Before The
HEALTH FACILITIES AND SERVICES REVIEW BOARD
State of Illinois

HEALTH FACILITIES AND SERVICES REVIEW BOARD,	)	
Complainant,	)	
v.	)	**Docket No. HFSRB #11-11**
CENTEGRA HEALTH SYSTEM and CENTEGRA HOSPITAL-HUNTLEY, **Project No. 10-090**,	)	
Respondents.	)	

CENTEGRA'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ's PROPOSAL FOR DECISION

The Applicants/Respondents, Centegra Health System and Centegra Hospital-Huntley (collectively "Centegra"), respectfully submit this Brief in Support of Exceptions to the Proposal for Decision of Administrative Law Judge ("ALJ") Richard E. Hart.

BACKGROUND

On December 7, 2011, Centegra Hospital-Huntley, Project No. 10-090 was before the Illinois Health Facilities and Services Review Board ("State Board") for consideration. A motion to approve the project received 4 affirmative votes and 4 negative votes, with one Board member absent. The vote constituted an Initial Denial of the project and, under the Illinois Health Facilities Planning Act ("Planning Act"), Centegra was entitled to a hearing before a hearing officer to review the Initial Denial. Section 10 of the Planning Act requires that the hearing officer "take actions necessary to ensure that the hearing is completed within a reasonable period of time, but not to exceed 90 days, except for delays or continuances agreed to by the person requesting the hearing." 20 ILCS 3960/10. Instead of completing Centegra's requested hearing within the statutory time frame, Administrative Law Judge ("ALJ")

Richard E. Hart cancelled Centegra's hearing, vacated the State Board's decision of December 7, 2011, and remanded Centegra's project back to the State Board for reconsideration.

Centegra sets for the basis for its Exceptions to ALJ's Proposal for Decision below. In the event the State Board adopts the Proposal for Decision or reconsiders Centegra's project, Centegra respectfully requests that the State Board vote to approve Centegra Hospital-Huntley, Project No. 10-090 for the reasons addressed below.

Statement of Facts

A. Initial Proceedings Before the State Board

On December 29, 2010, Centegra filed a Certificate of Need ("CON") application to establish a new hospital in Huntley, Illinois located in McHenry County. The project was designated before the State Board as Centegra Hospital-Huntley, Project No. 10-090.

On June 28, 2011, during initial consideration before the State Board, a motion for approval failed to receive the votes necessary for approval, resulting in issuance of an Intent to Deny.

On December 7, 2011, the State Board again considered the project and a motion for approval received four affirmative votes and four negative votes, with one State Board member absent. Because five affirmative votes were required to approve the project, the 4-4 vote was deemed an Initial Denial of the application.

The State Board issued a written decision in a letter dated December 9, 2011 (the "Denial Letter") stating that the denial of Centegra's permit application was based on Centegra's alleged failure to document conformance with three review criteria promulgated by the State Board. (A copy of the State Board's Denial Letter dated December 9, 2011, is attached hereto as **Exhibit A** to Appendix 1 of Centegra's Brief in Support of Exceptions to ALJ's Proposal for Decision. The

Denial Letter notified Centegra of their right under Section 10 of the Planning Act to a hearing before an ALJ for purposes of reviewing the State Board's denial of the application.

In the event an applicant requests an administrative hearing following an Initial Denial by the State Board, the Planning Act mandates that the ALJ "take actions necessary to ensure that the hearing is completed within a reasonable period of time, but not to exceed 90 days, except for delays or continuances agreed to by the person requesting the hearing." 20 ILCS 3960/10.

On December 20, 2011, Centegra requested an administrative hearing. On December 22, 2011, the Acting Director of IDPH appointed Richard E. Hart as the ALJ. On January 17, 2012, the State Board scheduled an initial prehearing conference for February 23, 2012.

B. Proceedings Before ALJ Hart

1. ALJ Hart Schedules the Administrative Hearing for March 22-23.

On February 23, 2012, during the initial prehearing conference, ALJ Hart scheduled the administrative hearing to be held on March 22-23, 2012 in Chicago, Illinois. (*See* Transcript of Hearing on February 23, 2012 attached as **Transcript of February 23rd Hearing** to Appendix 2 to Centegra's Brief in Support of Exceptions to ALJ's Proposal for Decision ("Appendix 2").) ALJ Hart's written order of February 29, 2012 confirmed the scheduling of the hearing for March 22-23, 2012 in Chicago. (A copy of ALJ Hart's written order of February 29, 2012 is attached as **Exhibit B** to Appendix 1.)

ALJ Hart confirmed that the administrative hearing would proceed as scheduled during a hearing on March 14, 2012, and during a hearing on March 19, 2012, just three days before the scheduled hearing.

2. The State Board's Attorneys engage in an *Ex Parte* Communication with ALJ Hart on March 15.

In the afternoon of Thursday, March 15, 2012, the State Board's attorneys had an *ex parte* communication with ALJ Hart without notice to Centegra or any other party to the proceeding, and without opportunity for Centegra or the other parties to participate. The *ex parte* communication was first disclosed by ALJ Hart in a proposed Decision of the Administrative Law Judge ("Proposed Decision") that was served on Centegra and the other parties on March 19, 2012. (A copy of the Proposed Decision is attached as **Exhibit C** to Appendix 1.) ALJ Hart's Proposed Decision disclosed the following:

> "Last Wednesday afternoon, Counsel for the Health Facilities and Services Review Board (hereafter the "State Board") advised me that they had discovered that the record in this case contained materials that should have been a part of the record in another case and that the record in the other case contained materials that should have been a part of the record in this case."

