

**REPORT ON EXAMINATION**

**OF**

**ORCHARD PARK CCRC, INC.**

**D/B/A**

**FOX RUN AT ORCHARD PARK**

**AS OF**

**DECEMBER 31, 2012**

**DATE OF REPORT**

**FEBRUARY 6, 2015**

**EXAMINER**

**FROILAN ESTEBAL**

## TABLE OF CONTENTS

<u>ITEM NO.</u>		<u>PAGE NO.</u>
1.	Scope of the examination	2
2.	Description of the Community	3
	A. Corporate governance	6
	B. Holding company system	8
	C. Conflict of interest statements	9
	D. Occupancy rates	10
	E. Information technology	10
3.	Financial statements	13
	A. Balance sheet	13
	B. Statement of revenue, expenses and change in actuarial surplus	15
4.	Compliance with prior comments and recommendations	17
5.	Summary of comments and recommendations	19



NEW YORK STATE  
DEPARTMENT *of*  
FINANCIAL SERVICES

---

Andrew M. Cuomo  
Governor

Benjamin Lawsky  
Superintendent

February 6, 2015

Honorable Benjamin M. Lawsky  
Superintendent of Insurance  
Albany, New York 12257

Sir:

Pursuant to the requirements of the New York Insurance Law, and acting in accordance with the instructions contained in Appointment Number 31067, dated February 12, 2014, attached hereto, I have made an examination of Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park, a not-for-profit continuing care retirement community licensed pursuant to the provisions of Article 46 of the New York Public Health Law, as of December 31, 2012, and respectfully submit the following report thereon.

The examination was conducted at the home office of Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park, at One Fox Run Lane, Orchard Park, New York.

Wherever the designations the “Community” or “Fox Run” appear herein, without qualification, they should be understood to indicate Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park.

Wherever the designation the “Department” appears herein, without qualification, it should be understood to indicate the New York State Department of Financial Services.

### **1. SCOPE OF THE EXAMINATION**

The previous examination was conducted as of December 31, 2009. This examination covered the three-year period from January 1, 2010 through December 31, 2012. Transactions occurring subsequent to this period were reviewed where deemed appropriate by the examiner.

Representatives of the New York State Department of Financial Services and the New York State Department of Health conducted a site inspection of the Community’s facility on November 22, 2013, pursuant to Section 4614(1) of the New York Public Health Law.

The examination comprised a verification of the assets and liabilities of the Community as of December 31, 2012, in accordance with generally accepted accounting principles (GAAP), as modified by the Department pursuant to Insurance Regulation No. 140 (11 NYCRR 350), a review of income and disbursements deemed necessary to accomplish such verification, and utilized, to the extent considered appropriate, work performed by the Community’s independent certified public accountant and independent actuary. It should be noted that the balance sheet included herein was reported as of December 31, 2012, on a statutory actuarial basis pursuant to Insurance Regulation No. 140 (11 NYCRR 350).

A review was also made of the following items:

- Community documents
- Compliance with By-Laws
- Occupancy levels
- Disclosure statement
- Financial documents
- Minutes of Board of Directors' meetings

This report on examination is confined to financial statements and comments on those matters which involve departures from laws, regulations or rules, or which are deemed to require explanation or description.

A review was also made to ascertain what actions were taken by the Community with regard to comments and recommendations contained in the prior report on examination.

## **2. DESCRIPTION OF THE COMMUNITY**

The Community is a continuing care retirement community as defined in Article 46(2-b) of the New York Public Health Law. The Community received a Certificate of Authority issued by the New York State Department of Health and approved by the New York State Continuing Care Retirement Council on November 1, 2007. The Community began operations in November, 2007. The Community is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

The Community is a not-for-profit organization formed to build, own and operate a continuing care retirement community, which currently consists of one hundred eighty (180) independent living units, fifty-two (52) enriched housing and memory care units and fifty (50) skilled nursing beds). Within the 180 independent living units, there are thirty (30) individual patio homes, of which eighteen (18) are referred to as the “California Neighborhood” and twelve (12) are referred to as the “Woods”. The Community is located on a 53 acre site in Orchard Park, New York.

