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NO. COA13-367
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

HOLLY SPRINGS HOSPITAL II, LLC,
Petitioner,

v.

From the North Carolina
Department of Health and
Human Services

N.C. DEPARTMENT OF HEALTH AND HUMAN
SERVICES, DIVISION OF HEALTH SERVICE
REGULATION, CERTIFICATE OF NEED
SECTION,

No. 11 DHR 12727

Respondent, and

REX HOSPITAL, INC., HARNETT HEALTH
SYSTEM, INC. AND WAKEMED,
Intervenors.

REX HOSPITAL, INC.,
Petitioner,

v.

No. 11 DHR 12794

N.C. DEPARTMENT OF HEALTH AND HUMAN
SERVICES, DIVISION OF HEALTH SERVICE
REGULATION, CERTIFICATE OF NEED
SECTION,

Respondent, and

WAKE MED, HOLLY SPRINGS HOSPITAL II,
LLC, and HARNETT HEALTH SYSTEM, INC.,
Intervenors.

HARNETT HEALTH SYSTEMS, INC.,
Petitioner,

v.

No. 11 DHR 12795

N.C. DEPARTMENT OF HEALTH AND HUMAN
SERVICES, DIVISION OF HEALTH SERVICE
REGULATION, CERTIFICATE OF NEED
SECTION,

Respondent, and

REX HOSPITAL, INC., HOLLY SPRINGS
HOSPITAL, II, LLC and WAKEMED,
Intervenors.

WAKE MED,
Petitioner,

v.

No. 11 DHR 12796

N.C. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF HEALTH
SERVICE REGULATION, CERTIFICATE OF
NEED SECTION,

Respondent, and

HOLLY SPRINGS HOSPITAL II, LLC, REX
HOSPITAL, INC., AND HARNETT HEALTH
SYSTEM, INC.
Intervenors.

Appeal by petitioner from a Final Agency Decision entered 4
September 2012 by North Carolina Department of Health and Human
Services, Division of Health Service Regulation. Heard in the
Court of Appeals 25 September 2013.

*Attorney General Roy Cooper, by Special Deputy Attorney
General June S. Ferrell, and Assistant Attorney General
Scott T. Stroud for respondent-appellee the North Carolina*

Department of Health and Human Resources Division of Health Service Regulation, Certificate of Need Section.

K&L GATES LLP, by Gary S. Qualls, Colleen M. Crowley, and William W. Stewart, Jr., for intervenor-appellee Rex Hospital, Inc.

SMITH MOORE LEATHERWOOD LLP, by Maureen Demarest Murray, Susan M. Fradenburg, and Allyson Jones Labban, for intervenor-appellee WakeMed.

NELSON MULLINS RILEY & SCARBOROUGH LLP, by Noah H. Huffstetler, III, Denise M. Gunter, Candice S. Friel, and J. Blakely Kiefer, for petitioner-appellant Holly Springs Hospital II, LLC.

ELMORE, Judge.

Petitioner Holly Springs Hospital II, LLC (Novant) assigns error to the findings, inferences, conclusions and decision issued by the North Carolina Department of Health and Human Services (DHR) concerning its application for a Certificate of Need (CON). Novant contends that DHR's decision violated certain statutory provisions, and it now petitions this Court to reverse DHR's decision and grant it a CON. In light of the record on appeal and the applicable law, we conclude that DHR's decision should be affirmed.

I. Background

In 2011 the State Medical Facilities Plan (SMFP) identified a need for 101 additional acute care beds in Wake County.

Accordingly, six CON applications were filed, with each applicant seeking a portion of the additional acute care beds. On 15 April 2011, Novant filed its CON application to develop a new 50-bed hospital in Holly Springs, Wake County (the Novant application). Rex and WakeMed also filed CON applications, each also seeking a portion of the 101 acute care beds in Wake County. In their applications, the applicants were to demonstrate that their proposals for the acute care beds conformed or conditionally conformed to the applicable review criteria under N.C. Gen. Stat. § 131E-183 (2009).¹

After reviewing the applications, DHR's Certificate of Need Section (CON Section) issued its decision: it conditionally approved the WakeMed Raleigh application for 29 of the 79 beds for which it applied; it conditionally approved the WakeMed Cary application for all 22 beds for which it applied; and it conditionally approved the Rex Holly Springs application for all 50 beds for which it applied. However, the CON Section denied the Novant application on the basis of a determination that

¹ In 2011, the Legislature amended certain provisions in the Administrative Procedure Act and the CON Law. However, these amendments apply only to contested cases commenced on or after January 1, 2012. All citations to the amended statutes are to the 2009 versions, which are the versions applicable during this CON review.

Novant failed to show compliance with the applicable statutory review criteria in its application.

Novant appealed the CON Section's decision. On Novant's 19 March 2012 motion for summary judgment, the Administrative Law Judge (ALJ) issued a Recommended Decision, holding that the CON Section erred in finding the Novant Application to be nonconforming with N.C. Gen. Stat. § 131E-183(a)(1), (3), (4), (5), (6), (8), and (18a). Together the CON Section, WakeMed, and Rex Hospital appealed. On 4 September 2012, DHR issued its Final Agency Decision, which rejected the ALJ's Recommended Decision and affirmed the CON Section's decision. Novant timely appealed to this Court on 4 October 2012.

II. Criterion 3

Novant contends that DHR improperly required it to provide letters of physician support as a part of its CON application. Specifically, Novant argues that DHR acted upon unlawful procedure and exceeded its statutory authority by imposing the requirement of letters of support without first promulgating the requirement as a regulation. We disagree.