(*See* **Exhibit C,** Proposed Decision at page 1.)

The proceeding before ALJ Hart was subject to the contested case provisions of the Illinois Administrative Procedure Act ("APA"), 5 ILCS 100/10-5 *et seq.* The APA prohibits *ex parte* communications by any party with an ALJ:

> "(a) Except in the disposition of matters that agencies are authorized by law to entertain or dispose of on an ex parte basis, agency heads, agency employees, and administrative law judges shall not, after notice of hearing in a contested case or licensing to which the procedures of a contested case apply under this Act, communicate, directly or indirectly, in connection with any issue of fact, with any person or party, or in connection with any other issue with any party or the representative of any party, except upon notice and opportunity for all parties to participate."

(5 ILCS 100/10-60(a).)

In the event an *ex parte* communication with an ALJ is made, Section 10-60(c) of the APA requires that the communication "shall be made a part of the record of the pending matter,

including all written communications, all written responses to the communications, and a memorandum stating the substance of all oral communications and all responses made and the identity of each person from whom the ex parte communication was received."
5 ILCS 100/10-60(c).

When Centegra learned of the *ex parte* communication between the State Board's attorneys and ALJ Hart they filed objections and a demand pursuant to the APA that all *ex parte* communications with ALJ Hart be disclosed, documented and made part of the record of proceedings. (*See* Centegra's Verified Objections to *Ex Parte* Communications by the State Board's Counsel and Demand that the State Board's Counsel Disclose and Document All Known *Ex Parte* Communications attached as **Exhibit D** to Appendix 1.)

The State Board's attorneys subsequently admitted in writing that they contacted ALJ Hart *ex parte* to argue that there was "an error in the record" which "could have a major impact on the evidentiary hearing scheduled for March 22-23, 2012." (*See* IHFSRB's Response to Centegra's Objections to State Board Counsel's Inconsistent, Misleading and False Representations to the ALJ [etc.] attached as **Exhibit E** to Appendix 1.) The State Board's attorneys attempted to justify the *ex parte* communication by claiming that they were merely contacting ALJ Hart to inquire of the "status of proceedings." (*See* **Exhibit E** at page 3.) Centegra responded to this claim by noting, among other things, that the State Board's attorneys raised and argued a substantive issue during their *ex parte* communication that subsequently involved *four* telephonic hearings with ALJ Hart and multiple briefs, motions and other submissions by the parties. (*See* Centegra's Response to State Board's Recent Filing Regarding Remand and *Ex Parte* Communications attached as **Exhibit F** to the Appendix 1.) Centegra further noted that the points argued by the State Board's attorneys during their *ex parte* contact

with ALJ Hart were the sole grounds on which ALJ Hart subsequently cancelled Centegra's requested administrative hearing. (*See* **Exhibit F** at page 3.)

Again without notice to Centegra or the other parties, the State Board's attorneys asked ALJ Hart on March 15, 2012 to schedule an emergency hearing the following morning. ALJ Hart complied with this request and had his office contact counsel for Centegra and the other parties. (*See* **Exhibit E** at page 3.)

ALJ Hart's office contacted Centegra's counsel on the afternoon of March 15, 2012, to inquire of his availability for a hearing the next morning that State Board attorney Mr. Frank Urso had previously requested. When Centegra's counsel inquired of the purpose of the emergency hearing, ALJ Hart's office advised that it did not know. Centegra's counsel then telephoned State Board attorney Frank Urso to ask the purpose of the emergency hearing. Mr. Urso refused to disclose the purpose of the hearing.

Following Mr. Urso's refusal to disclose the purpose of his requested emergency hearing, Centegra's counsel sent an email to ALJ Hart on March 15, 2012 (and copying counsel for all parties of record) stating:

> "[Your office] called me this afternoon to inquire of my availability for an emergency hearing tomorrow morning at 10:00 am regarding the Centegra Hospital-Huntley hearing requested by Mr. Urso. [Your office] indicated that [it] was not aware of the purpose of the hearing. I telephoned Mr. Urso and requested notice of the purpose of the hearing and Mr. Urso would not say. After advising my client of the request for emergency hearing and discussion, we will be available for the hearing, however, *I am requesting on behalf of the applicants Centegra Health System and Centegra Hospital-Huntley that notice of the subject matter of the hearing and the relief, if any, sought by the Review Board or any other party from ALJ Hart be provided to all parties immediately*."

(Emphasis added; A true and correct copy of the above email from Centegra's counsel, Daniel Lawler, to the ALJ and Mr. Urso of March 15, 2012, and Mr. Urso's response of the same day, are attached as **Exhibit G** to Appendix 1.)

Mr. Urso responded to the above email in a return email stating:

> "Board Counsel have requested to have a status meeting tomorrow, not a hearing. The subject matter will be the project file."

(*See*, **Exhibit G.**) Mr. Urso's email did not mention any alleged incurable error in the record or indicate that the State Board would be seeking any relief from ALJ Hart such as cancellation of Centegra's hearing or remand to the State Board.

3. The emergency hearing on March 16.

On March 16, 2012, an emergency hearing was held in which the State Board's General Counsel, Mr. Urso, said there was an important, potentially incurable error in the record. During the emergency hearing, the State Board's Assistant General Counsel, Mr. Juan Morado, proposed that ALJ Hart remand the matter back to the State Board:

> **MR. MORADO:** This is Juan Morado. Judge, if I can get back to your original question of what we think you can do at this point. Maybe two different avenues, Your Honor. We can either figure out what we are going to do with the report and move forward with the hearing this coming week, Thursday and Friday; or in the alternative, **Your Honor can make a recommendation for the Board to reconsider and remand this back to them for another opportunity to vote a clean record.**

(Emphasis added; Transcript of Hearing on March 16, 2012 at page 20 lines 6-15. A copy of the March 16, 2012 transcript is attached **Transcript of March 16th Hearing** to Appendix 2.)

