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JUN 30 2011

**HEALTH FACILITIES &  
SERVICES REVIEW BOARD**

June 27, 2011

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daniel.lawler@klgates.com**Via E-Mail and U.S. Mail**Frank Urso  
Deputy Chief Counsel  
Illinois Department of Public Health  
122 South Michigan Avenue  
7th Floor  
Chicago, IL 60605Re: Technical Assistance Documentation and Public Comment Issues;  
Project No. 10-090, Centegra Hospital-Huntley

Dear Mr. Urso:

I represent the applicants Centegra Health System and Centegra Hospital-Huntley in Project No. 10-090, Centegra Hospital-Huntley. This letter is to provide technical assistance documentation relating to our telephone conversation on June 27, 2011 at approximately 9:45 a.m. in which your assistant, Mr. Marudao also participated. I had requested technical assistance with regard to the procedures for public comment under the Open Meetings Act at the June 28, 2011 Review Board meeting and with regard to the status of the request that was submitted by Mr. Joe Ourth, Arnstein & Lehr, to defer Review Board action on new hospital projects, including Project No. 10-090, Centegra Hospital-Huntley. You provided me with information regarding the current status of the procedures for public comment, and also advised that Mr. Ourth's request and my response to that request were received and under consideration. Thank you for providing this technical assistance.

With respect to public comment at Review Board meetings under Section 2.06(g) of the Open Meetings Act (5 ILCS 120/2.06(g)), the applicants in Project No. 10-090 share the concerns and objections raised by the Illinois Hospital Association ("IHA") in the letter of Mark Deaton, Senior Vice President and General Counsel, IHA, to Ms. Courtney Avery, Review Board Administrator, dated June 20, 2011. A copy of that letter is attached. We concur that the Review Board's current rules allowing for public comment comply with the provisions of the Open Meetings Act, and that allowing public comment prior to projects at the same meeting where the projects will be decided impairs the fairness of the proceeding and is highly prejudicial to the applicants. By way of example, at the Review Board's meeting on May 10, 2011, public speakers in opposition to a project (1) made comparisons between the applicant's proposal and the "mass extermination of the chronically sick" in Nazi Germany, (2) claimed to speak on behalf of God and threatened revolution and the judgment of God if the project were approved, and (3) made other intimidating statements directed at Board members such as "we know who you are...." (Transcript of Review Board

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meeting dated May 10, 2011 at pages 21, 33, 44-45.) When statements such as these are made immediately prior to the Review Board's consideration of a project, the undue influence on Review Board members and prejudice to the applicants is patent.

Section 2.06(g) of the Open Meetings Act requires public comment to be "under the rules established and recorded by the public body." (5 ILCS 120/2.06(g).) Public comment on projects pending before the Review Board at the Board meeting at which the project is considered is not in accordance with the established rules of the Review Board and, in fact, violates the Board's existing regulations regarding *ex parte* information. Section 1130.635 of the Review Board's rules specifically limit public comment to that which is "submitted in accordance with the public comment and public hearing provisions of this Part..." (77 Ill. Adm. Code 1130.635(c).) Part 1130 does not allow public comment at Review Board meetings. Moreover, public comment that is not made in accordance with the promulgated rules of the Review Board is *ex parte* information under Section 1130.635(d).

Finally, we believe that allowing public comment at the Review Board meeting is inconsistent with the legislative intent expressed in the Illinois Health Facilities Planning Act (20 ILCS 3960/1 et seq.) and Public Act 96-0031. Section 6(c-5) of the Planning Act allows members of the public to submit written responses to State Agency Reports. Prior to June 30, 2009, the Planning Act allowed these responses to be submitted at least two business days before the meeting of the State Board. However, Public Act 96-0031 amended Section 6(c-5) to require written responses "at least 10 days before the meeting of the State Board." Other written materials could thereafter be submitted only at the Review Board's discretion. Oral public comment at the Review Board meeting on pending projects conflicts with Section 6(c-5) specifically limits public comment to written comments on the State Agency Report submitted 10 days before the State Board meeting, and other additional *written* material submitted at the Review Board's discretion, oral public comment at Review Board meetings on pending projects is inconsistent with Section 6(c-5).

