



COMMONWEALTH of VIRGINIA

M. NORMAN OLIVER, MD, MA
STATE HEALTH COMMISSIONER

Department of Health
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February 5, 2020

VIA EMAIL AND FIRST CLASS U.S. MAIL

Mark Hedberg, Esquire
Hunton Andrews Kurth
851 East Byrd Street
Richmond, Virginia 23219-4074

RE: PETITION SEEKING TO SHOW GOOD CAUSE
Submitted by
INOVA HEALTH CARE SERVICES,
d/b/a INOVA FAIRFAX HOSPITAL ("Inova")
In Relation to:

Certificate of Public Need (COPN)
Request No. VA-8436
RESTON HOSPITAL CENTER
Planning District (PD) 8
Introduce Open Heart Surgery Services

Dear Mr. Hedberg:

I am sustaining the petition to show good cause submitted by Inova in relation to the above-captioned application for a certificate of public need (COPN).

Inova's petition has demonstrated good cause for the reasons stated in the enclosed recommended decision, prepared by the adjudication officer after he conducted an informal fact-finding conference on the petition and reviewed the record as it relates to the petition. I am adopting the recommended decision and making this case decision based on my review of this matter, and my review of the adjudication officer's recommended decision. I concur and agree with the enclosed recommended decision.

In order to show good cause under subsection G of Virginia Code § 32.1-102.6, a petitioner must show "that (i) there is significant relevant information not previously presented at and not available at the time of the public hearing, (ii) there have been significant changes in factors or circumstances relating to the application subsequent to the public hearing, or

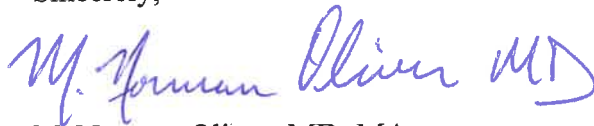
(iii) there is a substantial material mistake of fact or law in the Department[’s Division of Certificate of Public Need] staff’s report on the application” Inova, under this law, has shown good cause based on an analysis of the eight allegations made in its petition, as discussed in the enclosed recommended decision.

Inova, then, is a party to the proceedings by which a public need determination will be made on the application for a COPN submitted by Reston Hospital Center.

In accordance with Rule 2A:2 of the Rules of the Virginia Supreme Court, an aggrieved party to an administrative proceeding that chooses to appeal a case decision, must file within 30 days after service of the case decision, a signed notice of appeal with “the agency secretary.” I would consider such a notice sufficiently submitted if it were addressed or otherwise sent to my Office, on the Thirteenth Floor of the James Madison Building, 109 Governor Street, Richmond, Virginia 23219. Under Rule 2A:2, when service of a decision is “accomplished by mail,” three days are added to the 30-day period established under the Rule.

You are receiving a photocopy of this letter, along with the enclosed recommended decision in accordance with Virginia law.*

Sincerely,

A handwritten signature in blue ink that reads "M. Norman Oliver MD". The signature is fluid and cursive, with the letters "M", "N", and "O" being particularly prominent.

M. Norman Oliver, MD, MA
State Health Commissioner

Enclosure

cc: Thomas J. Stallings, Esq.
Vanessa C. MacLeod, Esq.
Office of the Attorney General
Erik Bodin, Director
VDH, Office of Licensure and Certification
Douglas R. Harris
VDH, Adjudication Officer

* Va. Code § 2.2-4023 provides that the signed original of this final agency case decision “shall remain in the custody” of the Department, so the petitioner is receiving a photocopy of the original letter and recommended decision.

**Recommendation to the
State Health Commissioner
Regarding a PETITION SEEKING TO SHOW GOOD CAUSE
Submitted by
INOVA HEALTH CARE SERVICES,
d/b/a INOVA FAIRFAX HOSPITAL (“Inova”)
In Relation to:**

**Certificate of Public Need (COPN)
Request No. VA-8436
RESTON HOSPITAL CENTER
Planning District (PD) 8
Introduce Open Heart Surgery Services**

Introduction

This is a recommended decision, submitted to the State Health Commissioner (hereinafter, the “Commissioner”) for his adoption. This recommended decision follows an informal fact-finding conference (IFFC) conducted in accordance with the Virginia Administrative Process Act (APA), Virginia Code § 2.2-4000, et seq.,¹ and review of the Virginia Department of Health (Department) administrative record pertaining to the above-referenced petition and parts of the administrative record relating to the above-captioned application.

This recommended decision provides legal and factual bases for the Commissioner, as called for in the APA, to inform the good cause petitioner, “briefly and generally in writing[] of the factual or procedural basis” for making a case decision on the petition to show good cause, as called for in the APA.²

Authority

Article 1 of Chapter 4 of Title 32.1 (§ 32.1-102.1 *et seq.*) of the Virginia Code (the “COPN law”) addresses medical care facilities and provides that “[n]o person shall commence any project without first obtaining a certificate issued by the Commissioner.”³ The COPN law provides a definition of “project,” under which the application falls.⁴

The COPN law provides that “any person showing good cause” shall be “a party to the administrative proceedings, or case,” in which an applicant requests approval of a project, such as the project captioned above (the “proposed project”).⁵ Inova seeks to be such a party in relation to the

¹ Specifically, Va. Code § 2.2-4019.

