STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

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

ORDER

Summary

On January 13, 2017, we granted Barre Gardens Holdings, LLC and Barre Gardens Nursing and Rehab, LLC (collectively, Barre Gardens or Applicants) a Certificate of Need (CON) that allowed them to purchase the real estate and operations of Rowan Court Health and Rehabilitation Center (Rowan Court), a Vermont nursing home, from Revera Assisted Living, Inc. (Revera). On May 12, 2017, Barre Gardens notified us that the sale had closed and asked us to amend the CON to reflect the fact that the financing for the purchase ended up being different than originally anticipated and the total cost of the project increased $809,349, or 13.2%, due in part to a $600,000 increase in the purchase price.

On July 7, 2017, we granted Barre Gardens' request and amended the CON, subject to several conditions. One of the conditions was that Barre Gardens demonstrate that the increased purchase price for Rowan Court was not attributable to the sale of the three out-of-state facilities that Revera sold along with Rowan Court. On July 21, 2017, Barre Gardens submitted a letter suggesting that the reason they paid $600,000 more than they initially expected for Rowan Court was because the value of one of the out-of-state facilities turned out to be $600,000 less than projected, they were unable to get financing for a higher amount, the other sales had already closed, and the total amount due to Revera had not changed.

We held a hearing on November 9, 2017 to take additional testimony in this matter. Michael Barber, Esq. served as the hearing officer. Akiva Glatzer, David Gamzeh, Ephram Lahasky, and Tara Starzec testified on behalf of Barre Gardens, which was represented by Shireen T. Hart, Esq. of Primmer, Piper, Eggleston & Cramer PC. Messrs. Glatzer, Ganzah, and Lahasky are members of Barre Gardens. Ms. Starzec is the facility's Director of Nursing Services. Andrew Bachand, a Certified Public Accountant with Kittell, Branagan & Sargent, and Kathleen Dennette, the Director of the Division of Rate Setting (a division of the Vermont Agency of Human Services), also testified at the hearing.

For the reasons set forth below, we 1) withdraw the condition requiring Barre Gardens to demonstrate that the increase in the purchase price was not attributable to the sale of the out-of-state facilities; 2) require Barre Gardens to update us on its progress towards securing a HUD-insured loan in each of its subsequent implementation reports; and 3) impose a civil administrative penalty of $1,000.

Findings of Facts

1. In 2015, Joshua Farkovits, David Gamzeh, Akiva Glatzer, and Ephram M. Lahasky (collectively, Owners or Purchasers) formed two member-managed Vermont domestic limited liability companies, Barre Gardens Holding, LLC and Barre Gardens Nursing and Rehab, LLC. Application (App.) at ¶ 16, Attachments N-O. The Purchasers are each members of these companies and hold equal ownership interests.[1] App. at ¶ 18, Attachments N-O; Letter re: Proposed Purchase of Rowan Court (April 20, 2017). In January 2016, the companies applied for a CON that would allow them to purchase the real estate and operations of Rowan Court. As the project was described in the application, Barre Gardens Holdings would own the real estate and lease it to Barre Gardens Nursing and Rehab, which would hold the license and be responsible for operating the facility. App. at ¶¶ 17, 56.

2. The sale of Rowan Court was part of a larger set of transactions between Revera and the Purchasers. App. at ¶ 43. Specifically, Revera had entered into a Portfolio Agreement with the Purchasers in June of 2015 to sell four facilities in four different states for a total of $27 million, to be allocated as follows: $9.9 million for Neptune Rehabilitation and Care Center (Neptune Gardens) in New Jersey; $5.2 million for Renaissance Manor of Westfield (Westfield Gardens) in Massachusetts; $5.9 million for Village Green of Waterbury (Waterbury Gardens) in Connecticut; and $6 million for Rowan Court (Barre Gardens) in Vermont. Submission in Response to Corrected Order (July 21, 2017) at 1-2. The Portfolio Agreement allowed the Purchasers to change this allocation, so long as they paid Revera $27 million for all four properties. Testimony of Ephram Lahasky, Transcript (TR) at 16. At the time the CON application was submitted, the sales of Neptune Gardens and Westfield Gardens had already closed, and the Waterbury Gardens sale was scheduled to close in February 2016. App. at ¶ 43.

3. Consistent with the allocation in the Portfolio Agreement, the CON application stated that the purchase price for Rowan Court would be $6 million and the total project cost would be $6.1 million. App. at ¶¶ 45-46. The application also stated that the purchase would be financed with a $4.8 million loan from Greystone Funding Corporation (Greystone) and the remainder would be financed with $1.3 million in equity. App. at ¶ 47.

