

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HERNANDO-PASCO HOSPICE, INC.,

Petitioner,

vs.

Case No. 14-1367CON

HOSPICE OF CITRUS COUNTY, INC.,
d/b/a HOSPICE OF CITRUS AND THE
NATURE COAST, AND AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondents.

_____ /

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the
Division of Administrative Hearings (DOAH), heard this case, as
noticed, on July 21 through 24, 2014, in Tallahassee, Florida.

APPEARANCES

For Petitioner, Hernando-Pasco Hospice, Inc., (Herando-
Pasco):

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(Agency):

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For Respondent, Hospice of Citrus County (Nature Coast):

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STATEMENT OF THE ISSUES

A. Did Nature Coast demonstrate special circumstances to justify approval of its Certificate of Need (CON) application to establish a new hospice program in Service Area 3D, Hernando County, in the absence of published numeric need?

B. If Nature Coast demonstrated special circumstances to justify approval, does Nature Coast's proposal satisfy the requirements of Florida Administrative Code Rule 59C-1.0355, and section 408.035, Florida Statutes (2014)?^{1/}

PRELIMINARY STATEMENT

On September 27, 2013, the Agency published a zero fixed need pool for hospices in Hernando County, for the applicable planning horizon. On November 13, 2013, Nature Coast filed its CON Application No. 10204 seeking to establish a new hospice program in Hernando County. The application relied upon the theory that "special circumstances," as provided in rule 59C-1.0355(4) (d), supported approval of a program, in the absence of fixed need. The factors relied upon were an underserved need for pediatric palliative care in Hernando County with a related need for services through Children's Medical Services Partners in

Care/Together for Kids program (PIC:TFK) and a lack of access to hospice care for rural residents.

AHCA preliminarily granted the application in its State Agency Action Report (SAAR) issued February 14, 2014. Hernando-Pasco filed a petition challenging the granting of Nature Coast's CON application. On March 24, 2014, AHCA referred the petition to DOAH. On April 7, 2014, DOAH set the matter for final hearing to be held July 21 through 25, 2014, dates suggested by all parties in their Joint Response to Initial Order.

On May 20, 2014, Nature Coast filed a Motion for Continuance of the hearing until December 2014, based upon the assertion that its health planning witness, Kathy Platt, was "unavailable during the scheduled final hearing dates due to a final hearing for a certificate of need matter in Georgia." Ms. Platt was also the CON application's primary author. The undersigned denied the motion because the motion did not identify the Georgia case, state when the Georgia hearing was scheduled, or describe any efforts to resolve the asserted schedule conflict. Fla. Admin Code R. 28-106.210 (requiring good cause for a continuance). The order denying the motion, however, allowed presentation of the witness's testimony out of order or by deposition. Nature Coast chose to engage another expert. The final hearing convened as scheduled.

Nature Coast presented the testimony of Marylin Bloom; Jennifer Lawson; Linda Martin, R. N.; Suzanne Worsham; Bonnie Saylor; David Levitt; and Armand E. Balsano. Nature Coast Exhibits 1 through 24, 27 through 29, 31, 34 through 60, 64 through 67, 75, 76, 78 through 80, and 117 through 122 were admitted into evidence.

The Agency presented the testimony of Jeffrey N. Gregg by deposition transcript, admitted as Agency Exhibit 2. The Agency also entered Exhibit 1, the State Agency Action Report, into evidence.

Hernando-Pasco presented the testimony of Thomas Barb; Laura Finch; Jaysen Roa; Rose Milks; David McGrew, M.D.; Sharon Gordon-Girvin; and Darryl Weiner. Hernando-Pasco Exhibits 1 through 8, 10 through 20, 22, 24 through 26, 33 through 40, and 43 through 67 were admitted into evidence.

