Department of Health and Human Services
Maine People Living Safe, Healthy and Productive Lives

Paul R. LePage, Governor Mary C. Mayhew, Commissioner

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IN THE MATTER OF:

North Country Associates)
c/o William Stiles, Esq.)
Verrill Dana, LLP) **FINAL DECISION**
P.O. Box 586)
Portland, ME 04112-0586)

This is the Department of Health and Human Services' Final Decision.

The Recommended Decision of Hearing Officer Thackeray, mailed April 22, 2016, and the responses and exceptions filed by the parties have been reviewed.

I hereby adopt the findings of fact but I do NOT accept the Recommendation of the Hearing Officer that the Department was not correct when it determined, for fiscal year ending December 31, 2010, that North Country Associates, Inc. by and through its eight identified facilities, did not obtain Department approval to refinance each of the facilities' loans, thereby resulting in the disallowance of specified interest costs, and the denial of the request for the disallowed interest. Instead, for the reasons set forth below, I conclude that the Department was CORRECT when it issued its Final Informal Review Decision dated March 27, 2015 regarding the final audit settlement for North Country Associates, Inc. for fiscal year ending December 31, 2010.

It is true that, under applicable regulations, the Department was required to review every request for any change of "basis of cost allocation, which has an effect on the amount of allowable costs" and to "approve, deny or propose modifications of the requested change" within sixty (60) days of receipt. See 10-144 C.M.R. Ch. 101, sub-ch. III, §67.22.4 (eff. Sept. 28, 2009). A request for approval of refinancing, however, is not a request for change of basis of cost allocation. Cost allocation refers to the manner in which a provider attributes the cost of a shared function among various facilities which share this function. For example, if a provider has one laundry facility that serves multiple facilities then it might choose to allocate the cost of laundry among the facilities by the amount of pounds of laundry for each facility. Allocation of a cost is irrelevant to the determination of whether the cost is allowable and the issue in this matter is the allowability of a cost; more specifically, the allowablity of interest of refinanced mortgage loans entered into by North Country Associates, Inc. ("NCA") in March of 2010.

The regulations applicable to the allowability of interest from a refinanced mortgage loan require that the refinancing be "prior approved" and that the interest be "necessary." See 10-144 C.M.R. Ch. 101, sub-ch. III, §§ 67.44.3 and 67.44.3.4 (eff. Sept. 28, 2009). In this case, there is no question that the refinancing was not explicitly prior approved. It is asserted, however, that, under the totality of circumstances of this case, the Department should be equitably estopped from disallowing NCA's interest expenses. Application of the doctrine of equitable estoppel requires a factual determination, by clear and convincing evidence, that one party reasonably relied to its detriment upon the declaration or acts of the other party. In this case, however, NCA did not establish by clear and convincing

evidence that it was reasonable for NCA, a sophisticated business entity, to rely upon vague oral statements by a government official, Herbert F. Downs, Director of Audit, that everything was "all set." To the contrary, the testimony of Glen Cyr, NCA's Vice President of Finance, regarding these statements acknowledges that it was unreasonable for NCA to rely on such statements:

> *I was following up with him because I would like to get, obviously, written notification of these requests prior to our closing ....*
> Test. Of Glen Cyr.

Moreover, there is not clear and convincing evidence that NCA suffered any detriment from proceeding with the refinancing. Indeed, there is evidence that the opposite was true: by refinancing at a lower interest rate and re-amortizing the debt over an additional thirty-five (35) year period, NCA benefitted from the refinancing because it helped "sustain the long term success of the facilities by creating necessary cash flow." See NCA's *Written Closing Statement* ¶¶ 40 and 42. Finally, the cost of the interest that resulted from the refinancing was unnecessary from the perspective of the Department's operation of the MaineCare program. This refinancing was unrelated to the "acquisition of facilities and equipment, and capital improvements", as specified in the MaineCare Benefits Manual, Chapter III, § 67.44.5.2, and, if approved, could have resulted in MaineCare being required to participate in the payment of NCA's mortgage interest for a total of 51 years or, potentially, indefinitely.

DATED: 10/27/14 SIGNED: _____

MARY C. MAYHEW, COMMISSIONER
DEPARTMENT OF HEALTH & HUMAN SERVICES

YOU HAVE THE RIGHT TO JUDICIAL REVIEW UNDER THE MAINE RULES OF CIVIL PROCEDURE, RULE 80C. TO TAKE ADVANTAGE OF THIS RIGHT, A PETITION FOR REVIEW MUST BE FILED WITH THE APPROPRIATE SUPERIOR COURT WITHIN 30 DAYS OF THE RECEIPT OF THIS DECISION.

WITH SOME EXCEPTIONS, THE PARTY FILING AN APPEAL (80B OR 80C) OF A DECISION SHALL BE REQUIRED TO PAY THE COSTS TO THE DIVISION OF ADMINISTRATIVE HEARINGS FOR PROVIDING THE COURT WITH A CERTIFIED HEARING RECORD. THIS INCLUDES COSTS RELATED TO THE PROVISION OF A TRANSCRIPT OF THE HEARING RECORDING.

cc: Christopher Leighton, AAG, Office of the Attorney General, 415 Congress Street #301, Portland, ME 04101

Department of Health and Human Services
Maine People Living Safe, Healthy and Productive Lives
Paul R. LePage, Governor
Mary C. Mayhew, Commissioner

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Date Mailed: APR 22 2016

Mary C. Mayhew, Commissioner
Department of Health and Human Services
11 State House Station • 221 State Street
Augusta, ME 04333

In the Matter of: North Country Associates Case ID Code. "FYE: 12/31/2010"

ADMINISTRATIVE HEARING RECOMMENDED DECISION

An administrative hearing in the above-captioned matter was held on February 29, 2016, before Hearing Officer Richard W. Thackeray, Jr., at Augusta, Maine. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner of the Maine Department of Health and Human Services. The hearing record was left open to allow submission of written closing arguments, which were timely received. The record closed on March 18, 2016.

