



STATE OF ILLINOIS  
HEALTH FACILITIES AND SERVICES REVIEW BOARD

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<b>DOCKET NO:</b> H-01	<b>BOARD MEETING:</b> September 22, 2020	<b>PROJECT NO:</b> 19-022	<b>PROJECT COST:</b>
<b>FACILITY NAME:</b> Austin Dialysis at Loretto		<b>CITY:</b> Chicago	Original: \$1,961,169
<b>TYPE OF PROJECT:</b> Substantive			<b>HSA:</b> VI

**PROJECT DESCRIPTION:** The Applicants (Loretto Hospital and Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto) propose a 12-station ESRD facility in 2,750 GSF of modernized space on the campus of Loretto Hospital in Chicago, Illinois. The cost of the project is \$1,961,169 and the expected completion date is December 31, 2021.

## EXECUTIVE SUMMARY

### PROJECT DESCRIPTION:

- The Applicants (Loretto Hospital and Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto) propose to establish a 12-station ESRD facility in 2,750 GSF of leased space on the campus of Loretto Hospital, 645 South Central Avenue, Chicago, Illinois. The cost of the project is \$1,961,169 and the expected completion date is December 31, 2021. Although the facility will be housed in Loretto Hospital, it will function as an outpatient care facility, and will seek licensure, accreditation, and Medicare certification as a freestanding facility.
- Dr. Sameer Suhail, M.D. is the sole owner of Austin Dialysis Center, LLC. Austin Dialysis Center, LLC will be responsible for operations of the ESRD. Loretto Hospital will waive the rental lease payments for the first two years with a value of \$167,750. Should the Board approve this project Loretto Hospital will acquire 49% of Austin Dialysis Center, LLC.
- On February 25, 2020 this Application for Permit was granted a **Board deferral** in order to add a co-applicant. (See Transcript at the end of this report).
- On March 9, 2020 the State Board received notice that Dr. Kosuri withdrew as Medical Director for the proposed project. As of the date of this report a medical director has not been identified by the Applicants. The Applicants provided a letter from **MPG Physician Group** signed by the Chief Medical Officer Maria Elena Iliescu-Levine, M.D. *“declaring their commitment to recruiting and engaging a nephrologist, either as an employee of our group practice or as an independent contractor, who will provide services through our group practice and oversee the development of the Applicant’s in-center hemodialysis center as its medical director, directly treat patients in need of both inpatient and outpatient dialysis care, and work to expand the service line as demand grows based on Loretto Hospital’s expectations.”* This letter is included in the additional information at the end of this report.
- On August 3, 2020 the Applicants submitted additional information to the State Board. No co-applicant was identified (See this additional information provided at the end of this report).
- The Applicants are justifying the proposed project based upon the number of acute inpatient dialysis patients that receive care while they are residents at Loretto Hospital. The Applicants stated the following:

*“Specifically, the data provided by the Applicant identifies the number of inpatients treated each year since 2017 who received hospital-based dialysis treatments. In many cases, these patients did not have a nephrologist to oversee their ESRD care. Thus, for the present application on file with the State Board, for the purpose of justifying need for the proposed ESRD Facility, the Applicant did not count patients who had already established a doctor-patient relationship with a nephrologist outside of the hospital. The Applicant’s intent was to ensure that the project would not adversely affect existing dialysis providers in the geographic service area. As a result, the data used to justify need for the proposed ESRD Facility only relies upon historical patient numbers where the hospital determined that the patients had not already chosen a nephrologist and who were in immediate need for dialysis treatments. Thus, the data submitted with Dr. Kosuri’s letter remains as the basis to justify need for this permit application. In sum, in regard to projected referrals for this Application, the Applicant reviewed the hospital’s historic data, focusing solely on patients identified as pre-ESRD, and made a projection based on several factors, including: (1) the three-year trend of total patients receiving inpatient dialysis treatments; (2) the loss of patients due to a group of nephrologists ending its hospital affiliation in 2019; and (3) the ability to recapture patient referrals to outside providers upon the addition of one or more nephrologists following permit approval.”*
- **Board Staff Notes:** Board Rules require physician referral letters with the number of historic ESRD patients by zip code of residence for the prior 3-years and the number of projected ESRD patients by zip code of residence that would require outpatient dialysis within 2-years

after project completion. The Applicants do not meet this requirement and the Board Staff could not determine if the proposed project will serve the residents of the GSA or the demand for the proposed 12-stations in this GSA.

**PUBLIC HEARING/COMMENT:**

- A public hearing was offered regarding the proposed project, but none was requested. Five letters of support were received, and one letter of opposition was received:
  - Donald Dew, President/CEO Habilitative Systems, Inc. (support)
  - Melody Lewis, Executive Director, Austin Chamber of Commerce (support)
  - Camille Lilly, State Representative, 78<sup>th</sup> District (support)
  - LaShawn Ford, State Representative, 8<sup>th</sup> District (support)
  - Kimberly Lightford, State Senator, 4<sup>th</sup> District (support)
  - Hamid Humayun M.D. CEO & Medical Director, Maple Avenue Kidney Center (oppose)

**SUMMARY:**

- There is a calculated need for 66 ESRD stations in the City of Chicago (HSA VI ESRD Planning Area) as of July 2020. The GSA for the proposed facility is a 5-mile radius that has a population estimate of 1,353,395 residents. Currently, there are a total of 15 ESRD facilities with 340 stations in this 5-mile GSA. Of these 15 ESRD facilities only five ESRD facilities are at target occupancy. No referral letters have been submitted as required.
- The Applicants addressed a total of 22 criteria and did not meet the following:

<b>State Board Standards Not Met</b>	
<b>Criteria</b>	<b>Reasons for Non-Compliance</b>
77 ILAC 1110.230 (b) (2) (3) (5) - Planning Area Need	No physician referrals were provided that would indicate that the proposed facility will serve the residents of this 5-mile GSA. Additionally, the Board Staff was unable to determine if there was enough demand for the proposed 12-station facility without the physician referral letters. It does not appear the proposed 12-stations will improve access as there are existing facilities that are currently underutilized.
77 ILAC 1110.230 (c) (A) (B) (C) – Unnecessary Duplication/Maldistribution of Service/Impact on Other Area Providers	There are 15 facilities within the 5-mile GSA. Five of the 15 facilities are at target occupancy. Based upon the historical growth in the number of ESRD patients in the City of Chicago it appears additional stations would not be needed in the 5-mile GSA until 2026.
77 ILAC 1110.230 (e) – Staffing	The Applicants have failed to name a Medical Director as required by the State Board.
77 ILAC 1120.120 – Availability of Funds	There is no assurance that a loan in the amount of \$1,119,500 will be forthcoming should this project be approved.
77 ILAC 1120.130 – Financial Viability	The projected financial information did not include the loan amount of \$1,119,500, nor as stated above

**State Board Standards Not Met**

<b>Criteria</b>	<b>Reasons for Non-Compliance</b>
	has there been any assurance provided that if this project is approved the loan will be made.

**STATE BOARD STAFF REPORT**  
**Project 19-022**  
**Austin Dialysis at Loretto**

<b>APPLICATION/CHRONOLOGY/SUMMARY</b>	
Applicants	Loretto Hospital Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto
Facility Name	Austin Dialysis at Loretto
Location	645 South Central Avenue, Suite 100, Chicago, Illinois
Permit Holder	Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto
Operating Entity	Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto
Owner of Site	Loretto Hospital
Total GSF	2,750 GSF
Application Received	May 21, 2019
Application Deemed Complete	May 23, 2019
Review Period Ends	September 20, 2019
Review Period Extended	October 23, 2019
Board Deferral	February 25, 2020
Financial Commitment Date	December 31, 2021
Project Completion Date	December 31, 2021
Can the Applicants request a deferral?	No

**I. Project Description**

The Applicants (Loretto Hospital and Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto) propose to establish a 12-station ESRD facility in 2,750 GSF of leased space on the campus of Loretto Hospital in Chicago, Illinois. The cost of the project is \$1,961,169 and the expected completion date is December 31, 2021.

**II. Summary of Findings**

- A. State Board Staff finds the proposed project is **not** in conformance with the provisions of 77 ILAC 1110 (Part 1110).
- B. State Board Staff finds the proposed project is **not** to be in conformance with the provisions of 77 ILAC 1120 (Part 1120).

**III. General Information**

The Applicants are Loretto Hospital and Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto. Dr. Sameer Suhail, M.D. is the sole owner of Austin Dialysis Center, LLC, and Austin Dialysis Center LLC will be responsible for operations of the ESRD facility, and Medicare certification. It is noted that Loretto Hospital will acquire 49%

ownership in the entity after issuance of the Certificate of Need permit, being actively involved in daily operations, provision of care, and be in control of capital assets such as fixed equipment, mobile equipment, and buildings. Loretto Hospital is an Illinois not-for profit hospital, incorporated under the laws of this state on September 7, 1939. This project is subject to a Part 1110 and Part 1120 review. Financial commitment will occur after permit approval.

**IV. Health Planning Area**

The proposed facility will be in the HSA VI Health Service Area. This planning area includes the City of Chicago. As of July 2020 the State Board is estimating **a need for 66** ESRD stations.

**V. Project Uses and Sources of Funds**

The Applicants are funding this project with cash in the amount of \$121,500, securities totaling \$167,750, fair market value (FMV) of leased space totaling \$264,419, equipment leases (FMV) totaling \$288,000, and loans totaling \$1,119,500. The estimated start-up costs and operating deficit is \$167,750.

<b>TABLE ONE</b>				
<b>Project Uses and Sources of Funds</b>				
Uses of Funds	Reviewable	Non-reviewable	Total	% of Total
Modernization Contracts	\$705,500	\$0	\$705,500	36%
Contingencies	\$70,500	\$0	\$70,500	3.50%
Architectural/Engineering Fees	\$71,500	\$0	\$71,500	3.60%
Consulting & Other Fees	\$0	\$50,000	\$50,000	2.50%
Movable or Other Equipment (not in construction contracts)	\$288,000	\$56,000	\$344,000	17.60%
Fair Market Value of Leased Space <sup>(1)</sup>	\$432,169	\$0	\$432,169	22%
Fair Market Value Leased Equipment	\$288,000	\$0	\$288,000	14.80%
<b>Total Uses of Funds</b>	<b>\$1,855,169</b>	<b>\$106,000</b>	<b>\$1,961,169</b>	<b>100.00%</b>
<b>Sources of Funds</b>				
Cash	\$71,500	\$50,000	\$121,500	6.20%
Securities <sup>(1)</sup>	\$167,750	\$0	\$167,750	8.50%
Leases Space (fair market value) <sup>(1)</sup>	\$264,419	\$0	\$264,419	13.50%
Leases Equipment (fair market value)	\$288,000	\$0	\$288,000	14.80%
<b>Other Funds &amp; Sources (Loans)</b>	<b>\$1,063,500</b>	<b>\$56,000</b>	<b>\$1,119,500</b>	<b>57%</b>
1. The Amount of the FMV of the lease space in the <b>Uses of Funds</b> does not equal the FMV of the lease space in the <b>Sources of Funds</b> . The difference of \$167,500 is the amount of the forgiven lease amount, which will be used to fund Loretto Hospital's 49% interest in Austin Dialysis Center, LLC.				

## **VI. Background of the Applicants, Purpose of the Project, Safety Net Impact, Alternatives**

### **A) Criterion 1110.110(a) - Background of the Applicant**

To address this criterion the applicants must provide a list of all facilities currently owned in the State of Illinois and an attestation documenting that no adverse actions<sup>1</sup> have been taken against any applicant's facility by either Medicare or Medicaid, or any State or Federal regulatory authority during the 3 years prior to the filing of the Application with the Illinois Health Facilities and Services Review Board or a certified listing of adverse action taken against any applicant's facility; and authorization to the State Board and Agency access to information in order to verify any documentation or information submitted in response to the requirements of the application for permit.

1. The applicant, Austin Dialysis Center, LLC was formed 2014 and is not currently operating any other facilities in Illinois. The co-applicant, Loretto Hospital, owns and operates the following:
  - a. The Immediate Care Center of Oak Park, Oak Park
  - b. Loretto Hospital outpatient Mental Health Program at Symphony West, Chicago
  - c. Loretto Primary/Intermediate Care, Berwyn
2. The Applicants provided the necessary attestation that no adverse action has been taken against any facility owned or operated by the Applicants and authorization allowing the State Board and IDPH access to all information to verify information in the Application for Permit. [Application for Permit pages 111-116]
3. Evidence of ownership (Copy of the Letter of Intent to Lease the Property) of the site has been provided as required at pages 38-43 of the Application for Permit. Organizational relationships can be found at pages 47 of the Application for Permit.
4. Certificates of Good Standing have been provided as required for Loretto Hospital and Austin Dialysis Center, as entities with permission to transact business in the State of Illinois. An Illinois Certificate of Good Standing is evidence that an Illinois business franchise (i.e. Illinois Corporation, LLC or LP) is in existence, is authorized to transact business in the state of Illinois, and complies with all state of Illinois business requirements and therefore is in "Good Standing" in the State of Illinois. [Application for Permit page 45-46]
5. The Applicants provided evidence that they were in compliance with Executive Order #2006-05 that requires *all State Agencies responsible for regulating or permitting development within Special Flood Hazard Areas shall take all steps within their authority to ensure that such development meets the requirements of this Order. State Agencies engaged in planning programs or programs for the promotion of development shall inform participants in their programs of the existence and location of Special Flood Hazard Areas and of any State or local floodplain requirements in effect in such*

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<sup>1</sup> "Adverse action is defined as a disciplinary action taken by IDPH, CMMS, or any other State or federal agency against a person or entity that owns or operates or owns and operates a licensed or Medicare or Medicaid certified healthcare facility in the State of Illinois. These actions include, but are not limited to, all Type "A" and Type "AA" violations." (77 IAC 1130.140)

*areas. Such State Agencies shall ensure that proposed development within Special Flood Hazard Areas would meet the requirements of this Order. [Application for Permit page 48-55]*

6. The proposed location of the facility is in compliance with the Illinois State Agency Historic Resources Preservation Act which requires *all State Agencies in consultation with the Director of Historic Preservation, institute procedures to ensure that State projects consider the preservation and enhancement of both State owned and non-State owned historic resources* (20 ILCS 3420/1). [Application for Permit pages 57-93]

## **B) Criterion 1110.110(b) - Purpose of the Project**

To demonstrate compliance with this criterion the Applicants must document

1. That the project will provide health services that improve the health care or well-being of the market area population to be served.
2. Define the planning area or market area, or other relevant area, per the applicant's definition.
3. Identify the existing problems or issues that need to be addressed as applicable and appropriate for the project.
4. Detail how the project will address or improve the previously referenced issues, as well as the population's health status and well-being.
5. Provide goals with quantified and measurable objectives, with specific timeframes that relate to achieving the stated goals as appropriate.