In the present case, DHR's findings of fact are binding on appeal because Novant has not challenged them as being

unsupported by substantial evidence. *Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.*, 188 N.C. App. 68, 72-73, 658 S.E.2d 665, 668 (2008). "The substantive nature of each assignment of error controls our review of an appeal from an administrative agency's final decision. Where a party asserts an error of law occurred, we apply a *de novo* standard of review. If the issue on appeal concerns an allegation that the agency's decision is arbitrary or capricious or fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision we apply the whole-record test." *Id.* at 71, 658 S.E.2d at 667-68. Under the "whole record" test, the "findings of fact of an administrative agency are conclusive if they are supported by competent, material and substantial evidence when the record is reviewed as a whole." *Hospital Group of Western North Carolina, Inc. v. North Carolina Dep't of Human Resources*, 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985) (citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Parkway Urology, P.A. v. N. Carolina Dep't of Health & Human Servs., Div. of Health Serv. Regulation, Certificate of Need Section*, 205 N.C. App. 529, 535, 696 S.E.2d 187, 192 (2010).

To obtain a CON, an applicant must satisfy all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a). If an application fails to conform with any one of the criteria, the applicant is not entitled to a CON for the proposed project as a matter of law. See *Presbyterian-Orthopaedic Hospital v. N.C. Dept. of Human Resources*, 122 N.C. App. 529, 534, 470 S.E.2d 831, 834 (1996) (holding that "an application must comply with all review criteria" and that the failure to comply with one review criterion supports entry of summary judgment against the applicant).

N.C. Gen. Stat. § 131E-183(a)(3) (Criterion 3) requires an applicant to affirmatively demonstrate that its utilization and need projections are reliable and reasonable: An applicant

shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services provided.

N.C. Gen. Stat. § 131E-183(a)(3) (2009).

DHR made the following finding of fact and conclusions of law with respect to this criterion:

92. What the CON Section does require is that an applicant provide some support of its utilization and need projections to demonstrate that those projections are reliable and reasonable. Here, Novant failed to provide adequate documentation of its ability to provide the obstetrics services it proposes. It was not simply that Novant lacked physician support letters, but Novant provided no documentation of its ability to provide the proposed obstetrics services. As admitted by Ms. Bres Martin, the preparer of Novant's need methodology, Novant's utilization projections rely upon obstetricians referring patients to Novant's proposed Holly Springs Hospital. Yet, the Novant Application did not contain any letters or a listing of any Wake County obstetricians. The Novant Application failed to contain any type of recruitment plan to recruit obstetricians. Ultimately, it is not about the number of letters in an application, but what the applicant puts before the Agency in its application to support its proposed project. The information from Novant was lacking to support its projections. Thus, Novant's Application failed to demonstrate the need for the proposed project.

35. [S]ubstantial evidence demonstrates the Agency properly determined the Novant Application was nonconforming with Criterion 3 as well as Criteria 1, 4, 5, 6, 8, and 18a as a result of Novant's failure to demonstrate it could meet its projected utilization projections since it failed to include letters of support from any obstetricians.

36. [U]nder Criterion 3, it is necessary for the Agency to analyze the assertion in an application to determine if an application's utilization projections are

reasonable. Physician support is a component the Agency should consider when an applicant, such as Novant, is projecting to serve a significant number of obstetrical patients as a new provider of acute care services and will plainly need the support of obstetricians/gynecologists to meet its projections. I conclude it is reasonable and permissible for the Agency to undertake such an analysis and such a statutory criterion analysis does not amount to the Agency utilizing an unpromulgated rule.

On appeal, Novant is solely concerned with DHR's conclusion #35, arguing that DHR's reliance on letters of physician support is akin to relying on an unpromulgated rule. However, Novant's argument is without merit. In conclusion #36, DHR states that physician support is merely a consideration of whether an applicant can meet its projections, and such consideration does not amount to the utilization of an unpromulgated rule. We agree and have previously held that letters of support for a proposal constitute evidence of the existence or non-existence of statutory factors determinative of need. See *Charter Pines Hospital, Inc. v. North Carolina Dep't of Human Resources*, 83 N.C. App. 161, 170, 349 S.E.2d 639, 645 (1986). Specifically, in *Hospital Group of Western N.C. v. N.C. Dept. of Human Resources*, DHR requested letters from "physicians, community mental health centers, schools, churches, the court systems and

other groups/individuals who could affect the projects [sic] success." 76 N.C. App. 265, 269, 332 S.E.2d 748, 752 (1985) (alteration in original). The petitioner provided eight letters of support, none of which were from schools or from the courts, and all of which were from one county out of the twenty-nine county area. *Id.* Based on those letters, we upheld DHR's determination that there was insufficient support for the proposed hospital. In the case *sub judice*, we hold that it was entirely reasonable and within DHR's authority to consider physician support letters as evidence of Novant's ability to meet its utilization and market share projections under Criterion 3.

Moreover, the lack of a sufficient number of physician support letters was not the only reason the Novant application was found to be nonconforming. DHR also found that Novant failed to provide adequate documentation of its ability to provide the obstetrics services it proposed, which included the lack of a recruitment plan and no list of any Wake County obstetricians offering support for the project (finding #92).

The "whole record" test does not allow the reviewing court to "replace the agency's judgment as between two reasonably conflicting views even if we might have reached a different

result if the matter were before us *de novo*." *Parkway*, 205 N.C. App. at 535, 696 S.E.2d at 192. Based on the foregoing principle and a careful examination of the record, briefs, transcript, and the exhibits submitted in this matter, we conclude that there is substantial evidence to support DHR's Final Agency Decision. We affirm the portion of the final agency decision that denied Novant a CON because Novant failed to satisfy Criterion 3. As such, we need not address Novant's remaining issues on appeal.

Affirmed.

Judges CALABRIA and STEPHENS concur in result only.

Report per Rule 30(e).