[Cite as *In re Green Village Skilled Nursing Ctr.*, 2012-Ohio-3769.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re:	:	
Green Village Skilled Nursing Center,	:	
		No. 12AP-91
(Jarvis Leasing Company, LLC, d.b.a. Pebble Creek Healthcare Center,	:	(ODH File No. 9029-01-10X)
	:	(ACCELERATED CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on August 21, 2012

Taft, Stettinius & Hollister LLP, Eric M. Simon, and *Mark R. Jacobs,* for appellee Green Village Realty, Ltd.

Dinsmore & Shohl LLP, and *Thomas W. Hess,* for appellant.

Michael DeWine, Attorney General, and *Lisa M. Eschbacher,* for Director, Ohio Department of Health.

APPEAL from the Ohio Department of Health.

SADLER, J.

{¶ 1} Appellant, Jarvis Leasing Company, LLC, d.b.a. Pebble Creek Healthcare Center ("appellant"), appeals from an order of the director of the Ohio Department of Health ("the director"), granting a certificate of need ("CON") to appellee, Green Village Realty, Ltd. ("the applicant"). Because the director's order is supported by reliable, probative, and substantial evidence and is in accordance with law, we affirm.

I. BACKGROUND

{¶ 2} On July 30, 2010, the applicant submitted a CON application seeking approval of a project to purchase and relocate 72 licensed nursing home beds from the Andover Village Retirement Community in Ashtabula County, Ohio to an all-private room skilled nursing home facility to be constructed in Summit County, Ohio to be called Green Village Skilled Nursing Center.

{¶ 3} The Ohio Department of Health ("ODH") submitted two requests for additional information. After the applicant responded to both requests, ODH declared the application complete on February 28, 2011. On March 29, 2011, appellant, a long-term nursing care facility located less than one mile from the proposed project, filed a written objection to the CON application and requested a hearing.

{¶ 4} An ODH hearing examiner conducted a four-day adjudication hearing on the applicant's CON application. At the hearing, appellant argued that the proposed facility is not needed and is not financially feasible and that the applicant had not met all of the relevant criteria for approval of the application. On December 14, 2011, the hearing examiner issued a report and recommendation in which he advised that the CON application be granted. Indeed, the hearing examiner concluded that appellant "failed to carry its burden of proof as to its allegations that the Director has insufficient information to evaluate the application, that the project is not needed, or that the project is financially unfeasible. Accordingly, the Objector has failed to establish that the application should be denied." (Report and Recommendation, 30.) Appellant filed objections to the hearing examiner's report and recommendation. By adjudication order dated January 24, 2012, the director approved the CON application.

II. ASSIGNMENTS OF ERROR

{¶ 5} On appeal, appellant sets forth the following three assignments of error for this court's review:

> [1.] The Adjudication Order is not supported by reliable, probative, and substantial evidence and is not in accordance with the law because the Ohio Department of Health gave excessive weight to the statutory formula.
>
> [2.] The Adjudication Order is not supported by reliable, probative, and substantial evidence and is not in accordance

> with the law because the Director failed to properly consider the evidence of the CON project's impact on surrounding facilities, lack of unique services, and the impact on area staffing.
>
> [3.] The Adjudication Order is not supported by reliable, probative, and substantial evidence and is not in accordance with the law because the Director failed to properly consider the evidence that the project is not financially feasible and relied upon improperly submitted evidence.

{¶ 6} R.C. 3702.52(C)(1) provides in part: "If the project proposed in a certificate of need application meets all of the applicable certificate of need criteria for approval under sections 3702.51 to 3702.62 of the Revised Code and the rules adopted under those sections, the director shall grant a certificate of need for all or part of the project that is the subject of the application by the applicable deadline." During the adjudication hearing, "[t]he affected persons bear the burden of proving by a preponderance of evidence that the project is not needed or that granting the certificate would not be in accordance with sections 3702.51 to 3702.62 of the Revised Code or the rules adopted under those sections." R.C. 3702.52(C)(3).

