1-19-2006

MAHOGANY HOSPICE CARE, INC.

Follow this and additional works at: http://trace.tennessee.edu/utk_lawopinions

Part of the Administrative Law Commons

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact administrative.procedures@tn.gov
BEFORE THE TENNESSEE HEALTH SERVICES
AND DEVELOPMENT AGENCY

IN THE MATTER OF:
MAHOGANY HOSPICE CARE, INC.

DOCKET NO. 25.00-066804J

ORDER

This matter came to be heard on January 17 and 19, 2006, before Thomas G. Stovall, Administrative Judge, sitting for the Tennessee Health Services and Development Agency (Agency) in Nashville, Tennessee. The Petitioner, Priority Hospice Care, Inc. (Priority), was represented by counsel, Mr. E. Graham Baker, Jr. of Nashville. The Applicant, Mahogany Hospice Care, Inc. (Mahogany), was represented by counsel, Mr. Michael D. Brent and Mr. Austin L. McMullen, of Nashville. The Agency was represented by Mr. James B. Christoffersen, Deputy General Counsel. This matter became ready for consideration on August 14, 2006, upon the parties’ final submission of proposed findings of fact and conclusions of law.

The subject of this hearing is the appeal filed by Priority of the granting of a certificate of need (CON) to Mahogany by the Agency for the establishment of a hospice agency in the Middle Tennessee area. After consideration of the record in this matter, it is determined that the granting of the CON to Mahogany by the Agency should be UPHELD. This decision is based upon the following findings of fact and conclusions of law.
FINDINGS OF FACT

1. On August 10, 2004, Mahogany filed an application with the Agency for a CON to establish and operate a hospice agency. The Agency approved the CON application on January 26, 2005.

2. Hospice care is medically appropriate when a physician has diagnosed a patient with a terminal condition with less than six months to live. Most if not all hospice patients are physician referrals. The primary goal of hospice care is palliation, to keep the patient as pain and symptom free as possible to allow for a comfortable death.

3. There are two types of hospice agencies, residential and freestanding. A residential hospice operates a residential facility where patients are treated, while a freestanding hospice treats the patients in their homes, nursing homes or hospitals. Mahogany operates a freestanding hospice, maintaining only an administrative office. The only residential hospice currently operating in Mahogany’s proposed service area is Alive Hospice (Alive), located in Nashville.

4. Mahogany’s administrative office is located in Nashville, Tennessee. Mahogany’s proposed service area is Davidson County and the seven counties within a 30 mile radius of Nashville: Cheatham, Dickson, Robertson, Rutherford, Sumner, Williamson, and Wilson.

5. After obtaining the CON from the Agency in January 2005, Mahogany received a license from the Tennessee Department of Health in June 2005, and commenced operation. Mahogany was certified by Medicare in December 2005. At the time of the hearing in January 2006, Mahogany had negotiated contracts with two
TennCare Managed Care Organizations (MCO) and was awaiting final approval of the contracts by the MCO review boards. From June 2005, through the date of the hearing, Mahogany had provided hospice services to 14 patients.

6. Tony L. Suggs is the owner and president of Mahogany. Mr. Suggs is African-American and a native of Nashville. He has a nursing degree and experience in the hospice field in both Nashville and Memphis. Mr. Suggs first gained experience in hospice care by working as a nurse and marketing director at Friendship Hospice Care in Nashville. In 2001, Mr. Suggs moved to Memphis where he established a new hospice agency. In 2003, Mr. Suggs sold his hospice agency in Memphis to Odyssey Healthcare, a large hospice organization. After his experience in Memphis, Mr. Suggs realized that he had personal deficiencies in the management side of operating a hospice agency. To address that perceived deficiency, he subsequently obtained certification as a hospice administrator from the National Hospice and Palliative Care Organization and has been involved in that organization’s Access and Diversity Awareness Council. In 2004, Mr. Suggs invested the profits from the sale of his Memphis hospice, approximately $978,000, into the establishment of Mahogany in Nashville.

7. Mahogany’s goal is to provide hospice care to populations that traditionally underutilize hospice services, primarily racial minorities and the economically deprived who do not access medical care to the extent that other populations do. Mahogany will attempt to provide services to the TennCare population to a greater extent than that population is currently utilizing hospice care.
8. At the time of the granting of the CON to Mahogany, Priority was the only African-American owned hospice agency in Nashville. Priority has been in operation since 1999.

