Regulatory Advisory Panel for the Regulations for Licensure of Abortion Facilities (12VAC5-412)
Building Panel Minutes

April 20th 2:00-4:00 p.m.
Perimeter Center
Second Floor Conference Center Board Room 3
9960 Mayland Drive,
Henrico Virginia 23233

In attendance: VDH Staff: Dr. David Trump, Deputy Commissioner, Erik Bodin, Director of the Office of Licensure and Certification, Fred Kyle, Director of the Office of Licensure and Certification's Acute Care Unit, Joe Hilbert, Director of Governmental and Regulatory Affairs, and Susan Horn, Policy Analyst. Building Panel Members: Ron Clements, Ron Reynolds, Cheri Hainer, Robert Dawson, Emory Rodgers, Julie Walton, and Richard Peterson. Members of the public also attended.

Physician's Panel Members (in attendance at 3:30): Dr. David Chelmow, and Dr. Serina Floyd

Dr. David Trump began the meeting by welcoming all present and telling the panel that the Virginia Department of Health (VDH) and the Commissioner truly appreciated their work during the last meeting. He noted that the first order of business is to determine whether the panel finds it necessary to have a third meeting. The panel suggested determining whether a third meeting was necessary at the end of the meeting. With that, Dr. Trump began the introductions with Joe Hilbert, Director of Governmental and Regulatory Affairs. All panel members and VDH staff introduced themselves.

Dr. Trump then presented the minutes from the last meeting and asked the panel members if they had any edits. Hearing none, the minutes were approved. Dr. Trump then turned over the meeting to Erik Bodin for a recap of the last regulatory advisory panel meeting. Mr. Bodin stated that the minutes accurately reflect the work done during the last meeting, then he noted he will review the questions presented by the panel at the last meeting. First he recounted that a member of the panel asked what the FGI was. Mr. Bodin stated that a brief description was provided during the past meeting, however a staff member wrote a memo providing a brief history of the FGI which will be sent out to the panel after the meeting. He noted that a takeaway from this memo is that 42 other states utilize the FGI Guidelines in some form in regulation. He then reiterated that Section 32.1-127.001 of the Code of Virginia requires that the Regulations for Licensure of Abortion Facilities (Regulations) include minimum standards for design and construction consistent with the FGI Guidelines. He noted that a copy of that Code section has been provided to the panel members.

Mr. Bodin then related that during the last meeting a panel member asked if there was a "theme" to those elements of the FGI Guidelines that providers request a variance from. Mr. Bodin stated that variance requests really do "run the whole gambit" but provided what the Office of Licensure and Certification (OLC) deemed the "top 4". Those are: 1. the corridor width

requirement; 2. the exam/treatment room square footage requirement; 3. HVAC requirements; and 4. Americans with Disabilities Act compliance standards.

Next, Mr. Bodin stated that in the previous meeting the panel asked for a legal analysis of how 12VAC5-412-370 of the Regulations and Section 32.1-127.001 of the Code, which require the FGI Guidelines take precedence over the Virginia Uniform Statewide Building Code (USBC) can be reconciled with Section 36-98 of the Code which states the USBC "shall supersede the building codes and regulations of the counties, municipalities and other political subdivisions and state agencies." Mr. Bodin noted that the OLC has posed this question to the Office of the Attorney General but has not yet received a response. The OLC will follow up.

Mr. Bodin noted that the panel requested a side-by-side comparison of the USBC and the FGI Guidelines. Mr. Bodin stated that OLC has not been able to complete this request within the two weeks since the last meeting due to the density of both documents. Mr. Bodin noted that he is hopeful that the panel will provide their expertise in these areas. Mr. Bodin noted that should it be deemed necessary the OLC will carry out this request in the future.

Dr. Trump then introduced Joe Hilbert again. Dr. Trump observed that during the last meeting there were some questions regarding the history of the Regulations. Dr. Trump stated that Mr. Hilbert was in attendance to answer any questions related to historical issues. Robert Dawson asked if outside the Regulations if there is any requirement that these facilities comply with the FGI Guidelines. Mr. Hilbert noted Section 32.1-127.001 of the Code requires these facilities comply with the latest edition of the FGI Guidelines. Mr. Dawson observed 32.1-127.001 of the Code states that hospitals and nursing facilities shall comply with the latest edition of the FGI Guidelines. Mr. Hilbert elaborated that Section 32.1-127 of the Code designated facilities in which 5 or more first trimester abortions per month are performed as a category of hospital. There were no more questions regarding historical issues.