For these reasons, we do not believe that public comment at Review Board meetings on projects to be acted upon by the Review Board on that day complies with the provisions of the Planning Act or the Review Board's promulgated regulations. If public comment is to be allowed, we agree with the IHA's position, expressed in Mr. Deaton's attached email to Ms. Avery dated June 24, 2011 that, in order to mitigate the prejudice to the applicants and the potential of tainting the decision-making process with last minute unsubstantiated information, public comment should be placed at the end of the agenda.

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Thank you for your consideration of these issues.

Very truly yours,

K&L GATES LLP



Daniel J. Lawler  
One of the Attorneys for Centegra Health  
System and Centegra Hospital-Huntley, the  
Applicants in Project 10-090

DJL:dp  
Enclosures

cc: Ms. Courtney Avery, Administrator

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June 20, 2011

Courtney Avery  
Administrator  
Illinois Health Facilities and Services Review Board  
122 S. Michigan Ave. 7<sup>th</sup> Floor  
Chicago, IL 60603

Dear Ms. Avery:

The Illinois Hospital Association respectfully urges the Health Facilities and Services Review Board to discontinue the practice of permitting public comments related to projects at the meeting where the board intends to vote on the projects. This new procedure was just adopted at the last board meeting – without the benefit of the rule-making process.

IHA strongly supports full public participation in the certificate of need process. The existing regulations already provide for that full and complete participation. Creating this additional opportunity for comment immediately prior to a decision will do nothing but taint the process, create substantial delays in approving time-sensitive transactions, and prejudice applicants. And it adds nothing to the public's ability to participate.

The Illinois Open Meetings Act provides that “any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.” 5 ILCS 120/2.06(g). This provision does two things. It honors the right of the public to participate in the governmental process. But just as importantly, it protects another right of the public – the right to fair and balanced decisions by public officials – by requiring public bodies to adopt rules governing public participation. Those two elements – participation guided by rules – go to the heart of democracy. The people are not served by a free-for-all.

The first requirement of Section 2.06(g) – the opportunity for public comment – is clearly satisfied by the board's existing regulations. They allow an incredible degree of public comment and participation in the certificate of need process – both in writing and in person. See: 77 Ill. Adm. Code 1130.910 – 1130.995 “Public Hearing and Comment Procedures.” The openness and reasonableness of the process is demonstrated by the large volume of written comments and the large amount of oral testimony provided by members of the public.

The second requirement of Section 2.06(g) – reasonable ground rules – must also be honored. Allowing public comment on projects at the same meeting where they will be decided imposes a tremendous and unfair burden on both the board and applicants

[www.ihatoday.org](http://www.ihatoday.org)

without adding one iota to the public's ability to participate. It could well taint the board's decision-making and deprive applicants of due process.

Certificate of need applications can be incredibly complex and incredibly contentious. Millions of dollars can be at stake. All of that requires a process that allows the staff and the board to make as rational a decision as possible after carefully weighing all of the information presented – by applicants, opponents, and the public. The existing regulations do that very well.

Permitting last-minute comment allows the introduction of unreliable, unsubstantiated, inflammatory, and prejudicial information – either intentionally or unintentionally – immediately prior to a vote. Hours of thoughtful review and analysis by applicants, board staff, and board members can be undone without any recourse. Such a chaotic process serves no one – least of all the public, which deserves the best thinking and decision-making possible from its government officials. This is exactly why the board's exiting rules require a twenty-day hiatus in comments prior to action on an application.

For these reasons, the Illinois Hospital Association urges the Health Facilities and Services Review Board to abide by its existing regulations regarding public participation in the certificate of need process and not to allow additional public comment on projects at the hearing where they will be acted upon. The existing regulations satisfy the Open Meetings Act and serve the best interest of the public in a fair and thoughtful process.

