

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY CORINTHIAN, LLC) DECLARATORY RULING
)**

I, Jeff Horton, as Acting Director of the Division of Health Service Regulation, North Carolina Department of Health and Human Services (“Department” or “Agency”), do hereby issue this Declaratory Ruling pursuant to North Carolina General Statute § 150B-4 and 10A NCAC 14A .0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

Corinthian, LLC (“Corinthian”) has requested a declaratory ruling allowing for the development of an additional 22 beds at the facility known as Corinthian Place and bearing license number HAL-010-006 (hereinafter, the “Facility”) on the grounds development of the additional beds do not constitute the addition of new beds and may proceed without a Certificate of Need. This ruling will be binding upon the Department and the entity requesting it, as long as the material facts stated herein are accurate. This ruling pertains only to the matters referenced herein. Except as provided by N.C.G.S. § 150B-4, the Department expressly reserves the right to make a prospective change in the interpretation of the statutes and regulations at issue in this Declaratory Ruling. Gary S. Qualls and Susan K. Hackney, Counsel for Corinthian, LLC, have requested this ruling on behalf of Corinthian and have provided the material facts upon which this ruling is based.

STATEMENT OF THE FACTS

The facility currently licensed and known as Corinthian Place, Inc., located at 1935 Lincoln Road¹ Leland, NC in Brunswick County, and bearing license HAL-010-006 was licensed on February 9, 2006 for a total of 80 beds. Review of Division correspondence shows that the project for a facility at this location was in planning stages for several years and was reviewed by the Division staff in relation to the Section 11.69(b) of Session Law 1997-44.3, and later reviewed in relation to Session Law 2001-234 and the Certificate of Need law.

The development of a total of 100 beds was previously noted as meeting the requirements set out in Session Law 1997-34 with 66 of these beds considered “pipeline” beds, as plans for the project were submitted prior to May 18, 1997. The development of these beds was conditioned by Session Law 2001-234 on several factors including the timely submission of a Certificate of Occupancy, submission of loan closing papers, and submission of documentation regarding the completion of foundation and footings for the Facility. Items required by Session Law 2001-234 were not submitted in the time required, and the Facility subsequently filed a Petition for Contested Case seeking additional time to submit these items. The Division and the Facility ultimately reached a settlement agreement that allowed for the development of 80 beds. *See* Settlement Agreement, attached hereto as Exhibit 1.

On June 8, 2006, following application by the Facility, the Facility was licensed for an Alzheimer’s Special Care Unit of 24 beds with a total licensed capacity of 78 beds. The total licensed capacity was reduced from 80 to 78 beds due to the conversion of space within the Facility to meet the physical plant requirements for the special care unit.

¹ The Facility location is also referenced as 2050 Mt. Misery Rd NE on documentation from the Brunswick County Building inspector. The Mt. Misery Rd NE address and the 1935 Lincoln Rd address are both associated with the parcel of land bearing Tax ID 0230003105.

The Facility now asks that it be allowed to develop an additional 22 beds noted in the 2009 State Medical Facilities Plan as exempt beds to bring the total capacity of the facility to 100 beds.

ANALYSIS

Session Law 2001-234, Senate Bill 937 sets out that:

Notwithstanding the provisions of subsection (b1) of this section, any person who obtained an exemption under subsection (b) of this section for the construction of a new building ... may proceed to develop the beds and obtain a license for the operation of the beds if all of the following conditions are met. Exemptions that were received for increases in bed capacity of existing buildings must meet the requirements set forth in subsection (b1) of this section.

- (1) No later than the close of business on June 1, 2004, the person granted the exemption shall submit to the Department of Health and Human Services fully executed copies of loan closing papers for a loan to the exempted person or a letter from a certified public accountant which states that liquid reserves have been placed in a separately identified account for the exempted person that document sufficient funding to cover the entire capital cost of the project for which the exemption was granted.
- (2) Not later than the close of business on December 1, 2004, the person granted the exemption shall submit to the Department of Health and Human Services documentation from the builder or architect that the foundation and footings of the facility for which the exemption was granted have been completed.
- (3) Not later than the close of business on December 1, 2005, the person granted the exemption shall submit to the Department of Health and Human Services a copy of the certificate of occupancy from the building inspector for the facility for which the exemption was granted.

Due to a delay in financing, the Facility was unable to comply fully with the requirements set out in Session Law 2001-234, Senate Bill 937. The Facility filed a Petition for Contested Case seeking relief and an extension of time to complete the required loan closing. *See* Petition, attached hereto as Exhibit 2. On October 24, 2004, the Facility and the Division entered into a settlement agreement allowing for the development of 80 beds at the proposed site.

The Facility has not complied with Session Law 2001-234 as to the development of any beds beyond those it is currently licensed for, and further, the Facility acknowledged in the settlement entered October 24, 2004 that the facility was to encompass 80 beds. While additional beds may have been previously designated as exempt or “pipeline” beds, these beds were never developed in accordance with Session Law 2001-234, were not contemplated in the settlement agreement allowing for the development of the Facility, and a Certificate of Occupancy was issued only as to those beds currently licensed. It appears that the 22 beds noted in the declaratory ruling request and published most recently in the proposed 2010 State Medical Facility Plan are not available for development. The Plan notes in its disclaimer that the plan is subject to revision throughout the year. The notation of 22 beds available in the plan should be revised to reflect no beds available.

