

REPORT ON EXAMINATION

OF

ORCHARD PARK CCRC, INC.

D/B/A

FOX RUN AT ORCHARD PARK

AS OF

DECEMBER 31, 2018

DATE OF REPORT

MARCH 18, 2022

EXAMINER

HUSSEIN AGOUDA, CFE

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Department of Financial Services

KATHY HOCHUL
Governor

ADRIENNE A. HARRIS
Superintendent

March 18, 2022

Honorable Adrienne A. Harris
Superintendent of Financial Services
Albany, New York 12257

Madam:

Pursuant to the requirements of the New York Insurance Law and New York Public Health Law, and acting in accordance with the instructions contained in Appointment Number 32010, dated October 23, 2019, 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, 2018, and respectfully submit the following report thereon.

The examination was conducted at the administrative 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, 2015. This examination covered the three-year period January 1, 2016 through December 31, 2018. 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 October 15, 2019, 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, 2018, 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, 2018, 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
- Board of Trustees' minutes of meetings
- Occupancy levels
- Financial documents

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 (“CCRC”) as defined in Section 4601 of the New York State Public Health Law. The Community received a Certificate of Authority that was issued by the New York State Department of Health and approved by the New York State Continuing Care Retirement Council on November 1, 2007. Fox Run began its operations on November 1, 2007. The Community is a New York State not-for-profit organization and is tax exempt per Section 501(c)(3) of the Internal Revenue Code.

The Community is a not-for-profit organization located on a 54-acre campus in Orchard Park, New York. The Community was formed to build, own and operate a continuing care retirement community, which, as of the examination date, consisted of one hundred eighty (180) independent living units (150 apartment units and 30 patio homes), sixty (60) skilled nursing beds, and fifty-two (52) assisted living suites (including memory care).

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 between the Community and each prospective resident, which sets forth the responsibilities of both parties. Each resident is required to pay both an entrance fee for the right to occupy a unit and a monthly service fee for the right to occupy the living accommodations and utilize the services of the Community. Both 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 a one-time payment based upon the following three factors: 1) the type of apartment or patio home selected, 2) the entrance fee plan chosen, and 3) the number of occupants. The prospective resident pays an initial deposit of ten percent (10%) of the total entrance fee upon execution of the life care agreement. Entrance fee deposits are placed in an

interest-bearing escrow account. The resident pays the balance of the total entrance fee on or prior to the residency date.

The following is a description of the three types of contracts that were available to existing or prospective residents of the Community during the examination period:

(i) Traditional Lifecare Plan

The Traditional Lifecare Plan offers medically necessary assisted living services including memory care and skilled nursing care with no additional increase in the monthly service fee (except for the annual cost of living adjustment). The entrance fee is subject to a declining balance refund provision until the amount reaches zero. The following is a description of the refund provisions under this Plan.

The refund provision provides that if an agreement terminates within the first ninety (90) days immediately following the initial effective residency date for any reason other than rescission, the Community shall issue a refund to the resident within thirty (30) days following the residency date of a new resident occupying a vacated unit but not more than one (1) year after a unit being vacated. Such refund is to consist of the entrance fee paid to the Community by or on behalf of the resident without interest, less: (a) any costs incurred by the Community at the request of the resident, (b) any costs incurred to refurbish the unit for resale; and (c) any unpaid monthly service fees and other charges set forth on the monthly statement of charges.

If this agreement terminates more than ninety (90) days following the residency date for any reason other than rescission, the Community shall issue a refund to the resident within thirty (30) days following the residency date, but no more than one (1) year. Such refund is to be determined by first comparing (a) four percent (4%) administrative fee and a two percent (2%) fee

for each month or fraction thereof from the resident's residency date; (b) any costs incurred by the Community at the request of resident; (c) any costs incurred to repair the living accommodation for damage caused by resident; and (d) any unpaid monthly service fees and other charges set forth on the monthly statement.

(ii) 90% Refundable Lifecare Plan

The 90% Refundable Plan offers medically necessary assisted living including, memory care and skilled nursing care with no increase in the monthly service fee (except for the annual cost of living adjustment). This plan requires a higher entrance fee than the Traditional Lifecare Plan. The entrance fee refund provision of this plan allows for 90% of the entrance fee paid to be refunded to the residents' estates. The Community will provide a refund to a resident within thirty (30) days following the initial effective residency date of a new resident occupying a vacated unit, but not more than one (1) year after a unit being vacated. Such refund shall be determined by the greater of the following: (a) the entrance fee paid less a four percent (4%) administrative fee and a two percent (2%) fee for each month or fraction thereof since the resident's residency date; and (b) ninety percent (90%) of the full entrance fee paid. The greater amount determined will be further reduced by the following: (a) any costs incurred by the Community, at the request of the resident, that are set forth in writing in an addendum to the signed agreement; (b) any costs incurred to repair the living accommodation for damage caused by the resident; and (c) any unpaid monthly service fees and other unpaid charges set forth on the monthly statement.