Pursuant to an Order of Reference dated December 15, 2015, the issues presented *de novo* for hearing were whether the Maine Department of Health and Human Services ["Department"] was

> correct when it determined, for fiscal year ending 12/31/2010, North Country Associates facilities ("Facilities"), identified as Courtland Rehabilitation & Living Center, Edgewood Rehabilitation & Living Center, Heritage Rehabilitation & Living Center, Maplecrest Rehabilitation & Living Center, Orchard Park Rehabilitation & Living Center, Somerset Rehabilitation & Living Center, Sonogee Rehabilitation & Living Center, and Southridge Rehabilitation & Living Center, did not obtain approval from the Department to refinance each of the facilities' loans, thereby resulting in the removal of the unallowable interest costs, and the denial of the request for reimbursement for the disallowed interest?

Ex. HO-3.

APPEARING ON BEHALF OF THE APPELLANT

- William H. Stiles, Esq., VERRILL DANA, LLP
- Glen Cyr, Senior VP for Finance, North Country Associates
- Tammy J. Brunetti, CPA, FHFMA, Principal, Berry Dunn McNeil & Parker, LLC

APPEARING ON BEHALF OF THE DEPARTMENT

- Christopher C. Leighton, AAG
- David Hellmuth, Program Manager, OMS, Division of Audit, Augusta
- Laurie L. Cummings, Auditor, OMS, Division of Audit, Augusta

ITEMS INTRODUCED INTO EVIDENCE

Hearing Officer Exhibits

HO-1: "Notice of an Administrative Hearing," dated December 15, 2015

HO-2: "Fair Hearing Report Form," dated June 2, 2015

HO-3: "Order of Reference," dated December 15, 2015

HO-4: "Entry of Appearance," Christopher C. Leighton, AAG, dated January 7, 2016

HO-5: "Pre-Hearing Administration Letter," dated January 12, 2016

HO-6: "Pre-Hearing Brief (Department)," with attachments, dated February 12, 2016

HO-7: "Pre-Hearing Brief (North Country Associates)," with attachments, dated February 12, 2016

HO-8: "Pre-Hearing Administration Letter," dated February 23, 2016

HO-9: "Hearing Request and Entry of Appearance," William H. Stiles, Esq., dated May 21, 2015

Department Exhibits

D-1: "Final Rule – Principles of Reimbursement for Nursing Facilities Services," MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67 (eff. Sept. 28, 2009)

D-2: "Interest Expense," Medicare Provider Reimbursement Manual, Centers for Medicare and Medicaid Services, Pub. No. 15-1, Ch. 2, §§ 200 – 233.5 (02-96)

D-3: "Final Decision," In re: Cedars Nursing Care Center, (Me. DHHS, Dec. 18, 2012)

D-4: "Recommended Decision," In re: Cedars Nursing Care Center, (*Longanecker, HO*), (Me. DHHS, July 16, 2012)

D-5: "Letter of Intent – Reorganization and Refinancing," North Country Affiliated Entities, dated June 1, 1999

D-6: "Letter in Response," Catherine M. Cobb, dated June 30, 1999

D-7: "Refinance Approval Letter," Debra C. Couture, dated August 17, 1999

D-8: "Refinance Clarification Letter," Glen Cyr, Senior VP of Finance, dated December 10, 2009

D-9: "Refinance Approval Request and attachements," Glen Cyr, Senior VP of Finance, dated June 14, 2013

D-10: "Refinance Request Response Letter," Larry Carbonneau, CPA, dated June 18, 2013

D-11: "Cost Report for Nursing Facilities – Courtland Rehabilitation and Living Center," for period of January 1, 2010 to December 31, 2010

D-12: "Audit Report Transmittal and attachments – Courtland Rehabilitation and Living Center," Herbert F. Downs, Director, dated September 29, 2014

D-13: "Request for Informal Review," Courtland Rehabilitation & Living Center, dated October 30, 2014

D-14: "Final Informal Review Decision," Laurie L. Cummings, dated March 27, 2015

D-15: "Email – David Hellmuth to Larry Carbonneau," dated May 29, 2013, with cover letter and attachments

D-16: "Audit Report Transmittals," with cover letter, re: Edgewood Rehabilitation & Living Center, Heritage Rehabilitation & Living Center, Maplecrest Rehabilitation & Living Center, Orchard Park Rehabilitation & Living Center, Somerset Rehabilitation & Living Center, Sonogee Rehabilitation & Living Center, and Southridge Rehabilitation & Living Center, dated September 29, 2014

D-17: "Written Closing Argument," Christopher Leighton, AAG, dated March 18, 2016

