

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

**IN RE: REQUEST FOR DECLARATORY) DECISION TO DECLINE TO ISSUE
RULING BY VILLAGES OF WILKES) DECLARATORY RULING
TRADITIONAL LIVING)**

Villages of Wilkes Traditional Living (“Villages of Wilkes”) has requested the North Carolina Department of Health and Human Services, Division of Facility Services (the “Department”) to issue a declaratory ruling interpreting the applicability of 10A NCAC 14C.1102(c) to a certificate of need (“CON”) application that Villages of Wilkes planned to file with the Department’s CON Section for the August 1, 2006 review. Villages of Wilkes states that it will seek to expand its facility in North Wilkesboro, Wilkes County, by adding 30 ACH beds, 14 of which would be private rooms. 10A NCAC 14C.1102(c) relates to the average occupancy showing required of an applicant proposing to add adult care home beds to an existing facility.

Pursuant to N.C. Gen. Stat. § 150B-4, 10A NCAC 14A .0103, and the authority granted to me by the Secretary of the Department of Health and Human Services, and for the reasons given below, I hereby decline to issue any ruling to Villages of Wilkes.

The North Carolina Administrative Procedure Act (“APA”) provides that:

On request of a person aggrieved, an agency shall issue a declaratory ruling . . . as to the applicability to a given state of facts of a statute administered by the agency . . . except when the agency for good cause finds issuance of a ruling undesirable.

N.C. Gen. Stat. § 150B-4. The APA also provides that an agency “shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. *Id.* Consequently, the Department has adopted a rule that provides that:

Whenever the Director [of the Division of Facility Services] believes for good cause that the issuance of a declaratory ruling will not serve the public interest, he

may refuse to issue one. When good cause is deemed to exist, the Director will notify the petitioner of his decision in writing stating reasons for the denial of a declaratory ruling.

10A NCAC 14A .0103.

Villages of Wilkes filed its Request for Declaratory Ruling (the "Request") on 31 May 2006. On 17 July 2006, Villages of Wilkes filed an application for a CON to expand its North Wilkesboro facility. The CON Section will begin review of Villages of Wilkes's application on 1 August 2006.

The ruling sought by Villages of Wilkes does not serve the public interest for several reasons. First, the CON Section's interpretation of its review criteria should not be changed during the period after applications are filed and a review is about to commence. Second, the issuance of a ruling could lead to judicial review of the ruling in Superior Court at the same time that the CON Section's decision on the application is under review in the Office of Administrative Hearings. This would violate the principle of judicial economy and would deprive the Department of the opportunity to decide the matter administratively before the courts are involved.

CONCLUSION

For the reasons given above, I decline to issue any ruling in response to the Request for Declaratory Ruling filed by Villages of Wilkes.

This the _____ day of July, 2006.

Robert J. Fitzgerald, Director
Division of Facility Services
N.C. Department of Health and Human Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Declaratory Ruling has been served upon the nonagency party by certified mail, return receipt requested, by depositing the copy in an official depository of the United States postal service in a first class, postage prepaid envelope addressed as follows:

CERTIFIED MAIL

S. Todd Hemphill
Bode, Call & Stroupe, LLP
3105 Glenwood Avenue, Suite 300
Raleigh, NC 27612

This the _____ day of July, 2006.

Jeff Horton
Chief Operating Officer