The Applicants stated the following in part:

*“The primary purpose of this project is to establish an ESRD facility to provide dialysis services and treatments to Loretto Hospital’s existing patients as well as the residents of the Austin community and surrounding neighborhoods. It is very important to have adequate dialysis care at Loretto Hospital because the community has a large percentage of residents who are African American, a demographic group that is at increased risk of developing chronic kidney disease (CKD), which often leads to dialysis and may require a kidney transplant. The applicants decided to seek a Certificate of Need (CON) permit from the State Board is to enhance access to care for Loretto’s patients who need dialysis care. The most recent inventory of health care services published by the State Board shows that the health service area has a need for additional dialysis stations. The applicant will close the need gap by establishing the ESRD facility, which will serve a community that is largely African-American, a population group disproportionately affected by kidney disease”*

## **C) Criterion 1110.110(c) – Safety Net Impact Statement**

To demonstrate compliance with this criterion the Applicants must document

- The project's material impact, if any, on essential safety net services in the community, to the extent that it is feasible for an applicant to have such knowledge.
- The project's impact on the ability of another provider or health care system to cross-subsidize safety net services, if reasonably known to the applicant.
- How the discontinuation of a facility or service might impact the remaining safety net providers in each community, if reasonably known by the applicant.

The Applicants provided a safety net impact statement as required at pages 318-321.

**TABLE THREE**  
**Loretto Hospital**  
**Net Revenue, Charity and Medicaid Information for the State of Illinois Facilities**

	2017	2016	2015
Net Patient Revenue	\$63,501,711	\$38,507,013	\$33,974,217
Amt. of Charity Care (charges)	\$2,147,639	\$1,287,335	\$1,061,311
Cost of Charity Care	\$2,573,063	\$2,147,643	\$1,053,200
% of Charity Care/Net Patient Revenue	3.4%	3.3%	3.1%
Number of Charity Care Patients (self-pay)	1,337	130	111
Number of Medicaid Patients	2,906	2,039	1,383
Medicaid Revenue	\$29,287,135	\$18,064,174	\$13,598,752
% of Medicaid to Net Patient Revenue	46.1%	46.9%	40%

1. The Applicants do not define charity care per the Illinois Health Facilities Planning Act. "Charity Care" means care provided by a health care facility for which the provider does not expect to receive payment from the patient or a third-party payer." [20 ILCS 3960/3] For profit entities do not have charity care. These costs are considered a bad debt expense.

**D) Criterion 1110.110(d) – Alternatives to the Proposed Project**

To demonstrate compliance with this criterion the Applicants must identify all the alternatives considered to the proposed project.

The Applicants considered three alternatives to the proposed project;

1) Do Nothing/Maintain Status Quo

The applicants rejected this alternative because it fails to address the growing need for dialysis services in HSA-06. The applicants note that Loretto hospital has served approximately 100 dialysis patients in the last two years, which presents a valid need for these services. The applicants identified no costs with this alternative.

2) Propose a Project of Lesser Scope

The applicants note, per the MSA requirement, that the smallest facility that can be established in an MSA is 8 stations. The applicants cite a need for 80 additional stations in the service area, and a projected referral population that will support 12 stations. The applicants rejected this alternative and feel that a project of lesser scope would not meet the needs of its existing and future patient populations. The applicants identified no project costs with this alternative.

3) Utilize Other Health Care Resources in the GSA

The applicants rejected this alternative, citing a heightened need for ESRD services in the zip code (60644) in which the hospital is located. It is noted that 70% of Loretto Hospital patients were required to seek ESRD services further away, increasing travel time, the potential for missed appointments, and a lessened continuity of care. The applicants agree with their patient base in that it is best to receive patient care within their own community. The applicants identified no project costs with this alternative.

**VII. Size of the Project, Projected Utilization and Assurances**

**A) Criterion 1110.120(a) - Size of the Project**

To demonstrate compliance with this criterion the Applicants must document the size of the proposed facility is in compliance with the State Board Standards published in Part 77 ILAC 1110 Appendix B.

The Applicants are proposing 2,750 GSF for 12-stations, amounting to 229 GSF per station. The State Board Standard is 650 GSF per station or 7,800 GSF. [7,800 GSF (State Standard) – 7,067 GSF (Proposed GSF) = (733 GSF). The Applicants have successfully addressed this criterion.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT TO BE IN CONFORMANCE WITH SIZE OF THE PROJECT CRITERION (77 ILAC 1110.120(a))**

**B) Criterion 1110.120(b) – Projected Utilization**

To demonstrate compliance with this criterion the Applicants must document that the proposed facility will be in compliance with the State Board Standards published in Part 77 ILAC 1110 Appendix B two (2) years after project completion.

The Applicants are projecting 65 patients will require dialysis within 12-24 months of project completion (application, p. 217).

$$\begin{aligned} 65 \text{ patients} \times 156 \text{ treatments per year} &= 10,140 \\ 12 \text{ stations} \times 936 \text{ treatments per year per station} &= 11,232 \text{ treatments} \\ 10,140 \div 11,232 &= 90.2\% \end{aligned}$$

The Applicants have successfully addressed this criterion.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT TO BE IN CONFORMANCE WITH PROJECTED UTILIZATION CRITERION (77 ILAC 1110.120(b))**

**C) Criterion 1110.120(e) – Assurance**

To demonstrate compliance with this criterion the Applicants must document that the proposed facility will be in compliance with the State Board Standards published in Part 77 ILAC 1110 Appendix B two (2) years after project completion.

The Applicants have provided the necessary attestation as required at page 258 of the Application for Permit.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT TO BE IN CONFORMANCE WITH ASSURANCE CRITERION (77 ILAC 1110.120(e))**

## VIII. In-Center Hemodialysis

### A) **Criterion 1110.230(b)(1)(A) & (B) - Planning Area Need**

The applicant shall document that the number of stations to be established or added is necessary to serve the planning area's population, based on the following:

#### 1) **77 Ill. Adm. Code 1100**

A) The number of stations to be established for in-center hemodialysis is in conformance with the projected station deficit specified in 77 Ill. Adm. Code 1100, as reflected in the latest updates to the Inventory.

B) The number of stations proposed shall not exceed the number of the projected deficit, to meet the health care needs of the population served, in compliance with the utilization standard specified in 77 Ill. Adm. Code 1100.

The Applicants are proposing a 12-station facility. There is a calculated need in this ESRD Planning Area for **66 stations per the July 2020** Inventory update. The Applicants have met this sub-criterion.

### B) **Criterion 1110.230 (b) (2) - Service to Planning Area Residents**

A) Applicants proposing to establish or add stations shall document that the primary purpose of the project will be to provide necessary health care to the residents of the area in which the proposed project will be physically located (i.e., the planning or geographical service area, as applicable), for each category of service included in the project.

The proposed 12-station facility will be located at 645 South Central Avenue, Suite 100, Chicago, IL. No historic referrals were identified by the Applicants that would indicate the proposed facility will serve the residents of the 5-mile geographical service area.

### C) **Criterion 1110.230 (b) (3) - Service Demand – Establishment of In-Center Hemodialysis Service**

The number of stations proposed to establish a new in-center hemodialysis service is necessary to accommodate the service demand experienced annually by the existing applicant facility over the latest 2-year period, as evidenced by historical and projected referrals, or, if the applicant proposes to establish a new facility, the applicant shall submit projected referrals. The applicant shall document subsection (b) (3) (A) and either subsection (b) (3) (B) or (C).

No historical or projected referrals were provided by the Applicants. Service Demand was not provided by the Applicants.

### D) **Criterion 1110.230 (b) (5) - Service Accessibility**

The number of stations being established or added for the subject category of service is necessary to improve access for planning area residents. The applicant shall document the following:

#### A) **Service Restrictions**

The applicant shall document that at least one of the following factors exists in the planning area:

- i) The absence of the proposed service within the planning area;
- ii) Access limitations due to payor status of patients, including, but not limited to, individuals with health care coverage through Medicare, Medicaid, managed care or charity care;
- iii) Restrictive admission policies of existing providers;
- iv) The area population and existing care system exhibit indicators of medical care problems, such as an average family income level below the State average poverty level, high infant mortality, or designation by the Secretary of Health and Human Services as a Health Professional Shortage Area, a Medically Underserved Area, or a Medically Underserved Population;

- v) **For purposes of this subsection (b)(5) only, all services within the established radii outlined in subsection (b)(5)(C) meet or exceed the utilization standard specified in 77 Ill. Adm. Code 1100.**
- i) There is no absence of ESRD services in the HSA VI ESRD Planning Area-Chicago. There are 68-ESRD facilities within this planning area with 1,363 stations.
  - ii) No Access limitations have been identified.
  - iii) No restrictive admission policies of existing providers have been identified.
  - iv) The proposed facility will be in an area that has been Federally designated as a Medically Underserved Area and Medically Underserved Population.<sup>2</sup>
  - v) There are 14 ESRD facilities within the 5-mile radius with an average utilization of approximately 69%. Ten of the 15-ESRD facilities are not at the target occupancy of 80%.

As per the criterion the Applicants are proposing a facility that meets the calculated need for 66 stations in the HSA VI ESRD Planning Area. There are 15 facilities within the 5-mile GSA with 5 of the facilities operating in excess of the 80% target occupancy. The proposed facility will not improve service accessibility as not all the 1,397 stations are at target occupancy. The Applicants have not successfully addressed this criterion.

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<sup>2</sup> Medically Underserved Areas (MUAs) and Medically Underserved Populations (MUPs) identify geographic areas and populations with a lack of access to primary care services. MUAs have a shortage of primary care health services for residents within a geographic area such as:

- a whole county;
- a group of neighboring counties;
- a group of urban census tracts; or
- a group of county or civil divisions.

MUPs are specific sub-groups of people living in a defined geographic area with a shortage of primary care health services. These groups may face economic, cultural, or linguistic barriers to health care. Examples include, but are not limited to, those who are:

- homeless;
- low-income;
- Medicaid-eligible;
- Native American; or
- migrant farmworkers.

MUA/P designations are based on the Index of Medical Underservice (IMU). IMU is calculated based on four criteria:

- the population to provider ratio;
- the percent of the population below the federal poverty level;
- the percent of the population over age 65; and
- the infant mortality rates.

IMU can range from 0 to 100, where zero represents the completely underserved. Areas or populations with IMUs of 62.0 or less qualify for designation as an MUA/P. Source: Health Resources and Services Administration.

**TABLE FOUR**  
**Facilities within the 5-Mile GSA**

Facility	City	Stations	Mile	Patients	Occ
Fresenius Kidney Care West Suburban	Oak Park	46	2	209	75.72%
Fresenius Kidney Care Oak Park	Oak Park	12	2.2	67	93.06%
Oak Park Kidney Center, LLC	Oak Park	18	2.6	61	56.48%
Fresenius Kidney Care Austin Community	Chicago	16	2.7	66	68.75%
Fresenius Kidney Care Congress Parkway	Chicago	30	3	100	55.56%
DaVita Cicero Dialysis	Cicero	12	3.2	0	0.00%
Fresenius Kidney Care Cicero	Cicero	20	3.8	104	86.67%
Lawndale Dialysis	Chicago	16	3.8	89	92.71%
Garfield Kidney Center	Chicago	24	3.9	82	56.94%
Fresenius Kidney Care Berwyn	Berwyn	30	4.4	130	72.22%
Mt. Sinai Hospital	Chicago	16	4.7	79	82.29%
Fresenius Kidney Care Humboldt Park	Chicago	34	4.8	128	62.75%
Loyola Center for Dialysis on Roosevelt	Maywood	30	4.9	151	83.89%
Fresenius Kidney Care River Forest	River Forest	24	5	112	77.78%
DaVita Brickyard Dialysis	Chicago	12	5	19	26.39%
Total		340		1,397	68.48%

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT NOT IN CONFORMANCE WITH CRITERION PLANNING AREA NEED (77 ILAC 1110.230 (b) (1) (2) (3) (5))**

**C) Criterion 1110.230(c) - Unnecessary Duplication of Service/Maldistribution**

1) The applicant shall document that the project will not result in an unnecessary duplication. The applicant shall provide the following information:

A) A list of all zip code areas that are located, in total or in part, within the established radii outlined in subsection (c)(4) of the project's site;

B) The total population of the identified zip code areas (based upon the most recent population numbers available for the State of Illinois population); and

C) The names and locations of all existing or approved health care facilities located within the established radii outlined in subsection (c)(4) of the project site that provides the categories of station service that are proposed by the project.

A. A list of zip codes was provided at page 224 of the Application for Permit. There are approximately 1,353,395 residents within this 5-mile radius. There are 15 ESRD facilities within this 5-mile radius with 340 stations.

B. There is one station per every 5,328 residents in the identified 5-mile GSA. In the State of Illinois there is one station per every 2,621 resident. There is not a surplus of stations in this 5-mile GSA when compared to the State of Illinois ratio. To have a surplus of stations

in this 5-mile GSA there would have to be one station per every 1,741 residents or 1.5 times the State of Illinois ratio.

**TABLE FIVE  
Ratio Analysis**

	5-mile GSA	State of Illinois
Stations	340	4,971
Population	1,353,395	12,978,800
Ratio	1 station per 5,328 residents	1 station per 2,611 resident

Based upon the historic growth of 3.1% in number of ESRD patients over the past 10-years in the HSA VI Planning Area there will be no need for additional stations in this 5-mile GSA until 2026.