Appellant Exhibits

A-1: "Summary of Allowable Debt for All Facilities," Berry Dunn, LLC

A-2: "Summary of 1999 HUD Refinancing," with attachments, Berry Dunn, LLC

A-3: "Summary of Allowable Debt, Historical – Refinancing," with attachments, Berry Dunn, LLC

A-4: "Long Term Debt and Amortization Schedules, 1999 to 2010," Berry Dunn, LLC

A-5: "Summary of 2010 HUD Refinancing," with attachments, Berry Dunn, LLC

A-6: "North Country Affiliated Entities Financial Statements," Berry Dunn, LLC, FY 2000 to FY 2009

A-7: "Analysis of Actual & Allowable Medicaid Mortgage Interest," Berry Dunn, LLC, dated December 31, 2015

A-8: "Summary of Maine Industry Shortfall Trend," Berry Dunn, LLC, FY 2007 to FY 2013

A-9: "Allowable Interest Calculations," North Country Affiliated Entities, Berry Dunn, LLC, FY 2010

A-10: "Final Decision," In re: Cedars Nursing Care Center, (Me. DHHS, Dec. 18, 2012); "Recommended Decision," In re: Cedars Nursing Care Center, (*Longanecker, HO*), (Me. DHHS, July 16, 2012); "Refinance Approval Letter," Michael Mathieu, dated October 11, 2005; "DHHS Approval of HUD Refinancing Confirmation Request," S. John Watson, CFO, dated April 27, 2006; "Confirmation Letter," Michael Mathieu, dated May 1, 2006

A-11: "Refinance Request Letter," Michael T. McNeil, dated April 20, 1993; "Refinance Approval Letter," John D. Dickens, dated April 28, 1993; "Letter of Intent – Reorganization and Refinancing," North Country Affiliated Entities, dated June 1, 1999; "Letter in Response," Catherine M. Cobb, dated June 30, 1999; "Refinance Approval Letter," Debra C. Couture, dated August 17, 1999

A-12: "Written Closing Argument," William H. Stiles, Esq., dated March 18, 2016

STANDARD OF REVIEW

The hearing officer reviews a Departmental audit of an approved MaineCare services provider's cost report *de novo*. DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (C)(1);

Provider Appeals, MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.21-1 (A). The Department bears the burden to persuade the Hearing Officer that, based on a preponderance of the evidence, it acted correctly when it issued a Final Informal Review Decision based on a nursing facility final audit settlement report for an approved provider of MaineCare services. 10-144 C.M.R. Ch. 1, § VII (B)(1), (2).

LEGAL FRAMEWORK

The Department administers the MaineCare program, which is designed to provide "medical or remedial care and services for medically indigent persons," pursuant to federal Medicaid law. 22 M.R.S. § 3173. *See also* 42 U.S.C. §§ 1396a, *et seq*. To effectuate this, the Department is authorized to "enter into contracts with health care servicing entities for the provision, financing, management and oversight of the delivery of health care services in order to carry out these programs." *Id.* Enrolled providers are authorized to bill the Department for MaineCare-covered services pursuant to the terms of its Provider Agreement, Departmental regulations, and federal Medicaid law. "Provider Participation," MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03. *See also* 42 C.F.R. § 431.107 (b) (state Medicaid payments only allowable pursuant to a provider agreement reflecting certain documentation requirements); 42 U.S.C. § 1396a (a)(27). Enrolled providers also "must … [c]omply with requirements of applicable Federal and State law, and with the provisions of this Manual." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (Q). Enrolled providers are also required to maintain records sufficient to "[m]aintain accurate, auditable and sufficiently detailed financial and statistical records to substantiate cost reports, negotiated rates, by report items, or any other fee for service rate for a period of at least five (5) years following the date of final settlement or established rate with the Department," and "[c]omply with this Chapter and all other applicable Chapters and Sections of the MaineCare Benefits Manual." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (X), (BB).

"The Division of Audit or duly Authorized Agents appointed by the Department have the authority to monitor payments to any MaineCare provider by an audit or post-payment review." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.16. Pursuant to federal law, the Department is also authorized to "safeguard against excessive payments, unnecessary or inappropriate utilization of care and services, and assessing the quality of such services available under MaineCare." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.17. *See also* 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.18; 22 M.R.S. § 42 (7); 42 U.S.C. § 1396a (a)(27); 42 C.F.R. § 431.960.

The Department is specifically required to assure that nursing facilities operate "efficiently and economically" and do so "in conformity with applicable State and Federal laws, regulations, and quality and safety standards." "Principles of Reimbursement for Nursing Facilities," MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.1.1. To that end, "[n]o change in accounting methods or basis of cost allocation may be made" by any nursing facility participating in the MaineCare program "without prior written approval of the Office of MaineCare Services." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.7.2. The same regulatory language was in effect in Fiscal Year 2010, during which the

operative facts relevant to the present appeal took place. *See* 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.22.2 (eff. Sept. 28, 2009).

"Any application for a change in accounting method or basis of cost allocation, which has an effect on the amount of allowable costs or computation of the per diem rate of payment, shall be made within the first ninety (90) days of the reporting year," and "shall specify

- the nature of the change;
- the reason for the change;
- the effect of the change on the per diem rate of payment; and
- the likely effect of the change on future rates of payment.