The Community provides residents with a continuum of services, including independent living, assisted living, and skilled nursing care. These services are covered under a life care contract entered into between the Community and each prospective resident which it sets forth the responsibilities of both parties. Each resident is required to pay an entrance fee for the right to occupy a unit, and to pay a monthly service fee for the right to use the living accommodations and utilize the services of the Community. The entrance fee and monthly service fees are based on the size and type of living unit, and the number of residents that occupy each unit.

The entrance fee is paid in two installments. Ten percent (10%) of the entrance fee is due when the life care contract is signed. The remaining ninety percent (90%) is due the earlier of: (1) the date the resident initially moves into the Community; or (2) 30 days from the date when the unit is available for occupancy.

The entrance fees vary among the three types of contracts that the Community offers, as described below:

- 90% Refundable Lifecare Plan

This plan allows for a 90% refund of the entrance fee within 30 days following the date the Community executes a residency agreement with another resident but in no event later than one year after termination of this agreement.. The monthly service fee remains consistent throughout all levels of care; including independent living, assisted living, memory care, and skilled nursing.

- Traditional Lifecare Plan

This plan allows for a lower refund of the entrance fee which declines at approximately 2% per month following residency. The monthly service fee remains consistent throughout all levels of care; including independent living, assisted living, memory care, and skilled nursing.

- Choice Care Plan

The Community also offers a plan termed the Choice Care Plan, which allows for a 90% refund of the entrance fee following the date the Community executes a residency agreement with another resident for that unit but no more than one year after termination of this agreement.. The monthly service fee includes 30 days in assisted living/memory care and 60 days in skilled nursing, cumulatively. Then the current private pay rates apply in lieu of the independent monthly service fee.

A. Corporate Governance

Pursuant to the Community's Charter and By-Laws, management of the Community is to be vested in a Board of Directors comprised of at least nine (9) directors.

As of December 31, 2012, the Community's Board of Directors was comprised of the following twelve (12) members:

<u>Name and Residence</u>	<u>Principal Business Affiliation</u>
Judith Berges North Tonawanda, NY	Secretary, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
David J. Blesy Orchard Park, NY	Treasurer, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
Melinda Disare Buffalo, NY	Partner, Jaeckle Fleishmann & Mugel, LLP
David Donner Snyder, NY	Vice President, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
Donald Hayes Orchard Park, NY	Resident, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
George Herbert Orchard Park, NY	President, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
Richard Holmes Orchard Park, NY	Retired
Jeffery Kemp Hamburg, NY	Assistant Vice-President, Trust Administration, M&T Bank

<u>Name and Residence</u>	Principal Business Affiliation
Michael J. Maloney Cheektowaga, NY	Executive Director, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
Daniel Newcomb Perrysburg, NY	Past President, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
Jill Ortner Hamburg, NY	Retired
Donna Tussing Kenmore, NY	Consultant, Parmed Pharmaceuticals

The Board of Directors is required to meet six (6) times each year, of which, one (1) of the meetings is designated as the annual meeting of the Board of Directors. According to the Community's By-Laws, the Board of Directors may hold special meetings as may be called by the President, upon a written request of one-third or more of the Directors, or on the written request of its sole Member, the United Church Home Society, Inc.

A review of the minutes of the meetings of the Board of Directors during the examination period revealed that the meetings were generally well attended, with all of the Directors attending at least one-half of the meetings they were eligible to attend.

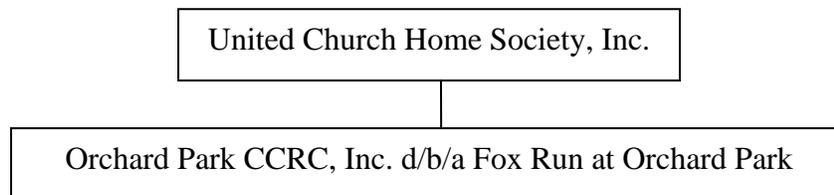
The principal officers of the Community as of December 31, 2012 were as follows:

<u>Name</u>	<u>Title</u>
George Herbert	President
David Donner	Vice President
Michael Maloney	Chief Executive Officer
William Wlodarczyk	Chief Financial Officer
Judy Berges	Secretary
David Blesy	Treasurer

On July 1, 2013, Mr. William Wlodarczyk replaced Mr. Maloney as the Community's Chief Executive Officer. Ms. Jill Hausrath was appointed as the Community's Chief Financial Officer on August 1, 2013.

