

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEESBURG REGIONAL MEDICAL CENTER,)
)
 Petitioner,)
)
 vs.) CASE NO. 83-156
)
 DEPARTMENT OF HEALTH AND)
 REHABILITATIVE SERVICES,)
)
 Respondent,)
 and)
)
 LAKE COMMUNITY HOSPITAL,)
)
 Intervenor-Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in the above case before the Division of Administrative Hearings, by its duly designated Hearing Officer, DONALD R. ALEXANDER, on July 19 and 20, 1983 in Leesburg, Florida and on July 22, 1983 in Tallahassee, Florida.

APPEARANCES

For Petitioner: Dean Bunch, Esquire
Post Office Box 1170
Tallahassee, Florida 32302
and
Bruce A. Saylor, Esquire
Post Office Drawer 2160
Leesburg, Florida 32748

For Respondent: Jay Adams, Esquire
Building One, Room 406
1323 Winewood Boulevard
Tallahassee, Florida 32301

For Intervenor/
Respondent: Eric J. Haughdahl, Esquire
1020 East Lafayette Street, Suite 208
Tallahassee, Florida 32301
and
Thomas K. Riden, Esquire
5656 Central Avenue
St. Petersburg, Florida 33707

BACKGROUND

By petition dated December 23, 1982 petitioner, Leesburg Regional Medical Center, requested a formal hearing to contest proposed agency action of

respondent, Department of Health and Rehabilitative Services, to deny in part its application for a certificate of need to renovate its existing space to accommodate 36 medical/surgical beds and seven intensive care unit beds at a cost of approximately \$785,000. The denial was issued on November 29, 1982 and was based generally upon the ground there was no need for additional medical/surgical beds in the Lake/Sumter subdistrict. The petition was forwarded by respondent to the Division of Administrative on January 14, 1983 with a request that a Hearing Officer be assigned to conduct a hearing.

Thereafter, Petitioner sought to consolidate its application with one filed by intervenor-respondent, Lake Community Hospital. Lake's application to expend 4.1 million dollars on a renovation project had been previously granted by respondent on November 29, 1982. The request to consolidate and to hold a comparative hearing was docketed as DOAH Case No. 83-261. After considering oral argument and briefs of counsel, the undersigned concluded by recommended order dated April 28, 1983 that petitioner had no standing to contest the application of intervenor-respondent and accordingly granted a motion to dismiss the request of petitioner. This order was adopted by respondent as a final order on June 15, 1983. The matter has subsequently been appealed by petitioner to the Fifth District Court of Appeal where it remains pending.

By notice of hearing dated April 5, 1983 a final hearing was scheduled for July 19 and 20, 1983 in Leesburg, Florida. A continued hearing was also held on July 22, 1983 in Tallahassee, Florida. At the final hearing, petitioner presented the testimony of Frederick D. Woodrell, petitioner's administrator, Mr. Ronald Everett, an expert in health care planning, Jerry Ingram, a registered professional engineer, and Carol Gormley, executive director of the North Florida Health Planning Council. It also offered petitioner's exhibits 1-4, 8, 10.-14, 16, and 18-20; all were received except exhibits 13, 14 and 14a which were conditionally received. A ruling on their admissibility is made in the conclusions of law portion of this order. Respondent presented the testimony of Gail Buck, an expert in health planning, and offered respondent's exhibits 1-5; all were received in evidence. 1/ Intervenor-respondent presented the testimony of Dr. Deborah S. Kolb, an expert in health planning and financial feasibility, Patricia D. Stover and Nancy Taylor, assistant administrator and executive director, respectively, of Lake Community Hospital, and Thomas J. Konrad, administrator of the Department's office of community affairs. It also offered intervenor-respondent's exhibits 1 and 2; both were received in evidence. By agreement of the parties, the deposition of Carol Gormley was taken on September 16, 1983 and made a part of this record.