The Transcript of the proceedings was filed August 18, 2014. On the motion of the parties the date for filing proposed recommended orders was twice extended, until October 2, 2014. Nature Coast and the Agency timely filed a Joint Proposed Recommended Order. Hernando-Pasco timely filed its Proposed Recommended Order. The proposed recommended orders have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

I. The Parties

A. The Agency

1. The Agency is the single state agency responsible for the administration of Florida's CON Program. § 408.031, Fla. Stat.

2. The Agency is designated both "as the state health planning agency for purposes of federal law . . . [and as] the single state agency to issue, revoke, or deny certificates of need . . . in accordance with present and future federal and state statutes." § 408.034(1), Fla. Stat.

B. Nature Coast

3. Nature Coast is a non-profit, charitable organization that provides hospice services in Service Areas 3A and 3C. Citrus County makes up Service Area 3C. Service Area 3A consists of 11 counties in north central Florida stretching all the way to the Georgia border. They are: Alachua, Bradford, Columbia, Dixie, Gilchrist, Hamilton, Lafayette, Levy, Putnam, Suwanee, and Union Counties.

4. Nature Coast provides hospice services, medical, psychological, spiritual, and social support to people with terminal illness at the end of life. It provides grief services to families and survivors during hospice care and for at least 13 months afterwards. Nature Coast also provides grief counseling

services to anyone in its area who has experienced the death of someone close to them. Grief counseling can be individualized, group, by telephone, or mail support and is provided for as long as needed. Nature Coast also offers social support services to individuals to re-integrate them back into society.

5. Nature Coast utilizes its hospice house, nursing homes with inpatient contracts, the hospice unit at a hospital, or continuous care at a patient's home when a patient's symptoms are out of control or there is not adequate care given at home. It also provides respite care.

6. Nature Coast operates seven thrift and gift shops. In addition to raising money, the shops offer employees, volunteers, and shoppers a place to talk about hospice. The shops are also an avenue for grief support. They offer a place for caregivers who would like to help out a chance to give back.

7. Nature Coast offers numerous community programs, including youth programs, bereavement programs, education, and outreach.

8. All Nature Coast employees and contracted staff must meet required training and education standards. They must have demonstrated competencies, evaluations, and training. Employees and contracted staff alike can be reprimanded, written up, and retrained if they are not performing as expected by Nature Coast.

9. Nature Coast operates a 16-bed inpatient facility in Lecanto, Citrus County, Florida. Nature Coast sometimes uses these beds as residential beds. Nature Coast also operates an inpatient unit at Citrus Memorial Hospital. Nature Coast has eight satellite offices located throughout Service Areas 3A and 3C. It has approximately 475 employees, about 200 staff working as needed, about 200 contract staff, and 600 volunteers.

10. Nature Coast serves patients in home, any facility setting, or inpatient facility. Home could be a patient's home, a caregiver's home, a group home, an ARC residential facility, or a tent in a backyard. Nature Coast also serves homeless persons wherever they choose to be served. Nature Coast will assist a homeless person with finding a residence, if asked.

11. Nature Coast has been Joint Commission accredited since 2007. The Joint Commission audits Nature Coast. The Commission has never found Nature Coast out of compliance with quality of care or Medicare Conditions of Participation.

12. The Hospice Provider Family Survey rating for Nature Coast is five stars. According to the Department of Elder Affairs ("DOEA") Hospice Outcomes Measures Report for calendar year 2012, Nature Coast exceeded the state average for outcomes.

13. Nature Coast is accredited by the Jewish Institute and also provides specialized services for veterans.

14. Nature Coast has specialized services for pediatric patients and provides services to children enrolled in the Children's Medical Services (CMS) PIC:TFK program.

15. Nature Coast took over the PIC:TFK program in the CMS-Alachua service district, at the request of CMS, because the existing provider abandoned the program due to cost and required labor. In 2009, federal laws changed, allowing the PIC:TFK program to go statewide. This allowed Nature Coast to provide PIC:TFK services in all 11 counties of Service Area 3A.

