

The Informal Fact-Finding Conference Under Virginia's New Certificate of Public Need Procedures

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At a recent administrative conference at the Virginia Department of Health, the hearing officer brought his gavel down to commence the hearing and at the same time announced, "The record is now closed." So began an informal fact-finding conference ("IFFC") without the fact-finding under the Department's new Certificate of Public Need ("COPN") procedures. More than simply an unusual way to begin a fact-finding process, the new procedures raise concerns about: (1) the sufficiency of statutory authority to issue the procedures, (2) the meaning of the newly amended enabling act, and (3) whether the new procedures invite judicial intervention in the COPN process.

Introduction:

The Department issued the new IFFC procedures through a letter to all concerned parties from the Department's Office of Adjudications on August 31, 1999. The announced purpose of the procedures was to implement section 32.1-102.1 of the Virginia Code, as amended by General Assembly action earlier this year. *See* Va. Code Ann. § 32.1-102.1 *et seq.* (amended March 29, 1999). The new law changed, among other things, the COPN review process and the applicability of the Commonwealth's Administrative Process Act to that review process. *See* §32.1-102.6.

The COPN process is the method by which medical facilities, such as hospitals and nursing homes, and other specialized centers, such as imaging centers and certain physician's offices, get state approval to undertake significant building projects or purchase/expensive medical equipment. A mainstay of this process for many years is the informal fact-finding conference ("IFFC"). An IFFC for a COPN generally looks something like a cross between an informal trial court and a legislative hearing. Under the enabling law, as supplemented by Virginia's Administrative Process Act, a hearing officer used to weigh evidence and hear testimony about why a person or entity should (or should not) be given a COPN for a particular project. And, until the new law went into effect on October 1, 1999², this was the way medical facilities were given a chance to make a case for their proposed project before the Department following a negative recommendation at the regional board or state COPN staff level.

The new law provides that "[u]pon accepting an application as complete, the following procedure, in lieu of the Administrative Process Act shall control," except for issues of "timeliness and specifications not . . .delineated." §32.1-102.6 D and E. Specifically, "[a]ny informal fact-finding conference shall be to consider the information and issues in the record and shall not be a *de novo* review. . . . In any case in which an informal fact-finding conference is held, a date shall be established for the closing of the record which shall not be more than forty-five calendar days after the date of holding the

. . . conference.” *Id.*

The Department’s Office of Adjudication stated as justification for the changes it imposed that “[i]n order to carry out the intent of the new law. . . and to continue administering the COPN program effectively, the [Department]. . . has developed specific procedures. . . .” Among the most significant of the procedural changes is the requirement that the record be completed three days before the IFFC and the prohibition that at the IFFC, “no witnesses. . . and no written material or documents will be allowed.”³ Under the old rules it was common for an applicant to offer live witness testimony at the IFFC. This practice provided an additional basis upon which the hearing officer could judge an application, that is, witness credibility. After October 1, 1999, the only means by which an applicant can speak into the record is to use affidavits in place of live testimony. When competing applicants came before the Department, under the old rules, applicants could file post-IFFC rebuttals to any criticisms raised by competing applicants or outstanding issues raised by the hearing officer. This practice is prevented by the new rules because the record is closed before the hearing. Changes such as these have altered the COPN playing field and raised the concerns discussed below.

(1) Whether the new IFFC procedures were issued pursuant to statutory authority.

Section 32.1-102.2 of the COPN law requires that substantive procedures be established to implement section 32.1-102.6. On their face, the Department offered the new IFFC procedures as a statement of administrative procedure, not as a rulemaking action. Statements of administrative procedure may provide a process for efficient administrative action, but may not substantially alter established rights. *See Commonwealth v. Champion Int’l Corp.*, 220 Va. 981, 992 (1980). Only properly promulgated regulations have the force and effect of law. *See Carbaugh v. Solem*, 225 Va. 310 (1983).

The Department’s August letter was not subject to publication or notice and comment in the Virginia Register as required by Administrative Process Act. *See* Va. Code §9-6.14:7.1, *et seq.* The notice and comment process helps bring efficiency and legitimacy to the ultimate administrative mechanism. These attributes are arguably lacking from the procedures under consideration. Therefore, inasmuch as the new procedures purport to affect substantive rights, the new procedures may be invalid.

(2) The meaning of the recently amended Certificate of Public Need law.