10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.22.3 (eff. Sept. 28, 2009). "The Department shall review each application and within sixty (60) days of the receipt of the application approve, deny or propose modification of the requested change." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.22.4 (eff. Sept. 28, 2009). "No change in accounting methods or basis of cost allocation may be made without prior written approval of the Office of MaineCare Services." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.22.2 (eff. Sept. 28, 2009). However, "[i]f no action is taken within the specified period, the application will be deemed to have been approved." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.22.4 (eff. Sept. 28, 2009).

"Costs allocated to the nursing facility shall be reasonable and necessary, as determined by the Department pursuant to these rules." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.22.7 (eff. Sept. 28, 2009). "Necessary and Proper Costs are for services and items that are essential to provide appropriate resident care and activities at an efficient and economically operated facility," and "are costs for services and items that are commonly provided and are commonly accepted as essential for the type of facility in question." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.13 (eff. Sept. 28, 2009). "Reasonable Costs are those services and items for which a prudent and cost-conscious buyer would pay and which are essential for resident care and activities at the facility." *Id. See also* "Interest Expense," Medicare Provider Reimbursement Manual, Centers for Medicare and Medicaid Services, Pub. No. 15-1, ["Medicare Provider Reimbursement Manual"], Ch. 2, § 202.1 ("Reasonable finance charges and service charges together with interest on indebtedness are includable in allowable cost.").

"If any of a provider's costs are determined to exceed by a significant amount, those that a prudent and cost-conscious buyer would have paid, those costs of the provider will be considered unreasonable in the absence of a showing by the provider that those costs were unavoidable." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.13 (eff. Sept. 28, 2009). "If these principles do not set forth a determination of whether or not a cost is allowable or sufficiently define a term used, reference will be made first, to the Medicare Provider Reimbursement Manual (HIM-15) guidelines, followed by the Internal Revenue Service Guidelines in effect at the time of such determination if the HIM-15 is silent on the issues." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.23 (eff. Sept. 28, 2009).

"Allowable costs" include costs within three categories: "Direct Care Costs," "Routine Costs," and "Fixed Costs." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.40.1 (eff. Sept. 28, 2009). Allowable

"fixed costs" include those related to the acquisition, improvement, and maintenance of real estate and/or capital assets, specifically "necessary and proper interest on both current and capital indebtedness ...." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.44.5 (eff. Sept. 28, 2009).[1] "In order to be considered "necessary", interest must:

- Be incurred on a loan made to satisfy a financial need of the provider. Loans which result in excess funds or investments would be considered unnecessary; and
- Be reduced by investment income except where such income is from gifts, whether restricted or unrestricted, and which are held separate and not commingled with other funds. Income from funded depreciation is not used to reduce interest expense.

10-144 C.M.R. Ch. 101, sub-Ch. III, §§ 67.44.3 (eff. Sept. 28, 2009). To be "proper," the interest must:

- Be incurred at a rate not in excess of what a prudent borrower would have had to pay in the money market existing at the time the loan was made.
- Be paid to a lender not related through control or ownership, or personal relationship to the borrowing organization.

10-144 C.M.R. Ch. 101, sub-Ch. III, §§ 67.44.3.3 (eff. Sept. 28, 2009).

"Any refinancing of property mortgages or loans on fixed assets must be prior approved by the Department." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.44.3.4 (eff. Sept. 28, 2009). "If prior approval is not obtained any additional interest costs or finance charges will not be allowed." *Id.*

FACTUAL AND PROCEDURAL BACKGROUND

On May 11, 2011, North Country Associates, Inc. ["NCA" or "Appellant"] submitted a Cost Report for its nursing facility, Courtland Rehabilitation & Living Center, in Ellsworth. Ex. D-11. On other unspecified dates close-in-time to its submission for the Courtland facility, NCA submitted cost reports for seven other nursing facilities operating in Maine, to wit: Edgewood Rehabilitation & Living Center, in Farmington; Heritage Rehabilitation & Living Center, in Winthrop; Maplecrest Rehabilitation & Living Center, in Madison; Orchard Park Rehabilitation & Living Center, in Farmington; Somerset Rehabilitation & Living Center, in Bingham; Sonogee Rehabilitation & Living Center, in Bar Harbor; and Southridge Rehabilitation & Living Center, in Biddeford. Ex. D-16; Test. of Glen Cyr; Test. of David Hellmuth.

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[1] "Interest" is defined by the MaineCare Benefits Manual as:

> the cost incurred for the use of borrowed funds. Interest on current indebtedness is the costs incurred for funds borrowed for a relatively short term, usually one (1) year or less, but in no event more than fifteen (15) months. This is usually for such purposes as working capital for normal operating expenses. Interest on capital indebtedness is the cost incurred for funds borrowed for capital purposes, such as acquisition of facilities and equipment, and capital improvements. Generally, loans for capital purposes are long-term loans. Except as provided in Principle 18.5.4.6, interest does not include interest and penalties charged for failure to pay accounts when due.

10-144 C.M.R. Ch. 101, sub-Ch. III. § 67.18.5.2. *See also* "Interest Expense," Medicare Provider Reimbursement Manual, Centers for Medicare and Medicaid Services, Pub. No. 15-1, Ch. 2, § 200.1 (02-96) (providing substantially equal definition of "interest" to the one employed in the MaineCare Benefits Manual).