16. In 2010, Nature Coast became a PIC:TFK provider in Citrus County, which is included in the CMS-Ocala service district. At the request of CMS-Ocala, Nature Coast began serving a few PIC:TFK patients in Hernando County in 2012. Nature Coast incorrectly believed that, similar to the operation of its agreement with CMS-Alachua, which allowed Nature Coast to serve multiple counties, its agreement with CMS-Ocala allowed it to serve PIC:TFK patients in Hernando County.

17. Nature Coast provides quality care to its patients. If Nature Coast begins operation in Hernando County, it will provide quality care to the patients served there.

C. Hernando-Pasco

18. Hernando-Pasco began operating in Pasco and Hernando counties in 1984. It currently serves Citrus, Pasco and Hernando counties. Hernando-Pasco operates three care centers in Pasco

County. Hernando County's care center was once located in the city limits of Brooksville. But Hernando-Pasco relocated it towards the Suncoast Parkway nearer the center of the population. The care centers are inpatient units, built similar to a nursing home.

19. Hernando-Pasco serves everyone who is appropriate for hospice. It serves patients wherever they may live, i.e., homes, nursing homes, ALFs, rural areas. It provides interpreters for non-English speaking and deaf patients and families.

20. Hernando-Pasco provides a full range of core services including nursing, social work, physician, dietary counseling, bereavement counseling, and spiritual counseling. It provides inpatient care to qualified patients. Hernando-Pasco provides bereavement counselors for adults and children.

21. Hernando-Pasco also offers non-core services, such as, physical and occupational therapy, aide services, home aide services, volunteers, medical supplies, and short-term inpatient care. It also has comfort touch, compassionate paws pet therapy, music therapy, and its Legacy Program. And its Children's Assistance Program (CAP) provides community support and both anticipatory grief and bereavement counseling for children. The CAP program holds two types of children's camps every year, which provide therapeutic activities.

22. Hernando-Pasco has its own pharmacy, durable medical equipment company, and home health agency. It also has a foundation, which is a separate not-for-profit entity.

23. Hernando-Pasco relies on charitable gifts in order to maintain the unreimbursed programs for the community. Approximately 85 percent of the charitable gifts it receives come in the form of memorials, honorariums, and bequests.

24. In conjunction with the Veterans Administration and the National Hospice and Palliative Care Organization, Hernando-Pasco operates a program to honor veterans called "We Honor Veterans."

25. Like Nature Coast, Hernando-Pasco provides its patients quality care. Operation of a new hospice in Hernando County by Nature Coast will not impair Herando-Pasco's ability to provide quality care.

II. Overview of Hospice Services

26. Florida law requires a hospice program to provide a continuum of hospice services and supportive care for terminally ill patients and their families. § 400.609, Fla. Stat. The core hospice services required by Medicare Conditions of Participation include physician, nursing, bereavement, spiritual and social services.

27. "Hospice care" consists of comprehensive care and services that are not curative in nature, but are provided to persons who are dying. It is defined by proximity to death.

28. A patient must meet certain state and federal criteria to be admitted to hospice. Florida law defines a terminally-ill patient as a person having a medical prognosis of 12 months or less life expectancy. §§ 400.601(3), (7) and (10), Fla. Stat.

29. The Medicare hospice benefit requires terminally ill patients to have a life expectancy prognosis of six months or less. Like Florida law, the Medicare benefit excludes patients seeking curative treatments from hospice eligibility.

30. Hospice care is provided pursuant to a plan of care developed by an interdisciplinary team consisting of physicians, nurses, home health aides, social workers, bereavement counselors, spiritual care counselors, chaplains and others.

31. There are four levels of service in hospice care: routine home care, general inpatient care, continuous care, and respite care. To qualify for hospice care one must be certified by two physicians as having a terminal illness with less than a six-month prognosis.

32. Routine home care, provided where the patient resides, is the predominant form of hospice care.

33. The symptoms managed in general inpatient and in continuous care are the same. But the settings in which patients receive services are different. General in-patient care is provided in either a hospital setting, a dedicated nursing unit, or in a freestanding hospice inpatient facility. For patients

wishing to remain in a home setting such as their home or an assisted living facility (ALF), continuous care is an option to avoid being moved to an inpatient setting.