Even if proper rulemaking is unnecessary in this case, the new procedures must not conflict with the underlying statute. The COPN law provides that “[the] Board . . . shall establish concise procedures for the prompt review of applications . . . consistent with the provisions of this article . . .” Setting out the operative section once again:

3. Any informal fact-finding conference shall be to consider the information and issues in the record and shall not be a *de novo* review.

4. In any case in which an informal fact-finding conference is held, a date shall be established for the closing of the record which shall not be more than forty-five calendar days after the date for holding the informal fact-finding conference.

Va. Code Ann. §32.1-102.6(E)(3)&(4)(amended March 29, 1999). Interpreting the above statutory provisions, the Department's letter concludes that "[c]hanges in the COPN law prohibit new information from being introduced during the IFFC." The Board and Commissioner, acting through the Office of Adjudications, appear to have read §32.1-102.6(E)(3) to mean that an IFFC is a purely appellate proceeding. This interpretation may not be consistent with the nature of an IFFC.

First, at the time at which an IFFC is held, there is no decision or order from which to appeal. Second, the words "informal fact-finding conference" have no meaning if paragraph 3, above, is understood to require an IFFC with a closed record. There is no definition provided for an "informal fact-finding conference" in section 32.1-102.1 et seq., therefore, pursuant to section 32.1-102.6(D), one must turn to the Virginia Administrative Process Act which provides:

Agencies shall ascertain the fact basis for their decisions of cases through informal conference. . . proceedings. . . . Such conference-consultation procedures include rights of parties to the case. . .(ii) to appear in person or by counsel. . .for the informal presentation of factual data, argument, or proof in connection with any case.

Va. Code Ann. §9-6.14:11(1998). Clearly, one cannot have an "informal presentation of factual data, argument, or proof" where the record is closed.

The phrase "de novo review" as used by the General Assembly in section 32.1-102.6 may have created confusion. The language of this section neither refers to nor proscribes a trial de novo. The IFFC never was a de novo trial because it is not preceded by a case decision. It was -- and remains -- an informal fact-finding conference. The words of the statute necessarily refer not to the sort of proceeding, but to the kind of review which an adjudication officer exercises prior to making a case decision. By analogy, de novo judicial review of agency action means that a court is free to substitute its judgment for that of the agency. *See* Charles H. Koch, Jr. ADMINISTRATIVE LAW 165 (3d ed. 1996). Thus, the phrase "shall not be a de novo review" should be read to mean that deference should be accorded to the agency's fact-finding process that precedes the IFFC.

The words "de novo" do not appear at all in the Virginia Code except as set forth at section 2.1-102.6(E)(3). There is no analogous Virginia law from which to judge the purpose and effect of the COPN law amendment. These words are defined in BLACK'S LAW DICTIONARY 435 (6th ed. 1990) to mean, "anew or afresh." In this context, where there is to be no "de novo review," the adjudication officer would presumably be prohibited from accepting evidence as to new issues not previously raised. At a

minimum, however, the parties should arguably be able to present proof of issues already raised and to respond to issues appropriately raised by other parties or the Adjudication Officer prior to and during the IFFC.

The new procedures also state that, “[t]he agency’s record concerning any application will close at the beginning of the informal fact-finding conference.” Again, if the words “informal fact-finding conference” are to have any meaning, it is not possible to close the record before the Adjudication Officer and Commissioner complete their fact-finding mission. The law reads, “a date shall be established for the closing of the record which shall not be more than forty-five calendar days after the date for holding the informal fact-finding conference.” §32.1-102.6(E)(4)(emphasis added). This language cannot support the conclusion that the record must close before the IFFC.

It should be presumed that the General Assembly phrased §32.1-102.6 intentionally. By providing that the record need not be closed until “after the date for holding the informal fact-finding conference” the General Assembly seems to allow for new facts to enter the record at the IFFC. *See Williams v. Commonwealth*, 190 Va. 280, 293 (1949)(articulating a presumption against statutory interpretations which suggest the legislature has undertaken a “vain or useless thing”). As mentioned above, the new rules preclude the practice of providing live witness testimony or the filing of supplemental or rebuttal material. When placed in the context of the fact-finding mechanism, a plain reading of the law would appear most plausible, that is, the record should close after the record has been fully developed.

(3) Whether the new procedures will invite judicial intervention in the COPN process.

The new procedures change agency review such that judicial intervention in the COPN process may increase or, at very least, the accuracy of agency decision making may be adversely affected. The new procedures are problematic in two respects: first, procedural due process issues may be raised by the truncated review process and, second, an incomplete or incoherent agency record may degrade the quality and consistency of agency adjudication.

