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December 4, 2014

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DEC 05 2014

Ms. Courtney Avery
Administrator
Illinois Health Facilities and
Services Review Board
525 West Jefferson Street, 2nd Floor
Springfield, IL 62761

**HEALTH FACILITIES &
SERVICES REVIEW BOARD**

**Re: NorthPointe Health and Wellness Campus Free-Standing Emergency Center,
Roscoe, Illinois Project No. 14-040**

Response to State Board Staff Report

Dear Ms. Avery:

I represent SwedishAmerican Hospital and submit this response to the State Board Staff Report ("Report") for Project No 10-040 pursuant to the Illinois Health Facilities Planning Act ("Planning Act") which allows "written responses regarding the facts set forth in the review or findings of the Board staff..." 20 ILCS 3960/6(c-5). This response relates to the applicant's additional information referenced on page 1 of the Report and appended at pages 19 through 72 of the Report.

The applicant submitted to the State Board over 50 pages of documentation following the Intent-to-Deny issued on November 12, 2014. The Board's staff correctly identifies this submission as "additional information" on the page 1 of its Report. Under the State Board's rules, the applicant's submission of additional information does not allow for State Board action at its next meeting following the Intent to Deny. (See, 77 Ill. Adm. Code 1130.620 addressed below.) **Consequently, Board action at the December 16th meeting would raise an issue as to the legality of such action.** See, *Provena Health v. Ill. Health Facilities Planning Bd.*, 382 Ill. App. 3d 34, 42 (1st Dist. 2008)(Administrative agencies "are bound to follow their own rules as written, without making *ad hoc* exceptions or departures[,]" citing, *Springwood Assocs. v. Ill. Health Facilities Planning Bd.*, 269 Ill. App. 3d 944, 948 (4th Dist. 1995).)

The additional information appended to the staff Report shows that the applicant is keenly aware that Board action at the December 16th meeting is not allowed by the Board's rules. The applicant therefore urges the Board to make an *ad hoc* exception to its rules for the applicant's project and to not apply the Board's existing rules as written.

The applicant's additional information also refers to a legal opinion obtained by the applicant which asserts that a facility licensed outside of Illinois, such as the applicant, may own and control an Illinois Freestanding Emergency Center because it should still be deemed a "hospital" under the Illinois Hospital Licensing Act. The additional information fails to note, however, that the applicant has previously avoided compliance with CON requirements on the ground that it is not an "in-state facility" licensed under the Hospital Licensing Act. The applicant should not now be heard to claim it is a hospital under the Hospital Licensing Act when it previously evaded regulation by the State Board based on the claim that it was *not* such a hospital.

A. State Board Rules Do Not Allow For Board Action at the December Meeting

This project received an Intent to Deny on November 12, 2014. Proceedings subsequent to an Intent to Deny are governed by Section 1130.670 of the Board's rules. That section provides for Board action at the meeting following an Intent to Deny only if the applicant elects to not submit additional information. If the applicant submits additional information, as was the case here, the rule provides for an extension of the review period for up to 60 days following receipt of the information. Such an extension is for staff review of the information, and it would also allow for public comment on the additional information.

Following an Intent to Deny, and applicant has 14 days to notify the State Board "whether the applicant intends to appear before HFSRB and/or submit additional information." (77 Ill. Adm. Code 1130.670(b).) Section 1130.670(c) then provides in pertinent part:

c) Action Following Notice of Intent to Deny

- 2) If the applicant indicates that no additional information will be submitted, HFSRB shall take action on the application at its next meeting.
- 3) If the applicant indicates that additional information will be submitted, the applicant shall be afforded a period of 60 days from the date of issuance of the Intent to Deny to submit the material. Upon receipt of additional information, HFSRB staff shall commence a review and submit its findings to HFSRB in accordance with the provisions of this Subpart. HFSRB staff shall be allowed up to 60 days following the receipt of all material to review the material and issue a supplemental report.

77 Ill. Adm. Code 1130.670(c).

The applicant's action here subverts the above rule in that the applicant has requested State Board action "at its next meeting" as if no additional information were submitted while, at the same time, submitting over 50 pages of additional information.

B. The Applicant Urges the Board to Ignore the Plain Meaning of its Rules

The applicant is well aware that its actions contravene the Board's rules and requests the Board to pretend that the 50 pages of additional information is not additional information. The applicant's November 21, 2014 cover letter with the additional information states: "Please do not consider this clarifying information as 'additional information'[".]]" See Staff Report at page 19.

