STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. MARY'S HOSPITAL, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 93-0956
	)	
STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION and GOOD SAMARITAN HOSPITAL, INC.,	)	
	)	
Respondents.	)	
	)	
PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., d/b/a PALM BEACH GARDENS MEDICAL CENTER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 93-0957
	)	
STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

These consolidated cases were heard by Eleanor M. Hunter, the designated Hearing Officer for the Division of Administrative Hearings, from October 18-22, November 30 - December 2, and December 22-23, 1993, in Tallahassee, Florida.

APPEARANCES

For Petitioner, W. David Watkins, Attorney

St. Mary's Hospital, Inc.: Kenneth F. Hoffman, Attorney
Christopher Bryant, Attorney
OERTEL, HOFFMAN, FERNANDEZ & COLE
2700 Blair Stone Road
Tallahassee, Florida 32301

For Respondent, Agency For Health Care Administration: Robert Griffin, Attorney
Edward Labrador, Attorney
Agency for Health Care Administration
325 John Knox Road, Suite 301
Tallahassee, Florida 32303-4131

For Respondent, Good Samaritan Hospital, Inc.: Jon Moyle, Attorney
Ronald Kolins, Attorney
Thomas Sheehan, Attorney
MOYLE, FLANIGAN, KATZ, FITZGERALD & SHEEHAN, P.A.
Post Office Box 3888
West Palm Beach, Florida 33402

STATEMENT OF THE ISSUES

Whether the application for a certificate of need, filed by Good Samaritan Hospital, Inc., to establish an adult inpatient cardiac catheterization program in District IX meets the statutory and rule criteria for approval.

PRELIMINARY STATEMENT

The Agency For Health Care Administration ("AHCA") preliminarily approved the certificate of need ("CON") application, subsequently numbered 7086, for Good Samaritan Hospital, Inc. ("Good Samaritan") to provide adult inpatient cardiac catheterization services in Palm Beach County in District IX. St. Mary's Hospital, Inc. ("St. Mary's) and Palm Beach Gardens Community Hospital, Inc., d/b/a Palm Beach Gardens Medical Center ("Palm Beach Gardens"), are existing providers of the same service in the same district and challenged the Agency's preliminary agency action. By notice dated September 27, 1994, St. Mary's voluntarily dismissed its petition in Case No. 93-0956. St. Mary's counsel, in a telephone conference call, represented that the dismissal resulted from certain hospital mergers.

Although it is stipulated that the numeric need methodology results in a need for two additional adult inpatient cardiac catheterization ("cath") programs, Palm Beach Gardens asserts that the program proposed by Good Samaritan is not needed, will not achieve the projected utilization in excess of 300 procedures by the end of the second year, and will not be financially feasible. Palm Beach Gardens disputes Good Samaritan's claim that the project will not require any capital expenditures, and questions the completeness of the application.

Good Samaritan presented the testimony of William J. Byron, expert in hospital administration and operations; Bruce H. Berman, M.D., expert in family medicine and geriatrics; Chauncey Crandall, M.D., expert in invasive cardiology; James Vanek, M.D., expert in internal medicine; Thomas F. Raymond, M.D., expert in cardiology; Joyce Cleva, R.N., expert in nursing services, nursing services administration and cardiology services administration; David E. Musgrave, Jr., expert in hospital financial operations; Ronald T. Luke, Ph.D., JD., expert in health planning, health economics and health policy analysis; and Hugh W. Long, expert in health care economics and finance. Good Samaritan submitted exhibits 1 - 56, all of which were received in evidence, except exhibit 10 (which was marked, identified, but not moved into evidence) and exhibit 51 (which was not received) and exhibits 4, 6, 25, 26, 29 and 39 (on which ruling was reserved for resolution in this recommended order).

St. Mary's presented the testimony of Jay Midwall, M.D., expert in invasive cardiology; Gerald Humphreys, M.D., expert in cardiology; James Whittle, M.D., expert in invasive cardiology; Julia Bower Brown, expert in health care planning; Jay Cushman, expert in health care planning; and Edward Pershing, expert in health care finance. St. Mary's exhibits 1 - 10 were received in evidence.

Palm Beach Gardens presented the testimony of Rick Knapp, expert in health care finance. Palm Beach Gardens' exhibits 1 and 2 were received in evidence.

AHCA presented the testimony of Robert Maguire, expert in the administration of CON programs and reviews. AHCA's exhibits 1 - 3 were received in evidence.

The transcript of the final hearing was received by the Division of Administrative Hearings on January 18, 1994. Proposed recommended orders were filed on February 14, 1994.

The legal issues concerning the admissibility of some of Good Samaritan's exhibits have been briefed in the proposed recommended orders. Exhibits 4 and 6 are interim drafts of new state and local health plans. Exhibit 25 is an organizational chart for the existing outpatient cardiac cath lab at Good Samaritan, with the names of staff and their titles included. Similarly, exhibit 26 is a listing of primary and back-up staff, titles, dates of employment, and salaries or sources of salaries, if derived from a different department of the hospital. The objections to the staffing exhibits were based on an increase of staff over that listed in the application from 5 to 5.2 full-time equivalent (FTE) positions, a shift in health care professionals in certain positions, and on training relationships established between Duke University doctors, entered into subsequent to the filing of the Good Samaritan application. Exhibit 39 is a pro forma prepared on an incremental basis in contrast to a pro forma in the application that appears to be prepared on a fully allocated cost basis.