4. As part of their CON application, the Applicants submitted a conditional commitment letter from Greystone that described a 20-year loan comprised of a two-year bridge loan followed by a permanent HUD-insured loan. App. at Attachment CC. However, the financial projections that the Applicants submitted did not assume a HUD loan. App. at 20 n. 4; *see also*, Testimony of Andrew Banchand, TR 47-48.

5. On January 13, 2017, the Board approved Barre Gardens' application. The total cost of the project as approved by the Board was $6.1 million, to be financed with $1.3 million in equity and the $4.8 million loan from Greystone comprised of a two-year bridge loan followed by a

[1] Jordan Fensterman, or an LLC he formed, was initially going to be added as a member of the companies and he and the other investors were each going to have a 20% interest. App. at ¶ 18. However, Mr. Festerman withdrew from the project after the CON was issued and his share was divided equally amongst the four remaining investors. Letter re: Proposed Purchase of Rowan Court (April 20, 2017).

permanent HUD-insured loan. Certificate of Need, 1; Statement of Decision and Order, Findings of Fact at ¶¶ 1 & 23, Conclusions of Law at § II.

6. The CON required Barre Gardens to "develop and operate the Project in strict compliance with the Project scope as described in the application, in other materials in the record submitted by the applicant, and in strict conformance to the Findings of Fact and Conclusions of Law set forth in the Statement of Decision and Order." Certificate of Need, Conditions (Conditions) at ¶ 1. The CON also required Barre Gardens to notify the Board if it contemplated or became aware of a potential or actual nonmaterial change, as defined in 18 V.S.A. § 9432(12), or a material change, as defined in 18 V.S.A. § 9432(11), to the scope or cost of the Project described in the application and as designated in the CON. Conditions at ¶ 5. Finally, the CON specified that "[n]oncompliance with any provision of this certificate of need or with applicable ordinances, rules, laws and regulations constitutes a violation of this certificate of need and may be cause for enforcement action pursuant to 18 V.S.A. §§ 9445, 9374(i), and any other applicable law." Conditions at ¶ 3. The Purchasers received a copy of the CON. Testimony of Andrew Bachand, TR at 51.

7. On May 12, 2017, Barre Gardens notified the Board that the sale of Rowan Court had closed on or about May 3, 2017 and that the total cost of the project had increased from $6.1 million to approximately $6,909,349, a "material" increase of 13.2%, due in part to a $600,000 increase in the purchase price. Letter re: Purchase of Rowan Court (May 12, 2017). Barre Gardens also notified the Board that while they had anticipated taking out a $4.8 million loan from Greystone with an interest rate of 4.5%, they ended up taking out a $5.4 million loan from Oxford Finance, LLC with an interest rate of approximately 7.99%. *Id*. Barre Gardens asked the Board to amend the CON to reflect the changes to the project. The Board granted this request, subject to several conditions. One of the conditions was that Barre Gardens demonstrate that the increase in the purchase price for Rowan Court was not attributable to the sale of the three out-of-state properties that the Purchasers bought along with Rowan Court. Corrected Order Conditionally Approving Amendment to CON (Corrected Order) at 3.

8. On July 21, 2018, Barre Gardens submitted documentation showing that the purchase price for Rowan Court had increased because of a lower-than-expected appraisal for Waterbury Gardens and the Purchasers could not get financing in excess of this amount. Submission in Response to Corrected Order (July 21, 2017) at 1-2. Since the Purchasers had agreed to buy four properties from Revera for $27 million, and since Rowan Court was the only sale that had not closed, the purchase price of Rowan Court had to be increased by $600,000. Testimony of Ephram Lahasky, TR at 16-17 ("Vermont closed last, so whatever was left of the 27 million had to be allocated to Vermont.").

9. The purchase price for Rowan Court "effectively changed" as soon as the Waterbury Gardens sale closed in March 2016. Testimony of Akiva Glatzer, TR at 51; Response to GMCB Requests for Information (June 7, 2017) at 1. The Board was not notified at that time because nobody involved realized that it affected the CON application. Testimony of Ephram Lahasky, TR at 17. Had the sale of the New Jersey and Massachusetts facilities not already closed when the purchase price for Waterbury Gardens was reduced, the Purchasers probably would not have

added $600,000 to the price of Rowan Court; the price difference would likely have been equally spread among the three facilities. Response to Corrected Order (July 21, 2017) at 2.