² Va. Code § 2.2-4019 (A).

³ Va. Code § 32.1-102.3 (A).

⁴ Va. Code § 32.1-102.1, definition of “[p]roject.”

⁵ Va. Code § 32.1-102.6.

review of the proposed project, a status that would give it certain rights that appertain under the APA and the COPN law. The COPN law defines good cause to mean:

. . . that (i) there is significant relevant information not previously presented at and not available at the time of the public hearing, (ii) there have been significant changes in factors or circumstances relating to the application subsequent to the public hearing, or (iii) there is a substantial material mistake of fact or law in the Department [of Health, Division of Certificate of Public Need, (DCOPN's)⁶] staff's report on the application or in the report submitted by the health planning agency."⁷

The present recommended decision may rely upon "case law and administrative precedent," including past decisions of the Commissioner (incorporating adjudication officer's recommended decisions prepared for routine review) made in sustaining or denying past petitions to show good cause, to a degree consistent with the APA.⁸

Context

Inova is "person seeking to be made a party to the case [i.e., the case involving the proposed project] for good cause."⁹ Inova presents six allegations that good cause exists. The proving of one of these allegations would result in a finding of good cause, thereby allowing Inova to acquire the status of being a good cause party to the administrative proceedings, *i.e.*, to participate in the IFFC and post-IFFC written briefing process in relation to the proposed projects.¹⁰

If the Commissioner determines that Inova has not shown good cause, it will not acquire such status; however, its petition and submittals will be records, among many, in the totality of the administrative record relating to the project, and in accordance with the COPN law and regulations.¹¹

The present recommended decision addresses only the issue whether Inova has shown good cause, whereby it would obtain the right to intervene in the administrative proceedings conducted on the proposed project, and to have its submissions considered in adjudication. The present document does not touch upon the issue of whether Reston Hospital Center ("Reston") has demonstrated public need for its proposed project.

Background

1. Following routine review, on May 30, 2019, DCOPN released its staff report and recommendation (the "DCOPN staff report") on the proposed project. The DCOPN staff report includes that division's recommendation that the Commissioner deny the proposed project.

⁶ DCOPN is the division within the Department of Health that comprises the Commonwealth's professional health facilities planning staff.

⁷ Va. Code § 32.1-102.6 (G).

⁸ Va. Code § 2.2-4019. (B).

⁹ Va. Code § 32.1-102.6 (E)(3).

¹⁰ Va. Code § 32.1-102.6 (D).

¹¹ Under Virginia regulation, "[a]ny person affected by a proposed project" may submit, for inclusion in the record, "opinions, data and other information" before the Commissioner's "final action" on an application for a COPN.

2. On June 3, 2019, Inova submitted a petition seeking to show good cause as to why it should be made a party in the case of the application submitted by Reston.
3. An informal fact-finding conference to allow Inova an opportunity to substantiate its petition orally (a "good-cause IFFC") was convened on December 11, 2019, pursuant to the APA, the COPN law, Virginia regulations and a guidance document.¹²
4. A transcript of the good-cause IFFC was created and made available on or about December 27, 2019. Inova and Reston have filed post-IFFC documents and briefings discussing the good cause petition and the application.
5. The close of the administrative record relating to good cause and the project, on its merits, occurred, with the agreement of the applicant and assent of the petitioner, on January 30, 2020.

Discussion of the Allegations Made in the Petition

The First Allegation. Pursuant to the law defining good cause, set out above, Inova first alleges that good cause exists due to DCOPN committing a substantial material mistake of law because the DCOPN staff report failed "to analyze or resolve" competing interpretations of the State Medical Facilities Plan's ("SMFP's") definition of "procedure."

Reston believes the term refers to a distinct ICD or CPT code while Inova believes it refers to a single surgical session, consisting of a combination of one or more studies and treatments identified by ICD or CPT codes performed on a single patient. Inova's interpretation follows the customary interpretation of this definition.

If the term is interpreted to mean a single ICD or CPT code, the calculated number of procedures performed by existing services is much greater than if it is interpreted to mean a single surgical session regardless of the number of ICD or CPT codes involved in each session. This would be determinative of a major portion of SMFP consistency. Clarifying and interpreting the definition of procedure is crucial. Not doing so appears to be a substantial material mistake of law. Good cause exists by assertion of the first allegation.

The Second Allegation. Pursuant to the law defining good cause, set out above, Inova next alleges that good cause exists due to DCOPN committing a substantial material mistake of fact because the surgical case volume in Table 6 of the DCOPN staff report is "significantly overstated," which would seem to lend itself to a recommendation of approval, if relied upon.