FINDINGS OF FACT

1. Good Samaritan Hospital, Inc. d/b/a Good Samaritan Medical Center ("Good Samaritan") is a 341 bed not-for-profit community hospital in West Palm Beach, established over 73 years ago. West Palm Beach is located in Agency for Health Care Administration ("AHCA") District 9. Its services include obstetrics and neonatal, medical and pediatric intensive care. Good Samaritan also opened an outpatient cardiac catheterization ("cath") laboratory of 1399 gross square feet, approximately two weeks prior to the start of the final hearing in this case. The establishment of an outpatient laboratory does not require a certificate of need. At the time the final hearing commenced, two procedures had been performed in the Good Samaritan outpatient cath lab. Written protocals exist for transfers to facilities with open heart surgery programs. Here, Good Samaritan is an applicant for a certificate of need ("CON") to provide adult inpatient cardiac cath services in the same cath lab.

2. AHCA is the state agency which administers CON laws in Florida. AHCA published, on August 7, 1992, a fixed need pool showing a net need for two additional cardiac cath programs in AHCA District 9. On January 11, 1993, AHCA issued a State Agency Action Report ("SAAR") preliminarily approving Good Samaritan's CON.

3. St. Mary's Hospital, Inc. ("St. Mary's") is a 430 bed hospital with acute care, psychiatric, and Levels II and III neonatal intensive care beds, located in West Palm Beach, Florida in AHCA District 9. St. Mary's is located 3 miles, or a 5 to 7 minute drive from Good Samaritan, and is an existing provider of adult inpatient cardiac cath services. Open heart surgery services are not available at St. Mary's.

4. Palm Beach Gardens Community Hospital, Inc. ("Palm Beach Gardens") also in AHCA District 9, is located approximately a 25 minute drive from St. Mary's. Palm Beach Gardens' services include adult inpatient cardiac cath in a two room laboratory, and open heart surgery.

5. There are eleven cath labs in District 9. Palm Beach Regional, Lawnwood in St. Lucie County, and a doctor in Martin County operate outpatient facilities. Five hospitals serve inpatients and outpatients - Boca Raton, St. Mary's, Martin Memorial, Bethesda, and Indian River. Three others, Palm Beach Gardens, JFK Medical Center and Delray Community Hospital, have cardiac cath labs at hospitals which also provide open heart surgery services.

6. By prehearing stipulation, the parties agreed that the historical quality of care at Good Samaritan is not at issue.

7. Palm Beach Gardens asserts that Good Samaritan's application was incomplete.

Application Content

8. Submitted with the Good Samaritan application was a certificate of the custodian of its records which relied on an April 20, 1989 resolution of Good Samaritan's Board of Directors as authorization for the filing of ". . . an application as described in the Letter of Intent."

9. On August 25, 1989, Good Samaritan filed a letter of intent, with the Board's April 20, 1989 resolution, announcing its intent to apply on September 27, 1989, to establish inpatient cardiac cath and open heart surgery services, and to convert ten medical/surgical beds to intensive care beds for an estimated capital cost of $4,950,000. The 1989 resolution has not been withdrawn.

10. The President of Good Samaritan, William J. Byron, testified that Good Samaritan never filed a joint application for cardiac cath, open heart surgery and intensive care beds, as described in the 1989 letter of intent. Good Samaritan also, he testified, never filed an application for cardiac cath services in 1989, but did file cardiac cath applications in 1990, and 1991 and the one at issue, in 1992.

11. In February 1991, Good Samaritan's Board passed a resolution authorizing the filing of a CON application for inpatient cardiac cath services. Mr. Byron considered that resolution a reaffirmation of the 1989 resolution and decided to file the 1989 resolution with this application.

12. The predecessor of AHCA initially notified Good Samaritan that the 1989 letter of intent for combined services was rejected. Subsequently, in November 1989, Good Samaritan was notified that the initial rejection applied to open heart surgery, because these were competing applicants, but that it would extend a grace period to apply for cardiac cath services to October 27, 1989, due to the absence of any competing applicants. What was intended in the letter which postdated the date it gave for the grace period was not established.

13. Mr. Byron testified that Good Samaritan filed the February 1990 application, referencing the 1989 resolution, in accordance with the agency's grant of a grace period.

Need For the Subject Project

14. In August 1992, AHCA published its finding that a numeric need exists for two additional adult inpatient cardiac cath programs in District 9, by July 1995.

15. The 1990-1991 local health plan for District 9 includes two factors for determining need and for allocating CONs for cardiac cath and open heart surgery services.

16. The first District 9 factor favors facilities with an historical record of or commitment to serving Medicaid and indigent, handicapped or other underserved population groups. Good Samaritan's service to Medicaid patients increased from .2 percent in 1985 to 1.1 percent in 1989, then from 5.0 percent in 1990 to 11.2 percent of total admissions in 1992. Mr. Jay Cushman testified that the Medicaid commitment and record may be evaluated by comparing Good Samaritan to St. Mary's because they share a medical service area. Medicaid admissions to St. Mary's were 7.7 percent in 1985, 17.5 percent in 1989, 19.7 percent in 1990, and 32.0 percent in 1992. Therefore, as Mr. Cushman observed, the widening gap in the same service area is not indicative of Good Samaritan's historical record or present commitment to serve Medicaid patients.

17. The District 9 plan also gives priority to applicants who propose to establish inpatient cardiac cath and open heart surgery services at the same facility when both are needed. The preference is inapplicable to the review of this application cycle, because no need was published for additional open heart surgery services in the district. There was testimony that Good Samaritan was, at the time of hearing, an applicant for an open heart surgery CON, having applied in March 1993, and had been preliminarily denied. The preference statement that an applicant "would not be expected to have to apply for both" describes the situation at the time of Good Samaritan's application. Therefore, the preference neither supports nor detracts from this application.