{¶ 7} R.C. 3702.60(F)(3) provides that in an appeal to this court from a decision granting or denying a CON application, this court must "affirm the director's order if it finds, upon consideration of the entire record and any additional evidence admitted * * * that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order."

{¶ 8} Accordingly, upon appeal to this court, appellant must demonstrate that either the director's factual findings are not supported by reliable, probative, and substantial evidence or that the director improperly applied the law to the findings of fact. *In re The Knolls of Oxford,* 10th Dist. No. 02AP-514, 2003-Ohio-89, ¶ 13. "Analysis of whether the director's decision is supported by the evidence is essentially a question of the absence or presence of the requisite quantum of evidence." *In re Doylestown Parke Rehab. Ctr.,* 10th Dist. No. 09AP-694, 2010-Ohio-2064, ¶ 6, citing *In re Manor Care of Parma,* 10th Dist. No. 05AP-398, 2005-Ohio-5703, ¶ 9.

III. DISCUSSION

A. First Assignment of Error

{¶ 9} In its first assignment of error, appellant contends the director acted contrary to law by placing exclusive reliance on the bed-need formula set forth in Ohio Adm.Code 3701-12-23. Appellant maintains the director failed to consider other evidence that the project is not needed, including evidence of lack of need in the surrounding geographic area, including adjacent counties.

{¶ 10} Ohio Adm.Code 3701-12-20 sets forth the criteria the director must consider in determining whether to grant a CON to the applicant. Ohio Adm.Code 3701-12-20(A) specifies that "[t]he director shall apply each of the criteria prescribed in this rule, as applicable, when reviewing an application for a certificate of need, in addition to any criteria specific to the application that are established by this chapter of the Administrative Code and sections 3702.51 to 3702.62 of the Revised Code."

{¶ 11} Ohio Adm.Code 3701-12-20(E) requires the director to consider "the need that the population served or proposed to be served has for the services to be provided upon implementation of the project." In assessing the need for the project, the director must examine: (1) the current and proposed primary and secondary service areas and their population, (2) travel times and the accessibility of the project site, (3) current and projected patient origin data by zip code, (4) any special needs and circumstances of the applicant or population proposed to be served by the proposed project, and (5) special needs related to any research activities. Ohio Adm. Code 3701-12-20(E)(1) through (5).

{¶ 12} The project at issue involves inter-county bed relocation authorized by R.C. 3702.593(A), which states that the director must accept for review CON applications for the approval of beds in a new health care facility "if the proposed increase in beds is attributable solely to relocation of existing beds from an existing health care facility in a county with excess beds to a health care facility in a county in which there are fewer long-term care beds than the county's bed need." R.C. 3702.593(B)(1) provides that "[f]or the purpose of implementing this section," the director must "[d]etermine the long-term care bed supply for each county." The director must also "[f]or each county, determine the county's bed need by identifying the number of long-term care beds that would be needed in the county in order for the statewide occupancy rate for a projected population aged

sixty-five and older to be ninety per cent." R.C. 3702.593(B)(3) further provides that "[i]n determining each county's bed need, the director shall use the formula developed in rules adopted under section 3702.57 of the Revised Code."

{¶ 13} Appellant argues that utilization of county borders is an inappropriate and ineffective means of determining bed need, and that a need analysis must include consideration of the need for beds in adjacent counties. Appellant supports this argument with the testimony of its expert witnesses, Dr. Robert Applebaum, Director of the Ohio Long-Term-Care Project at the Scripps Gerontology Center at Miami University in Oxford, Ohio, and Daniel Sullivan, a consultant in the area of healthcare planning and development of rules and bed-need methodologies related to state long-term care CON programs. Both witnesses opined that county boundaries provide an artificial and arbitrary mechanism for determining bed need. The hearing examiner addressed and rejected this argument in Finding of Fact No. 17:

> The evidence does not establish that the project is not needed. It is undisputed that, under the bed need formula, Summit County has a need for substantially more beds than the Applicant proposes to transfer. The bed need formula is established by statute and has been determined by independent experts to be valid. To alter or modify the formula by considering the proximity of over-bedded counties would be contrary to law.