The transcripts of hearing (four volumes) were filed on September 12, 1983. Proposed findings of fact and conclusions of law were filed by the parties on October 21, 1983 and have been considered by the undersigned in the preparation of this order. Findings of fact not included in this order were considered irrelevant to the issues, immaterial to the results reached, or were not supported by competent and substantial evidence.

By order dated July 15, 1983 the undersigned denied a motion to intervene in opposition to the application filed by Sumter County Health Facilities Authority on the ground it had no standing to participate. Counsel for Sumter appeared at the outset of the final hearing, and after considering further argument, the prior ruling was reaffirmed.

At issue herein is whether petitioner's application for a certificate of need to add 36 medical/surgical beds and seven intensive care unit beds to its facility at a cost of approximately \$785,000 should be granted.

Based upon all of the evidence, the following findings of fact are determined:

FINDINGS OF FACT

A. Introduction

1. Petitioner, Leesburg Regional Medical Center ("Leesburg"), is a 132-bed acute care private, not-for-profit hospital located at 600 East Dixie Highway, Leesburg, Florida. It offers a full range of general medical services. The hospital sits on land owned by the City of Leesburg. It is operated by the Leesburg hospital Association, an organization made up of individuals who reside within the Northwest Taxing District.

2. By application dated August 13, 1982 petitioner sought a certificate of need (CON) from respondent, Department of Health and Rehabilitative Services (HRS), to construct the following described project:

This project includes the addition of 36 medical/surgical beds and 7 SICU beds in existing space and the leasing of a CT scanner (replacement).

The addition of the medical/surgical beds is a cost effective way to add needed capacity to the hospital. Twenty-four (24) beds on the third floor will be established in space vacated by surgery and ancillary departments moving into newly constructed space in the current renovation project. A significant portion of this area used to be an obstetric unit in the past; and therefore, is already set up for patient care. The 7 bed SICU unit will be set up on the second floor, also in space vacated as a result of the renovation project. Twelve additional beds will be available on the third and fourth floors as a result of changing single rooms into double rooms. No renovation will be necessary to convert these rooms into double rooms.

It is also proposed to replace the current TechniCare head scanner with GE8800 body scanner. Based on the high demand for head and body scans and the excessive amount of maintenance problems and downtime associated with the current scanner, Leesburg Regional needs a reliable, state-of-the-art CT scanner.

The cost of the project was broken down as follows:

The total project cost is \$1,535,000.

The construction/renovation portion of the project (24 medical/surgical and 7 SICU beds) is \$533,000. Equipment costs will be

approximately \$200,000. Architectural fees and project development costs total \$52,000.

The CT scanner will be leased at a monthly cost of \$16,222 per month for 5 years. The purchase price of the scanner is \$750,000 and that amount is included in the total project cost.

The receipt of the application was acknowledged by HRS by letter dated August 27, 1982. That letter requested Leesburg to submit additional information no later than October 10, 1982 in order to cure certain omissions. Such additional information was submitted by Leesburg on October 5, 1982.

3. On November 29, 1982, the administrator for HRS's office of health planning and development issued proposed agency action in the form of a letter advising Leesburg its request to replace a head CT scanner (whole body) at a cost of \$750,000 had been approved, but that the remainder of the application had been denied. The basis for the denial was as follows:

There are currently 493 medical/surgical beds in the Lake/Sumter sub-district of HSA II. Based upon the HSP for HSA II, there was an actual utilization ratio of existing beds equivalent to 2.98/1,000 population. When this utilization ratio is applied to the 1987 projected population of 156,140 for Lake/Sumter counties, there is a need for 465 medical/surgical beds by 1987. Thus, there is an excess of 28 medical/surgical beds in the Lake/Sumter sub-district currently.

This action prompted the instant proceeding.