ALJ Hart set the matter over for further hearing to Monday morning, March 19, 2012.

4. The alleged "misfiled" document and supposed "error."

The alleged incurable error, according to the State Board's attorney Mr. Urso, was that Advocate had sent to the State Board two different consulting reports: one in opposition to

Centegra's project and another in opposition to a project entitled Mercy Crystal Lake Hospital and Medical Center, Project No. 10-089 (the "Mercy Project") and, in separate, misplaced cover letters to the State Board's Staff, directed that the consultant's report for the Mercy project be filed in Centegra's project file, and the report for the Centegra's project be filed in the Mercy project file.

In a written statement filed with ALJ Hart, Centegra's counsel documented that the document was not misfiled and there was no error in the record. To the contrary, the State Board's Staff filed the documents pursuant to the direction of Advocate's counsel. Moreover, the State Board's Staff posted a public notice of this filing in early June 2011, so the State Board, its counsel, and Advocate all had actual notice of the filing in early June and did nothing to correct any alleged "error." (*See* Centegra's Response to Advocate's Memorandum Concerning the Record in Centegra Hospital-Huntley, IHFSRB #11-11, attached as **Exhibit H** to Appendix 1.)

5. The continuation of the emergency hearing to the morning of March 19th: ALJ Hart affirms the administrative hearing will proceed on March 22-23.

On Monday morning, March 19, 2012, the emergency hearing resumed. Following further argument on the alleged error in the record and the propriety of remand, ALJ Hart stated that there was no error in the record, that the State Board's Staff filed the document as directed by Advocate's attorney, and that a remand would set a bad precedent of allowing project opponents, either through negligence or by intent, to create error in the record requiring a remand. ALJ Hart stated:

> **HEARING OFFICER HART:** This is Dick Hart. Let me just pose a hypothetical. Believe me, I understand the arguments of all of the parties here I think, but if we adopt the position that Mr. Urso has stated - - I'm just trying to think this through - - I think we maybe set a precedent that in the future at board hearings

> an intervener can, either through negligence or intentionally, send something to the board to be filed in that matter but send them the wrong document or send them the right document and misstate where it should be filed and, by the action of that party, create something that thereafter will make it a matter of, according to the parties, one of the parties here, make it necessary for this to be remanded back to the board because of that type of error.
>
> I just think that we're perhaps setting some kind of a precedent where, in my mind, there was no error here other than as far as the record is concerned that document was filed exactly where the party submitting it told them it to be filed. And so it was not the state or the clerk or the board that misfiled it, our - - it was an intervener who instructed them as to where it would be filed.

(*See* pages 21-22 of Transcript of Hearing on March 19, 2012 attached as **Transcript of March 19th Hearing** to Appendix 2.)

ALJ Hart stated that he would make his final ruling on the matter at the previously scheduled final prehearing conference set for March 21, 2012, and that the administrative hearing would proceed as scheduled on March 22-23, 2012. (*See* **Transcript of March 19th Hearing** at 28-29.)

6. Another emergency hearing on the afternoon of March 19th: ALJ Hart reverses course and proposes to cancel the hearing on March 22-23 and remand the matter to the State Board.

On March 19, 2012 at approximately 4:00 p.m., ALJ Hart's office called counsel for the parties to set-up a conference call for 4:30 p.m. that day. ALJ Hart's office stated that the purpose of the call was for ALJ Hart to announce his decision. During the 4:30 p.m. hearing, ALJ Hart served the parties with a proposed decision stating that "[a]fter due consideration and based upon the foregoing, I have decided to cancel the hearing scheduled for March 22 and 23, 2012, and send this case back to the State Board for its consideration." (*See* **Exhibit C**, Proposed Decision.) ALJ Hart set the matter over for further hearings on March 20, 2012.

7. The March 20th hearing: ALJ Hart cancels the hearing on March 22-23.

On Tuesday March 20, 2012, Centegra filed with ALJ Hart an Emergency Motion to Conduct Hearing within Mandatory Statutory Time Limit and to Refrain from Remanding to the State Board. Centegra noticed the Motion for the hearing previously scheduled that afternoon. (Copies of Centegra's Emergency Motion and Notice of Emergency Motion are attached hereto as **Exhibit I** to Appendix 1.)

During the hearing on March 20, 2012, just two days before the administrative hearing was to commence, ALJ Hart announced that he was canceling the hearing even though no party had formally moved that the hearing be cancelled or that the matter be remanded. Centegra's counsel objected to the cancellation of the hearing and to the propriety of a remand. (*See* pages 8-9 of the Transcript of Hearing March 20, 2012 attached as the **Transcript of March 20th Hearing** to Appendix 2.)

8. Centegra's efforts to resolve the issue of the misfiled document, and its proposed stipulation with Advocate.

Centegra and Advocate (the party that submitted the misfiled documents) desired the administrative hearing to proceed and did not want a remand to the State Board.

Centegra's counsel and Advocate's counsel worked for two days, on March 21 and 22, on a proposed stipulation by which the parties would agree to proceed to a hearing without remand.