CONCLUSION

For all the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that Corinthian, LLC may not develop the additional unlicensed 22 beds requested without receipt of a Certificate of Need.

This the _____ day of January, 2010.

Jeff Horton, Acting Director
Division of Health Service Regulation
N.C. Department of Health and Human Services

NORTH CAROLINA
COUNTY OF BRUNSWICK

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 DHR 1660

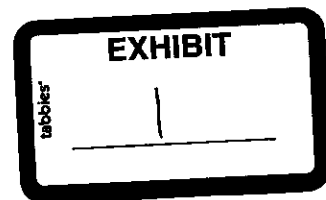
BENEATH THE TREES, LLC)
)
Petitioner,)
)
vs.)
)
N. C. HEALTH AND HUMAN SERVICES,)
DIVISION OF FACILITY SERVICES,)
ADULT CARE LICENSURE SECTION,)
)
Respondent.)

SETTLEMENT AGREEMENT

NOW COME Beneath The Trees, LLC ("Petitioner") and the North Carolina Department of Health and Human Services, Division of Facility Services, Adult Care Licensure Section ("Respondent") (collectively referred to hereinafter as "the parties") and enter into the following settlement agreement in order to settle and compromise all claims arising out of the above-captioned contested case.

RECITALS

WHEREAS in accordance with Section 11.69(b) of S.L. 1997-443, as amended by Section 12.16C(a) of S.L. 1998-212, as amended by Section 1 of S.L. 1999-135; as amended by Section 11.9(a) of S.L. 2000-67 as amended by S.L. 2001-234 ("Moratorium Law"), Petitioner qualified for and Respondent granted to Petitioner an exemption to the adult care project moratorium, permitting Petitioner to pursue development of 80 bed assisted living facility in Leland, Brunswick County ("Village Beneath the Trees project");



WHEREAS Petitioner timely obligated one or more Qualifying Financial Commitments for the construction of Village Beneath the Trees project totaling at least twenty-five thousand dollars before January 1, 2001;

WHEREAS Petitioner timely submitted evidence that the Greensboro HUD office issued a firm commitment for mortgage insurance for Village Beneath the Trees project on May 21, 2004;

WHEREAS through various delays by HUD, Petitioner has been unable to obtain the requisite loan closing papers for Village Beneath the Trees project by the statutory deadline of June 1, 2004. Because some of these delays were beyond the control of Petitioner, it is expressly determined that Petitioner is in material compliance with S.L. 2001-234, Sec. 3, Subsection (b2)(1);

WHEREAS Petitioner contends that it substantially complied with the laws and rules governing the exempt adult care bed projects, and therefore the exemption is still valid;

WHEREAS pursuant to N.C. Gen. Stat. § 150B-22, it is the policy of the State to settle disputes between State agencies and other persons whenever possible;

NOW THEREFORE, the parties have decided to resolve this contested case in the manner set forth below, pursuant to N.C. Gen. Stat. §§150B-22 and -31(b), and subject to the approval of Robert J. Fitzgerald, Director of the Division of Facility Services.

AGREEMENT

1. Within five business days after this agreement is approved and adopted by Robert J. Fitzgerald, Director of the Division of Facility Services, and Petitioner has received written

confirmation of such approval. Petitioner shall file a notice of voluntary dismissal, with prejudice, in contested case number 04-DHR-1660 in the Office of Administrative Hearings.

2. Respondent shall permit Petitioner to continue to develop its Brunswick County project under the following conditions: after this agreement is approved and adopted by Robert J. Fitzgerald, Director of the Division of Facility Services, Petitioner shall submit to Respondent no later than November 30, 2004, the requisite financial documents from Love Funding Corporation pertaining to the Village Beneath the Trees project. Petitioner shall abide by the conditions set forth in the Moratorium Law for the continued development of its exempted adult care project, included but not limited to the December 1, 2004 deadline for the submission of documentation from the builder or architect that the foundation and footings of the facility for which the exemption was granted have been completed. Failure to adhere to such conditions will result in a breach of this agreement, and revocation of Petitioner's exemption.

3. If this agreement is not approved by Mr. Fitzgerald, the parties agree that this agreement shall be null and void and that Petitioner shall be entitled to proceed with its contested case. In that event, Mr. Fitzgerald's review of this agreement as provided herein shall not prejudice his authority to render the final agency decision following the hearing in this matter in accordance with N.C. Gen. Stat. Chapter 150B. In addition, if this agreement is not approved by Mr. Fitzgerald, the parties agree that it shall be inadmissible at the contested case hearing for any purpose.

4. The parties further agree and acknowledge that this written agreement sets forth

all of the terms and conditions between them concerning the subject matter of this agreement, superseding all prior oral and written statements and representations, and that there are no terms or conditions between the parties except as specifically set forth in this agreement.

