



COMMONWEALTH of VIRGINIA

Karen Shelton, MD
State Health Commissioner

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May 23, 2023

By Email

Matthew M. Cobb, Esquire
Williams Mullen
200 South Tenth Street
Richmond, Virginia 23219

**RE: Certificate of Public Need (COPN)
Request Number VA-8674
Burke SNF LLC
Fairfax County, Planning District (PD) 8
Health Planning Region II
Addition of 68 relocated nursing home beds to
an existing nursing facility through relocation
from Alexandria**

Dear Mr. Cobb:

In accordance with Article 1.1 of Chapter 4 of Title 32.1 (§ 32.1-102.1 *et seq.*) of the Code of Virginia (the "COPN Law"), I have reviewed the application captioned above. As required by Subsection B of Virginia Code § 32.1-102.3, I have considered all matters, listed therein, in making a determination of public need under the COPN law.

I have reviewed and adopted the enclosed findings, conclusions and recommended decision of the adjudication officer that convened the informal fact-finding conference on this application in accordance with the Virginia Administrative Process Act, Virginia Code § 2.2-4000 *et seq.*

Based on my review of this application and on the recommended decision of the adjudication officer, I am denying the application. The project proposed in the application is not consistent with applicable law.

The reasons for my decision include the following:

- (i) PD 8 has a large number of unused nursing home beds, the largest in the state, and a low average occupancy level among its nursing home beds;
- (ii) The project is not consistent with applicable provisions of the State Medical Facilities Plan;
- (iii) The Health Systems Agency of Northern Virginia, by vote of its board, recommends denial of the project;
- (iv) As proposed, the project appears intended to serve a relatively low percentage of Medicaid patients;
- (v) The total capital costs of the project are substantial, and constitute an additional cost to be paid by the applicant, in the form of a forbearance fee, which would likely bear an additional upward pressure on systemic health care costs;
- (vi) While the project would be of economic benefit to the applicant and the private equity owner that recently acquired this nursing home, it would be of no substantiated public value or benefit; and
- (vii) The most reasonable alternative to the project is maintenance of the status quo, allowing the foregone closure of 68 lightly-used beds proposed to be transferred, thereby decreasing a substantial surplus of nursing home beds and avoiding the unnecessary cost of constructing the project.

Sincerely,



Karen Shelton, MD
State Health Commissioner

Encl.

cc

(via email):

Gloria Addo-Ayensu, MD, MPH, Director, Fairfax Health District
Deborah K. Waite, Virginia Health Information, Inc.
Allyson Tysinger, Esq., Senior Assistant Attorney General
Douglas R. Harris, JD, Adjudication Officer
Erik O. Bodin, III, Director, Division of Certificate of Public Need

**Recommended Case Decision
Certificate of Public Need (COPN)
Request Number VA-8674
Burke SNF LLC
Fairfax County
Planning District (PD) 8
Health Planning Region II
Addition of 68 relocated nursing home beds to
an existing nursing facility through relocation
from Alexandria**

This document is a recommended case decision submitted to the State Health Commissioner (hereinafter “Commissioner”) for consideration and adoption. It follows review of the application captioned above and the convening of an informal fact-finding conference (IFFC)¹ conducted in accordance with the Virginia Administrative Process Act² and Title 32.1 of the Code of Virginia.

Authority

Article 1 of Chapter 4 of Title 32.1 (§ 32.1-102.1 *et seq.*) of the Code of Virginia (the “COPN Law”) addresses medical care services and provides that “[n]o person shall undertake a project described in [this Article] or regulations of the [State] Board [of Health] at or on behalf of a medical care facility . . . without first obtaining a certificate [of public need] from the Commissioner.”³ The endeavor described and proposed in the application falls within the statutory definition of “project” contained in the COPN Law, and, thereby, requires a certificate of public need (COPN, or “Certificate”) to be issued before the project may be undertaken.⁴

Statement of Facts

1. Burke SNF, LLC (“Burke”) is a single-purpose entity wholly owned by Burke Holdings I LLC, a Delaware limited liability company. Burke owns and operates Burke Health and Rehabilitation Center (“Burke HRC”), a 120-bed nursing facility located in PD 8. Burke owns no other health care facility in Virginia.
2. Burke states that, upon approval and issuance of a Certificate, it will arrange with the owner and operator of The Fountains at Washington House, a 68-bed nursing facility within a

¹ The IFFC was held on February 6, 2023. A certified reporter’s transcript of the IFFC is in the administrative record.