18. The 1989 State Health Plan contains a similar preference for an applicant proposing both cardiac cath and open heart surgery services in response to a publication of the need for both. To have any practical effect in a comparative review process, avoiding speculation on the outcome of other pending administrative cases, the preference has to be understood to favor an applicant for cardiac cath and open heart surgery over an applicant for only cardiac cath in the same batching cycle. Therefore, the preference is inapplicable to this application for cardiac cath services, despite evidence of an open heart surgery application in a subsequent batching cycle.

19. The state preference for the establishment of a new cardiac cath program in a county without such programs is not met. See, Findings of Fact 5.

20. The state plan preference for disproportionate share charity care and Medicaid providers does not support approval of the Good Samaritan application. See, Finding of Facts 16, supra.

21. The state preference for hospitals which accept patients regardless of ability to pay is met by Good Samaritan.

22. On balance, there is no showing of the need for Good Samaritan's proposal to advance the special interests identified in the state and District 9 health plans.

23. Good Samaritan argues that its inpatients should have access to its new, state-of-the-art cath lab to avoid costs and disruptions associated with unnecessary transfers. The argument is rejected as inconsistent with the regulatory scheme and need criteria established by statutes and rules. Testifying about AHCA's preliminary approval of Good Samaritan's application, Good Samaritan's expert, Ronald Luke, Ph.D., described the objective as improving access to care for the underserved, meaning uninsured, because ". . . there is no question - - no question - - that there is sufficient physical capacity in the market to perform the projected number of caths . . ." Transcript, Vol. 9, p. 1154.

24. At hearing, David Musgrave, Good Samaritan's financial officer, and Dr. Luke asserted that Good Samaritan would perform caths on 100 more indigents than originally represented in the application. The application projected 3 percent indigent and 2 percent Medicaid payer categories. In the pro forma marked as exhibit 39, Good Samaritan projected 2.7 percent indigent care. There is no credible evidence to demonstrate that Good Samaritan can recruit an additional 100 indigent cardiac cath patients, through contacts with public health agencies.

Utilization Projections

25. Two major issues in dispute, which partially depend on the accuracy of utilization projections, are the requirements of Rule 59C-1.032(8)(b) that an applicant reasonably project 300 cath lab visits within two years of operation, and the long-term financial feasibility of the proposal.

26. According to Dr. Luke, the 300 minimum annual procedures for a cath lab and 150 for invasive cardiologists who perform caths are standards set by the American College of Cardiology and American Heart Association Guidelines for Cardiac Catherization and Cardiac Catheterization Laboratories. The standards are set to insure that sufficient numbers of procedures are performed to maintain staff and cardiologists' proficiency.

27. Good Samaritan's application includes projections of 270 caths in year one and 360 in year two. Initially, a minimum of 119 caths is reasonably expected, based on that number of inpatients transferred in 1992 from Good Samaritan for cath inpatient procedures at other hospitals.

28. The experts for Good Samaritan compare its proposal to the operations of the cath lab at Boca Raton Community Hospital ("Boca Raton"), which has no open heart surgery services and a closed in-house cathing staff. A "closed staff" limits those who perform cath lab procedures to invasive cardiologists based at the facility. After opening in October 1987, Boca Raton has had the following number of cath procedures performed at its hospital:

1988	1989	1990	1991	1992
621	658	644	530	487

29. Like Boca Raton, Good Samaritan also proposes to have a closed lab. It will be headed by a hospital-employed physician. An agreement with the medical school at Duke University will allow the staff cathing physician to maintain the necessary personal clinical skills by performing sufficient numbers of additional procedures at Duke.

30. Good Samaritan shares its medical staff and medical service area with St. Mary's. St. Mary's experts project that Good Samaritan would be another low volume provider in the area, primarily due to the lack of back-up open heart surgery services. Volumes of cath procedures reported at St. Mary's, which opened in February 1988, are as follows:

1988	1989	1990	1991	1992
229	292	323	381	359

31. St. Mary's has an open cathing staff. Its lab is used by a number of different invasive cardiologists, who also practice primarily at other hospitals which have open heart surgery services available.

32. Palm Beach Gardens also has an open cardiac cath staff, although a number of the cathing physicians are based at the hospital. However, Palm Beach Gardens also has open heart surgery services. It's volumes from 1988-1992 were as follows:

1988	1989	1990	1991	1992
1598	1392	1587	1824	1750

33. Clearly, both the presence or absence of open heart surgery and the internal operations of a lab affect the volumes of procedures performed at any cardiac cath lab. The greater weight of the evidence suggests that the presence of open heart surgery is more determinative of cath lab utilization than the internal operations of the cath lab.

34. Despite evidence of increasing use rates in District 9, Good Samaritan has failed to demonstrate that its projected utilization is reasonable. All of the growth in volume in Palm Beach County in 1992 is attributable to JFK Medical Center and Delray Community Hospital, both of which have open heart surgery and to Bethesda, with a new program in 1992 and 249 procedures. Declines in volume occurred at both mature inpatient programs without open heart surgery in Palm Beach County, St. Mary's and Boca Raton. The suggestion that 1992 is an aberration in this regard, is rejected. See, Findings of Facts 28 and 30.

