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May 17, 1979

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ARIZONA ATTORNEY GENERAL

The Honorable Robert B. Usdane  
Arizona State Senator  
Senate Wing, State Capitol  
Phoenix, AZ 85007

Re: I79-129 (R79-143)

Dear Senator Usdane:

This is in response to your letter of May 4, 1979, concerning A.R.S. § 36-433.04, as added by Ch. 151, Laws of 1979. Your question has been rephrased as follows:

Is the Director, Arizona Department of Health Services authorized by Ch. 15, Laws of 1979, to suspend or otherwise fail to complete the processing of an application for a certificate of need within the time limit and in the manner prescribed by A.R.S. § 36-443.01 because of perceived inadequacies in the bed plan adopted by the authorized local agency?

A.R.S. § 36-433.01, in pertinent part, provides:

A. The authorized local agency shall notify the applicant in writing of the beginning of the review. The director shall issue regulations defining the procedures for the review of the application which shall include the following provisions:

1. That no review shall take longer than one hundred forty-five days from the initial date of filing the application with the authorized local agency, unless the agency and the applicant agree in writing to an extension of time. (Emphasis added.)

Among the regulations adopted pursuant to this section, the Director has promulgated A.C.R.R. R9-9-32 which, in pertinent part, provides:

A. Not later than fifteen days after the completion of the public hearing required pursuant to A.R.S. § 36-443.01.A, the agency shall adopt written findings on the application as provided in R9-9-20. The findings shall be based only on the information contained in the record of the public hearing and shall specifically cover at least the following factors:

\* \* \*

17. The conformance of the proposed services or facilities with any health plans adopted by the agency.

B. Based upon the findings referred to in subsection A preceding, a further finding shall be made as to whether a certificate of need for the proposed services or facilities should be issued.

The Director is required by A.R.S. § 36-433.02 to adopt the findings of the authorized local agency unless they are found to be arbitrary, capricious or not supported by any substantial evidence. Based on these statutes and regulations, it is evident on one hand that the review of an application for a certificate of need must be completed within 145 days from its initial date of filing, except where a written extension is agreed upon by the applicant and the authorized local agency. On the other hand, it is evident that one of the findings required of the authorized local agency is the conformance of the applicant's proposed services or facilities with the "bed plan".

During its most recent session, the Legislature added a new A.R.S. § 36-433.04, made effective retroactively to January 1, 1979. This section reads as follows:

§ 36-433.04. Certificate of need application and reviews; psychiatric specialty beds

A. The department, the director and the authorized local agency shall not consider psychiatric specialty beds to be a part of the general hospital bed allocation set forth in the bed plan adopted by the authorized local agency. An application for psychiatric specialty beds shall be approved under this chapter upon a showing of need for those particular beds.

B. The determination of need shall take into consideration the availability of all other beds designated as psychiatric beds by the department.

C. "Psychiatric specialty beds" include psychiatric, alcohol dependence and drug dependence treatment beds to be located in a freestanding hospital facility which is not part of a general hospital.

The first sentence requires the Director and the authorized local agency to disregard "psychiatric specialty beds" as a part of the bed plan.<sup>1</sup> Undoubtedly, future bed plans for general hospitals will not include "psychiatric specialty beds". However, the raw data upon which current bed plans were formulated, we understand, does include such beds. If such is the case, the requirement of A.R.S. § 36-433.04 to disregard such beds may be impossible to follow with respect to findings being prepared on applications in process, unless a correction or adjustment is made to the existing bed plan. Applications relating solely to psychiatric specialty beds as defined in A.R.S. § 36-433.04.C should not in any way be affected since the bed plan cannot be used to determine the need for such beds.

The Director and the authorized local agencies are faced with a four-pronged predicament. Should the local findings be adopted notwithstanding the proscription in A.R.S. § 36-433.04.A, or should the requirement that there be conformity with the agency's health plan be ignored on the ground that the plan is defective and the resulting recommendation be based on the other sixteen factors, or should the local findings be set aside as arbitrary and substitute findings be adopted on the ground that a local bed plan which includes or may include psychiatric specialty beds was utilized, or should the statutory time limits established by A.R.S. § 36-433.01 be ignored for a period of time needed to eradicate psychiatric specialty beds from the bed plan?

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<sup>1</sup> The bed plan is a document which is designed to reflect projected needs within a specified area for various types of health care institution beds based on statistical formulae, mathematical models and analysis which take into account the current availability, distribution and types of beds as well as the anticipated demography and health trends during the period projected.

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We see no authority for the Director, under any of the circumstances herein contemplated, to suspend or fail to complete the processing of an application even though it may be difficult under the circumstances for all applicable requirements to be met. The consequences, if any, of a failure by the Director or the authorized local agency to comply with all applicable requirements is a matter for judicial determination.

Sincerely,



BOB CORBIN  
Attorney General

BC/mm