34. Hospices provide continuous care, sometimes called "crisis care," in the home or in any setting where the patient resides, including nursing homes and ALFs. Continuous care is provided for short durations when symptoms become so severe that around-the-clock care is necessary for pain and symptom management.

35. Respite care is for caregiver relief. It allows patients to stay in an inpatient setting for brief periods in order to provide caregivers a break.

36. A hospice cannot provide inpatient care or continuous care simply because a patient's family wants to receive the service. State and federal law mandate placing a patient in the correct care setting, with approval by a physician and the interdisciplinary team.

37. Medicare is the largest payor for hospice services. Other payors include Medicaid, private insurance, managed care plans, and other government payors. Hospices provide some uncompensated care as charity.

38. A specific philosophy drives hospice care. Consequently, state and federal law require hospice providers to

employ all core staff except in times of peak patient loads or in extraordinary circumstances. §400.609(1), Fla. Stat.

39. Hospice programs are required by law to accept all patients regardless of ability to pay. §400.6095(1), Fla. Stat.

III. The Nature Coast Proposal

40. Nature Coast proposes to establish a new hospice program in Hernando County.

41. It will provide the same types of services in Hernando County that it has in Citrus County. It also proposes to specifically focus on the county's rural population, care to persons residing in nursing home and ALF facilities, and to people less than 18 years of age. In its application, its evidence, and the Joint Proposed Recommended Order, Nature Coast identified the special circumstances supporting approval of its application despite the absence of a calculated need as "lack of service to children enrolled in the PIC:TFK program and rural patients not being served at home." (Joint PRO at ¶ 49) Nature Coast and the Agency also emphasize that since Hernando-Pasco is the sole provider in the county, Nature Coast's hospice would provide choice and competition to Hernando County residents.

42. The residents include non-hospice patients enrolled in PIK:TIF which will be discussed in more detail later. Nature Coast will also meet other needs of the Hernando County community as they are identified.

43. Nature Coast would operate its proposed program as a satellite out of Nature Coast's Lecanto home office in Citrus County. If approved, Nature Coast would offer the same services that Hernando-Pasco currently provides in Hernando County, participate in PIC:TKF, and emphasize services to patients under the age of 18.

44. Nature Coast will be able to use its existing infrastructure to support the new hospice program. Additionally, it will be able to share staffing from nearby offices such as those in Inverness and Homosassa.

45. Nature Coast has not chosen the location for its Hernando offices. It has looked at leasing space in the central eastern portion of Hernando County, near the intersection of Highways 41 and 50 in Brooksville. The Agency and Nature Coast do not propose a location as a CON condition.

46. Nature Coast plans to conduct only one fundraising event in Hernando County. That is its holiday season Tree of Remembrance.

47. Nature Coast will not solicit donations from families of Hernando County patients. It is typical, however, for friends and family of patients to contribute to a hospice, if pleased with the care provided. Consequently, it is reasonable to infer that a family using Nature Coast for its hospice needs would be

unlikely to make a donation or memorial gift to Hernando-Pasco and vice versa.

48. Nature Coast will meet the needs of low income patients and residents through its Indigent/Charity Care Policy.

49. The Agency and Nature Coast propose to condition approval of the CON application on the following: (a) Nature Coast will participate in the PIC:TFK program for Hernando County patients and the provision of hospice services to PIC:TFK patients that become hospice eligible; (b) Nature Coast will provide community outreach and education and grief support programs; and (c) Nature Coast will offer alternative therapies to patients, that may include massage therapy, music therapy, play therapy and holistic (non-drug) therapy.

50. State and federal law require hospice programs to provide services to anyone eligible who requests them. Therefore, the Agency will not place conditions on the program to provide legally required services.

51. There is nothing especially remarkable or unusual about Nature Coast's proposed conditions.

52. There is also nothing special or unique about Nature Coast's volunteer program or materials. Every hospice is required by federal law to have a volunteer program.