Mr. Emory Rodgers then remarked that he and several other panel members had worked on recommended language since the last panel meeting. That language was displayed on a projection screen for all present. The recommended language is as follows:

Abortion facilities shall comply with state and local codes, zoning~~, and building~~ ordinances and the Virginia Uniform Statewide Building Code (13VAC5-63). In addition, abortion facilities shall be designed and constructed consistent with Part 1 and sections 3.1-1 through 3.1-8 and section 3.7 of Part 3 of the 2014~~2010~~ Guidelines for Design and Construction of Health Care Facilities of the Facilities Guidelines Institute, ~~which shall take precedence over the Virginia Uniform Statewide Building Code~~ for functional design program and operational requirements pursuant to § 32.1-127.001 and § 36-98 of the Code of Virginia.

~~Entities operating as of the effective date of this chapter as identified by the department through submission of Reports of Induced Termination of Pregnancy pursuant to 12VAC5-550-120 or other means and that are now subject to licensure may be licensed in their current buildings if such entities submit a plan with the application for licensure that will bring them into full compliance with this provision within two years from the date of licensure.~~

In order to determine whether the abortion facility is in compliance with the 2014 Guidelines for Design and Construction of Health Care Facilities of the Facilities Guidelines Institute ~~this provision~~, the commissioner may obtain additional information from the facility or its architect concerning compliance ~~the design and construction of~~ for the facility.

Mr. Rodgers explained that first the panel suggests removing the term "building ordinance" as there are no local building ordinances in existence as they were all superseded by Section 36-98 of the Code of Virginia. He noted that keeping this terminology within the Regulations could be confusing.

Then Mr. Rodgers explained that the panel suggested removing the text which states the FGI Guidelines take precedence over the USBC. The newly proposed language would take this provision's place and allow the FGI Guidelines to be an "overlay code" which would be applied for all functional design features. Mr. Rodgers believes that this language would fulfill both the requirements of Section 32.127.001 of the Code as well as Section 36-98. He noted that the USBC requirements would control other elements of accessibility, means of egress, construction type, occupancy, etc. and the FGI would control on room size requirements, ventilation, hand washing stations, etc. He commented that the Department of Housing and Community Development (DHCD) has developed regulatory coordination and agreements over several decades across state agencies that clearly establish what each regulation covers and where. He stated it is unnecessary to reinvent the wheel. He further argued that the recommended language provides complete coverage. He noted that that the USBC recognizes functional design and operational requirements. Further, the recommendation removes some of the conflict over which agency is making compliance decisions. He stated should the USBC need to be updated for these specific facilities the update can be done through the usual regulatory process, and that process would involve updating the USBC rather than inappropriately inserting the building requirements into these Regulations.

Other members of the panel expressed their support of the language presented by Mr. Rodgers. Mr. Dawson noted it may be necessary to amend the usage classification of these facilities within the USBC, as there seems some discrepancy between the Code classifying these facilities as a type of hospital and the "B-use" classification currently used for these facilities in the USBC. He noted this would be important in terms of enforcement of the USBC.

Dr. Trump had a question regarding the final paragraph. Mr. Rodgers stated that the final paragraph is intended to direct users and operators to the proper regulating authority for each Code, to provide a clear demarcation of which guidelines VDH will utilize in their inspections and which building inspectors will utilize. He also stated that he believed the language would avoid potential conflict when there is differing advice from different groups.

Mr. Bodin asked if the overall language of the section was too vague, whether it is specific enough or clear enough. Richard Peterson stated he believes the proposed language is clear enough. He stated the USBC is a minimum standard and the FGI is an "overlay code." He stated in almost every other case for other facilities an architect and designer would have to determine how these two codes fit together. He also stated he believes specifying which sections of the Guidelines a facility will need to comply with is "leading the witness" as that will all depend on the functional program and the type of anesthetic utilized.

A panel member noted that building designers may not be aware that they are required to design to the FGI Guidelines. Mr. Rodgers noted that communication may be a break down; however; this type of language will usually bring the information to those who need it and bring both state "balls" into play. Ron Reynolds asked who is going to enforce the FGI Guidelines. Mr. Bodin

stated that when facilities are first licensed the OLC requires an attestation from the facility's architect under the architect's seal, attesting that the facility is in compliance with the Guidelines.

Cheri Hainer asked Mr. Bodin whether the OLC looks at the plans of abortion facilities prior to licensure. Mr. Bodin answered no; OLC relies on design professionals as the office does not have the expertise. Mr. Clements noted that in most other arenas there is a requirement for a third party inspection. Mr. Rodgers stated that he wished to clarify that DHCD will only inspect for compliance with elements of the USBC and will not check for compliance with requirements above and beyond the USBC.

