

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.

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SUPPLEMENTAL RECOMMENDED ORDER ON STANDING ISSUE

This cause comes before the undersigned on remand from Respondent, Agency for Health Care Administration (Agency), for Findings of Fact and Conclusions of Law on the issue of standing for Petitioner, Hernando-Pasco Hospice, Inc. (Hernando-Pasco). The decision is based upon the record of the hearing conducted on July 21 through 24, 2014.

APPEARANCES

For Petitioner, Hernando-Pasco Hospice, Inc:

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For Respondent, Agency for Health Care Administration:

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For Respondent, Hospice of Citrus County, Inc., d/b/a Hospice of Citrus and the Nature Coast:

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STATEMENT OF THE ISSUE

Does Petitioner, Hernando-Pasco Hospice, Inc., have standing to challenge the Agency's intended award of a certificate of need (CON) to Respondent, Hospice of Citrus County, Inc., d/b/a Hospice of Citrus and the Nature Coast (Nature Coast), to establish and operate a hospice in Hernando County?

PRELIMINARY STATEMENT AND HISTORY OF THIS PROCEEDING

This is a dispute about whether the CON application of Nature Coast to start a new hospice in Hernando County should be approved. The Agency approved the application. Hernando-Pasco challenged the approval. After a formal hearing, the undersigned issued a Recommended Order recommending denying the application. Subsequently, the Agency referred the matter back to the Division of Administrative Hearings (Division) for a determination of the standing of Hernando-Pasco.

Nature Coast and Hernando-Pasco filed, respectively, a memorandum and a proposed order on standing. The Agency did not. When ordered to file a memorandum or proposed recommended order addressing the standing issue, the Agency filed a one-sentence memorandum stating: "Having reviewed the record, the Recommended Order, and the documents filed in the case since the Recommended Order was issued, the Agency concludes that Petitioner, Hernando-Pasco Hospice, Inc., has provided sufficient evidence of standing in this matter to satisfy both the statutory and Agrico requirements for standing." In contrast, the Agency's proposed recommended order argued that Hernando-Pasco did not have standing. The Agency's pleading does not reveal what documents have been filed since the Recommended Order issued or explain the reasons for its change of position.

Nature Coast moved for leave to file a reply to the Agency's memorandum reversing the Agency position. The undersigned granted the motion with an Order allowing Nature Coast and Hernando-Pasco to reply to the Agency's memorandum. Both filed replies. The parties' papers have been considered. In addition, the record of the hearing and the parties' proposed recommended orders have been reviewed.

#### FINDINGS OF FACT

1. The Findings of Fact in the Recommended Order are adopted and incorporated by reference.

2. In this proceeding, Nature Coast and the Agency did not carry their burden of proving that the proposed hospice was financially feasible in the long term. The failure stemmed from the "absence of credible utilization projections." (RO, ¶ 109). The Agency had noted this weakness in the State Agency Action Report initially disposing of the application. (AHCA Ex. 1, p. 41).

3. None of the parties maintained in the proceeding, in their proposed recommended orders, or in their filings since remand that the proposed Nature Coast Hospice would serve no patients, if it were established. It would serve some patients in Hernando County. Utilization projections varied significantly. Those of Nature Coast were not persuasive. This was a reason for the recommendation to deny the application.

4. Nature Coast's CON application projected that it would achieve 243 admissions in year one and 413 admissions in year two. (Hernando-Pasco Ex. 1, Sch. 5). Those projections are overstated. But they represent the intent and possible extent of the project.

5. If Nature Coast achieves those projections, the better reasoned and more credible evidence shows that Hernando-Pasco would not receive 152 admissions that it would have otherwise received in the second year of operation. Testing the impact of Nature Coast's facility on Hernando-Pasco, using projected

admissions for the second year of operation, is the most sensible way to analyze the effect of the new hospice. This is because Nature Coast maintains that it should reach a steady state of operation in the second year.

6. Nature Coast's theory that the penetration rate for hospice services in Hernando County, i.e., utilization, will increase over historical experience as a halo effect of adding another provider to the market is not established by the evidence. Nature Coast bases its theory on the penetration rate in another market where Hernando-Pasco and Nature Coast are the only hospices. The analysis is not persuasive. It does not, among other things, provide enough information about the market to allow a determination about the validity of the comparison.

7. A contribution margin analysis is the industry standard for analyzing adverse impact. Calculation of the contribution margin ratio is the cornerstone of the analysis. Contribution margin is the difference between a company's sales and variable expenses. Variable expenses are expenses that change depending on the number of units sold or services provided. Fixed costs do not vary depending on those factors.

