

STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

May 3, 1978

ATTORNEY GENERAL OPINION NO. 78- 154

Mr. E. A. Jarvis
Statewide Health Coordinating Council
154 N. Broadway, Room 1210
Wichita, Kansas 67202

Re: Public Health--Health Facilities--Hearing Held
by Agency

Synopsis: The Statewide Health Coordinating Council must
review an application for certificate of need
on its merits when conducting hearings pursuant
to K.S.A. 1977 Supp. 65-4801 et seq.

* * *

Dear Mr. Jarvis:

I have received your letter wherein you requested my opinion
as to what standard of review should be used by the State-
wide Health Coordinating Council (hereinafter referred to
as SHCC) when it conducts hearings on applications for
certificates of need pursuant to K.S.A. 1977 Supp. 65-4801
et seq.

I note that applications for certificates of need are
first submitted to the appropriate health systems agency
and the Department of Health and Environment for review.
K.S.A. 1977 Supp. 65-4807 states that the health systems
agency may only offer comments and recommendations regarding
the application. However, K.S.A. 1977 Supp. 65-4808 vests
the Department of Health and Environment with the authority
to either approve, approve subject to modification, or
deny the application. K.S.A. 1977 Supp. 65-4809 provides
that certain parties who are adversely affected by a
decision of the Department of Health and Environment may
request a hearing before the SHCC.

SHCC hearings shall be conducted upon the record unless the SHCC on its own motion orders that the hearing be conducted de novo. K.S.A. 1977 Supp. 65-4812. Following the hearing, the SHCC may either approve, approve subject to modification, or disapprove the decision of the Department of Health and Environment; these decisions must also include findings of fact and a determination of the issues presented. K.S.A. 1977 Supp. 65-4814.

You have specifically asked if the above-cited statutes, and K.S.A. 1977 Supp. 65-4814 in particular, require that the SHCC render its decision on the merits of the application; or whether the decision can be made on a more limited nature by utilizing the substantial evidence doctrine.

Obviously, the SHCC must consider the merits of the application if it chooses to conduct a de novo hearing. Evidence of this legislative intent is found in K.S.A. 1977 Supp. 65-4813 which dictates special procedures which must be followed in a de novo hearing. However, there is some confusion as to what the legislature intended when it stated that SHCC hearings (other than those conducted de novo) "shall be upon the record . . .". K.S.A. 1977 Supp. 65-4812.

Standing alone, this section would seem to indicate that the SHCC need only review the decision of the Department of Health and Environment to establish the existence or non-existence of substantial evidence which will support the decision. While this standard of review may be efficient and desirable, two factors lead me to believe that the legislature has intended to enact a stricter standard.

First, K.S.A. 1977 Supp. 65-4810 speaks of a SHCC "hearing" and not an "appeal" of the Department of Health and Environment's decision. Had this statute referred only to an administrative appellate review, it is clear that the SHCC substantial evidence doctrine could be used. The specific reference to a "hearing" leads one to believe that the SHCC must use a broader scope of review.

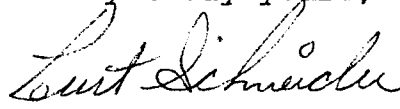
This interpretation is also supported by the language of K.S.A. 1977 Supp. 65-4814 which allows the SHCC to approve a Department of Health and Environment decision "subject to modification". The authority to modify these decisions indicates that the SHCC must look at the merits of a particular application and not merely ascertain if the determination is or is not supported by substantial evidence.

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I should emphasize that the SHCC may still render its determination by merely reviewing all of the evidence presented to the Department of Health and Environment should it choose to do so. A full adversary hearing need only be used should the SHCC order a de novo review.

It is, therefore, my opinion that the SHCC must review an application for certificate of need on the merits when it conducts a hearing pursuant to K.S.A. 1977 Supp. 65-4801 et seq.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:CAB:ksn