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PUBLIC HEALTH AND HEALTH PLANNING COUNCIL
AD HOC COMMITTEE ON NURSING HOME CERTIFICATE OF NEED
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TRANSCRIPT

Ms. Leonard: Go ahead, Scott, please. Thank you.

Mr. LaRue: Good afternoon, everyone. I'm Scott LaRue, Co-Chair of the Nursing Home Certificate of Need ad hoc committee. I have the privilege to call to order the meeting of the Ad Hoc Committee and welcome Co-Chair Tom Holt, members, participants, and our virtual observers. I would like to remind the virtual observers that they are permitted to view the meeting only. There will be no public comments. As such, we ask you to keep your video and audio off for the duration of the meeting and we thank you in advance. Members and staff, please note all participants and observers are muted. Please raise your hand when you would like to speak and the host will unmute you. I would like to remind council members, staff, and the viewing audience that this meeting is subject to the open meeting law and is broadcast over the internet. The webcasts are assessed at the Department of Health website, httpnewyorkhealth.gov.

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Due to timing, we would ask members to hold their questions till the end of each presentation. Thank you. So the purpose of today's meeting, if we go back to our FIPIC meeting on April 10th of 2025, there were a handful of applications that were not passed through the Public and Health Planning Council, and it was determined that we would form an ad hoc committee to review current nursing home policies, develop new recommendations with regard to the qualifications of proposed operators, financial feasibility of the proposed transactions, the delegation of

authority through consulting service agreement, administrative services agreement, management services agreements, and related party transaction, and the use of conditional approvals.

Such ad hoc committee accepted the charge, and we are now reporting our recommendations today. So with that, I would turn it over to Andrew.

Mr. Lebwohl: Thank you so much, Scott. So just an overview of what we're going to be doing in the course of this meeting. We'll start with me providing some background on the comments that we received, so that everyone knows that we are honest messengers in the course of this process, and that there was an opportunity for public comment. Then we will move to describing the recommendations that were developed in reviewing the public commentary, and going through that with members of this committee, and working it through in the department, and identifying what there seemed to be consensus on for what could really contribute to achieving the goal of this committee, of really focusing on improvements to the character and competence component of the review of the Certificate of Need process.

So I do just want to make the point that this was not a comprehensive Certificate of Need reform initiative. And based on some comments that we received, I think we want to make sure that that's understood, that this was an ad hoc committee that was put together in response to events last year, specifically focused on the character and competence portion of nursing home Certificate of Need applications. And so while some of the committee's work touched on related issues, character and competence remains the primary focus of this committee. The committee tried to reach delicate balance based on the comments received from the public. The major body of the comments came from three different external sources representing different organizations and stakeholder groups. And we'll now go through what the public commentary was that came in over the course of this.

So first, the comments that we received included, generally we need to reduce delays in Certificate of Need application processing. Specifically on the subject of character and competence, commentary included reconsidering regulations that disqualify owners with two-star ratings and inflexible requirements on experience. Change absentee ownership so it is not a dis-qualifier. Applicant narrative should contain the specifics of who will be on-site for operation. And then reconsider the imposition of conditional approvals. Regarding related party transactions, commentary included reconsider the Attorney General's Medicaid Fraud Control unit presentations since the cases presented were selective and incomplete, not all related party transactions are inappropriate. Economies of scale are possible, and blanket skepticism is unwarranted. And then people also

noted, existing guardrails are already in place. Cost reporting rules eliminate related party profit.

Finally, on the subject of financial feasibility, people encouraged an equity requirement reduction from 25% to 10% for capital projects, which would be consistent with hospitals. People asked us to consider the financial realities when placing caps on rent, to consider the consequences of legislative enactments on facilities, to recommend reasonable rent where market rate certifications should rely on independent appraisers, and also to consider the needs of working capital.

Again, these were the comments that we received from the public. We are reporting these in order to establish that we are honest messengers in the course of this process. I'm going to hand this over to Scott now to go through where we landed on reviewing the input that we received both from the public and from members of the committee, and in the course of that, developing more concrete recommendations. So Scott, I'll hand this back to you.

