



# COMMONWEALTH of VIRGINIA

## Department of Health

M. NORMAN OLIVER, MD, MA  
STATE HEALTH COMMISSIONER

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September 11, 2021

### By Email

Peter M. Mellette, Esquire  
Mellette PC  
428 McLaws Circle, Suite 200  
Williamsburg, Virginia 23185

RE: Petition Attempting to Show Good Cause  
Submitted by Bon Secours Richmond Health System  
in Relation to:

Certificate of Public Need (COPN)  
Request No. VA-8549  
Virginia Commonwealth University Health System  
Chesterfield County, Planning District (PD) 15  
Establishment of an Outpatient Surgical Hospital  
with Four Operating Rooms

Dear Mr. Mellette:

I am denying the petition attempting to show good cause submitted by Bon Secours Richmond Health System ("Bon Secours"), in relation to the above-captioned application for a COPN.

Bon Secours' petition does not demonstrate good cause for the reasons stated in the enclosed recommended decision prepared by an adjudication officer following an informal-fact finding conference. 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 . . . ."

Peter Mellette, Esq.  
September 11, 2021  
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Under this law, Bon Secours has not shown good cause based on an analysis of the four allegations made in its petition. Bon Secours will not become a party to the proceedings by which a public need determination will be made on the application for a COPN, submitted by Virginia Commonwealth University Health System, referenced above.

In accordance with Rule 2A:2 of the Rules of the Supreme Court of Virginia, any aggrieved party to an administrative proceeding choosing to appeal a case decision shall file, within 30 days after service of the case decision, a signed notice of appeal with "the agency secretary." Such a notice would be sufficiently filed if it were addressed to my attention, sent to the Office of the State Health Commissioner, James Madison Building, Thirteenth Floor, 109 Governor Street, Richmond, Virginia 23219, and timely received in accordance with the Rule.

Sincerely,

DocuSigned by:

*M. Norman Oliver, MD*

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M. Norman Oliver, MD, MA  
State Health Commissioner

Encl.

cc (by email):  
Vanessa MacLeod, Esq.  
Assistant Attorney General  
Erik O. Bodin, III  
Director, Division of Certificate of Public Need  
(DCOPN)  
Piero Mannino, JD, MPIA  
Supervisor, DCOPN  
Douglas R. Harris, JD  
Adjudication Officer

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**Recommendation to the  
State Health Commissioner  
Regarding a Petition Seeking to Show Good Cause  
Submitted by Bon Secours Richmond Health System  
("Bon Secours") in Relation to:**

**Certificate of Public Need (COPN)  
Request No. VA-8549  
Virginia Commonwealth University Health System (VCUHS)  
Chesterfield County, Planning District (PD) 15  
Establishment of an Outpatient Surgical Hospital  
with Four Operating Rooms (ORs)**

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**Introduction**

This is a recommended decision, submitted to the State Health Commissioner (hereinafter, "Commissioner") for his consideration and adoption. It follows an informal fact-finding conference (IFFC) conducted in accordance with the Virginia Administrative Process Act (APA),<sup>1</sup> and is made upon a review of the Virginia Department of Health's (Department's) administrative record compiled in relation to the above-referenced petition.

**Authority**

Article 1 of Chapter 4 of Title 32.1 (§ 32.1 - 102.1 *et seq.*) of the Virginia Code ("COPN law") governs the process by which an application for a COPN is reviewed and creates a petitioning mechanism. Specifically, 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 ("VCUHS' project" or "project").<sup>2</sup>

Bon Secours seeks to be such a party in relation to the review of the VCUHS project, a status that would give Bon Secours specific 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)<sup>3</sup>] staff's report on the application . . . ." [Italics added.]<sup>4</sup>

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<sup>1</sup> Va. Code § 2.2-4000, *et seq.* Specifically, Va. Code § 2.2-4019.

<sup>2</sup> Va. Code § 32.1-102.6.

<sup>3</sup> DCOPN is the division within the Department of Health that comprises the Commonwealth's professional health facilities planning staff.

<sup>4</sup> Va. Code § 32.1-102.6 (G).

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The present recommended decision may rely upon “case law and administrative precedent,” consisting of past decisions of the Commissioner (incorporating adjudication officer’s recommended decisions prepared for routine review) made in sustaining or denying previous, unrelated petitions to show good cause, to the degree consistent with the APA.<sup>5</sup>

### **General Context for Considering Petitions for Good Cause; Substantial and Material Mistakes**

The statute creating the good cause mechanism within the COPN law was intended to correct manifest errors of process or analysis and errant developments that arise during a review of an application for a COPN.

