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Via E-mail

Ms. Natalie Mehra
15 Gervais Drive, Suite 201
Toronto Ontario, M3C 1Y8

Dear Ms. Mehra:

**Re: Proposal from Southbridge Care Homes Inc.
re Orchard Villa in Pickering, Ontario**

The Ministry of Long-Term Care is reviewing a proposal from Southbridge Care Homes Inc.¹ (“Southbridge”) for a 30-year license to redevelop, expand and operate the Orchard Villa long-term care home in Pickering, Ontario.

You have asked for our opinion about the lawfulness of a decision by the Director to approve Southbridge’s application.

Summary Opinion

Orchard Villa had one of the worst records among long-term care homes during the COVID-19 pandemic. A majority of its residents contracted COVID, and at least 70 residents died as result. Orchard Villa was the first home in Ontario to be subject to an order that the local hospital take over management, and was one of five homes where the Canadian Forces were brought in to provide humanitarian relief. Hospital staff and Canadian Forces officials have documented the

¹ The Ministry of Long-Term Care identifies the proponent as CVH (No. 6) LP by its general partners, Southbridge Health Care GP Inc. and Southbridge Care Homes (a limited partnership, by its general partner, Southbridge Care Homes Inc.) (the licensee) for issuing a new long-term care (LTC) home licence to Southbridge Pickering (Orchard Villa).

many egregious and repeated ways in which Orchard Villa residents failed to be provided with even rudimentary, let alone proper care.

The testimony of Orchard Villa families, and the record of Ministry inspection reports make it clear that many of these conditions predated the pandemic, and persisted during its second wave.

It is in this context, Southbridge is seeking a 30-year license to rebuild and expand the Orchard Villa long-term care home.

Before the Director can approve a new license under the *Long-Term Care Homes Act, 2007*, or give an undertaking to grant a new license, section 98 of the *Act* requires the Director to determine that Southbridge is “eligible” to operate the home. The decision is to be based on the applicant’s past record, and asks whether the licensee is “competent” to operate the home, and in particular whether its “*past conduct ... affords reasonable grounds to believe*” that the home will be operated “with honesty and integrity” and “not ... in a manner that is prejudicial to the health, safety or welfare of its residents.”

In our view, in light of Southbridge’s record at Orchard Villa, it would be unreasonable and contrary to law for the Director to find that Southbridge is ‘eligible’ to operate Orchard Villa under s. 98 of the *Act*. Accordingly, if the Director made such a decision, a Court would likely find the decision to be unreasonable and quash it.

In addition, the consultations conducted by the Ministry on the Orchard Villa application failed to meet the procedural fairness standards required by law. Participants reported being prevented from asking questions or offering comments about Southbridge’s past and current record at Orchard Villa, despite this being central to the Ministry’s decision under the *Act*. In our view, the failure to conduct proper and fair consultations provides another justification for a Court to quash any decision approving Southbridge’s application.

Our understanding of the facts of this matter are as follows:

Southbridge Care Homes and Orchard Villa

Southbridge Care Homes LP is a property development firm that owns 27 long-term care (LTC) homes in Ontario, in addition to retirement homes. Orchard Villa is a Southbridge LTC home based in Pickering, Ontario. Southbridge bought Orchard Villa from its previous owner, Community Lifecare Inc., in 2015, during what Southbridge’s Chairman has called its “acquisition phase”.²

Southbridge does not have a history of operating LTC homes. It purchases and licenses homes in order to draw a return on its investment. As it notes on its website, Southbridge hires a

² “Peterson named new chair of Southbridge Health Care GP,” *Cambridge Times* (4 April 2018), available online: <https://www.cambridgetimes.ca/news-story/8372553-petersen-named-new-chair-of-southbridge-health-care-gp/> (accessed 26 August 2021).

management firm, Extendicare Canada Inc., “to manage the operations of our homes, both before and after redevelopment.” Extendicare is a for-profit LTC management company that trades on the TSX. Thus, investors are looking for a return on investment from two layers of Orchard Villa’s operations.