**TABLE SIX  
Estimate of the number of ESRD patients and stations needed by 2026**

Year	2020	2021	2022	2023	2024	2025	2026
Patients	1,412	1,456	1,502	1,549	1,598	1,648	1,700
Stations	295	304	313	323	333	344	355

**C. Impact of Project on Other Providers**

Based upon the number of stations not currently at target occupancy it appears that the proposed project would impact other providers in the 5-mile GSA. There are 10 existing facilities not at target occupancy within this 5-mile GSA. The Applicants have not met the requirements of this criterion.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT NOT IN CONFORMANCE WITH CRITERION UNNECESSARY DUPLICATION/MALDISTRIBUTION (77 ILAC 1110.230(c)(1)-(3))**

**D) Criterion 1110.230(e) - Staffing**

The applicant shall document that relevant clinical and professional staffing needs for the proposed project were considered and that licensure and The Joint Commission 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.

The proposed clinic will be staffed in accordance with all State and Medicare staffing requirements. No medical director has been identified by the Applicants.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT NOT IN CONFORMANCE WITH CRITERION STAFFING (77 ILAC 1110.230(e))**

**E) Criterion 1110.230 (f) - Support Services**

An applicant proposing to establish an in-center hemodialysis category of service must submit a certification from an authorized representative that attests to each of the following:

- 1) Participation in a dialysis data system;
- 2) Availability of support services consisting of clinical laboratory service, blood bank, nutrition, rehabilitation, psychiatric and social services; and
- 3) Provision of training for self-care dialysis, self-care instruction, home and home-assisted dialysis, and home training provided at the proposed facility, or the existence of a signed, written agreement for provision of these services with another facility.

The Applicants have attested to the following:

- A patient tracking system will be utilized to record the provision of dialysis care to its patients;
- Austin Dialysis at Loretto will have available all needed support services required by CMS which may consist of clinical laboratory services, blood bank, nutrition, rehabilitation, psychiatric services, and social services. [Application for Permit page 250]

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION SUPPORT SERVICES (77 ILAC 1110.230(f))**

**F) Criterion 1110.230(g) - Minimum Number of Stations**

The minimum number of in-center hemodialysis stations for an End Stage Renal Disease (ESRD) facility is:

- 1) Four dialysis stations for facilities outside an MSA;
- 2) Eight dialysis stations for a facility within an MSA.

The proposed 12-station ESRD facility will be in the Chicago-Naperville-Elgin, IL-IN-WI MSA. The Applicants have successfully addressed this criterion.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION MINIMUM NUMBER OF STATIONS (77 ILAC 1110.230(g))**

**G) Criterion 1110.230(h) - Continuity of Care**

An applicant proposing to establish an in-center hemodialysis category of service shall document that a signed, written affiliation agreement or arrangement is in effect for the provision of inpatient care and other hospital services. Documentation shall consist of copies of all such agreements.

A signed transfer agreement with Loretto Hospital has been provided as required. Loretto Hospital has agreed to provide Emergency, In-Patient and Backup Support Services to the dialysis patients. The proposed ESRD facility will be located on the Loretto Hospital campus.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION CONTINUITY OF CARE (77 ILAC 1110.230(h))**

**H) Criterion 1110.230(i) - Relocation of Facilities**

This criterion may only be used to justify the relocation of a facility from one location in the planning area to another in the same planning area and may not be used to justify any additional stations. A request for relocation of a facility requires the discontinuation of the current category of service at the existing site and the establishment of a new category of service at the proposed location. The applicant shall document the following:

- 1) That the existing facility has met the utilization targets detailed in 77 Ill. Adm. Code 1100.630 for the latest 12-month period for which data is available; and
- 2) That the proposed facility will improve access for care to the existing patient population.

The Applicants are proposing the establishment of a new facility and not relocating an existing facility. This criterion is not applicable to this project.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION RELOCATION OF FACILITIES (77 ILAC 1110.230(i))**

**I) Criterion 1110.230 (j) - Assurances**

The applicant representative who signs the CON application shall submit a signed and dated statement attesting to the applicant's understanding that:

- 1) By the second year of operation after the project completion, the applicant will achieve and maintain the utilization standards specified in 77 Ill. Adm. Code 1100 for each category of service involved in the proposal; and
- 2) An applicant proposing to expand or relocate in-center hemodialysis stations will achieve and maintain compliance with the following adequacy of hemodialysis outcome measures for the latest 12-month period for which data are available:  
≥ 85% of hemodialysis patient population achieves urea reduction ratio (URR) ≥ 65%  
and ≥ 85% of hemodialysis patient population achieves Kt/V Daugirdas II 1.2.

The Applicants have provided the necessary attestation at page 258 of the Application for Permit.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION ASSURANCES (77 ILAC 1110.230(j))**

**IX. Financial Viability**

**A) Criterion 1120.120 – Availability of Funds**

To demonstrate compliance with this criterion the Applicants must document that the resources are available to fund the project.

The Applicants are funding this project with cash in the amount of \$289,250 an equipment lease with an FMV of \$288,000, a lease for the space totaling \$264,419, and a loan totaling \$1,119,500. A summary of the consolidated financial statements of the Applicants is provided below. It appears that the Applicants have enough cash to fund this project.

**TABLE SEVEN**  
**Loretto Hospital Consolidated Financial Statements**  
**Ending June 30<sup>th</sup> 2016-2017**  
**(in thousands (000))**

	2017	2016
Cash	\$10,650,931	\$15,476,868
Current Assets	\$10,650,931	\$15,476,868
Total Assets	\$55,570,675	\$56,6787,645
Current Liabilities	\$13,184,074	\$9,398,593
Long Term Debt	\$22,058,234	\$18,116,018
Patient Service Revenue	\$63,067,790	\$60,462,021
Total Net Revenues	\$59,030,650	\$58,710,595
Total Operating Expenses	\$64,564,785	\$60,002,012
Operating Income	(\$5,534,135)	(\$1,289,417)
Net Income	(\$4,800,186)	\$2,191,907

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION AVAILABILITY OF FUNDS (77 ILAC 1120.120)**

**B) Criterion 1120.130 - Financial Viability**

To demonstrate compliance with this criterion the Applicants must document that they have a Bond Rating of “A” or better, they meet the State Board’s financial ratio standards for the past three (3) fiscal years or the project will be funded from internal resources.

The Applicants are funding this project with cash in the amount of \$289,250 an equipment lease with an FMV of \$288,000, a lease for the space totaling \$264,419, and a loan totaling \$1,119,500. As a new business entity, the Applicant has provided projected financial viability ratios in Table Eight. The financial viability ratios information is not complete as a loan in the amount of \$1,119,500 has not been included in the projected financial statements. The Applicants have not met the requirements of this criterion.

**TABLE EIGHT**  
**Financial Viability Ratios**  
**Austin Dialysis Center, LLC**

	State Standard	Year 1	Year 2	Year 3	Met Standard?
<b>Current Ratio</b>	➤ 1.5	1.96	1.88	1.82	Yes
<b>Net Margin Percentage</b>	➤ 3.5	5.6%	29.6%	28.7%	Yes
<b>Long-Term Debt to Capitalization</b>	< 80%	2.64%	1.41%	1.27%	Yes
<b>Project Debt Service Coverage</b>	>1.75	TBD	TBD	TBD	N/A

<b>Days Cash on Hand</b>	➤ 45 days	TBD	TBD	TBD	TBD
<b>Cushion Ratio</b>	➤ 3.0	TBD	TBD	TBD	TBD

**TBD:** A loan in the amount of \$1,119,500 has not been included in the calculation of Project Debt Service Coverage, Days Cash on Hand, and Cushion Ratio. The loan has not been included in the projected financial statements that have been provided at pages 284-285 of the Application for Permit.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT NOT IN CONFORMANCE WITH CRITERION FINANCIAL VIABILITY (77 ILAC 1120.130)**

**X. Economic Feasibility**

**A) Criterion 1120.140(a) – Reasonableness of Financing Arrangements**

**B) Criterion 1120.140(b) – Terms of Debt Financing**

To demonstrate compliance with these criteria the Applicants must document that leasing of the space is reasonable. The State Board considers the leasing of space as debt financing.

The Applicants are funding this project with cash in the amount of \$289,250 an equipment lease with a FMV of \$288,000, a lease for the space totaling \$264,419, and a loan totaling \$1,119,500. The lease for space is for 5 years at \$30.50/GSF per year for the first 5 years with a 2.4% increase annually. [Application for Permit pages 268-273]. The equipment lease is located on pages 274-279 of the application. The applicant also supplied a letter of interest to lend from STC Capital Bank (application p. 262). The supplied letter does not confirm a promise on the lenders part to finance the mortgage portion of the project.

**TABLE TEN  
Terms of Lease Space**

Premises	Approximately 2,750 GSF, 645 South Central Ave. Ste 100, Chicago, Illinois 60644
Landlord:	Loretto Hospital
Tenant:	Austin Dialysis Center, LLC
Term:	Initial 5 Year term with two five-year options
Base Rent:	\$30.50/per gsf with 2.4% increases annually

The applicant supplied notarized attestations pertaining to the reasonableness of financing arrangements, saying that a portion of the project will be funded through financing, which is less costly than liquidation of existing investments (application, p. 310), and a Conditions of debt financing statement, saying that the debt financing will be at the lowest net cost available and in part involves leasing of space and equipment (application, p. 311).

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERIA REASONABLENESS OF FINANCING ARRANGEMENTS AND TERMS OF DEBT FINANCING (77 ILAC 1120.140(a) & (b))**

**C) Criterion 1120.140(c) – Reasonableness of Project Costs**

To demonstrate compliance with this criterion the Applicants must document that the project costs are reasonable by the meeting the State Board Standards in Part 1120 Appendix A.

Table below details the ESRD cost per GSF for new construction based upon 2015 historical information and inflated by 3% to the midpoint of the construction. Additionally, Table details the cost per station based upon 2008 historical information and inflated by 3% to the midpoint of construction.

TABLE ELEVEN						
Calculation of ESRD Cost per GSF						
Year	2015	2016	2017	2018	2019	2020
ESRD Cost Per GSF	\$254.58	\$262.22	\$270.08	\$278.19	\$286.53	\$295.13
Calculation of Moveable Equipment Cost per ESRD Station						
Year	2015	2016	2017	2018	2019	2020
Cost per Station	\$49,127	\$50,601	\$52,119	\$53,683	\$55,293	\$56,952

Modernization Contracts total \$705,500 or \$242.69 per GSF ( $\$705,500 \div 2,750$  per GSF = \$256.36]. This appears reasonable when compared to the State Standard of \$295.13 per GSF or \$811,607.

Contingencies total \$70,500 and are 9.9% of modernization costs of \$705,500. This appears reasonable when compared to the State Board Standard of 10%-15%.

Architectural and Engineering Fees total \$71,500 or 9.2% of modernization and contingencies [ $\$71,500 \div \$776,000 = 9.2\%$ ]. This appears reasonable when compared to the State Board standard of 7.18% -10.78%.

Movable or Other Equipment totals \$288,000 or \$24,000 per station [ $\$288,000 \div 12$  stations = \$24,000 per station]. This appears reasonable when compared to the State Board Standard of \$56,952 per station or \$683,424.

Fair Market Value of Leased Space/Equipment totals \$720,169. There is no State Board standard for this criterion.

**STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION REASONABLENESS OF PROJECT COSTS (77 ILAC 1120.140(c))**

**D) Criterion 1120.140(d) – Projected Operating Costs**

To demonstrate compliance with this criterion the Applicants must document that the projected direct annual operating costs for the first full fiscal year at target utilization but no more than two years following project completion. Direct costs mean the fully allocated costs of salaries, benefits and supplies for the service.

The Applicants are projecting \$128.21 operating expense per treatment. The Board does not have a standard for this criterion.

**THE STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION PROJECTED OPERATING COSTS (77 ILAC 1120.140(d))**

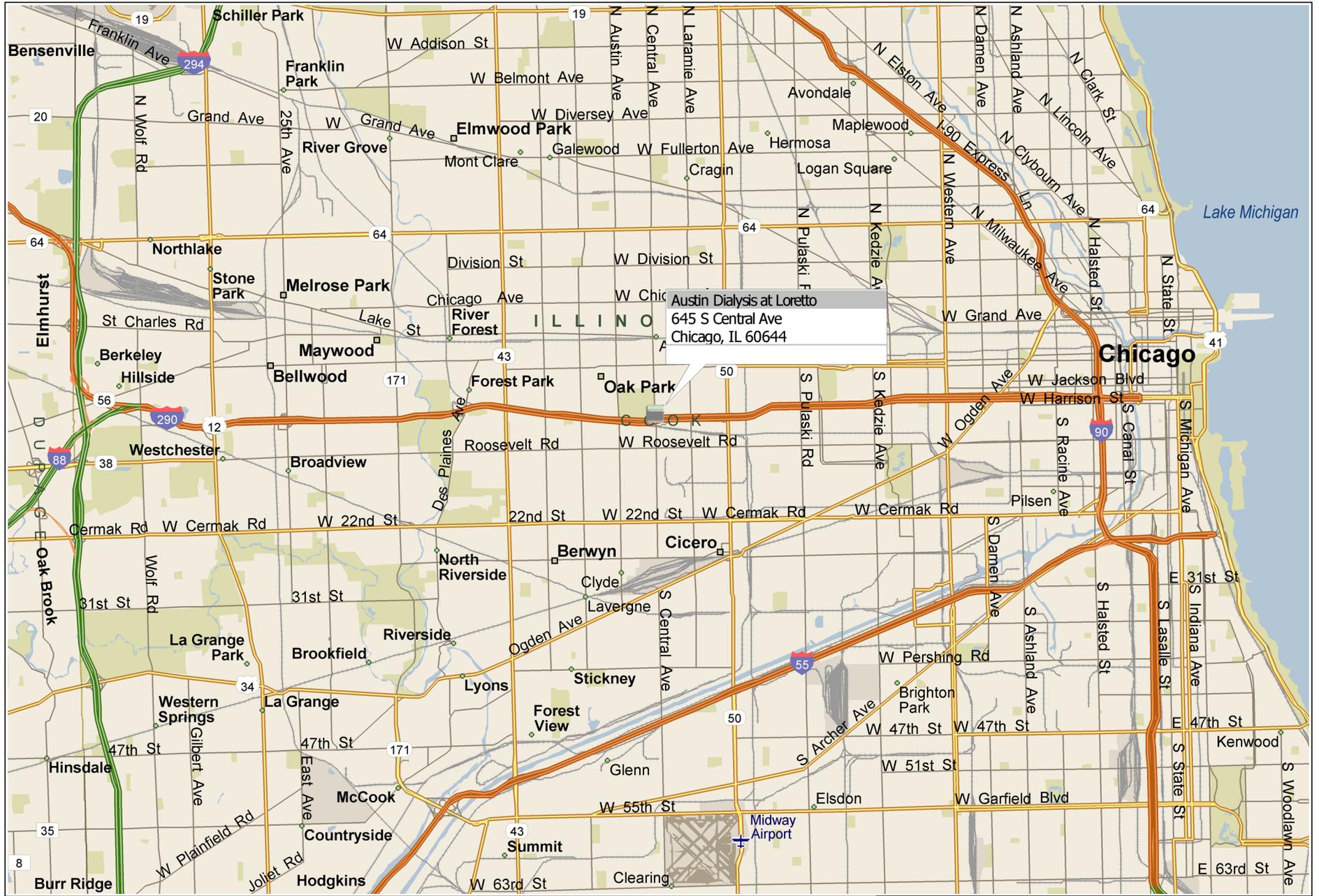
**E) Criterion 1120.140(e) – Total Effect of the Project on Capital Costs**

To demonstrate compliance with this criterion the Applicants must provide the total projected annual capital costs for the first full fiscal year at target utilization but no more than two years following project completion. Capital costs are defined as depreciation, amortization and interest expense.