Yet DCOPN recommended denial. Any mistake committed here had no operative effect in determining the outcome of DCOPN's recommendation. Such a mistake is not material as contemplated by the statutory provision defining good cause in the COPN law. Good cause does not exist by assertion of the second allegation.

¹² Va. Code §§ 2.2-4019, 32.1-102.6, 12 VAC 5-220-230 and VDH Guidance Document ADJ-004.1. The good-cause IFFC was followed by an IFFC-in-chief, in which the applicant orally presented the merits of its project.

The Third Allegation. Pursuant to the law defining good cause, set out above, Inova next alleges that good cause exists due to DCOPN committing a substantial material mistake of fact because the surgical case volume in Tables 7 and 8 of the DCOPN staff report include pediatric open heart surgery volume, which would weigh toward a recommendation of approval, if relied upon.

Yet DCOPN recommended denial. Any mistake committed here had no operative effect in determining the outcome of DCOPN's recommendation. Such a mistake is not material as contemplated by the statutory provision defining good cause in the COPN law. Good cause does not exist by assertion of the third allegation.

The Fourth Allegation. Pursuant to the law defining good cause, set out above, Inova next alleges that good cause exists due to DCOPN committing a substantial material mistake of fact and law because, while two statutory considerations require an evaluation of the benefits offered by the proposed project, DCOPN quotes Reston's assertion "'that the approval of the project would increase access for residents of the western portion of PD 8, where more than a third of the residents of the planning district reside, to time sensitive lifesaving procedures in a planning district notorious for traffic congestion' as if such statement identified an actual benefit of the proposed project."

Inova states that "DCOPN should have concluded that in reality there is no benefit to the proposed project because substantial evidence in the administrative record demonstrates conclusively that (i) PD 8 residents have ample access to open heart surgery services consistent with the travel time requirements codified in the SMFP at 12 VAC 5-230-440.A, and (ii) open heart surgery is rarely performed on an emergent basis."

Yet DCOPN recommended denial. Any mistake committed here had no operative effect in determining the outcome of DCOPN's recommendation. Such a mistake is not material as contemplated by the statutory provision defining good cause in the COPN law. Good cause does not exist by assertion of the fourth allegation.

The Fifth Allegation. Pursuant to the law defining good cause, set out above, Inova next alleges that good cause exists due to DCOPN committing a substantial material mistake of fact and law, specifically observing that the fourth statutory consideration of public need reads as follows:

The extent to which the proposed service or facility fosters institutional competition that benefits the area to be served while improving access to essential health care services for all persons in the area to be served[.]

Inova states that substantial evidence in the record demonstrates that the proposed project would be "a low volume, low quality program and, in addition would have a substantial negative impact on the quality of other existing open heart surgery programs in PD 8." Inova observes that DCOPN states the proposed project would foster institutional competition, stating that "[s]uch conclusion, however, on the part of DCOPN, fails to analyze the entire statutory provision, which requires an evaluation of '[t]he extent to which the proposed service or facility fosters institutional competition that *benefits the area to be served* while improving access to essential health care services for all persons in the area to be served.'" [Italics in original.] Inova states that substantial evidence

shows that approval of the proposed project would result in a program that would be “detrimental – not beneficial – to the area to be served.”

Without applying the full statutory consideration and discussing additional implications, the DCOPN staff report contains a substantial material mistake of fact and law. Good cause exists by assertion of the fifth allegation.

The Sixth Allegation. Pursuant to the law defining good cause, set out above, Inova next alleges that good cause exists because DCOPN failed to analyze the staffing issue and to reject, based on substantial evidence, Reston's contention that acquiring and developing human resources for the open heart program would be readily accomplished without harming existing providers of open heart surgery.

Inova states that DCOPN “should have analyzed the staffing issue and rejected Reston Hospital's position.” DCOPN noted Reston's statement that staffing would not be a problem and acknowledged Inova's and Virginia Hospital Center's disagreement, backed by “[s]ubstantial evidence in the administrative record.”

If this is a mistake, it is not material because DCOPN ultimately recommended denial of Reston's proposed project. It had no determinative, or material, effect on the recommendation. Good cause does not exist by assertion of the sixth allegation.

Conclusions and Recommendation

I have reviewed the good cause petition filed by Inova, and portions of the administrative record relating to the good cause petition.

For the reasons discussed above, I find that Inova's petition has stated two allegations upon which good cause can be demonstrated. **The Inova petition is sufficient to allow Inova to become a good cause party to the proceedings by which Reston's project is reviewed. The petition should be sustained.**

Adoption by the Commissioner of the present recommended decision serves only to complete the identification of the parties to the administrative proceedings underway in relation to the proposed project.

Respectfully submitted,



Douglas R. Harris, JD
Adjudication Officer

February 2, 2020