10. The appraised value of Rowan Court was $7.2 million, $600,000 more than the final purchase price. *Id.*; Testimony of Ephram Lahasky, TR at 45.

11. In its July 21, 2017 submission to the Board, Barre Gardens noted that the increased purchase price for Rowan Court did not alter the stepped-up basis Barre Gardens was seeking from the Vermont Division of Rate Setting. Response to Corrected Order (July 21, 2017) at 2; Testimony of Andrew Bachand, TR at 43. The allowable basis will be approximately $4.5 million based on the stepped-up basis calculation, and this would be the case whether the purchase price was $6 million or $6.6 million. *Id*. The allowable debt will be limited to approximately $4.5 million as well. Response to Corrected Order (July 21, 2017) at 2.

12. Once the CON was approved, Revera pressured the purchasers to close. Testimony of Akiva Glatzer, TR at 49 ("[W]e were literally getting pressured every single day to just close, close, close."). Revera was exiting the business and had already sold 23 other homes to Genesis. The four homes they agreed to sell to the Purchasers were "outliers," and, of these outliers, Rowan Court was the last to sell. Testimony of Ephram Lahasky, TR at 50.

13. When it came time to finance the purchase, Greystone wanted Barre Gardens to own the property for one to two years before it would make the loan. Response to GMCB Requests for Information (June 7, 2017) at 2. The Purchasers then began looking for a new lender and settled on Oxford because Mr. Lahasky had done a few other deals with them and knew that, while they were not cheap, they would close. Testimony of Ephram Lahasky, TR at 50. The Purchasers likely received a term sheet from Oxford 90 days in advance of the closing. *Id.* at 50-51.

14. Barre Gardens anticipates that its profits will cover the approximately $48,000 in interest expenses and $15,000 in depreciated expenses it will have to pay in connection with its loan. Response to Corrected Order (July 21, 2017) at 2. Barre Gardens assured the Board that it has "no intention of spending any less on care delivery or altering [its] original intentions to improve quality." *Id.* at 4.

15. Mr. Lahasky testified that, if he and the other Owners need to put money from their own pockets in order to run the facility the way it needs to be run, they will do it because, if they don't, they could lose their entire investment. TR at 14. He also testified that, besides having economic reasons not to decrease necessary services at the facility, the Owners are dedicated to the residents of the facility and are committed to taking care of them. TR at 15.

16. The Owners would like to get better financing and it is their intention to apply for a HUD loan in the future. Testimony of Emphram Lahasky, TR at 12. Lenders typically want to see twelve months of solid financials and the Owners feel they are probably three to four months away from evaluating their numbers and potentially starting the application process. The Owners would like to go to a HUD loan because it is a non-recourse loan and the terms are very favorable. *Id.* at 13.

Conclusions of Law

We withdraw the condition requiring Barre Gardens to demonstrate that the increase in the purchase price was directly attributable to the Rowan Court sale. Barre Gardens cannot meet this condition. As we now understand, the purchase price for Rowan Court increased because the purchase price for Waterbury Gardens decreased following a lower-than-expected appraisal. Findings of Fact (Findings), ¶ 8. Since the Purchasers owed Revera $27 million for all four facilities and since Rowan Court was the last sale to close, the Purchasers had to increase the purchase price for Rowan Court. *Id.*

The Purchasers' decision to allocate an additional $600,000 to the sale of Rowan Court is understandable when the sale is viewed in the context of the larger transaction of which it was a part. The assessed value of Rowan Court was $7.2 million, $1.2 million more than the initial purchase price. Findings at ¶¶ 2, 10. Furthermore, the additional $600,000 could not be allocated to the other facilities because they had already closed. Findings at ¶ 8. The decision to obtain a loan from Oxford is also understandable considering the Purchasers' inability to obtain the Greystone loan, their desire to close quickly, and their familiarity with Oxford from prior transactions. Findings at ¶¶ 12-13. Our concern is that these decisions may impact the Purchasers' ability to sustain the cost of the project and negatively affect the breadth or quality of services it is able to provide to its residents. Our concern was heightened after learning that the additional debt Barre Gardens will be responsible for as a result of these decisions will not be recognized in the stepped-up basis for Medicaid. Findings at ¶ 11. While we believe this is an appropriate result, it will make it more difficult for Barre Gardens to cover the additional expenses that come with a larger loan on less favorable terms.