The Board's rules do not distinguish "clarifying information" from "additional information." To the contrary, information submitted to "clarify the application" is specifically identified as "additional information" under Section 1130.635(a)(1) of the Board's rules.

Moreover, if the State Board were to accept the applicant's invitation to not treat its additional information as additional information, the Board's only option would be to treat it as *ex parte* information under Section 1130.635. That rule recognizes only four categories of submissions to the Board: Additional Information; Public Comment Information; Public Response to Staff Review and Findings, and; *Ex Parte* Information. The applicant's submission is plainly not public comment or a public response to the Report, so if it is not additional information it can only be *ex parte* information.

C. The Applicant's Undue Delay in Filing its Application Does Not Justify *Ad Hoc* Exceptions to the State Board's Rules

The applicant desires to be exempted from the Board's rule governing procedures after an Intent to Deny because "we must appear before the Board in December in that the underlying FSEC legislation sunsets and we require a final Review Board determination by December 31, 2014." (See Staff Report at page 19.) This supposed crisis is entirely of the applicant's own making and in no event justifies the departure from the Board's rules being sought by the applicant.

As shown on page 7 of the applicant's CON application, the applicant filed a letter of intent with the State Board in early December 2013 advising of the applicant's "intent to submit a certificate of need application to establish a freestanding emergency center" in Roscoe. The applicant then inexplicably waited over eight months before submitting its application to the Board on August 22, 2014. The applicant is now pressuring the Board to violate its own rules in order to accommodate the applicant's prior inaction and lack of diligence. Such conduct should not be countenanced.

D. The Applicant Now Claims it is a Hospital Under the Licensing Act While Previously Avoiding CON Review on the Ground it Was Not Such a Hospital

The Illinois Emergency Medical Services System Act requires that an FEC be owned or controlled by a hospital and that the term “hospital” has the meaning “ascribed to that term in the Hospital Licensing Act.” 210 ILCS 50/32.5(a)(1); 210 ILCS 50/3.5. Under the Hospital Licensing Act, the term “hospital” is always used with reference to a hospital licensed by the Illinois Department of Public Health (“IDPH”). Because the applicant is not a hospital located in Illinois and licensed by IDPH, it should not be permitted to own or control an Illinois FEC.

The applicant’s additional information states that the applicant has submitted a legal opinion asserting that “an FSEC does not have to be owned or controlled by an Illinois licensed hospital....” (Staff Report at page 23.) That opinion letter, dated October 24, 2014, stated on page 2 that “the definition of ‘hospital’ in the Hospital Licensing Act also does not contain any reference to location or licensure[.]” According to this opinion then, the applicant, which is located and licensed in Wisconsin, is nevertheless a “hospital” within the meaning of the Hospital Licensing Act and can therefore own and control an FEC. Yet, the applicant has previously avoided State Board jurisdiction on the ground that it was not subject to the Hospital Licensing Act.

The applicant has built a \$35 million medical and health complex in Roscoe without a CON permit. It did not obtain a permit on the basis that it was not an “in-state facility” subject to the State Board’s jurisdiction which extends to facilities “licensed pursuant to the Hospital Licensing Act.” 20 ILCS 3960/3. The project file here contains a submission from the applicant dated October 27, 2014 which includes the attached letter dated December 21, 2005 from the applicant’s law firm to the former Executive Secretary and former Acting General Counsel of the Illinois Health Facilities Planning Board. The firm’s letter refers to the applicant’s “planned health care facility which will be located in Roscoe” and to a determination that:

“[T]he BMH project is not reviewable by the IHFPB. However, this conclusion was a concern for the IHFBP [sic] because it is possible that if this project were undertaken by an ‘in-state facility’ a determination might have been made that the substance of the project is reviewable.”

The only basis for excluding an out-of-state hospital from CON requirements would be that it is not a health care facility within the meaning of the Planning Act because it is not licensed under the Hospital Licensing Act. The Planning Act regulates capital expenditures made “by or on behalf of a health care facility” which facilities are defined to include hospitals “licensed pursuant to the Hospital Licensing Act.” 20 ILCS 3960/3. Consequently, because the applicant was not a hospital under the Hospital Licensing Act, the position was taken that the Planning Board had no jurisdiction over its capital expenditures in Illinois.