(iii) Choice Care Plan

The captioned plan offers thirty (30) lifetime days of medically necessary assisted living care, including memory care and sixty (60) lifetime days of medically necessary skilled nursing care without an additional increase in the monthly service fee. The number of days of skilled nursing

care is received and paid for by Medicare and does not count against the sixty (60) medically necessary lifetime days of skilled nursing care provided under this option. After receiving sixty (60) medically necessary lifetime days of skilled nursing care, the resident will pay the then current published daily rate, and any other rates for services received in the skilled nursing facility.

After receiving the thirty (30) lifetime days of medically necessary assisted living care, including memory care, the resident thereafter will pay the current published daily rate then in effect and any other rates for services received in assisted living, including memory care. The Choice Care Plan entrance fee refund provision allows for 90% of the entrance fee paid to be refunded to the residents' estates.

Under the Choice Care Plan, if it terminates within the first ninety (90) days immediately following the initial effective residency date for any reason other than rescission, the Community is to issue a refund to the resident within thirty (30) days following the residency date of a new resident occupying the vacated unit. The Community shall not allow more than one (1) year to expire before refunding the previous resident following the unit being vacated. Such refund shall consist of the entrance fee paid to the Community by or on behalf of the resident without interest, less: (a) any costs incurred by the Community at the request of the resident that are set forth in writing in an addendum to the signed agreement; (b) any costs incurred to refurbish the unit for resale; and (c) any unpaid monthly service fees and other charges set forth on the monthly statement of charges.

For agreements terminating more than ninety (90) days following the initial effective residency date for any reason other than rescission, the refund shall be determined by first determining the greater of the following: (a) the entrance fee paid less a four percent (4%) administrative fee and a two percent (2%) fee for each month or fraction thereof since the resident's

residency date; and (b) ninety percent (90%) of the full entrance fee paid. The resulting greater of the amounts determined in (a) and (b) shall then be reduced by the following amount(s) to arrive at the refund due the resident: (i) any costs incurred by the Community at the request of the resident that were set forth in writing in an addendum to the signed agreement; (ii) any costs incurred to refurbish the unit for resale; and (iii) any unpaid monthly service fees and other charges set forth on the monthly statement of charges.

Additions to the Home Patio Loft Option

Beginning on January 1, 2015, the Community made an adjustment to the entrance fees of its available three Continuing Care Contract options. Such adjustments are required to be filed with DOH, however, the Community failed to file said adjustments. The adjustment to the entrance fees were related to the cost of the Community renovating and enlarging existing loft structures to certain patio homes, which increased the square footage of the units significantly. Additionally, these fees were to be treated in the same manner as the base entrance fee for the patio homes and refundable based on the terms of the selected contract.

It should be noted that the Community did not file with DOH the above-mentioned adjustment to the Community Care Contracts' entrance fees.

A review of the Community's patio home loft option agreement revealed the existence of an additional option for a prospective resident who selects a patio home and chooses to make an addition to that home's loft. Under this option, the resident, upon leaving the Community is reimbursed at 50% of the cost of the addition to the home's loft, no matter which of the three contract Plans is selected. Such option appears to be inconsistent with the 2015 home patio loft addition entrance fees adjustment.

Based upon the examiner's follow up conversation with the Community's relative to the above-mentioned, management responded that given the magnitude and cost involved in upgrading a patio home, the Community required residents to pay for the upgraded project in full at which the resident would be reimbursed at 50% of the project's cost. However, since 2017, Fox Run discontinued the project and no longer offers this option to prospective residents or current residents as the Community noticed that most residents found the option of the loft upgrade / addition to be too expensive.

It is recommended that in the event Fox Run should in the future, decide to revive the additions to the home patio loft option program, that any such addendum to submitted by Fox Run to the Departments of Health and Financial Services for review.

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 ("Board") that comprises at least nine (9) but not more than eleven (11) Directors.