(Report and Recommendation, 27.)

{¶ 14} The hearing examiner properly rejected appellant's contention, as the director is statutorily required to determine bed need by county. R.C. 3702.593(B)(1) and (3). Appellant points to no contrary legal authority. Moreover, Applebaum, appellant's own expert witness, confirmed that CON legislation mandates the use of county borders in determining bed need.

{¶ 15} Additionally, although appellant rightly asserts that the director acts contrary to law in placing exclusive reliance on the statutory bed-need formula in

reviewing a CON application,[1] the record does not support a finding that it was so used. In Finding of Fact No. 9, the hearing examiner discussed appellant's evidence as to need for the project:

> The Objector offered testimony that the project is not needed. Specifically, the Objector offered testimony that Pebble Creek and other facilities in the proposed service area are able to offer all of the services proposed to be offered by the Applicant, and that Pebble Creek, though it is close to full occupancy, does not have a waiting list for admissions.

(Report and Recommendation, 25.)

{¶ 16} In Finding of Fact No. 12, the hearing examiner noted the applicant's evidence as to need for the project:

> The Applicant offered testimony that the project is needed, including testimony as to the bed need in Summit County and the projected demographic trends in the area. The Applicant also offered testimony that private rooms are preferred by prospective residents.

(Report and Recommendation, 25.)

{¶ 17} These findings clearly establish that the hearing examiner considered evidence beyond the statutory bed-need formula.

{¶ 18} Further, although the bed-need formula is not the only factor to be considered by the director, it is, nonetheless, an important factor in determining overall need for a CON project, and the director is required by statute and rule to consider it when determining need. *See* R.C. 3702.593(B)(3); Ohio Adm.Code 3701-12-23(B). Both Applebaum and Sullivan acknowledged that pursuant to the statutory bed-need formula, Summit County is underbedded by 286 beds, well in excess of the 72 beds to be provided via the proposed project.

{¶ 19} As to need for the project distinct from the bed-need formula, the applicant offered the testimony of Christine Kenney, a recently retired administrator of ODH's CON

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[1] This court has held that "the bed need formula is but one factor which must be considered when reviewing a CON application. Reliance on the formula to the exclusion of all other criteria is reversible error." *In re Villa Springfield*, 10th Dist. No. 89AP-1134 (Mar. 29, 1990), citing *In re Jefferson Health Care Ctr.*, 10th Dist. No. 89AP-182 (Aug. 15, 1989); *Oak Park Manor v. State Certificate of Need Rev. Bd.*, 27 Ohio App.3d 216 (10th Dist.1985).

program and current director of Regulatory Services with Quality Management Consulting Group. Kenney testified that she independently examined the need for the proposed project within the service area identified in the CON application and prepared a report of her findings. In the report, Kenney documented pertinent statistics for the nursing homes identified in the CON application as being within the primary and secondary service areas of the proposed project, including number of beds and occupancy rates. In particular, Kenney noted that 7 of the 12 nursing homes in the proposed service area have occupancy rates above 90 percent, the statewide target for bed occupancy. She further noted that the facilities whose occupancy rates are less than 90 percent are "older" facilities, opening between 1954 and 1986. Kenney also documented the projected increase in the over 65 population in the service area between 2010 and 2015, applied the state bed-need formula to the projected 2015 population, and concluded there is a significant bed deficit in the service area. She further noted the trend toward developing single-occupancy nursing home rooms with dedicated toilet and shower facilities and noted the paucity of private rooms in the service area.

{¶ 20} Based on her research and report, Kenney opined that the proposed project will meet a need for healthcare services not currently provided in the proposed service area. Specifically, Kenney opined that there is a need for additional beds in the projected service area for the 2015 population and, in particular, a need for private rooms. Kenney testified that the trend in long-term nursing home care toward private rooms derives both from residents' desire for privacy and research that private rooms provide clinical benefits to residents.

{¶ 21} Michael Francus, the appellant's managing member and the operator of the proposed facility, testified that private rooms significantly improve infection control and eliminate psychosocial issues. Appellant's own expert, Applebaum, acknowledged the trend in long-term nursing home care toward greater privacy for residents, which includes private rooms with private bathrooms.