Sincerely,



Mark D. Deaton  
Senior Vice President & General Counsel

cc Dale Galassie, Chair, Illinois Health Facilities and Services Review Board  
Frank Urso, Illinois Health Facilities and Services Review Board  
Dave Carvalho, Illinois Department of Public Health  
Lynn Patton, Office of the Attorney General  
Paul Gaynor, Office of the Attorney General

> From: Deaton, Mark  
> Sent: Friday, June 24, 2011 12:26 PM  
> To: 'Courtney.Avery@illinois.gov'  
> Cc: 'Gaynor, Paul J.'; 'lpatton@atg.state.il.us'; 'Carvalho, David';  
> 'Frank.Urso@illinois.gov'; Guild, Ann; 'spratt@atg.state.il.us'  
> Subject: Follow Up to IHA Letter  
> Importance: High

>  
> Dear Ms. Avery -

>  
> I am writing to suggest a simple, temporary solution to the issues raised  
> in IHA's June 20 letter (copy attached). At next week's board meeting, I  
> suggest placing the public comment period as the final item on the board's  
> agenda - or at least following all action items.

>  
> The Open Meeting Act's requirement of "an opportunity to address public  
> officials" does not require any particular placement on an agenda. Placing  
> the public comment period at the end of the agenda mitigates the very real  
> potential of tainting the decision-making process with last-minute  
> unsubstantiated information. As my letter indicates, this threatens the  
> deliberative process of the board and exposes the board's decisions to  
> challenge.

>  
> While this may not be the best long-term solution, it does not appear that  
> we will be able to resolve the question prior to Tuesday's meeting. I  
> believe that placing the comment period at the end of the agenda complies  
> with the Open Meetings Act, protects the legitimacy of the board's  
> deliberations, and allows the interested parties additional time to discuss a  
> more permanent procedure.

>  
> Thank you again for the time and attention you are devoting to this issue.  
> Please let me know if you have any questions or need additional information.

>  
> Mark D. Deaton  
> Senior Vice President & General Counsel  
> Illinois Hospital Association  
> 1151 East Warrenville Road  
> P.O. Box 3015  
> Naperville, Illinois 60566  
>  
> 630-276-5466 Telephone & Fax  
> mdeaton@ihastaff.org<mailto:mdeaton@ihastaff.org>

>  
> cc David Carvalho, Illinois Department of Public Health  
> Frank Urso, Illinois Department of Public Health  
> Lynn Patton, Office of the Attorney General  
> Paul Gaynor, Office of the Attorney General  
> Sarah Pratt, Office of the Attorney General  
> Ann Guild, Illinois Hospital Association

>  
>  
> From: Deaton, Mark  
> Sent: Monday, June 20, 2011 4:40 PM  
> To: 'Courtney.Avery@illinois.gov'  
> Cc: Gaynor, Paul J.; 'lpatton@atg.state.il.us'; 'Carvalho, David';  
> 'Frank.Urso@illinois.gov'; Wurth, Maryjane; Peters, Howard; Guild, Ann

> Subject: Letter From IHA to Health Facilities and Services Review Board  
>  
> Dear Ms. Avery -  
>  
> Please find attached a letter from the Illinois Hospital Association  
regarding the issue of public comments on projects before the Health  
Facilities & Services Review Board. I have also sent a copy by regular mail,  
but wanted to share IHA's view as soon as possible given that there is a  
board meeting scheduled for next week.  
>  
> Thank you very much.  
>  
> Mark D. Deaton  
> Senior Vice President & General Counsel  
> Illinois Hospital Association  
> 1151 East Warrenville Road  
> P.O. Box 3015  
> Naperville, Illinois 60566  
>  
> 630-276-5466 Telephone & Fax  
> mdeaton@ihastaff.org<mailto:mdeaton@ihastaff.org>  
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> cc David Carvalho, Illinois Department of Public Health  
> Frank Urso, Illinois Department of Public Health  
> Lynn Patton, Office of the Attorney General  
> Paul Gaynor, Office of the Attorney General  
> Maryjane Wurth, Illinois Hospital Association  
> Howard Peters, Illinois Hospital Association  
> Ann Guild, Illinois Hospital Association  
>  
> <IHA Letter to HFSRB June 20 2011.pdf>

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