Southbridge is currently licensed for 233 long-term care beds at Orchard Villa. That license was initially granted in July 2010 to another company from which Southbridge purchased the home in 2015. Southbridge is now proposing:

- to develop 87 additional long-term care beds “conditionally allocated by the Ministry of Long-Term Care (the ministry)” to be included in the proposed 320-bed development project; and
- the issuance of a new license with a term of up to 30 years for the operation of 320 new beds at the existing location, following the development.³

Operations at Orchard Villa before and during the COVID-19 pandemic

Orchard Villa gained widespread notoriety for its appalling record during the COVID-19 pandemic. In Spring 2020, 206 of Orchard Villa’s 233 residents contracted COVID-19, along with more than 100 staff. Orchard Villa had at least 70 resident deaths during the pandemic. At 30 deaths per 100 beds, Orchard Villa is reported to have had one of the highest mortality rates in any Ontario long-term care home.⁴

In response to the home’s disastrous record, on April 21, 2020, Durham Region’s Medical Officer of Health invoked s. 29.2 of the *Health Protection and Promotion Act* to order that the local hospital, Lakeridge Health, assume management of Orchard Villa. As described in the report of Ontario’s Long-Term Care COVID-19 Commission, when Lakebridge staff arrived, they found staffing levels at the home to be 20-25% of the normal complement, garbage “everywhere”, “very shocking” personal protective equipment (PPE) practices, and the absence of even rudimentary infection control measures. Just to “stabilize the situation,” Orchard Villa required a deep clean costing almost \$500,000.”⁵

From April 28, 2020, Orchard Villa was among the five Ontario LTC homes where Canadian Forces were brought in to provide “humanitarian relief and medical support.” The observation report released by the Canadian Forces documented a range of disturbing conditions in the home including:

³ Ontario’s long-term care licensing public consultation registry, online: <https://www.ontario.ca/page/ontarios-long-term-care-licensing-public-consultation-registry#section-11> (accessed 20 August 2021).

⁴ M Mancini, K Pederson & D Common, “These nursing home chains have the highest COVID-19 death rates in Ontario, data analysis finds,” CBC News (18 December 2020), available online: <https://www.cbc.ca/news/canada/nursing-homes-covid-19-death-rates-ontario-1.5846080> (accessed 26 August 2021).

⁵ Ontario’s Long-Term Care COVID-19 Commission: Final Report (30 April 2021), at p 152.

- poor infection control practices, including improper use of PPE;
- the presence of cockroaches, flies and rotting food;
- such inadequate resident care that residents: were being left in soiled diapers; experienced falls without the post-fall assessments required by regulation; were the victims of medication administration errors; were not properly hydrated or sat up for meals (increasing their choking risk);
- a broad lack of medical supplies, including limited and/or inaccessible wound care supplies, linens and soaker pads, or properly functioning oxygen generators and suction units;
- residents being left on mattresses on the floor to prevent them from getting up and walking;
- significant shortcomings concerning incident reporting and communication between all levels of staff; and
- lack of training for staff and “[n]o accountability for staff in regards to upholding basic care needs or best practices”.⁶

Families of Orchard Villa residents testified before Ontario’s Long-Term Care COVID-19 Commission, echoing the comments from Lakeridge hospital staff and the Canadian Forces. Long before the pandemic, families described dire understaffing, poor management, and the absence of infection control procedures at the home, conditions that resulted in extreme weight loss, bed sores, infections and other harms. As described by the families, things got much worse during the pandemic. These problems were only exacerbated when family members were excluded from the home - neither able to assist with resident care, or reach anyone at the home over the phone to inquire about the status of their loved ones.⁷

It is important to note that not only did the government fail to fine Southbridge for its record prior to and during the pandemic, it instead introduced legislation creating a liability shield to protect Southbridge and other LTC homes and contractors (predominantly operating on a for-profit basis) from liability claims arising from their negligence.

⁶ C.J.J. Mialkowski, *OP LASER – JTFC OBSERVATIONS IN LONG TERM CARE FACILITIES IN ONTARIO* (14 May 2020), available online: <https://www.documentcloud.org/documents/6928404-OP-LASER-JTFC-Observations-in-LTCF-in-On> (accessed 20 August 2020).