9. For the population as a whole, utilization of hospice services would appear to significantly exceeded the need formula set forth in Tennessee’s Health Guidelines for Growth (Guidelines) adopted by the Health Planning Commission. (Ex. No. 8) Pursuant to these Guidelines, in 2005 there was a 70.1% overutilization of hospice services in Mahogany’s eight county service area. In Davidson County, there was a 98.2% overutilization rate. According to the Guidelines, the total need for hospice care in the service area in 2005 was 2,100, while 3,478 patients were actually served. Alive itself treated 2,171 patients in 2005. (Ex. No. 6)

10. Despite the need formula set forth in the Guidelines, there is strong evidence to suggest that hospice services are underutilized in Tennessee, especially by the minority and lower income populations, the populations to be targeted for service by Mahogany. In the period 2001-2002, 16% of the non-traumatic deaths in the service area were African-Americans. In 2002, only 11% of hospice patients in the service area were African-American. This is reflective of a national trend of underutilization of hospice services by African-Americans. In 2003, 9% of hospice patients in the United States were African-American. In 2004, the number decreased to 8.1%.1

---

1 According to the 2000 Census, African-Americans comprised 16.4% of the population of Tennessee, and 12.1% of the population of the United States.
11. TennCare patients also underutilize hospice services. In 2002, while TennCare recipients represented 16.14% of the service area population, less than 10% of hospice patients were on TennCare.

12. The population of Tennessee as a whole underutilizes hospice services when compared to other states. In 2003, the hospice penetration rate for Medicare recipients in Tennessee was 21.4%, while the national average was 29.94%. This placed Tennessee 39th amongst the states in the rate of hospice utilization for their Medicare population. Alabama and Mississippi, two of Tennessee’s bordering states, have hospice utilization rates in their Medicare populations of 39% and 34% respectively.  

13. There are a number of factors that may explain the underutilization of hospice care by various population groups in Tennessee, specifically racial minorities and the TennCare population. As stated previously, most if not all patients receiving hospice care are physician referrals. It is therefore obvious that groups lacking adequate health care such as minorities and the lower income would not be receiving physician referrals to the same extent as population groups with greater access to health care providers. Cultural and religious factors also often influence whether certain populations utilize hospice services. Mr. Suggs testified that as many African-Americans were raised in a faith-based culture, they do not “give up” easily. Some view hospice care as giving up and they do not wish to discuss death and dying. Carol Jenkins, the President and CEO of Priority, agreed with Mr. Suggs’ assessment and believes that African-Americans are

---

2 Alabama and Mississippi do not require a CON for the establishment of a hospice agency.
less accepting of hospice care because they are less likely to accept the inevitability of death.

14. All the witnesses who testified at the hearing, whether on behalf of Mahogany or Priority, agreed on the need for more education and outreach to underserved population groups to help address the underutilization of hospice care. When the population becomes more educated about hospice care, it becomes less resistant and more likely to utilize hospice services. Both Priority and Mahogany do extensive marketing and outreach in the African-American community. By the time of the hearing in January 2006, Mahogany had already spent $22,000 on advertising. Mr. Suggs participates in a weekly radio program on a gospel music station with a large African-American audience. Through these efforts, Mr. Suggs hopes to both increase Mahogany’s name recognition as well as educate the community in general about hospice care.

15. Priority also does extensive marketing and outreach in the African-American community. In 2005, Priority helped sponsor an education program entitled The Clergy End of Life Enhancement Project. This program worked with members of the African-American clergy to educate them and their congregations about end of life issues and the role of hospice care. Ms. Jenkins estimated that the clergy involved in this project represented congregations totaling about 30,000 people. Between June and September 2005, the program held four separate all day educational sessions at different area hospitals located in Nashville, Ashland City, Smyrna and Hendersonville. Ms. Jenkins believes that because of this type of education the clergy is more
understanding and accepting of the death and dying process and the role of hospice care than their congregations at large. Ms. Jenkins believes that a better educated clergy will result in their congregations having a better understanding and be more accepting of hospice care.

16. In addition to The Clergy End of Life Enhancement Project, Ms. Jenkins stated that Priority engages in other forms of community outreach and education.

