

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

In re: Application of Barre Gardens Holdings)
LLC and Barre Gardens Nursing) GMCB-020-15con
and Rehab LLC)
)
)
_____)

STATEMENT OF DECISION AND ORDER

Introduction

Barre Gardens Holdings LLC and Barre Gardens Nursing and Rehab LLC (Barre Gardens, the purchaser, or the applicant) seek a certificate of need (CON) from the Green Mountain Care Board to purchase the real estate and operations of Rowan Court Health and Rehabilitation Center (Rowan Court) from Revera Assisted Living, Inc. (Revera) for \$6,100,000. For the reasons outlined below, we approve the application.

Procedural Background

On January 19, 2016, Barre Gardens filed a certificate of need (CON) application and request for expedited review with the Green Mountain Care Board to purchase the real estate and operations of Rowan Court, a 96-bed skilled nursing facility located in Barre. On February 12, 2016, the Board denied the applicant's request for expedited review.

The Board requested additional information from the applicant on March 11, May 11, July 1, July 19, September 22, and November 3, 2016. On October 25, 2016, the Vermont Long Term Care Ombudsman (Ombudsman) filed a Notice of Intervention.

Public hearing was held before the Board on December 1, 2016. Noel Hudson, Esq. served as hearing officer. Shireen Hart, Esq. represented the applicant. Akiva Glatzer and David Gamzeh, two of the five individual purchasers comprising Barre Gardens and the cofounders of Priority Healthcare Group, LLC (Priority Healthcare) testified under oath at the hearing. In addition, Shalom Lerner (Priority Healthcare Regional V.P. of Operations), Dawn Murphy (Priority Healthcare V.P. of Clinical Services), Heather Filonow (Rowan Court Administrator), Tara Starzec (Rowan Court Director of Nursing Services), and Andy Bachand (CPA), testified on the applicant's behalf.

Public comment was accepted at the hearing and in writing through December 12, 2016. The Ombudsman commented at the hearing and provided written comments to the Board dated December 13, 2016 and received December 15, 2016. The Board received no other written comments. The applicant opposes admission of the Ombudsman's written comments into the record. As we explain in our decision, we have reviewed and considered the Ombudsman's written concerns, and have determined that they do not alter our result.

Findings of Fact

1. Barre Gardens seeks to purchase the real estate and operations of Rowan Court, a 96-bed skilled nursing facility located in Barre for \$6,100,000. Application (App.), Attachment G, Table 1. Barre Gardens is comprised of five individual owners — Joshua Farkovits, Jordan Fensterman, David Gamzeh, Akiva Glatzer, and Ephram Mordy Lahasky —who each hold equal ownership shares in the two entities. App. at 15. In addition to Rowan Court, the same five individuals have filed CON applications to purchase four other Vermont facilities located in Newport, Glover, Lyndonville and Barton.¹ Transcript (TR) at 11.

2. Three of the owners— Farkovits, Fensterman, and Lahasky —hold minority ownership interests in an additional 37skilled nursing facilities in thirteen states.² Responses to Questions (Resp.) (Sept. 28, 2016) at 1-9. Most of the 37 facilities receive low overall ratings under the Centers for Medicare & Medicaid Services’ (CMS) star-rating system,³ with either one or two stars on a five-star scale. Resp. (Nov. 22, 2016); *Updated Star Rating Submission for 37 Skilled Nursing Facilities* at 1-3.

3. The two remaining owners, Gamzeh and Glatzer, hold interests in only seven of the 37 facilities—Centennial Gardens, Birch Manor, the Gardens at Cannon Falls, Hamilton, Neptune, Waterbury Gardens, and Westfield Gardens— and manage the facilities through Priority Healthcare, a management company they cofounded in 2015. TR at 16, 70 (Glatzer confirms that he and Gamzeh “don’t own any facilities that we don’t manage ourselves.”)

4. Since July 1, 2016, Priority Healthcare has managed Rowan Court, per agreement with Revera and with the approval of the Vermont Department of Disabilities, Aging and Independent Living (DAIL). App. at 17; TR at 9; Letter from DAIL (July 7, 2016) at 1-2. Priority Healthcare will continue to manage the facility after the transfer to Barre Gardens for a fee of four to five percent of the facility’s annual revenue. App. at 23; TR at 12.