The procedures do not allow a party to the IFFC to supplement the record in response to issues which are raised at the conference and may impinge upon the procedural due process right to be heard. For example, where there are competing applications, one applicant may raise a new issue or provide new evidence to the Department before the record closes (three days before the IFFC), leaving a competing applicant unable to fully respond. The Virginia Supreme Court has suggested that the minimal requirements due process requirements for agency action include the opportunity to file testimony and exhibits in support of one’s position, participate in an evidentiary hearing and to be heard in oral argument on motions before the agency enters judgement. *See Virginia Electric and Power Co. v. State Corporation Comm’n.*, 226 Va. 541, 547 (1984)(citing *Blue Cross v. Commonwealth*, 221 Va. 349, 357 (1980)). In *Blue Cross*, judgment was entered only after an evidentiary hearing was held. The procedures issued by the Board and Commissioner through the Office of Adjudications do not provide a similar

opportunity to be heard.

Even if the new rules are not constitutionally infirm⁴, they nonetheless raise questions and legitimate concerns about good governance. The purpose of the Certificate of Public Need process is to determine whether there is a public need for health care services or facilities. *See* §32.1-102.3 (amended March 29, 1999). The fact that the new procedures may hinder the making of an orderly and consistent determination of public need is alone cause for concern to the Commonwealth.

While the Department's action might appear to truncate the previous practice of excessive document filing, the incentives may in practice be reversed. The new procedures may create an inherent incentive to add extraneous and perhaps irrelevant data to the record which might not have otherwise been submitted. In order to avoid being barred from introducing evidence which may become relevant after the record closes, applicants may feel compelled to throw in the proverbial kitchen sink. Unlike the IFFC model provided by the Administrative Process Act, there is no opportunity under the new rules to challenge the accuracy or relevance of information submitted at the last minute and no opportunity to respond to questions raised by the hearing officer which are unanswered during the IFFC.

Where the record upon which the Commissioner makes her decision is incomplete or otherwise uncritically assembled, two sorts of appeals are likely to ensue. The reviewing circuit court may become a fact gathering forum – a result not likely contemplated by the General Assembly when it acted to streamline the COPN process. *See* Va. Code Ann. §9-6.14:17. *See also, State Bd. of Health v. Godfrey*, 223 Va. 423, 433 (1982)(interpreting §9-6.14:17 to allow a reviewing court to augment the record as necessary)⁵. Moreover, the new procedures may also allow a disappointed applicant to show that the administrative decision was not reasonable under the substantial evidence test. *See* §9-6.14:17. By prohibiting live witness testimony, the Commissioner has surrendered witness credibility as a basis upon which her decision may be justified.

Conclusion:

The General Assembly's amendments to the COPN law raise some questions of interpretation, for example, the meaning and implications of the paragraph which provides that a fact-finding conference "shall not be a de novo review." It seems clear, however, that the legislature intended to streamline the process by which COPN applications are approved or disapproved. For the reasons discussed above the new procedures adopted by the Commissioner pursuant to this law may frustrate this purpose.

If the new procedures are found wanting and require change, at least one administrative solution is apparent. A constructive improvement to the fact-finding and decision making mechanism could be achieved by simply allowing the record to close after the IFFC has been held and supplemental or rebuttal motions have been filed. This improvement could be implemented by agency action without any change to the enabling

act.

Virginia's General Assembly set forth the general COPN scheme and empowered the Department of Health to regulate most significant capital improvements undertaken in the health care sector. The result is a regulatory structure which is charged with the difficult task of judging the public's need for health care services. It is important that this structure, for as long as the General Assembly sees fit to maintain it, operates evenhandedly, efficiently and predictably. The Department's new IFFC procedures must be matched against this demanding measure.

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² See §32.1-102.6 Editor's Note (citing Acts 1999, cc. 899 and 922).

³ Notably, the Adjudication Officer in a recent IFFC involving competing applicants stated that the pre-IFFC document filing rule was not enforceable and allowed rebuttal documentation, distributed the day of the hearing, into the record.

⁴ Constitutional procedural due process is implicated only where liberty or property interests are at stake, that is, where government action infringes liberty or takes property. See *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth* at 577.

⁵ In *Ohio Bell Telephone Co., v. Public Utilities Comm'n of Ohio*, a seminal case on the question of procedural due process requirements of administrative law, the U.S. Supreme Court noted the conundrum caused by a faulty administrative record, "How [is] it possible for [an] appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved [is] unknown or unknowable?" *Ohio Bell*, 301 U.S. at 292, 303 (1937).