Mr. LaRue: Thank you, Andrew. So as I mentioned in my opening remarks, the purpose of the committee, and we sorted our recommendations into three pillars. The first pillar being operator qualifications and experience. The second being financial sustainability and resource adequacy. And the third being related party and administrative oversight. And Colleen and Andrew, if it's okay with you, we'll take questions after each pillar on that particular pillar, and then move to the next, or did you want to have all the questions at the end?

Mr. Lebwohl: That's up to you, Scott. If you want to have discussion with the committee members after each pillar.

Mr. LaRue: That's what we'll do then. Thank you, Andrew. So our first pillar, operator qualifications and experience, the objective was to determine the adequate and relevant experience necessary to successfully operate a nursing home. So the committee has come forward with adopting a five-year minimum leadership experience threshold with some limited flexibility, defining relevant experience as a licensed nursing home administrator, director of nursing, owner, operator, or other leadership position held at a healthcare facility. Applicants who do not meet the threshold must submit detailed narratives with the initial application to demonstrate equivalent qualifications for the Public Health and Health Planning Council to consider on a case-by-case basis. And to that end, we're recommending that we leverage the existing authority that allows for independent quality monitors.

So in the case where someone may not meet the criteria, or flexibility is sought, the department will leverage its existing statutory authority under Public Health Law 2803-W, and require an independent quality monitor for purposes of monitoring the operator's compliance with a written and mandatory corrective plan.

In addition, mandatory disclosure and 90-day notice. In accordance with PHL2803-X, operators must provide a 90-day notice to the department and the state long-term care ombudsman prior to executing administrative or consulting agreements. So under pillar one, those are the first three recommendations, and I'd open it up for any questions that the council may have. Hi, Ann.

Ms. Monroe: Yeah, thank you for this and Andrew, for your just one question about the public comments. Who were the three organizations that submitted comments?

Mr. Lebwohl: I don't think we were going to share that. I think we wanted to, because we also weren't going to-

Ms. Monroe: Isn't that public information?

Mr. Lebwohl: Source it.

Ms. Monroe: Well, I don't want to bog us down here, but I'll say that I think we should get that. My first question is on the five-year leadership experience. It says a healthcare facility. So I could have been at a hospital, could I have been at an FQHC? It doesn't limit it to long-term care facilities. Is that accurate?

Mr. LaRue: Yes, that is accurate. In that case where you may be entering into a gray area where we were concerned about the experience that someone holds, that might be an instance where we ask for an independent quality monitor to oversee that initial period.

Ms. Monroe: Well, that leads me to my second question about an independent quality monitor. Is that a person who would be there on-site? What is an independent quality monitor? What are they required to do and who pays them?

Mr. LaRue: The applicant would pay for the independent quality monitor, and it would be an individual who was on... Would it be on an approved list, Andrew, from the Department of Health? Or they would approve the independent quality monitor?

Mr. Lebwohl: The department has an approved list of independent quality monitors.

Ms. Monroe: And that person would be responsible for compliance with the corrective plan. And so it would be time limited, I assume?

Mr. LaRue: Yes. Assuming the criteria was met, the independent quality monitor would no longer be allowed, but I think it's going to depend on the circumstances of that situation, and how the monitoring is progressing, and how they are achieving the objectives that were laid out with the independent quality monitor.

Ms. Monroe: And then lastly, on the third one, the operator has to provide the notice to the department and the ombudsman, but do they provide consulting or administrative agreement as well? Or just notice that they have one?

Mr. Lebwohl: That is going to be part of some of the recommendations that are coming in the other pillars.

Ms. Monroe: I'm sorry, Andrew, I didn't follow you.

Mr. Lebwohl: That is going to be part of the recommendations coming in some of the other pillars.

Ms. Monroe: That they provide notice or...

Mr. Lebwohl: Not just that they provide notice, that they provide [inaudible 00:13:01].

Ms. Monroe: So, we'll talk about that going forward.

Mr. Lebwohl: Yeah.

Ms. Monroe: All right. Those were my questions. Thank you.

