

**NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF FACILITY SERVICES
RALEIGH, NORTH CAROLINA**

IN RE: REQUEST FOR DECLARATORY)
RULING BY HOSPICE OF WAKE) **DECLARATORY RULING**
COUNTY, INC.)
(Hospice Inpatient Facility Application)

I, Robert J. Fitzgerald, Director of the Division of Facility Services (the “Department”), hereby issue this declaratory ruling pursuant to N.C.G.S. § 150B-4 and 10A NCAC 14A .0103, and the authority delegated to me by the Secretary of the Department of Health and Human Services. Hospice of Wake County, Inc. (“Hospice”) has filed a Declaratory Ruling Request (the “request”) asking the Department to issue a ruling as to the applicability of Chapter 131E, Article 9 of the North Carolina General Statutes and of the Department’s rules to the facts described below.

For the reasons given below, I conclude that Hospice’s Certificate of Need (“CON”) application to develop a combination inpatient/residential facility with eight hospice inpatient beds and six hospice residential beds, was not timely filed to be included in the scheduled review period beginning December 1, 2005.

This ruling is binding on the Department and the person requesting it if the material facts stated in the request are accurate and no material facts have been omitted from the request. The ruling applies only to this request. Except as provided by N.C. Gen. Stat. §150B-4, the Department reserves the right to change the conclusions which are contained in this ruling. Gary S. Qualls of Kennedy Covington Lobdell & Hickman, LLP, counsel for Hospice, has requested this ruling on behalf of Hospice and has provided the statement of facts upon which this ruling is based. The *material* facts as provided by counsel for Hospice are set out below.

STATEMENT OF FACTS

At approximately 5:00 p.m., on November 15, 2005, Emily Cromer, of Health Planning Source (“HPS”) left HPS’s office in Durham (just off of I-40) to hand-deliver Hospice’s application to the CON Section. Due to a short light cycle and a long line of cars turning left off of Quadrangle Drive onto Highway 54, she had to wait through three light cycles before being able to turn left onto Highway 54. Ms. Cromer merged onto I-40 East from the Highway 54 ramp where traffic was heavy but moving. Just before the I-40 Miami Boulevard Exit, traffic slowed in all lanes to 30 miles per hour up to the I-540 exit. Traffic between the I-540 exit and the Harrison Avenue Exit (I-40 Exit 287) varied, preventing Ms. Cromer from exceeding 45 miles per hour at times. At the Harrison Avenue Exit, traffic came to complete stop in all lanes and increased to a “stop and roll” situation until I-40 Exit 293, where the far right lane opened up, and Ms. Cromer was able to drive at the speed limit for the remaining four miles to I-40 Exit 297, the Lake Wheeler Road Exit.

According to Lieutenant Babb of the North Carolina Highway Patrol, in Field Communications, there was an automobile accident reported on I-40 at the Harrison Road Exit (I-40 Exit 287) at 5:03 p.m., on November 15.

Around 5:27 p.m., Ms. Cromer, called on her cellular phone and spoke with Cooper Linton, a Hospice employee, who was in the CON Section’s offices. Ms. Cromer informed Mr. Linton that she was in route to hand-deliver the remaining portions of the Hospice Application which Mr. Linton did not already have in his possession.

At 5:28 p.m., Ms. Cromer called Craig Smith, CON Section Assistant Chief, to inform him of the traffic problem, and that she would be arriving at the CON Section

offices shortly. Ms. Cromer thus informed Mr. Smith that she would likely arrive at the CON Section's offices at about 5:35. Mr. Smith responded that under no circumstances would he wait for Ms. Cromer to arrive and said that he and CON Section Chief Lee Hoffman were "leaving in about one minute." Ms. Cromer repeatedly asked Mr. Smith to stay and accept the remaining application portions, but Mr. Smith responded "I'm serious, Emily, we are leaving in one minute, there is nothing I can do." At that point Mr. Smith abruptly ended the call. At this point, Mr. Linton delivered to the CON Section portions of the Hospice Application (including the certification page, the application fee check, and the funding letters).

Hospice's requests further contends that Ms. Cromer immediately called HPS President Dawn Carter, who then tried to call Mr. Smith to further discuss the filing logistics, but no one answered the CON Section's phone line in response to Ms. Carter's call. At 5:30 p.m., Mr. Linton contacted Ms. Cromer on her cell phone to inform her that Craig Smith and Lee Hoffman, had left the building and the front door was locked to the Council Building at 701 Barbour Drive (which houses the CON Section's offices). Mr. Linton also indicated that he was standing in the CON Section's offices just before 5:30 and Mr. Linton witnessed Ms. Hoffman instruct Mr. Smith not to answer the phone.