The Applicants are projecting capital costs of \$30.98 per treatment. The Board does not have a standard for this criterion.

**THE STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION TOTAL EFFECT OF THE PROJECT ON CAPITAL COSTS (77 ILAC 1120.140 (e))**

# 19-022 Austin Dialysis at Loretto - Chicago



1 CHAIRWOMAN SAVAGE: So next on the agenda  
2 is Item H-01, Project 19-022, Austin Dialysis at  
3 Loretto in Chicago.

4 May I have a motion to approve an  
5 establishment of a 12-station ESRD facility for  
6 Project 19-022, Austin Dialysis at Loretto.

7 MEMBER DEMUZZIO: Motion.

8 CHAIRWOMAN SAVAGE: A second.

9 MEMBER MURRAY: Second.

10 CHAIRWOMAN SAVAGE: Please identify yourself,  
11 spell your name, and be sworn in.

12 MR. HYLAK-REINHOLTZ: Good morning, Madam  
13 chairman. Joseph Hylak-Reinholtz, H-y-l-a-k,  
14 hyphen, R-e-i-n-h-o-l-t-z. I am the new counsel  
15 representing the applicant, Loretto Hospital.

16 I'm here today to ask for a Board deferral.  
17 I have to appear before the Board because we are  
18 out of regular deferrals that the applicant can  
19 ask for without coming before the Board. We have  
20 to do this for two reasons. One, we're out of the  
21 timeline to do an applicant deferral, but, in  
22 addition, we need to now make a modification to  
23 the application. Per 1130.650 of your Board rules,  
24 we are adding a coapplicant, which is a Type A

1 modification, which is going to require  
2 resubjecting us to the public hearing and notice  
3 requirements.

4 So we would make a modification to add a  
5 coapplicant to the application. If you'd like  
6 further discussion about this, I'd be happy to  
7 give you a CliffNotes version.

8 THE COURT REPORTER: He's not been sworn.  
9 Will you raise your right hand, please.  
10 (Witness sworn.)

11 CHAIRWOMAN SAVAGE: So, Mike, if we can  
12 have the State Board staff report.

13 MR. CONSTANTINO: Thank you, Madam Chair.  
14 The applicants are asking the State Board  
15 to approve the establishment of a 12-station ESRD  
16 facility in Chicago, Illinois, at a cost of  
17 approximately \$1.96 million. No public hearing  
18 was requested, and the Board staff did receive  
19 support and opposition letters which are included  
20 at the end of your report. The applicants  
21 addressed a total of 22 criteria and failed to  
22 meet 5 of those criteria.

23 Thank you, Madam Chair.

24 CHAIRWOMAN SAVAGE: Thank you.

1           So I have many, many questions about what  
2 we would ask, and I would encourage you-all to  
3 work with our State Board as you work through your  
4 referral.

5           So now a roll call vote for deferral.

6           MR. ROATE: Thank you, Madam Chair. Do we  
7 call a new motion, or can we use the existing  
8 motion?

9           MR. KINERY: For deferral.

10          MS. AVERY: Oh, yes. Sorry, George,  
11 thank you.

12          CHAIRWOMAN SAVAGE: So may I have a motion  
13 to defer an establishment of this 12-station ESRD  
14 facility for Project 19-022, Austin Dialysis at  
15 Loretto.

16          MEMBER MARTELL: I so move.

17          CHAIRWOMAN SAVAGE: A second.

18          MEMBER SLATER: Second.

19          MR. ROATE: Motion made by Dr. Martell,  
20 second by Mr. Slater.

21          Senator Demuzio.

22          MEMBER DEMUZIO: Yes.

23          MR. ROATE: Thank you.

24          Dr. Martell.

Transcript of Open Session - Meeting  
Conducted on February 25, 2020

1 MEMBER MARTELL: Yes, in support of the  
2 deferral.

3 MR. ROATE: Thank you.

4 Dr. Murray.

5 MEMBER MURRAY: Yes.

6 MR. ROATE: Thank you.

7 Mr. Slater.

8 MEMBER SLATER: Yes.

9 MR. ROATE: Thank you.

10 Chairwoman Savage.

11 CHAIRWOMAN SAVAGE: Yes.

12 MR. ROATE: Thank you.

13 That's 5 votes in the affirmative.

14 CHAIRWOMAN SAVAGE: So the motion for  
15 deferral is approved. Thank you.

16 Would anyone on the Board need a break?

17 MS. AVERY: Yes.

18 CHAIRWOMAN SAVAGE: So we'll take a  
19 10-minute break, and then we'll come back with H-02.

20 (Recess taken, 10:34 a.m. to 10:47 a.m.)

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22

23

24

Midwest Nephrology and Internal Medicine  
Dr. Rajani Kosuri  
7315 W. North Ave.  
River Forest, IL 60305  
P - (708) 689-8539 F - (708) 689-8688

**RECEIVED**

MAR 9 2020

HEALTH FACILITIES &  
SERVICES REVIEW BOARD

February 21, 2020

Dear Ms. Avery:

I am writing to notify the Health Facilities and Services Review Board that, as I have advised Loretto Hospital, I will not be serving as the Medical Director for the proposed 12 station Austin Dialysis at Loretto project and as you know, I did not provide any referrals for the project.



Dr. Rajani Kosuri



**HRlaw**

1333 Burr Ridge Parkway, Suite 200, Burr Ridge, IL 60527

**JOSEPH HYLAK-REINHOLTZ**

ATTORNEY AT LAW

(630) 756-3177 office

(630) 464-4514 mobile

JHRLaw2017@gmail.com

August 3, 2020

**VIA ELECTRONIC MAIL & FEDEX DELIVERY**

Illinois Health Facilities & Services Review Board  
525 West Jefferson Street, Second Floor  
Springfield, Illinois 62761  
Attention: Michael Constantino, Supervisor, Project Review Section

**Re: Supplemental Information re: Austin Dialysis at Loretto, Project 19-022**

Dear Mr. Constantino:

I hereby submit supplemental information on behalf of co-applicants Austin Dialysis Center, LLC and Loretto Hospital (collectively the “Applicant”) in regard to Project 19-022, in which the Applicant is seeking approval for a 12-station dialysis facility in the City of Chicago, Illinois (the “ESRD Facility”). Specifically, I would like to address how the Applicant intends to address 77 Ill. Adm. Code 1110.230(b)(3) in regard to Service Demand. Also, at the end of this letter, a new project completion date is proposed.

**Background**

The Applicant first submitted its certificate of need (“CON”) permit application to the Illinois Health Facilities and Services Review Board (the “State Board”) on May 22, 2019. At that time, the Applicant identified Rajani Kosuri, M.D. as its proposed medical director and used patient data from Loretto Hospital to demonstrate projected need. On September 10, 2019, the Applicant’s project was opposed by an existing dialysis facility—Maple Avenue Kidney Center—with its points of opposition laid out and signed by Hamid Humayun, M.D., a physician who presently treats Loretto Hospital’s inpatients who need dialysis treatments post-hospitalization. Dr. Humayun proposed several points of opposition, many of which were off base or inaccurate. The Applicant addressed each point of opposition in a letter submitted on October 15, 2019.

While most of the opposition points were discredited, one of Dr. Humayun’s points of opposition was recognized by the Applicant. The opposition letter correctly inferred that the Applicant’s CON permit application was based on hospital admissions and that the Applicant may not be able to use all of the identified patients to demonstrate need. Dr. Humayun added that “these patients already have a [nephrologist] . . . [and that] [h]aving 97 ESRD patients getting acute dialysis does not guarantee that these patients do not have continuity of care and were actively looking for a dialysis unit placement.”

Upon review of Dr. Humayun’s opposition letter, Loretto Hospital conducted a more detailed analysis of its patient data and submitted new information in a supplemental filing submitted to the State Board

**Via Electronic Mail & FedEx Delivery**

Supplemental Information Submission in re Austin Dialysis at Loretto

August 3, 2020

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on January 10, 2020. In the supplemental filing, the Applicant acknowledged that the data it provided in the original application and in the supplemental filing was not in the typical format requested by the State Board because an existing nephrology group was not part of the project and the nephrologist's data set was therefore unavailable to the Applicant.

However, still seeing a need for the service line, the Applicant submitted historic hospital data from inpatients instead. However, the Applicant did take into account the critique raised by Dr. Humayun and omitted any historic patient who already had a nephrologist and/or indicated that the patient was not seeking a dialysis unit placement. The revised data still showed that a 12-station in-center hemodialysis center could achieve target utilization within two years after CON approval.

Unfortunately, after the Applicant submitted the supplemental information, Dr. Kosuri advised the Applicant that she no longer desired to be the medical director or be involved with the project going forward. Her resignation was dated March 9, 2020.

Since her withdrawal, the Applicant tried to find a replacement for Dr. Kosuri, and during that process, Dr. Humayun (the project's opponent) and his partners entered into negotiations with Loretto Hospital to be the party responsible for the project and would use their historic data to justify need for the proposed dialysis facility. However, despite lengthy negotiations, the Applicant and Dr. Humayun were unable to reach an amicable resolution and the proposed joint venture was abandoned during the last week of July 2020.

As of the date of this letter, the Applicant requested an affiliated physician group (MPG Physicians) to recruit and retain one or more nephrologists to treat the hospital's patients and to oversee the proposed hemodialysis facility. A letter evidencing this engagement is attached to this letter.

**Current Regulations**

The State Board's CON regulations presently provide that an applicant seeking to establish an in-center hemodialysis facility must be able to justify service demand. See 77 Ill. Adm. Code 1110.230(b)(3). The applicant must demonstrate that the "*number of stations proposed . . . is necessary to accommodate the service demand experienced annually by the existing applicant facility over the latest 2-year period . . . or, if the applicant proposes to establish a new facility, the applicant shall submit projected referrals.*"

The current regulations further state that the "*applicant shall document subsection (b)(3)(A) and either subsection (b)(3)(B) or (C).*" Section (b)(3)(A) addresses historical referrals, Section (b)(3)(B) addresses projected referrals, and Section (b)(3)(C) addresses projected need based on rapid population growth. The latter section does not apply to this project.

For historical referrals, the regulations provide that: "*(i) If the applicant is an existing facility, the applicant shall document the number of referrals to other facilities, for each proposed category of service, for each of the latest 2 years [and] (ii) Documentation of the referrals shall include: patient*

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Supplemental Information Submission in re Austin Dialysis at Loretto

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*origin by zip code; name and specialty of referring physician; name and location of the recipient facility.”*

For project referrals regarding the establishment of a new facility, the regulations provide that the applicant shall provide physician referral letters that attest to:

- (i) the physician's total number of patients (by facility and zip code of residence) who have received care at existing facilities located in the area, as reported to The Renal Network at the end of the year for the most recent 3 years and the end of the most recent quarter;
- (ii) the number of new patients (by facility and zip code of residence) located in the area, as reported to The Renal Network, that the physician referred for in-center hemodialysis for the most recent year;
- (iii) an estimated number of patients (transfers from existing facilities and pre-ESRD, as well as respective zip codes of residence) that the physician will refer annually to the applicant's facility within a 24-month period after project completion, based upon the physician's practice experience. The anticipated number of referrals cannot exceed the physician's documented historical caseload;
- (iv) an estimated number of existing patients who are not expected to continue requiring in-center hemodialysis services due to a change in health status (e.g., the patients received kidney transplants or expired);
- (v) the physician's notarized signature, the typed or printed name of the physician, the physician's office address and the physician's specialty;
- (vi) verification by the physician that the patient referrals have not been used to support another pending or approved CON application for the subject services; and
- (vii) that each referral letter shall contain a statement attesting that the information submitted is true and correct, to the best of the physician's belief.

**Hospital Patient Data vs. Group Practice Data**

The State Board's current regulations assume that an applicant for a *de novo* dialysis facility has already engaged with a nephrologist or a nephrology group, and not with an employed physician or otherwise engaged through a practice group service agreement. As a result, the CON regulations seek historical data from one or more private practice nephrologist(s), which is the same data reported to The Renal Network. However, in the Applicant's case, this typical data set is not available. Instead, the data submitted by the Applicant reflects historical patient data from co-applicant Loretto Hospital's inpatient care over the past three years instead of historic data from an nephrologist already in practice. In the

**Via Electronic Mail & FedEx Delivery**

Supplemental Information Submission in re Austin Dialysis at Loretto

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Applicant's case, it will be securing a new nephrologist from outside of the service area, which means his or her historic data will be irrelevant.

