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A NYAHSA Center Reform Proposal

Continuing Care Retirement Community Development In New York State:

A Major Economic Development Opportunity



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Executive Summary

Continuing care retirement communities (CCRCs) provide quality housing and services to New Yorkers. In 1989, state legislation (Article 46 of the Public Health Law) was enacted to authorize the establishment of these senior living arrangements. CCRCs are unique in that they offer a full range of services for their residents within one community.

In a fiscal climate that calls for encouraging economic development and containing public spending, increased CCRC development would meet both of these important goals. Residents of CCRCs invest their assets into the CCRC for residential and health-related services, which in turn obviates the need to rely on Medicaid to cover such costs. In addition, the residents of the CCRC spend their income in the community, contributing to the economic growth of the local economy.

Unfortunately, very few CCRCs have been developed in New York state. Burdensome fiscal and programmatic requirements under Article 46 and associated regulatory requirements have prevented the rise of CCRCs. This report from The NYAHS Center for Senior Living & Community Services (The NYAHS Center), a division of the New York Association of Homes & Services for the Aging (NYAHS), recommends a number of changes to Article 46 and New York State Department of Insurance Regulation 140 to encourage increased development of CCRCs. The NYAHS Center is asking state policymakers to embrace the proposals in this report by making changes to promote CCRC development — and the resulting increased economic activity — in New York state.

Introduction

The development of retirement communities is very important to the future economic development of New York state. The baby boom generation is the most prosperous in history, with Americans aged 50 and older controlling two-thirds of all household wealth in the nation in 1998, up from 56 percent in 1983.¹ With an anticipated 37 percent increase in New York's senior population (age 60 and above), from 3.0 million in year 2000 to 4.4 million in year 2025, there is a strong economic incentive to develop policies and legislation that would encourage seniors to retire in New York.²

One of the best opportunities available for senior retirement living is a CCRC. CCRCs combine the best of all worlds — independent living, adult care facility (ACF), and skilled nursing care — within one community. Article 46 of the Public Health Law (PHL) was enacted in 1989, creating a process and criteria for establishing CCRCs within New York state. Although it was estimated that New York would have nearly 100 communities at this point, unfortunately, after 20 years only nine communities are operational in the state, with only five more CCRCs in pre-operational status.

The advantages to New York state, in adopting legislation that would encourage additional CCRC development, are substantial and varied:

- CCRCs encourage seniors to invest their assets in long term care services within a

retirement community that largely prevents asset divestiture to qualify for Medicaid-funded services;

- ▶ Type A CCRCs are required to provide long term care to residents even if the residents run out of money. Residents of these communities will never access the state Medicaid program for benefits;
- ▶ CCRCs consistently deliver high-quality senior housing and services under some of the most stringent state regulatory oversight and consumer protections;
- ▶ The development of CCRCs offers job creation and economic development opportunities for local communities; and
- ▶ CCRC development helps to reduce out-migration of retiring seniors to other states, while retaining their income and assets within New York.

State law and regulation must be revised to encourage additional development of CCRCs while continuing to protect the interests of their residents and improve the operation of such communities. In this report, The NYAHS Center is proposing changes in state policy aimed at promoting development of new CCRCs and more efficient and effective regulation of these communities. The NYAHS Center represents not-for-profit CCRCs in New York state, assisting members to provide the highest quality homes and services for the elderly. The NYAHS Center believes that these changes will assist in ensuring that the needs of New York's seniors will be met in the future.

Defining Retirement Communities

CCRCs are defined in Article 46 as, "...facilities established to provide a comprehensive, cohesive living arrangement for the elderly, oriented to the enhancement of the quality of life." CCRC residents in communities established under Article 46 enjoy a continuum of care ranging from independent living units to skilled nursing, if needed. CCRCs provide for organized social events, dining facilities, recreational activities, transportation within the community, and long term care services for residents throughout their lives. Residents are required to pay an entrance fee and a contracted monthly fee for maintenance and services. The contracts stipulate the extent of services that residents are entitled to receive and other terms of the arrangement. The monthly fee does not change if a resident requires long term care.

In addition, fee-for-service CCRCs are authorized by Article 46-A of the PHL to provide the same range of services as other CCRCs on a fee-for-service basis, but without the contractual provisions required by Article 46.

Retirement community models include the following:

1. **Life care or "Type A contracts,"** are communities authorized by Article 46 and regulated by both DOH and the New York State Department of Insurance (DOI). These full-service "life care" contracts allow for unlimited long term care for the life of the

resident. Only CCRCs that provide unlimited nursing home care to their residents can be called “life care communities” in New York state. Residents under Type A contracts will never utilize the publicly-funded Medicaid program.