5. Of the seven facilities owned by Gamzeh and Glatzer and managed by Priority Healthcare— the first of which was acquired in September 2015—the facilities had the following average CMS star ratings as of June 2016:

FACILITY	OVERALL RATING	STAFFING RATING	RN RATING
Centennial Gardens	1.25	3	3.75
Birch Manor	3	4	5
Gardens at Cannon Falls	1	2	3
Hamilton	5	3	2
Neptune	2	2.5	2.5

¹ The CON applications for the four additional Vermont facilities indicate that there is a sixth individual purchaser for those transactions.

² At hearing, the applicant’s attorney stated that the purchasers acquired additional nursing facilities since providing this information to the Board. TR at 11.

³ The CMS ratings are intended to help consumers compare and select Medicare and Medicaid certified skilled nursing facilities. On a scale of one to five, one is the lowest rating, while five is the highest. For more information, see <https://www.medicare.gov/NursingHomeCompare/About/What-Is-NHC.html>.

FACILITY	OVERALL RATING	STAFFING RATING	RN RATING
Waterbury Gardens	1	2	2
Westfield Gardens	2.5	4	5

6. At hearing, Gamzeh and Glatzer advised the Board that despite owning the Neptune facility for a short period of time, they had made “significant improvements” and had increased the number of qualified clinical staff. They further explained that CMS star ratings do not always reflect improvements that have been implemented, because there is a period when older, less favorable data is still weighted into the star-rating calculation. TR at 18-22.

7. Both Gamzeh and Glatzer are licensed nursing home administrators, although neither are licensed in Vermont. Each served, in back-to-back tenures, as administrator at the Holliswood skilled nursing facility in Hollis, New York, which was a CMS five-star rated facility for almost all of the time that one or the other was its administrator. Gamzeh and Glatzer similarly served as back-to-back administrators at the Williamsbridge skilled nursing facility in the Bronx, New York, where the facility’s overall rating rose from two to five stars over the 46-month period of their tenures. Resp. (April 18, 2016) at 9-10.

8. The Holliswood facility includes a 60-bed unit that caters to institutionalized psychiatric residents, and a 60-bed unit for cognitively impaired behavioral management residents, both of which were operated in a manner that supports residents’ quality of life and allows for a less restrictive environment for its residents when compared to other nursing facilities. Additionally, Glatzer and his team developed a first-of-its-kind adult day care program for Alzheimer’s dementia residents at the facility. *Id.*

9. Rowan Court rates poorly under the CMS star-rating system, and had been designated as a Special Focus Facility (SFF) by CMS for a 13-month period ending in April of 2016. TR at 10. The designation was based on the facility’s poor compliance history, uncorrected deficiencies beginning in 2012, and the issuance of four Immediate Jeopardy citations by CMS (one in 2012 and three in 2013). App. Attachment Z, Exhibit 4.7; DAIL letter, (May 11, 2015) at 1-2. As of July 15, 2016, Rowan Court fell below the state average on 11 of 18 CMS quality measures, including residents experiencing moderate to severe pain; residents with pressure ulcers; residents receiving antipsychotic medication; residents who had catheter inserted and left in bladder; residents lost too much weight; residents who have depressive symptoms; residents who did not have seasonal flu and pneumococcal vaccines. Resp. (7/15/16) at 3.

10. Dawn Murphy is the former Vice President of Clinical Services for Revera, and now serves in that same position for Priority Healthcare. Murphy testified that in its management role at Rowan Court, Priority Healthcare is focusing on improving poor quality measures and has made improvements not yet reflected in CMS ratings, including notable gains in reducing the incidence of pressure ulcers and resident falls. TR at 36-37.

11. Shalom Lerner, Priority Healthcare’s Regional Vice President of Operations, is a licensed nursing home administrator with a lifelong interest and background in skilled nursing care. TR 48-49. Lerner is not currently licensed in Vermont, but anticipates obtaining his Vermont license. TR at 48. Lerner testified at hearing that he and his fellow managers have

“rolled [their] sleeves up” when needed, that he has a hands-on management style, and that he is always ready to pick up a phone or travel to a facility when and as needed. TR at 49-50.

