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Geoffrey D. Smith **February 11, 2015**

Update on Return of Nursing Home CON in Florida

AHCA will be releasing its State Agency Action Reports ("SAARs") on February 20, 2015, announcing the preliminary decisions for approvals and denials of the 104 CON Applications filed in the first batching cycle since the Legislature lifted the moratorium on new nursing homes in Florida. But what happens next? What do you do if you don't agree with AHCA's preliminary decisions? Who has standing to challenge the decision if your CON has been preliminarily approved? This article will provide a basic overview of Fla. Stat. §120.569 and §120.57 (2014), including the timing of challenges, the basic laws regarding standing to bring a challenge, and an overview of the administrative process should you wish to file a challenge or find yourself defending against a challenge.

NOTIFICATION OF DECISIONS

AHCA notifies CON Applicants of its preliminary decisions by releasing SAARs for each sub-district where there was one or more CON Applications filed. The SAARs contain an assessment of each Applicant's proposal, and a determination ultimately of which applicant or applicants best meets the statutory and rule review criteria. There is no fixed weight applied to any criteria, and the analysis by AHCA involves a weighing and balancing of all the review criteria.

There are four ways to access SAARs. First, there is a link from AHCA's home page where all of the SAARs will be posted on February 20, 2015: http://www.fdhc.state.fl.us/MCHQ/CON_FA/Batching/applications.shtml. Sometimes, it can be later in the afternoon before the SAARs are actually posted. Second, any person or company can sign up to be added to AHCA's email notification list for all CON batching cycle public notices, which includes the notification of the preliminary decisions on CON Applications. Third, AHCA directly contacts CON Applicants via the information provided in the initial CON Applications. Finally, within a few days of the decisions being announced, AHCA will publish formal Notices of Decisions in the *Florida Administrative Register* ("FAR").

DECISIONS AFFECTING SUBSTANTIAL INTERESTS

Anytime AHCA makes a decision affecting substantial interests, AHCA must provide a "point of entry" for challenging the decision in an administrative trial. The "point of entry" explains when, where, and how the affected person or entity can challenge AHCA's preliminary decision. Pursuant to Rule 59C-1.012 within 21 days after publication of the Notice of Intent in the FAR, a CON Applicant can request an administrative hearing to challenge the decision. The failure to timely file a proper request for administrative hearing challenging the denial of a CON Application shall result in the denial becoming final.

If a valid request for an administrative hearing is timely filed by a denied competing CON Applicant, a granted CON Applicant in the same sub-district shall have 10 days from the Notice of Litigation being published in the FAR to file a Petition challenging any or all other co-batched CON Applications.

Nursing home CON Applicants can only challenge other Applications that were comparatively reviewed for the same services in the same sub-district. Existing providers in the same district that will be substantially affected by the approval of a competing proposed facility or program can initiate or intervene in a challenge pursuant to Fla. Stat. §408.039(5)(c) (2014). Thus, existing providers are given a wider geographic area to be allowed to chal-

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lenge a CON than competing CON Applicants.

An existing provider that intervenes within 21 days of the publication of the Notice of Decisions has full party status; however, an intervenor that does not intervene within 21 days is only granted status that is contingent upon the standing of the other parties to the litigation. This comes into play where there is a problem with the original parties' standing, where the original parties decide to dismiss their challenge, or where the original parties resolved certain substantive issues in the case, through stipulations or otherwise, before the intervenor came into the case. It is often said that unless an existing provider files a Petition with 21 days of the FAR Notice of Decisions, the intervenor takes the case as they find it and is at the mercy of the original parties when it comes to maintaining standing.

FILING A PETITION

Petitions are filed at AHCA. Sometimes, inexperienced attorneys inadvertently file at the Division of Administrative Hearings ("DOAH"), which could raise jurisdictional issues if there is inadequate time to correct the error prior to the 21 day deadline.

Petitions must comply with the uniform rules of procedure under §120.54 (5)(b), including at least the following:

1. Identify the Petitioner;
2. State when and how the Petitioner learned of the decision;
3. Explain how the Petitioner's substantial Interest are affected by the proposed action;
4. A statement of all material disputed facts;
5. A statement of the ultimate facts that warrant the reversal of the decision;
6. A statement of the rules or statutes that require a reversal or modification of the decision; and
7. A statement of the relief sought.

