STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARBOR HEALTH CARE COMPANY,

Petitioner,

vs. CASE NO. 94-0889RU

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

MANOR CARE OF BOYNTON BEACH, INC., d/b/a MANOR CARE OF SARASOTA COUNTY,

Intervenor.

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Claude B. Arrington, held a formal hearing in the above-styled case on March 22, 1994, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether the challenged agency statements are unpromulgated rules, whether Respondent (AHCA) has violated the provisions of Section 120.535(1), Florida

Statutes, by failing to adopt the challenged agency statements as rules and whether the challenged agency statements are invalid exercises of delegated legislative authority within the meaning of Section 120.56, Florida Statutes. The challenged agency statements are (a) that Section 408.037(2)(a), Florida Statutes, requires that an application for a Certificate of Need list among its "capital projects" other Certificate of Need applications which have been preliminarily denied by the Agency and are the subject of a petition for an administrative hearing (denied-but-in-litigation CON applications), and (b) that failure to list denied-but-in-litigation CON applications constitutes grounds to summarily reject a Certificate of Need application without further review.

PRELIMINARY STATEMENT

Petitioner (Arbor Health Care) and Intervenor (Manor Care) are competing applicants for a Certificate of Need (CON) to be issued by AHCA for a nursing home project to be located in Sarasota, Florida. AHCA issued its notice of intent to award the CON to Arbor Health Care and to deny all other applications, including that of Manor Care. Manor Care challenged the proposed action and the matter was referred to the Division of Administrative Hearings (DOAH) where it was assigned DOAH Case No. 93-2562. The three parties to this proceeding were also parties to DOAH Case No. 93-2562. During the course of DOAH Case No. 93-2562, Manor Care asserted in a motion for summary recommended order that Arbor Health Care's application for the Sarasota project should be denied because Arbor Health Care did not include in its application information required by Section 408.037(2)(a), Florida Statutes, pertaining to applications for three separate projects that are unrelated to the Sarasota project. For each of these unrelated projects, a letter of intent had been issued which notified Arbor Health of the intent of AHCA to deny Arbor Health's application. For each of these unrelated projects, Arbor Health administratively challenged the proposed action by proceedings that were pending before the Division of Administrative Hearings at the time Arbor Health submitted its application for the Sarasota project. Manor Care asserted in DOAH Case No. 93-2562 that Arbor Health's failure to include these three projects (referred to as denied-but-in-litigation CON applications) in its listing of capital projects was fatal and required the summary dismissal or administrative withdrawal of Arbor Health's application for the Sarasota project. AHCA filed pleadings in DOAH Case No. 93-2562 by which it adopted the rationale asserted by Manor Care and joined in its motion for summary recommended order.

On February 19, 1994, Arbor Health Care filed its petition with the Division of Administrative Hearings contending that the agency assertions pertaining to denied-but-in-litigation CON applications made in DOAH Case No. 93-2562 are unpromulgated rules that violate the provisions of Section 120.535(1), Florida Statutes, and are invalid exercises of delegated legislative authority within the meaning of Section 120.56, Florida Statutes.

On March 10, 1994, AHCA filed a Motion to Dismiss the Petition. Arbor Health Care filed its response to the Motion to Dismiss on March 14, 1994, and a Supplemental Response on March 17, 1994.

Manor Care's Petition to Intervene was filed on February 25, 1994, and was granted by Order dated March 14, 1994. On March 18, 1994, Manor Care filed a Motion to Dismiss the Petition. On the morning of the hearing, Arbor Health Care filed a Motion to Strike Manor Care's Motion to Dismiss on the grounds that it was not timely filed.

The final hearing was conducted March 22, 1994. At the commencement of the hearing, the pending motions were denied without prejudice to the rights of the parties to raise the same issues in their post-hearing submittals. Arbor Health Care's Motion to Strike Manor Care's Motion to Dismiss filed on March 22, 1994, was rendered moot by that ruling.

At the formal hearing, Arbor Health Care presented the testimony of Elizabeth Dudek, the chief of AHCA's CON section. Arbor Health Care offered seven exhibits, AHCA offered one exhibit and Manor Care offered four exhibits. All exhibits, except for Arbor Health Care's Exhibit 6, were accepted into evidence. Official recognition was taken of Chapters 120 and 408, Florida Statutes, and of Chapters 59C-1 and 60Q-2, Florida Administrative Code.

A transcript of the proceedings has been filed. AHCA did not timely file a post-hearing submittal, but it did file a notice on April 27, 1994, that it was joining in the post-hearing submittal that was filed by Manor Care. Rulings on the proposed findings of fact submitted by Arbor Health Care and by Manor Care may be found in the Appendix to this Final Order.

