

**REPORT ON EXAMINATION**

**OF**

**ORCHARD PARK CCRC, INC.**

**D/B/A**

**FOX RUN AT ORCHARD PARK**

**AS OF**

**DECEMBER 31, 2009**

**DATE OF REPORT**

**JULY 15, 2011**

**EXAMINER**

**TOMMY KONG**

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STATE OF NEW YORK  
INSURANCE DEPARTMENT  
25 BEAVER STREET  
NEW YORK, NEW YORK 10004

Andrew M. Cuomo  
Governor

James J. Wrynn  
Superintendent

July 15, 2011

Honorable James J. Wrynn  
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 30529, dated June 22, 2010, 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, 2009, 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 Insurance Department.

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

The Community was incorporated on April 20, 2000, began construction in April 2006 and became operational on November 1, 2007. This is the first examination of the Community and covered the three-year period from January 1, 2007 through December 31, 2009. Transactions occurring subsequent to this period were reviewed where deemed appropriate by the examiner.

Representatives of the New York Insurance Department and the New York Department of Health conducted a site survey of the Community’s facility on June 23, 2010, 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, 2009, in accordance with generally accepted accounting principles (GAAP), as modified by the Department pursuant to Department 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, 2009, on a statutory actuarial basis pursuant to Department Regulation No. 140 (11 NYCRR 350).

A review was also made of the following items:

- Community documents
- Compliance with By-Laws
- Occupancy levels
- Financial documents
- Board of Directors' minutes of 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.

## **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 from the New York State Continuing Care Retirement Council on November 1, 2007.

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) assisted living units (including eighteen (18) 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 "The Woods". The Community is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

The Community provides residents with a continuum of services, including: independent living, assisted living, and skilled nursing home care. As a condition precedent to providing these services, the Community enters into a lifecare contract with each prospective resident that sets forth the responsibilities of both parties. For the right to occupy and use the living accommodations and utilize the services of the Community, each resident is required to pay an entrance fee and monthly service fee, which is based on the size and type of living unit and the number of occupants.

The entrance fee is due in two installments. Ten percent (10%) of the entrance fee is due when the lifecare 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 follows:

- 90% Refundable Lifecare Plan

During the first 90 days after the resident pays the entrance fee in full, all amounts collected by the Community are fully refundable if the resident terminates the contract for any reason. After the 90-day period, 90% of the entrance fee will be refundable for the duration of the contract.

- Traditional Lifecare Plan

During the first 90 days after the resident pays the entrance fee in full, all amounts collected by the Community are fully refundable if the resident terminates the contract for any reason. After the 90-day period, the refund will be reduced by 2% for each month or fraction thereafter, as well as a 4% administrative fee and any costs incurred by the Community at the request of the resident that were set forth in writing, until the refund amount reaches zero.

- Choice Care Plan

The Community also offers a plan termed the Choice Care Plan, which allows for a 90% refund of the entrance fee, but is limited to 30 lifetime days in enriched housing and 60 lifetime days in the skilled nursing facility. Days in the skilled nursing facility which are paid under Medicare do not count toward the 60 lifetime days. After exceeding 30 days in enriched housing or 60 days in the skilled nursing facility, the resident will then need to pay the Community's current per diem for services received.

A. Management and Controls

Pursuant to the Community's Charter and By-Laws, management of the Community is to be vested in a Board of Directors comprised of either nine (9) or eleven (11) directors.

As of December 31, 2009, 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	Trustee, United Church Home Society, Inc.
David J. Blesy Orchard Park, NY	Treasurer, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
John Bos Orchard Park, NY	Owner, Bos Business Consultants
Leonard Chase Tonawanda, NY	Vice Chairman & Vice President, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
Casimier Czamara* Cheektowaga, NY	Chief Executive Officer, United Church Home Society, Inc.
Eugene Goerss Tonawanda, NY	Chairman & President, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
William Harrington Orchard Park, NY	Partner, Brown & Kelly, LLP
George Herbert Orchard Park, NY	Secretary, Orchard Park CCRC, Inc. d/b/a Fox Run at Orchard Park
Mary Jane Kelley Orchard Park, NY	Resident
Jeffrey Kemp Hamburg, NY	Assistant VP, Trust Administrator, M&T Bank
Daniel Newcomb Perrysburg, NY	Retired
Reverend Scott Thomas Buffalo, NY	Senior Pastor, Amherst Community Church

Note: \* designates ex-officio board member

Article V, Section 2 of the Community's By-Laws states in part:

*"The Board of Directors shall consist of either nine or eleven Directors."*

As of December 31, 2009, the Board was comprised of twelve (12) Directors.