4. At the same time Leesburg's application was being partially denied, an application for a CON by intervenor-respondent, Lake Community Hospital (Lake), was being approved. That proposal involved an outlay of 4.1 million dollars and was generally described in the application as follows:

The proposed project includes the renovations and upgrading of patient care areas. This will include improving the hospital's occupancy and staffing efficiencies by reducing Med-Surg Unit-A to 34 beds and eliminating all 3-bed wards. Also reducing Med-Surg Units B and C to 34 beds each and eliminating all 3-bed wards. This will necessitate the construction of a third floor on the A wing to house the present beds in private and semi-private rooms for a total of 34 beds. There is also an immediate need to develop back-to-back six bed ICU and a six-bed CCU for shared support services. This is being done to fulfill JCAH requirements and upgrade patient care by disease entity, patient and M.D. requests. Another need that is presented for consideration is the upgrading of Administrative areas to include a

conference room and more Administrative and Business office space.

However, the merits of HRS's decision on Lake's application are not at issue in this proceeding.

5. In addition to Lake, there are two other hospitals located in Lake County which provide acute and general hospital service. They are South Lake Memorial Hospital, a 68-bed tax district facility in Clermont, Florida, and Waterman Memorial Hospital, which operates a 154-bed private, not-for-profit facility in Eustis, Florida. There are no hospitals in Sumter County, which lies adjacent to Lake County, and which also shares a subdistrict with that county. The facilities of Lake and Leesburg are less than two miles apart while the Waterman facility is approximately 12 to 14 miles away. South Lake Memorial is around 25 miles from petitioner's facility. Therefore, all three are no more than a 30 minute drive from Leesburg's facility.

6. At the present time, there are 515 acute care beds licensed for Lake County. Of these, 493 are medical/surgical beds and 22 are obstetrical beds. None are designated as pediatric beds.

B. The Proposed Rules

7. Rules 10-16.001 through 10-16.012, Florida Administrative Code, were first noticed by HRS in the Florida Administrative Weekly on August 12, 1983. Notices of changes in these rules were published on September 23, 1983. Thereafter, they were filed with the Department of State on September 26, 1983 and became effective on October 16, 1983.

8. Under new Rule 10-16.004 (1)(a), Florida Administrative Code, subdistrict 7 of district 3 consists of Lake and Sumter Counties. The rule also identifies a total acute care bed need for subdistrict 7 of 523 beds.

9. When the final hearing was held, and evidence heard in this matter, the rules were merely recommendations of the various local health councils forwarded to HRS on June 27, 1983 for its consideration. They had not been adopted or even proposed for adoption at that point in time.

C. Petitioner's Case

10. In health care planning it is appropriate to use five year planning horizons with an overall occupancy rate of 80 percent. In this regard, Leesburg has sought to ascertain the projected acute care bed need in Lake County for the year 1988. Through various witnesses, it has projected this need using three different methodologies.

11. The first methodology used by Leesburg may be characterized as the subdistrict need theory methodology. It employs the "guidelines for hospital care" adopted by the District III Local Health Council on June 27, 1983 and forwarded to HRS for promulgation as formal rules. Such suggestions were ultimately adopted by HRS as a part of Chapter 10-16 effective October 16, 1983. Under this approach, the overall acute care bed need for the entire sixteen county District III was found to be 44 additional beds in the year 1988 while the need within Subdistrict VII (Lake and Sumter Counties) was eight additional beds. 2/

12. The second approach utilized by Leesburg is the peak occupancy theory methodology. It is based upon the seasonal fluctuation in a hospital's occupancy rates, and used Leesburg's peak season bed need during the months of February and March to project future need. Instead of using the state suggested occupancy rate standard of 80 percent, the sponsoring witness used an 85 percent occupancy rate which produced distorted results. Under this approach, Leesburg calculated a need of 43 additional beds in 1988 in Subdistrict VII. However, this approach is inconsistent with the state-adopted methodology in Rule 10-5.11(23), Florida Administrative Code, and used assumptions not contained in the rule. It also ignores the fact that HRS's rule already gives appropriate consideration to peak demand in determining bed need.