FORMAL ADMINISTRATIVE HEARINGS

If timely Petitions are filed meeting all of the required substantive criteria, AHCA refers the cases to DOAH for assignment of an Administrative Law Judge ("ALJ") to review the decisions being challenged. This hearing is considered a "de novo" proceeding, which means that the ALJ should not be influenced by AHCA's preliminary decision set forth in the SAAR—and the SAAR is "not clothed with a presumption of correctness." That said, statistically, AHCA preliminary decisions are more frequently upheld than overturned by the ALJs. Perhaps that is because AHCA becomes a party in the proceeding and typically presents expert witnesses to support its rationale for why it's preliminary determination was correct. That said, there are a significant number of cases where AHCA's preliminary decision to approve or deny a CON has been decided differently by the ALJ and AHCA has issued a Final Order upholding the ALJ's determination.

An administrative hearing is similar to a civil court trial, with slightly relaxed rules of evidence. Parties conduct written discovery, and pre-trial depositions of witnesses. The parties then present their case through expert testimony, lay witness testimony, and submission of documentary evidence. There is an opening statement, direct examination and cross-examination of witnesses by attorneys, and legal arguments over admissibility of evidence.

One of the most common arguments in CON cases concerns whether the evidence being presented amounts to an "impermissible amendment" of a CON Application. By Rule and established case law, a CON Applicant cannot amend its Application to include new concepts or theories for approval that were not set forth in the CON Application. However, an Applicant may introduce new evidence, new or updated data, and testimony that elaborates and explains concepts or theories that were included in the CON Application.

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By statute, a party requesting a hearing has a right to demand that the hearing be commenced within 60 days of assignment to an ALJ. As a practical matter, most hearings are not done on this expedited schedule. It is not unusual for the hearing process to take 4-6 months or longer. Hearings typically last about 2-3 days for each party involved. In multi-party proceedings a final hearing may last 3-4 weeks. Virtually all CON final hearings are held in Tallahassee.

Upon conclusion of a formal hearing, the parties are required to submit a Proposed Recommended Order ("PRO") for the ALJ's review and consideration. This is typically filed 30 days or so after the final hearing. The PRO includes proposed Findings of Fact as well as proposed Conclusions of Law. By Rule a PRO is supposed to be no longer than 40 pages, but is not unusual for an ALJ to expand the number of pages to 60 or 80 pages depending on the number of parties involved. The ALJ reviews all PROs submitted by the parties and then issues a decision in a Recommended Order.

EXCEPTIONS AND THE FINAL ORDER

Once the ALJ issues a Recommended Order, the case is remanded back to AHCA for issuance of a Final Order. Parties may file exceptions to the Recommended Order to explain why the ALJ's decision is in error. In issuing a Final Order, AHCA may not reject an ALJ's findings of fact, unless the Agency reviews the entire record, and finds that there is no "competent, substantial evidence" to support a specific finding. It is not the role of AHCA to reweigh the evidence, or judge the credibility of witnesses, or to substitute its balancing of the evidence for that of the ALJ. As to Conclusions of Law, AHCA cannot disturb a conclusion unless it is on a legal matter that is within AHCA's expertise and jurisdiction (e.g., its governing statute and rules) and AHCA must state with particularity its reasons for rejecting or modifying the conclusion of the ALJ, and must make a finding that its substituted or modified conclusion of law is as or more reasonable than the ALJ's conclusion.

The issuance of a Final Order by AHCA is the end of the formal hearing process, and unless a judicial appeal is taken, the CONs will be issued or denied as set forth in the Final Order.

FURTHER APPEALS

A party may appeal the Final Order to a District Court of Appeal. This appeal is limited only to a review of the record by a three judge panel based upon legal arguments submitted by the parties' attorneys in legal briefs.

CONCLUSION

February 20, 2015, will be a historic date for nursing homes in Florida. No doubt there will be numerous preliminary approvals and numerous disappointed CON Applicants. The CON process also includes protections for those with existing operations that could be adversely impacted by a CON being issued to another facility. Thus, whether you are seeking approval for new a nursing home or are simply seeking to protect your existing operation, it's important to stay engaged in the process and know your rights.

Geoffrey D. Smith is a shareholder in the law firm of Smith & Associates, and has practiced in the area of health care law and CON regulation for over 20 years.

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