

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

In re: ACTD, LLC, d/b/a The Green Mountain)
Surgery Center) GMCB-010-15con
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NOTICE OF CONTINUATION OF PROCEEDING

On July 2, 2015, ACTD, LLC, d/b/a Green Mountain Surgery Center, filed an application for a certificate of need (CON) to open an ambulatory surgical center in Chittenden County. As explained below, the Board has not reached a consensus and is therefore without authority to issue a decision at this time.

Procedural Background

On June 12, 2015, ACTD filed a letter of intent with the Board stating that it intended to develop an ambulatory surgical center in Colchester, and on July 2, 2015, filed its CON application with the Board. The Vermont Office of the Health Care Advocate (HCA), Northwest Medical Center, and the Vermont Association of Hospitals and Health Systems (VAHHS) each intervened in the proceeding. For more than a year-and-a-half following the application’s submission, the Board requested additional information about the proposal from the applicant, which provided its final responses to the requests on February 27, 2017.¹ The Board closed the application on March 10, 2017.

In early December 2016, as the application process was nearing completion, Board Chair Al Gobeille was chosen to lead the Agency of Human Services and resigned from the Board effective January 2017. On January 5, 2017, Board member Dr. Betty Rambur resigned for personal reasons, effective January 15, 2017. Since that time, the remaining board members have continued to hold public meetings and take regulatory action consistent with their statutorily-defined duties. *See* 18 V.S.A. § 9375 (“Duties”).

The Board held a hearing on the application on April 13, 2017 and April 18, 2017. The applicant, represented by attorney Eileen Elliott of Dunkiel Saunders, presented testimony of Amy Cooper (managing member), Joan Dentler (Avanza Healthcare Strategies), Dr. Paul Reiss (Healthfirst), and Dr. Elizabeth Wennar Rosenberg, Ph.D. Anne Cramer of Primmer Piper

¹ The statutory 90-day application review period is exclusive of “the time during which the applicant is responding to the Board’s notice that additional information is required.” 18 V.S.A. § 9440(c)(4). Here, the applicant utilized 514 days to respond to the Board’s inquiries. In addition, the Board extended the period for 60 days, as permitted by statute, *id.*, in part to accommodate the applicant’s and interested parties’ requests to submit additional materials. The full record is available on the Board’s website at <http://gmcboard.vermont.gov/con>.

Eggleston & Cramer PC represented both VAHHS and Northwest Medical Center and presented testimony on VAHHS' behalf from Jeffrey Tieman (President), Walter Morrissey and Jim Medendorp (Kaufman Hall), Mike Del Trecco (Vice President of Finance), and Chris Oliver (UVM Medical Center Vice President of Clinical Services). Jill Berry Bowen (CEO), Dr. Gregory Brophy (ophthalmologist and Executive Medical Director of Physician Services), and Jane Catton (Registered Nurse and Chief Nursing Officer) testified for Northwest Medical Center. The Board accepted written public comment from the start of the application process through May 2, 2017, and set time aside at the close of each day's hearing for members of the public to speak.

After review of the application and materials contained in the record, including the many public comments, the Board members do not concur on a decision whether to issue a certificate of need to the applicant.

Discussion

As part of Act 48 (2011), the Legislature created the Green Mountain Care Board to advance Vermont's health care reform efforts. The legislation provides that the Board consists of a chair and four board members, each of whom are nominated by the Green Mountain Care Board Nominating Committee; the Committee's composition and appointment process is also outlined in statute. 18 V.S.A. § 9374(a), (b); 18 V.S.A. § 9390. The Nominating Committee screens applications for Board membership and forwards the names of qualified candidates to the governor for selection. 18 V.S.A. § 9391(a), (b). Once a candidate is chosen, the appointment is subject to consent of the senate. 18 V.S.A. § 9391(c).²

