

September 15, 2015

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Ms. Heather Adams
Assistant Attorney General
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RE: Grand JiVanté/Request for Reconsideration

Dear Heather:

On behalf of the citizens of Ackley, we recently received notification from Kala Shipley that Grand JiVanté's request for a reconsideration of the State Health Facilities Council's (the "Council") August 4, 2015 decision to deny Grand JiVanté's request for a nonreviewability determination will be heard by the Council on September 17, 2015. The citizens of Ackley oppose the placement of this item on the Council agenda because Grand JiVanté's request does not comply with the requirements for a rehearing contained in the Iowa Code or the Iowa Administrative Code.

Grand JiVanté's initial request for a determination of nonreviewability is permitted pursuant to Iowa Administrative Code section 641—202.3, which permits a sponsor of a proposed project to "submit a written request for a determination of reviewability as to whether the project requires a certificate of need." Section 202.3(2) requires the Department of Public Health ("Department") upon receipt of a written request from a project sponsor to "determine if a proposed project requires a certificate of need under Iowa Code sections 135.61 to 135.83." The Department conducted an initial review of Grand JiVanté's request and preliminarily determined that it was not subject to Iowa Certificate of Need ("CON") review.

Following the Department's preliminary determination, Grand JiVanté's nonreviewability determination was placed on the August 4, 2015, CON hearing agenda for consideration by the Council. After hearing additional evidence from the applicant and affected parties during this hearing, the Council voted 3-2 to reject the Department's preliminary determination of nonreviewability. The Council's ability to disagree with the Department's decision in a reviewability determination is provided for in Iowa Administrative Code section 641—202.3(2)(b), which states that "if it is determined that a certificate of need is not required [by the Department], the sponsor shall be notified by the department and the determination of nonreviewability shall be placed on the next agenda of the state health facilities council for review. "

Following the August 4th CON hearing, Grand JiVanté submitted a Request for Reconsideration and an Application for a Certificate of Need for a nursing facility. The date of these filings was August 31, 2015. The Request for Reconsideration has been placed on the agenda for a Council telephone conference call to be held this Thursday.

The CON statute and rules allow for a rehearing of a CON decision, but do not permit a rehearing of a decision of the Council related to a reviewability determination. Specifically, Iowa Code Section 135.70 provides that “the council’s decision on an application for **certificate of need**, when announced pursuant to **section 135.69**, is a final decision. Any dissatisfied party who is an affected person with respect to the application, and who participated or sought unsuccessfully to participate in the formal review procedure prescribed by **section 135.66**, may request a rehearing in accordance with **chapter 17A** and rules of the department.” The formal review process set forth in Section 135.66 describes in detail the process for review of a CON application. In addition, the CON rules confirm that “the applicant or any affected person who has participated or sought unsuccessfully to participate in the formal review procedure prescribed in Iowa Code section 135.66 may, for good cause shown, file an application for rehearing in writing with the department stating the specific grounds therefor and the relief sought, within 20 calendar days after the date of the issuance of the final decision **on an application for a certificate of need.**” Iowa Admin. Code r. § 641—202.9(1).

The decision from which Grand JiVanté is requesting reconsideration is a decision on a determination of nonreviewability—not a decision on a CON application—and thus there is no mechanism for Grand JiVanté to request a rehearing at this point in the process. Section 202.9(2) sets forth specific grounds upon which the applicant or an affected party could request a rehearing on an application for a CON. These “grounds for rehearing” include, but are not limited to:

- a) New significant, relevant information which was unavailable at the date of the hearing;
- b) Significant changes in factors or circumstances relied upon by the Council in reaching its decision;
- c) Demonstration that the Council has materially failed to follow its adopted procedures in reaching its decision; or
- d) Such other bases as the Council determines constitute good cause.

Not only does Grand JiVanté not reference the rehearing statute or rules in its reconsideration request, but Grand JiVanté does not mention any grounds upon which the Council could consider granting a rehearing.

Even if Grand JiVanté was eligible to request a “rehearing” under this section, it did not submit such a request. The Grand JiVanté request is for “reconsideration” of the Council’s decision and there is no process contained in the CON rules for a “reconsideration” request.

At this point, Grand JiVanté’s only remedy is set forth in Iowa Administrative Code Section 641—202.3(2)(a), which provides that “if it is determined that a certificate of need is required, the sponsor shall be notified by the department and the request for nonreviewability shall be considered

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the letter of intent for purposes of subrule 202.2(2).” Since the rules allow Grand JiVanté’s nonreviewability request to be considered a letter of intent, Grand JiVanté has satisfied the Department’s preliminary requirements and is eligible to submit a CON application for consideration at the Council’s regularly scheduled October 28, 2015 hearing.

In its request for reconsideration, Grand JiVanté quotes extensively from a 2007 letter from Barb Nervig in an attempt to create a standard by which the Council is required to decide nonreviewability requests. Specifically, Grand JiVanté quotes the following portions of the 2007 letter:

“We therefore recognize the legislature’s clear intent to exempt from CON review the replacement of a hospital, so long as the replacement does not result in new health services or additional bed capacity for existing services. While Wellmark and others have urged the Department and the Council to consider whether the need exists for the proposed hospital...The Department is bound by the legislative dictate that the replacement of an existing hospital is expressly excluded from Council review if certain criteria are met...”

In quoting this letter, however, Grand JiVanté completely fails to acknowledge that the 2007 letter from Ms. Nervig (related to the relocation of a hospital from the eastside of Des Moines to a location in West Des Moines), as well as similar decisions involving two other hospitals, were later overruled by an Iowa District Court. In fact, the Court concluded that “as the chief concern of the CON statute is preventing the duplication and escalation of health care costs, the Court concludes that allowing “replacement or modernization” to include “relocation” would undermine the legislative intent of the statute...The Court believes that Wellmark’s interpretation of the CON statute best achieves that goal. In the event the Court adopts the Department’s interpretation of “replacement or modernization,” “relocation” as a statutory trigger for a CON determination becomes meaningless in context of the statute. The “replacement or modernization” exemption is then allowed to subsume the statutory “relocation” trigger for CON review.” Although the legislature later amended the statute to set forth additional restrictions related to the replacement and modernization exemption, Grand JiVanté’s reliance on the 2007 letter is misplaced and not a basis on which Grand JiVanté is permitted to request a rehearing.

Grand JiVanté’s request for reconsideration should be removed from the Council’s hearing agenda this week, and Grand JiVanté should be instructed that its only remedy is to file a CON application. In the event the Council denies Grand JiVanté’s request for a CON, Grand JiVanté would at that time be entitled to request a rehearing or petition for judicial review pursuant to Iowa Code Section 135.70 and Iowa Administrative Code Section 641—202.11(2). Please let me know if you have any questions or would like to discuss this matter in further detail.

Very truly yours,



Douglas E. Gross

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DEG:ccc

cc: Kala Shipley, Iowa Department of Public Health