12. As an administrator, Lerner improved the CMS star ratings at two of three facilities where he was employed, bringing one from three to five stars, and the other from four to five stars. During his short (eight month) tenure at the third facility, the low (one star) rating did not improve. Resp. (July 15, 2016) at 12.

13. Gamzeh and Glatzer initially expected to each be at the facility eight hours a week, but at hearing clarified that neither plan to live in Vermont, and will be onsite at the facility on an as-needed basis. Resp. (July 15, 2016) at 6-7; TR at 46-50. Gamzeh and Glatzer explained that their work at the facility is a team effort, that their ownership interests have grown but so has their management team, and that they have confidence in their team members and in the facility’s local staff and administrator. *Id.* In their respective roles post-transfer, Gamzeh will focus on labor management and relations and on overseeing clinical strategies, while Glatzer will focus on facility admissions, marketing and reimbursement initiatives. Resp. (July 15, 2016) at 6.

14. The applicant plans to continue to pursue Rowan Court’s 2015 Quality Assurance and Performance Improvement(QAPI) Plan.⁴ The intent of the QAPI program, through CMS, is to proactively implement systems improvements in the areas of care and services. App. at 25-26, Attachment DD.

15. The applicant will offer the same services now offered at Rowan Court which include physical, occupational and speech therapies, long term care services, respite care and hospice care services. App. at 3. In addition, the applicant intends to accommodate the admission of more behaviorally complex residents, to add clinical programs for renal failure and total parenteral nutrition, and is exploring the possibility of adding a special needs unit to focus on dementia care. Further, the applicant intends to augment mental health services and has located a psychiatric telehealth provider with whom it hopes to partner. *See* Resp. (April 18, 2016) at 18; Resp. (June 21, 2016) at 12; TR at 29-30.

16. The applicant does not plan any material changes to staffing and will retain Heather Filonow as the Rowan Court’s day-to-day administrator. App. at 2-3, 24; TR at 13. The management team plans to implement preventive care models so that crises do not develop, and to extend educational opportunities and training programs for facility staff. TR at 40-42.

17. The facility will continue to work collaboratively with Central Vermont Home Health and Hospice and Bayada Hospice to provide hospice services to its residents. Five of its residents recently utilized hospice services. App. at 26-27, Resp. (Apr. 18, 2016) at 22; TR at 58.

18. The applicant projects that the facility’s census will increase from 76 percent in 2016 to 78 percent in 2017, then to 80 percent in 2018, with corresponding increases in staffing. App. at 20-21; Resp. (June 21, 2016) at 6, 12; (Attachment G at Table 9) (projected increase from 87.3 FTEs in 2015, to 93.8 in 2018).

⁴ CMS provides information regarding the elements of QAPI on its website at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/QAPI/qapidefinition.html>

19. DAIL supports the applicant's proposed purchase of Rowan Court, pending CON approval. Citing Rowan Court's record of substandard quality and Revera's interest in divesting of its Vermont nursing facilities, DAIL notes that "a change in management and programming might be timely." DAIL Letter of Support (Mar. 25, 2016) at 2.

20. In its letter of support for the transfer, DAIL reports that a higher-than-average use of nursing home beds in Washington County demonstrates the need for the 96 beds at Rowan Court. DAIL also cites as positive the applicant's plan to accept more behaviorally complex residents who may have been rejected under Rowan Court's current admission practices, which in turn may account for the facility's relatively low census. *Id.*

21. The applicant plans no major capital investments, and has budgeted approximately \$400,000 annually for working capital and \$150,000 for improvements and equipment. App. at 24; TR at 13.

22. Rowan Court has not been profitable over the last several years. According to Andy Bachand, the applicant's CPA, a "huge portion" of its losses was attributable to an inadequate Medicaid rate, which accounts for approximately two-thirds of the facility's population. Bachand testified that the inadequate rate was the result of a "bad base year," and that as of July 2015 the rate was increased by \$30 to \$252.36. The applicant has projected a 2016 Medicaid rate of \$260.59, which includes an estimated two percent increase for inflation and a \$3.18 step-up on the property's transfer. TR at 54-57.