13. The final methodology employed by Leesburg was characterized by Leesburg as the "alternative need methodology based on state need methodology" and was predicated upon the HRS adopted bed need approach in Rule 10-5.11(23) with certain variations. First, Leesburg made non-rule assumptions as to the inflow and outflow of patients. Secondly, it substituted the population by age group for Lake and Sumter Counties for the District population. With these variations, the methodology produced an acute care bed need of 103 additional beds within Lake and Sumter Counties. However, this calculation is inconsistent with the applicable HRS rule, makes assumptions not authorized under the rule, and is accordingly not recognized by HRS as a proper methodology.

14. Leesburg experienced occupancy rates of 91 percent, 80 percent and 73 percent for the months of January, February and March, 1981, respectively. These rates changed to 86 percent, 95 percent and 98 percent during the same period in 1982, and in 1983 they increased to 101.6 percent, 100.1 percent and 95.1 percent.

15. Leesburg's health service area is primarily Lake and Sumter Counties. This is established by the fact that 94.4 percent and 93.9 percent of its admissions in 1980 and 1981, respectively, were from Lake and Sumter Counties.

16. Although South Lake Memorial and Waterman Memorial are acute care facilities, they do not compete with Leesburg for patients. The staff doctors of the three are not the same, and there is very little crossover, if any, of patients between Leesburg and the other two facilities. However, Lake and Leesburg serve the same patient base, and in 1982 more than 70 percent of their patients came from Lake County. The two compete with one another, and have comparable facilities.

17. Leesburg has an established, well-publicized program for providing medical care to indigents. In this regard, it is a recipient of federal funds for such care, and, unlike Lake, accounts for such care by separate entry on its books.

18. The evidence establishes that Leesburg has the ability to finance the proposed renovation.

D. HRS's Case

19. HRS's testimony was predicated on the assumption that Rule 10-16.004 was not in effect and had no application to this proceeding. Using the bed need methodology enunciated in Rule 10-5.11(23), its expert concluded the overall bed need for the entire District III to be 26 additional beds by the year 1988. This calculation was based upon and is consistent with the formula in the rule. Because there was no existing rule at the time of the final hearing concerning

subdistrict need, the witness had no way to determine the bed need, if any, within Subdistrict VII alone.

E. Lake's Case

20. Lake is a 162-bed private for profit acute care facility owned by U.S. Health Corporation. It is located at 700 North Palmetto, Leesburg, Florida. Lake was recently granted a CON which authorized a 4.1 million dollar renovation project. After the renovation is completed all existing three-bed wards will be eliminated. These will be replaced with private and semi-private rooms with no change in overall bed capacity. This will improve the facility's patient utilization rate. The expansion program is currently underway.

21. Like Leesburg, the expert from Lake utilized a methodology different from that adopted for use by HRS. Under this approach, the expert determined total admissions projected for the population, applied an average length of stay to that figure, and arrived at a projected patient day total for each hospital. That figure was then divided by bed complement and 365 days to arrive at a 1988 occupancy percentage. For Subdistrict VII, the 1988 occupancy percentage was 78.2, which, according to the expert, indicated a zero acute care bed need for that year.

22. Lake also presented the testimony of the HRS administrator of the office of community affairs, an expert in health care planning. He corroborated the testimony of HRS's expert witness and concluded that only 26 additional acute care beds would be needed district-wide by the year 1988. This result was arrived at after using the state-adopted formula for determining bed need.

23. During 1981, Lake's actual total dollar write-off for bad debt was around \$700,000. This amount includes an undisclosed amount for charity or uncompensated care for indigent patients. Unlike Leesburg, Lake receives no federal funds for charity cases. Therefore, it has no specific accounting entry on its books for charity or indigent care. Although Leesburg rendered \$276,484 in charity/uncompensated care during 1981, it is impossible to determine which facility rendered the most services for indigents due to the manner in which Lake maintains its books and records. In any event, there is no evidence that indigents in the Subdistrict have been denied access to hospital care at Lake or any other facility within the county.

