

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY NATIVE ANGELS) DECLARATORY RULING
HOME CARE AGENCY, INC.)**

I, Robert J. Fitzgerald, Director of the Division of Facility Services (the “Department”), hereby issue this declaratory ruling to Native Angels Home Care Agency, Inc. (“Native Angels”) pursuant to N.C.G.S. § 150B-4, 10A NCAC 14A.0108, and the authority delegated to me by the Secretary of the North Carolina Department of Health and Human Services. Native Angels has filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a ruling as to the applicability of N.C.G.S. Chapter 131E, Article 9 to the facts described below. Specifically, Native Angels requests a ruling that it is entitled to have licenses issued for additional hospice offices of its Robeson County hospice home care program in Bladen, Columbus, Cumberland and Scotland Counties. For the reasons given below, I conclude that Native Angels is not entitled to have such licenses issued without first obtaining a certificate of need (“CON”) pursuant to N.C.G.S. § 131E-178(a).

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.G.S. § 150B-4, the Department reserves the right to change the conclusions which are contained in this ruling. Renee J. Montgomery and Susan L. Dunathan of Parker Poe Adams & Bernstein have requested this ruling on behalf of Native Angels and has provided the statement of facts upon which this ruling is based. Susan L. Dunathan provided additional facts upon which this ruling is based in

response to a question from counsel for the Department. The material facts as provided by counsel for Native Angels are set out below.

STATEMENT OF THE FACTS

Native Angels is a hospice home care agency located in Robeson County, North Carolina. In December, 2004, Native Angels began providing hospice services to residents of Robeson and surrounding counties pursuant to a CON issued in July, 2004.

In August, 2005, the General Assembly amended N.C.G.S. § 131E-176(16)(o) to include additional offices of an existing hospice program to the definition of “new institutional health service.” Native Angels states that prior to the amendment, an existing hospice program could open an additional office in a contiguous county, in which it currently provided services to patients, without first obtaining a CON. As amended, N.C.G.S. § 131E-176(16)(o) includes in the definition of “new institutional health service:”

The opening of an additional office by an existing home health agency **or hospice** within its service area as defined by rules adopted by the Department; or the opening of any office by an existing home health agency **or hospice** outside its service area as defined by rules adopted by the Department.

(Emphasis added.)

The amended law applied to hospices and hospice offices effective December 31, 2005. I note the actual wording of S.L. 2005-325, s. 7: “G.S. 131E-176 , as amended by Section 1 of this act, becomes effective for hospices and hospice offices December 31, 2005. The remainder of this act is effective when it becomes law.”

By letters dated August 21, 2005, Native Angels made “no review” requests to the CON Section of the Division of Facility Services, asking for a determination that Native Angels did not require CONs to open branch offices of its hospice home care program in Bladen, Columbus, Cumberland, and Scotland counties. By letters dated September 21, 2005, the CON Section

responded that a CON was not required, at that time, to open the proposed hospice branch offices. The letters each stated:

Based on the CON law **in effect on the date of this letter**, the proposal described in your correspondence is not governed by, and therefore, does not currently require a certificate of need. However, please note that if the CON law is subsequently amended such that the above referenced proposal would require a certificate of need, this determination does not authorize you to proceed to develop the above referenced proposal when the new law becomes effective.

(Emphasis in original.)

The Request represents that Native Angels then leased office space in the four counties for which it sought no review determination. The Request also represents that on December 30, 2005, Native Angels submitted to the CON Section copies of the no review letters, copies of the lease for each office, and a licensure application for each office. Exhibit C to the Request is a copy of a letter dated December 30, 2005 from Bobbie J. Ghaffar, Administrator, Native Angels to Andrea C. Phillips of the CON Section. Native Angels represents that the material was mistakenly sent to Ms. Phillips of the CON Section rather than to the Licensure and Certification Section of the Division of Facility Services.

Two of the lease agreements, those for Bladen and Columbus counties, bear a signature date of December 30, 2005. The Columbus County lease is effective December 31, 2005. The Scotland County lease is dated July 16, 2003. The Cumberland County lease is dated December 1, 2005. The four license applications are all dated December 30, 2005.