FINDINGS OF FACT

1. Arbor Health Care is an owner, operator, and developer of nursing homes with a continuing presence in the State of Florida. Arbor Health Care has been a provider of nursing home care in Florida for over seven years and has been an active applicant for Certificates of Need (CON) for nursing home facilities in Florida. Arbor Health Care owns and operates seven nursing homes in the State of Florida, and currently has under construction, or has a CON authorizing construction of, additional nursing home facilities in the State of Florida. Arbor Health Care currently has several applications for a CON for nursing home beds pending before AHCA and is currently involved in administrative proceedings before the Division of Administrative Hearings relating to the AHCA's notices of intent to grant and/or deny various applications for a CON. Arbor Health Care has been, and expects to continue to be, an active participant in the CON application and review process for nursing home beds in the State of Florida.

2. AHCA is the agency of the State of Florida charged with the duty to implement and enforce the CON program in Florida.

3. Manor Care owns and operates nursing homes and owns other health care facilities in the State of Florida. Manor Care has filed numerous applications for CONs related to provision of nursing home services in Florida, has several outstanding applications, and is the recipient of notices of intent from AHCA to approve and/or deny such applications. Manor Care has been, and expects to continue to be, an active participant in the CON application and review process for nursing home beds in the State of Florida.

4. In December 1992 Arbor Health Care and Manor Care, along with other providers, submitted competing applications for a CON to construct an 81-bed nursing facility in Sarasota, Florida (the Sarasota project). AHCA comparatively reviewed the applications and issued its State Agency Action Report and its notice of intent to grant the application submitted by Arbor Health Care and to deny all other applications, including the application submitted by Manor Care.

5. In April of 1993, Manor Care filed a formal challenge to the AHCA's proposed denial of its application for the Sarasota project and to the proposed intent to grant Arbor Health Care's application for that project. That

proceeding was referred to the Division of Administrative Hearings and assigned DOAH Case No. 93-2562. Manor Care filed a motion for summary recommended order in Case No. 93-2562 contending, in part, that Arbor Health Care's application for the Sarasota project should be dismissed because Arbor Health Care failed to comply with the provisions of Section 408.037(2)(a), Florida Statutes, pertaining to the minimum content of an application for a CON.

6. Section 408.037(2)(a), Florida Statutes, provides, in pertinent part, that an application for a CON shall include the following:

> (2) A statement of the financial resources needed by and available to the applicant to accomplish the proposed project. This statement shall include:
> (a) A complete listing of all capital projects, including new health facility development projects and health facility acquisitions applied for, pending, approved, or underway in any state at the time of the application, regardless of whether or not that state has a certificate-of-need program or a capital expenditure review program pursuant to section 112 of the Social Security Act. The department may, by rule, require less-detailed (sic) information from major health care providers. The listing shall include the applicant's actual or proposed financial commitment to those projects and an assessment of their impact on the applicant's ability to provide the proposed project.

7. Manor Care argued in Case No. 93-2562 that Arbor Health Care's application for the Sarasota project was deficient because it failed to include three projects, referred to as denied-but-in-litigation CON applications, within its listings of its capital projects. For each of these projects, Arbor Health Care's application for a CON had been preliminarily denied by AHCA. As to each project, Arbor Health Care had administratively challenged the denial in proceedings that were pending and still in litigation before the Division of Administrative Hearings at the time of Arbor Health Care's application for the Sarasota project. Consequently, no final order had been entered as to any of these three projects and whether Arbor Health Care would be issued a CON for one or more of these three projects had not been resolved.

8. On July 30, 1994, AHCA filed in DOAH Case No. 93-2562 a pleading agreeing with and adopting that portion of Manor Care's motion to dismiss grounded on Arbor Health Care's failure to include the three denied-but-in-litigation CON applications within its capital projects listing.

9. AHCA interprets the provisions of Section 408.037(2)(a), Florida Statutes, as requiring that denied-but-in-litigation CON applications be included within the applicant's capital projects listing. The position of AHCA is that any application that fails to contain the minimum information required by Section 408.037(2)(a), Florida Statutes, should be summarily dismissed or administratively withdrawn. AHCA has maintained this interpretation of Section 408.037(2)(a), Florida Statutes, and has applied this interpretation to all applications for a CON since the statute became effective in 1987.

10. AHCA's statement that denied-but-in-litigation CON applications must be included within an applicant's capital projects listing has never been adopted as a rule.

11. The term "capital project" is not defined in Chapter 408, Florida Statutes. AHCA adopted what is now codified as Rule 59C-1.002(9), Florida Administrative Code, effective January 31, 1991. That rule defines the term "capital project" as follows:

> "Capital project" means a project involving one or more expenditures which has received final approval via authorization to execute for which capitalization will be required under generally accepted accounting principles. For the purpose of this definition, final approval includes letters of intent to issue a certificate of need issued by the agency.