Impact On Existing Providers

35. The highest reasonable expectation of volumes for St. Mary's cath lab in 1993 is 330 visits. From October 1, 1991 through September 30, 1992, Good Samaritan transferred 13 to 14 inpatients to St. Mary's for cardiac caths. Subsequently, in December 1992, a group of internists sold their practices to Good Samaritan. The patient volume of that group, one internist estimated, will result in the referral of 150 to 200 patients for cardiac caths over the next year or two. Based on their staff affiliations, it is reasonable to expect that a significant number of their referrals will be diverted from St. Mary's.

36. One doctor in a group of invasive cardiologists, which has performed approximately 150 cardiac caths a year at St. Mary's, expects 75 to 90 of the cases would have been done at a Good Samaritan inpatient lab, if that alternative had existed. It is reasonable to expect that an inpatient cardiac cath program at Good Samaritan will result in a loss of up to 80 visits to the St. Mary's cath lab in 1995 and 1996. As a result, the St. Mary's program would be below 300 procedures (visits) a year minimum quality of care standard, with no assurance that Good Samaritan could exceed the standard.

37. Good Samaritan describes the financial impact on St. Mary's of an inpatient cath lab as relatively insignificant, because the more detrimental impact will occur as a result of the already established outpatient lab. Good Samaritan estimates, however, that 70 percent of its cardiac cath patients will be inpatient and 30 percent will be outpatients. St. Mary's financial loss would be $188,000 if Good Samaritan reaches 480 procedures, according to Good Samaritan's expert.

38. Good Samaritan concedes that St. Mary's is at risk of performing less than 300 procedures and, therefore, that the quality of care in the St. Mary's cath lab would decline. However, as Good Samaritan notes the decrease in volumes below 300 may occur whether or not Good Samaritan's proposal is approved. Cardiac cath volumes are declining at mature inpatient programs which do not have open heart surgery services. The establishment of a program at Good Samaritan would accelerate that trend at St. Mary's. See, Finding of Facts 33.

39. When Good Samaritan's cardiac cath volumes reach 240 visits, Palm Beach Gardens expects to lose 44 cardiac cath visits and $134,000 pre-tax revenue in Good Samaritan's second and third year of operation. If, as projected by Good Samaritan, its volumes reached 480 visits, a loss of 88 cardiac caths or approximately $250,000 to $270,000 is projected.

40. Good Samaritan contends that a loss of $250,000 to $270,000 pre-taxes for Palm Beach Gardens is relatively insubstantial. After taxes, the loss is $80,000 when Good Samaritan reaches 240 cases, or $160,000 if Good Samaritan reaches 480 cases. Revenues at Palm Beach Gardens, in 1992, were approximately $8 million pre-taxes, or $5 to $6 million after taxes. Good Samaritan's contention that the loss to Palm Beach Gardens is relatively insubstantial is supported by the evidence in this case.

Financial Feasibility

41. Good Samaritan has already constructed an outpatient cardiac cath lab, which is adequately staffed and capable of serving inpatients of the facility. The immediate financial feasibility of the proposal has been established.

42. The long term financial feasibility of the program has been questioned. The pro forma attached to the application showed a loss of $126,008 in year one, a loss of $26,967 in year two and a gain of $113,224 in year three of operations. Good Samaritan was required to include a two year pro forma in its application. In fact, Palm Beach Gardens' expert believes that profitability must be demonstrated in the second year to establish financial feasibility. Good Samaritan's projections are based on the assumption that case volumes will be 240 cases in 1994, 360 in 1995 and 480 in 1996. The assumption that Good Samaritan can reach 360 procedures in year two, while St. Mary's remains over 300 procedures is rejected. In addition, Good Samaritan's pro forma is prepared as Good Samaritan acknowledges, on a fully allocated cost basis which cannot demonstrate financial feasibility.

43. Good Samaritan's exhibit 39 was described as a sensitivity analysis, and is also based on only slight changes in utilization assumptions caused by rounding to whole numbers. Unlike the pro forma submitted with the application, exhibit 39 clearly is an incremental analysis. Good Samaritan failed to provide AHCA adequate evidence of financial feasibility based on the pro forma included in the application. Palm Beach Gardens asserts that consideration of exhibit 39 constitutes an impermissible, untimely amendment to the application which may not be relied upon to establish financial feasibility.

44. Mr. Musgrave, an expert in hospital financial operations, acknowledged that the information in exhibit 39 was available at the time he prepared the application pro forma. Comparing the two, he testified that among the differences are the use of different data bases, a higher Medicare case weight, a lower managed care discount rate, higher gross charges per admission, and lower indigent care percentages.

45. Good Samaritan also failed to account for certain capital costs. Good Samaritan claims that the project has no capital costs. The State Agency Action Report determined that the $5,000 filing fee is a capital cost. At hearing, there was expert testimony that expenses and equipment required to implement video-conferencing and other direct contacts with Duke University will result in additional costs which have not been adequately considered in Good Samaritan's financial analysis.

46. Mr. Musgrave also testified that 70 percent of the cardiac cath volume is expected to be derived from inpatients, with capital cost reimbursements from Medicare and Medicaid. When asked about Good Samaritan's claim that there are no or minimal capital costs associated with the proposal, Robert P. Maquire of AHCA testified as follows:

> With regard to outpatient services that are approved by non-reviewability criteria, if later a project is established as an inpatient program and does not require any new construction, those costs - - there's no allocation of costs to the inpatient factor.

Transcript, Vol. VIII, p. 1041.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this cause pursuant to subsections 120.57(1) and 408.039(5), Florida Statutes. 1/

48. Good Samaritan, as the applicant, has the ultimate burden of persuasion to demonstrate its entitlement to the certificate of need. Boca Raton Artificial Kidney Center, Inc. v. HRS, 475 So.2d 260 (Fla. 1st DCA 1985); Florida Department of Transportation v. J.W.C., Inc., 396 So.2d 788, 789 (Fla. 1st DCA 1981).