2. **Modified or “Type B contracts”** limit the number of covered nursing home days available to each resident, but require that the resident receive at least a year of nursing home services before receiving Medicaid coverage for such services. Communities with modified contracts are also regulated by both DOH and DOI under Article 46.
3. **“Type C” fee-for-service CCRCs** were authorized by Article 46-A in New York state, beginning on January 1, 2005. Fee-for-service CCRCs may provide the same services as a life care or modified CCRC, but charge for them on a fee-for-service basis as needed by individual residents.
4. **Equity models of Type A, B and C contracts**, allow the resident to own a condominium or cooperative shares within the CCRC. The New York State Department of Law, DOH, and DOI regulate these contracts.
5. In addition to CCRCs, another type of retirement community is a **“look-alike” community** in which a continuum of housing, meals, and other services are available on a fee-for-service basis without a contractual obligation on the part of the community sponsor. An entrance fee is required by most look-alike communities, and most include independent living and access to assisted living or a nursing home component, but with no guarantee for admission. Since look-alike communities do not have any nursing home or assisted living care provided as part of the contract arrangement, they do not require regulatory oversight by DOH or DOI, other than the oversight that each component of the community would be subject to under other relevant laws and regulations. The Department of Law regulates such communities as homeowners’ associations or senior residential communities under Part 25 of the General Business Law.

Article 46 established the 13-member Continuing Care Retirement Community (CCRC) Council, consisting of five state officials and eight public representatives. According to Article 46 the “public members shall be representative of the public, and have a demonstrated expertise or interest in continuing care retirement communities; provided that no more than one such member shall be a sponsor, owner, operator, manager, member of a board of directors, or shareholder of a continuing care retirement community. At least one of the public members shall be a representative of an organization with demonstrated experience in representing the interests of senior citizens.”

The CCRC Council has responsibility to recommend approval or disapproval of applications for certificates of authority for the establishment and operation of a CCRC and “to make such recommendations to the governor and the legislature as may be necessary to encourage or further regulate the development of continuing care retirement communities.”

DOH, DOI, and the Department of Law provide regulatory oversight of CCRCs. The laws and rules governing this oversight include Article 46 and 46-A of the Public Health Law and their

enabling regulations (10 NYCRR, Chapter VII, Part 900), Section 612(c) of the Tax Law, the General Municipal Law, General Business Law and Chapter 66 of the Laws of 1994 that authorized the modified “Type B” CCRCs.

Fee-for-Service CCRCs

On August 12, 2004, state lawmakers passed legislation establishing a fee-for-service (FFS) CCRC demonstration program. The legislation was enacted on September 14, 2004, with an effective date of January 1, 2005. This legislation allows for up to eight new communities that would provide the same services as a life care or modified CCRC, but charge for them on a fee-for-service basis as needed by individual residents. The first New York FFS CCRC, Good Shepherd Village at Endwell, is expected to open in fall 2009.

As part of this legislation, FFS CCRCs are required to maintain liquid reserves equivalent to fifteen percent of the projected annual operating expenses of the facility, exclusive of depreciation. Reserve requirements for FFS CCRCs are much lower than the requirements under DOI Regulation 140 for life care and modified CCRCs. The higher reserve requirements for life care and modified CCRCs in turn require much higher entrance and monthly fees, putting them at a distinct marketing disadvantage in relation to FFS CCRCs.

While life care and modified CCRCs offer an insurance product that requires significant reserves intended to protect resident assets, The NYAHS Center is proposing a more realistic reserve amount used by other states and allowable under PHL §4611 to allow future development of life care CCRCs and provide financial stability for existing CCRCs. The NYAHS Center has been working with DOI to modify Regulation 140 governing CCRC assets and reserve amounts.

CCRC Legislation Signed into Law

After continued advocacy from NYAHS Center CCRC reform bills (A.11920-A/S.7494-A) was passed by the Legislature, and signed into law on September 13, 2006.

The legislation implemented three aspects of The NYAHS Center’s recommended CCRC reforms, including:

- Doubling the number of beds available for CCRCs outside of the bed need methodology by adding 1,000 nursing home beds to the CCRC set-aside. This provision was extremely important to the future of CCRC development; without more nursing home beds, new CCRCs would have been unable to proceed;
- Allowing CCRC sponsors to obtain a release of deposited funds for construction at 70 percent pre-sales with 10 percent deposits, and eliminating the requirement to achieve an aggregate deposit amount of 15 percent; and
- Requiring DOH to review and make recommendations to eliminate unnecessary duplication of oversight and paperwork requirements of shared components of a CCRC.

On January 15, 2007, in accordance with the 2006 legislation, DOH issued its *Report to the Governor and Legislature on Duplicative Regulations*. The department made a number of positive recommendations to eliminate duplicative regulations, and The NYAHSA Center continues to work with DOH on completing recommendations issued in the report.

Legislative Reform Recommendations

NYAHSA believes that certain reforms will encourage development of additional CCRCs in New York state. The following items have been identified as proposed changes in the law:

1. Making Industrial Development Agency (IDA) financing authority permanent and raising the \$20 million cap on civic facilities;
Oppose A. 3659 (Hoyt)—S. 1241 (Thompson)
2. Allowing Article 46 CCRCs to enter into fee-for-service contracts;
3. Allowing life care contracts to serve as admission agreements;
4. Amending the one-year entrance fee refund requirement for equity/cooperative model CCRCs; and
5. Approving the use of entrance fees for construction.