12. Also effective January 31, 1991, AHCA adopted what is now codified as Rule 58C-1.008(5)(h), Florida Administrative Code, which requires that an application for a CON contain listing of all capital projects ". . . as defined in rule 59C-1.002(9)."

13. Section 408.037(4), Florida Statutes, requires that a resolution from the applicant's governing authority accompany each application for a CON for new nursing home facilities in Florida. This resolution must contain certain representations and commitments to the project for which application is made and constitutes "authorization to execute" within the meaning of Rule 59C-1.002(9), Florida Administrative Code. Section 408.037(4), Florida Statutes, provides as follows:

> (4) A certified copy of a resolution by the board of directors of the applicant, or other governing authority if not a corporation, authorizing the filing of the application; authorizing the applicant to incur the expenditures necessary to accomplish the proposed project; certifying that if issued a certificate, the applicant shall accomplish the proposed project within the time allowed by law and at or below the cost contained in the application; and certifying that the applicant shall license and operate the facility.

14. An application for a CON for a project involving capital expenditures that contains the resolution required by Section 408.037(4), Florida Statutes, "has received final approval via authorization to execute" within the meaning of Rule 59C-1.002(9), Florida Administrative Code, and meets the definition of a "capital project" contained in the first sentence of that rule.

15. On March 11, 1994, AHCA caused to be published in the Florida Administrative Weekly, Volume 20, Number 10, at pages 1434-35, a Notice of Proposed Rule. The proposed rule would amend AHCA's existing Rule 59C-1.002(9), Florida Administrative Code, to read:

> (9) "Capital project" means a project involving a capital expenditure, as defined in subsection (8) of this rule, which the applicant has approved via authorization to execute. For projects subject to certificate of need review, capital project also means a project involving a capital expenditure for which a letter of intent to grant a certificate of need has been issued; or a project involving a capital expenditure for which a letter of intent to deny a of need is in litigation, or could still be certificate litigated within any remaining part of the 21-day period provided by s. 408.039(5)(a), F.S.

16. The proposed rule incorporates the agency statement that denied-but-in-litigation CON applications must be listed in the applicant's capital projects listings and removes any doubt that applied-but-in-litigation CON applications must be included in an applicant's capital projects listing.

17. AHCA's position that Section 408.37(2)(a), Florida Statutes, requires that denied-but-in-litigation CON applications be included in the capital projects listing is merely an application of the plain language of the statute. Each of the three applications for CONs referred to as denied-but-in-litigation CON applications contains the commitment required by Section 408.037(4), Florida Statutes. These three applications are clearly for CONs that have been applied for and are pending within the meaning of Section 408.037(2)(a), Florida Statutes.

18. If an applicant fails to list denied-but-in-litigation CON applications in its capital projects listings, it has failed to provide information required by Section 408.037(2)(a), Florida Statutes.

19. If an application for a CON is deemed incomplete and administratively withdrawn prior to comparative review, the applicant no longer has that application pending and cannot obtain a CON based on that application.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Sections 120.535 and 120.56, Florida Statutes.

21. As an owner, operator, and developer of existing and proposed nursing home facilities in the State of Florida, Arbor Health Care is substantially affected by AHCA's statements pertaining to the required contents of applications for CONs. Consequently, Arbor Health Care has the requisite standing to bring this proceeding. Manor Care's assertion that Arbor Health Care lacks standing because it has not as of yet suffered any adverse action as a result of the challenged statements is rejected as being without merit. See, Professional Firefighters of Florida, Inc. v. Department of Health and Rehabilitative Services 396 So.2d 1194 (Fla. 1st DCA 1981). Likewise without merit is Arbor Health Care's assertion that Manor Care lacks standing to intervene in the challenge brought pursuant to Section 120.535, Florida Statutes.

22. As the challenger, the burden is upon the petitioner to demonstrate, by a preponderance of the evidence, that the challenged agency assertions constitute rules as defined by Section 120.52(16), Florida Statutes. See, Section 120.535, Florida Statutes, Humana, Inc. v. Department of Health and Rehabilitative Services, 469 So.2d 889 (Fla. 1st DCA 1985), and Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1978).

23. Section 120.52(16), Florida Statutes, defines the term "rule" as follows:

> (16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. . . .

24. In St. Francis Hospital, Inc. v. Department of Health and Rehabilitative Services, 553 So.2d 1351 (Fla. 1st DCA 1989), at page 1354, the court stated:

> We recognize that an agency interpretation of a statute which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create rights, or require compliance, or to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rulemaking.

25. The agency statement challenged in this proceeding that denied-but-in-litigation CON applications must be included in the capital projects listing of an application for a CON is not a rule as the term rule is defined by Section 120.52(16), Florida Statutes. The Petitioner has failed to establish that the agency has asserted any requirement that is not apparent from an application or reading of the statute. The proof is compelling that the agency's assertion in the underlying case that instigated this petition was predicated on existing statute and did not impose any requirement not contained within the existing statute.