Specifically, the data provided by the Applicant identifies the number of inpatients treated each year since 2017 who received hospital-based dialysis treatments. In many cases, these patients did not have a nephrologist to oversee their ESRD care. Thus, for the present application on file with the State Board, for the purpose of justifying need for the proposed ESRD Facility, the Applicant did not count patients who had already established a doctor-patient relationship with a nephrologist outside of the hospital. The Applicant's intent was to ensure that the project would not adversely affect existing dialysis providers in the geographic service area. As a result, the data used to justify need for the proposed ESRD Facility only relies upon historical patient numbers where the hospital determined that the patients had not already chosen a nephrologist and who were in immediate need for dialysis treatments. Thus, the data submitted with Dr. Kosuri's letter remains as the basis for justify need for this permit application.

In sum, in regard to projected referrals for this Application, the Applicant reviewed the hospital's historic data, focusing solely on patients identified as pre-ESRD, and made a projection based on several factors, including: (1) the three-year trend of total patients receiving inpatient dialysis treatments; (2) the loss of patients due to a group of nephrologists ending its hospital affiliation in 2019; and (3) the ability to recapture patient referrals to outside providers upon the addition of one or more nephrologists following permit approval.

Analysis

Based on the foregoing, the Applicant did not submit historical referral information pursuant to Section (b)(3)(A) as the State Board typically receives for identified nephrologists. The Applicant acknowledges that this approach will lead to negative findings by the State Board staff. Nevertheless, the Applicant took all reasonable steps to provide similar historic data in an effort to show that historically the hospital has seen a sufficient number of unaffiliated inpatients in need of hemodialysis treatments to justify its proposed 12-station facility, patients who can be treated by a new nephrologist hired by Loretto Hospital or engaged through a services agreement.

For compliance with Section (b)(3)(B), the Applicant used its historic hospital inpatient data to make certain projections based on a three-year average. However, as above, the Applicant acknowledges that it will not receive a positive finding under this review criterion as well because there is not presently an identified nephrologist affiliated with this project, and therefore, compliance with the criterion is impossible. In the alternative, the Applicant now provides a letter from an affiliated physician practice group that has committed to recruiting and engaging with a nephrologist to become the medical director and become the nephrologist who can assume the care of those hospital patients who are not yet in the care of another physician and will need in-center hemodialysis.

Project Completion Date

The original CON permit application included a project completion date of January 31, 2021. However, that application assumed a State Board hearing and approval in October 2019. The project was initially

**Via Electronic Mail & FedEx Delivery**

Supplemental Information Submission in re Austin Dialysis at Loretto

August 3, 2020

Page 5

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deferred at the request of board staff and subsequently deferred again at the request of the Applicant. Several months have passed without action being taken and further time will elapse between this submission and the next State Board meeting in September 2020. Based on this extended consideration period, the Applicant now requests a project completion date of December 31, 2021.

**Final Considerations; Conclusion**

The Applicant understands that its application does not comport with a number of the State Board's regulations to justify need in that it neither has an identified nephrologist nor is the data submitted to demonstrate need in the preferred format. However, the Applicant has a formal commitment from an affiliated physician practice group to seek and retain physicians to provide key nephrology services and take over the care of hospital inpatients who need post-acute dialysis and are not already affiliated with a nephrologist. The Applicant respectfully requests a CON permit to provide care to a historically medically underserved community with a disproportionate need for dialysis care. If necessary, the Applicant is willing to accept a conditional CON permit.

Thank you for your time and consideration. If you have questions, do not hesitate to contact me at either phone number provided above or via e-mail.

Sincerely,

A handwritten signature in blue ink, appearing to read "J Hylak R", with a long horizontal flourish extending to the right.

Joseph Hylak-Reinholtz  
Counsel for Applicant

enclosure

August 3, 2020

**VIA ELECTRONIC MAIL & FEDEX DELIVERY**

Illinois Health Facilities & Services Review Board  
525 West Jefferson Street, Second Floor  
Springfield, Illinois 62761  
Attention: Courtney Avery, Administrator

**Re: Supplemental Information re: Austin Dialysis at Loretto, Project 19-022**

Dear Ms. Avery,

I am writing in support of the certificate of need (“CON”) permit application submitted by the co-applicants Loretto Hospital and Austin Dialysis at Loretto (collectively, the “Applicant”). Specifically, this letter not only supports this all-important project for Chicago’s Austin Community, it also formally declares our commitment to recruiting and engaging a nephrologist, either as an employee of our group practice or as an independent contractor, who will provide services through our group practice and oversee the development of the Applicant’s in-center hemodialysis center as its medical director, directly treat patients in need of both inpatient and outpatient dialysis care, and work to expand the service line as demand grows based on Loretto Hospital’s expectations.

We are firmly committed to meeting the healthcare needs of Loretto Hospital. Our practice group has a physician services agreement with Loretto Hospital, in which we agree to provide key physician services at the hospital and its outpatient sites as needed. Loretto Hospital, recognized as a key safety net hospital, has the ability through the service agreement to ask us to add a category of service at any time, and if our group does not presently have a physician to provide said services, then we have contractually agreed to seek out, recruit, and then engage one or more physicians in the specialization desired by the hospital. As of the date of this letter, Loretto Hospital has requested that we recruit and engage the services of at least one qualified nephrologist to run the program and treat patients in need of dialysis treatments once a CON permit has been granted for the project.

We pledge and certify to the Illinois Health Facilities and Services Review Board (the “State Board”) that we will take all reasonable efforts to recruit and retain at least one, perhaps multiple, nephrologists who will solely focus on the Applicant’s dialysis center. We further pledge to keep the State Board informed of our recruitment efforts from time to time, to ensure that the state is aware of our efforts to engage a nephrologist for the project.

Should you have questions, do not hesitate to contact me at [Mira.Iliescu@lorettohospital.org](mailto:Mira.Iliescu@lorettohospital.org) or at (773) 450-5422. We appreciate your consideration for this project.

Respectfully submitted,



Maria Elena Iliescu-Levine, M.D.  
Chief Medical Officer  
MPG Physicians



645 S. CENTRAL AVE • CHICAGO, IL 60644 • (773) 854-5848

645 South Central Avenue • Chicago, IL 60644 • 773.854.5848 • Fax: 773.854.5395

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OCT 2 2019

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SERVICES REVIEW BOARD**

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Loretto Hospital

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October 2, 2019

Illinois Health Facilities and Services Review Board  
525 West Jefferson Street, Second Floor  
Springfield, Illinois 62761  
Attention: Courtney Avery, Administrator

**Re: Letter of Support for Austin Dialysis at Loretto  
CON Project 19-022**

Dear Board Members:

I am currently serving as the Executive Director of Austin Chamber of Commerce. Our organization serves as a resource and liaison for businesses in the Austin Neighborhood.

I am writing to express our support for the certificate of need (CON) permit application submitted by Austin Dialysis at Loretto, a joint venture with Loretto Hospital to establish a 12-station in-center hemodialysis center. We ask the members of the State Board to approve this project and grant a CON permit because this project will enhance access to important healthcare services in a traditionally underserved and impoverished community. There are no other infusion centers in the Austin area, therefore it is very much needed. We kindly request that you approve this application. We believe the project is both necessary and in the best interest of our community. Thank you for your consideration.

Sincerely,  
  
Melody Lewis  
Executive Director

**Visionaries**

Congressman Danny K. Davis • State Senator Kimberly Lightford • State Senator Don Harmon • State Representative Camille Y. Lilly  
• State Representative LaShawn Ford • Alderman Emma Mitts • Alderman Chris Talifero • Alderman Jason Ervin  
• Commissioner Barbara McGowan • Commissioner Richard R. Boykin •



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Chicago, Illinois 60644

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Donald J. Dew

October 2, 2019

Illinois Health Facilities and Services Review Board  
Attn: Courtney Avery, Administrator  
525 West Jefferson Street, Second Floor  
Springfield, Illinois 62761

**Re: Letter of Support for Austin Dialysis at Loretto  
CON Project 19-022**

Dear Board Members:

I am currently serving as the President/CEO of Habilitative Systems, Inc. Our organization serves vulnerable, low-income people who face a wide variety of adverse health and social outcomes which include, but are not limited to: homelessness, substance abuse, mental illness, and developmental disabilities. Our core services are segmented into four categories: *Residential Services, Disabilities Management, Children and Family Services, and Behavioral Health*. We provide community housing, outpatient therapy and counseling, psychoeducational groups, medication management, case management, crisis intervention, prevention and wellness services and employment and training.

I am writing to express our support for the certificate of need (CON) permit application submitted by Austin Dialysis at Loretto, a joint venture with Loretto Hospital to establish a 12-station in-center hemodialysis center. We ask the members of the State Board to approve this project and grant a CON permit because this project will enhance access to important healthcare services in a traditionally underserved and impoverished community. It will provide an additional and accessible resource for our clients who frequently have co-occurring medical conditions, including kidney disease.

We kindly request that you approve this application. We believe the project is both necessary and in the best interest of our community. Thank you for your consideration.

Sincerely,

Donald J. Dew, MSW, ACSW  
President/CEO

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OCT 2 2019

HEALTH FACILITIES &  
SERVICES REVIEW BOARD

Web Site [www.habilitative.org](http://www.habilitative.org)  
773/261-2252 Phone • 773/854-8364 TDD • 773/854-8300 Fax

**CHICAGO OFFICE**  
5051 W. CHICAGO AVE.  
CHICAGO, IL 60651  
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773.378.5903 FAX  
773.416.4663 CELL  
repford@lashawnford.com



**CAPITOL OFFICE**  
239-E STRATTON BUILDING  
SPRINGFIELD, IL 62706  
217.782.5962 OFFICE  
217.557.4502 FAX

**La Shawn K. Ford**  
**State Representative**  
**8<sup>th</sup> District**

**RECEIVED**

October 2, 2019

OCT 2 2019

Illinois Health Facilities and Services Review Board  
Attention: Courtney Avery, Administrator  
Illinois Department of Public Health  
525 West Jefferson St., 2nd Floor  
Springfield IL 62761

**HEALTH FACILITIES &  
SERVICES REVIEW BOARD**

Re: Project 19-022 – Austin Dialysis at Loretto Hospital

Dear Ms. Avery:

I write this letter in support of Austin's Dialysis Certificate of Need (C.O.N) Project at Loretto Hospital. Please inform the members of the Illinois Health Facilities and Services State Review Board that I fully support C.O.N Project 19-022. The C.O.N Project is proposing the establishment of a 12-station dialysis facility in the City of Chicago. Currently, the State Board's inventory data shows that Health Service Area 6 (Chicago) has a need for 80 additional dialysis stations. The C.O.N Project is prepared to help meet those needs of the State Board.

The federal Health Resources and Services Administration lists Austin and the surrounding communities as medically underserved. Austin is an area with a large African American population, and a group that suffers disproportionately from kidney disease. Loretto Hospital's C.O.N Project will help to enhance access to dialysis care for people in our area.

In conclusion, I support Loretto Hospital's C.O.N Project. The C.O.N Project will not only provide the much-needed resources but will also provide new economic development and job creation in our community. I humbly ask the State Board to approve the C.O.N Project's permit application to further help serve the many constituents in need of this service.

For any further questions about this letter of support, please contact me at Repford@lashawnford.com. I thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to be "L. Ford".

La Shawn K. Ford  
State Representative-Eighth District

October 2, 2019

Illinois Health Facilities and Services Review Board  
Illinois Department of Public Health  
525 West Jefferson St., 2nd Floor  
Springfield IL 62761

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HEALTH FACILITIES &  
SERVICES REVIEW BOARD

Attention: Ms. Courtney Avery, Administrator

**Re: Project 19-022 – Austin Dialysis at Loretto**

Dear Ms. Avery:

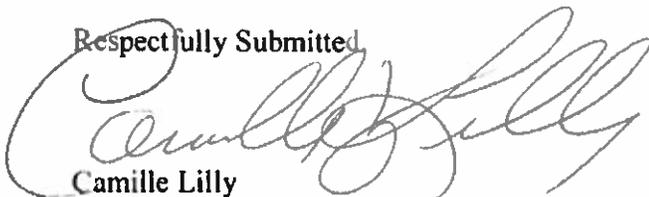
Please let the members of the Illinois Health Facilities and Services Review Board (State Board) know that I fully support CON project 19-022, which is proposing the establishment of a 12-station dialysis facility in the City of Chicago. The State Board's inventory data shows that Health Service Area 6 (i.e., Chicago) has a need for 80 additional dialysis stations. This project will meet that stated need.

Furthermore, I support this project because:

- it will enhance access to dialysis care in the Austin neighborhood, an area with a large African American population, a group that suffers disproportionately from kidney disease;
- it will enhance access to dialysis care services in an area that is underserved, with the federal Health Resources and Services Administration listing Austin and surrounding communities as medically underserved; and
- it will provide economic development and create more jobs in this community.

For the reasons noted above, I ask the State Board to approve this CON permit application. Thank you for your consideration.

Respectfully Submitted,



Camille Lilly  
State Representative  
Illinois 78<sup>th</sup> District  
6937 W. North Avenue  
Oak Park, IL 60302  
773.854.5011  
[Camille.lilly@lorettohospital.org](mailto:Camille.lilly@lorettohospital.org)

SPRINGFIELD OFFICE:  
ROOM 329A CAPITOL BUILDING  
SPRINGFIELD, IL 62706  
217/782-8505

DISTRICT OFFICE:  
10330 WEST ROOSEVELT ROAD  
SUITE 308  
WESTCHESTER, IL 60154  
708/343-7444  
708/343-7400 FAX



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MAJORITY LEADER  
STATE SENATOR • 4<sup>TH</sup> DISTRICT

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October 2, 2019

Illinois Health Facilities and Services Review Board  
Illinois Department of Public Health  
525 West Jefferson St., 2nd Floor  
Springfield IL 62761

Attention: Ms. Courtney Avery, Administrator

**Re: Project 19-022 – Austin Dialysis at Loretto**

Dear Ms. Avery:

Please let the members of the Illinois Health Facilities and Services Review Board (State Board) know that I fully support CON project 19-022, which is proposing the establishment of a 12-station dialysis facility in the City of Chicago. The State Board's inventory data shows that Health Service Area 6 (i.e., Chicago) has a need for 80 additional dialysis stations. This project will meet that stated need.

