



September 4, 2013

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**HEALTH FACILITIES &  
SERVICES REVIEW BOARD**

Via Hand Delivery

Ms. Kathryn Olson  
Chair  
Illinois Health Facilities and Services  
Review Board  
525 W. Jefferson  
Springfield, IL 62761

Re: Centegra Hospital - Huntley  
Project No. 10-090 (the "Project")

Dear Ms. Olson,

The Centegra Project referenced above was recently remanded by the Court to the Board with a request that the Board further explain the basis for the award of a permit for the Centegra Project. This letter provides written public comment on behalf of Advocate Health Care and Hospitals in connection with the Board's consideration of this remand.

**Background and Summary of Centegra Application**

On June 28, 2011 the Review Board voted an Intent-to-Deny on the Centegra Project to establish a new hospital in Huntley. On December 7, 2011 the Board voted a final denial of the Centegra Project and subsequently issued its Denial Letter stating that the Project had been denied because it failed to meet a number of review criteria. The Board was concurrently considering a project by Mercy Crystal Lake Hospital to establish a new hospital in the same planning area, which was similarly denied.

Centegra subsequently requested an administrative hearing on its denial. During the course of the administrative hearing it was discovered that two similar documents had been crossed-filed in the Centegra and Mercy project files. The matter was remanded to the Board to "correct the record" and "reconsider [Centegra's] application for permit with the corrected record." No new State Agency Report was issued and the Board did not allow additional written public comment. On the administrative remand to correct the record the Board voted to reverse its previous decision and approve the permit, despite the only change in the record being the

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inclusion of a study setting forth reasons why the permit should not be granted. There was virtually no discussion on the record by the Board explaining this reversal.

At the request of opposing hospitals the Board then issued a 10-page written decision. This written decision confirmed that the Project did not meet certain review criterion. The Circuit Court for the 12<sup>th</sup> Judicial Circuit (the "Court") found that this written decision, however, did not offer explanation for the Board's reversal and approval of the permit despite the Project's non-compliance. Mercy Hospital, Sherman Hospital and Advocate Good Shepherd Hospital subsequently requested Administrative review in Will County Circuit Court, which precipitated the Court's remand to the Board.

## **Judge's Ruling**

On July 15, 2013 Judge Petrungaro issued her decision to remand to the Board for further explanation stating:

*However, the decision contains no findings of fact, no indication as to why the Board must have disagreed with the SAR and no conclusions by the Board.<sup>1</sup>*

In issuing her decision, Judge Petrungaro ruled on the recently issued decision in Medina v. Review Board. In Medina the appellate Court stated that administrative agencies adequately articulate the bases for their action and show "a rational connection between the facts found and the choice made." Medina, page 8. Although her decision asks the Board for further explanation, Judge Petrungaro was quite explicit that she was not telling the Board how to proceed:

*"I'm not telling them that they can or can't revote again. That certainly is not before me at all. I'm not saying it's proper or improper.... All I'm asking is that they clarify, give me further explanation for the reasons that they have set forth what the factors were that they considered relative to page ten of that decision. However they choose to do that, and whatever else they choose to do I don't believe is something - I think everyone can agree that I don't have jurisdiction to address that."<sup>2</sup>*

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<sup>1</sup> Mercy Crystal Lake Hospital v. Illinois Health Facilities and Services Review Board 12 MR 1824 unpublished decision, p. 9.

<sup>2</sup> Transcript of Centegra Court Proceedings, July 23, 2013, pages 14-15.

### Options for Board Action

The Board appears to have a number of options in responding to the Court's request including the following.

1. Further Explain Board Decision and Make Findings of Fact

The Court requested that the Board provide further explanation of its decision. If the Board chooses to provide this explanation it faces unique challenges. Unlike the Medina and Fresenius cases, the Board would also need to explain how it reversed a finding of "non-compliance" in its Denial Letter with no new written supporting information and, in fact, additional negative information in the corrected record. The difficulties in this explaining this reversal are discussed in detail later in this letter.

2. Determine that the Board Cannot Reach a Consensus for an Explanation

As further discussed in this letter, the process of obtaining consensus among Board members on a detailed explanation could prove challenging. This could be especially so in that with changes in Board membership, there is now only the barest minimum of members who voted on the prevailing side remaining on the Board and available to try to explain the decision. Further, while certain aspects of litigation are appropriately considered in executive session, deliberations as to the explanation of approval seem more appropriate for open session. While informing the Court of lack of a majority of the applicable Board members to reach consensus may result in the permit not being upheld, it appears well within the range of options the Court afforded the Board.

