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DEPARTMENT of HEALTH

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MEMORANDUM

TO: North Dakota LTC and Basic Care Administrators

FROM: Darleen Bartz, PhD, Chief Health Resources Section

DATE: August 5, 2016

TOPIC: Response to Questions Related to Bed Transactions

Recently, we have had questions raised with the North Dakota Department of Health related to: 1) if LTC beds had been placed in a bed layaway (for 24 months) or bed hold (for 48 months) and were due to expire, could the beds be relicensed by the facility and other licensed beds in the facility be placed into bed layaway or bed hold resulting in a new 24 month (bed layaway) or 48 month period (bed hold)? and, 2) can a facility transfer (sell) basic care beds to another facility, and then the facility that sold the beds request and be approved for new additional basic care beds from the NDDoH and DHS to replace those beds? We have visited with the department's attorney on these questions. His response was that both of these scenarios would be considered a shell game and would not be allowable.

The department's attorney referred us to a memorandum he had written in response to a similar situation in 2007. The response to these questions is based on our recent conversation with the department's attorney and the information from the previous research he had completed on this issue. This information is updated and summarized below.

The statutory moratorium on expansion of long-term and basic care bed capacity requires the beds become licensed within forty-eight months of transfer. In addition, the statutory language allows a facility to delicense up to twenty-five percent of its bed capacity for a period of twenty-four months. Delicensed bed capacity not sold or relicensed at the conclusion of the twenty-four-month period ceases to exist. If the bed capacity is transferred to another facility within the twenty-four month period, the receiving entity must license the transferred bed capacity within the forty-eight month period originally established at the time of initial delicensure. [1]

The facility in the original 2007 scenario was planning to build a second facility. Their proposal was to purchase beds that were close to their expiration date, but which would expire before the new facility was constructed. In order to obtain the full (or new) 48 month period before licensure, the facility proposed to transfer bed capacity from its current facility

[1] See N.D.C.C. § 23-16-01.1(2) and (5) ("Transferred bed capacity must become licensed by an entity within forty-eight months of transfer."), see also N.D.C.C. § 23-16-01.1(6) and (7) for a twenty-four month timeframe for facilities to delicense and relicense or transfer bed capacity and N.D.C.C. §§23-09.3-01.1 for similar provisions concerning basic care facilities.

period before licensure, the facility proposed to transfer bed capacity from its current facility to the new facility and replace these beds at their existing facility with the beds they were planning to purchase which were close to their expiration date. These beds transferred from their existing facility to the new facility presumably would gain the full forty-eight months to become licensed at the new facility. Thus, the entire project would be completed in a series of transactions which would individually comply with the law, but taken together these transactions were "an attempt to evade the forty-eight month limitation contained in the moratorium."

This same analysis applies to the two transactions described in the first paragraph of this memo. The department's attorney also has indicated if a facility had delicensed beds that were close to the twenty-four month expiration date and decided to relicense those beds, only to delicense other beds in the facility, this too would be considered an attempt by the facility to evade the intent set forth in statute.

The department's attorney indicated the second scenario identified in the first paragraph of this memo related to the selling of basic care beds, followed by a request for new/additional basic care beds from the Department of Health and Department of Human Services calls into question the need for the basic care beds when the facility that sold beds is the same facility requesting the new/additional basic care beds. The department's attorney recommended that such a request not be approved.

Summary of Legal Analysis

When interpreting the bed capacity moratorium, we need to be sure any interpretation is consistent with other statutory uses of bed capacity.[2] The original use for licensed bed capacity is to measure the maximum number of patients that may be admitted to a facility for licensing fee purposes.[3] Therefore, when discussing a facility's licensed bed capacity, each individual bed is not counted separately, but rather the sum total of beds is the relevant consideration. This is because a facility does not receive a license for each bed, but rather the facility itself is licensed, and the licensing fee is determined by the total number of beds. Therefore, a transaction that subtracts one bed and adds another bed doesn't actually have an effect on the facility's state license.[4] Also, this meaning for bed capacity implies that a bed is to be licensed at a facility whether or not it is presently occupied by a resident.

Further, the moratorium's background[5] and purpose[6] needs to be considered. The moratorium is the sole surviving remnant of the former certificate of need program.[7] The

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[2] All statutes relating to the same topic are to be construed together. State v. Novak, 338 N.W.2d 637, 640 (N.D. 1983), Litten v. City of Fargo, 294 N.W.2d 628, 633 (N.D. 1980), Hospital Services, Inc. v. Brackey, 283 N.W.2d 174, 177 (N.D. 1979).

[3] N.D.C.C. § 23-16-03 sets fees for facilities based on the number of beds in the facility.

[4] But it may have an effect on Federal certification. That, however, is a moot issue given the state licensing issue.

[5] In construing a statute, consideration must be given to the background for the enactment as ascertained from the whole act. Sheets v. Graco, Inc., 292 N.W.2d 63, 66 (N.D. 1980).