² Va. Code § 2.2-4000 *et seq.*

³ Va. Code § 32.1-102.1:2 (A); (a “Certificate” or COPN).

⁴ Va. Code § 32.1-102.1.

continuing care retirement community, also located in PD 8, that is slated for closure, and for those beds to be relocated to Burke HRC for licensure.

3. The project would involve construction sufficient and appropriate for expanding the Burke HRC physical plant to accommodate the relocated beds.⁵ Total capital and financing costs of the project are \$12,914,000.⁶

Summary and Incorporation of Advisory Staff Reports

The Health Systems Agency of Northern Virginia (HSANV) is a regional health planning agency that serves PD 8,⁷ which is coterminous with Health Planning Region II. The HSANV board of directors voted to recommend that the Commissioner deny Burke's project. The HSANV staff report supporting this recommendation includes findings and conclusions including:

- (i) PD 8 has a large number of unused nursing home beds. This number is the largest in the Commonwealth. There is no current or foreseeable public need for a capital expenditure to develop the nursing home capacity proposed;
- (ii) Burke's argument that a quantifiable need for hundreds of additional nursing home beds exists is based on a flawed projection in the 2020, the most recent, request for applications (RFA) issued pursuant to Va. Code § 32.1-102.3:2; pointedly, HSANV advises that the argument does not comport with reality, common sense or the public interest;
- (iii) Adding nursing home beds at Burke HRC would not improve access to health care; and
- (iv) The proposed project would be of economic benefit to Burke, but of no discernible public value or benefit.

In a staff report dated January 19, 2023, prepared by the Virginia Department of Health, Division of Certificate of Public Need (DCOPN, or "division") on Burke's project, that division recommended that the Commissioner deny the proposed project, finding no public need for it.

⁵ Va. Code § 32.1-102.3:7, commonly known as the bed transfer statute, does not apply to the review of Burke's project because it does not involve the relocation of beds from one PD to another.

⁶ The private arrangement by which an intangible right or something akin to ownership of the beds would be transferred, resulting in a "forbearance fee" paid by Burke, totals \$2,924,000. (A COPN is not transferrable.) This cost represents, essentially, payment for transfer of the intangible legal privilege of being able and positioned to seek and maintain licensure under federal and state law to operate the beds to Burke. This cost is *in addition to the total costs of Burke's project*, as proposed and as reviewed. As HSANV observes, this additional cost comprises an amount that exceeds 24 percent of the total costs of the project, and is separate from the cost of the project. Several unrelated applications for a COPN seeking nursing home bed transfers and involving forbearance agreements have been reviewed and approved by the Commissioner in recent years. *See* HSANV Staff Report at 8.

⁷ HSANV is a regional agency constituted under Va. Code S 32.1-122:05, and "represent[s] the interests of [a] health planning region[] and perform[s] health planning activities at the regional level" in PD 8 (HPR II) and has served in this role for decades. *Id.*

Observing HSANV's similar recommendation and echoing several of that agency's conclusions, DCOPN stated that:

- (i) Burke's project is not consistent with the State Medical Facilities Plan (SMFP) and a nursing home expansion standard contained in that plan;
- (ii) The project is intended to serve a relatively low percentage, about 28 percent, of less-profitable Medicaid patients and a disproportionately high percentage of more-profitable Medicare and commercially-insured patients; and
- (iii) A reasonable alternative to the project is maintain the status quo and allowing the foregone closure of 68 beds at The Fountains at Washington House, thereby decreasing the surplus of nursing home beds in PD 8 and avoiding costs of construction and relocation.

By reference, the HSANV staff report and the DCOPN staff report are incorporated into the present recommended decision for the purpose of extending recognition to facts, corroborative and numerous, that constitute the solid evidentiary basis on which the present recommended decision rests.

Application of Criteria of Public Need and Conclusions

Salient analysis and conclusions regarding Burke's project and relating directly to the eight criteria of public need contained in the COPN law (the "statutory considerations"),⁸ are set forth below in relation to each statutory consideration.

1. The extent to which the proposed service or facility will provide or increase access to needed services for residents of the area to be served, and the effects that the proposed service or facility will have on access to needed services in areas having distinct and unique geographic, socioeconomic, cultural, transportation, and other barriers to access to care.

Expanding Burke HRC is not necessary to maintain or improve access to nursing care services in PD 8. Long-term nursing care services, and nursing home beds, are plentiful and well distributed in PD 8.

