[Cite as *In re Heritage at Heather Hill*, 2009-Ohio-6480.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re:	:	
The Heritage [at Heather Hill],	:	No. 09AP-256 (O.D.H. No. 8990-01-07)
(Burton Health Care Center,	:	
Appellant).	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on December 10, 2009

Chester Willcox & Saxbe, LLP, and *Geoffrey E. Webster*, for appellant.

Taft Stettinius & Hollister LLP, Eric M. Simon, and *Majeed G. Makhlouf*, for appellee Geauga Quality Long Term Care Realty, LLC.

APPEAL from the Ohio Certificate of Need Review Board.

BROWN, J.

{¶1} Appellant, Burton Health Care Center, appeals from an order of appellee, Ohio Department of Health ("ODH"), granting approval of an application for a certificate of need filed by appellee, Geauga Quality Long Term Care Realty, LLC ("appellee").

{¶2} On October 16, 2007, appellee submitted a certificate of need ("CON") application to ODH, seeking to relocate 108 nursing home beds from a recently closed nursing home in Geauga County to a newly constructed facility to be located approximately 1,000 feet from the closed facility. The new facility is projected to cost

$10,841.036, with a projected 21-month timetable for completion. On April 10, 2008, ODH declared the CON application for the "Heritage at Heather Hill" project complete. On April 25, 2008, appellant, a long-term care provider located in the same service area, filed a written objection to the CON application and requested a hearing.

{¶3} A hearing examiner conducted a hearing beginning August 21, 2008. The hearing examiner issued a report January 12, 2009, finding that appellant failed to present evidence indicating that the project was not needed or that the issuance of a CON would be contrary to statute, and, therefore, recommending that appellant's objections be overruled. The hearing examiner also filed, on January 12, 2009, a "summary of report and recommendation of the hearing examiner."

{¶4} Appellant filed objections with ODH to the hearing examiner's report and recommendation. On February 23, 2009, the director of ODH issued an adjudication order approving the CON application.

{¶5} On appeal, appellant sets forth the following two assignments of error for this court's review:

> FIRST ASSIGNMENT OF ERROR: THE ADJUDICATION ORDER OF THE OHIO DEPARTMENT OF HEALTH IS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AND IS NOT IN ACCORDANCE WITH LAW.
>
> SECOND ASSIGNMENT OF ERROR: THE OHIO DEPARTMENT OF HEALTH ERRED AS A MATTER OF LAW IN ITS CONDUCTING OF THE ADJUDICATION HEARING AND ISSUANCE OF AN ADJUDICATION ORDER THAT WAS NOT BASED UPON A RECOMMENDATION BY THE HEARING EXAMINER, DEPRIVING APPELLANT OF ITS RIGHT TO A FAIR ADMINISTRATIVE HEARING AS WELL AS A FAIR AND MEANINGFUL OPPORTUNITY TO BE HEARD, THEREBY CONSTITUTING AN UNCONSTITUTIONAL DUE PROCESS VIOLATION.

{¶6} At the outset, we address two motions filed by the parties. Appellee has filed a motion to dismiss the appeal for lack of jurisdiction, while appellant has filed a motion for an order to remand this matter to the director of ODH to consider additional evidence.

{¶7} Appellee seeks dismissal on jurisdictional grounds, based upon the Supreme Court of Ohio's recent decision in *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.,* 121 Ohio St.3d 622, 2009-Ohio-2058. In *Medcorp* at ¶20, the Supreme Court construed the phrase "grounds of the party's appeal," as set forth in R.C. 119.12, in addressing the statute's requirements for appealing an administrative agency's order, holding in pertinent part:

> In view of * * * the plain language of R.C. 119.12, we hold that to satisfy the "grounds of the party's appeal" requirement in R.C. 119.12, parties appealing under that statute must identify specific legal or factual errors in their notices of appeal; they may not simply restate the standard of review. While an extensive explanation of the alleged errors is not required at that point in the proceedings, the stated grounds must be specific enough that the trial court and opposing party can identify the objections and proceed accordingly, much in the same way that assignments of error and issues for review are presented in the courts of appeals and propositions of law are asserted in this court.

