

**LETTER OPINION
93-L-172**

June 3, 1993

Jon R. Rice, MD
State Health Officer
North Dakota Department of
Health and Consolidated Laboratories
600 E Boulevard Avenue
Bismarck, ND 58505

Dear Dr. Rice:

Thank you for your May 3, 1993, letter in which you pose the following questions:

If a hospital or other licensed health care facility closes and later wishes to reopen as a health care facility, is the reopening subject to the certificate of need [CON] program under North Dakota Century Code ch. 23-17.2? Is the reopening subject to review if the facility reopens under a different licensure category?

As you correctly indicate, there are no statutory provisions addressing the situation where a health care facility closes and then later reopens. As such, the fact that a facility closes and then reopens in and of itself does not render it subject to the CON program. However, the reopening of a facility may nevertheless be subject to the CON program depending on the circumstances.

N.D.C.C. ? 23-17.2-03(1) provides in relevant part:

The certificate of need program applies to:

. . . .

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- b. The addition or expansion of a health service by or on behalf of a health care facility beyond that which was offered within the previous twelve-month period before the month in which the health service would be offered which is associated with a capital expenditure and entails an annual operating cost of at least three hundred thousand dollars. . . .

. . . .

- e. The obligation of a capital expenditure of seven hundred fifty thousand dollars or more by any person to acquire an existing health care facility if a notice of intent is not received at least thirty days prior to entering into a contract for the obligation or the department finds that the services or bed capacity of the facility will be changed.
- f. An acquisition by donation, lease, transfer, or comparable arrangement must be reviewed if such acquisition would have been subject to review if purchased. An acquisition for less than fair market value must be reviewed if the acquisition at fair market value would have been subject to review.

Where a health care facility has been closed for more than 12 months, any reopening would result in the addition or expansion of a health service under N.D.C.C. ? 23-17.2-03(1)(b). Likewise, an attempt to reopen under a different licensure category suggests that an added or expanded health service is to be offered. However, whether something constitutes a health service within the scope of N.D.C.C. ch. 23-17.2 essentially is a question of fact. See 1981 N.D. Op. Att'y Gen. 23. Further, whether the addition or expansion of a health service through reopening is associated with a capital expenditure and an operating

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cost as required under N.D.C.C. ? 23-17.2-03(1)(b) is a question of fact.

New ownership or other reorganization of a health care facility planning to reopen may render it subject to the certificate of need program pursuant to subsection (e). Again, each case would depend on its own unique set of facts.

In summary, it is my opinion that the reopening of a health care facility which has been closed is subject to the certificate of need program if the operation as reopened falls within the scope of coverage outlined in N.D.C.C. ? 23-17.2-03.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

tca/krb