⁷ See F Snowden, “Son of Pickering long-term care home resident alleges neglect,” *Global News* (23 May 2020), available online: <https://globalnews.ca/news/6977393/orchard-villa-neglect-complaint/> (accessed 26 August 2021).

Orchard Villa's poor record prior to the pandemic is evidenced by the reports of inspections since Southbridge purchased the license in 2015, which include 18 inspections with orders for non-compliance with requirements under the *LTC Homes Act* (the "*Act*") and regulations. Such orders are only issued after repeated non-compliance with written notifications and voluntary plans of compliance. There have been literally hundreds of written notifications and voluntary plans for compliance given by inspectors to Southbridge for Orchard Villa.

Simply put, Orchard Villa's record is one of repeated non-compliance with the requirements of the *Act* and its regulations.

Consultations on the Southbridge Orchard Villa License Application

As part of the consultation on Southbridge's application for a new license and 87 new units for Orchard Villa, the Ministry held a teleconference public meeting on July 15, 2021.

In opening the consultation process, participants report that Ministry officials stated that comments and questions should be limited to Southbridge's presentation and its building plans for the new facility and expansion. During the question period, Ministry officials repeatedly restricted questions or comments about Southbridge's record in operating the home and caring for residents. In other words, many participants in the consultation were directed to limit their comments to Southbridge's present plans, not its past practices or performance as the owner of Orchard Villa.

ANALYSIS

The approval process for LTC home licensing

For an LTC home with an existing license, the licensing process under the *Act* begins at least three years before a license may be issued, at which time the Director must under s. 103 of the *Act* decide whether to give an undertaking to issue a license under s. 100 of the *Act*. An undertaking has a number of "non-amendable components," which include all of the essential features of an LTC home license that cannot be amended "under any circumstances." Once an undertaking is issued, then as long as the licensee meets the conditions of the undertaking, the Director must issue a license (s. 100(7)).

This means that a decision to grant an undertaking under sections 100 and 103 is effectively a decision to grant a license. Since Southbridge's license on Orchard Villa expires in 2025, it requires an undertaking from the Director for a new license for expanded facilities it proposes for the site of the Orchard Villa long-term care home.

The considerations for giving an undertaking are the same as those for issuing a new license, and they are set out in sections 96, 97 and 98 of the *Act*:

- Section 96 requires the Minister to determine whether there is a need for the LTC home in the area having regard to the public interest.
- Section 97 similarly allows the Minister to restrict who can be issued a license, considering factors like control or management of LTCs and the balance between non-profit and for-profit providers.
- Section 98 requires the Director to determine if an applicant for a license is eligible to be issued one. This is decided according to a closed list of factors, which requires that:
 - (a) the home and its operation would comply with this Act and the regulations and any other applicable Act, regulation or municipal by-law;
 - (b) *the past conduct relating to the operation of a long-term care home or any other matter or business of the following affords reasonable grounds to believe that the home will be operated in accordance with the law and with honesty and integrity; ...*
 - (c) it has been demonstrated ... that the [applicant] ... *is competent to operate a long-term care home in a responsible manner* in accordance with this Act and the regulations and is in a position to furnish or provide the required services;
 - (d) *the past conduct relating to the operation of a long-term care home or any other matter or business of the following affords reasonable grounds to believe that the home will not be operated in a manner that is prejudicial to the health, safety or welfare of its residents; ... and*
 - (e) the person is not ineligible because of any other reason that may be provided for in the regulations.

Critically, the focus of s. 98 is *backward-looking* and because of that, it is almost entirely concerned with the past conduct and record of the applicant.

Section 98 also uses the conjunction “and” between the factors that the Director must consider, which means that an applicant must meet *all* of these conditions to be approved for a license. In fact, the extensive record of Southbridge operations at Orchard Villa, clearly demonstrate that it fails to meet most the criteria that are necessary for it to obtain a license.

Finally, before issuing a license or an undertaking, the Director must consult the public (s. 106).