We have a CNA certified nursing assistant class that’s licensed through the State of Tennessee and we offer CNA classes to the community at no charge to educate them on death and dying and for long-term care. We also have bereavement, grief and bereavement seminars, that we do every Thursday, and they are open to the community and we provide dinner at Shoney’s. (Transcript p. 305)

17. Further evidence of the amount of community outreach and marketing engaged in by hospice agencies in Middle Tennessee, and the positive results in terms of increased patient numbers that hospice agencies generate from this activity, can be found from the experience of Alive. The experience of Alive in this regard is especially notable in Murfreesboro, Tennessee. From 2002 through 2004, Alive was able to increase its total patient census in the eight county service area from 1,224 to 2,247. (Ex. No. 1. pp. 000099-000101) Ms. Jan Jones, President and CEO of Alive Hospice, stated in her deposition (Ex. No. 10) that Alive engages in community outreach and advertising to all populations, including efforts which focus on African-Americans and Hispanics. (Jones Dep. pp. 30-32) Ms. Jones further testified that Alive purchased Hospice of Murfreesboro on August 15, 2005. Alive had been able to increase the patient census at
this hospice agency from 35 at the time of the purchase to 50 at the time of her deposition in December 2005, through “[o]utreach, focus on outreach.” (Jones Dep. p. 46, line 18)

18. Mahogany’s goal was to serve 20 patients in its first year of operation, 30 in the second year. As stated in Finding of Fact No. 5 above, Mahogany had served 14 patients by the time of the hearing in January 2006, approximately six months after it commenced operation in June 2005. Mahogany proposed to staff the project in the first year with 9.75 FTEs. At the time of the hearing, Mahogany had already hired or contracted with a doctor, a registered nurse, certified nursing assistants, physical and occupational therapists, a dietician, a social worker, a speech pathologist and a chaplain. Mr. Suggs was intending to operate as the administrator of Mahogany during the start up years of the project.

19. Priority contended that Mahogany had underestimated the start up costs of the project by not hiring adequate staff. However, Priority had less than five FTEs in its first year of operation and did not hire a nutrition, dietician or volunteer director. Moreover, as Mr. Suggs intends to do at Mahogany, Ms. Jenkins functioned as administrator of Priority during the early years of its operation.

20. Mahogany will be paid $125 per day for Medicare patients and $90 to $115 per day for TennCare patients depending upon the MCO contract. These reimbursement rates are consistent with those of other hospice agencies and are sufficient to make the business profitable presuming an adequate patient population.

21. Mr. Suggs believes that he has sufficient personal resources from the sale of his hospice agency in Memphis to adequately fund Mahogany until the patient
population grows to the level of self sufficiency. Although there is no evidence to suggest that Mahogany will not eventually become financially viable, the only money invested in Mahogany are the personal funds of Mr. Suggs. Thus, Mr. Suggs is the only person or entity who would suffer if Mahogany does not succeed financially.

22. Priority contended the operation of Mahogany will attract patients that otherwise would have been served by Priority. As an example, Priority cited the referrals of patients to Mahogany from Dr. Melvin Lightford and Dr. Kenneth Hicks. Dr. Lightford has been hired by Mahogany as its medical director. He had previously referred patients to both Priority and Alive prior to becoming Mahogany’s medical director. Eight of Mahogany’s patients were referred by Dr. Lightford. Dr. Hicks is another physician who had referred patients to Priority in the past. Dr. Hicks has referred four patients to Mahogany since it began operation. Despite Priority’s speculation to the contrary, no proof was offered to establish how many, if any, of the 12 patients referred to Mahogany from Drs. Lightford and Hicks would have been referred to Priority but for Mahogany’s existence. Indeed, Priority was unable to produce any proof as to how many patients it had received in the past based upon referrals from Drs. Lightford and Hicks.

23. Further evidence that Mahogany’s existence will not negatively impact the patient population of Priority is the fact that at the time of the hearing in January 2006, Priority’s average daily patient census had been 31 for approximately three months. For the year prior to that, Priority’s average daily patient census had been 25. Mahogany commenced operation in June 2005.
CONCLUSIONS OF LAW

1. In a contested case hearing before the Agency, the party petitioning for the hearing bears the burden of proof to establish by a preponderance of the evidence, that the CON should be granted or denied. Tenn. Comp. R. & Regs. Rule No. 0720-13-.01(3) In this case, Priority has the burden of proof to establish that the CON granted to Mahogany should be denied. Priority has failed to carry this burden of proof.

2. Tenn. Code Ann. §68-11-1609(b) provides:

No certificate of need shall be granted unless the action proposed in the application is necessary to provide needed health care in the area to be served, can be economically accomplished and maintained, and will contribute to the orderly development of adequate and effective health care facilities and/or services. In making such determinations, the agency shall use as guidelines the goals, objectives, criteria and standards in the state health plan. Until the state health plan is approved and adopted, the agency shall use as guidelines the current criteria and standards adopted by the state health planning and advisory board, and any changes implemented thereto by the state health planning division pursuant to §68-11-1625. Additional criteria for review of applications shall also be prescribed by rules of the agency.