Centegra's and Advocate's respective attorneys jointly presented the proposed stipulation to the State Board's attorney Mr. Urso in a face-to-face meeting on March 23, 2012. Mr. Urso rejected the proposed stipulation out of hand and insisted that the matter had to be remanded to the State Board because of the supposed incurable error in the record. A letter of Centegra's counsel, Daniel Lawler, to ALJ Hart dated March 23, 2012 details the joint effort of counsel for

Centegra and Advocate to reach agreement and the subsequent meeting with Mr. Urso at which he summarily rejected the proposal is attached hereto as **Exhibit J** to Appendix 1.

9. The March 26th hearing: The State Board's attorney denies that it ever requested remand.

On March 26, 2012, during yet another hearing regarding the propriety of a remand, Centegra's counsel objected to the cancellation of the hearing and a remand to the State Board on, among other grounds, that no party had formally requested a remand. In response, the State Board's Assistant General Counsel represented to ALJ Hart that the State Board had never requested a remand the matter, and did not need to make such a request:

> **MR. MORADO:** ... The board, at no point, sought the remand. This is an order from Your Honor. We support Your Honor's order.
>
> So to say that we are required to make a motion for remand, I think is just not right at this point. Your Honor has made an order, we support that.
>
> And then anything further regarding filings, Your Honor, we're open to whatever your requests are.

(*See* page 11-12 of Transcript of Hearing on March 26, 2012 attached as **Transcript of March 26th Hearing** to Appendix 2.)

At the hearing on Monday, March 26, 2012, Centegra's counsel requested ALJ Hart to rule on Centegra's emergency motion to conduct and complete the administrative hearing within the statutory time period. (**Transcript of March 26th Hearing.**) ALJ Hart did not rule on Centegra's motion and concluded the hearing by stating, "I will consider all of this and let all of you know what my position is very shortly." (**Transcript of March 26th Hearing** at page 22.)

10. Centegra's counsel seeks a ruling from ALJ Hart by letter dated March 30, 2012.

By the close of business on Friday, March 30, 2012, ALJ Hart still had not advised the parties any ruling. Centegra's counsel then sent a letter to ALJ Hart and counsel for the parties renewing Centegra's objection to cancellation of the administrative hearing and to any order of remand to the State Board. The letter further stated the 90-day period for completing the hearing, as counted by the State Board had expired, and that the *latest* the 90-day period could be reasonably argued to expire was April 18, 2012. The letter then proposed dates for conducting and completing the administrative and concluded by stating:

> "For the above reason, there is a reasonable argument that, under the provisions of Section 10 of the Planning Act, your Honor has until April 18, 2012 to complete this administrative hearing. In order to avoid the expense and delay of potential litigation to protect its statutory right to the requested administrative hearing, Centegra would agree to the scheduling and completion of the evidentiary hearing on April 5 and April 6, 2012 or any two consecutive days from April 16 to April 18, 2012. (Centegra's key participants for the hearing will be out of the country the week of April 9.) But we must know by noon on Tuesday, April 3, 2012, whether or not Centegra's requested hearing will be conducted and completed on the referenced days.
>
> By proposing hearing dates by April 18, 2012, Centegra does not waive its objections to having the March 22-23, 2012 hearing cancelled and delayed without Centegra's consent based upon matters first raised in *ex parte* communications from the State Board's attorneys. We are proposing these dates because Centegra believes that a circuit court judge could reasonably find that your Honor has until April 18, 2012 to complete the hearing based on the above provisions of the Planning Act."

(A copy of the March 30, 2012 letter from Centegra's counsel to ALJ Hart is attached as **Exhibit K** to Appendix 1.)

11. ALJ Hart remands to the State Board.

On Wednesday morning, April 4, 2012, Centegra's counsel received a letter by certified mail from ALJ Hart that was postmarked March 30, 2012. (A copy of the postmarked envelope is attached as **Exhibit Q** to Appendix 1.) The certified mailing from ALJ Hart included an Administrative Law Judge's Report ("ALJ's Report) and a Proposal for Decision. (Copies of the ALJ's Report and the Proposal for Decision are attached as **Exhibit R** and **Exhibit S,** respectively, to Appendix 1.)

The ALJ's Report recommends that the State Board "correct" the record to include Centegra's project file the document that Advocate directed to be filed in the Mercy project file, and exclude the document Advocate directed to be filed in the Mercy project file from Centegra's project file. The ALJ's Report further recommended that the State Board "reconsider Respondent's application for permit with the corrected record." **Exhibit R**.

ARGUMENT IN SUPPORT OF EXCEPTIONS

A. There is No "Error" in the Administrative Record that Justified the Cancellation of Centegra's Requested Administrative Hearing

The State Board's attorneys privately argued to ALJ Hart in a prohibited *ex parte* communication on March 15, 2011 that the record in the Centegra project had "an error in the record ... that could have a major impact on the evidentiary hearing" requested by Centegra. (*See* Appendix 1, Exhibit E, page 3, ¶16(a).) In fact, there was no "error" requiring ALJ Hart to cancel Centegra's hearing. If there was any error at all, it was not an error "in the record," but an error by Advocate's attorneys in failing to assure that documents they submitted appeared in the project file they intended.

1. The multiple Krentz reports submitted by Advocate's attorneys.

The alleged misfiled document was entitled "Market Assessment and Impact Study, Proposed Centegra-Huntley Hospital (Project 10-090)", and appeared to have been prepared by Krentz Consulting ("Krentz"). The document will hereafter be referred to as the "Krentz Centegra Document." This document is not in the project file for Centegra-Huntley Hospital, Project No. 10-090.