On September 29, 2014, the Department's Office of MaineCare Services ["OMS"], Division of Audit issued eight separate "Audit Report Transmittals," for the eight NCA-controlled nursing facilities. Ex. D-12; Ex. D-16. On October 30, 2014, NCA requested an informal review of the eight "Audit Report Transmittals" issued on September 29, 2014. Ex. D-13. On March 27, 2015, the Department issued a Final Informal Review Decision upon each of the eight informal review requests, essentially affirming each of the underlying 2014 audits. Ex. D-14; Test. of Glen Cyr; Test. of David Hellmuth. On May 21, 2015, NCA timely requested a consolidated administrative hearing, challenging the Department's eight Final Informal Review Decisions issued on or about March 27, 2015. Ex. HO-9. Per request of the Hearing Officer, the parties submitted their respective pre-hearing briefs on or about February 12, 2016. Ex. HO-5; Ex. HO-6; Ex. HO-7. The present hearing followed.

RECOMMENDED DECISION

The Department was not correct when it determined, for fiscal year ending 12/31/2010, that North Country Associates, Inc., by and through its eight identified facilities, did not obtain Departmental approval to refinance each of the facilities' loans, thereby resulting in the disallowance of specified interest costs, and the denial of the request for reimbursement for the disallowed interest.

RECOMMENDED FINDINGS OF FACT

1. In accordance with agency rules, the NCA was properly notified of the time, date, and location of the immediate proceeding. Ex. HO-1.

2. NCA is a Maine corporation that owns and operates nursing facilities throughout Maine, which are enrolled MaineCare providers, and which specifically include the following: Courtland Rehabilitation & Living Center, in Ellsworth; Edgewood Rehabilitation & Living Center, in Farmington; Heritage Rehabilitation & Living Center, in Winthrop; Maplecrest Rehabilitation & Living Center, in Madison; Orchard Park Rehabilitation & Living Center, in Farmington; Somerset Rehabilitation & Living Center, in Bingham; Sonogee Rehabilitation & Living Center, in Bar Harbor; and Southridge Rehabilitation & Living Center, in Biddeford. Ex. HO-6; Ex. HO-7; Ex. D-17; Ex. A-12.

3. On April 20, 1993, North Country Associates, Inc. ["NCA" or "Appellant"] sought Departmental prior approval of a refinance plan seeking to consolidate its long term capital debt related to several of its facilities into a single loan ["OMEGA Loan"] and borrow additional funds to finance capital improvements at some of the covered Maine facilities. Ex. A-11; Test. of Glen Cyr; Test. of Tammy J. Brunetti.

4. On April 28, 1993, the Department notified NCA that the "plan to refinance its existing long-term debt, borrow additional funds for non-CON reviewable renovation projects and borrow funds for CONs issued" had "been examined and found acceptable.," and that NCA was authorized "to implement

the proposed financing conditioned on the reimbursable costs of the program ... not exceeding current capital cost reimbursement." Ex. A-11.

5. In September 1993, NCA closed on its OMEGA loan, which featured total borrowing of $26,500,000.00, and a variable interest rate that was scheduled to escalate to 12 percent by September 2000, at which time a balloon payment was also scheduled to come due. Ex. A-3; Test. of Glen Cyr.

6. On June 1, 1999, NCA sought Departmental prior approval of a plan to reorganize the corporate structure of 12 of its nursing facilities and refinance its long term capital debt with the U.S. Department of Housing and Urban Development ["HUD"] through its Section 232 Program. Ex. A-11; Test. of Glen Cyr; Test. of Tammy J. Brunetti.

7. On June 30, 1999, the Department notified NCA that its proposed corporate reorganization did not require "review under its Certificate of Need," due to the Department's finding that the plan reflected "a reorganization and not a transfer of ownership." Ex. A-11.

8. On August 17, 1999, the Department notified NCA that its proposed refinance through HUD was approved, "contingent on the fact that North Country will continue to have the interest expense calculated from the historical amortization schedules, resulting in no increase cost to the Medicaid program as a result of this refinancing." Ex. A-11.

9. In December 1999, NCA closed on its HUD Section 232 Loan, which included an interest rate of 8.13 percent immediately following the closing. The 1999 HUD Loan contained a provision barring any refinance by NCA for a period of 10 years. Ex. A-2; Ex. A-11; Test. of Glen Cyr.

10. On December 10, 2009, NCA requested prior approval of a plan to refinance its long term debt through HUD with respect to eight nursing facilities under its corporate control, which had been subject to finance terms governed by the 1999 HUD Section 232 Program loan. Ex. D-8.

11. In the period preceding and immediately following its December 10, 2009 written request for approval of its new refinance plan, NCA Vice President of Finance Glen Cyr engaged in several oral discussions with Division of Audit officials, chiefly Director of Audit Herbert F. Downs, in which the refinance approval request was discussed. In none of these conversations was Mr. Cyr told by Mr. Downs or any other Departmental official that the request for prior approval was incomplete, was denied, or would be denied. Test. of Glen Cyr.

12. The Department did not provide any written response to NCA's request for prior approval of the new HUD refinancing proposal made on December 10, 2009. Ex. HO-6; Ex. HO-7.

13. NCA closed on its new HUD loan in March 2010. The interest rate paid following the 2010 HUD refinance was 4.62 percent. Test. of Glen Cyr; Test. of Tammy J. Brunetti.