IV. Overview of Partners-in-Care:Together-for-Kids

53. PIC:TFK is a 1915(b) Medicaid waiver program operated under the authority of Children's Medical Services, Florida's Title V Program for Children with Special Health Care Needs. Funding is through Medicaid, Florida Kid Care, Title XIX (Pedi-Care), and some private insurance. Some children are uninsured. Eligible families have either Medicaid or Title XIX and are on the lower income scale. Children who receive PIC:TFK services are very, very sick. Their parents are often social-economically challenged.

54. The federal government created the PIC:TFK program several years ago. It is designed to extend the normal life expectancy for children in hopes doctors and families would refer children and a relationship would be established. Then if a child becomes hospice appropriate, it would be easier for doctors and families to segue from curative care to hospice care.

55. Only hospices can be a PIC:TFK partner or provider.

56. Referrals for PIC:TFK come from CMS nurses' caseloads. Each CMS nurse serves between 200-300 patients. CMS Care coordinators identify eligible children and enroll them in PIC:TFK. Once enrolled a child receives home and community-based palliative services provided by hospice staff specially trained in pediatric palliative care. These services are based on the

individual child and family's care plan, which is regularly assessed and updated.

57. A child must have a life-limiting illness to enroll in PIC:TFK. Children—birth through age 21—enrolled with Children's Medical Services may qualify for PIC:TFK at any stage of their life-limiting illness.

58. The primary physician must attest to the life-limiting illness in writing. Life-limiting diagnoses include, but are not limited to: cancer, cerebral palsy, cystic fibrosis, traumatic brain injuries, severe motor vehicle accidents, and chromosomal abnormalities.

59. Children and their families can receive palliative care such as pain management, symptom management, patient and family counseling, expressive therapies, including play, music or art therapy, psychosocial and spiritual therapy, respite care, volunteer services and bereavement, including anticipatory grief services, concurrently with curative treatment through the PIC:TFK program.

60. PIC:TFK is a psychological-social program. It provides understanding of medications, complexity of issues, and helps with the grieving process. PIC:TFK gives parents a person to talk to who understands the unique challenges and sorrow of a mortally ill child.

61. Under PIC:TFK, the hospice physician is charged with contacting and staying in touch with the primary care physician. The primary care physician is the gate keeper and is responsible for following a child enrolled in PIC:TFK: prescribing medications, ordering durable medical equipment, ordering home care. The primary care physician will receive copies of all correspondence, updated plans of care, admitting plans of care, and discharge from PIC:TFK.

62. CMS nurses let families know about PIC:TFK services offered by a hospice. A service isn't offered unless agreed to by CMS.

63. The PIC:TFK provider goes into the child's home, assesses the child's needs, and guides the family toward appropriate services and resources. The PIC:TFK provider can provide respite care to the family, and can offer nursing care, social workers, in-home medical support for pain management and symptom management, in-home personal care, and in-home spiritual care.

64. PIC:TFK patients are a subset of patients that could become hospice patients.

V. Fixed Need Pool

65. The Agency's rule 59C-1.0355 establishes a hospice numeric need formula for publication of a Fixed Need Pool (FNP) for each hospice Service Area in each CON batching cycle.

66. The formula takes into account historic and projected deaths in each service area for a particular planning horizon, as well as the historic and projected number of hospice admissions within the service area in four specific categories of patients: cancer age 65 and over; noncancer age 65 and over; cancer under age 65; and noncancer under age 65.

67. Under the numeric need formula, if the number of projected admissions to hospice in the planning year using a statewide average penetration rate applied to the four specific patient categories is at least 350 more than the current number of hospice admissions in the service area, there is a numeric need for another hospice provider in the service area.

68. In the batch here, there was not a numeric need. The formula projected 254 additional hospice admissions in Hernando County in the October 2013 projections governing this batch. After Nature Coast submitted its application, that number declined to 155.