The Krentz Centegra Document is not to be confused with the many other reports authored by Krentz that were submitted into Centegra's project file by Advocate and its allies. The record shows that the other Krentz reports, all of which are in Centegra's project file, included the following:

1. "Financial Impact Study, Proposed Centegra Hospital-Huntley (Project 10-090)", submitted via email by Joe Ourth on June 2, 2011 (Administrative Record "R." at 238 of 497 and R. 222 of 497);

2. "Market Assessment and Impact Study, Proposed Mercy-Crystal Lake Hospital (Project 10-089)", submitted via Federal Express delivery by Joe Ourth on June 2, 2011 (R. 190 of 497 and R. 189 of 497);

3. "Assessment of Utilization, Population Growth, and Applicant Arguments of Impact on Existing Providers, Proposed Centegra Hospital-Huntley (Project No. 10-090)," submitted by Joe Ourth via email on November 14, 2011. (R. 42 of 497 and R. 41 of 497);

4. "Assessment of Likely Impact on Centegra-Hospital-Woodstock, In response to Proposed Centegra Hospital-Huntley (Project 10-090)," submitted on behalf of Sherman Hospital on November 16, 2011. (R. 463 of 497 and R. 461 of 497).

Advocate's attorney, Mr. Joe Ourth, submitted the Krentz Centegra Document to the State Board's Staff with a cover letter directing that it be filed in the project file for *Mercy Crystal Lake Hospital and Medical Center*, Project No. 10-089. Conversely, Mr. Ourth sent the State Board's Staff a different Krentz report on the Mercy project and, in a cover letter also dated

June 2, 2011, directed the Staff to file that document in the *Centegra* project file. (*See* Record at page 189-221 of 497.

Under Illinois law, public agencies are presumed to have properly performed their statutory duties and the burden to overcome that presumption is on the one asserting agency malfeasance. *Village of Hillside v. John Sexton Sand & Gravel Corp.,* 113 Ill. App. 3d 807, 447 N.E.2d 1047 (1st Dist. 1983); *Advanced Systems, Inc. v. Johnson,* 126 Ill.2d 484, 535 N.E.2d 797 (1989). The State Board's Staff has a statutory duty to post on the Board's website "notices of project-related filings, including notice of public comments related to the [permit] application." 20 ILCS 3960/12.2(1.5). The Staff is presumed to have properly performed this duty with respect to Mr. Ourth's submissions of June 2, 2012 and Advocate presented no competent evidence to overcome this presumption. On the other hand, there is ample evidence proving that Mr. Ourth repeatedly erred in submitting documents to the State Board in both the Centegra project and the Mercy project.

Even if there was a mistake in connection with Mr. Ourth's submissions on behalf of Advocate, the burden of correcting that mistake rested entirely with Mr. Ourth and his client, both of whom had actual notice as early as June 2011 that the Krentz Centegra Document was not in the Centegra project file.

2. Under the State Board's Rules, Advocate and its attorneys were responsible to assure that documents they submitted were timely received into the project file intended.

Advocate and its attorneys had a personal responsibility and affirmative obligation under the State Board's rules to assure that the State Board's Staff had received any comments they submitted within the required timeframes. Section 1130.950(b) of the Board's rules state, "Persons submitting comments are responsible for assuring that the Board's Staff at IDPH receive the comments within the prescribed time frame." 77 Ill. Adm. Code 1130.950(b).

At the time Mr. Ourth submitted the Krentz Centegra Document on June 2, 2011, the State Board had established June 8, 2011 as the deadline for written comments. Mr. Ourth apparently did nothing to fulfill his responsibility to assure that the Krentz Centegra Document had been received into the Centegra project file by that time. After the Centegra project received an intent-to-deny at the June 28, 2011 State Board meeting, the Board re-opened the written comment period which was eventually extended to November 16, 2011. During that entire time, the Staff's public postings of Mr. Ourth's June 2nd submissions remained on the Board's website, and continued to show that the Krentz Centegra Document was *not* in the Centegra project file, and *was* in the Mercy project file. Mr. Ourth did nothing to assure that the document was received into the Centegra project file by the November 16th deadline, and he failed to meet his obligation under the Section 1130.950(b) of the State Board's rules.

3. Mr. Ourth and Advocate had actual notice in early June 2011 that the Krentz Centegra Document was not in the Centegra Project File, and they did nothing.

Mr. Ourth and Advocate had actual notice commencing in June 2011 that the Krentz Centegra Document was not in the Centegra project file, and they did nothing to include it.

Under the Illinois Health Facilities Planning Act, the State Board's Staff is required to post on the Board's web site "notices of project-related filings, including notice of public comments related to the application." 20 ILCS 3960/12.2(1.5). Mr. Ourth's Centegra Cover Letter and the Krentz Centegra Document were "public comments related to the application" within the meaning of this provision. In accordance with its statutory duty, the State Board's Staff provided notice of the submission of these two documents on the State Board's website within a week of receipt by posting links on its website to PDF files of the full documents. *(See* Appendix 1, Exhibit H, Attachment ¶10.) At that point, Mr. Ourth, Advocate and the public at

large had actual notice that the Krentz Centegra Document was not posted under the Centegra project, and was posted under the Mercy project.

Simple ordinary prudence compelled Advocate and its attorneys to insure that documents they submitted to the State Board found their way into the intended project files. *See*, *Villapiano v. Better Brands of Ill., Inc.*, 26 Ill. App. 3d 512, 516, 325 N.E.2d 722, 725 (1st Dist. 1975)("If it appears a party having knowledge or information of facts sufficient to put a prudent man upon inquiry wholly neglects to make any inquiry, the inference of actual notice is necessary and absolute").