A decision that Southbridge is eligible for a license renewal would likely be quashed by a Court

Based on the overwhelming evidence concerning Southbridge’s appalling record of operations at Orchard Villa, both before and during the COVID-19 pandemic, there are simply no reasonable grounds for concluding that Southbridge is “eligible” for a license under s. 98 of the *Act*.

Accordingly, we believe there would be strong grounds for seeking an order to quash a decision by the Director to give Southbridge an undertaking for Orchard Villa under s. 103 of the *Act*.

The Director's decision under s. 98 is a statutory power of decision, which is subject to judicial review.⁸ Judicial review empowers the court to ensure that administrative decision-makers—like the Director—follow the law.

The Director is given a certain degree of deference in making a policy decision such as the one at issue here, but will be held to a “reasonableness standard” in doing so, and must interpret the law in a manner consistent with the text of the statute, taking account of the evidence in front of her.⁹

In this case, the Southbridge record at Orchard Villa is so egregious that we cannot see a reasonable interpretation of s. 98 of the *Act* that could find Southbridge eligible for the license it is seeking for the Orchard Villa long-term care home. To be more specific, it would be unreasonable and contrary to law for the Director to find as ‘eligible’ an operator that:

- had well over 100 notices in 4 years just prior to the pandemic;
- required intervention by both the local hospital and the Canadian Forces to provide basic care to its residents during the pandemic;
- was subject to numerous comments by both the hospital staff and Canadian Forces officials involved describing its operations as disgraceful;
- had COVID infection spread through the large majority of its residents, at least 70 of whom died as a result; and that
- has, even following the intervention of external parties, been the subject of dozens of written notifications and compliance orders.

No reasonable application of s. 98 of the *Act* could conclude that Southbridge's is “competent” to operate Orchard Villa, or that its “*past conduct* ... affords reasonable grounds to believe” that the home will be operated “with honesty and integrity” and “not ... in a manner that is prejudicial to the health, safety or welfare of its residents,” as the words of the *Act* require.

If the Director were to conclude that Southbridge is “eligible” to operate Orchard Villa under s. 98 of the *Act*, it is our opinion that a Court would likely find that decision to be unreasonable and quash it.

The Ministry did not conduct an adequate consultation which accorded with procedural fairness

⁸ *Judicial Review Procedure Act*, RSO 1990, c J.1, s 2.

⁹ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paras 118 and 126.

The *Act* requires the Director to conduct a consultation before giving an undertaking under s. 100. The Director has discretion in deciding how a public consultation is carried out, but it is clearly improper to prohibit the public from giving feedback or asking questions on essential issues in the consultation.

In this case, the Ministry invited the public to a teleconference meeting, but the Ministry official facilitating the call repeatedly limited participants, including family members of Orchard Villa residents, from asking questions and offering comments about the past record of operations at Orchard Villa, including staffing levels, and other vital aspects of care. Yet as noted above, the Director's decision on "eligibility" under s. 98 of the *Act* is squarely focused on Southbridge's "past conduct" in operating the home. A consultation that limits questions or comments about a central consideration in the approval process cannot satisfy the requirements of the *Act* or procedural fairness.

The need to conduct a proper consultation is amplified by the fact that the lives of home residents are at stake. The events of the last 18 months could not have made this clearer. Where a decision impacts an individual's right to life or security of person under s. 7 of the *Charter*, then they have increased procedural rights to participate in the decision-making process. This *Charter* right overrules anything in the legislation, and the consultation requirements in the *Act* should be interpreted in a way to accord with the principles of fundamental justice under the *Charter*.¹⁰

In our view, by so limiting discussion or questions on considerations that are central to the Director's decision on "eligibility" under s. 98 of the *Act*, the consultation process concerning Orchard Villa's license application did not meet the standards required by law. We believe this failure would also provide a basis for a Court to quash any decision approving the Southbridge application.

Having summarized our opinion by way of introduction, we won't repeat the exercise here, but please don't hesitate to contact us should you have any questions.

Sincerely,



Steven Shrybman
Benjamin Piper
SS:lr/cope 343

¹⁰ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.