In addition, The NYAHSA Center and DOI have made significant progress on revising CCRC reserve and actuarial requirements under Regulation 140.

Each of the proposed changes is described below in detail.

1. Making Industrial Development Agency (IDA) Financing Authority Permanent

Issue:

Industrial Development Agency (IDA) financing needs to be made a permanent option for CCRCs. The development of these projects is a long-term commitment. Typically, a new project can take up to four years from inception to completion. Arbitrary sunset dates, such as those that have governed IDA financing of CCRCs, can threaten ongoing projects and severely impede the planning for new facilities. A permanent extension will remove uncertainty from the process for provider organizations, lenders and municipal officials. IDA financing for CCRCs expired on January 31, 2008, taking away a critical, and oftentimes, sole financing option for CCRCs .

The sunset provision of IDA financing has current and past ramifications for New York CCRCs. In 1999, the development of Jefferson's Ferry, Long Island's first CCRC, suffered through a six-month delay in financing because the sunset lapsed for several months. The delay cost the project hundreds of thousands of dollars since the start of construction did not begin until December, with associated increases in construction cost due to winter conditions. The project also had to fund ongoing operations of a marketing office with six staff during the delay. Unfortunately, residents paid for these associated costs in the form of higher fees.

While CCRCs have the ability to obtain financing through the New York State Dormitory Authority (DA), the Public Authorities Control Board (PACB) requires that organizations have

investment-grade credit ratings for DA financing. CCRCs often do not qualify for investment-grade credit ratings requiring costly third-party credit enhancement. This added cost is passed on through resident fees, making these facilities less affordable.

The development of a CCRC using IDA financing will create hundreds of construction jobs as well as full time, part time and per diem employment for the operation of the CCRC community. For instance, the next CCRC being developed, Good Shepherd Village at Endwell, will be the first fee-for-service CCRC in New York state. The project will create an estimated 340 construction jobs and 150 permanent CCRC employees. Below are the CCRCs currently in development and the projected number of jobs created during development and in operation:

Good Shepherd Village at Endwell (Article 46-A FFS CCRC)

150(ILU) / 32(EH) / 32(NH)

Endwell, New York 13760

Estimated 340 construction employees; 150 CCRC employees.

Harbor Village at Mount Sinai

234(ILU) / 43(EH) / 60(NH)

Mount Sinai, New York

Estimated 385 construction employees; 180 CCRC employees.

Moving CCRCs to the second enumerated subdivision four of §854 of the General Municipal Law (that does not include a sunset provision) from the first enumerated subdivision four of §854 (that does include a sunset and expired in January 2008) will ensure permanent financing for these facilities. Without IDA financing, the development of these CCRCs and the jobs they create would be virtually eliminated.

In addition, civic facilities, including retirement communities (housing facilities primarily designed to be occupied by individuals 60 years of age or older) and nursing homes, should have a permanent IDA financing option and eliminate the cap on financing.

Finally, the CCRC Counsel, which approves the development of CCRCs, must be extended to provide a certificate of authority for CCRC IDA financing.

Current Law:

§854 (4) New York State General Municipal Law

Proposal:

Add continuing care retirement communities under “projects” for IDA financing and eliminate the sunset; eliminate the cap and sunset for civic facilities; and extend the CCRC Council.

Action – Statutory Change:

AN ACT to amend the general municipal law and the Public Health Law in relation to a continuing care retirement community.

Section 1. The second enumerated subdivision 4 of section 854 of the general municipal law is amended as follows:

* (4) “Project” - shall mean any land, any building or other improvement, and all real and personal properties located within the state of New York and within or outside or partially within and partially outside the municipality for whose benefit the agency was created, including, but not limited to, machinery, equipment and other facilities deemed necessary or desirable in connection therewith, or incidental thereto, whether or not now in existence or under construction, which shall be suitable for manufacturing, warehousing, research, commercial or industrial purposes or other economically sound purposes identified and called for to implement a state designated urban cultural park management plan as provided in title G of the parks, recreation and historic preservation law and which may include or mean an industrial pollution control facility, a recreation facility, educational or cultural facility, a horse racing facility, a continuing care retirement community or a railroad facility, provided, however, no agency shall use its funds in respect of any project wholly or partially outside the municipality for whose benefit the agency was created without the prior consent thereto by the governing body or bodies of all the other municipalities in which a part or parts of the project is, or is to be, located.

* NB Effective July 1, 2007

Section 2. The second enumerated subdivision 13 of section 854 of the general municipal law is amended as follows:

* (13) “Civic facility” - shall mean any facility which shall be owned or occupied by a not-for-profit corporation organized and existing under the laws of this state or authorized to conduct activities in this state. Such facilities shall not include convention centers, housing facilities, dormitories for educational institutions or roads, buildings, water systems, sewer systems, or any public facility for use by a municipality in the performance of its governmental functions or medical facilities which are predominately used for the delivery of medical services, except that such facilities shall include habilitation centers and hospices.

