

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 18,821
)
Appeal of)
)

INTRODUCTION

The petitioner appeals the decision by the Department of Prevention, Assistance, Transition, and Health Access (PATH) denying his application for Home and Community Based Services under the Medicaid Waiver program. The issue is whether the petitioner provided sufficient verification as to whether he was making a good faith effort to sell real property he owns in Staten Island, New York for fair market value. In lieu of an oral hearing the parties submitted the case to the Board on the basis of written evidence and legal argument.

FINDINGS OF FACT

The following allegations are taken directly from the petitioner's **Memorandum of Law** and do not appear to be in dispute.

[Petitioner] is a 96 year old man whose primary residence was until recently a historically significant house located at [address]. The house's historical import stems both from its age of 280 years and from the fact that it was at one time the residence of landscape architect Frederick Law Olmsted. It has been designated as a Historic Landmark since 1967.

In 2000, [petitioner] began what he hoped would be a temporary convalescent stay in Vermont with his [daughter]. At the same time, he began to formalize plans to sell the house to New York City, based on conversations with the Parks and Recreation Department of the City of New York ("Parks Dept.") which had been ongoing since 1983. After further discussions in August 1999, and with [petitioner's] commitment to sell the property, New York City, in April of 2001, began the somewhat labyrinthine process of administrative review and public hearings that must be undertaken to approve the City's real estate purchases. This is not a typical purchase and sale process for a residential property since it is a sale to a municipality. However, the municipal purchase process is underway and New York City's Department of Recreation and Parks remains committed to purchasing the property. Completion of the process is expected this year. During the pendency of the sale to the City, and until September of 2003 [petitioner] considered [house] to be his permanent residence and hoped to return there if he was physically able.

Two years after the above sale process began, on March 24, 2003, [petitioner] submitted an application to PATH for Medicaid Long-Term Care Waiver benefits (the "Application"). The Home and Community Based Waiver Program allows an applicant to receive long-term care services in their own home. M200. PATH requested information concerning the status of the sale of the [house] to New York City. Specifically in late September of 2003, [name] of PATH sent a document styled "Verification Reminder (PATH 202V2)" notifying [petitioner] that his application would be denied if he did not provide her with the following information by September 30, 2003:

A purchase and sale agreement from the Staten Island parks and Rec. Office or an agreement of sale from a real estate agent showing that it is up for sale for fair market value. The Staten Island Agreement must show the fair market value as well to retain the property as an excluded resource.

On or about October 14, 2003, PATH denied [petitioner's] application, stating "you have failed to provide information we need." Notice of Decision 10/14/2003. While the Notice of Decision did not specifically reference what information was lacking, presumably it is the items identified by [name].

[Petitioner] now appeals that denial of benefits on the grounds that he timely supplied all necessary information required by M234(1)(d) and M232.13 to establish that the [house] was not a countable asset, and that it was an excluded resource because it is subject to a sale for fair market value. There is no regulatory authority requiring a sale contract. [Petitioner] provided PATH with documents evidencing a sale for fair market value. Such denial was erroneous under the application regulation, since [petitioner's] homestead is an excluded resource under M234(1)(d).

Based on the above, and on the documents submitted as part thereof, the following findings of fact are made.

1. As of the date of his application for Medicaid Waiver benefits, March 24, 2003, the petitioner was a Vermont resident. His principal and exclusive place of residence since 2000 has been Vergennes, Vermont.

2. To date, there has been no contract or other legally binding commitment from the City of New York or any other person or entity to buy the petitioner's property in Staten Island at any price, much less for fair market value.

3. There has been no showing that the purported appraised value of the property in 1999 reflected its fair

market value as of March 2003, when the petitioner applied for Medicaid Waiver benefits in Vermont.

4. The petitioner has not submitted any documentation or other credible evidence that since March 2003 he has made any other effort to sell the property at any price, much less than for fair market value.

ORDER

The Department's decision is affirmed.

REASONS

Inasmuch as the petitioner has not resided at the Staten Island property since 2000 and since at least March 2003 he has claimed to be a Vermont resident, the Staten Island property cannot be considered the petitioner's "home" within the meaning of Medicaid Manual § M232.11. Thus, the issue in the case is whether the property in question is excludable from countable resources under § M232.13, which provides as follows:

The department excludes real property from countable resources as long as owners verify that they are making reasonable efforts to sell it. Reasonable efforts to sell property means taking all necessary steps to sell it for fair market value in the geographic area covered by the media serving the area in which property is located, unless owners are prevented by circumstances beyond their control from taking these steps.

The steps considered necessary to sell the property depend on the method of sale. Owners may choose to list the real property with a real estate agent or undertake to sell it themselves. If owners choose to sell it without an agent, they must take all of the following necessary steps:

- advertise it in at least one of the appropriate local media continuously;
- place a "For Sale" sign on the property continuously, unless prohibited by zoning regulations;
- conduct open houses or otherwise show the property to prospective buyers; and attempt any other appropriate methods of sale.

If any prospective buyer makes a reasonable offer for the property, owners must accept it or demonstrate why it was not a reasonable offer. Any offer at least two-thirds of the most recent estimate of the property's fair market value is considered a reasonable offer.

Fair market value means a certified appraisal or an amount equal to the price of the property on the open market in the locality at the time of the transfer or contract for sale, if earlier.

In this case, all the petitioner has shown to date is that since 1983 he has been engaged in discussions with the New York City Parks and Recreation Department over the potential sale of the property in question. A selling price has never been determined, and there is no indication that either the petitioner or the City of New York is legally bound to follow through with the sale on any terms. At best, the City has stated it will use a 1999 appraisal of the property "for the purposes of *negotiating* (the) sale". However, even

after more than twenty years there is no indication that such negotiations have even begun. Nothing in the record indicates, much less verifies, that the City will actually offer the 1999 appraised value of the property, much less its present fair market value, whatever that might be.

In light of the above, it cannot be concluded that the petitioner has come close to the verification standards articulated in the above regulation. It may well be laudable that he is willing to place an historically significant property in the public domain. However, nothing in the regulations remotely suggests that Medicaid, a government-funded poverty-based medical assistance program, must sanction or support the *negotiation* of such an action by excluding such property from consideration as a financial resource of an otherwise eligible applicant.

When, as here, an applicant for Medicaid has a potential resource in excess of a half million dollars, it is reasonable for, if not incumbent upon, the Department to carefully scrutinize the circumstances under which the applicant claims such a resource to be exempt. Under the regulation (and certainly in keeping with the intent of the program), the burden of proof in the matter is squarely upon the petitioner to verify that he has met the requirements for exclusion. As

noted above, the petitioner has clearly failed to meet that burden. Inasmuch as the Department's decision in this matter is consistent with its regulations the Board is bound by law to affirm. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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