

 Law Office of Joy HeathDFS Health Planning  
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Medical Facilities  
PLANNING SECTIONJoy Heath, Esq.  
Law Office of Joy Heath  
514 Daniels Street #182  
Raleigh, NC 27605  
T 919.559.3904  
F 919.803.6876  
jht@jht-law.com*Via Facsimile*

TO: Elizabeth K. Brown, Chief of Budget and Planning  
FROM: Joy Heath, Esq., Law Office of Joy Heath  
RE: Home Health Agency Need Determinations in the 2011 SMFP  
DATE: February 8, 2011

I have received your memorandum of February 7, 2011 announcing an upcoming meeting of the Long-Term and Behavioral Health Committee intended to consider whether to recommend to the State Health Coordinating Council an amendment to the 2011 State Medical Facilities Plan to remove the need determinations previously identified for home health agencies for Mecklenburg, Cabarrus and Guilford Counties.

I represent a client actively involved in preparing CON Applications in response to the need determinations in these three Counties and strongly object to the removal of the need determinations. First, we question the authority of the Committee to take the action suggested in your Memorandum. Second, such action is inconsistent with Policy GEN-2. Finally, significant expenditures have already been made in reliance on the announced need determinations such that it would be unfair and unreasonable to remove the need determinations now. My client would suffer loss if unable to pursue approval to develop the home health agencies described in the need determinations.

Multiple decisions of the North Carolina Court of Appeals make it clear that it is only the Governor who has authority to amend and approve the State Medical Facilities Plan. The Committees and the State Health Coordinating Council only work to "prepare" the Plan which the Governor then approves. During the planning process, the Committee members, the Council and all interested parties had multiple opportunities to question the data, the calculations and any other aspect of the Tables and Methodology used in the three County need determinations, all of which were published as part of the Proposed 2011 Plan. The Plan was "disseminated broadly and examined in six public hearings held across the State." Any comments received during this year-long process "were duly considered." The work of the Committee and Council has concluded; the Governor has made the final decision on the Plan's content. The Governor has exercised her final authority to approve the Plan: "With the Governor's approval, the [Plan] becomes the official document for health facility and health service planning in North Carolina for the specified calendar year." Plan, p. 4. An effort to use the Committee and the Council to amend the State Plan now would appear to fly in the face of the law which empowered the Governor to act.

The only mechanism for change in need determinations is that provided in Policy GEN-2 which speaks to revisions to need determinations to reflect changes in "inventories" of facilities and equipment. Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list. See Evans v. Diaz, 333 N.C. 774, 430 S.E. 2d 244 (1993). In other words, because Policy GEN-2 only authorizes changes in need determinations based on inventory changes, it effectively precludes changes for any other purposes.

Relying on the announced need determinations, my client has already expended time and resources in the development of three CON Applications. As an interested party, my client has relied upon the Plan as a "key resource" for planning. Plan, p. 1. Specifically, my client has engaged the services of a consulting firm and has paid a significant non-refundable deposit to retain this firm's services. Moreover, my client has entered into a contractual arrangement obligating it to pay for the work performed in the preparation of these Applications. My client has also expended funds for legal fees and services in connection with its plans to file CON Application in the three Counties. My client has devoted its own staff time and effort in assembling information for use in the CON Applications for the three Counties and has incurred charges for various expenses associated with its CON Application preparation efforts. My client's consultant has already participated in a Pre-Filing Conference last month, attended by Assistant CON Chief Martha Frisone and Project Analyst Carol Hutchinson. Removing the need determinations would be unfair and unreasonable inasmuch as my client has expended time and resources pursuing efforts to secure CON approvals for home health agencies in the three Counties in response to the announced needs.

Moreover, my client is committed to bringing home health agencies into the identified Counties and would suffer undue harm and loss if it were unable to pursue the CON approvals necessary to allow it to do so. Our Supreme Court has stated, that "an estoppel may arise against a (governmental entity) out of a transaction in which it acted in a governmental capacity, if an estoppel is necessary to prevent loss to another, and if such estoppel will not impair the exercise of the governmental powers of the (entity)." See Washington v. McLawhorn, 237 N.C. 449, 454, 75 S.E.2d 402, 406 (1953). Here, we believe the prudent course is to allow the need determinations to remain in the Plan and allow the CON Section to exercise its governmental powers to evaluate each applicant under the Need Criterion, N.C. Gen. Stat. Section 131E-183(a)(3), to determine whether the applicant has demonstrated the need the identified population has for the services proposed.

Thank you for your attention and consideration. We look forward to learning of a decision which will continue the need determinations as announced in the 2011 Plan.