification Luther Oaks presented to support the conclusion that the Project meets the criterion related to Service to Planning Area Residents, 1125.530, is that the "proposed project will serve as a continuum of care for those residents at the existing senior care campus...." If that is truly Luther Oaks' desired goal, then the Project should be proposed utilizing the continuum of care variance and occupancy should be limited to existing members of

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the Luther Oaks community. However, this is not what is being proposed. The Project **proposes establishing an open-admission facility to serve a community in which there is not a single facility operating at the mandated 90% target utilization rate (the utilization threshold to justify creating a new facility).**

Approval of the Project would adversely affect existing facilities. Not only would existing referrals be lost, but so too would numerous others, thereby exacerbating the existing utilization problems at every area facility. **The Project fails to meet the criteria justifying the need for the facility and it fails to meet the economic review criteria for establishment of a facility.** The most likely arguments from the applicant will focus on completing the continuum of care at Luther Oaks and the inflated prediction for needing more beds in 2018. However, both of these needs can be met without establishing an unnecessary new facility in a community where every facility is struggling to keep its census up. It may not be the Board's responsibility to project any one facility's market share, but it is the responsibility of the Board to avoid unnecessary duplication of services in an already underutilized community.

There is no question that the Board is afforded discretion in reviewing and considering applications, but there is simply no basis by which to justify the approval of the Project. Accordingly, Heritage and Petersen respectfully request that the Board take into consideration the issues raised herein in evaluating and denying Project No. 13-018.

Best regards,



Mark J. Silberman