69. However, Hernando County's population is growing, including its elderly and pediatric populations.

VI. Special Circumstances

70. Since the Agency did not project a need for a new hospice, Nature Coast relied on the argument that special circumstances supported approving its application. Rule 59C-

1.0355(4) (d) establishes the standards for a special circumstance need.

71. It provides:

(d) Approval Under Special Circumstances.
In the absence of numeric need identified in paragraph (4) (a), the applicant must demonstrate that circumstances exist to justify the approval of a new hospice. Evidence submitted by the applicant must document one or more of the following:

1. That a specific terminally ill population is not being served.
2. That a county or counties within the service area of a licensed hospice program are not being served.

72. There are no counties within Nature Coast's proposed service area that are not being served by a hospice.

73. Consequently Treasure Coast and the Agency must prove that a specific terminally ill population is not being served. The population that they contend is not being served are eligible PIC:TFK patients and terminally ill patients under the age of 18.

74. The parties and witnesses presented different data and theories about terminally ill patients under 18 in need of hospice services. The data and theories agree that the number of these patients is small, by any measure. The data and theories presented as evidence are simply inconclusive about whether the absence of reported hospice utilization by young patients in

Hernando County is because the patients are not being served or because there have not been any patients in recent years.

75. The data is clear, however, that residents of Hernando County include some undetermined and small number of terminally ill patients under the age of 18 and patients under the age of 18 who may become terminally ill. The admission by Herando-Pasco in 2011 of four patients under the age of 18 and in 2013 of seven patients under the age of 18 shows that. The fact that Hernando-Pasco admitted no patients under the age of 18 in 2013 exemplifies the unpredictable nature of these admissions.

76. The record is also clear that Hernando County, at the time that the Agency issued its decision, did not have a PIC:TFK provider and that only hospices may be providers. After the decision on June 14, 2014, Hernando-Pasco entered a PIC:TFK agreement with CMS.

77. The Agency, applying its expertise and in fulfillment of its legislative charge to administer the CON program and conduct health care planning for the state, has concluded that terminally ill patients under the age of 18 and patients under the age of 18 who may become terminally ill should have access to PIC:TIF services. Approval of Nature Coast's CON application will provide that service to the population of Hernando County. In fact, it is reasonable to infer that preliminary approval of the application motivated to Hernando-Pasco to contract with CMS.

78. The Agency and Nature Coast maintain, albeit half-heartedly, that the rural population of Hernando County does not have access to hospice services. The credible persuasive evidence does not demonstrate that an identifiable rural population of Hernando County lacks access to hospice services.

VII. Other Applicable Disputed Criteria

A. Section 408.035(1)(b), Florida Statutes – availability, quality of care, accessibility and extent of utilization

79. Hernando-Pasco provides high quality of hospice care to Hernando County residents. Its services are accessible and adequately utilized.

80. It seeks to serve everyone that is appropriate for hospice care, including but not limited to: patients who are homeless; children; persons with HIV, AIDS, Alzheimer's or dementia; minority and ethnic groups; and persons residing in rural Hernando County.

81. It also offers staff and volunteers who speak languages other than English, when needed, to assist patients and their families.

82. The hospice service penetration rate for Hernando-Pasco County is 65 percent, just below the state average of 66 percent.

83. Credible persuasive evidence did not establish that Hernando-Pasco has refused services to eligible patients.

B. Section 408.035(1)(c) – The ability of the applicant to provide quality of care and the applicant's record of providing quality of care.

84. The weight of the credible, persuasive evidence, including the private accreditations of Nature Coast and its ratings, establish a record of providing quality care and that it would provide quality care in Hernando County.

85. This is despite the fact that in 2012 an Agency survey identified six patients who did not meet the criteria for hospice care or criticisms in that survey of Nature Coast providing services, mostly PIC:TFK services, to residents of Hernando County. In addition, since PIC:TFK services are not available in Hernando County, approval of this application will alleviate that problem.

86. It is also despite the fact that in 2013 Nature Coast spent approximately 12 percent of its labor expenses on contract staff. That fact may be a licensure or reimbursement issue. But the record does not establish that it affects the quality of care Nature Coast provides.