49. Good Samaritan's application refers to a resolution of its governing board which, in 1989, was the basis for letter of encompassing a project of significantly greater scope and almost $5 million in capital costs. The inpatient cardiac cath proposal is within the scope of the project authorized by the letter of intent but was not filed on the date specified in the letter of intent. Subsequent action taken by the board has reaffirmed that portion of the 1989 proposal. Good Samaritan argues that the statutory requirements for the resolution are not, as are the purposes of subsections 408.039(2)(c) and 408.037(4), by assuring that the correct corporate entity has, prior to filing, fully committed to funding, building and operating the project proposed. Further, Good Samaritan notes that its case is distinguishable from cases dismissing or upholding the dismissal of CON applications because of faulty corporate resolutions, e.g.: (a) the resolution was not adopted by the governing body of the applicant itself, see, Humhosco, Inc., d/b/a Humana

Hospital Brandon v. Department of Health and Rehabilitative Services, 561 So.2d 388; (b) the applicant did not hold the license to the facilities and was therefore unable to effectuate the project, Brookwood-Jackson County Convalescent Center v. HRS, 591 So. 1085; (c) the resolution was ineffective because it was not approved by the applicant's parent as required by the applicant's bylaws, Naples Community Hospital v. AHCA, 15 F.A.L.R. 2615; or (d) the resolution did not reflect that the applicant would accomplish, license and operate the facility, University Community Hospital, Inc. v. HRS, 13 F.A.L.R. 2362. In Naples Community Hospital, supra., the agency head noted that the rule requires each applicant's certification to contain a statement that its resolution is "still in full force" and does not "in any manner contravene" its articles of incorporation or bylaws, Rule 59C-1.008(1)(e)(2), F.A.C., citing Humhosco, Inc. v. HRS, 561 So.2d 388, 391 (Fla. 1st DCA 1990). Good Samaritan's resolution and its Board's subsequent reaffirmation of support for any inpatient cardiac cath program at or below the costs specified are consistent with AHCA's interpretation of its rules. The application is not incomplete.

50. On balance, Good Samaritan has not demonstrated that its proposal will meet needs identified in the state and local health plans, as required by subsection 408.035(1)(a).

51. Good Samaritan has also failed reasonably to project sufficient utilization to meet the volume requirements necessary to assure quality of care and to meet the requirements of Rule 59C-1.032(8)(b), Florida Administrative Code.

52. Due to its failure to support the utilization projections in the application pro forma or in exhibit 39, and the failure to consider all of the capital costs associated with the establishment of the inpatient cardiac cath service, Good Samaritan failed to establish the financial feasibility of its proposal.

53. Although not dispositive of this case, AHCA failed to explicate a dichotomy in the position taken in this case and that announced during the pendency of this proceeding. In Sacred Heart Hospital v. AHCA, DOAH Case NO. 92-1508 (F.O. 10/22/92), the agency stated that:

> . . .it would be illogical from an accounting and health planning perspective to assume that Petitioner's proposal is without cost simply because additional equipment and space would not be required to initiate inpatient service.

The Sacred Heart case concerned AHCA's jurisdiction to review the initiation of inpatient radiation services after the establishment of outpatient services. The explicit references in the agency's order to accounting and health planning issues over and above jurisdictional concerns, apply to Good Samaritan's factual situation and compel the conclusion that capital costs were also understated by the failure to allocate any portion of the total to inpatients. See, Findings of Fact 46.

54. Good Samaritan's exhibits 4 and 6, the interim health plans, are not received based on relevance. Good Samaritan's exhibits 25 and 26 are received in evidence and considered. The actual staffing plan which resulted from the opening of the outpatient lab, and the Duke University agreement are events subsequent to the filing of the application not known to the applicant at the time the application was filed.

55. Section 59C-1.010(2)(b), Florida Administrative Code, provides that:

> Subsequent to an application being deemed complete by the agency, no further application information or amendment will be accepted by the agency.

The court in Manor Care, Inc. v. DHRS, 558 So.2d 26, 29 (Fla. 1st DCA 1989), stated that, "as to matters within an applicant's control significant changes to an application are not permitted." In Charter Medical-Orange County, Inc. vs. DHRS, (DOAH Case No. 87-4748), Appendix 2, the hearing officer concludes that:

> The concept of "control" of the applicant over the information that goes into the original application is the only phrase that gives applicants any guidance. The word "control" probably is intended as a "knew or reasonably should have known" standard. If the applicant reasonably should have known about the information and should have provided the Department with the information as a part of its original application, then the new information cannot be considered during the formal administrative hearing.

Using the test of "control" in light of the testimony that the data could have been generated to provide exhibit 39 to AHCA for its review at the time the application was submitted, exhibit 39 constitutes an impermissible amendment and cannot be the basis for approval of Good Samaritan's application.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that an order be entered denying the application of Good Samaritan Hospital, Inc. for Certificate of Need 7086 to establish an adult inpatient cardiac catheterization program.

DONE AND ENTERED this 2nd day of November, 1994, in Tallahassee, Leon County, Florida.

ELEANOR M. HUNTER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of November, 1994.

ENDNOTE

1/ St. Mary's entered a voluntary dismissal on September 27, 1994. The foregoing findings of fact include a determination that the established program at Palm Beach Gardens will not be substantially affected by the proposed Good Samaritan project. The issues in the case are resolved on the merits, consistent with Home Builders and Contractors Association of Brevard, Inc. v. Department of Community Affairs, 585 So.2d 965 (Fla. 1st DCA 1991).