23. The five individual owners have demonstrated that they are financially able to purchase the facility, make capital improvements and upgrades, and to cover ongoing debt obligations and operating costs. They will finance the purchase with \$1.3 million in equity and a \$4.8 million loan from Graystone Funding Corporation for a minimum loan term of 20 years, comprised of a two-year bridge loan followed by a permanent HUD-insured loan. App. at 20.

24. On December 15, 2016, Alice Harter, the Long-Term Care Ombudsman, filed a letter with the Board which expressed her concerns about the applicant's ability to properly manage and achieve improvements in the facility. Ms. Harter advised the Board that she "do[es] not support this purchase," and requested that the Board require Priority Healthcare to continue managing Rowan Court for at least a year, and to report to the Board quarterly concerning staffing, planning, surveys, and quality measures. Ombudsman Letter to the Board (Dec. 13, 2016).

Standard of Review

Vermont's CON process is governed by 18 V.S.A. §§ 9431-9446 and Green Mountain Care Board Rule 4.000 (Certificate of Need). An applicant bears the burden to demonstrate that each of the criterion set forth in 18 V.S.A. § 9437 is met. Rule 4.000, § 4.302(3). We review the criteria below.

Conclusions of Law

I.

Under the first statutory criterion, the applicant must show that the application is consistent with the health resource allocation plan (HRAP). The HRAP, last published in 2009, identifies needs in Vermont's health care system, resources to address those needs, and priorities for addressing them on a statewide basis. *See* 18 V.S.A. § 9437(1). The standards applicable here require that the applicant collect and monitor data relating to quality and outcomes (Standard 1.6); explain how the project is consistent with evidence-based practice (Standard 1.7); demonstrate how it supports high quality palliative and end-of-life care (Standard 3.12); demonstrate that offered services support residents' mental health and well-being and that they reflect patient values and preferences in the least restrictive environment (Standards 4.7; 5.1). Nursing home purchasers must also show that the facility beds are needed, that DAIL supports the transfer of ownership, and that they can meet financial and quality obligations associated with nursing home ownership (Standards 5.2, 5.3, 5.4, and 5.12)

The applicant has satisfied this criterion. The applicant confirmed that the facility will continue to implement Rowan Court's 2015 QAPI program and that the new owner will work proactively towards improving quality measures. Finding of Fact (Finding) ¶ 14. Barre Gardens will retain the facility's administrator and has confidence that a strong team will help with quality improvements, and the applicant plans to increase clinical staffing to meet the needs of residents and will extend educational opportunities to the facility employees to insure they are apprised of appropriate practices and procedures. Findings ¶¶ 10, 13, 16. Further, the facility will continue to utilize hospice services for its residents, and anticipates supplementing onsite mental health services using a telehealth provider. Findings ¶¶ 15, 17.

Last, the applicant has obtained a letter of support from DAIL and has demonstrated its financial viability to own and operate the facility. Findings ¶¶ 19, 20.

We therefore conclude that the applicant has met the first criterion.

II.

Under the second criterion, the applicant must demonstrate that the cost of the project is reasonable by showing that it can sustain any financial burden likely to result from the project, that costs of care will not unduly increase, and that less expensive alternatives are not feasible or appropriate. 18 V.S.A. § 9437(2).

The applicant can sustain the financial burden of the project. In addition to an equity contribution of \$1.3 million, the applicant has secured a loan of \$4.8 million from Graystone Funding Corporation and will hold sufficient funds to purchase the facility, make capital improvements and upgrades, and to cover ongoing debt obligations and operating costs. Finding ¶ 23. Although the facility has not recently been profitable, the applicant's CPA, Andy Bachand, credibly testified at hearing that much of the loss was attributable to an inadequate Medicaid rate, which has since increased by \$30/day and which accounts for approximately two-thirds of the

population. Moreover, we find that the increase in rate is appropriately based on a change in base year and that projected rate changes are reasonably based on historical increases. Finding ¶ 22.