Ms. Cromer arrived at the CON Section offices at 5:36 p.m. At 5:40, someone exited the Council Building and let Ms. Cromer into the Council Building. At that time, there was no one in the CON Section's offices to accept the Hospice Application.

ANALYSIS

In its request, Hospice is asking that it be found to have materially complied with 10A NCAC 14C .0203 when it purportedly filed its application to develop a combination

inpatient/residential facility with eight hospice inpatient beds and six hospice residential beds.

10A NCAC 14C .0203 provides:

- (a) An application shall not be reviewed by the agency until it is filed in accordance with this Rule.
- (b) An original and a copy of the application shall be received by the agency no later than 5:30 p.m. on the 15th day of the month preceding the scheduled review period. . . . An application shall not be included in a scheduled review if it is not received by the agency by this deadline. . . .

10A NCAC 14C .0203(a) and (b).

10A NCAC 14C .0102 provides that “As used in this Subchapter [14C], the agency is the Certificate of Need Section in the Division of Facility Services, North Carolina Department of Health and Human Services. . . .” Similarly the State Medical Facilities Plan (“SMFP”) mirrors the language of 10A NCAC 14C .0203 in stating,

In order to give the DHHS sufficient time to provide public notice of review and public notice of public hearings as required by G.S. 131E-185, the deadline for filing certificate of need applications is 5:30 p.m. on the 15th day of the month preceding the ‘CON Beginning Review Date.’ . . . *The filing deadline is absolute and applications received after the deadline shall not be reviewed in that review period.* Applicants are strongly encouraged to complete all materials at least one day prior to the filing deadline and to submit material early on the ‘Certificate of Need Application Due Date.’

2005 SMFP, p. 13 (emphasis added.)

As stated in the SMFP, the filing deadline is absolute. I conclude that Hospice’s application is untimely filed. Hospice’s CON application was required to be filed by 5:30 on November 15th. The rule requires the application to be received by *the agency* by 5:30 p.m. By rule, “agency” is expressly defined as the CON Section. Hospice’s failure to deliver the application to the CON Section on or before 5:30 p.m. on November 15th constitutes the untimely filing of its CON application.

Hospice cannot show that the purported filing of its application materially complied with 10A NCAC 14C .0203. Hospice's explanation for the untimely filing of its application is that Ms. Comer left the HPS office in a reasonable time in which to arrive at the CON Section by 5:30, but encountered unexpected traffic. According to Hospice's request, Ms. Comer left Durham at 5:00, which I take administrative notice as "rush hour" and had thirty minutes to get to the CON Section which is located on the southwest side of Raleigh. I merely note that neither heavy traffic nor traffic accidents are "unexpected" in the Triangle area. Taking Hospice's representations as true, I see no basis upon which I can find that Hospice has materially complied with 10A NCAC 14C .0203. Rather, the untimely filing of Hospice's application is simply due to Hospice's own actions.

Hospice's reliance on a number of declaratory rulings previously issued by the Department is not persuasive. With the exception of the April 8, 2005 declaratory ruling issued to United Home Service, Inc., all other declaratory rulings cited by Hospice were issued prior to the adoption of the Department's policy in 2000 that the filing deadlines for CON applications is absolute.. *See* 2000 SMFP, p. 13; *cf.* 1999 SMFP, p. 12.

The United Home Service, Inc. ("United") ruling which I issued most recently, is not analogous to the current situation. That ruling was not based on courier problems as represented in Hospice's request, but on representations by an employee of the CON Section that United's application had been received, when in fact it had not. Reliance on the employee's statements caused United to terminate efforts to locate the missing application. For that reason I found United to have materially complied with 10A NCAC 14C .0203.

Moreover, the agency cannot waive a requirement set by administrative rule unless the agency promulgates a rule which establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement. N.C. Gen. Stat. § 150B-19(6). The agency has not promulgated such a rule and I, nor any other employee of the Department, have authority to waive or modify the requirements of 10A NCAC 14C .0203.

CONCLUSION

For the foregoing reasons, I conclude Hospice's Certificate of Need ("CON") application to develop a combination inpatient/residential facility with eight hospice inpatient beds and six hospice residential beds, cannot be reviewed by the CON Section in the review period to commence on December 1, 2005, because the application was not timely filed pursuant to 10A NCAC 14C .0203.

This the ____ day of November, 2005.

Robert J. Fitzgerald, Director
Division of Facility Services