3. Rule 0720-11-.01 sets forth the additional criteria for review of CON applications as adopted by the Agency:

GENERAL CRITERIA FOR CERTIFICATE OF NEED. The Agency will consider the following general criteria in determining whether an application for a certificate of need should be granted:

(1) Need. The health care needed in the area to be served may be evaluated upon the following factors:

---

3 Tennessee’s Health Guidelines for Growth (Ex. No. 8)
(a) The relationship of the proposal to any existing applicable plans;

(b) The population served by the proposal;

(c) The existing or certified services or institutions in the area;
(d) The reasonableness of the service area;

(e) The special needs of the service area population, including the accessibility to consumers, particularly women, racial and ethnic minorities, TennCare participants, and low-income groups;

(f) Comparison of utilization/occupancy trends and services offered by other area providers;

(g) The extent to which Medicare, Medicaid, TennCare, medically indigent, charity care patients and low income patients will be served by the project. In determining whether this criteria is met, the Agency shall consider how the applicant has assessed that providers of services which will operate in conjunction with the project will also meet these needs.

(2) Economic Factors. The probability that the proposal can be economically accomplished and maintained may be evaluated upon the following factors:

(a) Whether adequate funds are available to the applicant to complete the project;

(b) The reasonableness of the proposed project costs;

(c) Anticipated revenue from the proposed project and the impact on existing patient charges;

(d) Participation in state/federal revenue programs;

(e) Alternatives considered; and
(f) The availability of less costly or more effective alternative methods of providing the benefits intended by the proposal.

(3) Contribution to the Orderly Development of Adequate and Effective Healthcare Facilities and/or Services. The contribution which the proposed project will make to the orderly development of an adequate and effective health care system may be evaluated upon the following factors:

(a) The relationship of the proposal to the existing health care system (for example: transfer agreements, contractual agreements for health services, the applicant’s proposed TennCare participation, affiliation of the project with health professional schools);

(b) The positive or negative effects attributed to duplication or competition;

(c) The availability and accessibility of human resources required by the proposal, including consumers and related providers;

(d) The quality of the proposed project in relation to applicable governmental or professional standards.

4. Tenn. Code Ann. §68-11-1605(5) requires the Agency to:

Weigh and consider the health care needs of consumers, particularly women, racial and ethnic minorities, TennCare or medicaid recipients and low income groups, whenever the agency performs its duties or responsibilities assigned by law.

5. In the Guidelines adopted by the Health Planning Commission, the commission indicates that it “…strongly favors those institutions that provide services to the elderly, categorically needy, and indigent patients.” (Ex. No. 8, p.5)
6. Priority failed to establish the lack of need for the CON granted to Mahogany by the Agency. Indeed, Mahogany demonstrated the need for an additional hospice agency in the service area which intends to focus on providing hospice services to the indigent, TennCare recipients and racial minorities. It is clear from the statutory and regulatory standards set forth above, that the legislature, the Agency and the Health Planning Commission intend to encourage and support those entities which will provide health services to these underserved populations. Any review of Mahogany’s CON application must be performed in consideration of these legislative and regulatory pronouncements.

7. As set forth in Finding of Fact No. 9, a strict numerical analysis of the utilization rates of hospice care demonstrates a severe overutilization of hospice services. In 2005, there was a 70.1% overutilization of hospice services when compared to the projected need in the service area as set forth in the Guidelines. However, there are a number of reasons why this apparent overutilization rate should not operate as a bar to Mahogany’s CON. As set out in Tenn. Code Ann. §68-11-1609(b), the Agency is to use as guidelines the objectives and standards set forth in the state health plan. Thus the projected need for hospice services in the service area found in the Guidelines is not mandatory or binding on the Agency, but should merely be used as a guide. Further evidence of the lack of the mandatory nature of the projected need figures found in the Guidelines is the fact that the Agency itself granted the CON to Mahogany despite the
fact that a strict application of the Guidelines would not support a new CON for hospice services.

8. Additional analysis of the projected need formula set out in the Guidelines calls into question its significance in this case. As established in Finding of Fact No. 9, there were a total of 3,478 patients who received hospice services in 2005, when the total projected need was only 2,100. No one would suggest that the 1,378 patients who received hospice care in excess of the estimated 2,100 should somehow not have been served. It should also be noted that in 2005, Alive itself met the projected need of 2,100 with its treatment of 2,171 patients. A strict application of the need formula would suggest that there is no need for any other hospice agency in the service area except for Alive, which of course would be an absurd result.