Barre Gardens believes its profits will cover the expenses it will have to pay under the Oxford loan. Findings at ¶ 14. The Owners have also assured us that they will put their own money into the facility if necessary. Findings at ¶ 15. Finally, the Owners assured us that they intend to try to refinance soon and that their goal is to obtain a long-term, HUD-insured loan. Findings at ¶ 16. Through the implementation reports, we plan to monitor Barre Gardens' progress towards this goal.

While we understand the decisions Barre Gardens has made, we nevertheless conclude that it knowingly violated its CON, as well as the CON statute and rule. A person acts "knowingly" with respect to a material element of an offense when: 1) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and 2) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result. *State v. Trombley,* 174 Vt. 459, 461 n.1 (2002); *see also, U.S. v. Bailey*, 444 U.S. 394, 407-08 (1980). Unless the text of a statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense, as distinguished from knowledge of the law. *Bryan v. U.S.*, 524 U.S. 184, 192-93 (1998) (examined by *State v. Witham*, 2016 VT 51, ¶¶ 30-33 (Robinson, J., concurring)). With respect to corporations, the general rule is that knowledge of a corporate officer or agent is imputed to the corporation. *Mann v. Adventure Quest, Inc.*, 2009 VT 38, ¶ 11; *see also, McGann v. Capital Sav. Bank & Trust Co.*, 117 Vt. 179, 183 (1952) ("Corporations can

do business only through officers or agents, and any notice or knowledge imparted to an officer or agent authorized to receive the same is actually imparted to the corporation.").

We conclude that Barre Gardens knowingly violated the CON by purchasing Rowan Court for $6.6 million. Barre Gardens was aware that it was purchasing the facility for $6.6 million. While ignorance of the CON's requirements would not provide a defense, Barre Gardens was also aware that the Board approved a total cost for the project of $6.1 million. Findings at ¶¶ 5-6.

We also conclude that Barre Gardens knowingly violated the CON, 18 V.S.A. § 9444, and § 4.600(1) of GMCB Rule 4.000, by failing to notify the Board of the changes to the purchase price and financing arrangement until after the closing. The CON required Barre Gardens to immediately inform the Board if it contemplated or became aware of a potential or actual change, material or nonmaterial, to the scope or cost of the project. Findings at ¶ 6. This standard CON condition implements 18 V.S.A. § 9444 and § 4.600(1) of GMCB Rule 4.000, which require the recipient of a CON to notify the Board of changes in the scope or cost of the approved project so that the Board has an opportunity to review them. While Barre Gardens notified the Board of the changes to the purchase price and the financing arrangement a little over a week after the sale closed, it was aware of the potential or actual changes to the project well before then. The purchase price for Rowan Court effectively changed when Waterbury Gardens closed in March of 2016, many months before we approved the CON and over a year before Rowan Court closed. Findings at ¶¶ 5, 7, 9. The Purchasers also knew the terms of the Oxford loan some months prior to closing. Findings at ¶ 13.

Under 18 V.S.A. § 9445(c), the Board may impose a civil administrative penalty on any person who "knowingly violates a provision of [18 V.S.A. §§ 9431-9446], or a rule or order adopted pursuant to [18 V.S.A. §§ 9431-9446]." The maximum penalty the Board can impose is $40,000, or, for a continuing violation, the greater of $100,000 or one-tenth of one percent of the gross annual revenues of the health care facility. GMCB Rule 4.000, § 4.700, requires the Board to consider certain factors in determining the appropriate sanction. Having considered these factors, many of which are not relevant to this case, we choose to impose a penalty of $1,000. We do not believe Barre Gardens purposefully violated the CON or the CON statute or rule, or that it intended to deceive the Board. The Purchasers have recognized that they made a mistake in not informing the Board of the changes to the project earlier and have expressed genuine regret at the oversight. Given these factors, and given the fact that a larger penalty might further harm the financial health of the facility, we choose to impose a minimal penalty of $1,000.

Order

For the reasons set forth above, we hereby 1) withdraw the condition requiring Barre Gardens to demonstrate that the increase in the purchase price was not attributable to the sale of the out-of-state facilities; 2) require Barre Gardens to update us on its progress towards securing a HUD-insured loan in each of its subsequent implementation reports; and 3) impose a civil administrative penalty of $1,000.

SO ORDERED.

Dated: January 23, 2018 at Montpelier, Vermont.

s/ Kevin Mullin, Chair	)	
	)	GREEN MOUNTAIN
s/ Jessica Holmes	)	CARE BOARD
	)	OF VERMONT
s/ Robin Lunge	)	
	)	
s/ Maureen Usifer	)	
	)	
s/ Tom Pelham	)	

Attest: /s/ Erin Collier
Green Mountain Care Board