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-956

To comply with the requirements of Section 120.59(2), Fla. Stat. (1991), the following rulings are made on the parties' proposed findings of fact:

Good Samaritan's Proposed Findings of Fact

1-2. Accepted in Finding of Fact 1.
3. Accepted in Findings of Fact 3 and 4.
4. Accepted in Findings of Fact 2 and 14.
5. Subordinate to Finding of Fact 1.
6. Accepted in Finding of Fact 2.
7. Accepted in Finding of Fact 8.
8. Accepted in Findings of Fact 8 - 13.
9. Accepted in Finding of Fact 17.
10-11. Accepted in Finding of Fact 34.
12. Rejected first sentence in Findings of Fact 34 and 35. Rejected second sentence in Finding of Fact 24. Accepted remainder in Finding of Fact 29.
13. Rejected in part in Findings of Fact 34 - 35, Accepted in part in Finding of Fact 35.
14-16. Rejected in Findings of Fact 34 - 35.
17. Accepted as not clearly shown in Finding of Fact 43.
18-20. Rejected conclusions in Findings of Facts 42-44.
21-25. Accepted in preliminary statement and conclusions of law 54.
26-28. Accepted in Findings of Fact 37, 38, 39 and 40.
29. Rejected first and last sentences in Findings of Fact 35, 36 and 38. Accepted second sentence in Findings of Fact 35 and 38. Rejected third sentence in Finding of Fact 33. Accepted fourth and fifth sentences in Finding of Fact 31.
30. Accepted as specified in Finding of Fact 16.
31. Accepted as specified in Finding of Fact 24.
32. Rejected as not demonstrated to be effective in Finding of Fact 24.
33-34. Accepted in or subordinate to Finding of Fact 21.
35-37. Accepted in or subordinate to Finding of Fact 23.

Palm Beach Gardens Proposed Findings of Fact

1-3. Accepted.
4. Accepted in Findings of Fact 1, 2, 3 and 4.
5. Accepted in Findings of Fact 3 and 4.
6. Accepted in or subordinate to Findings of Fact 3 and 4.
7. Accepted in preliminary statement and Finding of Fact 1.
8 Accepted in Finding of Fact 2.

9. Accepted in preliminary statement and subordinate to Findings of Fact 3 and 4.
10(a). Accepted in Findings of Fact 3 and 4.
10(b). Accepted in conclusions of law 47.
11. Rejected in conclusions of law 49.
12-13. Accepted in Findings of Fact 8 and 9.
14. Accepted in Finding of Fact 10.
15-16. Accepted in Findings of Fact 8 and 9.
17. Accepted in Finding of Fact 11.
18-19. Accepted in Finding of Fact 9.
20. Rejected in Finding of Fact 40.
21. Accepted in Finding of Fact 39.
22. Accepted in Finding of Fact 37.
23-39. Accepted in or subordinate to Findings of Fact 39 and 40.
40-41. Accepted in Finding of Fact 42.
42-51. Issues not reached.
52. Accepted in Finding of Fact 45.
53. Issue not reached.
54. Accepted in Finding of Fact 42.
55. Accepted in Finding of Fact 43.
56. Accepted in Finding of Fact 42.
57. Accepted in Finding of Fact 43.
58-64. Issue not reached.
65. Accepted in Finding of Fact 42.
66. Issue not reached.
67. Accepted in Finding of Fact 44.
68-83. Accepted in or subordinate to Findings of Fact 42, 43, and 44.
84-92. Issue not reached.
93. Accepted in Finding of Fact 45.
94. Rejected on ability to fulfill commitment in Finding of Fact 24.
95. Issue not reached.
96. Accepted in Findings of Fact 34, 42 and 43.

AHCA's Proposed Findings of Fact

1. Accepted in Finding of Fact 1
2. Accepted in Finding of Fact 2.
3. Issue not reached as not finalized at hearing.
4. Accepted in preliminary statement and Findings of Fact 29 and 45.
5. Accepted as subordinate to Finding of Fact 1.
6. Accepted in Finding of Fact 29.
7. Accepted in Findings of Fact 14 and 34.
8. Rejected in Finding of Fact 34.
9. Rejected in Findings of Fact 16 and 17.
10. Accepted first two sentences in Finding of Fact 21. Rejected in Findings of Fact 18 - 21.
11. Accepted third and last sentences in Findings of Fact 23 and 27. Rejected remainder in Finding of Fact 22 and conclusions of law.
12. Accepted in Finding of Fact 41.
13. Rejected in Findings of Fact 16 and 24.
14-20. Accepted in or subordinate to Findings of Fact 1 or 23.

21. Rejected in Finding of Fact 22.
22. Accepted in Finding of Fact 34.
23-25. Rejected in Findings of Fact 38 and 42.
26. Rejected conclusion in Findings of Fact 24 and 34.
27. Rejected conclusion in Findings of Fact 34, 38 and 41.
28. Rejected in conclusions of law 53.
29. Accepted in part in Finding of Fact 23.
30. Accepted in Finding of Fact 26 except last sentence
31. Accepted in Finding of Fact 29.

Due to the withdrawal of St. Mary's as a party, no rulings are made on St. Mary's proposed recommended findings of fact.