8. Non-administrative labor costs are an example of a variable cost in the health care industry. The mortgage payment for a physical plant is an example of a fixed cost.

9. The contribution margin represents the total earnings that can be used to pay fixed expenses and generate a profit. From it, you can calculate the contribution margin ratio by dividing the contribution margin by total sales. Applying the contribution margin ratio to the amount earned by sale of the next unit of service, in this case a patient admission, permits calculation of how much the sale would supply to cover fixed expenses and contribution profit. Multiplying the contribution margin ratio by the 152 admissions here results in identifying the profit lost from those admissions.

10. Applying a contribution margin analysis, as health finance expert Darryl Weiner did, persuasively, to the impact of the 152 admissions that Hernando-Pasco would not receive in year two demonstrates that approval of Nature Coast's proposal would result in Hernando-Pasco losing approximately \$991,000 in revenue from operations that it would have otherwise received. Nature Coast's theory that Hernando-Pasco can manage the loss of admissions and revenue better than many and therefore mitigate the impact is not persuasive.

11. Loss of \$991,000 in revenue by Hernando-Pasco will substantially and adversely affect it.

12. Hernando-Pasco argues that it would suffer additional income loss from its foundation and other affiliates, primarily by donations that it would have received being given to Nature

Coast. Even though Nature Coast is committed to not asking patients or their families for donations, "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." (RO, ¶ 47).

13. One reasonable way to determine the financial loss caused by not serving the 152 patients that Nature Coast plans to serve is to calculate the per-patient average of donations and memorials and multiply that by 152. This results in Nature Coast causing a \$62,818 loss of revenue for the foundation and other affiliates. That money will not be available to support Hernando-Pasco and is another adverse impact that Nature Coast would cause.

#### CONCLUSIONS OF LAW

14. The Conclusions of Law in the Recommended Order are adopted and incorporated by reference.

15. Section 408.039(5)(c), Florida Statutes (2014), governs standing in this CON proceeding. It states:

Existing health care facilities may initiate or intervene in an administrative hearing upon a showing that an established program will be substantially affected by the issuance of any certificate of need, whether reviewed under s. 408.036(1) or (2), to a competing proposed facility or program within the same district.

16. Hernando-Pasco is an existing health care facility for which Nature Coast proposes a competing facility and program in the same sub-district. The only standing question is whether the proposed Nature Coast hospice will substantially affect Hernando-Pasco. See Mem'l Healthcare Grp., Inc. v. Ag. for Health Care Admin., 879 So. 2d 72 (Fla. 1st DCA 2004). The statute disposes of the part of the standing test established by Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), that requires proof that a party has an interest of the type or nature the proceeding is to protect. Grand Dunes, Ltd. v. Walton Cnty., 714 So. 2d 473 (Fla. 1st DCA 1998) (If statute specifically states who has standing, the statute controls instead of the general standing requirements of Chapter 120.).

17. Standing in an administrative proceeding at the Division, if proved at a hearing, does not dissipate because of the ultimate decision on the merits. See Martin Cnty. Conservation Alliance v. Martin Cnty., 73 So. 3d 856, 870 (Fla. 1st DCA 2011) (distinguishing between standing to participate in a chapter 120 proceeding before the Division and standing on appeal from an agency's order). See also Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., et al., 18 So. 3d 1079 (Fla. 1st DCA 2009); Hamilton Cnty. v. Dep't of Env'tl. Reg., 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991).



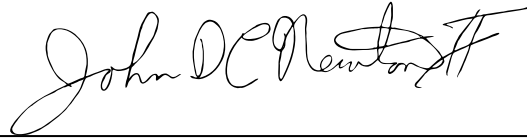
18. On this record, looking at the admissions that Nature Coast intends to achieve is the rational approach. Relying on Nature Coast's failure to prove its utilization to determine if it will be substantially affected is irrational. It amounts to concluding that Hernando-Pasco will not be substantially affected because it successfully challenged the proposed approval.

19. Hernando-Pasco proved that operation of the proposed hospice will substantially affect its finances. Hernando-Pasco does not have to prove that the new hospice will imperil its finances to prove that Nature Coast's proposed hospice will substantially affect Hernando-Pasco's finances. Hope of SW Fla. Inc. v. Ag. for Health Care Admin., Case No. 03-4066 (Fla. DOAH Dec. 28, 2005; Fla. AHCA April 13, 2006). Hernando-Pasco has standing.

#### 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 concluding that Petitioner, Hernando Pasco Hospice, Inc., has standing.

DONE AND ENTERED this 8th day of May, 2015, in Tallahassee,  
Leon County, Florida.



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JOHN D. C. NEWTON, II  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of May, 2015.

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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.