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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DHR 04538

FMRH LLC Petitioner, v. North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Respondent, and Davie Medical Center Respondent-Intervenor.	**FINAL DECISION**

THIS MATTER comes before the Honorable Donald W. Overby for consideration of the Motion for Summary Judgment, with brief and accompanying documents in support of the motion, filed with the Office of Administrative Hearings ("OAH") on January 3, 2020, by Respondent North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section (hereinafter "Agency"). Petitioner FMRH, LLC (hereinafter "FMRH") filed a response to Respondent's Motion with OAH on January 23, 2020. Respondent-Intervenor Davie Medical Center filed a separate Response to Respondent's Motion for Summary Judgment on January 24, 2020 specifically not joining the Agency's Motion but also not opposing the Motion for Summary Judgment.

Summary judgment is only proper under Rule 56 of the North Carolina Rules of Civil Procedure if after review of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56. See Nasco Equipment Co. v. Mason, 291 N.C. 145, 149, 229 S.E.2d 278, 281 (1976). The North Carolina Rules of Civil Procedure apply to proceedings in the Office of Administrative Hearings unless otherwise specified. 26 NCAC 03 .0101(b).

The purpose of summary judgment is to eliminate the necessity of a trial and to bring litigation to an expeditious and efficient decision on the merits based on the pleadings and supporting materials, "where only a question of law on the indisputable facts is in controversy." McNair v. Boyette, 282 N.C. 230, 234-35, 192 S.E.2d 457, 460 (1972); Nasco Equipment Co. v. Mason, 291 N.C. 145, 149, 229 S.E.2d 278, 281 (1976); Estate of Williams v. Pasquotank County Parks & Rec. Dep't, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012).

Summary judgment is an extreme remedy and should be awarded only where the truth is quite clear. See Lee v. Shor, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). To entitle one to summary

judgment, the movant must conclusively establish a legal bar to the non-movant's claim or complete defense to that claim. See Virginia Elec. And Power Co. v. Tillett, 80 N.C. App. 383, 343 S.E. 2d 188, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

In order to determine, for purposes of Rule 56, if a genuine issue as to a material fact exists, our courts have held that:

> an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail.

Loy v. Lorm Corp., 52 N.C. App. 428, 437, 278 S.E.2d 897, 903–04 (1981).

The burden is on the movant to establish the lack of a triable issue of fact. See generally Boudreau v. Baughman, 322 N.C. 331, 338 S.E. 2d 849 (1988). The non-movant does not have a burden of coming forward until the movant produces sufficient evidence which negates the claims of the non-moving party to the degree of necessary certainty required. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

It is necessary to clarify a point raised by Petitioner on page 3 of its Response to the Motion for Summary Judgment. The linguistic fancy footwork mischaracterizes what I thought was plainly stated in the Order of June 13, 2019 to the point that I barely recognized my own words. That Order was ruling on a motion to dismiss pursuant to Rule 12(b)(6), a different legal standard from a Motion for Summary Judgment.

Our appellate courts have long held that the purpose of summary judgment under Rule 56, as opposed to a motion to dismiss under Rule 12(b)(6), is not to test the legal sufficiency of the pleadings, but rather, in reviewing evidentiary material from outside the pleadings, "to provide an efficient method for determining whether a material issue of fact actually exists." Thus, "[t]he distinction between a Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality." Brittian ex rel. Hildebran v. Brittian, 243 N.C. App. 6, 10–11, 776 S.E.2d 867, 871 (2015).

In the prior Order of June 13, 2019, Respondent had alleged that certain facts were undisputed when in fact they were facts that were in actual dispute for the Rule 12(b)(6) Motion. I did not in any manner find that the facts were not true, but only that they were being disputed by Petitioner. I stated that the "assertion" (singular, not plural as rewritten) that the facts were undisputed was not correct.

It is well settled law that Findings of Fact and Conclusions of Law are surplusage in Motions for Summary Judgment. The following mixed Findings of Fact and Conclusions are to provide a framework for this decision but are purposely not a detailed recitation or discourse of all relevant facts in this contested case.

Petitioner contends that the Agency erroneously denied the CON exemption request because the Agency determined that the Davie Medical Center located in Mocksville is not a "Legacy Medical Care Facility" as defined in N.C. Gen. Stat. § 131E-176(14f), which states:

> "Legacy Medical Care Facility" means a facility that meets all of the following requirements:
>
> a. Is not presently operating.
>
> b. Has not continuously operated for at least the past six months.
>
> c. Within the last 24 months:
>
> 1. Was operated by a person holding a license under G.S. 131E-77; and
> 2. Was primarily engaged in providing to inpatients or outpatients, by or under supervision of physicians, (i) diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons or (ii) rehabilitation services for the rehabilitation of injured, disabled, or sick persons.

N.C. Gen. Stat. § 131E-176(14f).

N.C. Gen. Stat. § 131E-176(14f)(c.)(1.) requires that the closed facility was "operated by a person holding a license under N.C. Gen. Stat. § 131E-77," which is part of the Hospital Licensure Act. The requirement in paragraph § 131E-176(14f)(c.)(2.) mirrors the definition of hospital as defined in N.C. Gen. Stat. § 131E-176(13). The words "or outpatients" were added in 2018. It is clear that in order for a facility to qualify as a "Legacy Medical Care Facility" it must have been a hospital. There has been no question raised by either party that the DMC was a hospital.