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.

On December 9, 2010, the Community amended Article V, Section 2 of its By-Laws to remove the reference that, "The Board of Directors shall consist of either nine or eleven Directors." and replaced such wording with "The Board of Directors shall consist of at least nine (9) directors."

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; this meeting is to take place following the annual meeting of the sole member, United Church Home Society, Inc. The Community's By-Laws dictate that the Board of Directors may hold special meetings at the written request of the sole member or may be called by the President on a written request by one-third or more of the Directors.

The Community erroneously reported its Board members as of 2010 in its filed 2009 annual statement. All but two of the Board members in 2010 were also members in 2009.

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.

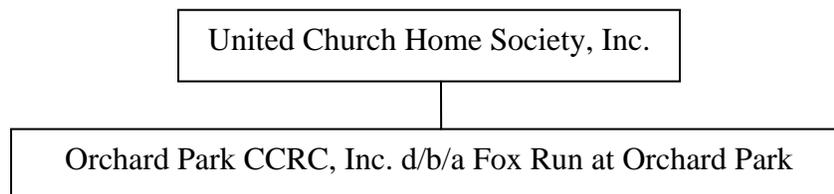
A review of the minutes of the meetings of the Board of Directors during the examination period revealed that the meetings were generally well attended, with all of the Directors attending at least one-half of the meetings they were eligible to attend.

The principal officers of the Community as of December 31, 2009 were as follows:

<u>Name</u>	<u>Title</u>
Eugene Goerss	Chairman & President
Leonard Chase	Vice Chairman & Vice President
George Herbert	Secretary
David J. Blesy	Treasurer

B. Holding Company System

The Community is a member of a holding company system. The structure of the holding company as of December 31, 2009 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 under Section 201 of the New York Not-For-Profit Corporation Law. The sole member of the Community is United Church Home Society, Inc. (“UCHS”). The Community is controlled by UCHS through By-Law requirements. UCHS must approve any amendments to the Community’s By-Laws or Articles of Incorporation.

Based upon a management agreement, approved by the New York State Department of Health, effective August 31, 2000, which was entered into between the Community and New Life Management, Inc. (“NLM”), the Community appointed NLM as manager of the Community to provide general oversight, management and financial services. Under the terms of the management agreement, the Community is required to pay a base quarterly rate of \$62,500, which is adjusted for inflation. The initial term of the agreement is for five years and is automatically renewable in one-year increments, unless terminated with cause by the Community, with 60 days notice. The Community also has the right to terminate the agreement, for any reason, with 90 days notice.

On November 29, 2010, subsequent the examination date, the Community issued a 90-day notice of termination of the management agreement with NLM. The termination of the management agreement was effective February 27, 2011. The Community did not replace NLM. Executive Director Mike Mahoney, an employee of NLM, left NLM and was rehired as Executive Director and is now an employee of the Community.

C. Occupancy Rates

The following reflects the occupancy rates at each year-end, for the period 2007 to 2009, for each of the facilities within the Community:

	<u>2007</u>	<u>2008</u>	<u>2009</u>
Independent Living Units	28.8%	63.0%	67.0%
Enriched Housing (includes Adult & Memory Care Unit)	0.0%	38.0%	72.0%
Skilled Nursing Facility	0.0%	74.0%	88.0%

As noted previously, the Community became operational on November 1, 2007. The independent living occupancy rate for 2007 was 28.8% and increased to 63% in 2008 and further to 67% in 2009. Due to the downturn of the economy in 2009, the Community had difficulty selling its independent living units, particularly the “California Neighborhood” patio homes. The Community began accepting non-lifecare resident admissions to its skilled nursing facility on February 11, 2008, as a way to supplement its income. The Community maintains 5 skilled nursing beds for its lifecare residents and only accepts private pay or Medicaid eligible patients when there are more than 5 skilled nursing beds available. As of December 31, 2009, there were 26 private pay patients and 7 Medicaid eligible patients within the Community’s skilled nursing facility.

The Community began accepting non-lifecare resident admissions to its memory care units in January 2009. The Community maintains 2 memory care beds for its lifecare residents and only accepts private pay patients when there are more than 2 memory care beds available. As of December 31, 2009, there were 4 private payment patients within the Community’s memory care facility.

In 2010, the Department approved a change in the fees of the “California Neighborhood” patio homes. As a result of the change in fees, and an upturn in the local economy, the Community sold 37 additional units, 17 of which were occupied in 2010; 20 are scheduled for occupancy in 2011.