{¶ 22} Appellant argues that its witnesses established the lack of need for the proposed project. Sullivan opined that Summit County's average occupancy rate of 89 percent, which falls below the state's targeted occupancy rate of 90 percent, demonstrates the lack of need for the proposed project. Sullivan further averred there is no evidence

that Summit County will experience significant population growth in the future or an increased demand for nursing home beds. Sullivan also averred that the number of nursing home patient days in Summit County has declined in recent years despite the significant increase in the over 65 population, and, accordingly, the market will not experience growth sufficient to absorb an additional 72 beds.

{¶ 23} Jennifer Eiswerth, appellant's licensed executive director, testified that appellant opposes the CON application because the project is not needed. Eiswerth averred that appellant does not have a waiting list for admissions and has never declined prospective patients due to lack of services.

{¶ 24} Upon review, the record sufficiently supports the hearing examiner's determination that appellant failed to prove, by a preponderance of the evidence, that the project is not needed. Presented with conflicting testimony as to need, the hearing examiner gave weight to the evidence regarding the demographic trends in Summit County and the need for private beds. "Although this court may engage in a very limited weighing of the evidence upon an appeal of this nature, we may not substitute our judgment for that of the [director] as to the credibility of witnesses and the weight to be given the testimony." *In re The Knolls of Oxford* at ¶ 13, citing *In re Manor Care of Kettering*, 10th Dist. No. 92AP-208 (Dec. 31, 1992); *In re Mill Run Care Ctr. and New Albany Care Ctr.*, 10th Dist. No. 94APH04-591 (Dec. 20, 1994). Rather, a reviewing court must afford due deference to the administrative resolution of evidentiary conflicts. *In re Doylestown* at ¶ 6, citing *In Re Manor Care of Parma* at ¶ 9, citing *In re Christian Care Home of Cincinnati, Inc.*, 74 Ohio App.3d 453 (10th Dist.1991).

{¶ 25} Appellant also contends under its first assignment of error that the director failed to consider mathematical flaws in the statutory bed-need formula. Sullivan testified that the formula utilized by the director in assessing bed need contains a mathematical error. According to Sullivan, dividing the total statewide bed need by the population over 65 multiplied by 1,000 results in a bed need rate of 51.2 beds per every thousand individuals over age 65, not 53.3 beds per every thousand individuals over age 65. Sullivan averred that from an operational perspective, this overstatement reduces the bed need by about two beds per every thousand individuals over age 65 in every county, including Summit County. Thus, according to Sullivan, the director's determination that

Summit County is underbedded by 286 beds overstates the bed need by approximately 100 beds. However, assuming arguendo that Sullivan's calculations are accurate, Summit County remains underbedded by 186 beds, which is significantly more than the 72 beds proposed for transfer in the applicant's CON application.

{¶ 26} Appellant further contends the director failed to consider "methodological deficiencies" in the statutory bed-need formula. Appellant maintains that the formula is flawed because it does not account for factors such as declining occupancy rates and nursing home demand. However, Applebaum, appellant's own expert witness, testified that the statutory formula and methodology was verified by Scripps Gerontology prior to implementation by the director. Indeed, Applebaum testified that "we, essentially, concluded that the methodology used by the Department of Health to implement the legislation appeared valid to us." (Tr. Vol. I, 17.) He further averred that the methodology used by ODH to implement R.C. 3702.593 is valid, and that the director created the bed-need formula following statutory guidelines set forth by the General Assembly. Based upon this testimony, the hearing examiner found in Finding of Fact No. 17 that "[t]he bed need formula is established by statute and has been determined by independent experts to be valid." (Report and Recommendation, 27.)

{¶ 27} For the foregoing reasons, we find there is reliable, probative, and substantial evidence to support the determination of the hearing examiner and the director that the proposed project is needed, and that appellant failed to establish that appellee did not comply with the requirements of Ohio Adm.Code 3701-12-20(E). Accordingly, appellant's first assignment of error is overruled.