C. Section 408.035(1)(d), Florida Statutes – availability of resources, including health personnel, management personnel and funds for project accomplishment and operation

87. Nature Coast will be able to recruit and employ the health and management personnel for its project. The fact that it bases its projections upon its actual experience in the

adjoining area is more persuasive than criticisms that its proposed salaries are lower than those paid by Hernando-Pasco.

88. Additionally the ability to share support, resources, and infrastructure from Nature Coast's existing operations provides it the resources and flexibility to adjust to fluctuations or shortfalls in utilization or income. The existing infrastructure can support the additional team required by opening the proposed Hernando County Hospice.

89. This is in addition to the flexibility and benefits provided by the fact that providing hospice services does not require large capital commitments and that most of its costs are therefore variable costs. One example of this is that staffing is incremental, increasing or decreasing, according to the demand created by utilization.

90. The estimated project costs of \$1,059,000 are reasonable. Nature Coast could fund the costs from existing liquid assets. It also has the working capital needed available.

91. The application did not disclose the now completed closing on an \$800,000 office building in Palatka or a \$1.2 million building project underway when the application was filed. The persuasive competent evidence proves that despite the absence of that information from the presentation in the application, Nature Coast will none-the-less have access to the resources necessary to establish the project. The credible, persuasive

evidence also proves that the smaller expense was not in the period covered by the application and the majority of the bigger amount had been expended before submission of the application.

92. In March 2014, the Office of the Inspector General served Nature Coast with a subpoena, seeking certain documents for the period 2009 through 2013. In response, Nature Coast turned over 188,000 pages of medical records. Being subject to a lengthy federal investigation is unpredictable and may be both time consuming and costly. As a result of the ongoing investigation, Nature Coast recently prudently established a \$2.5 million line of credit to cover possible costs of repayment and fines. There is no way at this point to reasonably project the timing or the impact of fines or repayments, if any, resulting from the investigation. Consequently not including them in the financial projections for the first two years of operation was reasonable.

93. The weight of the credible persuasive evidence established that Nature Coast has access to sufficient resources, including health personnel and funds, for accomplishing and operating the proposed Hernando County hospice.

D. Section 408.035(1)(e), Florida Statutes – extent to which the proposed services will enhance access to health care for residents of the service district

94. As discussed above, Nature Coast's proposed hospice will enhance access to PIK:TIF services. And it will enhance

those patients' access to continuity of care in the event that they need hospice services. Nature Coast will enhance choice for hospice patients; but it will not enhance access to hospice services.

E. Section 408.035(1)(f), Florida Statutes – immediate and long-term financial feasibility

(i) Immediate Financial Feasibility

95. Findings of Fact 88 through 93 address the issue of immediate or short-term financial feasibility. Nature Coast established by competent substantial evidence that it is financially feasible in the short-term.

(ii) Long-term Financial Feasibility

96. An applicant's pro forma financial projections are primarily determined by estimating the revenues and expenses associated with the projected utilization (in patient days), by payor source, for years one and two. Nature Coast's projection is unreasonably optimistic. It is not likely to capture the 243 and 413 admissions projected respectively for years one and two. Several factors support this finding including Nature Coasts start up experience in other markets, the lack of a basis for the size of its market share projections, and the absence from the record of a credible basis for the utilization projections.

97. Also, in order to meet Nature Coast's projected admissions in year one, it will have to match the highest market

share penetration of the 18 startups in the past 10 years, and in the second year will have to surpass the highest market share penetration rate of that same group. There is no evidence suggesting why that would happen.

98. The record does not establish a credible "break even" point for the proposal that would allow an evaluation of whether or at what point the project would be feasible with lower, realistic utilization projections.

99. Revenue and cost projections are based upon utilization. Without credible utilization projections, the record does not establish that the long-term financial projections are reasonable.