PD 8 has over 4400 nursing home beds, more than any other PD in Virginia. A sizeable portion of these beds – *several hundred* – lie empty on any given day. Many are not staffed. One hundred and fifteen nursing home beds have been added to the inventory in PD 8 through transfer from other PDs since October 15, 2018. Approval of Burke's project would cause 68 lightly-used beds, slated for decommissioning, to be retained in the PD 8 inventory. Retaining these beds is not necessary to ensure area residents' access to nursing home beds and services.

⁸ See Virginia Code § 32.1-102.3 (B).

PD 8, like other areas of Virginia, faces challenges to removing barriers to care. The metropolitan area of PD 8 is served by a well-developed rapid transit system.

2. The extent to which the project will meet the needs of the residents of the area to be served, as demonstrated by each of the following: (i) The level of community support for the project demonstrated by citizens, businesses, and governmental leaders representing the area to be served; (ii) The availability of reasonable alternatives to the proposed service or facility that would meet the needs of the population in a less costly, more efficient, or more effective manner; (iii) Any recommendation or report of the regional health planning agency regarding an application for a certificate that is required to be submitted to the Commissioner pursuant to subsection B of § 32.1-102.6; (iv) Any costs and benefits of the project; (v) The financial accessibility of the project to the residents of the area to be served, including indigent residents; (vi) At the discretion of the Commissioner, any other factors as may be relevant to the determination of public need for a project.

The record overall leads to the conclusion that no unmet need for additional nursing home development exists in PD 8. The Commissioner has the discretion, recognized as “specialized competence in decisional law, to draw this conclusion, despite Burke’s assertion that she should determine otherwise due to claims otherwise and precedent.

Aside from HSANV and staff of DCOPN, no one appears to oppose the project. Three persons wrote in favor; all three are associated with Burke and stand to gain from approval of the project and execution of the forbearance agreement,⁹ a contractual agreement that, along with the Certificate, would allow Burke to seek licensure of, and public reimbursement thereafter for operating, the nursing home beds.

The best alternative is maintenance of the status quo. This is the best alternative due to a continuing, actual, surplus of beds in PD 8, consistent with a demonstrated falling nursing home use rate – a “three decades[-]old decrease in use rates, and related demand” that HSANV discerns.¹⁰ At the very least, the Burke project is premature in light of the absence of actual need.

HSANV strenuously opposes the Burke project and the legitimacy of the project based on a principled, years-long reading of the COPN Law. Its board of directors voted overwhelming to recommend denial of Burke’s project. Over recent years, HSANV staff has consistently presented an analysis of prevailing facts and observable trends within its region that point unswervingly to absence of any need for additional nursing home beds in PD 8; here HSANV’s analysis points to the absence of a public need to retain 68 beds existing in the inventory.

⁹ The forbearance agreement is a contractual agreement between parties, and has not been reviewed or proffered for review.

¹⁰ HSANV Rebuttal at 5.

HSANV has opposed projects similar to Burke's for years, advising against what it sees as wasteful overexpansion and duplication of nursing home services. Within the last five months, HSANV's board voted against two PD 8 nursing home expansion projects that were later reviewed and approved by the Commissioner.¹¹ In turn, HSANV, Virginia's only currently-active regional health planning agency, which retains decades-long familiarity with PD 8's health facilities system. That agency now sees no public need for Burke's project.

Financial accessibility for PD 8 residents remains an issue, as both HSANV and DCOPN observe, since Burke appears to intend to serve a relatively low percentage of Medicaid patients.¹²

Though substantial, total costs of the project (without any cost stemming from the forbearance agreement) are in line with similar projects recently reviewed. Many particular benefits touted by Burke in presenting its project are benefits that are coincidental to a basic proposal to relocate nursing home beds and the review of such a project.

3. The extent to which the application is consistent with the State Medical Facilities Plan.

In publishing a 2020 notice, the State Board of Health and the Virginia Department of Medical Assistance Services (DMAS) announced that no PD in the Commonwealth meets the applicable test for making a request for applications (RFA) to add nursing home beds. As a proposal to relocate nursing home beds, Burke's project is not precluded by the COPN Law's provision requiring RFAs.

The SMFP contains a computational methodology by which a numerical indication of capacity and need for nursing home beds is developed for each of Virginia's PDs. This methodology is misleading. Operation of the methodology gives a numerical indication, a *preliminary* indication, of need, specifically, that 284 nursing home beds were needed in 2022. Burke relies on this preliminary indication and uses it to make a larger claim: That its proposed 68-nursing home bed project is necessary to meet a demonstrated public need. Regardless, in considering all of four required factors, including low levels of occupancy, the Board and DMAS ultimately concluded that no beds are currently needed in Virginia, including PD 8.