After receipt of the Request, counsel for the Department inquired of counsel for Native Angels how the materials were sent to the Department and whether Native Angels had any documentation showing delivery. Counsel for Native Angels replied by email:

The December 30 letter, the no review determinations and hospice license applications were sent by regular U.S. Mail to Andrea Phillips. Native Angels

does not have a return receipt or other documentation showing who at DHHS might have received or signed for the documentation.

I am advised by Department staff that the Department has no record of receiving the material referred to in the Request and has not found any individual who received it. The Request states that Native Angels contacted Ms. Phillips in March 2006, and that Ms. Phillips then acknowledged receiving the material and not forwarding it to the Licensure and Certification Section. However, I am advised that Ms. Phillips did not receive the material and she did not tell Native Angels that she had received it.

ANALYSIS

With certain exceptions not applicable here, no person shall offer or develop a new institutional health service without first obtaining a certificate of need. N.C.G.S. § 131E-178(a). As noted above, effective December 31, 2005, the definition of “new institutional health service” included the opening of an additional office by an existing hospice within its service area, or the opening of any office by an existing hospice outside its service area. N.C.G.S. § 131E-176(16)o.

Native Angels had not opened any of the additional offices it seeks prior to December 31, 2005. Native Angels claims that it had entered into leases for the hospice branch offices, two of which were signed on December 30 and one on July 16, 2003, and had mailed license applications by regular U.S. Mail on December 30, 2005. This demonstrates that the proposed facilities were not licensed, and therefore were not open, before December 31. Indeed, the applications themselves could not have reached the Department before December 31. Moreover, because December 30 was a Friday and Monday, January 2, 2006 was the New Year’s holiday, the license applications could not have reached the Department until January 3, 2006 at the earliest.

N.C.G.S. § 131E-203(a) provides:

. . . no person or other entity shall operate or represent himself or itself to the public as operating a hospice . . . or offer or represent himself or itself to the public as offering hospice services without obtaining a license from the Department

Native Angels, therefore, could not lawfully have “opened” an additional hospice office prior to December 31 because it did not have a license for an additional hospice office. The license applications allegedly mailed on December 30, 2005, could not have arrived at the Department prior to December 31. On December 31, and thereafter, Native Angels required a CON to open an additional hospice office.

Native Angels’ argument about having sent the applications to the wrong address is not material to this Ruling because its own statement of the facts, as clarified by counsel’s response to the method of delivery, shows that the applications could not have arrived at the Department before December 31, 2005. I note, in addition, that there is a factual question of whether the applications ever arrived. Whether they did or not, they could not have arrived prior to the effective date of the amended CON law.

Native Angels argues that it has a vested right in operating the additional hospice offices because of the no review letters, contending that it entered into leases in good faith reliance on the letters. This argument fails for several reasons. First, one of the leases bears a date of 2003, and it clearly could not have been entered into in reliance on a letter in September 2005. Two of the other leases bore dates of December 30, 2005. The timing suggests that rather than having acted in good faith reliance on the law, Native Angels was hastily attempting to evade the effect of a change in law that had been enacted for more than four months. In any event, the letters of September 21, 2005 from the CON Section specifically cautioned that they did not authorize

proceeding to develop the referenced project when an amendment to the CON law became effective. Native Angels has not shown that it had vested rights in the additional hospice offices.

I reach no conclusion as to Native Angels' argument concerning the need for the additional offices that it seeks, since that is not material to the issue posed here.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true except as noted, I conclude that Native Angels was not entitled to licensure of additional hospice offices prior to December 31, 2005 by having mailed applications on December 30. The additional hospice offices proposed by Native Angels, therefore, are subject to the requirements of N.C.G.S. § 131E-178(a). I deny Native Angels' Request for Declaratory Ruling.

This ____ day of _____, 2006.

Robert J. Fitzgerald, Director
Division of Facility Services
N.C. Department of Health and Human Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Declaratory Ruling has been served upon the nonagency party by certified mail, return receipt requested, by depositing the copy in an official depository of the United States postal service in a first class, postage prepaid envelope addressed as follows:

CERTIFIED MAIL

Ms. Renee J. Montgomery
Ms. Susan L. Dunathan
Parker Poe Adams & Bernstein
Wachovia Capitol Center
150 Fayetteville Street Mall, Suite 1400
Post Office Box 389
Raleigh, NC 27602

This 10th day of July, 2006.

Jeff Horton
Chief Operating Officer