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.

D. Disaster Recovery and Business Continuity Plan

The Community maintains business continuity and disaster recovery plans which provide for the essential maintenance of continuity of services to the Community’s residents in the event of certain occurrences.

E. Disclosure Statement

A review of the Community’s disclosure statement revealed that the Community did not include the most recent audited financial statements in its disclosure statement. Instead, the disclosure statement contained forecasted financial statements that were prepared in 2006.

Section 4606(10) of the New York Public Health Law states in part:

“Prior to the execution of a contract, or before the transfer of any money, other than a refundable priority reservation fee or non-refundable priority reservation agreement application fee, to an operator by or on behalf of a prospective resident, whichever occurs first, the operator shall deliver to the person’s legal representative... an initial disclosure statement which contains the...most recent financial statement of the provider prepared in accordance with generally accepted accounting principles applied on a consistent basis and certified by an independent certified, or public accountant, including a balance sheet as of the end of the provider’s last fiscal year and income statements for the last two fiscal years, or such shorter period of time as the provider has been in operation”...

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.

F. Entry Fee Refund

A sample of three entry fee refunds was reviewed. It was noted that in one instance, the Community took more than 30 days after the unit was resold and occupied to refund the entry fee.

Section 4609(4) of the New York Public Health Law states the following:

“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.”

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.

G. IDA Bonds

On April 1, 2006, the Community entered into two agreements (Company Lease Agreement and Installment Sale Agreement) with the Erie County Industrial Development Agency (“Agency”) for the purpose of obtaining revenue bonds used to finance construction of the Community’s facilities. The Agency took title of the facilities through a lease agreement and simultaneously conveyed title back to the Community through an installment sale of the lease interests. On April 27, 2006, the Agency issued fixed rate revenue and variable rate demand revenue bonds with an aggregate principal amount of \$77,835,000.

The bond issue consisted of two series of bonds: \$44,235,000 in fixed rate demand revenue bonds - series 2006A (Series A Bonds) and \$33,600,000 in variable rate demand revenue bonds - series 2006B (Series B Bonds). The Community was obligated to make lease rental payments to the bond Trustee as the Agency’s assignee, in amounts which correspond to the principal and interest payments on the bonds. The Community was required to make interest-only payments on the Series A Bonds until November 16, 2010, at which time principal payments would commence. The Series A Bonds can be redeemed at 100% of the face value, on or after November 15, 2016.

The Series A Bonds are secured by first mortgage liens on all buildings, improvements and equipment now owned and subsequently acquired by the Community, all unrestricted accounts receivable and a right of set-off against the Community's funds held by the Trustee. The Community is required to make interest-only payments on the outstanding balance of the Series B Bonds until maturity, or until the balance is paid in full. At December 31, 2009, the variable interest rate for the Series B Bonds was 0.5%. The Series B Bonds are not secured by a mortgage or security agreement.

Unlike the Series A Bonds, the Series B Bonds are secured by the Entrance Fee Fund Reserve as collateral. The Series B Bonds have a maturity date of November 15, 2036. However, the Series B Bonds may be redeemed in advance of such maturity date by means of installment purchase payments. Installment purchase payments are funded from entrance fees received from residents of the Community. The Community is required to deposit with the Trustee, within five days of receipt, entrance fees received from individuals that enter into a lifecare contract with the Community. As of June 10, 2011, there was \$3.5 million outstanding relative to the Series B Bonds, which the Community expects to redeem in its entirety by November 30, 2011.

The Trustee is required to first apply payment to refunds due as required under the refund provisions of the lifecare contract for terminated residents; second, fund working capital and operating reserve funds to the maximum amount established under the Indenture of Trust; and third, redeem Series B Bonds. Following the redemption of all the Series B Bonds, remaining entrance fee receipts are to be deposited in the Community's operating account.

In connection with the financing of the Series B Bonds, the Community executed an irrevocable direct pay letter of credit with a financial institution for a maximum amount of \$14,605,708, which expires on April 27, 2012. There was no outstanding amount at December 31, 2009.

The Community was required to pay an annual fee to maintain the letter of credit, which was calculated as a percentage of the maximum amount available; the amount of the Series B Bonds outstanding. The fee for 2009 was \$368,345.

The bond agreement with the financial institution requires the Community to meet certain covenants relating to marketing and occupancy target. As of December 31, 2009, the Community did not meet its marketing targets relative to the sale of independent living units. The agreements also require that the Community maintain a balance of at least \$3.8 million in its operating reserve fund, which the Community was in non-compliance. At year-end 2009 and throughout 2010, into 2011, the Community was only able to maintain approximately \$1 million in its operating reserve fund. The abovementioned two instances of non-compliance resulted in a declaration of an event of default in 2009 by the financial institution. The financial institution has not taken any action other than issuing an official notice of declaration of default, which gives the financial institution the right to call the debt on demand.