Burke asserts that it provides short-term, post-acute care to a wide variety of patients, causing Burke HRC to fall below 90 percent average annual occupancy, thereby allowing it to benefit from consideration of a particular exception to the expansion standard, included in the SMFP.¹³ Burke also points to the COVID-19 pandemic as another cause of the facility's low relative occupancy rate. But HSANV observes that "Burke's size, capability and reputation are commonplace among the dozens of

¹¹ COPN Nos.: VA-04822 (12/13/22; C. Green, Commissioner), and VA-04833 (4/3/23; P. Jaber, Commissioner).

¹² DCOPN Staff Report at 5-6, 14.

¹³ See 12 VAC 5-230-620, second paragraph.

commercial nursing homes operating in PD 8," all of which were beset by the pandemic and exhibited low average occupancy over the past five years.¹⁴ Burke HRC is not unique in these respects. I do not find that Burke has substantiated applicability of this exception to the standard, but in the final analysis, I also do not think that single fact is determinative.

Regarding the SMFP's requirement relating to the quality and appropriateness of facility staffing,¹⁵ DCOPN stated at the IFFC that Burke HRC recently received a rating of two stars under the Centers for Medicare and Medicaid Services (CMS) overall five-star facility quality rating system. This indicates a quality level of "below average" as well as a possible overall safety concern for residents of Burke HRC.¹⁶

Since Burke's project is a proposal to relocate nursing home beds that are already in the PD 8 inventory, SMFP provisions intended to gauge possible need for beds may not be directly applicable.

Regardless, an effort to gauge Burke's project against applicable provisions of the SMFP points to an overall conclusion that the project is not consistent with the SMFP and the public principles underlying that plan.

4. The extent to which the proposed service or facility fosters institutional competition that benefits the area to be served while improving access to essential health care services for all persons in the area to be served.

No significant change in institutional competition would follow approval of Burke's project.

5. The relationship of the project to the existing health care system of the area to be served, including the utilization and efficiency of existing services or facilities.

The project would have an untoward effect on the care system, insofar as it would result in the maintenance and continuation of 68 lightly-used nursing home beds located within a continuing care retirement community, otherwise slated for decommissioning, in the face of a substantial surplus of beds and a prevailing low average occupancy level. HSANV observes that Burke's project more accurately entails "resurrecting expiring unneeded capacity at a premium capital cost, to the benefit of newly installed private equity investors, with the additional cost passed on to the public."¹⁷

Burke's project is distinguishable from similar public need determinations, or administrative precedent, made recently. Burke portrays these determinations as administrative precedent requiring conformity and curtailing the Commissioner's ability

¹⁴ HSANV Rebuttal at 2; the five-year average occupancy level from 2017 to 2021 among PD 8's nursing homes was 78.77 percent, keeping, at the least, *several hundred beds empty* on any given day.

¹⁵ 12 VAC 5-230-640.

¹⁶ IFFC Transcript at 90 (Honaker).

¹⁷ HSANV Rebuttal at ___.

to decide the case, but analysis ultimately shows no public need for Burke's project, and a prevailing surplus of nursing home beds in PD 8 exists.

6. The feasibility of the project, including the financial benefits of the project to the applicant, the cost of construction, the availability of financial and human resources, and the cost of capital.

The project appears to be feasible. Approval of the project would be significantly beneficial to Burke, a private-equity investor, by expanding the revenue-generating capacity of Burke HRC by 56 percent. Resources for construction and operation appear generally available, although deploying adequate human resources at health care facilities can be problematic currently.

7. The extent to which the project provides improvements or innovations in the financing and delivery of health services, as demonstrated by: (i) The introduction of new technology that promotes quality, cost effectiveness, or both in the delivery of health care services; (ii) The potential for provision of services on an outpatient basis; (iii) Any cooperative efforts to meet regional health care needs; (iv) At the discretion of the Commissioner, any other factors as may be appropriate.

Not applicable, without prejudice to the applicant.

8. In the case of a project proposed by or affecting a teaching hospital associated with a public institution of higher education or a medical school in the area to be serve (i) The unique research, training, and clinical mission of the teaching hospital or medical school, and (ii) Any contribution the teaching hospital or medical school may provide in the delivery, innovation, and improvement of health care for citizens of the Commonwealth, including indigent or underserved populations.