B. Holding Company System

The Community is a member of the United Church Home Society, Inc. holding company system. The structure of the holding company system as of December 31, 2012 was as follows:



The Community is a corporation, defined under Section 102(a)(5) of the New York Not-For-Profit Corporation Law, organized exclusively for charitable purposes as a Type B corporation. The sole member of the Community is United Church Home Society, Inc. (“UCHS”). The Community is a controlled entity of

UCHS with control conferred through the Community's By-Laws. UCHS must approve any amendments to the Community's By-Laws or Articles of Incorporation.

The New York State Department of Health approved a management agreement, effective August 31, 2000, between the Community and New Life Management, Inc. ("NLM"). Fox Run appointed NLM as manager of the Community to provide general oversight, management and financial services.

On November 29, 2010, the Community issued a 90-day notice of termination of the management agreement between the Community and NLM. The termination of the management agreement was effective February 27, 2011.

Subsequent to February 27, 2011, Fox Run has been managed by employees of the Community.

C. Conflict of Interest Statements

Article IX, Section 1(d) of the Community's By-Laws states:

"Each Director and Officer shall annually complete a "Conflict of Interest Form" as provided by the Sole Member following the Sole Member's Annual Meeting."

The Community's By-laws require that conflict of interest statements be completed and signed by the members of the board of directors and officers annually. A review indicated that there were no conflict of interest statements

signed by the Community's board members and officers for the years 2011 and 2013.

It is recommended that the Community complies with Article IX, Section 1(d) of its By-Laws and obtain signed conflict of interest statements annually from each of the members of its board of directors and its officers.

D. Occupancy Rates

The following reflects the occupancy rates at each year-end, for the period 2010 to 2013, for each of the facilities within the Community:

	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>
Independent Living Units	75.0%	84.0%	88.0%	92.0%
Enriched Housing (includes Adult & Memory Care Unit)	92.3%	90.4%	94.2%	94.1%
Skilled Nursing Facility	90.0%	86.0%	90.0%	87.4%

For the years noted in the above schedule, the Community has steadily increased the occupancy rate for its Independent Living Units ("ILU"). However the Community has not reached the industry benchmark of 95% for its ILU occupancy rate.

It is recommended that the Community continues to strive to achieve the industry benchmark occupancy rate of 95% relative to its independent living units.

E. Information Technology

1. Consultant agreement

The Community utilizes the services of an outside consultant Aurora Consulting (“Aurora”) as its primary Information Technology (“IT”) vendor. Aurora has been providing IT services to Fox Run since 2007. Services include providing guidance and maintenance of Fox Run’s hardware and network systems. The vendor has access to the Community’s sensitive computer and network systems. In addition, the vendor was in charge of implementing and maintaining the Community’s data back-up and restoration.

However, the Community does not have a formal written agreement with Aurora that details the terms of the agreed upon services and related compensation.

It is recommended that the Community maintains a service agreement with its IT vendor (Aurora) that details the terms of the contract, including agreed upon responsibilities, compensation, and other legal obligations between the parties.

2. Internet based data back-up

The Community uses a third party internet-based information technology service provider, MOZY Online Backup Services (“MOZY”), to store and back-up sensitive Community and resident’s personal and medical data. However, the Community did not obtain a Service Organization Controls Report (“SOC1”) or a

Statement on Standards for Attestation Engagements No. 16 report (“SSAE 16”) for this vendor.

It is recommended, as a good business practice, that the Community periodically obtains SOC1 and SSAE 16 reports from its IT service vendor, MOZY, Aurora, and other third party vendors who provide significant services.

### 3. Back-up and restore testing

The Community’s formal, written computer back-up policy for backing-up and restoring data requires that monthly testing be done to verify restoring capabilities. The Community did not maintain evidence that such monthly tests regarding the capabilities of restoring backed-up data, was completed, as indicated in its policy.