The State Board's Staff provides ample notice and opportunity to allow anyone submitting written comments to confirm they are correctly filed. The Staff allows anyone to check on the status and correct filing of submissions received into a project file. The Staff is highly responsive to these inquiries and quickly corrects any mistakes brought to its attention.

The Staff's posted notices of filed documents in early June show that the Krentz Centegra Document was filed in the Mercy project file and not the Centegra project file ***and that notice was on the State Board's website every single day through the close of the final written comment period on November 16, 2011*** *(and remains there even to this day).* Advocate's attorneys had over 150 consecutive days of this notice in which they could have properly included the Krentz Centegra Document into the Centegra project file but they failed to do so.

4. Mr. Ourth repeatedly confused the Centegra and Mercy projects in his submissions to the State Board.

Even if the State Board's Staff had mistakenly placed the Centegra Krentz Document into the Mercy project file (and there is no evidence whatsoever by any party that the Staff made such a mistake), it could hardly have been blamed because the project files show that Mr. Ourth repeatedly misidentified the Centegra and Mercy projects in his submissions to the State Board.

In addition to the three different Krentz reports Mr. Ourth submitted into the Centegra project file, he also submitted three Krentz reports into the Mercy project file. As often as not, Mr. Ourth confused the project numbers and names as well as the reports:

Centegra Project File

1. In the Subject line of his June 2, 2011 email to Mike Constantino with the Safety Net Impact Statement Response that included the Krentz Financial Impact Study for the Centegra project, Mr. Ourth attached the Mercy project number (10-089) to the name of the Centegra project name. (R. 222 of 497 attached hereto as Group Exhibit 1(a).)

Mercy Project File

2. In the Subject line of his June 2, 2011 email to Mike Constantino with the Safety Net Impact Statement Response ("Response"), Mr. Ourth identified the Response as being for Centegra Hospital-Huntley, not Mercy Crystal Lake, even though the attached Krentz report was for Mercy Crystal Lake. He also attached the Mercy project number to the Centegra project. (*See* Group Exhibit 1(b) attached hereto.)

3. In the Subject line of his November 16, 2011 email to Mike Constantino containing the Krentz "Assessment of Population Growth [etc.]" for the Centegra project, Mr. Ourth referenced "Project No. 10-0890" which was an agglomeration of the Centegra project number (10-090) and the Mercy project number (10-089). (Note that Mr. Ourth here appears to have *intentionally* submitted the Krentz Assessment for the *Centegra* project into the *Mercy* project file.) (*See* Group Exhibit 1(c) attached hereto.)

4. In the body of the above November 16, 2011 email to Mike Constantino, Mr. Ourth attached the Mercy project number (10-089) to the name of the Centegra project name. (*See* Group Exhibit 1(c) attached hereto.)

Mr. Ourth's repeated errors and confusion in identifying the two project names and numbers, combined with his erroneous reference to the Krentz reports, together with his *intentional* submission of a Krentz Centegra study into the Mercy project file, made his submissions of multiple Krentz reports a matter of pure guess-work as to which project file he actually intended the reports to be directed. It also imposed an even greater burden on Mr. Ourth to clarify, assure and confirm with the State Board's Staff that his submissions were directed to the project file that he intended.

5. Even if absence of the Krentz Document from the Centegra file is considered an "error", it was a harmless error and did not justify cancellation of Centegra's hearing.

Advocate presented no evidence and made no claim that it was prejudiced by the absence of the Krentz Centegra Document, nor is there any evidence that the document would have affected the State Board's decision in any way. Consequently, any "error" associated with the document's absence is harmless.

Further, since Advocate was solely responsible for the document's absence from the record, and had actual notice that the document was not in the record, and failed to take any action to assure that the document was timely included in the record, and neither Centegra nor the State Board's Staff were responsible for the document not being included in the record, Centegra should not be penalized with the denial of its statutory right to a hearing to review the State Board's December 7, 2011 decision.

B. ALJ Hart's Proposal for Decision Violates the Planning Act

Section 10 of the Planning Act grants Centegra a right to an administrative hearing on the State Board's December 7, 2011 Initial Denial and directs that ALJ Hart "take actions necessary to ensure that the hearing is completed within a reasonable period of time, but not to exceed 90 days, except for delays or continuances agreed to by the person requesting the hearing." 20 ILCS 3960/10. Instead of taking action necessary to ensure that Centegra's hearing was completed within the statutory time frame, ALJ Hart cancelled the hearing in violation of the Planning Act. Centegra had a clear statutory right to the hearing and that right was denied by ALJ Hart's decision in violation of the Planning Act.

In addition, the Planning Act does not provide for the State Board's reconsideration of a decision prior to completion of the administrative hearing required by the Planning Act. It is well established that ("an administrative agency may allow a rehearing, or modify and later its

decisions, only where authorized to do so by statute"). *See*, *Pearce Hosp. Found. v. Ill. Public Aid Comm'n*, 15 Ill. 2d 301, 307, (1958); *see also*, *Vill. of Downers Grove v. Ill. State Labor Relations Bd.*, 221 Ill. App. 3d 47, 56 (2d Dist. 1991) *appeal denied* 143 Ill. 2d 637. Section 10 of the Planning Act states: "Following its consideration of the report of the hearing, or upon default of the party to the hearing, the State Board shall make its final determination, specifying its findings and conclusions within 45 days of receiving the written report of the hearing." (Emphasis added; 20 ILCS 3960/10.) The Planning Act does not provide for the State Board to reconsider a prior decision by making a non-final decision which is then again subject to an administrative hearing before an ALJ. Consequently, ALJ Hart's recommendation that the State Board reconsider its December 7th decision and issue another non-final decision contravenes the procedures set forth in the Planning Act.