24. Lake opines that it will loose 2.6 million dollars in net revenues in the event the application is granted. If true, this in turn would cause an increase in patient charges and a falling behind in technological advances.

25. For the year 1981, the average percent occupancy based on licensed beds for Leesburg, Lake, South Lake Memorial and Waterman Memorial was as follows: 71.5 percent, 58.7 percent, 63.8 percent and 65.7 percent. The highest utilization occurred in January (81 percent) while the low was in August (58 percent). In 1982, the utilization rate during the peak months for all four facilities was 78 percent. This figure dropped to 66.5 percent for the entire year. Therefore, there is ample excess capacity within the County even during the peak demand months.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties thereto pursuant to Subsection 120.57(1), Florida Statutes.

27. Requiring resolution at the outset is whether Chapter 10-16, Florida Administrative Code, which became effective on October 16, 1983, is applicable to the case at bar. If it does indeed apply, it reflects a need for eight additional acute care beds in Subdistrict VII by the year 1988. No such allocation for subdistrict needs is made in Rule 10-5.11(23). Although HRS and Lake vigorously objected to any evidence concerning the proposed rules at the time of the final hearing, they now concede that the rules apply. This is because the rules became operative prior to the issuance of a recommended order. In view of the status of the rules, and the fact that evidence was presented concerning their effect and application, the undersigned agrees they are applicable to this proceeding. 3/

28. A second issue concerns the proper methodology to be used in determining bed need. In all, some five methodologies were presented, producing varying needs for beds. The state-adopted formula for determining acute care bed need is set forth in Rule 10-5.11(23), Florida Administrative Code. It is well settled that HRS is bound to follow "department rules" in administering its certificate of need program. Page v. Capital Medical Center, Inc., 371 So.2d 1087, 1089 (Fla. 1st DCA 1979). Because of this, the methodology prescribed within Rule 10-5.11(23) and Chapter 10-16 should be used, to the exclusion of all others.

29. Using the state-adopted methodology, a district-wide need of 26 additional acute care beds has been shown. The subdistrict allocation for Lake and Sumter Counties under Rule 10-16.003 is eight additional acute care beds.

30. The fact that an applicant lies within a district or subdistrict which has a bed need does not in itself require the issuance of a CON to that applicant. This is particularly true where the number of beds sought by an applicant exceeds the actual bed need of the district. Indeed, Rule 10-5.11(23)(b) provides that HRS. . ."will not normally approve applications for new and additional acute care hospital beds. . .if approval would cause the number of beds in that district to exceed the number of beds calculated to be needed. . .A favorable (CON) determination may be made when the criteria other than bed need, as provided for in (section) 381.393(6)(c). . .demonstrates need." Therefore, because Leesburg's application seeks an additional 43 beds, and the projected district and subdistrict needs are only 26 and 8, it is incumbent upon Leesburg to demonstrate need under other relevant criteria if it is to be successful.

31. Leesburg contends that its application should be granted because all statutory criteria have been met. In particular, it points out that it has the only application pending in District III, that only Lake competes with Leesburg within the health service area, that Lakes does not make its facilities accessible to indigents as Leesburg does, and that it has experienced high occupancy rates during the peak season which justify an expansion program.

32. The parties have not precisely identified which of the 13 criteria enumerated in Subsection 381.494(6)(c) are pertinent, although the evidence and post-hearing memoranda suggest that not all apply to the case at bar. However, a review of subparagraph 381.494(6)(c)2. is of special interest for applicant has failed to satisfy that important criterion. It requires HRS to evaluate an applicant against the following factors:

The availability, quality of care, efficiency,
appropriateness, accessibility, extent of

utilization, and adequacy of like and existing health care services and hospices in the applicant's health service district area.