The statute creating the good cause mechanism exists in derogation of common law. As Virginia courts have admonished, such statutes ought to be strictly construed. Construing statutes strictly necessarily excludes liberality of interpretation. The opportunity offered by the mechanism must be seen strictly and plainly, with concomitant careful and close consideration of, in this case, certain alleged mistakes proffered as being substantial and material.

Consistent with administrative precedent, to be substantial and material under the COPN law a mistake must be important or essential. It is not sufficient for a petitioner to merely disagree or express dissatisfaction with a statement in a DCOPN staff report. A substantial mistake is one that is significant; it has substance in effect. A material mistake has real importance, is of great consequence, and is determinative in relation to the ultimate outcome. A substantial and material mistake must go to the merits of the matter, or is of such nature that knowledge of the particular facts cloaked by the mistake would necessarily affect a decision-maker’s ultimate conclusion. To meet the high bar established in the good cause mechanism, an alleged mistake cannot be inconsequential.

### **Preliminary Findings**

Bon Secours has filed a petition seeking to show good cause in relation to VCUHS’ application, COPN Request No. VA-8549. Bon Secours, then, is “person seeking to be made a party to the case [involving VCUHS’s application] for good cause.”<sup>6</sup> The petition cites four allegations of substantial material mistakes of law in the DCOPN staff report reviewing the application.

The proving of just one of the allegations would result in a finding of good cause, thereby allowing Bon Secours to acquire the status of being a good cause *party* to case of VCUHS’ project. If the Commissioner determines that Bon Secours has not shown good cause, it will not acquire such status; however, its petition and submittals will remain, among others, in the totality of the administrative record relating to the project, in accordance with the COPN law and regulations.<sup>7</sup>

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<sup>5</sup> Va. Code § 2.2-4019. (B).

<sup>6</sup> Va. Code § 32.1-102.6 (E) (3).

<sup>7</sup> 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. Virginia Administrative Code (“VAC”), at 12 VAC 5-220-240. If such opinions, data and information are received before the agreed-upon close of the administrative record on a proposed project or set of competing projects, they are included in the category of records reviewed by the adjudication officer. A petition filed by a good cause petitioner is part of the

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**Findings of Fact**

1. Following routine review, on May 19, 2021, DCOPN published its staff report and recommendation (the "DCOPN staff report" or "staff report") on the application submitted by VCUHS, along with an application submitted by a competing applicant.<sup>8</sup>
2. The DCOPN staff report includes that division's recommendation that the Commissioner approve VCUHS' project, with a condition requiring charity care, concluding that:
  - (i) VCUHS' project is consistent with, or is in harmony or general agreement with, the State Medical Facilities Plan (SMFP);<sup>9</sup>
  - (ii) Approval of the project would address an institutional need, *i.e.*, a need to expand surgical services on VCUHS' campus located downtown in the City of Richmond;
  - (iii) The status quo is not a viable alternative;
  - (iv) The capital costs of VCUHS' project are significant but consistent with recently-approved, comparable projects.
3. On May 21, 2021, Bon Secours timely submitted its petition seeking to show good cause as to why it should be made a party in the matter and review of VCUHS' project.
4. An informal fact-finding conference to allow Bon Secours an opportunity to substantiate its petition orally (a "good-cause IFFC") was convened on June 22, 2021, in Henrico County, pursuant to the APA, the COPN law, Virginia regulations and an applicable guidance document.<sup>10</sup>
5. A transcript of the good-cause IFFC was created and made available to me, Bon Secours and the VCUHS before, on or about July 12, 2021. Bon Secours has filed post-IFFC briefings and documents in support of its petition.
6. The close of the administrative record relating to good cause and the project, on its merits, occurred, with the agreement of the applicants and assent of the petitioner, on August 6, 2021.

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administrative record relating to an attendant proposed project, as are other communications and expressions of substance regarding the project. If a petitioner is found to have shown good cause, its written submittals are duly considered in the post-IFFC analysis of the merits of the project performed by the adjudication officer, *i.e.*, as the *submittals of a party to the proceedings* held on a project. If a petitioner is found not to have shown good cause, a project is reviewed with due consideration of *the totality of information in the record*. In such a case, a petitioner's submittals would be considered to be "opinions, data and other information" offered by a person who may be affected by a project, pursuant to the regulation referenced and quoted in this footnote.

<sup>8</sup> COPN Request No. VA-8547, submitted by Colon and Rectal Endoscopy and Surgery Center, LLC, seeks approval of the establishment of an outpatient surgical hospital with one special-purpose OR in PD 15.

<sup>9</sup> 12 VAC-230-10 *et seq.*

<sup>10</sup> Va. Code §§ 2.2-4019, 32.1-102.6; 12 VAC 5-220-230 *et seq.* and VDH Guidance Document ADJ-004.1. The good-cause IFFC was followed that day by an IFFC-in-chief, in which VCUHS orally presented, and submitted exhibits, on the merits of its project.