The applicant should not now be deemed a "hospital" within the meaning of the Hospital Licensing Act when it has previously avoided State Board jurisdiction on the ground that it was not a hospital under the Hospital Licensing Act.

It should be noted that while the applicant's submission dated October 27, 2014 claims that the applicant "executed an Agreement with the then State Board regarding the [Roscoe] project," in fact, there is no such agreement, executed or otherwise. When the matter was brought to the Planning Board's attention at a meeting on January 23, 2006, the Planning Board's Chair specifically requested whether Board action was sought, to which the former Acting General Counsel responded, "Don't need a vote, a motion or anything." (See attached excerpt from Transcript of Illinois Health Facilities Planning Board Meeting on January 26, 2006, Page 249, lines 21-24.) Whatever "determination" was made with respect to the applicant's \$35 million Roscoe complex was not a determination attributable to the State Board.

To conclude, SwedishAmerican Hospital respectfully submits that the application in Project No. 14-040 is not properly before the State Board and should not be acted upon by the State Board for the reasons that (1) the project is not properly before the Board in accordance with its procedural rules following an Intent to Deny, and (2) the proposed FEC will not be owned or controlled by a hospital licensed in the State of Illinois. If the State Board were to act on the application, SwedishAmerican respectfully submits that it should be denied as non-compliant with the State Board's regulations as set forth in the State Board Staff Report.

Sincerely,

BARNES & THORNBURG LLP



Daniel J. Lawler

DJL:dp

Attachments

HALL,
RENDER, KILLIAN,
NEATH & LYMAN

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Professional Corporation

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Paul W. Seidenstricker
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December 21, 2005

Mr. Jeffrey Mark
Executive Director
Illinois Department of Public Health
Illinois Health Facilities Planning Board
James R. Thompson Center
Suite 6-600
100 West Randolph Street
Chicago, IL 60601-3292

Mark J. Silberman, Esq.
Deputy Chief Counsel
Illinois Department of Public Health
Acting General Counsel
Illinois Health Facilities Planning Board
James R. Thompson Center
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100 West Randolph Street
Chicago, IL 60601-3292

Re: Beloit Memorial Hospital

Dear Jeff and Mark:

This letter summarizes the agreements and understandings between Beloit Memorial Hospital ("BMH") and the Illinois Health Facilities Planning Board ("IHFPB") with regard to BMH's planned health care facility which will be located in Roscoe, Illinois. This letter is a follow up to our October 13, 2005 memorandum to you. As you are aware, BMH originally contacted Jeff Mark to ask for technical advice as to whether or not its planned project was subject to the Illinois Certificate of Need law. During the course of those early discussions, Jeff determined that it was appropriate to involve Mark in providing that guidance to BMH.

Ultimately, Jeff and Mark determined that the BMH project is not reviewable by the IHFPB. However, this conclusion was a concern for the IHFBP because it is possible that if this project were undertaken by an "in-state facility" a determination might have been made that the substance of the project is reviewable. In addition, there was a concern that, after the initial project is completed, and with relatively minor capital expenditures, BMH could add, or convert, to an otherwise reviewable facility in the near term and avoid review. *

In response to those concerns, the following understandings and agreements were reached.

1. BMH has, at this time, no plans for an ambulatory surgery treatment center, a hospital, a nursing home or other reviewable facility.

Mr. Jeffrey Mark
Mr. Mark J. Silberman
Page 2 of 3
December 21, 2005

2. However, if a need for a health care service that is provided in one of those reviewable facilities were to develop or is shown to exist, BMH may consider providing that service and, thus, might want to build the necessary facility.

3. BMH committed to the IHFPB that, if it decides to build or convert any existing facility in Illinois to, a reviewable facility, within three years, it would aggregate the costs of that project with the costs of the current project. The result of this commitment is that, if within three years, BMH ends up converting to, or building, an otherwise reviewable facility it will have exceeded the dollar thresholds thus subjecting the new facility to review by the IHFPB.

4. BMH's commitment is for a three-year period of time beginning with commencement of substantial operations at the Roscoe location. For purposes of specifying that date, we recommend that the three years run from the day the assisted living facility is available for occupancy by residents.

5. Both of you have concluded that the IHFPB does not have jurisdiction over BMH in regard to the current project. In addition, you concluded that BMH's commitment protects the citizenry of Illinois and the responsibilities of IHFPB, in that BMH will not be able to piecemeal its construction projects and avoid review of an otherwise reviewable facility.

