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Bodin, Erik <erik.bodin@vdh.virginia.gov>

Thu, Jan 7, 2021 at 5:56 PM

To: Piero Mannino <piero.mannino@vdh.virginia.gov>, Nicholas Megibow <nicholas.megibow@vdh.virginia.gov>, Breana Frisby <Breana.Frisby@vdh.virginia.gov>

For the record and followup (accept the application for review).

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Dr. Oliver: Your review of the COPN decision is due to OLC by 1/11/21. Included is Doug's report and a letter for your signature. Once signed, it will go directly to Doug and OLC; and Doug will send it via email.

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Erik Bodin
Director
Division of COPN/MCHIP/Cooperative Agreement
(804)367-1889



COMMONWEALTH of VIRGINIA

Department of Health
P O BOX 2448
RICHMOND, VA 23218

M. Norman Oliver, MD, MA
State Health Commissioner

TTY 7-1-1 OR
1-800-828-1120

January 7, 2021

VIA EMAIL

Erin S. Whaley, Esquire
Troutman Pepper Hamilton Sanders LLP
1001 Haxall Point
Richmond, Virginia 23219


RE: Certificate of Public Need (COPN) Request No.: VA-8541
Centra Health, Inc.
Addition of a Positron Emission Tomography-Computed
Tomography Scanner at Centra Lynchburg Hospital

Dear Ms. Whaley:

Following the expedited, telephonic informal fact-finding conference held at your request on December 30, 2020, I am directing this Department's Division of Certificate of Public Need to include the above-captioned application for a COPN in the review cycle, Batch Group F/G, beginning January 11, 2021.

If you have any questions about this matter, please contact Mr. Doug Harris by telephone at (804) 864-7007 or by email at doug.harris@vdh.virginia.gov. As this letter, with an attached recommendation, is being delivered to you via email transmission, please confirm your receipt of it to Mr. Doug Harris at the email address given in this paragraph.

Sincerely,

DocuSigned by:

E9885CE3DE124C6...

M. Norman Oliver, MD, MA
State Health Commissioner

Enclosure

cc: Doug Harris
Erik Bodin
Piero Mannino

**Recommendation
to the State Health Commissioner
Regarding a Procedural Issue Relating to
the Requested Review of Certificate of Public Need (COPN)
Request Number VA-8541, Centra Health, Inc. (Centra)
Lynchburg, Planning District 11
Addition of a Positron Emission Tomography/
Computed Tomography (PET/CT) Scanner at
Centra Lynchburg General Hospital (the “Centra project”)**

Introduction

This recommended case decision is submitted to the State Health Commissioner (“Commissioner”) for his consideration and adoption. It follows review of the administrative record relating to the captioned issue and an informal fact-finding conference (IFFC) conducted on the issue in accordance with the Virginia Administrative Process Act (APA), Virginia Code § 2.2-4000 et seq. The issue at hand is discrete: Whether an application for a proposed project, viz., the Centra project, should be included in a routine batch review cycle about to begin in the Department’s Division of Certificate of Public Need (DCOPN).

Authority

Article 1 of Chapter 4 of Title 32.1 (§ 32.1 - 102.1 *et seq.*) of the Virginia Code (the “COPN law”) addresses medical care facilities and provides that “[n]o person shall commence any project without first obtaining a [Certificate] issued by the Commissioner.” The endeavor proposed in an application submitted by Centra, i.e., the Centra project, falls within the statutory definition of “project” contained in the COPN law.

Additionally, the COPN law and regulations¹ prescribe a process for persons, such as Centra, to apply for a Certificate, along with standards by which such applications are reviewed and related provisions.

In 2020, the General Assembly adopted Senate Bill (SB) 764 (Acts of Assembly, c. 1271), which made various amendments to the COPN law, effective July 1, 2020. Some provisions of the COPN regulations, one in relevant relation to the current issue, have lost effect by virtue of the enactment of SB 764, as discussed below.

Findings of Fact

1. On October 30, 2020, Centra filed a letter of intent (LOI) with DCOPN, thereby announcing its intention to apply for a certificate authorizing the Centra project.

¹ 12 VAC 5-220-10 et seq.

2. On November 6, 2020, the director of DCOPN responded, acknowledging receipt of the LOI and stating “[i]n accordance with 12 VAC 5-220-290 B, no application will be deemed to be complete for review until the required application fee is paid.”

3. The deadline applicable for filing the application for the Centra project fell, by operation of regulation,² on December 1, 2020. Filing an application by that deadline allowed a project to be included in the January 10, 2021, batch review cycle.

4. On December 1, 2020, counsel for Centra sent an email to DCOPN, attaching the application for the Centra project and stating “[t]he check for the application should arrive [at DCOPN] by mail today, if it has not arrived already.”

5. The check for the application submitted by Centra arrived at DCOPN on December 2, 2020.

6. On December 8, 2020, counsel for Centra wrote the director of DCOPN, stating, in part, “I understand that DCOPN may take the position that Centra Health’s application should not be accepted into the January 10 batch cycle because the application fee did not arrive at DCOPN until December 2 even though it was postmarked November 27[, 2020].”

