

STATE OF FLORIDA  
AGENCY FOR HEALTH CARE ADMINISTRATION

RENDITION NO. \_\_\_\_\_  
CON NO. 9710

FILED  
05 DEC 30 AM 11:31  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

SELECT SPECIALTY HOSPITAL –  
MARION, INC.,

Petitioner,

vs.

DOAH CASE NO. 04-0444CON  
AHCA NO. 2004000512

STATE OF FLORIDA, AGENCY FOR  
HEALTH CARE ADMINISTRATION,

Respondent,

and

KINDRED HOSPITAL – BAY AREA –  
TAMPA,

Intervenor.

---

**FINAL ORDER**

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), David M. Maloney, conducted a formal administrative hearing. At issue in this proceeding is whether Kindred – Bay Area – Tampa (“Kindred – Bay Area”) has proven it has standing to intervene in the proceeding, and whether Select Specialty Hospital – Marion, Inc.’s (“Select – Marion”) Certificate of Need (“CON”) Application No. 9710 for the establishment of a 44-bed long term care hospital in Polk County, AHCA Health Care Planning District 6, should be approved. The Recommended Order dated October 31, 2005, is incorporated herein by reference, except where noted infra.

## RULINGS ON EXCEPTIONS

Kindred – Bay Area filed exceptions to which Select – Marion and the Agency did not file a response. Select - Marion and the Agency did not file any exceptions.

In the First Exception, Kindred – Bay Area took exception to the findings of fact in Paragraph 58 of the Recommended Order, arguing there was no record evidence to support the ALJ's finding that “[f]or the 32 patients from Polk County admitted to Kindred – Bay Area in 2004, the total after-tax margin impact would be only \$240,000.” According to Kindred – Bay Area, the ALJ misinterpreted Select – Marion's Composite Exhibit 5. In that exhibit, Select – Marion estimated that Kindred – Bay Area's after-tax margin impact in 2004 for 32 patients was \$713,318; and its projected after-tax margin impact in 2007 for 11 patients would be only \$240,137. See Select – Marion's Composite Exhibit 5 at Page 4a. Kindred – Bay Area's argument is also supported by record testimony. See Transcript, Volume II, Pages 151-152. Therefore, Kindred – Bay Area's First Exception is granted and Paragraph 58 is changed to state:

58. In terms of net revenue and after-tax margin, Kindred – Bay Area would also sustain losses. For the 32 patients from Polk County admitted to Kindred – Bay Area in 2004, the total after-tax margin impact would be \$713, 318.

In the Second Exception, Kindred – Bay Area took exception to the findings of fact in Paragraph 59 of the Recommended Order, arguing there was no record evidence to support the ALJ's finding that Lakeland is closer to Tampa than it is to Winter Haven. Kindred – Bay Area also stated the ALJ erred in using that finding to infer that Lakeland area patients might continue to choose the services at Kindred – Bay Area over the proposed Select – Marion facility. Kindred – Bay Area is correct in its assertion that there was no evidence to support the ALJ's finding that Lakeland is closer to Tampa than it is to Winter Haven. On Page 9 of Select – Marion's Exhibit 1 there is a map of existing hospitals in Polk County and the surrounding area.

It is obvious from that map that the distance between Lakeland and Tampa is much greater than the distance between Lakeland and Winter Haven. Thus, the ALJ's finding that Lakeland is closer to Tampa than it is to Winter Haven is clearly erroneous. That error formed the basis for the ALJ's inference in Paragraph 59 of the Recommended Order that Lakeland area residents might still choose Kindred – Bay Area over the proposed Select – Marion facility. Therefore, Kindred – Bay Area's Second Exception is granted and Paragraph 59 is stricken in its entirety.

