

EXHIBIT NO. 6DATE: 1-28-05BILL NO. SB 257

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TO: Rose Hughes
 FROM: Steve Brown SB
 RE: Certificate of Need and Critical Access Hospital Swing Beds
 DATE: January 28, 2005

You asked me to review the April 22, 2003 legal opinion ("4/22/03 opinion") relied on by the Montana Department of Health and Human Services ("DPHHS") to conclude that swing beds in Critical Access Hospitals ("CAH") are exempt from review under Montana's certificate of need ("CON") laws and rules. I respectfully disagree with the 4/22/03 opinion and its conclusions.

Montana's CON law applies to health care facilities and long-term care facilities are included in the definition of a health care facility. *See* Section 50-5-301(2)(a), MCA. Hospitals are generally exempt from Montana's CON requirements and the health care facility definition. *See* 50-5-301(2)(a)(i), MCA. However, the hospital exemption is not absolute and hospitals are included in the CON definition of a "health care facility" to "the extent that a hospital is subject to certificate of need requirements pursuant to ... [Section 50-5-301(1)(h), MCA]." *Id.* If a hospital provides "services for ... long-term care" or uses "hospital beds in excess of five to provide services to patients or residents needing only skilled nursing care ... [or] intermediate nursing care as ... defined in 50-5-101," then the hospital is a health care facility subject to applicable CON requirements. *Id.*, and Sections 50-5-301(1)(g) and 50-5-301(1)(h), MCA.

The first crucial but erroneous conclusion in the 4/22/03 opinion is that a CAH is not a hospital but yet is somehow exempt from CON review.¹ The reverse is true. If a CAH is not a hospital, then it cannot claim the expansive but not absolute hospital exemptions from CON review under 50-5-301(1)(g) and (h), MCA. The ramifications of a CAH not being defined as a hospital under 50-5-101(28), MCA, are clear and unequivocal under Montana's CON laws:

A. A CAH is subject to the same CON review as any other non-hospital health care (long-term care) facility providing skilled or intermediate nursing care. Section 50-5-301(1)(e),

¹ I agree that a CAH is not a hospital under the definition in Section 50-5-101(28), MCA. But if a CAH is not a hospital, then it cannot claim the hospital exemption from CON review.

MCA, subjects any person, including a CAH, that constructs, develops, or establishes a health care facility "being replaced or that did not previously exist" to CON review.

B. A CAH cannot avail itself of the five swing bed exemption that hospitals enjoy because a CAH is not a hospital under Montana's CON statutes.

The second crucial but erroneous conclusion in the 4/22/03 opinion is that the relocation of beds from a CAH-owned nursing home facility to the CAH is not a relocation requiring CON review under Section 50-5-301(1)(b), MCA. This provision of law clearly requires CON review of a "change in bed capacity of a health care facility through ... a relocation of beds from one health care facility or site to another" As previously discussed, a CAH cannot claim the hospital swing bed exemption because it is not a hospital under Montana's CON definitions. It is equally clear that CON review is required when a "person" as defined in 50-5-101(44), MCA, triggers any of the CON review criteria in 50-5-301, MCA.

Thank you for the opportunity to review this important issue.