Not applicable, without prejudice to the applicant.

Conclusions and Recommendation

1. The Virginia Court of Appeals has held that, in its normally accepted meaning, the doctrine of *stare decisis*¹⁸ is inapplicable when applied to the decision of an administrative agency; an agency may refuse to follow its own precedent but it *must not act arbitrarily* in doing so. *Courtesy Motors, Inc. v. Ford Motor Co.*, 384 S.E.2d 118 (Va. Ct. App. 1989).

In its arguments touting the project, Burke makes much of a list it presents that shows the Commissioner has approved nursing home bed transfers in all of the last 47 times applicants have applied for approval to accomplish a bed transfer within a PD in Virginia since 1999.¹⁹

¹⁸ *Stare decisis*, meaning "to stand by things decided" in Latin, is the legal doctrine that a court will follow precedent when making case decisions.

¹⁹ This total, apparently, would exclude the number of inter-PD, or PD to PD, bed transfers, to which the nursing home bed transfer statute, adopted in 2013, applies.

Burke urges the Commissioner to approve another now. These earlier proposals were warranted; the one currently under review is not, for reasons discussed herein.

I am mindful of the past approvals of nursing home bed transfers, including those that were to occur within a PD and those that have transferred beds from one PD to another (the latter category now falling under a process imposed by the bed transfer statute, within the COPN Law.²⁰)

I have reviewed Burke's project with full cognizance of the Virginia Court of Appeals' guidance in *Courtesy Motors*, set out above. I have reflected on that court's admonition to administrative agencies against acting arbitrarily in refusing to follow their own precedent. In light of the facts of nursing home bed increases in PD 8, as well as other matters discussed above in gauging Burke's project. I believe the conclusions reached herein are inherently rational and based on adequate determining principles.

To whatever extent the recommended decision made herein constitutes a decision to refrain from following the precedent to which Burke refers, it is presented in an act precisely intended *not to be arbitrary*, and to reassert and retain faithful adherence to the COPN Law as well as its underlying principles. Taking this course requires explanation and substantiation toward reasonable conclusions. This document is intended to provide that.

2. As demonstrated by evidence and analysis, Burke's project would not meet a public need under the COPN Law. When gauged against the five principles of the guiding principles of COPN, set forth in regulation,²¹ the project appears clearly inconsistent with all but the fourth. The project is not approvable under the COPN Law, and I recommend that the project be denied.

Specific reasons supporting this recommended decision include:

- (i) PD 8 has a large number of unused nursing home beds, the largest in the state, and a low average occupancy level among its nursing home beds;
- (ii) The project is not consistent with applicable provisions of the SMFP;

²⁰ Va. Code § 32.1-102.3:7. (The bed transfer statute does not apply to proposed transfers or relocations of nursing home beds that would occur within a single PD.)

²¹ 12 VAC 5-230-30, in its entirety: "The following general principles serve as the basis for the development of the review criteria and standards for specific medical care facilities and services contained in this document: 1. The COPN program is based on the understanding that excess capacity or underutilization of medical facilities are detrimental to both cost effectiveness and quality of medical services in Virginia. 2. The COPN program seeks the geographical distribution of medical facilities and to promote the availability and accessibility of proven technologies. 3. The COPN program seeks to promote the development and maintenance of services and access to those services by every person who needs them without respect to their ability to pay. 4. The COPN program seeks to encourage the conversion of facilities to new and efficient uses and the reallocation of resources to meet evolving community needs. 5. The COPN program discourages the proliferation of services that would undermine the ability of essential community providers to maintain their financial viability."

- (iii) HSANV, by vote of its board, recommends denial of the project;
- (iv) As proposed, the project appears intended to serve a relatively low percentage of Medicaid patients;
- (v) The total capital costs of the project are substantial, and constitute an additional cost to be paid by Burke, in the form of a forbearance fee, which would likely bear an additional upward pressure on systemic health care costs;
- (vi) While the project would be of economic benefit to Burke and the private equity owner that recently acquired Burke HRC, it would be of no substantiated public value or benefit; and
- (vii) The most reasonable alternative to the project is maintenance of the status quo, allowing the foregone closure of 68 lightly-used beds proposed to be transferred, thereby decreasing a substantial surplus of nursing home beds and avoiding the unnecessary cost of constructing the project.

Respectfully submitted,



Douglas R. Harris, JD
Adjudication Officer

May 19, 2023