B. Second Assignment of Error

{¶ 28} In its second assignment of error, appellant contends the hearing examiner failed to properly consider evidence of the proposed project's impact on surrounding facilities, lack of unique services, and the impact on area staffing.

{¶ 29} Ohio Adm.Code 3701-12-20(F) provides that the director must consider "the impact of the project on all other providers of similar services in the service area specified by the applicant including the impact on their utilization, market share and financial status." Ohio Adm. Code 3701-12-20(K) requires the director to consider "the

impact of the project on existing staffing levels, if applicable, and the availability of personnel resources to meet the applicant's projected requirements."

{¶ 30} Here, the hearing examiner found that the applicant provided sufficient evidence on the issue of impact and noted that some impact will result from the new facility. The hearing examiner specifically found in Finding of Fact No. 18:

> The evidence establishes that the proposed new facility will have an impact on the Objector's facility, as well as other providers in the area. The evidence also establishes the existence of unrelated factors that may contribute to census challenges and staff retention at the Objector's facility, including the facility's age, the unavailability of a large number of private rooms, and the fact that the facility is not located on a bus line. Further, the evidence establishes that the Objector's facility may be in a better position than other facilities to weather the opening of the new facility, because of its excellent management and operation and current high census.

(Report and Recommendation, 27.)

{¶ 31} The record supports the hearing examiner's findings. As to impact on other area providers, Kenney testified that although existing facilities in a service area inevitably experience some impact from the opening of a new facility, such impact is typically "diffused over all facilities within the area." (Tr. Vol. III, 354.) Kenney averred that although appellant is the closest existing facility to the proposed project, it would "not necessarily" experience the greatest impact. (Tr. Vol. III, 354.)

{¶ 32} Francus testified that any adverse impact on appellant will be minimized because of the applicant's expected contracts with SummaCare and United Healthcare, two insurers with which appellant does not have contracts. He stated that "we are attracting referral sources that [appellant] either does not have or cannot have." (Tr. Vol. II, 246.) Francus further averred that appellant was "in a better position than most to meet the competition" due to its excellent management and operation and high occupancy rates. (Tr. Vol. II, 234.)

{¶ 33} In addition, the record contains evidence suggesting that any impact on appellant's facility will benefit area residents. For example, Francus averred that competition among facilities breeds improvement which ultimately benefits residents.

Indeed, he testified that "when you have two nice facilities in the area, it does raise the [quality] bar, and the ultimate beneficiary of that is going to be the resident." (Tr. Vol. II, 232.) Appellant's own expert, Sullivan, acknowledged that competition between facilities is both necessary and beneficial. Indeed, Sullivan stated, "I don't think you want to have a situation where you have a monolithic provider; there is no competition." (Tr. Vol. I, 108.)

{¶ 34} The hearing examiner noted the applicant's impact testimony in Finding of Fact No. 13:

> The Applicant offered testimony that the new facility would not have an overly adverse effect on Pebble Creek. The Applicant offered testimony that the distance from the new facility to Pebble Creek is 3.8 miles. Ms. Kenney testified that Pebble Creek, as the closest existing facility, would not necessarily experience the greatest impact. Mr. Francus testified that he believes competition for residents with Pebble Creek would be minimized by the probability that the new facility will have insurance provider agreements that are not available at Pebble Creek.

(Report and Recommendation, 26.)

{¶ 35} Appellant points to testimony offered by Sullivan and Eiswerth averring that the proposed project will detrimentally affect appellant and other providers in the service area. Indeed, both witnesses testified that 70 percent of appellant's patients come from the service area upon which the applicant proposes to draw. Sullivan opined that because the applicant will not provide any services unique to those already provided by existing facilities, and due to the lack of future demand for nursing home services, the applicant will necessarily have to attract patients who would otherwise be served by existing providers, including appellant. Indeed, Sullivan opined that appellant, as the closest existing provider, will experience "a pretty significant impact" from a new facility. (Tr. Vol. I, 83.) Eiswerth echoed Sullivan's opinion, testifying that the applicant will provide only duplicative services and will negatively impact appellant with respect to occupancy rates, finances, and quality of care and services.

