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Making Sense of CON

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DFS Health Planning
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Medical Facilities
PLANNING SECTION

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Good morning and thank you for the opportunity to speak with you today. My name is Jim Swann of Consensus Consulting and, I am here on behalf of a home health client. My client has already taken significant steps towards the preparation of CON Applications for all three of the home health need determinations identified in the 2011 SMFP. For four important reasons, I am here to urge the Council not to recommend changes to those need determinations. As I will explain very briefly, the time for changes has passed; Policy GEN-2 does not authorize changes to correct calculations; and a change would be a departure from DHSR policy and past practice. Finally, I will ask that you consider the unfairness and harm that would result from removing these need determinations when providers, such as my client, have already acted in reliance on the published need determinations.

A change to the need determinations would be inappropriate at this time because adequate time has already been allowed for revisions and the time for revisions has now passed.

Over the past many years I have been directly involved in the preparation of more than 170 CON applications. The overwhelming majority of my work has been here in North Carolina, but I also have filed applications in other States. In our State, unlike some of the other places in which I have worked, our plan is updated annually through a **very extensive planning process**. The process of our SMFP – with Public Hearings and opportunities for comment and updates over a period of months -- clearly provides providers, consultants and other interested parties the opportunity to comment on the various aspects of the “draft plan”. I submit to you today that the time has now passed for changes to the 2011 SMFP, and, for this reason, I urge you not to recommend a change to Governor Perdue.

Secondly, I ask you to focus on Policy GEN-2 which provides a **limited** grant of authority -- and the **ONLY** authority -- for revisions to the State Plan.

Under Policy GEN-2, need determinations can be revised throughout the year under one and only one circumstance and that is **when there is a change in the "inventory"** of health care facilities such as home health agency offices which may be decertified or a CON is awarded or withdrawn.

As Ms. Potter explained at the February 11 meeting of the Long Term and Behavioral Health Committee, the present circumstance does not involve any inventory change in any of the three counties. It simply involves a calculation issue.

Policy GEN-2 defines when changes can be made and this circumstance is simply **not** one in which a change is authorized. For this reason, I urge you not to recommend an unauthorized change in the Plan.

Thirdly, recommending a change in this circumstance would be inconsistent with past practice. I have observed the care taken by the DHSR to be consistent and fair – while I do not always agree with the DHSR, I do know that every effort is made to act in a manner consistent with past practice.

The problem with the 2011 SMFP is not like the matter in 2004 where the inventory of Operating Rooms was incorrect; that indeed was a Policy Gen -2 issue.

The problem with the 2011 SMFP is not like the 2005 SMFP where a complete page was omitted. That page was in fact a part of the Plan.

Based on personal experience, I can tell you this matter is similar to what transpired in 2004 in a case involving the Planning Section and a dialysis provider. In that matter, the dialysis provider was seeking a change to the published SemiAnnual Dialysis Report.

The Planning Section and Division Director refused to eliminate a need determination even when it became clear that incorrect data had been used in the calculation. The Planning Staff and Division Director Fitzgerald held that planning had to hold fast to the "cut-off" date for data.

To be consistent with its prior stance, the Council should refuse to entertain an elimination of the need determinations at this point in the year.

Finally, as I have already noted, my client is actively working, and has incurred expense directly related to application preparation for the need determinations in the 2011 SMFP. Today, we are only 13 days from the first CON filing. What remedy would the SHCC propose for my client? The right action by this SHCC is to continue the Need Determinations as published.

In the 2004 matter, the Courts noted that “[T]he dissent seems to suggest that the plan is a fluid document, subject to constant updating via the agency’s ministerial duties. We cannot agree. Instead, the enabling statute seems to suggest that the plan is a snapshot in time intended to enable the Department to “[d]evelop policy, criteria, and standards for health service facilities planning[,]” among other things.”

A “snapshot in time”: This snapshot was processed through the darkroom of review for a period of three months last summer. Then was the time to filter out, or identify errors or mis-calculations. The “snapshot” is now a picture, neatly framed and bound within the SMFP. Now is not the time to focus on the flaws within the picture. Now is the time to move forward with CON applications.

I also want to remind the SHCC that allowing this Need Determination to remain in the Plan is not a guarantee of another home health Agency in Mecklenburg, Guilford or Cabarrus Counties. Each application must endure the rigorous review by the Certificate of Need Section; each application must be conforming to the need element and performance standards associated with such a review.

As I close, I ask: What is the value of precedent? The Need Determination should remain in the plan – the time for review has passed, Policy GEN-2 does not authorize a change, a change would be inconsistent with established practice as explained by the Courts and my client would suffer unfairly. For all of these reasons, I urge the SHCC to vote to NOT send this matter to Governor Perdue for amendment.

Thank you.