14. NCA Senior Vice President of Finance Glen Cyr wrote a follow-up letter on June 14, 2013, repeating his request for written approval for the refinancing. Ex. D-9; Test. of Glen Cyr.

15. MaineCare Certificate of Need Program Manager Larry Carbonneau responded on June 18, 2013 that NCA's "request had been noted," but added that he did "not have the authority to give a backdated prior approval." Mr. Carbonneau's June 18, 2013 letter also included his interpretation that the 2010 HUD Loan "would have met the existing standards being applied now, and most likely confirmed by the department if you had received a response from the department in a timely fashion," specifically noting his belief that:

- the 2010 HUD loan was "necessary";
- the 2010 HUD loan was "proper";
- the 2010 HUD loan was "cost effective" and resulted "in a reduction of total interest costs."

Ex. D-10.

REASONS FOR RECOMMENDATION

As noted above, the Department bore the burden at hearing to demonstrate by a preponderance of evidence that it correctly calculated the nursing facility annual cost report settlements for each of the eight facilities whose appeals were consolidated herein. The issue presented for resolution is much narrower than might be deduced from arguments and testimony offered at hearing. The parties disagreed over whether the Department correctly disallowed portions of each of the eight facilities' cost reports, which reflected interest expenses directly linked to a HUD refinance loan closed in March 2010. Accordingly, the Order of Reference correctly identified the outstanding issue, namely, whether the Department was "correct when it determined, for fiscal year ending 12/31/2010, North Country Associates facilities ("Facilities") ... did not obtain approval from the Department to refinance each of the facilities' loans, thereby resulting in the removal of the unallowable interest costs, and the denial of the request for reimbursement for the disallowed interest." Ex. HO-3.

Among all of its arguments, the appellant, North Country Associates, Inc. ["NCA"], urged that its claims were sufficiently similar to those decided by the Commissioner in another case, *In re: Cedars Nursing Care Center*, (Me. DHHS, Dec. 18, 2012), that the Department should be effectively estopped from making the same type of arguments in favor of its position against NCA. Ex. HO-7. NCA devoted considerable time at hearing focusing on the Department's approval of the 1999 HUD Loan, which was made "contingent on the fact that North Country will continue to have the interest expense calculated from the historical amortization schedules, resulting in no increased cost to the Medicaid program as a result of this refinancing." Ex. D-7; Test. of David Hellmuth; Test. of Tammy J. Brunetti. It merits noting that the 1999 HUD Loan is not at issue in the present appeal, and that there does not appear to be any dispute between the parties as to the applicability of the "historical amortization" condition that is directly relevant to issue identified by the Order of Reference. More importantly, the appellant in *In re: Cedars Nursing Care Center*, challenged a Departmental cost report settlement that disallowed specific

interest expenses for fixed costs that were calculated based on a conditionally-approved refinance request that was not in dispute. Here, NCA disputes whether the Department correctly disallowed specific interest expenses on the basis that they were calculated based on the 2010 HUD Loan, which Departmental records indicate had never received prior approval.

Similarly, the Department urged that the Commissioner's decision in another case, *In re: Woodlands Assisted Living*, (*aff'd*, Me. Super. Ct., Ken. Cty, Marc. 21, 2012), was sufficiently similar to the facts in the present case that the Department's disallowance of interest expenses flowing from the 2010 refinance should be outright affirmed. Ex. HO-7. In that case, however, the facility challenged the Department's disallowance of interest expenses derived from a fixed debt refinance that it completed without requesting Departmental approval. Ex. HO-7. Here, the Department yielded that NCA timely requested approval of its 2010 HUD Loan. Ex. D-17; Test. of David Hellmuth; Test. of Laurie L. Cummings. Instead, the Department reasoned that its disallowance of NCA's claimed interest expenses was overwhelmingly, if not solely due to the fact that the Department never issued written prior approval of NCA's timely requested 2010 HUD refinance plan. Thus, neither *In re: Woodlands Assisted Living* nor *In re: Cedars Nursing Care Center* established any law that fully and directly addresses the questions raised in the present case. Accordingly, the present case's unique fact pattern must be newly reviewed in light of the Departmental rules for allowable cost settlements prescribed by the MaineCare Benefits Manual.

The Department framed its case in support of the NCA facilities' audits through testimony received from two officials, Audit Program Manager David Hellmuth and Auditor Laurie L. Cummings. Ms. Cummings' involvement in the case began in 2014, and carried through the completion of the Audit Report Transmittal on September 29, 2014. Test. of Laurie L. Cummings. Mr. Hellmuth testified that he was not the auditor of record or audit reviewer in the present matter, that his participation was limited to the "appeal process," and that his role primarily consisted of "reviewing the appeal request itself or the final informal review decision ... [and] our audit reports." Test. of David Hellmuth. The Final Informal Review Decision, dated March 27, 2015, was jointly issued by Ms. Cummings and Director of the Division of Audit, Herbert F. Downs. Ex. D-14. The Department did not receive testimony from Mr. Downs at hearing.