{¶ 36} The hearing examiner noted appellant's impact testimony in Finding of Fact No. 8, stating:

> The Objector offered testimony that Pebble Creek would be severely impacted, both in its resident census and its ability to attract and retain staff, by the proposed facility, because of its close proximity to Pebble Creek, the fact that it will be a new facility and an attractive employer, the fact that it will consist of all private rooms, and because a majority of Pebble Creek's residents are drawn from the proposed service area."

(Report and Recommendation, 24-25.)

{¶ 37} Presented with conflicting testimony as to the impact on other providers in the service area, including appellant, the hearing examiner gave weight to the testimony that appellant will be able to successfully withstand the opening of a new facility. The hearing examiner also noted there are other unrelated factors that pose a challenge to appellant's continued viability, including the facility's age and the unavailability of private rooms. As noted above, this court may not substitute its judgment for that of the hearing examiner as to witness credibility and weight of the evidence and must defer to administrative determinations involving evidentiary conflicts.

{¶ 38} This court has acknowledged that "any new facility will initially impact existing providers to some extent, and if some impact was sufficient to deny a CON, then few, if any, would ever be approved." *In re Doylestown* at ¶ 15, citing *In re Manor Care of Parma* at ¶ 51. Here, the hearing examiner considered all the evidence and concluded that while appellant will likely experience some impact from the proposed project, it will ultimately remain competitive.

{¶ 39} As to the impact of the proposed project on existing staffing levels and the availability of personnel resources to meet the applicant's projected needs, we note that Section 10.24 of the CON application requests information pertaining to the "availability of qualified personnel to provide the additional staff required and the impact on other area health care providers of recruiting them." The applicant provided the following response to this inquiry:

> The proposed facility will be located in an area (Akron/Canton) of high unemployment, providing a wealth of potential employees from which the best, most qualified can be selected. Moreover, the nursing school at nearby University of Akron should prove to be a terrific source of qualified skilled staff for the new facility. Kent State

> University, which also operates a vibrant College of Nursing, is proximate to the new facility, and will likely become a source for skilled staff for Green Village.

(Joint exhibit No. 1, 51.)

{¶ 40} It is reasonable to assume that staff recruitment and retention will be relatively easy at a new, state-of-the-art facility. In addition, Francus testified that the proposed project is located on a bus line which provides bus stops within a reasonable walking distance for employees.

{¶ 41} For appellant's part, Eiswerth testified that since January 1, 2010, appellant has had difficulty recruiting and retaining nurse and nurses' aides. According to Eiswerth, the facility experienced a 22 percent employee turnover rate in 2010 and a 42 percent employee turnover rate in 2011. Eiswerth opined that the opening of a new facility will exacerbate appellant's staffing issues.

{¶ 42} The hearing examiner recognized that appellant's challenges with staff retention result, at least partially, from the fact that the facility is not situated on a bus line. This finding is supported by the testimony of Eiswerth, who averred that appellant does not have bus service and is located at least one-half mile from a bus stop.

{¶ 43} As noted above, the hearing examiner considered the conflicting evidence presented and gave credence to the applicant's evidence regarding the impact the proposed project will have on existing staffing levels and the availability of personnel resources to meet the applicant's projected needs. We reiterate that this court may not substitute its judgment for that of the hearing examiner as to witness credibility and weight of the evidence and must defer to administrative determinations involving evidentiary conflicts.

{¶ 44} Appellant finally contends under its second assignment of error that the hearing examiner and the director failed to consider "whether the proposed facility brings anything unique to the area." (Brief at 12.) Appellant argues that the evidence demonstrates that all of the applicant's proposed services are already provided by existing facilities in the service area, and that the hearing examiner and the director did not "adopt or write any findings on this evidence put forth by Appellant." (Brief at 12.)