Mr. LaRue: Thank you, Ann. I can't see everyone's hand. Does anyone else have a question on the first pillar?

Mr. Lebwohl: No, I see Dr. Thomas.

Ms. Monroe: Where is everybody?

Mr. Lebwohl: I think we need to unmute him.

Mr. Thomas: Can you folks hear me?

Mr. Lebwohl: Yes.

Ms. Monroe: Now we can.

Mr. Thomas: Oh, okay. Thank you. I apologize. I didn't know if... Anyway, two really quick questions. Hugh Thomas, a member of the council and the ad hoc committee. Ann covered a couple. Andrew, on the owner operator minimum leadership experience, will we be doing what we normally do is taking into account their operational history, so that those who have been consistently subpar operators would be looked at differently? Or is it simply enough that they've been operating a nursing home for five years?

Mr. Lebwohl: There is a litmus test already out there. I think we don't want to discourage people from trying to go into facilities that are in trouble, and then try to help turn them around. So we certainly want to take that into account too. So I think that this isn't quantitative, or it isn't just quantitative, it's qualitative.

Mr. Thomas: Qualitative. So you'll look at it in the totality of [inaudible 00:14:44] has been running five nursing homes, some of which are great, some of which are not. It's a qualitative analysis, whether that's sufficient. I don't have a nursing home license. I'm not a DON, I'm not an administrator, but I'm an owner. And so you will look at it in totality as a qualitative exercise rather than quantitative?

Mr. Lebwohl: Yeah.

Mr. Thomas: Okay, fair enough. Thank you. And then my only other question, I think, Andrew, you've already answered this, but very quickly. On the notice and I follow on Ann's comment that the department will receive notice, and the ombudsman will receive notice of an administrative or consulting agreement, along with the copies of the agreements. Let's just assume that's where we end up. That's for notice purposes only. That's not for prior approval. This isn't a management contract, a change in the management contract rules, correct?

Mr. Lebwohl: Well, I think we're going to be talking about that. Again, that's going to be the subject of

Mr. Thomas: You understand the distinction I'm drawing? I'm sure you do.

Mr. Lebwohl: Yes, I do.

Mr. Thomas: Yeah. All right. That's all I have, Scott. Thank you.

Mr. LaRue: Are there any other questions on Pillar [inaudible 00:15:59]?

Mr. Le: I I do just want to make sure that I clarify that while we do have the list of the quality monitors, the department's willing to entertain someone who's

not already on the list of independent quality monitors. I think that's a conversation.

Mr. LaRue: Thank you, Andrew. If there's no other questions, we'll move to pillar two, which is financial sustainability and resource adequacy. So again, the charter objective was to ensure the adequacy of finances to support short and long-term financial sustainability. So the first recommendation is that all three-year financial models and budgets must be reviewed by an independent third-party auditing firm, to certify the reasonableness of utilization and revenue assumptions.

The second is professional real estate appraisals. So to verify fair market rent and property values, the department shall consider requiring appraisals from independent, licensed appraisers rather than local real estate agents or other individuals. And finally, equity and debt guardrails. This would be to limit related party rent to a maximum of 1.10 debt service coverage unless a Bonafide lender requires otherwise, and such requirement by the lender is provided by the applicant at the time of the CON submission.

So the first item under this pillar is to ensure that the modeling and the financial that are being sent in with the CON are reasonable, both in terms of utilization and revenue assumptions. The second is to ensure that when we receive an appraisal for the value of a property, it's done by a licensed appraiser. And then lastly, what we're trying to accomplish with this is to ensure that there is not an exorbitant rent payment, which is drawing resources from the nursing home. So with that, I'd open it up for questions on pillar two. And again, I can't see everybody at one time, so please just speak up.

I think Ann's got her hand up.

Ms. Monroe: Well, sure. And this is just a process question. I'm very pleased with all three of these things. The three-year financial model and budget that comes in, do we get succeeding years of budget and financials as time goes on? In other words, we get a three-year when we're first getting approval of the CON, and then time goes on. And I'm wondering, I'm just asking a process question. Does the applicant, or in this case, the person with the CON, have to submit further financials over time? I just don't know.