At its core, the Department's position was not that NCA's 2010 HUD Loan would not have satisfied the standards of "necessary," "proper," or "reasonable," as those terms are defined by the MaineCare Benefits Manual and/or the Medicare Provider Reimbursement Manual. As NCA pointed out, Departmental correspondence from 2013 reflected "that the loan would have met the existing standards being applied now, and most likely confirmed by the department if you had received a response from the department in a timely fashion," and that the contemplated standards for approving the new terms were the same: necessary, proper, and cost effective (i.e. resulting "in a reduction of total interest costs"). Ex. D-10. The Department's decision to disallow interest costs in the FY 2010 cost report settlement was solely made because Departmental records reflected that NCA's 2010 HUD Loan had not received prior approval from the Department, as required by its regulations. Ex. D-12; Test. of David Hellmuth; Test. of Laurie L. Cummings.

Under the applicable regulations, the Department was required to "review" every request for any change of "basis of cost allocation, which has an effect on the amount of allowable costs," specifically including "fixed costs" such as "necessary and proper interest on both current and capital indebtedness," and to "approve, deny or propose modification of the requested change" within 60 days of receipt. 10-144 C.M.R. Ch. 101, sub-Ch. III, §§ 67.22.4; 67.40.1; 67.44.5 (eff. Sept. 28, 2009). If the Department failed to provide notice of approval, denial, or proposed modification within the 60-day window, the application was to have been deemed approved. 144 C.M.R. Ch. 101, sub-Ch. III, § 67.22.4 (eff. Sept. 28, 2009). According to the Department's own witnesses, no notice of approval, denial, or proposed modification of NCA's December 10, 2009 refinance approval request was issued within 60 days. Test. of David Hellmuth; Test. of Laurie L. Cummings. Nor did the Department allege that it did not receive NCA's December 10, 2009 refinance approval request. Test. of David Hellmuth; Test. of Laurie L. Cummings.

The Department's disallowance of the claimed interest expenses relevant to this appeal was solely attributed to the lack of any written notice of prior approval issued by the Department after NCA issued its written request on December 10, 2009. Ex. D-8; Test. of David Hellmuth. Yet, Mr. Hellmuth testified that, based on his understanding of Departmental regulations, prior approval of any refinance for fixed asset loans need not have been made in writing. Test. of David Hellmuth. This interpretation finds support, albeit indirectly, in the language of the regulation. *See generally* 10-144 C.M.R. Ch. 101, sub-Ch. III, §§ 67.22, 67.44 (eff. Sept. 28, 2009). On one hand, the regulation requires "prior written approval" on a "change in accounting methods or basis of cost allocation" before a provider's request can be deemed to have been approved. 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.22.2 (eff. Sept. 28, 2009). However the same section provides that, "[i]f no action is taken within the specified period," i.e. within 60 days of receipt of a request for approval, "the application will be deemed to have been approved." 10-144 C.M.R. Ch. 101, sub-Ch. III, § 67.22.4 (eff. Sept. 28, 2009). If effect is to be given to the goal of deeming requests automatically approved after 60 days of Departmental inaction, it must flow from an exception to the requirement that all prior approvals be made in writing.

The hearing officer's "decision must be based on the agency regulations and the evidence which is a matter of hearing record." Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (B)(3). Only "where the agency's regulations are ambiguous or silent on the point critical to a determination" is "reference to other sources of law for guidance in interpreting the agency's regulations ... appropriate." *Id.* As with statutory interpretation, the language of an administrative regulation "should be construed to avoid absurd, illogical, or inconsistent results," and in light of the whole regulatory scheme "for which the section at issue forms a part so that a harmonious result ... may be achieved." *See Dep't of Human Servs. ex rel. Hampson v. Hager*, 2000 ME 140, ¶21, 756 A.2d 489, 493.

The regulations evince a clear intent to reduce the risk of consequences from Departmental inaction or undue delay. Mr. Cyr testified that the refinance opportunity presented to NCA by HUD was due to expire; that NCA faced the consequences of losing favorable terms if it did not receive

Departmental approval prior to the March 2010 closing date; and that ongoing operations by NCA under the terms of the pre-existing 1999 HUD Loan were not sustainable. Test. of Glen Cyr. NCA's fact pattern is precisely what Departmental regulations were drafted to avoid. To then interpret a related provision as requiring the automatic approval after 60 days of inaction to be in writing would yield an absurd, illogical, or inconsistent result, and would be inharmonious with the intent to reduce undue delay by the Department. For these reasons, it is recommended that the Departmental failure to provide notice of approval, denial, or modification proposal within 60 days of NCA's December 10, 2009 request be deemed an approval of that request.

Further, NCA Vice President of Finance Glen Cyr credibly testified that, during the period preceding and immediately following the December 10, 2009 written request for approval of its new refinance plan, he engaged in several oral discussions with Division of Audit officials, chiefly Director of Audit Herbert F. Downs, in which the refinance approval request was discussed. Test. of Glen Cyr. In none of these conversations was Mr. Cyr told by Mr. Downs or any other Departmental official that the request for prior approval was incomplete, was denied, or would be denied. Test. of Glen Cyr. On the contrary, Mr. Cyr testified that he spoke with Mr. Downs "more than five, and probably closer to ten" times, and that:

> I was following up with him because I would like to get, obviously, written notification of these requests prior to our closing and we had verbal conversations on multiple occasions. And the feedback that I got was very positive, and I am very confident that in many of those discussions, the words 'All Set' were used.

Test. of Glen Cyr.

It merits repeating that neither Mr. Hellmuth nor Ms. Cummings offered any testimony to cast doubt on Mr. Cyr's otherwise credible representations about his conversations with Mr. Downs, and that Mr. Downs was not made available for testimony.