{¶8} Appellee argues that the notice of appeal filed by appellant in the present case fails to comply with the requirements set forth in *Medcorp,* and is therefore defective under R.C. 119.12. In response, appellant argues that the instant action, involving a CON application, is governed instead by the provisions of R.C. 3702.60, and that there is no

basis for appellee's motion to dismiss for lack of jurisdiction pursuant to the Supreme Court's holding in *Medcorp*.[1]

{¶9} Ohio Adm.Code 3701-12-09(E) provides that the director's notice of its decision on an application for a CON shall include "a description of the right to appeal the decision, in accordance with sections 3702.60 and 119.07 of the Revised Code." R.C. 3702.60(E) states in part: "Each person appealing under this section to the director shall file with the director * * * a notice of appeal designating the decision, ruling, or determination appealed from." In contrast, R.C. 119.12 states in relevant part: "Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from *and the grounds of the party's appeal.*" (Emphasis added.)

{¶10} The notice of appeal filed by appellant in the instant case complies with the requirements of R.C. 3702.60(E), as it designates the order appealed from. Further, R.C. 3702.60(E) does not include the language (i.e., "grounds of the party's appeal") at issue in the *Medcorp* decision. Upon review, we agree with appellant's argument that the holding in *Medcorp* is not dispositive of this appeal, and we therefore deny appellee's motion to dismiss for lack of jurisdiction.

{¶11} We next address appellant's motion to remand this matter to the director of ODH for the admission of additional evidence. Appellant argues that this matter should be remanded for the director to consider a document attached to appellant's memorandum in support, setting forth a "list of facilities that are not open but have

[1] We take notice of the fact that, currently pending before the Supreme Court, following a motion for reconsideration filed in *Medcorp* is an order by the Supreme Court for the parties in that case to brief the following issue: "Whether the decision in this case should be applied prospectively only and, if so, to what cases should it be applied?" *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs*., 122 Ohio St.3d 1488, 2009-Ohio-3830.

inactive licensed beds." Appellant argues that the document was not publicly available until after June 1, 2009, and, thus, qualifies as "newly discovered evidence." Appellee opposes the motion, contending that the document does not meet the criteria for newly discovered evidence because it did not exist at the time of the administrative hearing.

{¶12} In seeking a remand for the admission of additional evidence, appellant relies upon R.C. 3702.60(F)(2), which states in part:

> In hearing the appeal, the court shall consider only the evidence contained in the record certified to it by the director. The court may remand the matter to the director for the admission of additional evidence on a finding that the additional evidence is material, newly discovered, and could not with reasonable diligence have been ascertained before the hearing before the director.

{¶13} This court has previously held that "newly discovered evidence," as contemplated under R.C. 3702.60, does not include evidence "that did not exist at the time of the application or hearing." *In re Mansfield Gen. Hosp.* (Sept. 8, 1994), 10th Dist. No. 09APH12-1700 citing *In re Lake Med. Ctr.* (Dec. 14, 1993), 10th Dist. No. 93AP-705. Courts construing analogous language in R.C. 119.12 have also made clear that "[n]ewly discovered evidence refers to evidence that was in existence at the time of the administrative hearing but which was incapable of discovery by due diligence," and that such evidence does "not refer to newly created evidence." *Diversified Benefit Plans Agency, Inc. v. Duryee* (1995), 101 Ohio App.3d 495, 501-02. See also *Golden Christian Academy v. Zelman* (2001), 144 Ohio App.3d 513, 517 ("Newly discovered evidence is evidence that was in existence at the time of the administrative hearing. * * * Newly discovered evidence does not refer to newly created evidence") (Citation omitted).

{¶14} Here, the document attached to appellant's memorandum in support of its motion to remand involves materials that did not exist at the time of the administrative hearing, and we conclude that it does not qualify as newly discovered evidence under R.C. 3702.60. Accordingly, appellant's motion to remand this matter to ODH is denied.

{¶15} We next consider appellant's first assignment of error, in which it asserts that the order of ODH approving appellee's CON application is not supported by reliable, probative, and substantial evidence and is not in accordance with law. Appellant raises several issues under this assignment of error contending that the order is defective in determining that the project is financially feasible, and in failing to find increased costs after appellee's CON application was declared complete. Appellant also argues that ODH erred in failing to require appellee to include a franchise permit fee as part of the project costs.

{¶16} R.C. 3702.52(B) provides that the director of ODH shall review applications for CONs, and that each application "shall include all information required by rules adopted under division (B) of section 3702.57 of the Revised Code." Pursuant to R.C. 3702.52(C)(3), if written objections to a CON application are submitted from any affected person within the requisite time period, the director shall notify the applicant and assign a hearing examiner to conduct an adjudication hearing in accordance with R.C. Chapter 119. R.C. 3702.52(C)(4) provides that the director "shall base decisions concerning applications for which an adjudication hearing is conducted under division (C)(3) of this section on the report and recommendations of the hearing examiner."