[6] Remedial statutes must be interpreted to address the mischief that the statute was enacted to correct. Northern X-Ray Co. Inc., v. State by and through Hanson, 542 N.W.2d 733, 736 (N.D.1996), Hebron

certificate of need program existed to require review and approval for expansion of services in hospitals and related medical facilities, including skilled nursing facilities, because facilities were being constructed which greatly exceeded the needs of patients or persons in the area to be served, thereby imposing great medical costs on the public for services that were not needed.[8]

This legislative purpose has continued in the moratorium on expansion of long-term care bed capacity and the moratorium on expansion of basic care bed capacity. These laws have been amended to adapt their purpose to present needs in every legislative session since the certificate of need program was repealed.[9] While the existing moratorium language must be interpreted on its own merits without regard to former terms, this history shows the Legislature has maintained a consistent public policy directing the reduction of state-wide licensed bed capacity, together with flexibility to transfer this capacity geographically with the ability to grant additional capacity where a shortage has been demonstrated.

The only way the proposed transactions can work is if they are independent from one another. If the transfers of beds from the existing facility are treated as completely unrelated to the beds being transferred to that facility, then both transactions would appear to be legally correct. However, doing so requires us to not see the forest because of the trees. The series of related transactions proposed are not independent from one another. The purpose of this series of related transactions is to take beds that are expiring and give them a new expiration date; or to sell beds and replace them with free beds requested from the state.

These related transactions, taken together as a single course of action, are plainly intended to evade the 24-month or 48-month time frame for licensure that has been mandated by the Legislature; or to gain revenue on existing beds by selling them and replacing them with free beds obtained from the state. It is well established law in North Dakota that a series of related transactions may be interpreted together.[10] Evidence of a series of related transactions is admissible to demonstrate the intent behind one of the individual transactions.[11] As found in a case involving securities fraud, the court noted the charge "arose out of the same series of events and is based upon the same acts and transactions, constituting a single act, carried out under a common scheme or plan."[12]

Public School Dist. No. 13 of Morton County v. United States Gypsum Co., 475 N.W.2d 120, 124 (N.D.1991) (quoting Berry v. Branner, 421 P. 2d 996, 998-999 (Or.1966).

[7] See 1995 N.D. Sess. Laws ch. 254.

[8] See generally City of LaMoure v. State Health Council, 213 N.W.2d 869, 873 (N.D. 1973).

[9] See 1995 N.D. Sess. Laws ch. 254, 1997 N.D. Sess. Laws ch. 12, 1999 N.D. Sess. Laws ch. 236, 2001 N.D. Sess. Laws ch. 237 and ch. 431, 2003 N.D. Sess. Laws ch. 216, 2005 N.D. Sess. Laws ch. 241, 2007 N.D. Sess. Laws ch. 240, 2009 N.D. Sess. Laws ch.218, 2011 N.D. Sess. Laws chs. 188, 189, 2013 N.D. Sess. Laws ch. 210, 2015 N.D. Sess. Laws ch. 190.

[10] Jacobson v. Mutual Ben. Health & Acc. Assn., 296 N.W. 545, 559 (N.D. 1941).

[11] Amann v. Frederick, 257 N.W.2d 456, 440 (N.D.1977). Of course, if the transactions are not related, then they should not be interpreted together. See generally Griffin v. Implement Dealers' Mut. Fire Ins. Co., 241 N.W. 75, 76-77 (N.D.1932) (distinguishing conducting a single transaction from generally doing business within a given county).

[12] State v. Weisser, 161 N.W.2d 360, 363 (N.D. 1968).

Further, it is also well established law in North Dakota to look at the substance of a transaction as opposed to its form or format:

> Illegality is seldom guilty of the consummate folly of flaunting its defiance of law in the face of public sentiment - of furnishing itself the evidence of its violation of law. To escape the penalties of breaking the law, it will always put on the "suits and trappings" of honest transactions. . . . In Edwards v. Hoeffinghoff, 38 Fed. 639, Judge Sage says: "no matter what the form of the contract, no matter how many colorings of reality and genuine dealing are thrown about the transaction, if, piercing all these disguises, the court or jury see that all these forms are merely shams, and that there was in fact no actual dealing in the article itself, but that forms were adopted as merely a semblance to deceive and evade the law, it is the duty of the court and jury to tear away the disguise, treat the transaction as it is."[13]

It is equally a long standing position of the North Dakota Supreme Court to forbid a person from evading a statute through indirect means.[14]

When the proposed series of transactions is examined as a whole, it is apparent the sole purpose is to remove the expiration from the beds transferred and placed in bed hold, or delicensed and placed in bed layaway, and give those beds a new forty-eight month (bed hold) or new twenty-four months (for delicensed beds in layaway) timeframe for licensure; or to gain revenue on selling of beds and replacing with new/additional free beds requested from the state in an area of identified need. As stated previously, the second scenario also calls in to question the need for new/additional beds in the area if the facility that sold beds is the same facility requesting the new/additional basic care beds. None of these actions (adding and subtracting beds) would result in a significant actual change in bed capacity for the facility, but would result in a new expiration date, or increased revenue from selling beds and replacing with free beds obtained from the state. This demonstrates these transactions are not intended to cause any real licensing change at that facility and is nothing more than a strawman transaction designed to evade the law.[15]

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[13] Dows v. Glaspel, 60 N.W. 60, 62-3 (N.D. 1894).
[14] Straw v. Jenks, 43 N.W. 941 (Dak. 1889), Ex Parte Corliss, 114 N.W. 962, 963 (N.D. 1907), Cain v. Merchants Nat. Bank & Trust Co., 268 N.W. 719, 722 (N.D. 1936).
[15] Roeders v. City of Washburn, 298 N.W.2d 799, 781 (N.D.1980), Rozan v. Rozan, 129 N.W.2d 694, 708 (N.D.1964).