We further conclude that there are no feasible or less expensive alternatives. No other buyers have stepped forward to purchase this facility, and its current owner is exiting the nursing home market. Rowan is a struggling facility, as evidenced by its low quality ratings and recent SFF status. Based on the credible testimony at hearing and the information in its application, we conclude that the applicant has sufficiently demonstrated that its experienced management team will work with facility staff to improve quality at the facility. We further conclude that the applicant has exhibited both ability and interest in making needed improvements, and understands this Board's expectations as we issue this CON.

Accordingly, the applicant has met this criterion.

III.

Under the third criterion, an applicant must show that there is a need for the project that is appropriate for the applicant to provide. 18 V.S.A. § 9437(3). The applicant has met this criterion.

We premise our discussion of need with the fact that Rowan Court is a struggling facility with a history of substandard care, and its current owner, Revera, wants to divest of its interests in skilled nursing facilities in Vermont. Findings ¶¶ 9, 19. This transaction is supported by DAIL, and we agree with DAIL's view that the transfer from Revera to Barre Gardens will provide continuity of care — Priority Healthcare is already managing the facility, with DAIL's consent — and that Gamzeh and Glatzer are experienced nursing home administrators capable of operating a high quality facility. Findings ¶¶ 4, 7. The 96 skilled nursing beds are needed; Washington County has a higher than average rate of nursing home use. Finding ¶ 20. Also needed are beds for more behaviorally complex residents, which Priority Healthcare plans to accommodate; Rowan Court's current admission policies results in rejection of these more challenging residents, which may account for its relatively low census. *Id.*

We further conclude that the applicant is an appropriate purchaser and operator of this facility. Two of the individual purchasers have experience as administrators and managers of skilled nursing facilities, and although not all of the seven facilities they currently owned receive high ratings from CMS, each has been owned for a short period of time, and some measurable gains have been made, such as improved staffing ratios at the Neptune facility. Finding ¶ 5; *see* also discussion and table, criterion 4, below. In addition, they credibly testified under oath at hearing that they intend to work diligently with facility staff to remedy deficiencies in quality that now drive the facilities low CMS ratings.

Based on these facts, we conclude the applicant has met this criterion.

IV.

Under the fourth criterion, an applicant must demonstrate that the quality of health care will improve as a result of the project, or that the project will lead to greater access to care. 18 V.S.A. § 9437(4). As we have explained in past decisions, the Board’s jurisdiction over nursing home transfers is limited, and any authority we may have over operations at the facility prior to the transfer is largely relinquished once the transfer is completed; plainly, we cannot “undo” the ownership transfer. *See, e.g., In re Application of Genesis Healthcare, Inc.*, Docket no. GMCB 014-15con. In a similar vein, we cannot guarantee through our decision that quality of care will improve once a new owner is in place; instead, we must consider all the credible evidence and inferences from that evidence, and then forecast whether a change in ownership can and will ensure high quality care for the facility’s residents. The legislature has not conferred the Board the authority to monitor a facility’s performance once a transfer takes place.

In light of our interest in accurately forecasting a new owner’s ability to provide high quality nursing care, and with these jurisdictional limitations in mind, we have reviewed the Ombudsman’s December 13, 2016 written concerns and conclude that they have no impact on our decision in this matter. The letter and the assertions contained therein raise issues we’ve either already considered in our review process, rely on conjecture rather than a factual foundation, or are not material to our decision. Further, the course of action that the Ombudsman requests we take—first, we deny the CON, and second, we oversee the facility for a period of time during which we require Priority Healthcare (which is not the applicant) to provide ongoing reporting to us—is clearly beyond our jurisdictional reach.

