

Public Health Law

Staples McDannold Stewart • November 2008

Exemption Applications Under The Community Care And Assisted Living Act

Introduction

During the Summer of 2008, the Community Care and Assisted Living Appeal Board handed down two decisions regarding the process to be followed for applications for exemptions under Section 16 of the Community Care and Assisted Living Act. While there is some uncertainty as to the exact effect of the Board's ruling, it is clear that the process which a licensing authority ("Licensing") should follow for exemption applications will have to change to require consultation with persons affected by the exemption applied for.

Valleyhaven Decision

On July 21, 2008, the Appeal Board gave its decision in the Valleyhaven Guest Home appeal. Valleyhaven was a grandfathered facility constructed in 1967 and in 2008, it had 51 persons in care. Valleyhaven needed to expand to meet the demand for care in the community and it needed to be updated to meet the current standards in the regulations. The owners looked at renovating the existing buildings but decided to replace the facility. In order to accomplish that, Valleyhaven applied for and was granted an exemption to allow double occupancy in existing single occupancy bedrooms and triple occupancy in the double occupancy bedrooms in order to vacate half of the facility for demolition and reconstruction.

Families of residents appealed to the Appeal Board and, after hearing evidence from the families, Licensing, and Valleyhaven, the Board allowed the appeal and set aside the exemption.

The Board held that Licensing had erred by not requiring Valleyhaven to notify residents and families about the application for the exemption. This had prevented Valleyhaven from receiving information regarding any concerns about increased risk to the health or safety of persons in care. The Appeal Board stated:

Given that the nature and scale of the exemption made it specific and significant in its effect on each person in care, ... the residents perspective on increased risk to their health or safety – as formulated by them or their family or family counsel representatives – was a relevant consideration that the MHO should have required Valleyhaven to bring to the table in connection with its application.

... because the residents, families or residents' counsel were not required to be informed or consulted about the application for the exemption, the MHO was without the relevant information input when she made her decision under section 16 of the Act. This was a serious decision making flaw for the exemption.

Cowichan Lodge Appeal

On August 22, 2008, the Appeal Board gave its decision in the Cowichan Lodge appeal. In this case, the Vancouver Island Health Authority (VIHA) as Licensee had made the decision



to close the Cowichan Lodge facility and to transfer residents to a newly constructed facility located in the same community. VIHA applied for an exemption to reduce the 12 month notice requirement under section 14 of the Adult Care Regulations to 60 days. The exemption was granted and families of residents filed an appeal with the Appeal Board.

Prior to the appeal being heard, the MHO, at the request of the Licensee, rescinded the exemption and the Licensee announced that Cowichan Lodge would instead follow the 12 month notice period in the Regulations. In its request to the MHO to cancel the exemption, the Licensee referred to the Valleyhaven decision and acknowledged it had not engaged in the type of consultation required since the Board decision was made after the exemption in this case had been applied for. The Board, in its decision cancelling the scheduled appeal hearing, stated:

Nothing in this decision should be taken as the Board's concurrence in or approval of the reasons that the Licensee announced for asking the MHO to rescind the exemption. The type and circumstances of the exemption in the case of Ganton v. Valleyhaven Guest Home were quite different than here and the decision maker's process in that case suffered because there was simply no consideration of any information from the affected residents (i.e. failure to take into account a relevant consideration) and not because of a novel duty to consult, as posed by the Licensee in its August 19, 2008 request to the MHO to rescind the exemption.

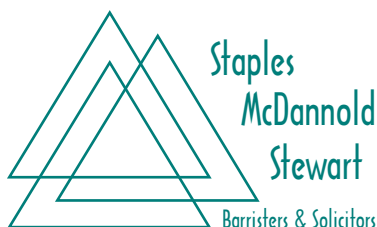
New Requirements on Exemption Applications

It is clear that the Appeal Board in the Valleyhaven decision imposed a duty to consult with residents and their families with respect to an exemption application in order to obtain information on possible concerns regarding health or safety that may arise from the granting of the application. This new duty to consult goes further than previous administrative law decisions which require a decision maker to consider the effect of their decision on the person making the application. The Appeal Board's decision goes far beyond considering the effect of a decision on the person applying for the exemption and requires Licensing to consider the effect of an exemption not only on the applicant, but anyone using the licensed facilities.

While the Appeal Board in the Cowichan Lodge decision appears to be trying to qualify the effect of its earlier decision, Licensing will now be faced with risk and uncertainty on any exemption application if it does not require the Licensee to obtain information from persons in care or their representatives.

The Appeal Board may further clarify the Valleyhaven decision in the future, but for the time-being Licensing will have to decide whether to require an Applicant for an exemption to consult and provide the results of that consultation as part of the application.

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