Notwithstanding the limitations contained in the preceding sentence, a civic facility project may include: (a) dormitories for educational institutions; (b) facilities as defined in article twenty-eight of the public health law and (c) housing facilities primarily designed to be occupied by individuals sixty years of age or older ~~{provided that the total cost of such projects as provided for in paragraphs (a), and (b), and (c) herein does not exceed twenty million dollars}~~. Nothing in this article shall be deemed to waive any applicable requirement for an operating facility certificate, consent or any other approval as provided by law.

~~{* NB Repealed July 1, 2007}~~

* NB There are 2 sb (13)'s

Section 3. Section 15 of chapter 66 of the laws of 1994, amending the Public Health Law, the general municipal law and the insurance law relating to the financing of life care communities, as amended by chapter 142 of the laws of 2006, is amended to read as follows:

§15. This act shall take effect immediately, provided, however that the amendment made to subdivision 4 of section 854 of the general municipal law by section eight of this act shall not affect the reversion of such subdivision as provided by section 5 of chapter 905 of the laws of 1986 as amended and that where the continuing care retirement community council is authorized to promulgate regulations by this act, it is hereby authorized to implement the provisions of this act in advance of such regulations ~~}; and provided further that sections one, three, seven, eight, nine, ten, eleven, twelve and thirteen of this act, and paragraph m of subdivision 2 of section 4602 of the Public Health Law, as added by section two of this act, shall apply only to applicants for a certificate of authority pursuant to article 46 of the Public Health Law that have been approved to receive and have received such certificate of authority on or before July 1, 2007[.~~

2. Allow Article 46 CCRCs to Enter into Fee-for-Service Contracts

Issue:

Effective January 1, 2005 providers could apply to develop a fee-for-service CCRC that would provide the same services as a life care or modified CCRC, but charge for them on a fee-for-service basis as needed by individual residents. Because they are not being regulated by the Department of Insurance (DOI), reserve requirements for FFS CCRCs will be much lower than the requirements under DOI Regulation 140 for life care and modified CCRCs. The higher reserve requirements for life care and modified CCRCs will require much higher entrance and monthly fees, putting them at a distinct marketing disadvantage in relation to FFS CCRCs. Additionally, seniors with long term care insurance would probably not utilize the life care contract, but could take advantage of the features of the CCRC through the fee-for-service contract. A fee-for-service option would allow seniors more flexibility within a CCRC setting.

Current Law:

§4601 paragraph 2-b. “Continuing care retirement community” or “community” shall mean a facility or facilities established to provide a comprehensive, cohesive living arrangement for the elderly, oriented to the enhancement of the quality of life and which, pursuant to the terms of the continuing care contract, at a minimum:

- (a) provides independent living units, and provides a meal plan. The independent living unit can be made available either through a non-equity arrangement or through an equity arrangement including, but not limited to a cooperative or condominium. For purposes of this article, the purchase price of an independent living unit in an equity arrangement, regardless of the form of the purchase agreement, shall not be considered an entry fee for purposes of calculating reserve liabilities, but shall be considered an entry fee for escrow purposes;
- (b) provides a range of health care and social services, subject to such terms as may be included within the contract, which shall include home health care, nursing care, and at a minimum sixty days of prepaid services of an on-site or affiliated nursing facility.

- (c) provides access to health services as defined in the contract, prescription drugs, and rehabilitation services; and
- (d) nothing in this article shall eliminate the obligation of a continuing care retirement community to provide at least sixty days of prepaid nursing facility services to all residents.

Proposal:

Allow life care CCRCs to enter into fee-for-service contracts under Article 46-A of the Public Health Law.

Action - Statutory Change:

§4601 paragraph 2-b. “Continuing care retirement community” or “community” shall mean a facility or facilities established to provide a comprehensive, cohesive living arrangement for the elderly, oriented to the enhancement of the quality of life and which, pursuant to the terms of the continuing care contract, at a minimum:

- (a) provides independent living units, and provides a meal plan. The independent living unit can be made available either through a non-equity arrangement or through an equity arrangement including, but not limited to a cooperative or condominium. For purposes of this article, the purchase price of an independent living unit in an equity arrangement, regardless of the form of the purchase agreement, shall not be considered an entry fee for purposes of calculating reserve liabilities, but shall be considered an entry fee for escrow purposes;
- (b) provides a range of health care and social services, subject to such terms as may be included within the contract, ~~[which shall include home health care, nursing care, and, at a minimum, sixty days of prepaid services of an on-site or affiliated nursing facility]~~ which may either be a life care contract including home health care, nursing care, and on-site or affiliated nursing facility care; a modified contract including home health care, nursing care, and a minimum of sixty days of prepaid services of an on-site or affiliated nursing facility; or a fee-for-service contract including long-term care and other services on a per diem or other agreed-upon rate.
- (c) provides access to health services as defined in the contract, prescription drugs, and rehabilitation services; and
- (d) nothing in this article shall eliminate the obligation of a continuing care retirement community to provide at least sixty days of prepaid nursing facility services to all residents, with the exception of a fee-for-service contract as defined by Article 46-A of the Public Health Law.

