

**LETTER OPINION
2013-L-04**

June 14, 2013

Dr. Terry L. Dwelle
State Health Officer
Department of Health
600 E Boulevard Ave Dept 301
Bismarck, ND 58505-0200

Dear Dr. Dwelle:

Thank you for your letter asking three questions concerning the exception from the moratorium on expansion of basic care bed capacity found at N.D.C.C. § 23-09.3-01.1(1)(c). This exception allows an entity to add basic care beds beyond the state's licensed bed capacity if it can demonstrate that basic care services are not readily available within a designated area of the state or that existing basic care beds within a 50 mile radius have been occupied at 90 percent or more for the previous 12 months.¹ You first ask whether an entity must meet both the requirement to demonstrate that basic care services are not readily available within the designated area of the state as well as the requirement that existing basic care beds within a 50 mile radius must have been occupied at 90 percent or more for the previous 12 months in order to be exempt from the moratorium. You further ask whether the Health Council's² standard of 15 beds or fewer per 1,000 people aged 65 and above is a legally correct standard to apply to determine whether basic care services are not readily available within the designated area of the state. Your last question is whether it is appropriate to interpret the designated area of the state to be the geographic area of the regional human service center in which the entity is located.

For the reasons stated below, it is my opinion that an entity must demonstrate either that basic care services are not readily available within a designated area of the state or that existing basic care beds within a 50 mile radius have been occupied at 90 percent or more for the previous 12 months. The entity is not required to meet both of those standards. It is my further opinion that the Health Council's standard of 15 beds or fewer per 1,000 people aged 65 and above is a reasonable interpretation of the statute to determine

¹ See N.D.C.C. § 23-09.3-01.1.

² The Health Council is an eleven member council established pursuant to N.D.C.C. § 23-01-02. One of the numerous duties of the Health Council is providing for the establishment of basic standards for medical institutions which render medical and nursing care. N.D.C.C. § 23-01-03.

whether basic care services are not readily available. And further, it is my opinion that the designated area of the state may be interpreted as the geographic area of each regional service center in which the entity is located.

ANALYSIS

I.

The moratorium on expansion of basic care bed capacity provides:

1. Basic care beds may not be added to the state's licensed bed capacity during the period between August 1, 2011, and July 31, 2013, except when:

...

- c. An entity demonstrates to the state department of health and the department of human services that basic care services are not readily available within a designated area of the state or that existing basic care beds within a fifty-mile [80.47-kilometer] radius have been occupied at ninety percent or more for the previous twelve months. In determining whether basic care services will be readily available if an additional license is issued, preference may be given to an entity that agrees to any participation program established by the department of human services for individuals eligible for services under the medical assistance program under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.]; or

....³

There are two criteria specified for the exception to apply: the entity must demonstrate that basic care services are not readily available within a designated area of the state, and the entity must demonstrate that existing basic care beds within a 50 mile radius have been occupied at 90 percent or more for the previous 12 months.

These criteria are separated by the word "or." Words used in a statute are to be understood in their ordinary sense unless a contrary intention plainly appears.⁴ "In its

³ N.D.C.C. § 23-09.3-01.1(1) (emphasis supplied). N.D.C.C. § 23-09.3-01.1 was amended by H.B. 1035 to extend the moratorium to July 1, 2015. H.B. 1035, 2013 N.D. Leg.

⁴ N.D.C.C. § 1-02-02.

ordinary sense, the term 'or' is a conjunction indicating an alternative between different things or actions."⁵ However, "[u]nlike the term 'or,' which is disjunctive in nature and ordinarily indicates an alternative between different things or actions, the term 'and' is conjunctive in nature and ordinarily means in addition to."⁶ The literal meaning of these terms should be followed unless it renders the statute inoperable or the meaning becomes questionable.⁷

Applying the literal meaning of the word "or" to N.D.C.C. § 23-09.3-01.1(1)(c) does not render the statute inoperable or its meaning questionable. This then indicates that the two provisions are disjunctive in nature and are an alternative between different things or actions. Therefore, it is my opinion that an entity seeking licensure under the exception from the moratorium on expansion of basic care bed capacity under N.D.C.C. § 23-09.3-01.1(1)(c) need only demonstrate that basic care services are not readily available within a designated area of the state or that existing basic care beds within a 50 mile radius have been occupied at 90 percent or more for the previous 12 months, but the entity does not have to demonstrate that both conditions exist.

II.

You next note that the Health Council has adopted a standard of 15 beds or fewer per 1,000 people aged 65 and above to demonstrate whether basic care services are "not readily available" under N.D.C.C. § 23-09.3-01.1(1)(c). You ask whether this standard is consistent with the statutory requirements. "Readily" has been defined as meaning promptly, willingly, or easily⁸ and, in this context, "available" has been defined as meaning accessible for use, at hand.⁹

"A statutory provision is ambiguous if it is susceptible to differing, but rational, meanings."¹⁰ Rational arguments could be made that different levels of available bed capacity might satisfy the standard of whether basic care services are "not readily available" because this phrase is inherently vague.¹¹ Because the statute would allow significant arguments over the meaning of this phrase, it is ambiguous. Being ambiguous, extrinsic aids may be used

⁵ State v. Silseth, 399 N.W.2d 868, 870 (N.D. 1987).