As of December 31, 2018, the Community's Board of Directors was comprised of the following ten (10) members:

<u>Name and Residence</u>	<u>Principal Affiliation</u>
Jon Bos Orchard Park, NY	Retired
Richard Holmes Orchard Park, NY	Retired
Maureen Lehsten Orchard Park, NY	Chief Financial Officer, Hospice & Palliative Care Buffalo
Gretchen Librock North Tonawanda, NY	Retired

<u>Name and Residence</u>	<u>Principal Affiliation</u>
Lewis McCauley Orchard Park, NY	Resident
Mark Moldenhaur, East Aurora, NY	Attorney
Jill Ortner Hamburg, NY	Retired
Benjamin Rand Orchard Park, NY	President, Insyte Consulting
John Sherman Tonawanda, NY	Retired
Ronald Witt Orchard Park, NY	Retired

The Board of Directors is required to meet six (6) times each year, of which, one of the meetings is designated as the annual meeting. According to the Community's By-laws, the Board of Directors may hold special meetings called by the President, and upon a written request of one-third or more of the Directors. A review of the minutes of the Board meetings held 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 in which they were eligible to attend.

The principal officers of the Community as of December 31, 2018, were as follows:

<u>Name</u>	<u>Title</u>
Ronald Witt	President
William Wlodarczyk	Chief Executive Officer
Jill Hausrath	Chief Financial Officer

Investment Policy Statement

Fox Run's Investment Policy Statement ("IPS") sets forth the policies and procedures that guide its Board of Directors in supervising and monitoring the management of Fox Run's investable assets.

Under the “Investment Advisor” section of the IPS, states in part:

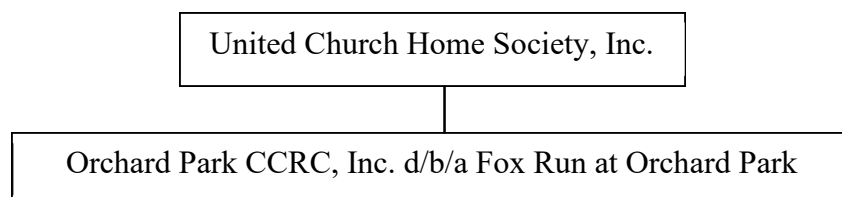
“The advisor’s responsibility includes but not limited to:
Meeting in person, at least annually with the Committee to review and explain the portfolio’s investment results and related information...”

A review of the Community’s Board meeting minutes for the examination period 2016 through 2018 revealed that the investment advisor did not attend any of the meetings that were held during the period. It is incumbent upon the investment advisor to participate and make the necessary presentations on the Community’s investment results to the Community’s management and Directors at the Board meetings, as required by Fox Run’s IPS.

It is recommended that Fox Run comply with its Investment Policy Statement by requiring that its outside investment advisor attend the Board meetings at least once annually to advise and make presentations on the Community’s investment results to Fox Run’s management and its Board.

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, 2018, 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.

C. Third Party Administrators

The Community has contractual agreements with various third-party administrators that provide the Community with multiple services, including information technology with MatrixCare. The examiner’s review of the Arbitration Clause and Governing Law under Sections 16.4 and 16.6 respectively of the MatrixCare Agreement revealed the following non-New York references:

Section 16.4

“The venue for any arbitration or juridical proceeding initiated under this agreement shall be Minneapolis, Minnesota.”

Section 16.6

“This agreement be deemed to have been made in the State of Minnesota and shall be governed by and construed in accordance with its laws as a contract made and performed therein.”

It is recommended that the Community amend Sections 16.4 and 16.6 respectively of its MatrixCare Agreement to include the governing laws and arbitration venue of the State of New York.

D. Occupancy Rates

The following reflect annual year-end the occupancy rates for the examination period January 1, 2016, to December 31, 2018, for each service area within the Community:

<u>Type of Occupancy</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>
Independent Living Units	97%	97%	96%
Enriched Housing (includes Adults & Memory Care Unit)	92%	96%	100%
Skilled Nursing Facility	80%	96%	92%

For the years noted above, the Community's Independent Living Units ("ILU") occupancy rate remained stable and met industry accepted benchmarks. Furthermore, there was a steady increase in the Enriched Housing ("EH") as well as a significant increase in the Skilled Nursing Facility ("SNF") occupancy rates since 2016. In addition, between the December 31, 2018, examination date and the subsequent September 30, 2019, date, the Community experienced a continued increase in its ILU from 96% to 98% with a simultaneous decrease from 100% to 98% in EH and the same unchanged 92% occupancy for SNF.

3. **FINANCIAL STATEMENTS**

The following statements show the assets, liabilities and actuarial surplus, as of December 31, 2018, as contained in the Community's December 31, 2018 filed annual statement presented on an actuarial basis pursuant to Insurance Regulation No. 140 (11 NYCRR 350), and a condensed summary of operations with a reconciliation of the actuarial surplus account for the years under review.

The firm of Freed Maxick CPAs, P.C. was retained by the Community to audit the Community's financial statements of financial position for the calendar years 2016, 2017, and 2018, and the related statements of operations and cash flows for the years then ended.