{¶ 45} The record demonstrates that the hearing examiner considered all the evidence pertaining to whether the proposed project will provide only duplicative services. In Finding of Fact No. 9, the hearing examiner noted that appellant presented testimony that it and other facilities in the proposed service area can provide all of the services proposed to be offered by the applicant. In Finding of Fact No. 12, the hearing examiner noted that the applicant offered evidence that its facility will provide private rooms. Thus, contrary to appellant's assertion, it is clear that the hearing examiner considered whether the proposed project will provide additional benefits to the service area that would otherwise not be available.

{¶ 46} For the foregoing reasons, we find there is reliable, probative, and substantial evidence to support the determination of the hearing examiner and the director regarding the proposed project's impact on other providers in the service area and on staffing levels, and that appellant failed to establish that the applicant did not comply with the criteria set forth in Ohio Adm.Code 3701-12-20(F) and (K). Accordingly, the second assignment of error is overruled.

C. Third Assignment of Error

{¶ 47} In its third assignment of error, appellant contends the hearing examiner failed to properly consider evidence that the project is not financially feasible. Appellant further maintains the hearing examiner relied on improperly submitted evidence in determining financial feasibility.

{¶ 48} Ohio Adm. Code 3701-12-20(J) requires the director to consider "the short-term and long-term financial feasibility and the cost effectiveness of the project and its financial impact upon the applicant, other providers, health care consumers and the medicaid program established under Chapter 5111. of the Revised Code." Among other relevant matters, the director must evaluate (1) the availability of financing for the project, including all pertinent terms of any borrowing, if applicable, (2) the operating costs specific to the project and the effect of these costs on the operating costs of the facility as a whole based upon review of balance sheets, cash flow statements, and audited financial statements, (3) the effect of the project on charges and payment rates for the facility as a whole and specific to the project, (4) the costs and charges associated with the project compared to the costs and charges associated with similar services furnished or proposed

to be furnished by other providers, and (5) the historical performance of the applicant and related parties in providing cost-effective health care services. Ohio Adm.Code 3701-12-20(J)(1) through (5).

{¶ 49} We initially consider appellant's argument that the hearing examiner relied on improperly submitted evidence in determining financial feasibility. On the second day of the hearing, counsel for appellant and the applicant discussed the fact that certain financial information included in the original CON application required modification. Counsel for the applicant delineated the modifications and averred that the applicant's financial experts would testify about the modifications and their impact on the project's financial feasibility. Counsel for appellant stipulated to the fact that the applicant would present updated financial information and requested that appellant's financial expert be permitted to review the updated financial information prior to offering testimony as to the financial feasibility of the proposed project. The hearing examiner agreed to this arrangement.

{¶ 50} In accordance therewith, the applicant's financial experts, Robert Pumphrey and Russell Corwin, testified in detail about the revisions made to the original CON application and their effect on the project's financial feasibility. Thereafter, appellant's financial expert, Jeff Heaphy, offered detailed testimony regarding the revised CON application and the financial feasibility of the project.

{¶ 51} Appellant now complains that the hearing examiner improperly permitted the revised financials. A party generally waives the right to appeal an issue that could have been but was not raised in earlier proceedings. *MacConnell v. Ohio Dept. of Commerce,* 10th Dist. No. 04AP-433, 2005-Ohio-1960, ¶ 21, citing *Am. Legion Post 200 v. Ohio Liquor Control Comm.,* 10th Dist. No 01AP-684 (Dec. 20, 2001). This general principle has been applied to appeals from administrative agencies. *MacConnell.* Thus, the failure to raise procedural or evidentiary objections at the administrative level waives those objections for purposes of a subsequent administrative appeal. *Trish's Café & Catering, Inc. v. Ohio Dept. of Health*, 195 Ohio App.3d 612, 2011-Ohio-3304, ¶ 19 (10th Dist.). Here, appellant not only failed to object to the submission of the revised financial information, it actually acquiesced in its submission with the proviso that its expert be permitted to review the modifications prior to testifying about the project's financial

feasibility. Appellant does not dispute that its expert reviewed the revised financials before testifying. Based on the above authority, we conclude that appellant's failure to object to the introduction of the revised financials constitutes a waiver of that issue for purposes of these administrative appeal proceedings.