⁶ Christl v. Swanson, 609 N.W.2d 70, 73 (N.D. 2000), quoting Narum v. Faxx Foods, Inc., 590 N.W.2d 454 (N.D. 1999).

⁷ Id. citing 1A Norman J. Singer, Southerland Statutory Const., § 12.14 (5th ed. 1991) (2000 cum. sup. 26).

⁸ The American Heritage Dictionary, 4th coll. ed. (2010) p.1159.

⁹ Id. at 98.

¹⁰ Zuger v. N.D. Ins. Guar. Assoc., 494 N.W.2d 135, 137 (N.D. 1992).

¹¹ The vagueness of "not readily available" as a standard is quite apparent when contrasted with the alternative objective standard that existing basic care beds within a 50 mile radius had been occupied at 90 percent or more for the previous twelve months.

to interpret the meaning of the statute.¹² One of the extrinsic aids in construction of an ambiguous statute is the administrative construction of that statute.¹³

“The construction of a statute by an administrative agency charged with its execution is entitled to weight and [courts] will defer to a reasonable interpretation of that agency unless it contradicts clear and unambiguous statutory language.”¹⁴ Courts normally defer to a reasonable interpretation of a statute by the agency enforcing it when that interpretation does not clearly contradict statutory language.¹⁵ Such deference, however, will not be provided to an agency’s interpretation if that interpretation is inconsistent with the statutory authority.¹⁶

Granting an exception from the moratorium on expansion of basic care bed capacity found at N.D.C.C. § 23-09.3-01.1(1)(c) is charged to both the State Department of Health and the Department of Human Services. You told a member of my staff that the Department of Human Services agrees with the Health Council’s interpretation that the determination of whether basic care services are not readily available for purposes of this exception is a standard of 15 beds or fewer per 1,000 people aged 65 and above. This interpretation does not contradict any clear or unambiguous statutory language and appears to be consistent with the ordinary meaning of the terms used in the statute.

Therefore, it is my opinion that the Health Council’s standard of “15 beds or fewer per 1,000 people aged 65 and above” is a reasonable interpretation of the statutory language and may be applied to determine whether basic care services are not readily available for purposes of deciding whether to grant an exception from the moratorium on expansion of basic care bed capacity found at N.D.C.C. § 23-09.3-01.1(1)(c).¹⁷

III.

Your last question is whether it is appropriate to interpret the designated area of the state in which basic care services are not readily available under N.D.C.C. § 23-09.3-01.1(1)(c) as being the geographic area of the regional human service center in which the licensed

¹² N.D.C.C. § 1-02-39, Kim-Go v. J.P. Furlong Enters., Inc., 460 N.W.2d 694, 696 (N.D. 1990).

¹³ N.D.C.C. § 1-02-39.

¹⁴ Frank v. Traynor, 600 N.W.2d 516, 520 (N.D. 1999).

¹⁵ Haugland v. Spaeth, 476 N.W.2d 692, 693 (N.D. 1991).

¹⁶ N. X-Ray Co., Inc. v. State, 542 N.W.2d 733, 738 (N.D. 1996).

¹⁷ The State Department of Health has authority to adopt administrative rules necessary to carry out its responsibilities under N.D.C.C. ch. 23-09.3. N.D.C.C. § 23-09.3-09. Although the State Department of Health and the Department of Human Services may exercise their authority under N.D.C.C. § 23-09.3-01.1(1)(c) on a case-by-case basis, the two state agencies may wish to consider whether adopting an administrative rule would be beneficial to the regulated community. See Amerada Hess Corp. v. Conrad, 410 N.W.2d 124, 133 (N.D. 1987).

entity is located. The regional human service centers must operate in the areas designated by the Governor's Executive Order 1978-12 dated October 5, 1978.¹⁸ These same areas are also used by the State to define the jurisdiction of the various regional planning councils.¹⁹

The Governor's Order states, in part:

NOW, THEREFORE, IT IS ORDERED that the state shall be divided into eight regions made up of groupings of entire counties around a recognized regional center city which provides major services in marketing, education, health, financing, recreation and cultural enjoyment for the majority of citizens in the counties of the region; and that all state agencies are ordered to adjust their agency planning and administration to conform to the standard regions hereby established, unless otherwise exempted upon application to the governor.²⁰

Therefore, for the reasons enumerated in part II of this opinion, above, and in consideration of the Governor's Executive Order No. 1978-12, it is my further opinion that the State Department of Health and the Department of Human Services may interpret the phrase "designated area of the state" as used in N.D.C.C. § 23-09.3-01.1(1)(c) as being the geographic area of the regional service center in which the license entity is located.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²¹

¹⁸ N.D.C.C. § 50-06-05.2.

¹⁹ N.D.C.C. § 54-40.1-02(7). See also N.D. Executive Order 1978-12, October 5, 1978.

²⁰ N.D. Exec. Order 1978-12, October 5, 1978 (emphasis supplied). The specific counties and the regional center city are stated in the order.

²¹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).