F. Section 408.035(1)(g) Florida Statutes – extent to which the proposal will foster competition that promotes quality and cost effectiveness

100. The addition of any provider will foster competition. But, with the exception of PIK:TFK services, there is nothing about Nature Coast's proposal that would foster competition other than as a new provider always would.

VIII. Standing

101. The Agency and Nature Coast include an argument in their Proposed Recommended Order that Hernando-Pasco does not have standing to bring this proceeding. The parties did not identify standing as an issue in the Pre-hearing Stipulation or

at any time in this proceeding. It is waived and may not be raised at this late date.

CONCLUSIONS OF LAW

A. Jurisdiction

102. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569, 120.57(1), and 408.039(5).

B. Burden of Proof

103. As the applicant, Nature Coast bears the burden of proving entitlement to a CON by the preponderance of the evidence. Boca Raton Artificial Kidney Ctr., Inc. v. Dep't of HRS, 475 So. 2d 260 (Fla. 1st DCA 1985); § 120.57(1)(j).

C. Balancing of Criteria

104. The award of a CON to an applicant must be based on a balanced consideration of all applicable and statutory rule criteria. Balsam v. Dep't of HRS, 486 So. 2d 1341 (Fla. 1st DCA 1986). "[T]he appropriate weight to be given to each individual criterion is not fixed, but, rather must vary on a case-by-case basis, depending upon the facts of each case." Collier Med. Ctr., Inc. v. Dep't of HRS, 462 So. 2d 83, 84 (Fla. 1st DCA 1985).

105. An administrative hearing involving disputed issues of material fact is a de novo proceeding, in which the Administrative Law Judge independently evaluates the evidence

presented. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); § 120.57(1), Fla. Stat. (2011). AHCA's preliminary decisions on CON applications, including its findings in the SAAR, are not entitled to a presumption of correctness. Id.

106. The Agency's fixed need pool was zero. This means that Nature Coast's CON will not be approved, unless it establishes "special circumstances" that support approval despite the absence of published need. Fla. Admin. Code R. 59C-1.0355(4) (b), (c), and (d).

E. Special Circumstances

107. Rule 59C-1.0355(4) (d) is the "special circumstances" provision. It provides:

Approval Under Special Circumstances. In the absence of numeric need identified in paragraph (4) (a), the applicant must demonstrate that circumstances exist to justify the approval of a new hospice. Evidence submitted by the applicant must document one or more of the following:

1. That a specific terminally ill population is not being served.
2. That a county or counties within the service area of a licensed hospice program are not being served.

108. The findings of fact establish that patients under the age of 18, including some number of terminally ill patients, in Hernando County are not receiving PIC:TFK services. The Agency

maintains that the reference to population "not being served" includes a population that is not receiving a service that can only be provided by a hospice. The Agency's interpretation of its rule has not been shown unreasonable and therefore merits deference. Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002); Fla. Wildlife Fed'n v. Collier Cnty., 819 So. 2d 200 (Fla. 1st DCA 2002); D.A.B. Constructors, Inc. v. State of Fla. Dep't of Transp., 656 So. 2d 940 (Fla. 1st DCA 1995). It is also supported by the fact that only hospice providers can provide PIC:TFK services which would make them a service of a hospice.

F. Weighing Other Criteria

109. The absence of credible utilization projections fatally flaws consideration of two critical criteria. Without credible utilization projections, the long-term financial reasonableness was not established. Without credible utilization projections, the staffing projections cannot be meaningfully evaluated. These two projections are central to determining if the project should be approved. Since the record does not establish them, this failure outweighs the benefit of providing PIC:TFK services.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is RECOMMENDED that the Agency for Health Care Administration issue a Final Order denying Certificate of Need

Application Number 10204 of Hospice of Nature Coast County, Inc.,
d/b/a Hospice of Nature Coast and the Nature Coast.

DONE AND ENTERED this 24th day of December, 2014, in
Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of December, 2014.

ENDNOTE

^{1/} All citations to Florida Statutes are to the 2014 edition
unless otherwise noted.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.