COPIES FURNISHED:

W. David Watkins, Attorney
Kenneth F. Hoffman, Attorney
Christopher Bryant, Attorney
OERTEL, HOFFMAN, FERNANDEZ & COLE
2700 Blair Stone Road
Tallahassee, Florida 32301

Robert Griffin, Attorney
Edward Labrador, Attorney
Agency for Health Care
Administration
325 John Knox Road, Suite 301
Tallahassee, Florida 32303-4131

Jon Moyle, Attorney
Ronald Kolins, Attorney
Thomas A. Sheehan, III, Esquire
MOYLE, FLANIGAN, KATZ,
FITZGERALD & SHEEHAN, P.A.
Post Office Box 3888
West Palm Beach, Florida 33402

R. S. Power, Agency Clerk
Agency for Health Care Administration
Atrium Building, Suite 301
325 John Knox Road
Tallahassee, Florida 32303

Harold D. Lewis, Esquire
The Atrium, Suite 301
325 John Knox Road
Tallahassee, Florida 32303

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.

==========

AGENCY FINAL ORDER

==========

STATE OF FLORIDA
AAGENCY FOR HEALTH CARE ADMINISTRATION

ST. MARY'S HOSPITAL, INC. AND PALM BEACH GARDENS COMMUNITY HOSPITAL, INC. d/b/a PALM BEACH GARDENS MEDICAL CENTER,

Petitioner,

CASE NO.: 93-0956
93-0957
CON NO.: 708
RENDITION NO.: AHCA-95-73-FOF-CON

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION ANDGOOD SAMARITAN HOSPITAL, INC.,

Respondent.
_____/

FINAL ORDER

This cause came on before me for the purpose of issuing a final agency order. The Hearing Officer assigned by the Division of Administrative Hearings (DOAH) in the above-styled case submitted a Recommended Order to the Agency for Health Care Administration (AHCA). The Recommended Order entered November 2, 1994, by Hearing Officer Eleanor M. Hunter is incorporated by reference.

RULING ON EXCEPTIONS
FILED BY GOOD SAMARITAN

In this consolidated proceeding, St. Mary's Hospital (St Mary's) and Palm Beach Gardens Medical Center (Palm Beach Gardens) filed petitions challenging the agency's initial approval of CON 7086 to Good Samaritan Hospital. After a ten day evidentiary hearing the Hearing Officer issued a Recommended Order and recommended that a CON be denied. Subsequent to the hearing, but before the Recommended Order was issued one of the Petitioners, St. Mary's, withdrew its challenge to the initial decision.

Good Samaritan's position in its exceptions is that the other Petitioner, Palm Beach Gardens, lacks standing and St. Mary's having withdrawn its challenge, the initial approval should become the final decision by operation of law. Assuming for the moment that Palm Beach Gardens lacks standing, it would not be sound public policy to disregard the evidence received at the hearing and the recommendation of the Hearing Officer. 1/ I conclude that the agency would not be required to disregard the results of the hearing. Wiregrass Ranch vs. Saddlebrook, 19 FLW s414 (Fla. 1994).

Regarding standing, Palm Beach Gardens is an existing hospital in the same district offering the service proposed by Good Samaritan. At the volume projected by Good Samaritan, Palm Beach Gardens will lose revenues of approximately $250,000.00 per year. Total revenues at Palm Beach Gardens in 1992 were approximately $8,000,000.00--a ratio of 1/32. The agency has previously held that standing should be liberally construed and that a facility seeking party status in a certificate of need proceeding need not prove that its solvency is threatened to be entitled to party status under Section 408.039(5)(b), Florida Statutes. Paracelsus vs. Agency for Health Care Administration, 16 FALR 2708 (AHCA 1994). I conclude that Palm Beach Gardens established standing in this proceeding.

Good Samaritan excepts in whole or in part to findings of fact stated in paragraphs 16, 22, 23, 24, 28 through 34, 35, 36, 38, 50, and 51. The challenged findings are supported by competent, substantial evidence; therefore, the exceptions are denied.

Good Samaritan maintains that in paragraphs 42, 43, and 52 the Hearing Officer has concluded as a matter of law that a proposal's financial feasibility can not be presented via a "fully allocated cost basis" Such a conclusion would be incorrect, but here the Hearing Officer has only found as a fact that Good Samaritan's presentation via a "fully allocated cost basis" did not show its proposal to be financially feasible. In other words, Good Samaritan failed to prove financial feasibility not because of its mode of presentation, but because other evidence impeached the credibility of its utilization projections. See the findings in paragraphs 30 through 34. The exception is denied.

Good Samaritan's exception to paragraph 45 is granted only as to the finding that Good Samaritan failed to account for the CON filing fee as a capital cost; the other findings in paragraph 45 are supported by competent, substantial evidence. The agency does not consider the filing fee to be a capital expenditure for purposes of CON review.

Good Samaritan excepts to the Hearing Officer's conclusion in paragraph 53 that its capital costs were understated because there was no allocation of capital costs of the previously established outpatient program to the proposed inpatient program. For purposes of CON review it is not the agency's policy not to require such allocation when no addition capital expenditures are required to initiate an inpatient service at an established and unreviewable outpatient program. In reviewing such an application the issue is whether the applicant can fund the proposal. Furthermore, the addition of an inpatient program to an established and under utilized outpatient program, where need is otherwise established, is consistent with one of the goals of CON regulation which is to minimize duplication of health care resources. The exception is granted.

Good Samaritan excepts to the Hearing Officer's ruling that its exhibits 4 and 6, the interim health plans, were irrelevant and therefore inadmissible. I find no abuse of discretion by the Hearing Officer; therefore, the exception is denied.

Finally, Good Samaritan excepts to the rulings of the Hearing Officer rejecting or modifying certain proposed findings of fact. At this level of review the agency cannot serve as a trier of fact. If additional fact finding is required, remand to the Division of Administrative Hearings is required. Friends of Children vs. Department of Health and Rehabilitative Services, 504 So2d 1345 (Fla. 1st DCA 1987). I find no error in the challenged rulings. The exceptions are denied.