3. Allow the Contract to Serve as the Admission Agreement for CCRCs

Issue:

On October 26, 2004 the Assisted Living Reform Act (ALRA) was signed as Chapter 2 of the Laws of 2004. The Act added Article 46-B to the Public Health Law (PHL), which establishes definitions and requirements for assisted living residences. On March 17, 2008, regulations of the ALRA were promulgated in Section 4662 of the Public Health Law and a new Chapter X consisting of Part 1001 was added to Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York.

The department has determined that under Article 46, the continuing care contract is the only agreement that needs to be signed by a resident for provision of services, conflicting with the requirements of Title IV §4658 of Article 46-B of the Public Health Law, and with §1001.8, parts (f)(2)(i) through (xvii), in which the ALR regulations requires residents to sign an ALR agreement. DOH state surveyors have cited deficiencies for the absence of separate signed admission agreements for life care contract holders who have moved to higher levels of care within a CCRC. The department agreed the requirement for a separate admission agreement at each level of care for a CCRC resident is duplicative and unnecessary. The NYAHS Center submitted recommendations to the department requesting that the continuing care contract serve as the admission agreement for all levels of care within a CCRC and that there be clarification issued to all state surveyors regarding this interpretation.

By statute, the CCRC residency agreement is the single contract covering all services provided by the community. Residents may not be asked to sign a nursing home admission agreement or an adult care facility admission agreement. While Article 46 specifically exempts CCRCs from the adult care facility admission agreement requirement contained in social services law, there is no exemption for CCRCs applying for an assisted living residence (ALR) licensure under Article 46-B of the Public Health Law to use the CCRC contract as the only contract.

Current Law:

Contracts for life care CCRCs under Article 46:

§ 4601. Definitions. As used in this article:

8. "Life care contract" shall mean a single continuing care retirement contract to provide a person, for the duration of such person's life, the services provided by the continuing care retirement community, which services shall include unlimited services of an on-site or affiliated nursing facility. Such term also shall mean a single continuing care retirement contract to provide a person, for the duration of such person's life, the services provided by the continuing care retirement community under an arrangement in which the costs of the residents' unlimited nursing home or home health care services are paid for in whole or in part by a long term care insurance policy approved by the superintendent in accordance with applicable regulations or by long term care insurance or medical assistance payments in accordance with The Partnership For Long Term Care program pursuant to the provisions of section three hundred sixty-seven-f of the Social Services Law, section three thousand two hundred twenty-nine of the Insurance Law and section four thousand six hundred twenty-three of this chapter.

§4604.(3). Nothing in this article shall be construed to enlarge, diminish or modify: a social services district's otherwise valid recovery under section three hundred sixty-nine of the social services law, nor medical assistance eligibility under title eleven of article five of the social

services law nor applicable provisions of the estates, powers and trusts law. Except as otherwise provided in this article, the activities of continuing care retirement communities shall be subject to any other law governing such activities including but not limited to article twenty-eight of this chapter and article seven of the social services law and regulations promulgated thereunder; provided, however, that the provisions of paragraphs (d) and (e) of subdivision four of section twenty-eight hundred one-a and section twenty-eight hundred two of this chapter shall not apply, and provided that the provisions of paragraph (a) of subdivision one and the provisions of subdivision two of section four hundred sixty-one-b of the social services law with respect to public need and the provisions of subdivision one of section four hundred sixty-one-c of the social services law shall not apply to residents who have been admitted in accordance with a continuing care retirement community contract provided that, upon admission to the adult care facility, such residents shall be given a notice which shall include, at a minimum, information regarding facility services, resident responsibilities, supplemental services, resident rights and protections and circumstances that warrant transfer. The number of residential health care facility beds available pursuant to subdivision five of this section, without proof of public need therefore, shall be reduced by the number of residential health care demonstration facility beds that are approved pursuant to this article.

The Assisted Living Reform Act

4658. Residency agreement and disclosures.

Residency agreement and disclosures. 1. Every operator shall execute with each resident a written residency agreement, in no less than twelve-point type and written in plain language, which satisfies the requirements of this section. Such agreement shall:

(a) be dated and signed by the operator, the resident, resident's representative, and resident's legal representative, if any, and any other party to be charged under the agreement;

(b) contain the entire agreement of the parties and shall include the disclosures required by subdivision three of this section.

1-a. The resident, resident's representative and resident's legal representative, if any, shall be given a complete copy of the agreement and all supporting documents and attachments and any changes whenever changes are made to the agreement.

2. The residency agreement shall include, at a minimum:

Assisted Living Residences

§1001.8 Consumer and Resident Protections

(f) Residency agreements and disclosures.

(2) Every operator shall execute with each resident a written residency agreement, in no less than twelve-point type and written in plain language, which satisfies the requirements of this section.

Proposal:

Allow Article 46 CCRCs to be exempt from the requirement that residents sign a contract for the assisted living residence (ALR) licensure under Article 46-B of the Public Health Law.