### 3. FINANCIAL STATEMENTS

#### A. Balance Sheet

The following shows the assets, liabilities and surplus as determined by this examination as of December 31, 2009. It is the same as the actuarial balance sheet reported by the Community (presented on a statutory actuarial basis pursuant to Department Regulation No. 140 (11 NYCRR 350)):

<u>Assets</u>	<u>Examination</u>	<u>Community</u>
Cash and invested assets	\$ 11,013,009	\$ 11,013,009
Accounts receivable and prepaid expenses	1,209,577	1,209,577
Land	1,426,345	1,426,345
Land improvements	69,102	69,102
Building	67,056,767	67,056,767
Property, plant and equipment – net	2,182,803	2,182,803
Deferred financing costs	3,178,949	3,178,949
Deferred marketing costs	<u>2,728,852</u>	<u>2,728,852</u>
Total assets	\$ <u>88,865,404</u>	\$ <u>88,865,404</u>
<u>Liabilities</u>		
IDA bonds	\$ 58,668,078	\$ 58,668,078
Actuarial reserve	26,559,762	26,559,762
Deferred development fees	<u>1,233,500</u>	<u>1,233,500</u>
Total liabilities	\$ 86,461,340	\$ 86,461,340
Total net surplus	\$ 2,404,064	\$ 2,404,064
Total liabilities and net surplus	\$ <u>88,865,404</u>	\$ <u>88,865,404</u>
Ratio of net surplus to total liabilities	<u>2.8%</u>	<u>2.8%</u>

**Note:** It should be 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, 2007 through December 31, 2009. The Community's actuarial surplus increased \$2,404,064 during the three-year examination period, January 1, 2007 through December 31, 2009, detailed as follows:

Revenue

Monthly maintenance fess	\$ 7,910,719	
Other revenue from residents	231,970	
Earned entrance fees (net of refunds)	1,092,190	
Patient revenues from nonresidents	5,903,102	
Interest and dividend income	1,033,883	
Non-operating revenue	<u>19,881</u>	
Total revenue		\$ 16,191,745

Expenses

Interest expense	\$ 7,516,485	
Facility and dining expenses	6,692,196	
Health expenses	4,369,745	
Administration expenses	3,964,461	
Depreciation and amortization charges	<u>4,792,946</u>	
Total expenses		\$ <u>27,335,833</u>
Net loss		\$ <u>(11,144,088)</u>

Change in Actuarial Surplus

Surplus as of December 31, 2006			\$	0
	<u>Gain in</u>	<u>Loss in</u>		
	<u>Surplus</u>	<u>Surplus</u>		
Net loss		\$ 11,144,088		
Statutory adjustment as per examination	\$ <u>13,548,152</u>	<u>                    </u>		
Net increase in surplus			\$	<u>2,404,064</u>
Surplus per report on examination, as of December 31, 2009			\$	<u>2,404,064</u>

#### 4. SUMMARY OF COMMENTS AND RECOMMENDATIONS

<u>ITEM</u>	<u>PAGE NO.</u>
A. <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
On December 9, 2010, the Community amended Article V, Section 2 of its By-Laws to remove the reference that, “The Board of Directors shall consist of either nine or eleven Directors.” and replaced such wording with “The Board of Directors shall consist of at least nine (9) directors.”	
ii.   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
B. <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
C. <u>Disclosure Statement</u>	
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
D. <u>Entry Fee Refund</u>	
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

Appointment No. 30529

**STATE OF NEW YORK  
INSURANCE DEPARTMENT**

I, James J. Wrynn, Superintendent of Insurance of the State of New York, pursuant to the provisions of the Insurance Law, do hereby appoint:

**Tommy Kong**

as a proper person to examine into the affairs of the

**Orchard Park CCRC, Inc.  
d/b/a Fox Run at Orchard Park**

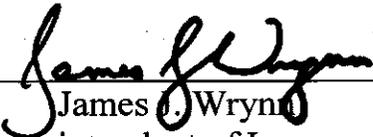
and to make a report to me in writing of the condition of the said

**CCRC**

with such other information as he shall deem requisite.

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

this 22<sup>nd</sup> day of June, 2010

  
\_\_\_\_\_  
James J. Wrynn  
Superintendent of Insurance