C. ALJ Hart's Action Violated the Illinois Administrative Procedure Act

ALJ Hart's Findings of Fact to the State Board violate the Illinois Administrative Procedure Act ("APA"), and the State Board's acceptance of those Findings of Fact would also violate the APA.

Section 10-35(a)(8) of the APA contains the blanket prohibition that, "No [*ex parte*] communication shall form the basis for any finding of fact." 5 ILCS 100/10-35(a)(8). The sole basis for ALJ Hart's decision to cancel Centegra's requested administrative hearing and remand the matter to the State Board for reconsideration was his factual finding that an "error" existed in the administrative record because a document Advocate filed in Centegra's project supposedly should have been filed in another project, and a document Advocate filed in the other project supposedly should have been filed in Centegra's project. *See* Administrative Law Judge's Report, Findings of Fact, ¶¶ 5, 6, 7, and Findings of Administrative Law Judge, ¶¶ 2, 4, attached as Exhibit R to Appendix 1.

It is undisputed that the claim of "error in the record" was first communicated to ALJ Hart in a private telephone call from the State Board's attorneys. The State Board's attorneys argued that the contact with ALJ Hart was not an *ex parte* communication under Section 10-60 of the Administrative Procedure Act which allows for communications "regarding matters of procedure and practice, such as the format of pleading, number of copies required, manner of service, and status of proceedings, are not considered ex parte communications." 5 ILCS 100/10-60. However, the State Board's attorneys were not calling ALJ Hart to ascertain the format of a pleading, or the number of copies required to be filed, or the manner of service. Nor were they inquiring about the "status of proceedings." To the contrary, by their own admission, they were calling ALJ Hart to assert an "error in the record ... that could have a major impact on the evidentiary hearing..." This was not a benign question about the status of proceedings. Rather, the State Board's attorneys were laying the groundwork for their later request for ALJ Hart to cancel Centegra's hearing and remand the matter to the State Board for reconsideration.

The fact that the March 15 *ex parte* communication was *later* disclosed to Centegra does not cure the harm caused by the prohibited contact. First, ALJ Hart had already made up his mind to cancel Centegra's hearing before either he or the State Board's attorneys disclosed the *ex parte* communication. Second, the disclosure of an *ex parte* communication does not remove its taint so as to allow it to be used as the basis of a finding of fact.

The *ex parte* communication occurred on March 15, 2012. Despite the fact that hearings were held on March 16 and the morning of March 19 to discuss the alleged "error" in the record, neither ALJ Hart nor the State Board's attorneys disclosed the *ex parte* communication of March 15. During another hearing in the afternoon of March 19th, ALJ Hart stated that he

proposed to cancel the March 22-23 hearing and send the matter back to the Board. He sent the parties a proposed Decision of Administrative Law Judge, and that proposed decision disclosed for the first time that the State Board's attorneys had privately contacted ALJ Hart the week before. Consequently, the damage had been done by the *ex parte* communication *prior* to the time it was disclosed to Centegra and the other parties.

Even if there had been prior disclosure, it would not have removed the taint of *ex parte* contact. The Illinois Appellate Court has held that, "In a contested case, mere disclosure of an *ex parte* communication does not transform such material into competent evidence before an administrative tribunal." *Vill. of Montgomery v. Ill. Commerce Comm'n*, 249 Ill. App. 3d 484 (2d Dist. 1993). In *Vill. of Montgomery*, the Appellate Court held that information provided to a hearing officer in an *ex parte* communication could not, under the APA, form the basis for any finding of fact of the hearing officer notwithstanding that the hearing officer had disclosed the communication. The Court specifically rejected the argument that disclosure of the communications "removed their *ex parte* nature..." 249 Ill. App. 3d at 494.

ALJ Hart's Findings of Fact to the State Board violate the prohibition in the APA that "No [*ex parte*] communication shall form the basis for any finding of fact." 5 ILCS 100/10-35.

D. ALJ Hart's Action Violated The State Board's Own Rules

Section 1130.1130(d) of the State Board's rules prohibits the action taken by ALJ Hart here. That rule states that the ALJ has no authority to vacate the State Board's decisions, yet that is effectively what ALJ Hart did. By refusing to conduct a hearing on the State Board's decision of December 7, 2011, and remanding the matter to the State Board for reconsideration and another vote on the project, the State Board's December 7, 2011 decision is essentially held for naught. For all practical purposes it has been vacated.

Also, Section 1130.1190(b) of the State Board's rules prohibit any construction of the rules that "abrogate, modify or limit any rights ... granted or protected by ... the laws of the State of Illinois." 77 Ill. Adm. Code 1130.1190(b). Section 10 of the Planning Act granted Centegra the right to an administrative hearing within a specified time frame to review the State Board's December 7th decision. ALJ Hart abrogated and limited that right by cancelling Centegra's hearing and refusing to complete it within the statutory time period. In addition, under the State Board's rules, the only circumstances under which the State Board can reconsider an initial denial of a permit application is after the ALJ completes the administrative hearing, or the applicant defaults its right to hearing. Moreover, in either circumstance, the Board's rule states that the Board is then to render its *final* decision. (*See* 77 Ill. Adm. Code 1130.1170(a).) The rules do not allow the State Board to reconsider its decision and then issue a non-final decision subject to another administrative hearing as proposed by ALJ Hart and the State Board here.