It is recommended that the Community complies with its computer back-up policy with regard to saving and restoring data by testing restoration capabilities on a periodic monthly basis. It is also recommended that the Community maintains a log of the results of the testing along with dates of the testing, items tested, and the name of the individual(s) performing the testing.

### 3. FINANCIAL STATEMENTS

The following statements show the assets, liabilities, and actuarial surplus as of December 31, 2012, as contained in the Community's filed annual statement presented on a statutory actuarial basis pursuant to Insurance Regulation No. 140 (11 NYCRR 350), a condensed summary of operations and a reconciliation of the actuarial surplus account for the years under review.

The examiner's review of a sample of transactions did not reveal any differences which materially affected the Community's financial condition as presented in its financial statements contained in the filed annual statement.

<u>Assets</u>	<u>Examination</u>	<u>Community</u>
Cash and investable assets	\$ 12,735,181	\$ 12,735,181
Accounts receivable and prepaid expenses	1,380,809	1,380,809
Land	1,839,000	1,839,000
Land improvements	4,639,337	4,639,337
Building	72,399,710	72,399,710
Furniture, Fixtures and Equipment	6,634,912	6,634,912
Accumulated Depreciation	(11,608,629)	(11,608,629)
Deferred Financing Costs	3,103,665	3,103,665
Deferred Marketing Costs	<u>1,978,791</u>	<u>1,978,791</u>
Total assets	\$ <u>93,102,776</u>	\$ <u>93,102,776</u>

<u>Liabilities</u>	<u>Examination</u>	<u>Community</u>
IDA bonds	\$ 43,237,162	\$ 43,237,162
Actuarial reserve	46,178,035	46,178,035
Deferred development fees	<u>1,233,500</u>	<u>1,233,500</u>
Total liabilities	\$ <u>90,648,697</u>	\$ <u>90,648,697</u>
Total net surplus	\$ <u>2,454,079</u>	\$ <u>2,454,079</u>
Total liabilities and net surplus	\$ <u>93,102,776</u>	\$ <u>93,102,776</u>
Ratio of net surplus to total liabilities	<u>2.7%</u>	<u>2.7%</u>

**Note:** It is noted that the asset values herein are reported on a statutory/actuarial basis. As such, the values differ from the certified financial statements prepared by the Community's certified public accountants.

B. Statement of Revenue, Expenses and Change in Actuarial Surplus

The statement of revenue and expenses is presented on a statutory modified GAAP basis for the three-year examination period, January 1, 2010 through December 31, 2012.

Revenue

Monthly maintenance fees	\$ 19,012,150	
Other revenue from residents	410,296	
Earned entrance fees (net of refunds)	2,915,849	
Patient revenues from nonresidents	15,015,691	
Interest and dividend income	247,767	
Non-operating revenue	<u>136,608</u>	
Total revenue		\$ 37,738,361

Expenses

Interest expense	\$ 8,024,340	
Facility and dining expenses	9,921,255	
Health expenses	9,653,564	
Administration expenses	4,849,296	
Depreciation and amortization charges	8,387,350	
Change in provision for uncollectible accounts	168,000	
Real estate taxes and PILOT	1,314,194	
NYS health facilities assessment	666,303	
Aggregate write-ins for other operating expenses	486,334	
Total expenses		\$ <u>43,470,636</u>
Net (loss)		\$ <u>(5,732,275)</u>

Change in Actuarial Surplus

The Community's actuarial surplus increased \$50,015 during the three-year examination period, January 1, 2010 through December 31, 2012, detailed as follows:

Surplus, per report on examination, as of December 31, 2009			\$ 2,404,064
	<u>Gain in Surplus</u>	<u>Loss in Surplus</u>	
Net loss		\$ 5,732,275	
Statutory adjustment as per examination*	\$ <u>5,782,290</u>	_____	
Net increase in surplus			\$ <u>50,015</u>
Surplus, per report on examination, as of December 31, 2012			\$ <u>2,454,079</u>

\*Note: This adjustment represents the difference between the net income pertaining to the statutory modified GAAP basis of accounting and the actuarial surplus.