The evidence reflects that applicant's facility is within thirty minutes driving time of Lake, Waterman Memorial Hospital and South Lake Memorial Hospital. This fits within the accessibility requirement of Rule 10-5.11(23)(i), Florida Administrative Code. All three have ample excess capacity to assure the residents of Lake County access to acute care beds. Indeed, the utilization rate for all four hospitals was only 78 percent during the peak months in 1982 and dipped to 66.5 percent for the entire year. Moreover, it was not shown that any resident of the County has ever been denied medical care due to a lack of acute care beds within the County. Therefore, it must be concluded that this criterion has not been met, and the other considerations advanced by Leesburg must be considered.

33. Leesburg raises several other circumstances which it contends justify the granting of its application. First, it argues that indigents in the subdistrict do not have access to hospital care because of Lake's failure to serve that segment of the population. But the evidence does not support this allegation, for there was no evidence to demonstrate that indigents in the subdistrict have been denied access to Lake or any other facility within the area.

34. Leesburg also points to its high occupancy rates during the peak months. However, the formula adopted by HRS gives specific consideration to bed need based on peak demand, and no additional beds were warranted. Further, the evidence reflects ample existing beds within the County to meet any peak demand that may occur. Therefore, Leesburg has demonstrated no special circumstances in this respect.

35. Finally, Leesburg suggests in its post-hearing memorandum that it has the only pending application for a CON within the District, and that accordingly it is entitled to any available beds. However, Case Nos. 82-2248, 83-013, 83-811 involve applications for additional beds in District III, and Leesburg is but one of four facilities seeking a part of the few remaining available beds.

36. It is concluded as a matter of law that petitioner has failed to demonstrate the need for additional acute care beds under 381.494(6)(c), Florida Statutes, or Rule 10-5.11, Florida Administrative Code, and that its application should be denied.

37. HRS's request for official notice of certain pending applications for CONs is hereby granted.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the application of Leesburg Regional Medical Center for a certificate of need to add 43 acute care beds, and renovate certain areas of its facility to accommodate this addition, be DENIED.

DONE and ENTERED this 15th day of December, 1983, in Tallahassee, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32301
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of December, 1983.

ENDNOTES

1/ Exhibit 5 was offered when witness Gormley's deposition was taken on September 16, 1983. After reviewing the same, it is hereby received in evidence.

2/ The difference between 44 beds arrived at by this approach and the 26 beds using the HRS approach in Rule 10-5.11(23) was not explained. A part of the difference may lie in the way certain beds are classified at Shands Hospital in Gainesville. In view of the result reached in this order, this point becomes moot.

3/ Of course this result is not without potential difficulties. For example, had objections by HRS and Lake to any testimony concerning the rules been sustained, the record would now be silent as to this point. On the other hand, if the rules were not eventually adopted, and testimony on this issue allowed, much time and effort would have been spent in a wasteful and inefficient manner. The better approach clearly seems to be that only those rules in effect at the time evidence is taken should apply when HRS has in place an existing rule governing the dispute.

COPIES FURNISHED:

Dean Bunch, Esquire
ERVIN VARN JACOBS ODOM
& KITCHEN
Post Office Drawer 1170
Tallahassee, Florida 32302

Bruce A. Saylor, Esquire
Post Office Drawer 2160
Leesburg, Florida 32748

Jay Adams, Esquire
Department of Health and
Rehabilitative Services
Building One, Room 406
1323 Winewood Boulevard
Tallahassee, Florida 32301

Eric J. Haughdahl, Esquire
Suite 208
1020 East Lafayette Street
Tallahassee, Florida 32301

Thomas K. Riden, Esquire
RIDEN WATSON & GOLDSTEIN, P.A.
5656 Central Avenue
St. Petersburg, Florida 33707

Alicia Jacobs, Esquire
General Counsel
Department of Health and
Rehabilitative Services
1323 Winewood Boulevard
Tallahassee, Florida 32301

David H. Pingree, Secretary
Department of Health and
Rehabilitative Services
1323 Winewood Boulevard
Tallahassee, Florida 32301