9. Beyond the strict application of the need formula found in the Guidelines, what a more thorough review of the data demonstrates is that the demand for hospice care is continuing to grow and this growth is directly related to the amount of marketing and education that is undertaken by the existing hospice agencies. The experience of Alive shows the dramatic impact that marketing and education has on patient population. Between 2002 and 2004, Alive experienced an 83.5% increase in the number of patients it served in the service area. In 2005, Alive increased the patient population of the Hospice of Murfreesboro from 35 to 50 after Alive purchased the hospice agency. The President and CEO of Alive attributed this growth in patient population to marketing and community outreach. (Finding of Fact No. 17)
10. Both Priority and Mahogany also expend considerable effort on marketing, both to increase awareness in the community (especially the African-American community) and to increase their patient population. (Findings of Fact Nos. 14-16)

11. Further support for the view that review of Mahogany’s CON application should not be strictly confined to the need formula found in the Guidelines is the evidence of the underutilization of hospice services by Tennesseans in general and the African-American and TennCare populations in particular. Tennessee ranks 39th amongst the states in the hospice utilization rate of the Medicare population, and it has a significantly lower utilization rate than either of the bordering states of Alabama or Mississippi. (Finding of Fact No. 12) Specifically, hospice care is underutilized by both the African-American and TennCare populations. (Findings of Fact Nos. 10-11) These populations intend to be targeted for education and outreach by Mahogany. These marketing programs will address some of the root causes of the underutilization of hospice services in the African-American and TennCare communities. (Finding of Fact No. 13) Finally, as was previously stated in Conclusion of Law No. 6, review of Mahogany’s CON application for a hospice agency which will target underserved communities must be done in consideration of the legislative and regulatory pronouncements that encourage and support entities which will provide health services to these underserved populations.

12. When all of these factors are considered, it is apparent that despite the need formula set forth in the Guidelines, there is a need for Mahogany’s CON to help address the continued growth in demand for hospice services in the service area. This growth is
largely attributable to the marketing, education and community outreach programs conducted by all hospice agencies. The marketing and education efforts of both Mahogany and Priority in the minority communities will especially address the demonstrated underutilization of hospice services by certain segments of the population.

**Economic Factors**

13. Priority failed to establish that the proposed CON granted to Mahogany is not economically viable. Mr. Suggs has the financial resources derived from the sale of his hospice agency in Memphis to adequately fund the start up of Mahogany’s operation. He also has the personal experience and training in hospice care to be capable of operating Mahogany. (Findings of Fact Nos. 6 and 21) Mahogany served 14 patients in the first six months of operation, which is in line with its projection of 20 patients in the first year of operation and 30 patients in the second year. (Finding of fact No. 18) Mahogany’s staffing patterns are adequate for the inception of the agency, and consistent with (if not in excess of) the staffing pattern of Priority in the first year of its operation. (Findings of Fact Nos. 18-19) Finally, Mahogany’s projected reimbursement rates from Medicare and TennCare are consistent with the reimbursement received by other hospice agencies and certainly adequate to operate the agency assuming a sufficient patient population. (Finding of Fact No. 20)

14. When all of the above factors are considered, it has been established that Mahogany’s proposed hospice agency is economically viable.
**Contribution to the Orderly Development of Health Care**

15. Priority has failed to establish that the granting of the CON to Mahogany will not contribute to the orderly development of adequate and effective health care facilities and/or services. As analyzed extensively in the discussion of the demonstrated need for the project (Conclusions of Law Nos. 6-12), Mahogany will provide services to population groups underserved by the existing hospice agencies. There is a demonstrated need for hospice services that is not currently being met in the service area.

16. Moreover, Priority failed to demonstrate that it will be adversely impacted by Mahogany’s operation. Not only was Priority unable to establish that it had lost any patients to Mahogany, but Priority’s patient population had actually increased during the period of time in which Mahogany had been in business. (Findings of Fact Nos. 22-23)

17. There was no evidence in the record to support the contention that Mahogany’s CON will not contribute to the orderly development of health care in the service area.

**Conclusion**

18. As Priority has failed to establish by a preponderance of the evidence that the CON granted to Mahogany fails to meet the statutory and regulatory criteria for such action, it is hereby **ORDERED** that the decision of the Agency to grant the CON to Mahogany be **UPHELD**.
This Order entered this 29th day of August 2006.

______________________________
Thomas G. Stovall
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 29th day of August 2006.

Charles C. Sullivan II, Director
Administrative Procedures Division