Mr. Lebwohl: I don't know if they have to submit projections on an ongoing basis.

Ms. Monroe: No, but reality.

Mr. Lebwohl: Yeah, there's financial report. There's cost reporting that's built-in. Yeah, there's reporting annually.

Ms. Monroe: So, I'm assuming that if what came in in the first three years is not carried out in the actual cost reporting, that there's some kind of flag or that's looked at by the department. Is that correct?

Mr. Lebwohl: Well, licensing happens at a point in time. We don't report back to FIPIC on an ongoing basis on how facilities that have been licensed have performed against their projections from when they were originally licensed. So I think that once a facility's licensed, their reporting is really evaluated just for the health of the facility on an ongoing basis. It's not necessarily evaluated against what they submitted when they originally submitted for licensure.

Ms. Monroe: Okay.

Mr. LaRue: Dr. Sofell?

Dr. Soffel: Yeah. Hi. I don't understand the third bullet. Can you explain what that means? Limited related party rent. Those are not words that are part of my vocabulary.

Mr. LaRue: Right. So we've had a number of applications or feedback that we received from the Medicaid Fraud Control Unit, as well as other locations about rent being used as a tool to bring resources out of the nursing home. And this is intended to create a swim lane of what is an acceptable and reasonable rent payment from the operator to the landlord.

Dr. Soffel: Yeah. And what does 1.10 debt service coverage mean? I understand what we're trying to do here. I'm just trying to understand the technical language.

Mr. LaRue: Yes. So the higher the debt service coverage that's allowed, the greater the amount of funds that could be taken out of. And this 1.10 is consistent with what is an allowable charge per CMS or through Medicaid for this type of expense.

Dr. Soffel: Thank you, Scott.

Mr. LaRue: Any other questions on pillar two? Not hearing any. We'll move to pillar three, which is related party and administrative oversight. So the objective with related party and administrative oversight is to examine related party transactions and agreements that affect the management, operations and finances of a facility. So first, strengthening governance, any entity or individual exercising management control or operational influence via the

consulting agreement must undergo the same character and competence review as the licensed operator.

Second, in terms of certifications, every natural person, owner must sign and notarize a certification under penalty of perjury affirming they will exercise independent judgment, and maintain ultimate authority over all fiscal and operational decisions. And lastly, inter-agency consultation, the department will consult with the Office of the Attorney General's Medicaid Fraud Control Unit on pending applications where ownership groups have been the subject of prior allegations, enforcement actions, or settlements. Mr. Hughes?

Mr. Thomas: Hi Scott. Very quickly, just to frame this for me, and I think we're really coming a long way here. So the example is that Scott, I own a nursing home, but I contract with a third party to manage it, consult to it, do whatever. And at least the middle bullet would suggest that notwithstanding the fact that I've hired a licensed nursing home administrator to help me to run it for me, I remain ultimately responsible for all of it. That's the spirit, right, Scott?

Mr. LaRue: Exactly. It's ensuring that the person who is licensed to operate the facility is actually the one who is making the decisions, and operating the facility and it hasn't been delegated to a third party.

Mr. Thomas: Great. Thank you. That's what I thought. I just wanted to confirm. That's all I had, Scott. Thank you.

Mr. LaRue: Ann?

Ms. Monroe: Yeah, Ann Monroe. What you just said, Scott, I need a little clarification on. There are owners and there are operators. Do we use those terms interchangeably? Or I could own it and I could have somebody else operating it for me, right? And to whom does this apply? Me as the owner? Or the person I hired to operate it for me?

Mr. LaRue: Under which bullet are you referring to?

Ms. Monroe: The middle one, certifications.

Mr. LaRue: So that every natural person owner must sign and notarize a certification under penalty of perjury affirming they exercise independent judgment and maintain ultimate authority over all fiscal and operational decisions. So that is the person who is the...

Ms. Monroe: Owns it.

Mr. LaRue: Is the owner, and owner operator have been used interchangeably, but in this case, it's meant to be the same thing.

Ms. Monroe: So, the person who's running it, the nursing home administrator is not considered the operator.