Freed Maxick CPAs, P.C. concluded that the financial statements present fairly, in all material respects, the financial position of the Community at the respective statement dates. Balances reported in these audited financial statements were reconciled to the corresponding years' annual statements with no discrepancies noted.

A. Balance SheetAssets

Cash and investable assets	\$ 24,440,305
Accounts receivable and prepaid expenses	1,105,338
Land	1,839,000
Land improvements	4,992,361
Building	92,081,380
Construction in progress	5,879,549
Furniture, fixtures and equipment	7,661,181
Accumulated depreciation	(25,720,676)
Deferred financing costs	<u>4,312,010</u>
Total assets	<u>\$116,590,448</u>

Liabilities

IDA bond reserve	43,281,218
Actuarial reserve	<u>72,978,578</u>
Total liabilities	\$116,259,796
Net actuarial surplus	<u>330,652</u>
Total liabilities and net surplus	<u>\$116,590,448</u>

Note: It should be noted that the net asset values herein are reported on an 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, expenses and changes in actuarial surplus is presented on a statutory modified GAAP basis for the three-year examination period, January 1, 2016 through December 31, 2018.

Revenue

Monthly maintenance fees	\$30,165,598	
Other revenue from residents	756,781	
Earned entrance fees (net of refunds)	3,242,375	
Patient revenues from nonresidents	12,428,252	
Interest and dividend income	572,890	
Non-operating revenue	<u>433,887</u>	
Total revenue		\$47,599,783

Expenses

Net change in obligation for future services	\$ (1,377,000)	
Interest expense	5,703,505	
Facility and dining expenses	12,703,916	
Health expenses	12,506,169	
Administration expenses	5,540,459	
Depreciation and amortization charges	8,328,937	
Change in provision for uncollectible Accounts	17,000	
Real estate taxes and PILOT	1,635,521	
NYS health facilities assessment	608,920	
Aggregate write-ins for other operating Expenses	<u>681,602</u>	
Total expenses		<u>46,349,029</u>
Net income		<u>\$ 1,250,754</u>

Change in Actuarial Surplus

The Community's actuarial surplus decreased \$(1,474,828) during the three-year examination period, January 1, 2016 through December 31, 2018, detailed as follows:

	<u>Gains in surplus</u>	<u>Losses in surplus</u>	
Surplus, per report on examination, as of December 31, 2015			\$ 1,805,480
Net income	\$1,250,754		
Statutory adjustment as per examination*	<u>0</u>	<u>\$2,725,582</u>	
Net decrease in surplus			<u>(1,474,828)</u>
Surplus, per report on examination, as of December 31, 2018			\$ <u>330,652</u>

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

4. **SUBSEQUENT EVENTS**

New York State Department of Health Issuing of Certification of Occupancy

The Community was issued a Certificate of Occupancy effective on April 18, 2019, as it completed a \$7,000,000 project that expanded its health center facility approximately 14,000 square feet and added ten (10) additional skilled nursing beds. The expansion also increased the space to the skilled nursing home residents' dining room and therapy area and provided additional private space within the skilled nursing home area.

5. SUMMARY OF COMMENTS AND RECOMMENDATIONS

<u>ITEM</u>		<u>PAGE NO.</u>
A.	<u>Additions to the Home Patio Loft Options</u>	
	It is recommended that in the event Fox Run should in the future, decide to revive the additions to the home patio loft option program, that any such addendum to submitted by Fox Run to the Departments of Health and Financial Services for review.	8
B.	<u>Investment Policy Statement</u>	
	It is recommended that Fox Run comply with its Investment Policy Statement by requiring that its outside investment advisor attend the Board meetings at least once annually to advise and make presentations on the Community's investment results to Fox Run's management and its Board.	10
C.	<u>Third Party Administrators - MatrixCare Agreement</u>	
	It is recommended that the Community amend Sections 16.4 and 16.6 respectively of its MatrixCare Agreement to include the governing laws and arbitration venue of the State of New York.	11

Respectfully submitted

_____/S/_____
Hussein A. Agouda, CFE
Financial Services Examiner

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

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

_____/S/_____
Hussein A. Agouda, CFE

Subscribed and sworn to before me
this ___ day of _____ 2022

NEW YORK STATE

DEPARTMENT OF FINANCIAL SERVICES

I, LINDA A. LACEWELL, 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:

Hussein Agouda

as a proper person to examine the affairs of the

Fox Run at Orchard Park

and to make a report to me in writing of the 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 23rd day of October, 2019

LINDA A. LACEWELL
Superintendent of Financial
Services

By:



Lisette Johnson
Bureau Chief
Health Bureau