#### **4. COMPLIANCE WITH PRIOR REPORT ON EXAMINATION**

The prior report on examination as of December 31, 2009, contained the following five (5) comments and recommendations (page numbers refer to the prior report on examination):

<b><u>ITEM NO.</u></b>	<b><u>PAGE NO.</u></b>
1. <u>Management</u>	
i. It is recommended that the Community comply with Article V, Section 2 of its By-Laws and maintain either nine (9) or eleven (11) Directors on its Board.	7
The Community has complied with this recommendation.	
2.     It is recommended that the Community correctly report in its filed annual statement, only those Board members who are actually on the Board of Directors as of the filing date of the annual statement.	8
The Community has complied with this recommendation.	
3. <u>Occupancy Rates</u>	
It is recommended that the Community continue to strive to increase its occupancy rates in its independent living units, particularly with regard to the "California Neighborhood" patio homes.	11
As noted in this report on examination, although the Community has made significant progress in improving its occupancy rate for its independent living units, including its "California Neighborhood" patio homes, the Community has not reached the industry standard occupancy rate of 95% for its independent living units.	
A similar recommendation is included within this report on examination.	

**ITEM NO.****PAGE NO.**

- .
- Disclosure Statement
4. It is recommended that a copy of the most recent audited financial statements, which includes the balance sheet and income statements for the last two fiscal years, be included in the Community's disclosure statement, as required by Section 4606(10) of the New York Public Health Law. 12

The Community has complied with this recommendation.

Entry Fee Refund

5. It is recommended that the Community ensure that it refund entry fees within thirty days after the unit is resold, but in no event later than one year after the unit is vacated, as required by Section 4609(4) of the New York Public Health Law. 12

The Community has complied with this recommendation.

#### 4. SUMMARY OF COMMENTS AND RECOMMENDATIONS

<u>ITEM</u>	<u>PAGE NO.</u>
A. <u>Conflict of Interest Statements</u>	
It is recommended that the Community complies with Article IX, Section 1(d) of its By-Laws and obtain signed conflict of interest statements annually from each of the members of its board of directors and its officers.	9
B. <u>Occupancy Rates</u>	
It is recommended that the Community continues to strive to achieve the industry benchmark occupancy rate of 95% relative to its independent living units.	10
C. <u>Information Technology</u>	
i. It is recommended that the Community maintains a service agreement with its IT vendor (Aurora) that details the terms of the contract, including agreed upon responsibilities, compensation, and other legal obligations between the parties.	11
ii. It is recommended, as a good business practice, that the Community periodically obtains SOC1 and SSAE 16 reports from the IT service vendor, MOZY, Aurora, and other third party vendor who provides significant services.	11
iii. It is recommended that the Community complies with its computer back-up policy with regard to saving and restoring data by testing restoration capabilities on a periodic monthly basis.	12
iv. It is also recommended that the Community maintains a log of the results of the testing along with dates of the testing, items tested, and the name of the individual(s) performing the testing.	12

Respectfully submitted,

\_\_\_\_\_/S/\_\_\_\_\_

Froilan Estebal  
Senior Insurance Examiner

STATE OF NEW YORK    )  
                                  ) SS.  
                                  )  
COUNTY OF NEW YORK )

FROILAN ESTEBAL, being duly sworn, deposes and says that the foregoing report submitted by him is true to the best of his knowledge and belief.

\_\_\_\_\_/S/\_\_\_\_\_  
Froilan Estebal

Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_ 2015

APPOINTMENT NO. 31067

NEW YORK STATE

**DEPARTMENT OF FINANCIAL SERVICES**

I, BENJAMIN M. LAWSKY, Superintendent of Financial Services of the State of New York, pursuant to the provisions of the Financial Services Law and the Insurance Law, do hereby appoint:

**Froilan Estebal**

as a proper person to examine the affairs of

**Fox Run at Orchard Park**

and to make a report to me in writing of the condition of said

**CCRC**

with such other information as he shall deem requisite.

In Witness Whereof, I have hereunto subscribed my name  
and affixed the official Seal of the Department  
at the City of New York

this 12th day of February, 2014

BENJAMIN M. LAWSKY  
Superintendent of Financial Services

By:



Lisette Johnson  
Bureau Chief  
Health Bureau