Mr. LaRue: I'm going to let the Department of Health split those hairs.

Ms. Monroe: I'm sorry to do that, but I want to make sure that certification applies to the person who owns the nursing home and is accountable for everything that happens there. That's what I'm looking for, and I believe that's what the department and you, Scott, have written into here. Could just Andrew, it looks like you're nodding. Are we on the same page on this?

Mr. Lebwohl: We are. That is really what we're saying. And the operator is anyone who's on the operating certificate. It's not the nursing home administrator who's hired but is not an owner of the facility is not the operator. The operators are the owners, and the concept here is that you cannot be in the ownership group, you cannot be on the operating certificate, but then say that you've really delegated all responsibility and authority to someone else, and that you can't really be held responsible for what happens in the facility. If you are one of the owners, you have ultimate responsibility.

Ms. Monroe: Thank you for that.

Mr. LaRue: I was looking to seeing if there are any other questions from any members of the council. I am not seeing any. Ann, you didn't have another question, did you?

Ms. Monroe: Oh, no, I'm sorry. Let me get out of... Yeah.

Mr. LaRue: So that concludes the recommendations. I don't know if the Co-Chair, Mr. Holt, has anything he wants to add.

Mr. Holt: No, I just want to thank the department and you, Scott. I think this aligns with where we have struggled as a council in recent years around these applications. I think this gets us a long way towards where the council members' concerns were coming from. So thank you.

Mr. LaRue: Andrew, I turn it back to you.

Ms. Monroe: I have one more comment if I could.

Mr. LaRue: Please.

Ms. Monroe: Ann Monroe, I want to make sure that we emphasize based specifically on one of the comments from the public, that we are not looking at all nursing homes as bad, and need supervision much tighter than what we've had. Our goal is to make sure that we set more specific guardrails, but not to... There was a comment that was not all independent contracts are bad, or not all consultants are bad. And I think we went into this with that understanding and belief, and it is not our intention to denigrate the entire system with these improvements, but rather address areas where we feel patient and resident safety needed some booster.

And so I just want to make sure that when we communicate this stuff to the council, the public and nursing home ownership, that it goes with that caveat that we have great respect for the people who do this and do it well, and we want to increase the opportunity and the possibility for more of that to happen in New York. So I just want to make sure we go into it with that idea.

Mr. LaRue: Thank you, Ann, and couldn't agree with you more. Our objective here is to ensure that the information that comes to the council is accurate and reflects what is actually going to happen, so that we can make the right decisions when these applications come before us. And I think the steps that are being recommended today go a long way towards ensuring that that's the case.

Ms. Monroe: Yeah.

Mr. LaRue: Andrew?

Mr. Lebwohl: So, we are going to ask that the members of the committee please send back their affirmation as to the recommendations that we presented today, if they do indeed support that these should be advanced to the full council. Originally, we were planning to report to the full council on June 24th. Because of some issues with scheduling and requirements around council presentations and speaking, it will probably have to roll to the September meeting of the council for a formal report out and vote.

Nonetheless, we would like to know that we have this squared away. So if the members of the committee could provide us any feedback, or provide us with their approval for these proposals to be moved forward by the end of the week on June 12th, we would appreciate that. And as mentioned earlier, this will be posted on the internet for members of the public to be able to see, for the members of the committee to be able to go back and take a look at. And when I say this will be posted, both the recording of the presentation and the actual file itself.

Mr. LaRue: Thank you, Andrew.

Mr. Thomas: Andrew, our comments or affirmation should be directed at Colleen.

Mr. Lebwohl: Yes, please.

Mr. Thomas: Thank you.

Mr. LaRue: Any other questions or comments?

Dr. Soffel: Yeah. I'm sorry. I want to respond to Ann's comment, because I absolutely appreciate that we don't want to be tarring the entire long-term care industry with a brush of bad behavior. But at the same time, I am very cognizant of the issues that led this committee to be established, and real abuses that we have seen in the industry of operators coming in and systematically sucking assets out, and seeing quality decline and staffing decline.