{¶17} In considering objections to a CON application, "[t]he affected persons bear the burden of proving by a preponderance of evidence that the project is not needed or

that granting the certificate would not be in accordance with sections 3702.51 to 3702.62 of the Revised Code or the rules adopted under those sections." R.C. 3702.52(C)(3). An affected person "may appeal the director's ruling in the adjudication hearing to the tenth district court of appeals." R.C. 3702.60(A).

{¶18} R.C. 3702.60(F), which sets forth the standard of review for this court in considering an appeal from the director of ODH, states in relevant part as follows:

> (3) The court shall affirm the director's order if it finds, upon consideration of the entire record and any additional evidence admitted under division (F)(2) of this section, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order.
>
> (4) If the court determines that the director committed material procedural error, the court shall remand the matter to the director for further consideration or action.

{¶19} This court's "[a]nalysis of whether the evidence supports the director's decision is essentially a question of the absence or presence of the requisite quantum of evidence." *In re Wedgewood Health Care Realty, L.L.C.,* 176 Ohio App.3d 554, 2008-Ohio-2950, ¶7.

{¶20} We initially address appellant's contention that the cost of an annual franchise permit fee, as prescribed under R.C. 3721.51(A)(1),[2] should have been included on line 5.26 of the CON application (designated for "Acquisition cost for long-term care beds"). Appellant argues that appellee's omission of this fee resulted in understating of costs in contravention of the CON statutes and regulations.

[2] R.C. 3721.51(A)(1) provides in part that the department of job and family services shall "[d]etermine an annual franchise permit fee on each nursing home in an amount equal to six dollars and twenty-five cents, multiplied by the product of * * * [t]he number of beds licensed as nursing home beds * * * on the first day of May of the calendar year in which the fee is determined."

{¶21} During the administrative hearing, there was conflicting testimony regarding whether appellee should have included on the CON application, as part of the costs of the project, an amount representing an annual franchise permit fee. Appellant's witness, Bert P. Cummins, a certified public accountant, testified that a franchise permit fee amount should have been included as an expense within the project's costs because it was a condition of the contract between the buyer and seller to acquire the beds.

{¶22} Paragraph 10.1 of the contract between appellee, as buyer, and University Hospitals Health System-Heather Hill, Inc., as seller, provides that "[t]he Closing shall take place through escrow with the Escrow Agent on the date that is five (5) business days following Buyer's receipt of an approved CON (the 'Closing Date')." Paragraph 10.4 of the contract states as follows:

> **Post-Closing Obligation**. After the Closing Date, Buyer shall be responsible for and pay all Bed Taxes that accrue on and after the Closing Date and shall provide written evidence thereof to Seller at least three (3) business days prior to the due date thereof. If Buyer fails to provide such written evidence, Seller may, but is not obligated to, pay such Bed Taxes on behalf of Buyer * * *. If the Transaction closes before May 1, 2008, Seller may de-license the Beds upon prior written notice to Buyer.

{¶23} At the administrative hearing, appellee's witness, Jeffrey Muencz, a certified public accountant, testified that nursing home beds are assessed a franchise fee (or "bed tax") based on the number of licensed beds at a facility on May 1 of each year. (Tr. 125.) He further testified, however, that if nursing home beds are de-licensed because of their attachment to a CON, fees are not assessed until those beds are re-licensed through approval of the project. Because of that potential scenario, Muencz noted, fees were not included as carrying costs during the construction period for the proposed project.

{¶24} The hearing examiner, in addressing appellant's argument with respect to the franchise fees, determined:

> It is clear from the language in the purchase agreement that any responsibility for bed taxes on the part of the applicant in this proceeding does not occur until after the closing date, and the closing date occurs five business days after the applicant receives an approved certificate of need. As the applicant has yet to secure the Heritage certificate of need, the language concerning the applicant's responsibility for the payment of franchise permit fees has had, to date, no effect. It is also the case that Ohio Revised Code section 3721.51(A)(1) refers to the "number of beds licensed as nursing home beds" and if the beds at issue were to be de-licensed following the issuance of the certificate of need, a question arises as to whether the franchise permit fees would be imposed on these beds prior to their re-licensure.
>
> The obligation to pay franchise permit fees depends upon a future event that is itself not certain. When such franchise permit fees would apply to these beds following the issuance of the certificate of need cannot be known at this time as future events will determine when such an obligation attaches to the applicant. Whether franchise permit fees comprise costs of a reviewable activity is subject to dispute. Ultimately, the Director of the Ohio Department of Health will determine whether such costs are reviewable, and if so, whether such costs belong in the certificate of need application. On these facts the hearing examiner is not persuaded to recommend a denial of the application based on the omission of franchise permit fees within the applicant's amended certificate of need application.