3. Determine that upon Reflection of the Issues the Board has Determined not to Provide Further Explanation

While the Court asked for further explanation, it made clear that the Board had other options. For example, the Board could inform the Court that it was in the best interest of the process to begin consideration anew on this Project. Instead of continuing litigation the Board could abandon the permit and recommend that the Applicants reapply for a new permit. This course would allow the Board to incorporate the explanatory process required by the Court as part of a new consideration process.

4. Vote to Reconsider the Project

It also appears as if the Board could decide to conduct a reconsideration of the project. The Court specifically addressed this alternative when it stated that “it was not telling the Board whether they can or can’t decide to revote on this project.”

**Board’s Challenges in Providing Meaning Further Explanation**

The Board must also consider remand issues for two other court cases; however, the Centegra project presents unique issues on remand. The Centegra project presents additional challenges in the findings of fact and explanation for decision.

1. Boards Reversal of Original Decision to Deny Project

Unlike Medina and Fresenius, before finally approving the Project, the Board had first voted an Intent-to-Deny and a Denial. In doing so, the Board issued its December 9, 2011 Denial Letter stating that “the applicants did not document conformance with the following review criteria” and the specified the applicable sections. The July 30 permit letter, however states that the “Board approved the application for permit for the referenced project based upon the projects substantial compliance with the applicable standards and criteria.”

These two apparently contradictory findings present a challenging scenario for the Board. There was no change on the record of new written submissions. Indeed, there was no change in staff findings or any change in the State Agency Report. The sole change was in correcting the filing of a document that the Board had already received and did not support the permit.

2. Boards Prior Issuance of a Written Decision

In furtherance of transparency in the planning process, the Illinois General Assembly recently amended the Planning Act to allow adversely impacted parties to request a written decision from the Board. The Board issued a written decision on the Centegra Project and at that time had an opportunity to explain its decision. That September 11, 2012 written decision, however, only recited the “substantial compliance” language of the permit letter without explanation and without explanation of why or how the corrected record mandated a different result. That written decision actually confirmed that the Project did not meet relevant review criteria. Any findings of fact will need to reflect that the Board has already found that the Project does not meet enumerated review criteria.

3. Projected Physician Referral Letters were not Submitted

The Centegra permit involves another important issue for which it appears should be addressed in any further explanation. The Board's rules are specific that in any application for a new hospital the applicant must provide projected physician referrals unless the area experiences "rapid population growth." [cite] Centegra did not submit physician referral letters showing the historical number of patients that would use a new hospital, attempting instead to rely on test for "rapid population growth." Under the Board's rules, "rapid population growth" means "an average of the three most recent annual growth rates of a defined geographic area's population that has exceeded the average of three to seven immediately preceding annual growth rates by at least 100%."

Ample evidence was submitted showing that the test in this definition was not met. In fact, new census data confirms that the population in McHenry County has actually declined. Centegra is the only new hospital applicant not to submit any physician referral letters since the rule went into effect. We believe that any further explanation provided on remand should include an explanation of why Centegra was not required to submit these physician referral letters and why the project was approved without these letters.

4. Procedural Deviations from Action on Other Projects

In addition to substantive issues discussed above, the process on the Centegra project also experience procedural deviations. For example, the Board's normal course is to follow its rules allowing the public to submit written comments on all projects prior to final action 20 days in advance of Board action. 77 Ill. Admin code 1130.920.

When the Centegra project went back to the Board to correct the record, the Board adopted a resolution effectively prohibiting submission of further written comment. We are unaware of any similar situation in which written of public comments were foreclosed and the Court may find further explanation helpful on this issue.

Similarly, there have been other projects going to administrative hearing where errors were discovered in the administrative record, but which were not sent back for reconsideration. The Court may also find helpful further explanation of why a cross-filed document here required correction of the record when other misfilings do not require cases sent back for correction of the record.

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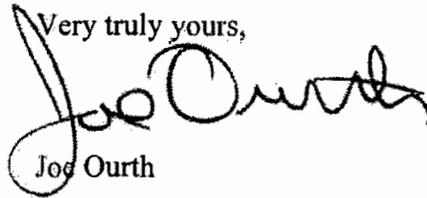
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## Conclusion – Request for Transparency

The Board faces considerable challenges in arriving at a further explanation to provide the Court. The Court, however, has afforded the Board flexibility in the action it chooses to take. The Board, for example, could take no action, determine no consensus on explanation is available, or vote to reconsider the Project. If the Board chooses to provide further explanation to the Court we ask that the explanation and process reflect the transparency intended by the Planning Act and the Court. We appreciate the opportunity to provide this public comment.

Very truly yours,  
  
Joe Ourth

JRO/eka

cc: Frank Urso  
Diane K. Moshman  
Linas Grikis  
Stephen H. Hoeft  
Daniel Lawler