Based on the contents of the application and the hearing testimony, we conclude that the applicant will both provide a higher quality of care and improve access at Rowan Court. Admittedly, the quality bar is low; CMS indicators show that the facility has earned poor ratings since at least 2012, and only recently graduated from its status as a Special Focus Facility. Finding ¶ 9. Gamzeh and Glatzer are experienced nursing home administrators, have improved facility ratings during their tenures, and credibly expressed their plans and interest in improving this particular facility. Findings ¶¶ 6, 7. In the short period Gamzeh and Glatzer have owned and managed seven other facilities, they have achieved some, albeit minimal, measurable improvements. As accessed on January 1, 2106, the Medicare “Nursing Home Compare” website indicates the following CMS star ratings for the seven facilities,⁵ which mostly compare favorably with the June 2016 ratings provided by the applicant:

FACILITY	OVERALL RATING	STAFFING RATING	RN RATING
Centennial Gardens	1	2	3
Birch Manor	2	4	5
Gardens at Cannon Falls	1	2	3
Hamilton	4	4	3
Neptune	2	5	5
Waterbury Gardens	2	4	4
Westfield Gardens	3	4	5

⁵ These ratings were obtained from the Nursing Home Compare website, as accessed on January 6, 2017.

Based on our review, we conclude that the applicant, using Priority Healthcare to manage the facility, is capable and willing to work towards improving the quality of care at Rowan Court. We are encouraged by the professional strengths and enthusiasm of those who testified at hearing, and we expect that their efforts will produce, over time, high quality care for Rowan Court residents. We realize that CMS ratings may not change dramatically in the immediate future, but nonetheless expect that the applicant will achieve positive results as it pursues its stated commitment to improve this ailing facility, and the quality of life of its residents.

We also find that the applicant has demonstrated that it will improve access to care. Under current Rowan Court admissions practices, potential residents with complex behavioral issues may be denied admission to the facility. The applicant plans to accommodate these more challenging patients, which may in turn increase its census above current levels. Findings ¶¶ 15, 18, 20. Further, the applicant is exploring the addition of a dementia care unit. Finding ¶ 15.

Based on the above, the applicant has satisfied the fourth criterion

V.

To satisfy the fifth criterion, the applicant must show that the project will not adversely affect other services that it offers. 18 V.S.A. § 9737(5). The applicant owns no other facilities in Vermont at this time, and does not plan to eliminate any of the services Rowan Court currently offers to its residents. Accordingly, we conclude that the transfer of ownership of Rowan Court will have no adverse effect on any services the applicant currently offers, satisfying the fifth criterion.

VI.

The sixth criterion requires an applicant to show that the project will serve the public good. 18 V.S.A. § 9737(6). The facts weigh heavily in favor of this proposed transfer; for example, the applicant is purchasing a struggling nursing facility from an owner that no longer wishes to own the facility; there is a need, as confirmed by DAIL, for the 96 nursing beds; and the applicant plans to admit more behaviorally complex residents than were admitted under Rowan Court's admission practices who may otherwise have had difficulty locating appropriate care. Findings ¶¶ 15, 19, 20

The applicant has therefore met the sixth criterion.

VII.

Finally, the applicant has met its burden to satisfy the two remaining criteria, to the extent applicable. 18 V.S.A. § 9437(7) (applicant must consider affordable, accessible transportation services); 18 V.S.A. § 9437(8) (requires conformance with health information technology plan if application is for purchase of new health information technology).

Conclusion

Our review of this CON application again reminds us of the narrow scope of review conferred on us by the legislature, notwithstanding the importance of ensuring that residents of Vermont’s nursing facilities are safe and receiving high quality care. We once more acknowledge that our approval of this application cannot guarantee that CMS ratings will increase, or that the quality of care will reach the high standards for which we strive. However, based on the application, materials provided by the applicant, and its credible testimony at hearing, we expect and trust that the applicant will work diligently towards what we believe is a common goal.

Accordingly, we approve the application, subject to the conditions outlined in the certificate of need in this docket, also issued on this date.

Order

Pursuant to 18 V.S.A. § 9440(d), the Green Mountain Care Board approves the application of Barre Gardens Holdings LLC and Barre Gardens Nursing and Rehab LLC, and a certificate of need shall issue, subject to the conditions set forth in that document.

SO ORDERED.

Dated: January 13, 2017 at Montpelier, Vermont

s/ <u>Cornelius Hogan</u>)	
)	
s/ <u>Jessica Holmes</u>)	GREEN MOUNTAIN
)	CARE BOARD
s/ <u>Betty Rambur</u>)	OF VERMONT
)	
s/ <u>Robin Lunge</u>)	

Filed: January 13, 2017