

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

IN RE: REQUEST FOR DECLARATORY) **DECLARATORY RULING**
RULING BY REX HOSPITAL, INC.)
(Rex OR Application))

I, Robert J. Fitzgerald, Director of the Division of Facility Services (the “Department”), hereby issue this declaratory ruling pursuant to N.C.G.S. § 150B-4 and 10A NCAC 14A .0103, and the authority delegated to me by the Secretary of the Department of Health and Human Services. Rex Hospital Inc. (“Rex”) has filed a Declaratory Ruling Request (the “request”) asking the Department to issue a ruling as to the applicability of Chapter 131E, Article 9 of the North Carolina General Statutes and of the Department’s rules to the facts described below.

For the reasons given below, I conclude that Rex’s Certificate of Need (“CON”) application to convert two dedicated endoscopy rooms to dedicated operating rooms and relocate those operating rooms to Wakefield, to be operated as part of Rex Hospital, was not filed for the appropriate scheduled review period as designated in the 2005 State Medical Facilities Plan (“SMFP”), and furthermore, was not timely filed.

This ruling is binding on the Department and the person requesting it if the material facts stated in the request are accurate and no material facts have been omitted from the request. The ruling applies only to this request. Except as provided by N.C. Gen. Stat. §150B-4, the Department reserves the right to change the conclusions which are contained in this ruling. Gary S. Qualls of Kennedy Covington Lobdell & Hickman, LLP, counsel for Rex, has requested this ruling on behalf of Rex and has provided the

statement of facts upon which this ruling is based. The *material* facts as provided by counsel for Rex are set out below.

STATEMENT OF FACTS

At 5:00 p.m. on November 15, 2005, representatives of Rex (Swain and Hawkins) left their offices located at 2500 Blue Ridge Road, Raleigh, to hand-deliver Rex's CON application to the CON Section. According to the Google and Mapquest maps attached to the request, the trip was projected to take approximately ten minutes because the CON Section's office is less than six miles from Rex. As represented in the request, Swain took an alternative route after noticing that traffic on the Raleigh beltline was at a standstill. According to the request, another Rex representative (Stanley) telephoned the CON Section at 5:20 p.m. and explained to a CON Section project analyst that the Rex employees who were to hand-deliver the application were stuck in traffic, but were in route. The request contends that the CON project analyst told Stanley that the analyst would wait for the arrival of Swain and Hawkins.

As stated in the request, Swain and Hawkins arrived at 701 Barbour Drive, the office address of the CON Section, at 5:38 and proceeded to call the project analyst. There was no answer and the door of the Council Building where the CON Section is housed was locked. At 5:40 Swain and Hawkins entered the building when an employee of the Department exited the building. Swain and Hawkins attempted entry into the CON Section offices, but the doors to those offices were locked. At 5:58, Stephanie Alexander,¹ came out of the building. Ms. Alexander agreed to sign for the application and it was left in her office.

¹ Chief of the Mental Health Licensure and Certification Section.

ANALYSIS

Rex's CON application proposes to convert two dedicated endoscopy rooms to dedicated operating rooms and relocate those operating rooms to Wakefield, to be licensed and operated as part of Rex Hospital. Rex intended to file this application for the review period beginning on December 1, 2005. A proposal for the relocation of existing operating rooms is a Category E proposal according to Chapter 3 of the SMFP. Rex Hospital is in Health Service Area IV. The review period for Category E proposals for Health Service Area IV is not December 1, 2005. Because Category E proposals are not scheduled to be included in the review period beginning on December 1st, the application cannot be considered by the CON Section during the December 1st review period. *See* 2005 SMFP, pp. 11, 13. The CON Section, and not the applicant, determines the appropriate review category, the applicable review period and the deadline date for submitting an application. 10A NCAC 14C .0202.

Even if the Rex application had been submitted for the correct review period, it cannot be reviewed because it was not timely filed.

10A NCAC 14C .0203 provides:

- (a) An application shall not be reviewed by the agency until it is filed in accordance with this Rule.
- (b) An original and a copy of the application shall be received by the agency no later than 5:30 p.m. on the 15th day of the month preceding the scheduled review period. . . . An application shall not be included in a scheduled review if it is not received by the agency by this deadline. . . .

10A NCAC 14C .0203(a) and (b).

10A NCAC 14C .0102 provides that "As used in this Subchapter [14C], the agency is the Certificate of Need Section in the Division of Facility Services, North

Carolina Department of Health and Human Services. . . .” Similarly the State Medical Facilities Plan (“SMFP”) mirrors the language of 10A NCAC 14C .0203 in stating,

In order to give the DHHS sufficient time to provide public notice of review and public notice of public hearings as required by G.S. 131E-185, the deadline for filing certificate of need applications is 5:30 p.m. on the 15th day of the month preceding the ‘CON Beginning Review Date.’ . . . *The filing deadline is absolute and applications received after the deadline shall not be reviewed in that review period.* Applicants are strongly encouraged to complete all materials at least one day prior to the filing deadline and to submit material early on the ‘Certificate of Need Application Due Date.’

2005 SMFP, p. 13 (emphasis added.)

As stated in the SMFP, the filing deadline is absolute. I conclude that Rex’s application is untimely filed. Rex’s CON application was required to be filed by 5:30 on November 15th. The rule requires the application to be received by *the agency* by 5:30 p.m. By rule, “agency” is expressly defined as the CON Section. Consistent with the rule, an applicant cannot effectuate the filing of an application by simply leaving it with whoever happens to be coming out the door at the Department. Rex’s failure to deliver the application *to the CON Section* on or before 5:30 p.m. on November 15th constitutes the untimely filing of its CON application.

Rex cannot show that the purported filing of its application materially complied with 10A NCAC 14C .0203. Rex’s explanation for the untimely filing of its application is that Swain and Hawkins left Rex’s offices in a reasonable time in which to arrive at the CON Section by 5:30, but encountered unexpected traffic. I merely note that heavy traffic is not “unexpected” in the Triangle area. Taking Rex’s representations as true, I see no basis upon which I can find that Rex has materially complied with 10A NCAC 14C .0203. Rather, the untimely filing of Rex’s application is simply due to Rex’s own actions.

Furthermore, even if I accept Rex's contention that the project analyst told Stanley that he would wait for Swain and Hawkins, such representation by the project analyst does not negate the requirements of 10A NCAC 14C .0203. The agency cannot waive a requirement set by administrative rule unless the agency promulgates a rule which establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement. N.C. Gen. Stat. § 150B-19(6). The agency has not promulgated such a rule and I, nor any other employee of the Department, have authority to waive or modify the requirements of 10A NCAC 14C .0203.

CONCLUSION

For the foregoing reasons, I conclude Rex's Certificate of Need ("CON") application to convert two dedicated endoscopy rooms to dedicated operating rooms and relocate those operating rooms to Wakefield, to be licensed and operated as part of Rex Hospital, was not filed for review during the appropriate scheduled review period. Furthermore, I conclude that even if the application were filed for review in the correct scheduled review period, the application cannot be reviewed by the CON Section in the review period to commence on December 1, 2005, because the application was not timely filed pursuant to 10A NCAC 14C .0203.

This the ___ day of November, 2005.

Robert J. Fitzgerald, Director
Division of Facility Services