We ask that one or both of you sign this letter in the space provided below and return a copy to us indicating your agreement with this arrangement. However, if you wish, you may respond with your own letter indicating your agreement with the information contained in this letter.

Thank you for your assistance in this matter and we appreciate your working with us on our technical assistance request.

Very truly yours,

HALL, RENDER, KILLIAN, HEATH & LYMAN, P.C.



Paul W. Seidenstricker

PWS:cab

DRAFT

ILLINOIS HEALTH FACILITIES PLANNING BOARD

525 West Jefferson, 2nd Floor

Springfield, Illinois 62761

(217)782-3516

Meeting held on January 23rd, 2006, at The
Springfield Hilton, 700 East Adams, Lincoln Room,
Springfield, Illinois, scheduled for the hour of 8:00
o'clock A.M.

ORIGINAL

Christina J. Riebeling, CSR, CCR

GOLEMBECK REPORTING SERVICE

Connie S. Golembeck, Owner

(217) 523-8244

(217) 632-8244

1 that?

2 BOARD MEMBER: Yes, I make that motion.

3 BOARD MEMBER: Second.

4 SUSANA LOPATKA: Call the role.

5 JEFFREY MARK: Ms. Lopatka?

6 SUSANA LOPATKA: Yes.

7 JEFFREY MARK: Ms. Avery?

8 COURTNEY AVERY: Yes.

9 JEFFREY MARK: Mr. Verdu?

10 EUGENE VERDU: Yes.

11 JEFFREY MARK: Dr. Winters?

12 DR. RONALD WINTERS: Yes.

13 JEFFREY MARK: Motion carries.

14 Mr. Silberman, would you like to
15 discuss Beloit Hospital?

16 MARK SILBERMAN: This is just a very brief
17 thing to advise the Board. As counsel for the Board,
18 Mr. Urso and I and Mr. Mark were contacted by an out
19 of state health care facility that was seeking
20 technical assistance to verify that a proposed project
21 they had did not fall in the purview of the Illinois
22 Health Facilities Planning Board. Based on the
23 project that they had proposed, it in fact did not.
24 During the discussions of this, we came up with a

1 potential way that in the future it could be changed
2 that would come under the purview of the Board and
3 effectively it could have been trying to subvert our
4 rules. In all of our discussions, it was made very
5 clear that that was not at all the case, that this
6 facility was going out of its way to ensure that they
7 were complying with the rules. So what the facility
8 volunteered to do and has in fact done was sent us a
9 letter to verify that the course of action we
10 considered as the only potential problem is not in
11 their plan of action, and to agree to bring themselves
12 under the jurisdiction of the Board if ever that
13 did -- or if during a certain period of time that ever
14 became their plan. All we wanted to do was advise the
15 Board of that and have Mr. Mark send them the letter
16 acknowledging the receipt of that, and it will be
17 filed away with our thanks. So it's sort of a
18 nonissue, but all of our business must be conducted in
19 open meeting, and we wanted to address that during the
20 course of this meeting.

21 SUSANA LOPATKA: Thank you. We don't have
22 actually to vote.

23 MARK SILBERMAN: Don't need a vote, a motion
24 or anything. Just sort of an update.

} *

1 SUSANA LOPATKA: Thank you.

2 JEFFREY MARK: If I may, Madam Chair, I
3 would like to take this opportunity to introduce to
4 the Board some members of our staff. Actually an old
5 member of our staff, Julie Peart, whom some of you may
6 know. Julie was promoted as our Administrative
7 Assistant 1 in Springfield. She's taking Kathy Tibbs'
8 place. Many of you may know Kathy. And we have two
9 new members, we have Bonnie and April, and please tell
10 me your last names.

11 UNKNOWN SPEAKER: Hills --

12 JEFFREY MARK: Hills?

13 UNKNOWN SPEAKER: -- and Godsil.

14 JEFFREY MARK: And both of these ladies will
15 be assisting us in our Springfield office.

16 EUGENE VERDU: Very good.

17 JEFFREY MARK: A couple of other
18 announcements to the Board. Some of this was touched
19 upon earlier. The 2004 long-term care questionnaires,
20 which result in profiles of the individual surveys,
21 that report, I believe, has been published. It is
22 complete, and I believe it has been published on their
23 website. Does anyone know for certain? If it hasn't
24 been published, it will be published momentarily. The