### **Discussion of the Allegations Made in Bon Secours' Petition**

**The First Allegation.** Pursuant to the mechanism defining good cause, set out above, Bon Secours alleges that good cause exists due to a substantial material mistake of law appearing in the DCOPN staff report, to wit: Bon Secours states such a mistake exists because "DCOPN concludes that [VCUHS' project] is consistent or in harmony or general agreement with the [SMFP]." <sup>11</sup>

Bon Secours identifies "a significant excess," or surplus, of operating rooms (ORs) existing in PD 15 as the basis for its allegation, arguing that approval of VCUHS' project would "exacerbate[e] the existing OR surplus by over 36%." Bon Secours boldly asserts that "[a]s a matter of law, there is no SMFP consistency to justify DCOPN staff recommending VCUHS' . . . project . . .," <sup>12</sup> and discusses VCUHS' project in relation to two previous cases in an attempt to draw beneficial comparisons.

As determined by the Virginia Court of Appeals <sup>13</sup> and discussed in numerous decisions of the Commissioner over many years, consistency with the SMFP does not require strict compliance, but rather, harmony or general agreement with that plan.

Arriving at an unassailable inventory and computing whether a need or surplus of a reviewable resource exists is challenging for several reasons (which are sufficiently familiar and will not be discussed here). PD 15 has a total of 164 general purpose ORs. DCOPN initially calculated that a 2026 surplus of 10 or 11 ORs exists in PD 15, <sup>14</sup> and later agreed with VCUHS' calculation showing a surplus of 4.4 ORs. <sup>15</sup> The existence of a calculated surplus is not determinative of SMFP consistency. Further, in this case, at most, the surplus of ORs constitutes 2.7 percent of the authorized, general-purpose OR inventory. Such a margin is not significant, especially in a PD the size of PD 15, when determining public need. This surplus is marginal and nominal.

DCOPN's conclusion that, despite a calculated surplus of ORs in PD 15, VCUHS' project is generally consistent with the SMFP is consonant with available data and administrative precedent, and is well supported by applicable discussion in its staff report. In turn, finding and recognizing such consistency with the SMFP is well within the Commissioner's specialized competency and discretion. Bon Secours' first allegation is insufficient to establish a substantial material mistake of law in the DCOPN staff report.

### **Good cause does arise from the first allegation of Bon Secours' petition.**

**The Second Allegation.** Pursuant to the mechanism defining good cause set out above, Bon Secours alleges that good cause exists due to a substantial material mistake of law appearing in the DCOPN staff report, to wit: Bon Secours states that "DCOPN concludes that '[a]pproval of the project

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<sup>11</sup> Bon Secours Petition ("Petition") at 2.

<sup>12</sup> *Id.* at 2, 3.

<sup>13</sup> See *Roanoke Mem. Hosp. v. Kenley*, 3 Va. App. 599, 352 S.E.2d 525 (1987).

<sup>14</sup> DCOPN Staff Report at 15.

<sup>15</sup> VCUHS Brief Opposing Petition at 3; DCOPN Proposed Findings and Conclusions at 2; VCUHS Rebuttal at 1.

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would address an institutional need to expand surgical services at VCUHS' downtown campus . . . ."<sup>16</sup> Bon Secours explains that this conclusion "is expressly contrary to the plain language of 12 VAC [*i.e.*, Virginia Administrative Code] 5-230-80.D., which states that '[a]pplicants shall note use [the institutional expansion] section to justify a need to establish new services.'"

DCOPN's factual determination of an applicant's operational benefit from approval in no way depends on reliance by VCUHS on the institutional expansion provision in substantiating its project; DCOPN's independent conclusion is well-supported by its regulatory determination appropriately made within statutory authority. DCOPN's independent determination is not dependent on or precluded by any assertion of institutional need by VCUHS. A plain reading of this regulatory provision defeats Bon Secours' second allegation.

DCOPN's conclusion that VCUHS' project would address an institutional need to expand its surgical services is consonant with DCOPN's assessment of public need under the COPN law, well supported by applicable discussion in its staff report and justified by resort to the statutory criteria for determining public need.<sup>17</sup> Bon Secours' second allegation is insufficient to establish a substantial material mistake of law in the DCOPN staff report.