26. Section 120.535, Florida Statutes, provides, in pertinent part, as follows:

> (1) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule under s. 120.52(16) shall be adopted

by the rulemaking procedure provided by s. 120.54 as soon as feasible and practicable to the extent provided by this subsection . . .

* * *

(a) Rulemaking shall be presumed feasible unless the agency proves that:

* * *

3. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

* * *

(2)(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates subsection (1). . . .

* * *

(4) When a hearing officer determines that all or part of an agency statement violates subsection (1), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.
(5) Subsequent to a determination that an agency statement violates subsection (1), if an agency publishes, pursuant to s. 120.54(1), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement, the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action. . . .

27. Even if it were determined that the challenged statement is an unpromulgated rule, AHCA established that it is currently using the rulemaking process expeditiously and in good faith to adopt rules that incorporate the challenged agency statement, which is all that is required by Section 120.535, Florida Statutes.

28. Section 120.56(1), Florida Statutes, provides as follows:

(1) Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

29. Section 120.52(8), Florida Statutes, defines the term "invalid exercise of delegated legislative authority" as follows:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:

> (a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; or
> (e) The rule is arbitrary or capricious.

30. The challenge to the agency statement that denied-but-in-litigation CON applications must be contained in an applicant's capital projects listing is not a rule. Consequently, the challenge pursuant to Section 120.56, Florida Statutes, must be denied. Even if the challenged statement were considered an unpromulgated rule, any challenge thereto would be limited to the provisions of Section 120.535, Florida Statutes, and not subject to challenge under Section 120.56, Florida Statutes, until promulgated as a rule. This is not to suggest that the propriety of an agency's "unpromulgated rule" could not be tested in a Section 120.57 hearing. See, Section 120.57(1)(b)15, Florida Statutes.

31. AHCA, as the agency responsible for the administration of the CON program in Florida, has the authority to administratively withdraw or to otherwise reject an application for a CON that fails to provide information required by statute. AHCA's assertion in DOAH Case No. 93-2562 that Arbor Health Care's application for the CON for the Sarasota project should be administratively withdrawn is not a rule as defined by Section 120.52(16), Florida Statutes, and is not subject to challenge in this proceeding pursuant to Section 120.535 or Section 120.56, Florida Statutes.

ORDER

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

ORDERED that Arbor Health Care's challenges pursuant to Section 120.535 and 120.56, Florida Statutes as set forth in its petition be, and the same hereby are, DENIED.

DONE AND ORDERED this 3rd day of May, 1994, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of May, 1994.

APPENDIX TO FINAL ORDER, CASE NO. 94-0889RU

The following rulings are made as to the proposed findings of fact submitted by Petitioner, Arbor Health Care Company.

1. The proposed findings of fact in paragraphs 1, 2, 3, 4, 5, 6, 8, and 12 are adopted in material part by the Final Order.
2. The proposed findings of fact in paragraph 7 are adopted in part by the Final Order, but are rejected to the extent they are contrary to the findings made and to the conclusions reached.
3. The proposed findings of fact in paragraph 9 are adopted in part by the Final Order, but are rejected to the extent they are unnecessary to the conclusions reached.
4. The proposed findings of fact in paragraph 10 are rejected as being unnecessary to the conclusions reached since it is found that denied-but-in-litigation CON applications meet the definition contained in the first sentence of the rule.
5. The proposed findings of fact in paragraphs 11 and 16 are rejected as being unnecessary to the conclusions reached.
6. The proposed findings of fact in paragraphs 13 and 14 are adopted in part by the Final Order or are subordinate to the findings made.
7. The proposed findings of fact in Paragraph 15 are rejected for failure to comply with Rule 60Q-2.031(3), Florida Administrative Code, and because the proposed findings are unnecessary to the conclusions reached.

The following rulings are made on the proposed findings of fact submitted by Intervenor, Manor Care of Boynton Beach, Inc., d/b/a Manor Care of Sarasota County.

1. The proposed findings of fact in paragraphs 1, 2, 3, 4, 5, 6, 17, 21, and 22 are adopted in material part by the Recommended Order.
2. The proposed findings of fact in paragraphs 7, 8, 9, 10, and 24 are rejected as being unnecessary to the conclusions reached.
3. The proposed findings of fact in paragraphs 11, 12, 13, 14, 15, and 16 are treated as preliminary matters, but are rejected as findings of fact because they are unnecessary to the conclusions reached.
4. The proposed findings of fact in paragraph 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37 are legal arguments that are rejected as findings of fact, but they are subordinate to the conclusions of law contained in the Final Order.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.