Mr. Dawson stated he was concerned with the use of the word "compliance" within the final paragraph when the word consistent was used elsewhere in the section. The panel suggested the following language in response to this concern:

In order to determine whether the abortion facility's design and construction is consistent~~in compliance~~ with the 2014 Guidelines for Design and Construction of Health Care Facilities of the Facilities Guidelines Institute~~this provision~~, the commissioner may obtain additional information from the facility or its architect ~~concerning the design and construction of the facility~~.

The panel then stated they were comfortable presenting this language as their recommendation to the Commissioner.

Dr. Trump then asked the panel to consider the VDH OLC's Guidance Document regarding Frequently Asked Questions about Abortion Facility Licensure. Mr. Rodgers stated the Guidance Document would need to be amended; he clarified the USBC would govern corridor width and thus certain sections of this document would need to be revamped should the regulatory language be amended to reflect the recommendation of the panel.

Dr. Trump then asked the panel if they would like to discuss other provisions of the regulations. A panel member suggested that in a future regulatory action Section 360 and 370 could be combined as 360 is redundant. The panel acknowledged that section 360 is indeed redundant but it does provide notice to providers and facilities of compliance requirements. Another panel member suggested that in the future VDH OLC may want to consider including the maintenance code within the Regulations, as it is another tool which is utilized to inspect existing building to ensure the ongoing safety of those structures.

Another panel member noted that Section 240 of the Regulations could be enhanced by adding language that states that these plans, policies and procedures related to disaster preparedness should be developed in conjunction with local emergency planning committees. This would ensure that the plans address actual risks within the facility's community.

Dr. Trump commented that the Physician's Panel will arrive in about 20 minutes; he requested that Mr. Rodgers summarize the Building Panel's recommendations to the Physician's Panel when they arrived.

At that point Dr. Trump asked the panel if they feel the need for a third meeting. The panel expressed they did not see the need. Dr. Trump thanked the panel for their work and stressed the advisory nature of the panel, noting that their recommendation will be considered however the regulatory language going forward may not exactly reflect the panel's recommendation.

The Building Panel took a short break until 3:30. The Physician's Panel arrived at 3:30. Dr. Trump welcomed the physicians. He then requested all panel members to go around the table and introduce themselves. At that point Mr. Rodgers explained the recommendation of the Building Panel, giving the details of their suggested amendments to Section 370 of the Regulations. A member of the Physician's Panel asked if the building requirements were to apply to all facilities even those facilities that only provide medical abortion. Mr. Rodgers noted that would be functional program question or a question for the Board of Health which could be addressed within the definition section of the Regulations. Dr. Chelmow noted that the construction guidelines are in his opinion overboard for those facilities which are only writing prescriptions. He stated there is precedent for such a separation of requirements within these very Regulations, as there are different requirements for facilities offering varying levels of anesthesia.

A panel member asked if there can be an amendment to separate out those facilities which only perform medical procedures. Ms. Horn noted that the Code of Virginia classifies the facilities by the number of abortion performed per month and the Code does not differentiate between medical and surgical abortion. Mr. Clements stated that means in order to create such distinction legislation would need to be enacted. Dr. Chelmow noted that he didn't know how to undertake the legal piece of the consideration; he was simply trying to take on the task of the panel.

Dr. Chelmow asked if all the provisions delineated within the FGI Guidelines were really necessary for safety purposes. Mr. Rodgers noted the building panel was not tasked with determining the relevancy of each provision. Dr. Chelmow noted concern that the FGI Guidelines include things such as awnings and parking. Mr. Rodgers stated the USBC would not be controlling in terms of awnings but would address parking. Mr. Dawson stated that the USBC bases usage and occupancy categorization on how many patients are able to self-preserve. Dr. Chelmow noted that the medical procedure that is utilized for first trimester abortions is substantially the same as that which is utilized when a woman miscarries; but now there are vastly different regulations for essentially the same procedure. He stated he doesn't believe anyone would argue that doctors throughout the Commonwealth are performing the procedure for miscarriages unsafely.

Dr. Floyd asked if this language will allow for grandfathering of existing facilities. Mr. Rodgers explained that usually retrofitting is not necessary or required by the USBC unless required by legislation. Dr. Floyd asked if facilities can be grandfathered. Mr. Bodin explained that VDH OLC received guidance from the Office of Attorney General that due to the fact that these facilities were not previously licensed they are required to be considered new facilities.

Dr. Trump asked if there was anything else the Building Panel wished to discuss. Hearing nothing further Dr. Trump thanked the Building Panel and dismissed them.