ARGUMENT IN SUPPORT OF APPROVAL OF CENTEGRA HOSPITAL-HUNTLEY, PROJECT NO. 10-090

If the State Board reconsiders Centegra Hospital-Huntley, Project No. 10-090, the project should be approved because the project conforms to the statutory criteria and is in substantial conformance and in accord with the criteria adopted and approved by the State Board pursuant to the Planning Act.

A. The Staff Report the Project was Overwhelmingly Positive

The findings made by the State Board's Staff in its Supplemental State Agency Report ("SSAR") on Centegra's project were overwhelmingly positive. The Staff found that the project was in conformance to most all of the Review Board's criteria including the following:

Criterion 1110.230(a): **Background of the Applicant**
Criterion 1110.230(b): **Purpose of the Project**

Criterion 1110.230(c):	**Alternatives to the Proposed Project**
Criterion 1110.234(a):	**Size of Project**
Criterion 1110.234(b):	**Project Services Utilization**
Criterion 1110.234(d):	**Assurances**
Criterion 1110.530(b)(1):	**Planning Area Need: formula calculation**
Criterion 1110.530(b)(2):	**Planning Area Need: service to planning area residents**
Criterion 1110.530(b)(3):	**Project Service Demand: rapid population growth**
Criterion 1110.530(e):	**Staffing Availability**
Criterion 1110.530(f):	**Performance Requirements**
Criterion 1110.530(g):	**Assurances**
Criterion 1120.120:	**Availability of Funds**
Criterion 1120.130:	**Financial Viability**
Criterion 1120.140(a):	**Reasonableness of Financing Arrangements**
Criterion 1120.140(b):	**Conditions of Debt Financing**
Criterion 1120.140(c):	**Reasonableness of Project and Related Costs**
Criterion 1120.140(d):	**Projected Operating Costs**
Criterion: 1120.140(e):	**Total Effect of the Project on Capital Costs**

Centegra's project was the most favorably reviewed new hospital project in the history of the Review Board and its predecessor Planning Board. The records of the State Board, as posted on the Board's official website and of which the Court may take judicial notice, show that no other acute care hospital approved by the State Board had been as positively reviewed by the State Board's own Staff as Centegra's project.

B. The Negative Findings Made by the Staff Were Erroneous and Did Not Justify the State Board's Denial of the Project

The SSAR made findings of non-conformance under only three Review Criteria: Criterion 1110.530(b); Criterion 1110.530(c), and: 1110.3030(b). These findings were in error.

The Finding Under Criterion 1110.530(b) was Erroneous

The finding of non-conformance for Criterion 1110.530(b) was solely based on sub-paragraph (5) of the Criterion which relates to Service Accessibility. That sub-paragraph states that an applicant "shall document that at least one of the following factors exists in the planning area," and then identifies five separate factors. The five factors relate to: (1) the absence of services in the area; (2) access limitations due to payor status; (3) restrictive admission policies

of existing providers; (4) federally designated health professional shortage areas and medically underserved areas, and; (5) utilization of existing facilities within 45 minutes. A copy of Criterion 1110.530(b)(5) is included as Attachment 1 hereto.

Importantly, Criterion 1110.530(b)(5) does not require that *all* of the five factors be documented, but rather, only that *at least one* be documented. Centegra documented conformance with one of the five factors by submitting proof in their permit application that areas within the designated Planning Area and the project's geographic service area were designated by the Secretary of Health and Human Services as a Health Professional Shortage Area, Medically Underserved Area and Medically Underserved Population. The SSAR confirms this in its finding on page 23 that "the applicants provided evidence of 3 census tracts within Planning Area A-10 that have been designated a[s] Medically Underserved Population, 1 census tract in the primary service area as designated Medically Underserved Area/Population, [and] four townships in the market area designated as Health Manpower Shortage Areas."

Having documented conformance with one of the five factors under Criterion 1110.530(b)(5), the project conformed to the plain language of the policy and the project should have received a positive finding under this Criterion. The finding of non-compliance is erroneous because it necessarily assumes that an applicant must document *more than one* of the five identified factors whereas the policy plainly states that an applicant document *at least one* of the five factors.

The Finding Under Criterion 1110.530(c) and 1110.3030(b) were Erroneous

Other than Criterion 1110.530(b) addressed above, the SSAR made findings of non-conformance under only two other Review Criteria, and both were triggered by a single factor, namely, underutilization at existing facilities. Underutilization of existing facilities is *not* a deciding factor under the Planning Act and the State Board's longstanding practice. **Indeed, in**

the vast majority of projects approved by the Review Board, the State Agency has reported the existence of numerous, underutilized facilities. Centegra's project meets an identified unmet need. The existence of underperforming facilities was not a basis to deny this much-needed project.

In addition, Centegra documented compliance with both Criterion 1110.530(c) and Criterion 1110.3030(b).

CONCLUSION

Centegra objects to the ALJ's Proposal for Decision for the reasons stated above. Further, if the State Board proceeds to reconsider Centegra Hospital-Huntley, Project No. 10-090, the project should be approved because it is in substantial compliance with the State Board's Review Criteria.

Respectfully submitted,

CENTEGRA HEALTH SYSTEM and
CENTEGRA HOSPITAL-HUNTLEY, the
Applicants/Respondents

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CERTIFICATE OF SERVICE

Daniel J. Lawler, an attorney, hereby certifies that he caused the foregoing **Brief in Support of Exceptions to ALJ's Proposal for Decision**, to be served upon the following persons by email this 4th day of May, 2012 before the hour of 5:00 p.m. and by first class U.S. Mail delivery before the hour of 5:30 p.m.

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