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October 6, 2021

Via Email Delivery

Courtney R. Avery
Administrator
Illinois Health Facilities and Services
Review Board
525 West Jefferson Street
2nd Floor
Springfield, IL 62761

Re: Project #21-011, Physician's Surgical Center, O'Fallon

Barnes & Thornburg Opposition Statement following Intent to Deny

Dear Ms. Avery:

On behalf of HSHS St. Joseph Hospital Highland ("Highland"), a 25-bed Critical Access Hospital, I respectfully submit this opposition statement to the additional information submitted by the applicant on Project #21-011, Physician's Surgical Center.

The Project received an Intent to Deny on September 14, 2021 following a unanimous negative vote of 0-6 by the Health Facilities and Services Review Board ("Review Board"). At that hearing and in a prior written submission, the applicant's legal counsel threatened litigation against the Review Board unless it approved the project. The purpose of this letter is to demonstrate that the Board's Staff properly reviewed and processed the application in accordance with the applicable review criteria, and that the Review Board's action on the application was amply supported by the administrative record and well within the Review Board's broad discretionary powers conferred by the Health Facilities Planning Act. Based upon the administrative record and applicable law, the applicant's threatened lawsuit would be devoid of merit.

A. Board Staff Properly Processed the Application

In its written submission dated July 16, 2021 ("July 16th Letter"), the applicant's counsel maintained that this project was "in all material respects" identical to Project #20-041 which the Staff had referred to the Board's Chair for action, and then argues that this project should also have been referred to the Board's Chair for approval. In fact, the two projects were not identical. To the contrary, material facts in the present project *required* Staff to refer the project to the full Board and *prevented* Staff from referring the project to the Chair.

Section 1130.655(a) of the Review Board's rules specifically addresses the requirements for referrals to the Chair:

“a) Chairman Consideration and Action

Applications for permit that **meet all of HFSRB's review criteria and are unopposed** shall be:

- 1) reviewed for approval by the Chairman, acting on behalf of HFSRB [20 ILCS 3960/5]; or
- 2) referred by the Chairman to the full Board for review and action.”

77 Ill. Adm. Code 1130.655(a); Emphasis added.

Under the above rule, the Staff could not have referred the present project to the Chair because (1) it was opposed, and (2) had negative findings. Where an administrative agency adopts rules or regulations under its statutory authority for carrying out its authorized duties, it is bound by those rules and cannot disregard them. *Springwood Associates v. Health Facilities Planning Board*, 269 Ill. App. 3d 944, 948 (4th Dist. 1995). The Board's Staff acted properly and in accordance with the Board's regulations, by not referring this project to the Chair.¹

B. The Board has Specific Criteria for the Addition of Surgical Services to an ASTC

The applicant's July 16th Letter states on page 3 that the Board has “never promulgated rules specific to the addition of a surgical specialty to an existing ASTC”. That is not true. The Board has promulgated rules specifically applicable to the addition of services to an ASTC. Section 1110.235 plainly states that a proposing to “add or expand an ASTC service in an existing ASTC facility shall describe how the proposed project will address the following indicators of need, as presented in the following table.” 77 Ill. Adm. Code 1110.235(c)(1)(C). The table shows that an applicant proposing to add services to an existing ASTC must satisfy eight specific criteria. The applicant here failed to meet four of the eight criteria, as the Staff properly determined.

After first asserting that the Board has no rules for the addition of services to an ASTC, the July 16th Letter then proceeds to recognize the rules promulgated in Section 1110.235 above, and states these existing criteria should not be applied to the applicant. It states that the criteria for Geographic Service Area and Service Demand “should not be applicable to projects seeking to add ASTC services but not add capacity” and, with respect to criteria for Service Accessibility and Unnecessary Duplication, the Board should “exclude these review criteria from projects proposing to add surgical capacity[.]” July 16th Letter, page 6.

The referenced criteria unequivocally apply to projects that add services to ASTCs whether or not additional operating rooms are also added. If operating rooms are added, a different set of criteria apply, so the Board obviously considered this distinction at the time the rules were

¹ Another material difference between this project and Project #20-041 is that in the latter project *none* of the referrals were from area hospitals and all but one of the 104 pain management referrals were from the applicant's own ASTCs. Consequently, the project had no adverse impact on the utilization of existing hospitals, as is the case with the present project.

promulgated. Having adopted these rules, the Board cannot “exclude these review criteria” from the applicant’s project as contended by the applicant. Administrative regulations have the force and effect of law, and once adopted must be followed by the agency. *Springwood Assoc., supra*, 269 Ill. App. 3d at 948; *Provena Health v. Health Facilities Planning Bd.*, 382 Ill. App. 3d 34, 43 (1st Dist. 2008).