In the Third Exception, Kindred – Bay Area took exception to the findings of fact in Paragraph 61 of the Recommended Order, arguing it was based on the erroneous findings of fact in Paragraphs 58 and 59 of the Recommended Order. Based on the reasoning for granting Kindred – Bay Area's First and Second Exceptions, Kindred – Bay Area's Third Exception is granted and Paragraph 61 of the Recommended Order is changed to state

61. On balance, the impact of the proposed facility located in Polk County will substantially affect Kindred – Bay Area.

In the Fourth Exception, Kindred – Bay Area took exception to the conclusion of law in Paragraph 72 of the Recommended Order, arguing the conclusion of law was not based on record evidence. Indeed, the record evidence established Kindred – Bay Area did have standing to intervene in this proceeding. "Economic injury is a sufficient substantial interest for standing to intervene in a CON proceeding." Baptist Hospital, Inc. v. Department of Health & Rehabilitative Services, 500 So.2d 620, 625 (Fla. 1st DCA 1986). Furthermore, "[a] facility seeking intervention is not required to show that its solvency is threatened by the proposed new service or facility." Paracelsus Peninsula v. Agency for Health Care Administration & Memorial Regional Rehabilitation Center, Inc., 16 FALR 2708, 2709 (AHCA 1994). See also St. Mary's Hospital and Palm Beach Gardens Community Hospital, Inc. d/b/a Palm Beach Gardens Medical Center v. State of Florida, Agency for Health Care Administration and Good Samaritan Hospital,

Inc., 17 FALR 457, 458 (AHCA 1995); and Vitas Health Care Corporation of Central Florida, Inc. v. State of Florida, Agency for Health Care Administration and Hospice of the Palm Coast, Inc., 27 FALR 2901, 2925 (AHCA 2005). It appeared that the ALJ, in making the conclusion of law in Paragraph 72 of the Recommended Order, imposed a higher standard upon an intervenor for proving standing than that established by prior agency precedent. The Agency finds that it has substantive jurisdiction over the conclusion of law in Paragraph 72 of the Recommended Order and that it could substitute a conclusion of law as or more reasonable than that of the ALJ based on the record evidence.<sup>1</sup> Therefore, for the reasons stated above, Kindred – Bay Area’s Fourth Exception is granted and Paragraph 72 of the Recommended Order is changed to state

72. Based on the evidence and this order’s findings of fact, Kindred Bay – Area does have standing to intervene in this proceeding. It has proven that an established program of Kindred – Bay Area’s will be substantially affected by the approval of Select – Marion’s application. See § 408.039 (5) (c), Fla. Stat.

#### **FINDINGS OF FACT**

The Agency hereby adopts the findings of fact set forth in the Recommended Order, except where noted supra.

#### **CONCLUSIONS OF LAW**

The Agency adopts the conclusions of law set forth in the Recommended Order, except where noted supra.

---

<sup>1</sup> It is important to note that, even though the Agency has determined that the ALJ erred in reaching this conclusion, the ALJ’s error was harmless since Kindred – Bay Area was still allowed to participate in the proceeding. See First Hospital v. Department of Health & Rehabilitative Services, 589 So.2d 310 (Fla. 1<sup>st</sup> DCA 1991).

**ORDER**

Based upon the foregoing, Kindred – Bay Area proved it had standing to intervene in this proceeding, and Select - Marion's CON application no. 9710 is denied.

DONE and ORDERED this 21 day of DECEMBER, 2005, in Tallahassee,

Florida.



ALAN LEVINE, SECRETARY  
AGENCY FOR HEALTH CARE ADMINISTRATION

**NOTICE OF RIGHT TO JUDICIAL REVIEW**

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 THE 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.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. Mail, or by the method indicated, to the persons named below on this

29<sup>th</sup> day of December, 2005.



RICHARD J. SHOOP, Agency Clerk  
Agency for Health Care Administration  
2727 Mahan Drive, MS #3  
Tallahassee, Florida 32308-5403  
(850) 922-5873

COPIES FURNISHED TO:

David M. Maloney  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060

Timothy Elliott, Esquire  
Assistant General Counsel  
Agency for Health Care Administration  
2727 Mahan Drive, MS #3  
Tallahassee, Florida 32308

Mark A. Emanuele, Esquire  
Brett R. Frankel, Esquire  
Panza, Maurer & Maynard, P.A.  
Bank of America Building, 3<sup>rd</sup> Floor  
3600 North Federal Highway  
Fort Lauderdale, Florida 33308

M. Christopher Bryant, Esquire  
Oertel, Fernandez, Cole & Bryant, P.A.  
301 South Bronough Street, 5<sup>th</sup> Floor  
Post Office Box 1110  
Tallahassee, Florida 32302-1110

Elizabeth Dudek  
Health Quality Assurance

Jan Mills  
Facilities Intake