And I don't want that concern to be lost, because I think that those concerns are really legitimate and valid. We have seen bad actors in this sector, which is what triggered the whole creation of this committee. So to simply say, "Oh, we think they're all good people is going..." And I know, and that's not what you said, but I would like to know that in our formal reporting back that we are very clear that this whole process was begun because of real abuses that we had seen.

Mr. LaRue: Thank you, Denise. Ms. Soffel. Any other comments?

Dr. Soffel: Doctor, excuse me, Scott. I am not a physician, I never call myself doctor because I think it's pretentious.

Mr. LaRue: So, with that, I want to thank the department. This has been a lot of work, and I really appreciate what was done behind the scenes. I want to thank the committee members. We spent a lot of time on this. Nothing is going to be perfect. It will evolve, but I do believe this puts us on a path for a better place, and more informed decision making by the Public Health and Health Planning Council. So I look forward to this going to the full council and getting these recommendations approved. So thank you, Andrew.

Mr. Lebwohl: My pleasure.

Mr. Lebwohl: Thank you, Scott. I think there were a couple of other comments from members of the committee.

Ann Monroe: Yeah. Who had one? I did, I know.

Mr. Lebwohl: Dr. Friedrich. Yeah.

Dr. Friedrich: Go ahead, Ann. Do you want to go?

Ms. Monroe: No, no. No, please, Marcus, go ahead.

Dr. Friedrich: I have one question and maybe you mentioned it, and I didn't get it. Again, Marcus Friedrich, member of the committee. Is this just for new applicants, or are parts of these ideas and recommendations also for existing applicants? I want to be very clear that I feel this is shifting everything in a more substantial oversight, Scott. And I don't know if the intention is just to have every new applicants, or if this will also change the oversight of existing applicants.

Mr. LaRue: I will let the Department of Health answer that question.

Mr. Lebwohl: This would only be for new applications, not for applications that were already initiated before these were formally adopted.

Dr. Friedrich: Thank you.

Ms. Monroe: Ann Monroe, just one last process question. So assuming in September FIPIC endorses these or approves them, do they automatically get put into place by the department in their review? Or is there another level of decision making beyond the council that will be looking at that, and perhaps weighing other considerations against the recommendations?

Mr. Lebwohl: So, I think there's some variation in the answer to that question. A lot of this... Well, you know what? Val just raised your hand. So Val, do you want to let me defer that over to you?

Ms. Deetz: Sure. I can take that, Ann. Thank you. Val Deets, Department of Health. So Ann, what we would do if the full council adopts the recommendations, we would draft a Dear Administrator letter. So it would go out, it would be publicly posted, it would give a date certain in which the recommendations would become effective for any new applicants, and it'd be posted to the public website, to give people ample notice what the expectations are, and any changes that may need to be made to any of the schedules or forms that we request, and receive and review.

Ms. Monroe: So, if FIPIC approves it, this will be the way it's going to work from now on. That's what I'm trying to understand because I'm sure even though you didn't tell us who made the public comments, it's pretty clear to me that there are some vested interests in things perhaps staying the same, or not moving as far as we're taking it.

So my question is once the council adopts this, is that what it is? Or is there another level of review within the department, or within state

government in some way or another that might edit, cut back, change some of these recommendations?

Ms. Deetz: That I'm not saying as a full automatic there. All of our releases Ann, whatever we release always goes through an approval process, but these are the recommendations that are coming from the statewide Public Health and Health Planning Council. We can also check with our legal team once we end the call and get back to you on that.

Ms. Monroe: Well, as I said, it's a process question. It can wait beyond today, but I'm wondering how that works.

Ms. Deetz: Yeah. And again, the recommendations need to be approved by the full council, so we're...

Ms. Monroe: Of course.

Ms. Deetz: ... jumping the gun here a little bit.

Ms. Monroe: Of course.

Ms. Deetz: Thank you.

Ms. LaRue: If there are no other questions, I will take a motion to adjourn.

Ms. Monroe: Thank you, everybody.

Mr. Thomas: We'll move, Scott.

Mr. LaRue: Thank you. Consider the meeting ended. Thank you, everyone.

Mr. Thomas: Thank you, Scott. Great job. Great work.