Furthermore, I support this project because:

- it will enhance access to dialysis care in the Austin neighborhood, an area with a large African American population, a group that suffers disproportionately from kidney disease;
- it will enhance access to dialysis care services in an area that is underserved, with the federal Health Resources and Services Administration listing Austin and surrounding communities as medically underserved; and
- it will provide economic development and create more jobs in this community.

For the reasons noted above, I ask the State Board to approve this CON permit application. Thank you for your consideration.

Respectfully Submitted,

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OCT 2 2019

**HEALTH FACILITIES &  
SERVICES REVIEW BOARD**

*Kimberly A. Lightford*

Kimberly Lightford  
State Senator  
Illinois 4<sup>th</sup> District  
10330 West Roosevelt Road  
Westchester, IL 60154  
708.343.7444  
[statesenatorkimberlylightford@comcast.net](mailto:statesenatorkimberlylightford@comcast.net)

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DEC 06 2019

HEALTH FACILITIES &  
SERVICES REVIEW BOARD

November 25, 2019

Illinois Health Facilities and Services Review Board  
Attn: Courtney Avery, Administrator  
525 West Jefferson Street, 2<sup>nd</sup> Floor  
Springfield, IL 62761

Re: Letter of Support for Austin Dialysis at Loretto  
CON Project 19-022

Dear Ms. Avery:

I am pleased to write a letter in support of Austin Dialysis at Loretto. This joint venture with Loretto Hospital to establish a 12-station in-center hemodialysis center will enhance access to important healthcare services in a traditionally underserved and impoverished community.

Please contact me if you have any questions.

Sincerely,



Larry McCulley  
President and CEO



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FEB 7 2020

HEALTH FACILITIES &  
SERVICES REVIEW BOARD

January 24, 2020

Illinois Health Facilities and Services Review Board  
525 West Jefferson Street, Second Floor  
Springfield, Illinois 62761  
Attention: Courtney Avery, Administrator

**Re: Letter of Support for Austin Dialysis at Loretto  
CON Project 19-022**

Dear Board Members:

Gift of Hope Organ and Tissue Donor Network is the federally designated agency, servicing 180 hospitals, 9 transplant programs and 12MM residents of Illinois and NW Indiana. We are the bridge between families who tragically lose a loved one who may be eligible for organ donation and those patients waiting for a live saving organ transplant. Roughly half of 1328 organs that were transplanted last year from our generous organ donors were kidneys to help get patients off dialysis and return them to productive, healthy lives. We work closely with the dialysis community to help educate patients about the possibility of receiving a kidney transplant and making sure that those who are on the wait list remain ready for transplant.

I am writing to express our support for the certificate of need (CON) permit application submitted by Austin Dialysis at Loretto, a joint venture with Loretto Hospital to establish a 12-station in-center hemodialysis center. We ask the members of the State Board to approve this project and grant a CON permit because this project will enhance access to important healthcare services in a traditionally underserved and impoverished community. Organ donation benefits our entire state since all patients listed at our local transplant programs here have equal access to the gifts of our donor families. It is critical that patients in our most disadvantaged communities such as Austin, have access, not only to quality dialysis services, but also at a facility that we know will strongly support organ transplantation. Loretto has been a key partner for Gift of Hope in its efforts to promote donation in their community. In fact, you can see that support in the form a 7-story tall mural located on the west wall of the hospital, that Gift of Hope and Loretto dedicated to honor organs donors from the community last year.

We kindly request that you approve this application. We believe the project is both necessary and in the best interest of our community. Thank you for your consideration.

Sincerely,



J. Kevin Cmunt  
President and CEO



MAPLE AVENUE KIDNEY CENTER  
DIVISION OF NEPHROLOGY

September 4, 2019

Ms. Courtney Avery  
Illinois Health and Facilities Services Review Board  
525 West Jefferson 2nd Floor  
Springfield, Illinois 62761

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SEP 10 2019

**HEALTH FACILITIES &  
SERVICES REVIEW BOARD**

Re: Opposition to #19-022, Austin Dialysis at Loretto, Chicago  
Applicants: **Austin Dialysis Center, LLC**

I am writing on behalf of Maple Avenue Kidney Center in Oak Park, Illinois in opposition to project **#19-022 Austin Dialysis at Loretto**, Chicago, (a proposed Joint Venture between Austin Dialysis Center LLC and Loretto Hospital) based on lack of Need, Unnecessary Duplication/Maldistribution of Services and impact on other Providers.

There is currently a need of **only 5 stations in HSA 6**. The applicants have submitted application for a 12 station ESRD facilities in HSA 6 to be heard at the October 22, 2019 Board meeting (#19-02, #19-025 and #19-027). Even if there will be a need for stations in HSA 6 after the next need determination, approving 12 stations to come on line at the same time in one HSA, within 30-minutes travel time, will flood the market rather than incrementally adding clinics to adjust to evidenced and projected growth of ESRD.

It also seems that the applicant is using the CKD base to justify number of CKD patients based on the **hospital admissions** of CKD and ESRD patients, the fact remains that these patients have established nephrology support outside the hospital with other nephrologist **and in case of ESRD patients they have already established schedule for their dialysis treatments with existing facilities**. Having **97 ESRD** patients' getting acute dialysis in the hospital does not guarantee that these patients did not have continuity of care and were actively looking for a dialysis unit placement. This merely means that they were hospitalized for any number of other health complications, received acute dialysis treatment at the hospital and upon discharge will prefer to return to their respective dialysis facilities. Almost every hospital provides acute dialysis treatment to the patients that are admitted to their facilities seeking care.

Applicants also attached a letter from their proposed medical director, Dr. Rajani Kosuri, who states in her letter that she **reviewed the records of the ESRD patients belonging to other Nephrologists** and agrees that they need dialysis. She was not the nephrology service provider for these patients either at the hospital or in her private practice and by reviewing these records she is possibly **violating the HIPPA rights** of these patient as well as their providers. These patients were followed by their respective providers at the hospital and continued their care at their outpatient practices after the patients got discharged from the hospital.



MAPLE AVENUE KIDNEY CENTER  
DIVISION OF NEPHROLOGY

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Further, Loretto hospital is non-profit organization with tax exempt status with IRS, they are going in partnership with Austin Dialysis Center, LLC, A for-profit organization with zero percent control of this joint venture. According to IRS Revenue Ruling 98-15, the summarized guidelines for joint venter partnership between a non-pro and for-profit organizations are as follows:

1. The **non-profit organization must have control** (in substance as well as a form) of the partnership or joint venture. (Loretto Hospital has **0 control** on this Dialysis JV)
2. The **benefit to the community** (or the non-profit's charitable purpose) must explicitly be put ahead of the partnership's profitability. (With **0 control, Loretto will have 0 benefits** to the community)
3. Although the ruling specifically deals with hospital joint ventures, it is not limited to the hospital sector and is presumably **applicable to any joint venture involving a non-profit entity as a general partner.**
4. Revenue Ruling 98-15 does not apply when an exempt entity is a limited partner rather than a general partner because the organization is merely a passive investor at that point. (Loretto Hospital is not a passive investor in this project)
5. Since a joint venture can also be a partnership, an entity's exempt status may be jeopardized by the activities of the partnership since the activities of a partnership are attributed to its partners.
6. The facts and circumstances of each joint venture or partnership arrangement will be analyzed to determine whether the preceding guidelines are satisfied.

Lastly, the applicant failed to inform our facility that they were applying for the certificate of need application for a new dialysis facility that will be located less than 3 miles from our unit. Our current utilization is 56.48%, we will gladly care for new patients requiring care, and do so willingly and well, and ask that you give us the opportunity to continue to provide this care by making our facility sustainable. Other facilities close by are struggling to keep their stations occupied, notable facilities current quarterly census is attached with this letter for your reference. Approving this project will put strain on the health care delivery system.

The approval of the Austin Dialysis at Loretto will create unnecessary duplication & maldistribution of services across HSA 6 & 7. There are under-utilized facilities of various providers in close proximity to the proposed project that would be negatively impacted.



MAPLE AVENUE KIDNEY CENTER  
DIVISION OF NEPHROLOGY

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We respectfully ask the Board to take our comments/concerns into consideration when reviewing the proposed project, as well as the negative findings which will most certainly be noted in the State Board Report.

Sincerely,

**Hamid Humayun M.D., F.A.C.P., F.A.S.N.**  
*CEO & Medical Director*

Attachment with this Letter:

- I. Utilization data of 16 facilities within 5/6 miles radius of the proposed project. 12 of the 16 facilities are under 80% of the capacity utilization. .
- II. The IRS Revenue Ruling 98-15 document, retrieved from <https://www.irs.gov/pub/irs-drop/rr-98-15.pdf>

Facility & Address	Ownership	HSA	Miles From Proposed Unit	March 2019 Stations	March 2019 Census	March 2019 Utilization	June 2019 Census	June 2019 Utilization
West Metro Dialysis Center 1044 West Mozart, Chicago	Fresenius	6	5.5	12	9	12.50%	10	13.89%
1806 West Hubbard Street, Chicago	Fresenius	6	6	21	59	46.83%	59	46.83%
Davita West Side 1600 West 13th Street, Chicago	Davita	6	6	12	39	54.17%	38	52.78%
Parkway 3410 West Van Buren Street. Chicago	Fresenius	6	3.1	30	101	56.11%	97	53.89%
Maple Avenue Kidney Center 610 South Maple Avenue. Oak Park	Independent	7	2.5	18	-	-	61	56.48%
Garfield Kidney Center 408 North Homan Avenue. Chicago	Davita	6	4	24	88	61.11%	87	60.42%
Austin Community Kidney Center 4800 W Chicago Ave Ste 2A. Chicago	Fresenius	6	2.8	16	65	67.71%	65	67.71%
FMC Humboldt Park 3500 West Grand Avenue. Chicago	Fresenius	6	5	34	144	70.59%	141	69.12%
Fresenius Medical Care River Forest 103 Forest Avenue. River Forest	Fresenius	7	3.6	24	100	69.44%	107	74.31%
FMC Berwyn 2601 South Harlem Avenue. Berwyn	Fresenius	7	4.7	30	138	76.67%	135	75.00%
West Suburban Hosp. Dialysis Unit 518 N Austin Blvd 5th Fl, Oak Park	Fresenius	7	1.9	46	237	85.87%	220	79.71%
Fresenius Medical Care Cicero 3000 South Cicero Avenue. Cicero	Fresenius	7	3.4	20	97	80.83%	99	82.50%
Oak Park Dialysis Center 733 West Madison Street. Oak Park	Fresenius	7	6.5	12	67	93.06%	67	93.06%
Little Village Dialysis 2335 W. Cermack Road. Chicago	Davita	6	6.2	16	89	92.71%	90	93.75%
Davita Lawndale 3934 West 24th Street. Chicago	Davita	6	3.9	16	101	105.21%	99	103.13%

Part I

Section 501.--Exemption From Tax on Corporations, Certain Trusts, Etc.

26 CFR 1.501(c)(3)-1: Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

(Also §§ 170 and 509.)

Rev. Rul. 98-15, 1998-12 I.R.B.

ISSUE

Whether, under the facts described below, an organization that operates an acute care hospital continues to qualify for exemption from federal income tax as an organization described in § 501(c)(3) of the Internal Revenue Code when it forms a limited liability company (LLC) with a for-profit corporation and then contributes its hospital and all of its other operating assets to the LLC, which then operates the hospital.

FACTS

Situation 1

A is a nonprofit corporation that owns and operates an acute care hospital. A has been recognized as exempt from federal

income tax under § 501(a) as an organization described in § 501(c)(3) and as other than a private foundation as defined in § 509(a) because it is described in § 170(b)(1)(A)(iii). B is a for-profit corporation that owns and operates a number of hospitals.

A concludes that it could better serve its community if it obtained additional funding. B is interested in providing financing for A's hospital, provided it earns a reasonable rate of return. A and B form a limited liability company, C. A contributes all of its operating assets, including its hospital to C. B also contributes assets to C. In return, A and B receive ownership interests in C proportional and equal in value to their respective contributions.

C's Articles of Organization and Operating Agreement ("governing documents") provide that C is to be managed by a governing board consisting of three individuals chosen by A and two individuals chosen by B. A intends to appoint community leaders who have experience with hospital matters, but who are not on the hospital staff and do not otherwise engage in business transactions with the hospital.

The governing documents further provide that they may only be amended with the approval of both owners and that a majority of three board members must approve certain major decisions relating to C's operation, including decisions relating to any of the following topics:

- A. C's annual capital and operating budgets;

- B. Distributions of C's earnings;
- C. Selection of key executives;
- D. Acquisition or disposition of health care facilities;
- E. Contracts in excess of \$x per year;
- F. Changes to the types of services offered by  
the hospital; and
- G. Renewal or termination of management agreements.

The governing documents require that C operate any hospital it owns in a manner that furthers charitable purposes by promoting health for a broad cross section of its community. The governing documents explicitly provide that the duty of the members of the governing board to operate C in a manner that furthers charitable purposes by promoting health for a broad cross section of the community overrides any duty they may have to operate C for the financial benefit of its owners.

Accordingly, in the event of a conflict between operation in accordance with the community benefit standard and any duty to maximize profits, the members of the governing board are to satisfy the community benefit standard without regard to the consequences for maximizing profitability.

The governing documents further provide that all returns of capital and distributions of earnings made to owners of C shall be proportional to their ownership interests in C. The terms of the governing documents are legal, binding, and enforceable under applicable state law.

C enters into a management agreement with a management company that is unrelated to A or B to provide day-to-day management services to C. The management agreement is for a five-year period, and the agreement is renewable for additional five-year periods by mutual consent. The management company will be paid a management fee for its services based on C's gross revenues. The terms and conditions of the management agreement, including the fee structure and the contract term, are reasonable and comparable to what other management firms receive for similar services at similarly situated hospitals. C may terminate the agreement for cause.

None of the officers, directors, or key employees of A who were involved in making the decision to form C were promised employment or any other inducement by C or B and their related entities if the transaction were approved. None of A's officers, directors, or key employees have any interest, including any interest through attribution determined in accordance with the principles of § 318, in B or any of its related entities.

Pursuant to § 301.7701-3(b) of the Procedure and Administrative Regulations, C will be treated as a partnership for federal income tax purposes.