7. On December 11, 2020, the project analyst to whom the Centra project had been assigned wrote counsel for Centra, stating that “[t]he application fee did not arrive until after the application deadline had passed. As such, [DCOPN] determined the application to be incomplete.” The DCOPN analyst added that Centra may re-submit its application for inclusion in a later batch review cycle by March 31, 2021, or receive a refund of the submitted application fee.

8. On December 30, 2020, I conducted a telephonic informal fact-finding conference (IFFC) requested by Centra to demonstrate why its application should be included in the January 10, 2021, batch review cycle. Centra, by counsel and by a corporate officer, participated in the IFFC, as did the supervisor of DCOPN. A court reporter prepared a certified transcript of the IFFC.

Discussion

Centra’s Position. Centra’s basic argument in support of its position that its application should be included in the January 10, 2021, batch review cycle is that SB 764 inserted language clarifying what a “completed application” is. This clarification specifies that an application is complete “when all relevant section of the application form have responses.”³ Since its application contained responses to all relevant sections and was received by the December 1, 2020, deadline, Centra contends, its application should be deemed complete, despite the arrival of the application fee a day later.

² 12 VAC 5-220-180 C.

³ Va. Code Sec. 32.1-102.6.

Centra argues that, the statute now clarifies, or basically defines, a completed application to be one that has responses to all relevant sections of the application form. The statute does not state that payment of the application fee is necessary for an application to be complete. Centra argues that its application was complete when received by DCOPN on December 1, 2020, and that it ought to be, therefore, included in the January 10 batch review cycle. Centra further argues that 12 VAC 5-220-290 B is no longer effective, to the extent that it states no application will be deemed complete until the application fee is paid, by virtue of a canon of statutory construction holding that a regulatory provision in conflict with a statute has no effect. Importantly, Centra argues that 12 VAC-220-190 is still in effect insofar as it provides that

[a]dditional information required to complete an application shall be submitted to the department . . . at least five days prior to the first day of a review cycle to be considered complete for review in the same review cycle.

This provision, Centra contends, “does not conflict with the statute . . . [and] remains in effect,” so it allows the application fee to be submitted up to the 35 days after the application is due, “. . . which is when applicants had traditionally paid the fee . . . prior to July 1 [i.e., when SB 764 became effective].”⁴ In this case, the deadline for such information and the application fee would be January 5, 2021, under this interpretation. In conceptually reconciling the statute, as amended, and regulation, as certain provisions remain in effect, it seems to me that the filing of an application that is deemed complete ought not foreclose the later submittal of an accompanying requisite to review, i.e., the application fee. Since the fee was received December 2, 2020, it was, Centra maintains, paid timely.

Centra concludes that, since its application, with appropriate responses to sections, was received by the close of the December 1, 2020, deadline, and the application fee was received long before the deadline for additional information, the application should rightfully be included in the January 10, 2021, batch cycle for review by DCOPN over the coming weeks.

DCOPN's Position. DCOPN contends that 12 VAC 5-220-290 B still retains effect, causing the application fee to have been due, in this case, December 1, 2020. DCOPN argues that, if the fee is not due on the deadline for an application, and since an application that has responses to all relevant sections is complete when filed, the application fee must be due when the application is due.

DCOPN adds that it has interpreted SB 764 and its remaining effective regulations in accordance with this position since the statute became effective on July 1, 2020. Holding otherwise could create an untenable situation where the Department is statutorily obligated to review an application, or applications, for which no fee has been received. Holding otherwise would remove inducement for an applicant to submit the required fee, and applicants could “withhold[] the fee until they know the [DCOPN] recommendation.”⁵ A holding that would

⁴ IFFC Transcript (“Tr.”) at 19, 35.

⁵ IFFC Tr. at 26.

allow such a scenario could damage the credibility of the DCOPN program and would be wholly at odds with the General Assembly's intention that the COPN program be funded entirely through application fees.

Conclusion

I believe the record in this matter compels a conclusion that a reasonable reading of the COPN law, as amended by SB 764, and COPN regulations that are not in conflict with that law, in particular, the last sentence of 12 VAC 5-220-190, continue to cause an opportunity for an applicant to supplement its application to remain in place up until five days before a batch review cycle begins. In light of judicial precedent, I have little doubt that a Virginia court would strive to give meaning to a reasonable melding of statute and regulation that preserves the rights of an applicant in this scenario.

Recommendation

I have reviewed the record in this matter, including (i) relevant provisions of the COPN law and the COPN regulations, (ii) the transcript of the December 30, 2020, IFFC, (iii) exhibits circulated by DCOPN via email on December 28, 2020, consisting mainly of correspondence between Centra and DCOPN), and (iv) a final briefing email from counsel for Centra dated January 5, 2021.⁶

I recommend that Centra's application be included in the batch review cycle beginning on January 11, 2021,⁷ and that the Commissioner should so direct.

Respectfully submitted,



January 6, 2021

Douglas R. Harris, JD
Adjudication Officer

⁶ I affirmatively and purposely have not reviewed the application for Centra's project. The application is attached to an email from counsel for Centra to DCOPN, dated December 1, 2020 (Exhibit 3, attached to a December 28, 2020, email from DCOPN support staff to counsel for Centra, myself, et al.). The present recommendation addresses a discrete, preliminary, procedural issue only, and does not in any way touch the merits of the project proposed in the application.

⁷ As January 10, 2021, falls on a Sunday, the operative date is moved to the next business day, i.e., January 11, 2021.