Since the departures of Chair Gobeille and member Rambur, the Board has continued to hold weekly Board meetings and to issue decisions and orders with only three participating members. Because its decisions thus far have been made by a concurrence of all three members, constituting a majority of the Board, they have been valid and enforceable. *See* 1 V.S.A. § 172 ("When joint authority is given to three or more, the concurrence of a majority of such number shall be sufficient and shall be required in its exercise"); *In re Reynolds*, 170 Vt. 352, 354 (2000) ("[t]he number of concurring votes required is a majority of all the members of the board"); *see also In re Lionni*, 160 Vt. 625, 626 (1993) (mem.) *citing* 1 V.S.A. § 101 (the requirement of consensus by the majority must be followed unless inconsistent with legislative intent or in conflict with governing statute's context). In the instant matter, however, the three participating Board members do not agree on a result.

In re Rumsey, a case stemming from a decision of the Human Service Board, is instructive for the Board at this juncture. In *Rumsey*, the Vermont Supreme Court held that a 3-3 vote by the seven-member board was not a "decision" of the board and therefore without effect. 2012 VT 74 ¶ 1. The Court reasoned that the tie vote alone did not signify an unresolvable impasse meriting exception to the general rule of 1 V.S.A. § 172; rather, the board could obtain the vote of the absent member to achieve a majority decision, for the board action to be effective. *Id.* ¶ 19. The Court noted that the absent member had not abstained or been otherwise

² Where not otherwise specified in statute, members of the Board are appointed and confirmed in the manner of a Superior judge. 18 V.S.A. § 9374(a)(2).

disqualified from voting, and could participate in the decision “without offending the requirements of due process of law or general statutory requirements by voting after reviewing a transcript of the testimony and other evidence or listening to a recording of the hearing and reviewing other evidence.” *Id.* ¶¶ 21, 22 (citations omitted).³ Although *Rumsey*’s facts can be distinguished from those in the case at hand — here, the absent Board member holding the “potentially outcome-affecting vote” is yet to be appointed — the differences are minor and are not material to our conclusion that we cannot decide this matter without a consensus of all three participating Board members.

Since January, a new governor has taken office, new members of the Nominating Committee have filled the seats of those whose terms have expired, the recruitment process for the two Board vacancies has concluded, and the legislative session is nearing adjournment. Accordingly, the Board reasonably expects, seeing no apparent impediment remaining that might further slow the selection process, that the two vacancies will soon be filled and a full Board can review the application and issue its decision within the timeframe prescribed by statute. *See* 18 V.S.A. § 9440(d)(3) (Board must make final decision within 120 days from notice that application is complete, which period may be extended by 30 days). Once seated on the Board, consistent with *Rumsey*, the new members can review the full record, the legal memoranda of the applicant and interested parties, and the transcript or recording of the hearing prior to casting their votes.

Conclusion and Order

Consistent with the discussion above, the Board unanimously agrees to continue the CON proceeding pending the appointment of a new Board member or members. A status conference will be held with the applicant and interested parties within fifteen days of the date of this Notice.

Dated: May 12, 2017 at Montpelier, Vermont.

s/ Cornelius Hogan) GREEN MOUNTAIN
) CARE BOARD
s/ Jessica Holmes) OF VERMONT
)
s/ Robin Lunge)

Filed: May 12, 2017

³ The *Rumsey* decision recognized that a member’s actual presence at the taking of testimony may be required in some instances. 2012 VT 74 ¶ 22; *see also In re Villeneuve*, 167 Vt. 450, 456 (1998) (defects in the record prevented its use for decision-making by absent board member). This exception is not applicable here, however, where there is a full record of written materials available for review and the hearing was both transcribed and videotaped. In addition, pursuant to Board rule, materials submitted after notice that the application is closed or at hearing may not include new information unless such information was specifically requested by the Board. *See* GMCB Rule 4.000, § 4.302(8) (no submissions of additional materials after application closes, unless requested by Board); § 4.407(2) (materials presented at hearing shall not contain new information unless expressly requested by Board).