C. The Board’s Staff Properly Applied the Criteria to this Project

All four of the negative findings made in the Staff Report are compelled by undisputed evidence in the record. Significantly, all of the negative findings were based on the applicant’s own submissions, and the applicant does not dispute the evidentiary basis of any of the Staff’s negative findings.

Service to Area Residents, §1110.235(c)(2)(B): An applicant is required to document that the proposed added service is “necessary to serve the planning area’s population” by demonstrating at least **50%** of admissions are residents of the Geographical Service Area (“GSA”). The Staff Report’s negative finding was based on the undisputed fact that only **29%** of the applicant’s historical referrals (13 of 45) resided within the GSA.

Service Demand, §1110.235(c)(3)(B): This Criterion requires an applicant to document need for the new service with projected referrals in the form of physician referral letters. Under the rule, there are two specific requirements for the referrals: they must be from “existing IDPH-licensed ASTCs or hospitals located in the GSA[.]” The applicant’s referral letter shows that only two referrals were from IDPH licensed facilities within the GSA. As the stated purpose of this Criterion is to demonstrate need for a new service, the Staff properly found that two referrals does not establish need for the project.

Service Accessibility, §1110.235(c)(6): To add a new service to an ASTC, the applicant must show the service is “necessary to improve access for residents of the GSA” with documentation of the existence of one of the following four conditions in the GSA: (1) There are no other ASTCs within the GSA; (2) All existing ASTC and hospital outpatient surgical rooms are at target utilization levels or existing underutilized services in the GSA have restrictive admission policies; (3) the specific surgical procedures proposed are not currently available in the GSA, or; (4) The proposed project is a cooperative venture sponsored by an existing hospital. The Staff found that the applicant met none of the four criteria, and the applicant does not contend otherwise.

Unnecessary Duplication/Maldistribution, §1110.235(c)(7): An applicant must document that the project will not result in an unnecessary duplication of services or the maldistribution of services. The Staff found that a “duplication of service will result should this project be approved” based on existing orthopedic surgery capacity in the area. Staff Report at 4. Once again, the applicant does not dispute the Staff’s findings.

D. The Applicant's Submissions of July 16th and September 23rd Violate the Board's Regulations

The applicant's July 16th Letter and its written submissions of September 23, 2021 ("September 23rd Letter") were not in compliance with the Board's regulations and technically constitute *ex parte* communications.

The July 16th Letter purports to be written comment on the Board Staff Report which, by statute, is to be limited to addressing and correcting possible factual inaccuracies. *See*, 20 ILCS 3960/4.2: "The applicant and members of the public may submit, to the State Board, written comment *regarding the facts set forth in the review or findings of the Board staff*"; Emphasis added. The sole purpose of this written comment is so that "staff may revise any findings *to address corrections of factual errors cited in the public response.*" *Id.* Emphasis added; *See also*, 77 Ill. Adm. Code 1130.635(c). Under the Board's Administrative Rules any communication "that is not authorized by the public comment process specified in 77 Ill. Adm. Code 1130 is *ex parte* or extra-record communication and is prohibited." 77 Ill. Adm. Code 1925.780(h). The July 16th Letter does not identify any factual inaccuracies. Its entire content should be deemed *ex parte* and is prohibited.

The September 23rd Letter purports to be a response to the Intent to Deny by which an applicant may request to appear at the next Board meeting, *provided no additional information is submitted*, or state an intent to submit additional information, which extends the review period up to 120 days. *See*, 77 Ill. Adm. Code 1130.670(c). While the September 23rd states that the applicant "does not intend to submit additional information" and requests to appear at the next Board meeting, the letter then goes on to respond to matters raised at the September 14th Board meeting and includes a 15-page attachment of additional information. Again, such a submission is not authorized by the Board's rules, and should be deemed *ex parte*.

Very truly yours,

BARNES & THORNBURG LLP



Daniel J. Lawler

cc: Mike Constantino, Lead Project Reviewer, HFSRB