Action - Statutory Change:

AN ACT to amend the Public Health Law in relation to continuing care retirement community contracts

§4604(3) of the Public Health Law is amended to read as follows:

3. Nothing in this article shall be construed to enlarge, diminish or modify: a social services district's otherwise valid recovery under section three hundred sixty-nine of the social services law, nor medical assistance eligibility under title eleven of article five of the social services law nor applicable provisions of the estates, powers and trusts law. Except as otherwise provided in this article, the activities of continuing care retirement communities shall be subject to any other law governing such activities including but not limited to article twenty-eight of this chapter and article seven of the social services law and regulations promulgated thereunder; provided, however, that the provisions of paragraphs (d) and (e) of subdivision four of section twenty-eight hundred one-a and section twenty-eight hundred two of this chapter shall not apply, and provided that the provisions of paragraph (a) of subdivision one and the provisions of subdivision two of section four hundred sixty-one-b of the social services law with respect to public need and the provisions of subdivision one of section four hundred sixty-one-c of the social services law shall not apply to residents who have been admitted in accordance with a continuing care retirement community contract provided that, upon admission to the adult care facility, such residents shall be given a notice which shall include, at a minimum, information regarding facility services, resident responsibilities, supplemental services, resident rights and protections and circumstances that warrant transfer, **and provided that the provisions of section forty-six hundred fifty-eight of Article 46-B of the Public Health Law shall not apply to residents who have been admitted in accordance with a continuing care retirement community contract provided that, upon admission to the assisted living residence, such residents shall be given a notice which shall include, at a minimum, information regarding facility ownership and services, the licensure or certification status of the operator, resident responsibilities, supplemental services, resident rights and protections and circumstances that warrant transfer.** The number of residential health care facility beds available pursuant to subdivision five of this section, without proof of public need therefore, shall be reduced by the number of residential health care demonstration facility beds that are approved pursuant to this article.

4. Amend the One-year Entrance Fee Refund Requirement for Equity/Cooperative Model CCRCs**Issue:**

An essential part of financing a CCRC is the practice of collecting entrance fees from residents upon signing a CCRC agreement. The CCRC provider is required to establish an interest-bearing

account with a New York bank, New York savings and loan association, or New York trust company for any entrance fees received by the operator.

When a resident cancels the CCRC contract, or upon death, the provider is required under Section 4609, Subdivision 4 of the Public Health Law to return any entrance fee amount owed to the resident or their estate within 30 days after the apartment or cottage has been resold, but no later than one year after the apartment/cottage has been vacated. There is no such provision for a one-year refund for other entrance fee senior residential communities (look-alike facilities) regulated by the Attorney General's Office through Section 352-e of the General Business Law ("GBL") for a senior residential community under Part 25, *Newly Constructed or Vacant Senior Residential Communities*.

The one-year refund requirement is especially onerous for cooperative CCRCs. Residents have direct ownership in the CCRC and allowing a refund before the vacated apartment/cottage is sold reduces the value of their investment.

Residents residing in entrance fee retirement communities throughout New York state should be treated equally. Current residents of CCRCs, especially equity/cooperative CCRCs, should not be required to hold the liability for returning residential entrance fees.

Current Law:

§4609. Withdrawal, death or dismissal of person; refund. 1. Upon the giving of written notice of cancellation by certified mail of at least thirty days, the contract may be cancelled by a resident for any reason, or by an operator if the applicant has willfully mismanaged assets needed to pay monthly care fees. A resident shall not be discharged for inability to pay the monthly fee except where a showing of the willful mismanagement of assets needed to pay monthly care fees has been made.

2. If the notice required by subdivision one of this section is given within the first ninety days of occupancy, the resident shall receive a refund of not less than the entry fee and any other pre-payments less the actual cost of any services actually provided and the actual cost of refurbishing the unit for resale. After the first ninety days of occupancy, any refund shall be not less than the entrance fee, except that the operator may retain no more than two percent per month of occupancy by the resident of such fee and no more than a four percent fee for processing.

3. Refunds upon death will be made on the same basis as refunds upon withdrawal.

4. Any refund made pursuant to this section must be paid no later than thirty days after the formerly occupied unit has been resold, but in no event later than one year after the formerly occupied unit has been vacated.

Proposal:

Extend the provision in Section 4609, Subdivision 4 to require an entrance fee refund within 24 months.

Action - Statutory Change:

Subdivision 4 of section 4609 of the Public Health Law is amended to read as follows:

4. Any refund made pursuant to this section must be paid no later than thirty days after the formerly occupied unit has been resold, but in no event later than ~~[one year]~~ **24 months** after the formerly occupied unit has been vacated for equity model CCRCs.