A intends to use any distributions it receives from C to fund grants to support activities that promote the health of A's community and to help the indigent obtain health care. Substantially all of A's grantmaking will be funded by distributions from C. A's projected grantmaking program and its

participation as an owner of C will constitute A's only activities.

Situation 2

D is a nonprofit corporation that owns and operates an acute care hospital. D has been recognized as exempt from federal income tax under § 501(a) as an organization described in § 501(c)(3) and as other than a private foundation as defined in § 509(a) because it is described in § 170(b)(1)(A)(iii). E is a for-profit hospital corporation that owns and operates a number of hospitals and provides management services to several hospitals that it does not own.

D concludes that it could better serve its community if it obtained additional funding. E is interested in providing financing for D's hospital, provided it earns a reasonable rate of return. D and E form a limited liability company, F. D contributes all of its operating assets, including its hospital to F. E also contributes assets to F. In return, D and E receive ownership interests proportional and equal in value to their respective contributions.

F's Articles of Organization and Operating Agreement ("governing documents") provide that F is to be managed by a governing board consisting of three individuals chosen by D and three individuals chosen by E. D intends to appoint community leaders who have experience with hospital matters, but who are not on the hospital staff and do not otherwise engage in business transactions with the hospital.

The governing documents further provide that they may only be amended with the approval of both owners and that a majority of board members must approve certain major decisions relating to F's operation, including decisions relating to any of the following topics:

- A. F's annual capital and operating budgets;
- B. Distributions of F's earnings over a required minimum level of distributions set forth in the Operating Agreement;
- C. Unusually large contracts; and
- D. Selection of key executives.

F's governing documents provide that F's purpose is to construct, develop, own, manage, operate, and take other action in connection with operating the health care facilities it owns and engage in other health care-related activities. The governing documents further provide that all returns of capital and distributions of earnings made to owners of F shall be proportional to their ownership interests in F.

F enters into a management agreement with a wholly-owned subsidiary of E to provide day-to-day management services to F. The management agreement is for a five-year period, and the agreement is renewable for additional five-year periods at the discretion of E's subsidiary. F may terminate the agreement only for cause. E's subsidiary will be paid a management fee for its services based on gross revenues. The terms and conditions of the management agreement, including the fee structure and the

contract term other than the renewal terms, are reasonable and comparable to what other management firms receive for similar services at similarly situated hospitals.

As part of the agreement to form E, D agrees to approve the selection of two individuals to serve as F's chief executive officer and chief financial officer. These individuals have previously worked for E in hospital management and have business expertise. They will work with the management company to oversee F's day-to-day management. Their compensation is comparable to what comparable executives are paid at similarly situated hospitals.

Pursuant to § 301.7701-3(b), E will be treated as a partnership for federal tax income purposes.

D intends to use any distributions it receives from E to fund grants to support activities that promote the health of D's community and to help the indigent obtain health care. Substantially all of D's grantmaking will be funded by distributions from E. D's projected grantmaking program and its participation as an owner of E will constitute D's only activities.

#### LAW

Section 501(c)(3) provides, in part, for the exemption from federal income tax of corporations organized and operated exclusively for charitable, scientific, or educational purposes,

provided no part of the organization's net earnings inures to the benefit of any private shareholder or individual.

Section 1.501(c)(3)-1(c)(1) of the Income Tax Regulations provides that an organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in § 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose. In Better Business Bureau of Washington, D.C. v. United States, 326 U.S. 279, 283 (1945), the Court stated that "the presence of a single . . . [non-exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly . . . [exempt] purposes."

Section 1.501(c)(3)-1(d)(1)(ii) provides that an organization is not organized or operated exclusively for exempt purposes unless it serves a public rather than a private interest. It further states that "to meet the requirement of this subdivision, it is necessary for an organization to establish that it is not organized and operated for the benefit of private interests . . . ."

Section 1.501(c)(3)-1(d)(2) provides that the term "charitable" is used in § 501(c)(3) in its generally accepted legal sense. The promotion of health has long been recognized as a charitable purpose. See Restatement (Second) of Trusts, §§ 368, 372 (1959); 4A Austin W. Scott and William F. Fratcher,

The Law of Trusts §§ 368, 372 (4th ed. 1989). However, not every activity that promotes health supports tax exemption under § 501(c)(3). For example, selling prescription pharmaceuticals certainly promotes health, but pharmacies cannot qualify for recognition of exemption under § 501(c)(3) on that basis alone. Federation Pharmacy Services, Inc. v. Commissioner, 72 T.C. 687 (1979), aff'd, 625 F.2d 804 (8th Cir. 1980) ("Federation Pharmacy"). Furthermore, "an institution for the promotion of health is not a charitable institution if it is privately owned and is run for the profit of the owners." 4A Austin W. Scott and William F. Fratcher, The Law of Trusts § 372.1 (4th ed. 1989). See also Restatement (Second) of Trusts, § 376 (1959). This principle applies to hospitals and other health care organizations. As the Tax Court stated, "[w]hile the diagnosis and cure of disease are indeed purposes that may furnish the foundation for characterizing the activity as 'charitable,' something more is required." Sonora Community Hospital v. Commissioner, 46 T.C. 519, 525-526 (1966), aff'd 397 F.2d 814 (9th Cir. 1968) ("Sonora"). See also Sound Health Association v. Commissioner, 71 T.C. 158 (1978), acq. 1981-2 C.B. 2 ("Sound Health"); Geisinger Health Plan v. Commissioner, 985 F.2d 1210 (3rd Cir., 1993), rev'g 62 T.C.M. 1656 (1991) ("Geisinger").

In evaluating whether a nonprofit hospital qualifies as an organization described in § 501(c)(3), Rev. Rul. 69-545, 1969-2 C.B. 117, compares two hospitals. The first hospital discussed is controlled by a board of trustees composed of independent

civic leaders. In addition, the hospital maintains an open medical staff, with privileges available to all qualified physicians; it operates a full-time emergency room open to all regardless of ability to pay; and it otherwise admits all patients able to pay (either themselves, or through third party payers such as private health insurance or government programs such as Medicare). In contrast, the second hospital is controlled by physicians who have a substantial economic interest in the hospital. This hospital restricts the number of physicians admitted to the medical staff, enters into favorable rental agreements with the individuals who control the hospital, and limits emergency room and hospital admission substantially to the patients of the physicians who control the hospital. Rev. Rul. 69-545 notes that in considering whether a nonprofit hospital is operated to serve a private benefit, the Service will weigh all the relevant facts and circumstances in each case, including the use and control of the hospital. The revenue ruling concludes that the first hospital continues to qualify as an organization described in § 501(c)(3) and the second hospital does not because it is operated for the private benefit of the physicians who control the hospital.

Section 509(a) provides that the term "private foundation" means a domestic or foreign organization described in § 501(c)(3) other than an organization described in § 509(a)(1), (2), (3), or (4). The organizations described in § 509(a)(1) include those described in § 170(b)(1)(A)(iii). An organization is described

in § 170(b)(1)(A)(iii) if its principal purpose is to provide medical or hospital care.

Section 512(c) provides that an exempt organization that is a member of a partnership conducting an unrelated trade or business with respect to the exempt organization must include its share of the partnership income and deductions attributable to that business (subject to the exceptions, additions, and limitations in § 512(b)) in computing its unrelated business income. See also H.R. No. 2319, 81st Cong., 2d Sess. 36, 111-112 (1950); S. Rep. No. 2375, 81st Cong., 2d Sess. 26, 109-110 (1950); § 1.512(c)-1.

In Butler v. Commissioner, 36 T.C. 1097 (1961), acq. 1962-2 C.B. 4 ("Butler"), the court examined the relationship between a partner and a partnership for purposes of determining whether the partner was entitled to a business bad debt deduction for a loan he had made to the partnership that it could not repay. In holding that the partner was entitled to the bad debt deduction, the court noted that "[b]y reason of being a partner in a business, petitioner was individually engaged in business." Butler, 36 T.C. at 1106 citing Dwight A. Ward v. Commissioner, 20 T.C. 332 (1953), aff'd 224 F.2d 547 (9th Cir. 1955).

In Plumstead Theatre Society, Inc. v. Commissioner, 74 T.C. 1324 (1980), aff'd, 675 F.2d 244 (9th Cir. 1982) ("Plumstead"), the Tax Court held that a charitable organization's participation as a general partner in a limited partnership did not jeopardize its exempt status. The organization co-produced a play as one of

its charitable activities. Prior to the opening of the play, the organization encountered financial difficulties in raising its share of costs. In order to meet its funding obligations, the organization formed a limited partnership in which it served as general partner, and two individuals and a for-profit corporation were the limited partners. One of the significant factors supporting the Tax Court's holding was its finding that the limited partners had no control over the organization's operations.

In Broadway Theatre League of Lynchburg, Virginia, Inc. v. U.S., 293 F.Supp. 346 (W.D.Va. 1968) ("Broadway Theatre League"), the court held that an organization that promoted an interest in theatrical arts did not jeopardize its exempt status when it hired a booking organization to arrange for a series of theatrical performances, promote the series and sell season tickets to the series because the contract was for a reasonable term and provided for reasonable compensation and the organization retained ultimate authority over the activities being managed.

In Housing Pioneers v. Commissioner, 65 T.C.M. (CCH) 2191 (1993), aff'd, 49 F.3d 1395 (9th Cir. 1995), amended 58 F.3d 401 (9th Cir. 1995) ("Housing Pioneers"), the Tax Court concluded that an organization did not qualify as a § 501(c)(3) organization because its activities performed as co-general partner in for-profit limited partnerships substantially furthered a non-exempt purpose, and serving that purpose caused

the organization to serve private interests. The organization entered into partnerships as a one percent co-general partner of existing limited partnerships for the purpose of splitting the tax benefits with the for-profit partners. Under the management agreement, the organization's authority as co-general partner was narrowly circumscribed. It had no management responsibilities and could describe only a vague charitable function of surveying tenant needs.

In est of Hawaii v. Commissioner, 71 T.C. 1067 (1979), aff'd in unpublished opinion 647 F.2d 170 (9th Cir. 1981) ("est of Hawaii"), several for-profit est organizations exerted significant indirect control over est of Hawaii, a non-profit entity, through contractual arrangements. The Tax Court concluded that the for-profits were able to use the non-profit as an "instrument" to further their for-profit purposes. Neither the fact that the for-profits lacked structural control over the organization nor the fact that amounts paid to the for-profit organizations under the contracts were reasonable affected the court's conclusion. Consequently, est of Hawaii did not qualify as an organization described in § 501(c)(3).

In Harding Hospital, Inc. v. United States, 505 F.2d 1068 (6th Cir. 1974) ("Harding"), a non-profit hospital with an independent board of directors executed a contract with a medical partnership composed of seven physicians. The contract gave the physicians control over care of the hospital's patients and the stream of income generated by the patients while also

guaranteeing the physicians thousands of dollars in payment for various supervisory activities. The court held that the benefits derived from the contract constituted sufficient private benefit to preclude exemption.

#### ANALYSIS

For federal income tax purposes, the activities of a partnership are often considered to be the activities of the partners. See, e.g., Butler. Aggregate treatment is also consistent with the treatment of partnerships for purpose of the unrelated business income tax under § 512(c). See H.R. No. 2319, 81st Cong., 2d Sess. 36, 110-112 (1950); S. Rep. No. 2375, 81st Cong., 2d Sess. 26, 109-110 (1950); § 1.512(c)-1. In light of the aggregate principle discussed in Butler and reflected in § 512(c), the aggregate approach also applies for purposes of the operational test set forth in § 1.501(c)(3)-1(c). Thus, the activities of an LLC treated as a partnership for federal income tax purposes are considered to be the activities of a nonprofit organization that is an owner of the LLC when evaluating whether the nonprofit organization is operated exclusively for exempt purposes within the meaning of § 501(c)(3).

A § 501(c)(3) organization may form and participate in a partnership, including an LLC treated as a partnership for federal income tax purposes, and meet the operational test if participation in the partnership furthers a charitable purpose, and the partnership arrangement permits the exempt organization

to act exclusively in furtherance of its exempt purpose and only incidentally for the benefit of the for-profit partners. See Plumstead and Housing Pioneers. Similarly, a § 501(c)(3) organization may enter into a management contract with a private party giving that party authority to conduct activities on behalf of the organization and direct the use of the organization's assets provided that the organization retains ultimate authority over the assets and activities being managed and the terms and conditions of the contract are reasonable, including reasonable compensation and a reasonable term. See Broadway Theatre League. However, if a private party is allowed to control or use the non-profit organization's activities or assets for the benefit of the private party, and the benefit is not incidental to the accomplishment of exempt purposes, the organization will fail to be organized and operated exclusively for exempt purposes. See est of Hawaii; Harding; § 1.501(c)(3)-1(c)(1); and § 1.501(c)(3)-1(d)(1)(ii).

Situation 1

After A and B form C, and A contributes all of its operating assets to C, A's activities will consist of the health care services it provides through C and any grantmaking activities it can conduct using income distributed by C. A will receive an interest in C equal in value to the assets it contributes to C, and A's and B's returns from C will be proportional to their respective investments in C. The governing documents of C commit C to providing health care services for the benefit of the

community as a whole and to give charitable purposes priority over maximizing profits for C's owners. Furthermore, through A's appointment of members of the community familiar with the hospital to C's board, the board's structure, which gives A's appointees voting control, and the specifically enumerated powers of the board over changes in activities, disposition of assets, and renewal of the management agreement, A can ensure that the assets it owns through C and the activities it conducts through C are used primarily to further exempt purposes. Thus, A can ensure that the benefit to B and other private parties, like the management company, will be incidental to the accomplishment of charitable purposes. Additionally, the terms and conditions of the management contract, including the terms for renewal and termination, are reasonable. Finally, A's grants are intended to support education and research and give resources to help provide health care to the indigent. All of these facts and circumstances establish that, when A participates in forming C and contributes all of its operating assets to C, and C operates in accordance with its governing documents, A will be furthering charitable purposes and continue to be operated exclusively for exempt purposes.

Because A's grantmaking activity will be contingent upon receiving distributions from C, A's principal activity will continue to be the provision of hospital care. As long as A's principal activity remains the provision of hospital care, A will

not be classified as a private foundation in accordance with § 509(a)(1) as an organization described in § 170(b)(1)(A)(iii).