5. The parties agree that each party shall bear its own expenses, including attorney's fees, and that no claim for such costs or expenses shall be made by one party against the other.

6. The undersigned represent and warrant that they are authorized to enter into this agreement on behalf of the parties to this agreement.

7. Petitioner authorizes counsel for Respondent to present this agreement to Mr. Fitzgerald *ex parte*.

8. In order to expedite the signing of this agreement, the parties stipulate and agree that the delivery of an executed signature page by one party to the other via facsimile transmission shall bind the transmitting party to the same extent as service of the original signature page by hand-delivery. The parties stipulate and agree that a party that sends a signature page via facsimile transmission shall mail the original to the other party within five business days after the facsimile transmission.

9. This agreement shall be effective as of the day and year on which it is adopted and approved by the Director of the Division of Facility Services.

IN WITNESS WHEREOF, the parties have executed duplicate original copies of this settlement agreement, with one original copy being retained by each party.

FROM : LEDBETTER
FROM : LEDBETTER

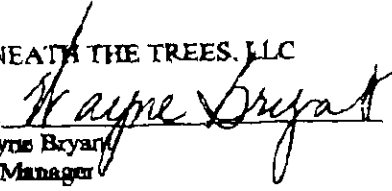
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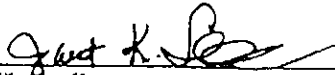
BENEATH THE TREES, LLC

BY:

Wayne Bryant
Co-Manager

A handwritten signature in cursive script, appearing to read "Wayne Bryant", is written over a horizontal line. The signature is positioned to the right of the printed name and title.

BENEATH THE TREES, LLC

BY: 
Janet K. Ledbetter
Attorney at Law
P.O. Box 1108
Hillsborough, NC 27278
COUNSEL FOR PETITIONER


ADULT CARE LICENSURE SECTION

BY: Barbara Ryan
Barbara Ryan, Section Chief
Division of Facility Services
N.C. Dept. of Health and Human Services
701 Barbour Dr.
Raleigh, NC 27603
(919) 855-3765

ROY COOPER
Attorney General

BY: Melissa L. Trippe
Melissa L. Trippe
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
(919) 716-6860
COUNSEL FOR RESPONDENT

APPROVED AND ADOPTED this the 25th day of October, 2004.


Robert J. Fitzgerald, Director
Division of Facility Services

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

BENEATH THE TREES, LLC)
)
)
PETITIONER,)
)
v.)
)
NC DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, DIVISION OF FACILITY SERVICES)
ADULT CARE LICENSURE SECTION)
)
RESPONDENT.)

**PETITION
FOR A
CONTESTED CASE HEARING**

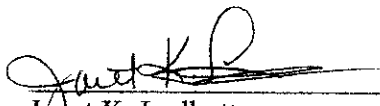
Petitioner hereby asks for a contested case hearing as provided for by North Carolina General Statute § 150B-23 because the Respondent has established deadlines of June 1, 2004 and December 1, 2004 pursuant to Section 3 of Session Law 2001-234 which amended N.C.G.S. §131E-176, Section 3, Subsection (b2) which Petitioner has not and may not been able to meet because of delays resulting numerous changes in the underwriting requirements of the US Department of Housing and Urban Development (HUD) which has jeopardized Petitioner's exemption to acquire a license from Respondent in a timely manner.

Because of these facts, the State agency or board has:

X deprived me of property;
 ordered me to pay a fine or civil penalty; or
 otherwise substantially prejudiced my rights;

X exceeded its authority or jurisdiction;
 acted erroneously;
AND failed to use proper procedure;
 acted arbitrarily or capriciously; or
 failed to act as required by law or rule

This the 14th day of October, 2004



Janet K. Ledbetter
Attorney for Petitioner
P. O. Box 1108,
Hillsborough, NC 27278
(919) 732-5741
(919) 732-2395 (fax)

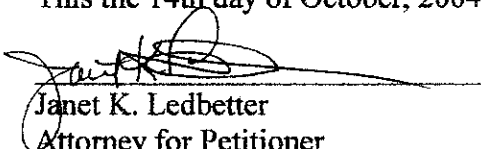
EXHIBIT
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CERTIFICATE OF SERVICE

I certify that this Petition has been served on the State agency or board named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed and by Fax to 919-733-9379 to:

BARBARA RYAN, CHIEF
ADULT CARE LICENSURE SECTION
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF FACILITY SERVICES
2708 MAIL SERVICE CENTER
RALEIGH, NC 27609-2708

This the 14th day of October, 2004.



Janet K. Ledbetter
Attorney for Petitioner

P. O. Box 1108
Hillsborough, NC 27278

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 first-class, postage pre-paid envelope addressed as follows:

CERTIFIED MAIL

Susan Hackney
430 Davis Drive, Suite 400
Morrisville, NC 27602
Attorney for Corinthian, LLC

Gary S. Qualls
430 Davis Drive, Suite 400
Morrisville, NC 27602
Attorney for Corinthian, LLC

This the _____ day of January, 2010.

Jesse Goodman
Acting Chief Operating Officer