5. Approving the Use of Entrance Fees for Construction

Issue:

Currently, Article 46 allows releasing the residents' CCRC deposits for up to 15 percent of the total cost of acquiring, constructing, and equipping the proposed CCRC. Unfortunately, resident deposits made after the 15 percent threshold is met cannot be used and must be kept in escrow. It would be more equitable to allow the use of a majority of entrance fee deposits for development, thereby lowering the CCRC's financing costs and making new community development more affordable for residents and financially viable for not-for-profit organizations. A portion of the entrance fee deposits could be made available for deposit refunds. However, requirements for a large amount of reserve funds available for deposit refunds prior to and during construction are not supported by experience. In a survey of completed life care CCRCs in New York state, an average of only 9.7 percent of depositors requested a refund prior to or during construction.

Current Law:

§4610. Entrance fee escrow account.

"As a condition for approval to advertise and collect refundable entry fees/deposits:

6. Escrowed funds shall not be released to the operator unless:

(b) the operator has submitted an application to the commissioner, on forms approved by the department, for authorization to use escrowed entrance fees to assist the operator in financing the construction or purchase of a proposed community and the commissioner, with the advice of the superintendent, and in accordance with such regulations as may be promulgated by the council, has approved such application. The commissioner shall not approve such application over the objection of the superintendent, and shall not approve it unless satisfied that the following conditions have been met:

(v) the total amount of escrowed entrance fees or deposits that may be approved for release under this paragraph shall not exceed fifteen percent of the total costs of acquiring, constructing and equipping the proposed community."

Proposal:

Approve the use of 85 percent of residents' entrance fee deposits for the cost of acquiring, constructing, and equipping the facility, provided all other conditions of §4610.6 (b) have been met.

Action - Statutory Change:

Subparagraph (v) of paragraph (b) of subdivision 6 of section 4610 of the Public Health Law is amended to read as follows:

(v) the total amount of escrowed entrance fees or deposits that may be approved for release under this paragraph shall not exceed ~~[fifteen percent of the total costs of acquiring, constructing and equipping the proposed community]~~ eighty-five percent of the entrance fees or deposits collected;

Regulatory and Policy Issues Affecting New York CCRCs

In addition to legislative changes that could enacted to assist in the development and affordability of CCRCs in New York state, there are regulatory and policy issues affecting CCRCs. In order for CCRCs to further develop in New York state, the legislature should encourage the DOH and DOI to enact the following changes.

CCRC Outside Admissions Regulations

Income from admissions into the CCRCs Adult Care Facility (ACF) and/or Residential Health Care Facility (RHCF) (nursing home) from persons who are not contract residents is an important aspect of maintaining affordability for existing CCRCs.

Subsection 4605. 2.a. and 2.b. of Article 46 provides the Commissioner of Health, in consultation with the CCRC Council, the authority for an operator of a community with an on-site or affiliated residential health care facility and/or adult care facility to provide, for a “limited period,” residential health care facility and/or adult care facility services to persons who are not residents of the community.

In regulation, the period of authorization is defined as seven years with an extension of the original authorization considered at the Commissioner’s discretion (10 NYCRR 900.8(b) and (c). The intent of the seven-year regulation was to provide a timeframe in which the majority of the Adult Care Facility (ACF) and Residential Health Care Facility (RHCF) beds were filled by lifecare contract holders, thereby making those levels of care financially self-sustaining.

Past policy has been to approve communities’ requests for annual extensions to the seven-year time period. After seven years, the Department of Health has granted, on an annual basis, one-year extensions to CCRCs who requested them.

On December 10, 2008, the Department of Health issued a letter to CCRCs informing them of a revision in current policy regarding requests to extend an authorization allowing a community to admit persons who are not residents of the continuing care retirement community to the community’s adult care facility and skilled nursing facility. The letter states: “As statute has clearly established a limited authorization period for these non-resident admissions, the Department does not anticipate approving any continuing care retirement community requests for annual extensions beginning with the period January 1, 2010 through December 31, 2010. This action will close the community’s RHCF and ACF to outside admissions effective January 1, 2010.” The letter allows CCRCs to appeal to DOH to continue to admit outside admissions past seven years. The CCRC must provide “a detailed analysis demonstrating the anticipated impact such RHCF and ACF closure would have on the community. The analysis should define

the actions the community would consider implementing in response to this closure and the potential direct impact on residents.”

Article 46, and the seven year outside admission regulation, was established in 1989 when CCRC residents tended to require clinical services sooner than today. Advances in healthcare and healthier lifestyles have extended the period of time seniors are able to live independently. CCRC residents stay in their independent living units longer, thereby extending the period of time to fill the RHCF and ACF. In addition, residents employ private home health care services in their independent living units more frequently than was practice when this regulation was established, which delays their transfer to the RHCF or ACF.

CCRC income is generated, and resident fees are based at the CCRC opening from actuarial studies, from: (1) entrance fees from move-ins into ILUs; (2) monthly fees from CCRC residents; (3) outside admissions into the ACF and RHCF. As residents stay in their apartment and cottages longer, CCRCs do not have the extra income generated from the investments of ILU entrance fee of the ILU becoming vacant. Due to a slower fill-up in the ACF and RHCF levels of care, there are CCRC fewer contract holders in continuum and less income generated by the CCRC. The DOH policy will penalize CCRCs past seven years for promoting independence of their residents to stay in a “least restrictive environment” by not allowing outside admissions into the ACF and RHCF. Ironically, it’s the CCRC residents who will be financially penalized for maintaining their independence within a CCRC.