Situation 2

When D and E form F, and D contributes its assets to F, D will be engaged in activities that consist of the health care services it provides through F and any grantmaking activities it can conduct using income distributed by F. However, unlike A, D will not be engaging primarily in activities that further an exempt purpose. "While the diagnosis and cure of disease are indeed purposes that may furnish the foundation for characterizing the activity as 'charitable,' something more is required." Sonora, 46 T.C. at 525-526. See also Federation Pharmacy; Sound Health; and Geisinger. In the absence of a binding obligation in F's governing documents for F to serve charitable purposes or otherwise provide its services to the community as a whole, F will be able to deny care to segments of the community, such as the indigent. Because D will share control of F with E, D will not be able to initiate programs within F to serve new health needs within the community without the agreement of at least one governing board member appointed by E. As a business enterprise, E will not necessarily give priority to the health needs of the community over the consequences for F's profits. The primary source of information for board members appointed by D will be the chief executives, who have a prior relationship with E and the management company, which is a subsidiary of E. The management company itself will

have broad discretion over F's activities and assets that may not always be under the board's supervision. For example, the management company is permitted to enter into all but "unusually large" contracts without board approval. The management company may also unilaterally renew the management agreement. Based on all these facts and circumstances, D cannot establish that the activities it conducts through F further exempt purposes. "[I]n order for an organization to qualify for exemption under § 501(c)(3) the organization must 'establish' that it is neither organized nor operated for the 'benefit of private interests.'" Federation Pharmacy, 625 F.2d at 809. Consequently, the benefit to E resulting from the activities D conducts through F will not be incidental to the furtherance of an exempt purpose. Thus, D will fail the operational test when it forms E, contributes its operating assets to E, and then serves as an owner of F.

#### HOLDING

A will continue to qualify as an organization described in § 501(c)(3) when it forms C and contributes all of its operating assets to C because A has established that A will be operating exclusively for a charitable purpose and only incidentally for the purpose of benefiting the private interests of B. Furthermore, A's principal activity will continue to be the provision of hospital care when C begins operations. Thus, A will be an organization described in § 170(b)(1)(A)(iii) and thus, will not be classified as a private foundation in

accordance with § 509(a)(1), as long as hospital care remains its principal activity.

D will violate the requirements to be an organization described in § 501(c)(3) when it forms E and contributes all of its operating assets to E because D has failed to establish that it will be operated exclusively for exempt purposes.

#### DRAFTING INFORMATION

The principal author of this revenue ruling is Judith E. Kindell of the Exempt Organizations Division. For further information regarding this revenue ruling contact Judith E. Kindell on (202) 622-6494 (not a toll-free call).



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October 2, 2019

**VIA U.S. MAIL**

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

***Re: Certificate of Need Project 19-022  
Austin Dialysis at Loretto  
Response to Opposition Letter***

**RECEIVED**

OCT 02 2019

**HEALTH FACILITIES &  
SERVICES REVIEW BOARD**

Dear Ms. Avery:

This letter replies to the comments submitted by Maple Avenue Kidney Center (“MAKC”) in its opposition letter dated September 4, 2019, and thereafter posted on the website of the Health Facilities and Services Review Board (“State Board”). The opposition letter raises six points, all of which are incorrect or misleading. On behalf of Austin Dialysis at Loretto, LLC (“Applicant”), a response to each argument is provided below.

**(1) State Board Data Shows Insufficient Need in HSA 6**

The first argument posed by MAKC, that Health Service Area 6 (“HSA 6”) only shows a need for 5 additional in-center hemodialysis stations and, therefore, the State Board should oppose the Applicant’s project seeking approval for a 12-station dialysis center, is now moot. The State Board recently published a new Inventory of Health Care Facilities and Services and Need Determination (“Inventory”) and, therein, included new ESRD facility station need projections for HSA 6 through 2022. The revised Inventory identifies a need for an additional 80 dialysis stations in HSA 6, clearly showing that a 12-station dialysis center is not an unreasonable request in a traditionally underserved part of Chicago.

**(2) Using CKD Patients Based on Hospital Admissions is Improper**

The second argument posed by MAKC illustrates an imperfection in the State Board’s rules. The Applicant correctly points out that the Applicant’s CON permit application justifies need for the project based on hospital data pertaining to patients with chronic kidney disease (“CKD”) that have received services at the hospital rather than the more traditional historical data coming from a nephrologist in private practice. This raises two important points of consideration. First, MAKC fails to address how this review criterion does not take into account a hospital hiring a new nephrologist with no historical case data.

Second, MAKC does not explain how difficult it is to find an established nephrologist in the City of Chicago or elsewhere who has not, long ago, agreed to an affiliation with the two big business dialysis—that is, Fresenius and DaVita. The Applicant approached several nephrologists and the result was not favorable.

In the present case, the Applicant first attempted the traditional route and met with several nephrologists in the area surrounding the hospital. Some were not interested in a relationship with the hospital. Others wanted unreasonable shares in the business. Many were already affiliated with Fresenius and DaVita. After several delays in the project due to ongoing efforts to secure a reasonable relationship with a nephrologist or nephrology group, the Applicant decided to take another route. The Applicant chose to hire or otherwise contract with one or more new, unaffiliated nephrologists to provide this service line and is prepared to present a cogent argument to the State Board regarding its need data at the upcoming State Board meeting in October.

In sum, the Applicant frequently sees that there is a growing need for dialysis stations in one of Chicago's poorest, medically underserved communities. The Applicant's observations are bolstered by the State Board's new hemodialysis station need data recently published in the revised Inventory (i.e., a need for 80 more stations). Therefore, the Applicant is asking the State Board to consider alternative data based on hospital admissions because it is the best it can do when existing nephrologists are joined in closed-shop relationships with Fresenius and DaVita or demand unrealistic shares in the joint venture business.

### **(3) Use of Hospital Data Violated HIPAA**

Next, MAKC incorrectly argues that the Applicant used hospital data in a manner that violates the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). MAKC argues that the Applicant's in-house dialysis medical director, Rajani Kosuri, M.D., "possibly" violated HIPAA when she "reviewed the records of the ESRD patients belonging to other nephrologists and agrees that the patients need dialysis" when she was neither the patients' "nephrology service provider at the hospital or in her private practice." The Applicant takes exception to a project opponent raising claims that "possibly" violate the law. MAKC should have consulted with a healthcare attorney before making claims about alleged violations of law. Such actions are irresponsible and possibly libelous.

Generally, under HIPAA, a person's protected health information ("PHI") may be used and disclosed by health care professionals and providers only with the person's express written authorization. However, there are some exceptions to this general rule. A notable exception is the "Treatment, Payment, or Health Care Operations" exception. Under the third element of this exception, physicians and health care providers may use and disclose a person's PHI in order to "conduct healthcare business and to perform functions that support business activities." These activities include, but are not limited to, quality assessment activities, employee review activities, training of staff, and conducting or arranging for other business activities such as population-based activities relating to improving health (i.e., establishing a new service line to combat kidney disease in a majority minority community that has historically demanded dialysis treatments when compared with the population as a whole). The "health care operations" exception allows health care providers to review and use data to determine if a new service line, such as in-center dialysis care, is needed. Importantly, HIPAA's "minimum necessary standard" provides that a covered entity, such as Loretto, make reasonable efforts to limit the use and release of PHI to the minimum

necessary to accomplish the intended purpose of the request. Loretto met this standard by redacting patient names and other identifying information from the data set it used for this CON permit application.

#### **(4) Loretto Hospital, as a Not-For-Profit, Can't Enter the Joint Venture as Proposed**

As with the prior point, MAKC should have consulted with a competent legal counsel with actual knowledge of tax law. MAKC, citing federal IRS Revenue Ruling 98-15, claimed that Loretto, a co-applicant, cannot have “zero control” over a joint venture entity and delineates several points in support of this position, including: (a) Loretto as a nonprofit must have control of the entity; (b) the benefit to the community must explicitly be put ahead of the partnership’s profitability; and (c) that Rev. Rul. 98-15 can be applied to an outpatient dialysis joint venture arrangement even though the ruling applied to a hospital joint venture arrangement. MAKC concluded that the proposed arrangement may jeopardize Loretto’s tax exempt status. *However, MAKC’s opposition relies on irrelevant tax law!*

A not-for-profit health care organization that is qualified for a federal tax exemption under Section 501(c)(3) may permissibly engage in a joint venture (“JV”) with for-profit parties without putting its tax exemption at risk, so long as the joint venture structure meets certain parameters. Joint ventures involving tax exempt health care organizations fall into one of two categories: (a) “ancillary” joint ventures; and (b) “whole-entity” joint ventures. The joint venture arrangement between Loretto and Austin Dialysis falls under the prior category—ancillary JVs. The revenue ruling cited by MAKC cites the federal IRS’ opinion concerning whole-entity JVs.

An ancillary JV, like the one proposed in the CON permit application, is one that involves an insubstantial portion of the exempt entity’s assets and activities, such as ventures to create ambulatory surgery centers, acquire and operate new medical technologies, and arrangements to establish an in-center ESRD facility. In the alternative, a whole-entity JV arises when a tax exempt entity contributes all or a substantial portion of its assets and operations to a JV entity in partnership with a for-profit entity that contributes cash and/or assets. Ancillary JVs are, by far, the more common type of JV.

All JVs, whether ancillary or whole-entity, must be organized in a manner that ensures that the exempt organization will not effectively subsidize the for-profit participant in the venture, in order to avoid private inurement and/or an impermissible level of private benefit. Specifically, (a) each JV party must receive an interest in the JV that is proportionate to the value of the party’s contributions; (b) payments to participants or their affiliates for goods and services to the JV must be at arm’s length and at fair market value; and (c) the terms of the JV agreement must not put the exempt organization’s assets at risk to the benefit on any for-profit participant.

In the Applicant’s case, co-applicant Loretto will ultimately end up getting a major benefit, albeit, its interest will grow over time as it acquires interests in the JV entity through waived rent payments, which will always be fair market value. The joint venture operating agreement will give Loretto equal seats on the board of managers and include a requirement to follow the hospital’s charity care policies. These contractual terms will protect Loretto’s tax exempt status.

Finally, in regard to JV governance, majority control of a JV governance by the exempt organization is not absolutely required. It is, however, a highly favorable factor in establishing that profit motives do not subvert the exempt organization's charitable mission. That said, an exempt organization that lacks formal voting control of the JV entity to ensure control of major decisions should have another mechanism to ensure that the JV will operate to further the exempt organization's charitable purpose (e.g., the tax exempt organization retains powers over certain major actions).

In this matter, the Applicant's attorney will draft JV documents consistent with the laws affecting ancillary JVs and will include a clear statement of purpose that indicates that the JV will be operated in a manner consistent with the exempt organization's charitable purpose. The governing documents will also reflect that the for-profit partners recognize and understand that the operations of the JV entity will not be conducted in a manner solely designed to maximize profits.

#### **(5) Applicant Failed to Notify MAKC About Filing a CON Permit Application**

MAKC infers that the applicant wrongfully "failed to inform the facility that they were applying for a CON." Again, the law has changed regarding notice to existing providers and is a moot point to raise in an opposition letter.

MAKC was not required to receive notice from the Applicant that it was submitting a CON permit application for this project. MAKC is likely remembering an outdated CON review criterion, which required a CON permit applicant to send an impact letter to every affected provider in the project's geographic service area. However, the State Board eliminated this requirement many years ago.

#### **(6) Area ESRD Facilities Are Underutilized**

In its final point, MAKC argues that the State Board should deny this application because nearby ESRD facilities are underutilized, including MAKC, which has a 56.48% utilization rate that is well below the State Board 80% utilization standard.

In regard to MAKC's complaint about its ESRD facility being underutilized, it is true that its dialysis center is underperforming the expectations they set when applying for their CON permit. MAKC should look internally and determine why its nephrologists failed to satisfy the State Board's utilization standards even though at the time they applied for a permit its nephrologists certified that the target utilization standard would be met within two years of operation.

The Applicant, however, does not want to suggest that the State Board should not consider utilization data. It is legitimate for the State Board to examine existing ESRD facilities within the geographic service area and see to what extent existing ESRD facilities are utilized. It is relevant to the discussion. However, it is also reasonable to ask the question "why are existing facilities not at capacity?" There are many answers to this question.

While all of the existing ESRD facilities in the Applicant's geographic service area are not at capacity according to the State Board's 80% utilization standard, there are important facts to consider:

- There are seven ESRD facilities owned by Fresenius, five of which are operating below 80% utilization.
- When Fresenius comes before the State Board, they always claim that their centers will achieve capacity. In most cases, they don't. Is it possible that Fresenius' strategy is to keep many facilities below 80% to drive away possible competition? Maybe. But it's also possible that Fresenius' inability to achieve the 80% utilization rate at all of its facilities is because their forecasting model is too aggressive, which results in building centers that are too large for the particular community at its present population count. For example, Fresenius Kidney Care Congress, a rather large center with 30 stations, is presently utilized at 56%. Take away several stations and this center reaches the 80% utilization standard.
- The Applicant believes that Fresenius should be asked to account for their inability to meet the utilization standards and that system wide underutilization should not be held against applicants unaffiliated with big business dialysis companies.
- Furthermore, of the six facilities not at capacity, two are over 70% utilized and two more have utilization rates in the upper 60th percentiles. Thus, these four centers appear to be approaching the State Board's 80% utilization standard.

### **Conclusion**

The Applicant believes that this project will have a great impact on the Austin neighborhood and other surrounding communities, many of which fall within federally-designated medically underserved areas and health professional shortage areas. The Applicant's project site is centered in an area with high levels of poverty and where notable health disparities and outcomes have been reported. Moreover, HSA 6 now shows a need for 80 more dialysis stations. Despite MAKC's attempt to raise doubts about this project, the need for more dialysis stations in the Austin neighborhood is quite clear. The Applicant is looking forward to presenting this project to the State Board on October 22, 2019.

Please let me know if you have questions. Thank you for your attention to this matter.

Sincerely yours,



Joseph Hylak-Reinholtz  
Legal Counsel for Applicant

Enclosures