Principally, the issue is whether Davie Medical Center "is not presently operating" as required by N.C. Gen. Stat. § 131E-176(14f)(a.). Davie Medical Center is fully operational even today. Petitioner's claim centers on the fact that the physical building of the hospital in Mocksville did indeed close its doors and cease to operate <u>at that location</u>.

From the outset of the planning for Davie Medical Center, the plan has been to relocate Davie Medical Center from Mocksville and to build a replacement hospital in Bermuda Run. The Support Agreement with Davie County supports this contention rather than disproves it. The Support Agreement entered August 21, 2007, though not relevant nor controlling, very plainly states that the existing hospital in Mocksville will close the physical facility once the replacement hospital opens and the existing hospital, on closing its doors, will relinquish its services to the replacement hospital. The Support Agreement does not use legalese or track language from any statute, but it uses very plain English. It is also important to note that N.C. Gen. Stat. § 131E-176(14f), setting forth the parameters for Legacy Medical Care Facilities, did not exist until 2015. All planning for the Davie Medical Center was being considered totally based upon the existing CON law, not whether there would be a "closing" to satisfy N.C. Gen. Stat. § 131E-176(14f).

N.C. Gen. Stat. § 131E–175(7), in conjunction with N.C. Gen. Stat. § 131E-176(16), require a new CON for the replacement hospital and those statutes were in effect in 2007. See Good Hope Hosp., Inc. v. N. Carolina Dep't of Health & Human Servs., 175 N.C. App. 309, 312, 623 S.E.2d 315, 318 (2006), aff'd, 360 N.C. 641, 636 S.E.2d 564 (2006).

The CON was appropriately sought by application. By letter dated August 28, 2008 stated: "Conditional Approval/ Project I.D. #G-8078-08 Davie County Emergency Health Corporation d/b/a Davie County Hospital and North Carolina Baptist Hospital/ Relocate existing hospital from Mocksville to Bermuda Run/Davie County." (Emphasis added). The conditional approval contains 8 enumerated conditions which must be met and which speak specifically to the replacement hospital.

The Required State Agency Findings, dated September 4, 2008, acknowledge on page 1 the proposed relocation of the Davie County Hospital from Mocksville to Bermuda Run. The Findings then are replete with what is expected of the replacement hospital.

The question in this contested case of whether the Davie Medical Center in Mocksville was closed and therefore qualified as a Legacy Medical Care Facility turns in substantial part on the definition of the very common verb "relocate." Merriam-Webster's on-line Dictionary defines "relocate" as a verb meaning "to move to a new location; to locate again; to establish or lay out in a new place." The business of the Davie Medical Center moved to a new location. The hospital in Mocksville remained open until the business of the hospital, including all services performed at the Mocksville site, were transferred to the replacement hospital unless otherwise modified as required by the CON. The physical building remained in Mocksville, but the services were subsumed into the new hospital. Relocation, be it an individual or a business, does not involve the actual movement of the physical building from which the relocation is being taken. Such would be ludicrous.

The idea of relocating the hospital and then having it wrapped into a new hospital is so that more services, and better services, can be provided to the people of Davie County, as required by the CON laws. The relocation by closing the physical plant in Mocksville and "establish or lay out in" Bermuda Run does not make the Mocksville hospital building qualified to be a Legacy Medical Care Facility. Davie Medical Center is still in operation and has not closed since its inception in 1957.

BASED UPON THE FOREGOING, it is concluded as a matter of law that the Agency did not err in concluding and notifying Petitioner FMRH that Davie Medical Center does not meet the definition of a Legacy Medical Care Facility, and therefore is not entitled to an exemption from the Certificate Of Need requirements for the Davie Medical Center. The Agency has shown that a legal bar exists to the non-movant's claim which is the fact that Davie Medical Center is not and has not been closed and is presently operating in derogation to N.C. Gen. Stat. § 131E-176(14f)(a.). The fact that Davie Medical Center is presently operating and has not been closed is a complete defense to Petitioner's claim that it is entitled to an exemption as a Legacy Medical Care Facility.

FINAL DECISION

NOW, THEREFORE, it is hereby **ORDERED** that the Agency's Motion for Summary Judgment is **ALLOWED**, and this contested case is **DISMISSED**.

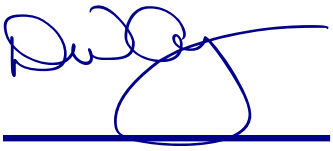
NOTICE OF APPEAL

Under the provisions of North Carolina General Statute § 131E-188(b): "Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal of the final decision shall be taken within 30 days of the receipt of the written notice of the Final Decision and notice of appeal shall be filed with the Office of Administrative Hearings and served on the Department [North Carolina Department of Health and Human Services] and all other affected persons who were parties to the contested hearing."

Under N.C. Gen. Stat. § 131E-188(b1): "Before filing an appeal of a final decision granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court of Appeals. The bond requirements of this subsection shall not apply to any appeal filed by the Department."

In conformity with the Office of Administrative Hearings' Rule 26 NCAC 03.0102 and the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail or served via electronic service as indicated on the Certificate of Service attached to this Final Decision.

SO ORDERED, this the 10th day of February, 2020.



Donald W Overby
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 10th day of February, 2020.

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