The DOH enforcement of the seven-year restriction of outside admissions to the RHCF and ACF (health center) threatens the financial stability of not-for-profit CCRCs. The magnitude of the reduction in future revenue will cause existing CCRC resident entrance fees and monthly service fees to soar causing severe financial hardship to existing residents. This change in DOH policy could increase **monthly** resident fees by \$580, effectively forcing existing CCRC residents from their home, and effectively breaking the promise of CCRCs “care for life.”

DOH to allow CCRCs that already have their certificate of authority to accept outside admissions to the ACF and AHCF for up to fifteen years, matching closer the actuarial studies of CCRC fill-up of the ACF and RHCF level of care.

Revising Reserve and Actuarial Requirements Under Regulation 140

The NYAHS Center has been working with the New York State Department of Insurance (DOI) on changes to Regulation 140. In an effort to safeguard residents’ assets, Article 46 requires life care communities to maintain reserve liabilities and supporting assets in an amount and for the purposes set forth in Regulation 140, which was issued by the superintendent of DOI. The specific financial requirements and criteria contained in Regulation 140 are extraordinarily stringent, and contribute to New York’s inability to attract the development of new communities.

Although most states require life care communities to conduct periodic actuarial reviews, they do not specify the required actuarial results. Instead, they take a holistic approach to evaluating the communities to make certain that they are maintaining occupancy rates, improving operating

results, generating cash, properly pricing contracts for new residents, and maintaining positive overall actuarial and financial condition.

Under the current regulations, it is extremely difficult to construct an affordable life care community in New York. This hinders most New York seniors from finding affordable life care services, forcing them to leave home and move to other states that have an abundance of high quality, affordable communities. Pennsylvania, for example, has the second highest number of life care communities of any state in the United States and has only a fraction of New York's senior population and wealth. The success of these communities in Pennsylvania is largely due to the supportive regulatory environment in which they are allowed to develop and operate. The amounts required by Regulation 140 are determined to protect resident assets, yet ironically result in higher resident fees and development of small numbers of communities that can't be built with a middle-income entrance and monthly fee structure.

In addition, the regulations also restrict the type of investments that can be made with reserve funds to those which can be liquidated in a year's time. The proposed changes in §4611 of the Public Health Law would continue to protect reserve funds but would provide greater investment flexibility to enhance yields, and would adjust required reserves to those more commonly maintained by CCRCs according to accepted actuarial standards.

On August 16, 2006, the Department of Insurance (DOI) posted to the *New York State Register* proposed amendments of Part 350 (Regulation 140) of Title 11 NYCRR that governs, in part, actuarial amounts, reserve requirements, and allowable investment purchases in life care CCRCs. DOI stated this was "phase one" of Regulation 140 changes and did not address reserve or investment policies. On October 17, 2007, the first amendment to Regulation 140 was finalized in the *New York State Register*.

NYAHSa has continued dialog with the Department of Insurance on reserves and investment requirements for CCRCs stipulated under Regulation 140. On April 25, 2008, The NYAHSa Center, through the NYAHSa CCRC Regulation 140 Workgroup, sent DOI a proposed second amendment to Regulation 140 that allows for investment portfolio limits that are linked to tests of financial strength for each CCRC. A copy of the proposal is available upon request.

The nation's economic downturn in the past six months have negatively affected all investment portfolios, including CCRCs. This experience can be used to develop sound economic policies for CCRCs that will take in account the best and worse economic conditions.

Conclusion

Continuing care retirement communities offer a highly desirable level of retirement housing and services to hundreds of seniors throughout New York state. Unfortunately, very few CCRCs have been developed due in part to the very extensive application process and regulatory policies established under Article 46 of the Public Health Law.

The NYAHSA Center believes that proposed changes identified in this report would lead to the following important outcomes:

- ▶ significantly reduced obstacles to development of new CCRCs;
- ▶ reduced administrative burden on existing CCRC sponsors;
- ▶ increased economic development;
- ▶ reduced Medicaid expenditures; and
- ▶ enhanced services and options for seniors residing in New York state.

Acknowledgements and Further Information

NYAHSA represents nearly 650 not-for-profit providers located throughout New York state. NYAHSA's members provide a full spectrum of continuing care services to an estimated 500,000 elderly, disabled, and chronically-ill New Yorkers each year.

The association would like to thank our CCRC members for their assistance in developing this proposal. The NYAHSA Center would also like to thank the New York State Department of Health (DOH) for its review of this proposal and its January 2007 report submitted to the Legislature and governor recommending the reduction of duplicative regulations impacting New York CCRCs.

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¹ AARP, *A Report to the Nation on Economic Security*, 2001

² NYS Office for the Aging, *Demographic Projections 1995-2025*, May 1999

CCRC Resource Information

Article 46 of the Public Health Law
http://www.nyahsa.org/documents/pdf_files/ARTICLE46807.pdf