{¶ 52} Accordingly, we turn now to appellant's substantive argument. In essence, appellant contends the hearing examiner did not properly consider its evidence that the project is not financially feasible. Appellant argues that testimony from it financial expert, Heaphy, establishes that the project is financially unfeasible. Heaphy testified that the applicant overstated the occupancy rate for Medicare Part A residents as well as the projected reimbursement rate for Medicaid residents, and that these errors resulted in overprojected revenue of $874,000 in the second and third years of operation. He further averred that the reduced revenue would result in a net operating loss for those years. Accordingly, Heaphy opined that the proposed project is not financially feasible.

{¶ 53} However, the applicant's financial experts, Pumphrey and Corwin, opined that the project is financially feasible. Pumphrey opined that although the revised financials result in decreased projected net income from that set forth in the original CON application, "[t]he project still makes economic sense based upon these [adjusted] financials." (Tr. Vol. III, 304.) He specifically averred that "[t]hey do have positive cash flow. They do have positive income levels in each year, even the year of startup [and] there is positive debt-service-coverage ratios." (Tr. Vol. III, 304.) According to Corwin, the project remained "a very viable project on a financial basis" even with the revisions to the financials. (Tr. Vol. IV, 369.) Corwin opined that projected changes to Medicare reimbursement will not negatively impact the project's financial viability.

{¶ 54} The record indicates that the hearing examiner considered the competing testimony with regard to financial feasibility. In Finding of Fact No. 10, the hearing examiner outlined Heaphy's testimony:

> Mr. Heaphy * * * questioned the Applicant's proposed Medicare Part A occupancy rate, stating that rate is higher than the actual performance of the Applicant's other facilities. Mr. Heaphy also opined that the Applicant's proposed daily rate for "other" expenses, including ancillary costs, is unreasonably high. Finally, Mr. Heaphy opined that the Applicant underestimated the effect of legislative reductions

> in Medicaid reimbursement rates. On cross-examination, Mr. Heaphy conceded that some facilities have a Medicare Part A mix equal to or higher than the Applicant's projections, and that the availability of private rooms may have a positive effect on Medicare census.

(Report and Recommendation, 25.)

{¶ 55} In Finding of Fact No. 14, the hearing examiner delineated the evidence put forth by the applicant:

> The Applicant offered testimony that the project is financially feasible. Specifically, Mr. Pumphrey testified that he reviewed the Applicant's financial projections, originally prepared by Mr. Corwin, and recommended changes to elements of the projections that he felt to be unreasonable or uncompetitive. These revisions included adjustments on the basis of changes in the Medicaid reimbursement rate and reductions in the bed tax rate. He also recommended an upward adjustment in the proposed private-pay rate to a figure he felt to be competitive. Finally, Mr. Pumphrey recommended an increase in the proposed interest rate, based on the quote by the lender. Mr. Pumphrey stated that with his revisions, the project will have positive cash flow even in the first year of operation, and positive debt service coverage ratios.

(Report and Recommendation, 26.)

{¶ 56} The hearing examiner found that the applicant provided sufficient evidence on the issue of financial feasibility. In Finding of Fact No. 16, the hearing examiner found that "[t]he evidence does not establish that the project is financially unfeasible. While the Objector presented evidence that elements of the financial projections are unreasonable, the Applicant presented evidence justifying those estimates, including evidence that its original figures were reviewed and revised." (Report and Recommendation, 26-27.)

{¶ 57} According due deference to the hearing examiner's resolution of conflicting evidence, we find there is reliable, probative, and substantial evidence to support the determination of the hearing examiner and the director that the project is financially feasible, and that appellant failed to establish that appellee did not comply with the requirements of Ohio Adm.Code 3701-12-20(J). Accordingly, the third assignment of error is overruled.

IV. CONCLUSION

{¶ 58} Having overruled appellant's three assignments of error, we hereby affirm the order of the director of ODH granting applicant's CON application.

Order affirmed.

FRENCH and CONNOR, JJ., concur.

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