RULING ON EXCEPTIONS FILED BY PALM BEACH GARDENS

Palm Beach Gardens excepts to the Hearing Officer's characterization as "relatively insubstantial" the anticipated effect on Palm Beach Gardens should Good Samaritan's proposal be approved. To the extent that the Hearing Officer implicitly found Palm Beach Gardens lacks standing in this proceeding, the finding is rejected for the reasons stated in the ruling on Good Samaritan's exceptions.

Palm Beach Gardens maintains that Good Samaritan's corporate resolution is legally deficient. Palm Beach Gardens relies on Rule 59C-1.008(1)(a)2 which requires a letter of intent to identify the planning horizon to be addressed by CON application. By its plain language the cited rule imposes requirements for a letter of intent. The corporate resolution satisfies applicable rule and statutory requirements. The exception is denied.

FINDINGS OF FACT

The agency hereby adopts and incorporates by reference the findings of fact set forth In the Recommended Order except as modified by the ruling on the exceptions.

CONCLUSIONS OF LAW

The agency hereby adopts and incorporates by reference the conclusions of law set forth in the Recommended Order except as modified by the ruling on the exceptions.

Based upon the foregoing, it is

ADJUDGED, that the application of Good Samaritan Hospital, Incorporated, for certificate of need number 7086 be DENIED.

DONE and ORDERED this 13th day of January, 1995, in Tallahassee, Florida.

_____

Douglas M. Cook, Director
Agency for Health Care
Administration

ENDNOTE

1/ A Section 120.57 proceeding gives the agency a chance to change its mind based on the record developed at the hearing. Boca Raton Artificial Kidney Center vs. Department of Health and Rehabilitative Services, 475 So2d 260 (Fla. 1st DCA 1985)

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

COPIES FURNISHED:

W. David Watkins, Esquire
OERTEL, HOFFMAN, FERNANDEZ
& COLE, P. A.
Post Office Box 6507
Tallahassee, Florida 32314-6507

Jon Moyle, Esquire
Ronald Kolins, Esquire
Thomas Sheehan, Esquire
MOYLE, FLANIGAN, KATZ,
FITZGERALD & SHEEHAN, P. A.
Post Office Box 3888
West Palm Beach, Florida 33402

Eleanor M. Hunter
Hearing Officer
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

Samuel Dean Bunton, Esquire
Senior Attorney, Agency for
Health Care Administration
325 John Knox Road
Atrium Building, Suite 301
Tallahassee, Florida 32303-4131

Elizabeth Dudek (AHCA/CON)

Alberta Granger (AHCA/CON)

Elfie Stamm (AHCA/CON)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the above named addresses by U.S. Mail this 17th day of January, 1995.

_____
R. S. Power, Agency Clerk
State of Florida, Agency for
Health Care Administration
325 John Knox Road
The Atrium Building, Suite 301
Tallahassee, Florida 32303
(904) 922-3808

==========

ORDER CORRECTING AGENCY FINAL ORDER

==========

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

ST. MARY'S HOSPITAL, INC. AND
PALM BEACH GARDENS COMMUNITY
HOSPITAL, INC. d/b/a PALM BEACH
GARDENS MEDICAL CENTER,

CASE NO.: 93-0956
93-0957
CON NO.: 7086

Petitioners,

vs.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION AND
GOOD SAMARITAN HOSPITAL, INC.,

Respondents.
_____/

ORDER CORRECTING FINAL ORDER

Two scrivener's errors have been noted in the Final Order rendered January 13, 1995, Rendition Number AHCA-95-73-FOF-CON. The errors are found in the second sentence of the first complete paragraph on pace 4 of the Final Order. The corrections are made by changing the first use of the word "not" to "now", and by adding the suffix, "al", to the word "addition". As corrected the sentence reads as follows:

> For purposes of CON review it is now the agency's policy to not require such allocation when no additional capital expenditures are required to initiate an inpatient service at an established

and unreviewable outpatient program. (Emphasis added where corrections are made)

The agency's official reporter is authorized to make the corrections noted above and publish the Final Order of January 13, 1995, as corrected.

DONE and ORDERED this 21st day of January, 1995,in Tallahassee, Florida.

_____
Douglas M. Cook, Director
Agency for Health Care
Administration

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

COPIES FURNISHED:

W. David Watkins, Esquire
OERTEL, HOFFMAN, FERNANDEZ
& COLE, P. A.
Post Office Box 6507
Tallahassee, Florida 32314-6507

Jon Moyle, Esquire
Ronald Kolins, Esquire
Thomas Sheehan, Esquire
MOYLE, FLANIGAN, KATZ,
FITZGERALD & SHEEHAN, P. A.
Post Office Box 3888
West Palm Beach, Florida 33402

Eleanor M. Hunter
Hearing Officer
DOAH, DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

Samuel Dean Bunton, Esquire
Senior Attorney, Agency for
Health Care Administration
325 John Knox Road
Atrium Building, Suite 301
Tallahassee, Florida 32303-4131

Elizabeth Dudek (AHCA/CON)

Alberta Granger (AHCA/CON)

Elfie Stamm (AHCA/CON)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the above named addresses by U. S. Mail this 24th day of January, 1995.

_____

R. S. Power, Agency Clerk
State of Florida, Agency for
Health Care Administration
325 John Knox Road
The Atrium Building, Suite 301
Tallahassee, Florida 32303
(904)922-3808