**Good cause does not arise from the second allegation of Bon Secours' petition.**

**The Third Allegation.** Pursuant to the mechanism defining good cause set out above, Bon Secours alleges that good cause exists due to a substantial material mistake of law appearing in the DCOPN staff report, to wit: Bon Secours states such a mistake exists because "DCOPN concludes that the status quo is not a viable alternative to [VCUHS'] project and there are no available reasonable alternatives to the project."<sup>18</sup>

The consideration of reasonable alternatives to a proposed project is a necessary component in deploying the statutory criteria of public need. The COPN law calls for identification of alternatives that would meet public need "in a less costly, more efficient, or more effective manner."<sup>19</sup> Due to inherently qualitative values and the plethora of available considerations involved in determining cost, efficiency and effectiveness, this aspect of a public need assessment is not a binary analysis that readily renders an insurmountably objective, yes-or-no conclusion. During project review, VCUHS responded in good faith to Bon Secours' curious presumption of knowledgeable standing to demand additional evidence substantiating VCUHS' representation that its main facilities are land-locked and face ineluctable space constraints. Bon Secours engages in detailed speculation over presumed availability of space in VCUHS' facilities. With this allegation, Bon Secours misappropriates the attendant analysis of any alternatives, second-guessing VCUHS' planning efforts, and DCOPN's review, in an apparent attempt to justify its opposition to VCUHS' project. In so doing, it fails.

DCOPN's conclusion that the status quo is not a reasonable alternative to VCUHS' project is well supported by available data, facts and representations regarding costs, efficiency and effectiveness

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<sup>16</sup> Petition at 3.

<sup>17</sup> Va. Code § 32.1-102.3 (B) (1) through (8).

<sup>18</sup> Petition at 4.

<sup>19</sup> See Va. Code § 32.1-102.3 (B) (2) (ii).

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of barely possible alternatives. Bon Secours' third allegation is insufficient to establish a substantial material mistake of law in the DCOPN staff report.

**Good cause does not arise from the third allegation of Bon Secours' petition.**

**The Fourth Allegation.** Pursuant to the mechanism defining good cause set out above, Bon Secours alleges that good cause exists due to a substantial material mistake of law appearing in the DCOPN staff report, to wit: "DCOPN concluded there is 'no precedent in past decisions to support' Bon Secours' argument that approval of this project is premature because VCUHS currently has a significant number of approved, but not yet operational, [ORs] that it will soon bring into operation."<sup>20</sup> As a matter of record and past decision, VCUHS has six such ORs, slated to become operational in the western portion of Henrico County, ahead of schedule in the fall of 2021.

The mere existence of approved, but not yet operational, inventory within an applicant's control does not constitute *prima facie* evidence of a project's prematurity. No such result necessarily obtains on the fact. Significantly, surgical activity, reflected in utilization of VCUHS' 31 currently-operational ORs, is markedly high, readily *exceeding full capacity even when* the six not-yet-operational ORs *and* the ORs sought in the present application are included in the calculation. Bon Secours' admonition against prematurely approving an incremental addition by an applicant, while a previously-approved addition awaits completion, fails to raise a legal issue.

DCOPN's conclusion that no precedent commands denial due to prematurity, under the facts of VCUHS' project, is correct and warranted in this case. In fact, to a clearly-recognizable degree, being mindful of the totality of particular facts upon which each case cited by Bon Secours turns, approval of the VCUHS' project would be demonstrably consistent with past administrative precedent. Bon Secours' fourth allegation is insufficient to establish a substantial material mistake of law in the DCOPN staff report.

**Good cause does not arise from the fourth allegation of Bon Secours' petition.**

**Conclusions of Law and Recommendation**

I have closely reviewed Bon Secours' petition and filings, the transcript of the IFFC on good cause, as well as the administrative record as it relates to the petition. Bon Secours' petition reflects disagreement and dissatisfaction with conclusions drawn in the DCOPN staff report. But it fails to demonstrate the existence of any substantial material mistake of law in the DCOPN staff report, despite four instances in which Bon Secours alleges such.

**The petition filed by Bon Secours is insufficient to demonstrate good cause under the COPN law. Bon Secours has not shown a basis upon which it can become a party to the proceedings by which VCUHS' project is reviewed.**

**The petition filed by Bon Secours should be denied.**

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<sup>20</sup> Petition at 6.



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**Note of the Stepwise Approach Taken.** A good cause analysis is performed separately and distinctly from that underlying the public need determination to be made on an associated project, and is performed only to complete identification of the parties to the administrative proceedings. The present recommended decision should not be seen as an indication of the substance to be contained in a recommended decision yet to be made in regard to VCUHS' project, on its merits. A good cause analysis is the first adjudicatory step in a good cause determination and proceeding that includes a good cause petitioning.

Adoption by the Commissioner of the present recommended decision would serve only to complete the identification of the parties to the administrative proceedings underway in relation to VCUHS's project.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'D. Harris', with a horizontal line extending to the right.

Douglas R. Harris, JD  
Adjudication Officer

September 3, 2021