Even if the regulations are not read in a way that strictly compels approval of NCA's request due to Departmental inaction, the Department should be estopped from disallowing NCA's FY 2010 interest expenses. In accordance with the Department's administrative hearings regulations, the Hearing Officer has limited authority to address equitable estoppel issues. *See* 10-144 C.M.R. Ch. 1, § VII (B)(6). The "doctrine of equitable estoppel may prevent a government entity from discharging governmental functions or asserting rights against a party who detrimentally relies on statements or conduct of a government agency or official." *State v. Brown*, 2014 ME 79, ¶14, 95 A.3d 82, 87. "To prove equitable estoppel against a governmental entity, the party asserting it must demonstrate that (1) the statements or conduct of the governmental official or agency induced the party to act; (2) the reliance was detrimental; and (3) the reliance was reasonable." *Dep't of Health and Human Servs. v. Pelletier*, 2009 ME 11, ¶17, 964 A.2d 630, 635. *See also Mrs. T. v. Comm'r of Dep't of Health and Human Servs.*, 2012 ME 13, ¶10, 36 A.3d 888, 891 (party asserting equitable estoppel defense has the burden of proof). "Equitable estoppel requires misrepresentations, including misleading statements, conduct, or silence, that induce detrimental reliance." *Dep't of Human Servs. v. Bell*, 1998 ME 123, ¶8, 711 A.2d 1292, 1295. The

"totality of the circumstances, including the nature of the government official or agency whose actions provide the basis for the claim and the governmental function being discharged by that official or agency" must be considered in determining whether governmental action should be equitably estopped. *Pelletier*, 2009 ME 11, ¶17, 964 A.2d at 636.

"Equitable estoppel based on a party's silence will only be applied when it is shown by clear and satisfactory proof that the party was silent when he had a duty to speak." *Bell*, 1998 ME 123, ¶8, 711 A.2d at 1295 (*citation omitted*). "Clear and satisfactory proof means clear and convincing proof." *Littlefield v. Adler*, 676 A.2d 940, 942 (Me. 1996). The requirement of "clear and convincing evidence" is "an intermediate standard of proof lying between the preponderance and the reasonable doubt standards," where "[t]he factfinder must be persuaded, on the basis of all the evidence, that the moving party has proved his factual allegations to be true to a high probability." *Taylor v. Comm'r of Mental Health and Mental Retardation*, 481 A.2d 139, 154 (Me. 1984).

Here, Mr. Cyr testified that he had directly worked with Mr. Downs, as an official with the Department's Division of Audit for approximately 20 years, and that his familiarity with Mr. Downs' administrative style bolstered his belief that it was reasonable to proceed to close on the 2010 HUD Loan despite lack of a written confirmation of Departmental approval. Test. of Glen Cyr. As noted above, the Department had a duty to act within 60 days of its receipt of NCA's December 10, 2009 request for prior approval, and by all accounts, the Department made no statements – express or implied, written or oral – suggesting that NCA's refinance plan would be denied or proposed for modification. Test. of Glen Cyr; Test. of David Hellmuth. Based on Mr. Cyr's un-contradicted accounts, it appears highly probable that Mr. Downs indicated Departmental approval would be forthcoming, and by Mr. Carbonneau's read, more than three years later, "the loan would have met the existing standards being applied now, and most likely confirmed by the department if [NCA had] received a response from the department in a timely fashion." Ex. D-10; Test. of Glen Cyr. Thus, it was reasonable for NCA to proceed with the closing under the circumstances. Finally, it is highly probable that NCA's reliance upon Mr. Downs' verbal statements and/or the Department's written silence within the 60-day window was detrimental, inasmuch as the interest expenses resulting from its refinance agreement were disallowed – more than four years later – by the Department in its September 29, 2014 Audit Report Transmittal, and affirmed by its Final Informal Review Decision, dated March 27, 2015. Ex. D-12; Ex. D-14. As such, NCA has sustained its burden to prove, to a high probability, that even if the regulations do not support a conclusion that the Department tacitly approved NCA's December 10, 2009 request by failing to respond within 60 days, then NCA reasonable relied on statements and/or silence of the Department in proceeding to closing on its 2010 HUD Loan and did so to its detriment.

Therefore, the Hearing Officer recommends that it be concluded that the Department was **not correct** when it determined, for the fiscal year ending 12/31/2010, that North Country Associates, Inc., by and through its eight identified facilities, did not obtain approval from the Department to refinance each of the facilities' loans, thereby resulting in the disallowance of specified interest costs, and the denial of the request for reimbursement for the disallowed interest.

MANUAL CITATIONS

- DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (2016)
- MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101 (2009), (2016).

RIGHT TO FILE RESPONSES AND EXCEPTIONS

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE RECEIVED BY THE DIVISION OF ADMINISTRATIVE HEARINGS WITHIN FIFTEEN (15) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDED DECISION.

A REASONABLE EXTENSION OF TIME TO FILE EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE DIVISION OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. COPIES OF WRITTEN RESPONSES AND EXCEPTIONS MUST BE PROVIDED TO ALL PARTIES. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

Dated: 4/21/16

Richard W. Thackeray, Jr.
Administrative Hearing Officer

cc: William H. Stiles, Esq., VERRILL DANA, LLP, P.O. Box 586, Portland 04112-0586
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