{¶25} The director agreed with the hearing examiner's interpretation that the franchise permit fee under R.C. 3721.51 pertains to licensed beds, and that, after approval of a CON application, licensed nursing home beds "may be de-licensed as 'approved' CON beds[3] and no franchise fee accrues." Adjudication Order, ¶7. The

[3] Ohio Adm.Code 3701-12-23.2(A) references "approved beds" as "beds for which a certificate of need has been granted but which have not been licensed."

director concluded that "the Applicant would not include franchise fee costs unless the application indicates that the beds that are the subject of the CON will remain licensed after the CON is approved and while the project is under construction." Id.

{¶26} In general, "[a] reviewing court, in interpreting a statute, 'must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command.' " *In re 138 Mazal Health Care, Ltd.* (1997), 117 Ohio App.3d 679, 685, quoting *State ex rel. McLean v. Indus. Comm.* (1986), 25 Ohio St.3d 90, 92.

{¶27} As noted by the hearing examiner, R.C. 3721.51 addresses the imposition of a franchise permit fee with respect to the "number of beds licensed as nursing home beds." Although the hearing testimony as to the status of de-licensed beds (and inactive facilities) is less than illuminating, we defer to the director's determinations that licensed beds may be de-licensed as "approved" CON beds, for which "no franchise fee accrues," and, therefore, an applicant "would not include franchise fee costs unless the application indicates that the beds * * * will remain licensed after the CON is approved and while the project is under construction." While appellant challenges the director's interpretation and application of R.C. 3721.51, an agency's interpretation of a statute need not be the only plausible one. *Mazal Health Care* at 686.

{¶28} As indicated above, the hearing examiner raised the issue whether franchise permit fees in fact "comprise costs of a reviewable activity," and appellee similarly questions whether an annual fee on licensed beds is a capital-related acquisition cost (as opposed to an operating expense). The hearing examiner observed, and we

agree, that the issue regarding when franchise fee permits would apply to the beds, following issuance of a CON, was dependent upon an uncertain future event at the time of the administrative hearing (August and September of 2008). On the record presented, we decline to disturb the agency's determination regarding the omission of franchise permit fees on the CON application. Further, even accepting appellant's claim that funds should have been allocated for franchise permit fees as part of the reviewable project costs, we agree with appellee that the contingency amounts allowed for the project appear adequate to cover those fees.[4]

{¶29} We next address appellant's arguments that the adjudication order is defective in failing to find increased costs after the CON application was declared complete, and that ODH erred in determining that the project is financially feasible. By way of background, the administrative hearing in this case took place over three days: August 21, August 28, and September 19, 2008. On the first day of the hearing, appellant called its expert, Bert Cummins, who challenged the financial feasibility of the project, stating he would have "a great deal of difficulty concluding that the project, as it has been presented in the application * * * is financially feasible because there are too many questions relating to the accuracy and the consistency of the numbers and the amounts." (Tr. 44.) The testimony of Cummins was based in large part upon his review of the parties' Joint Exhibit No. 1.

[4] R.C. 3702.52(C)(8) provides that, in granting a CON, the director "shall specify as the maximum capital expenditure the certificate holder may obligate under the certificate a figure equal to one hundred ten percent of the approved project cost." Pursuant to Ohio Adm.Code 3701-12-05(A)(6), a reviewable activity includes "[t]he expenditure of more than one hundred ten percent of the maximum expenditure specified in a certificate of need concerning long-term care beds."

{¶30} On the second day of the hearing (August 28, 2008), appellee's witness, Muencz, who prepared the initial financial feasibility information, testified that he had updated the information contained in Joint Exhibit No. 1. Specifically, Muencz identified appellee's Exhibit No. 2 as the updated project costs for the CON application, and appellee's Exhibit No. 6 as an updated projected balance sheet. Further, appellee's Exhibit No. 7 contained updated projected financial information for the 12 months ending December 31, 2010 through December 31, 2012. In response to the introduction of the updated information, appellant called Cummins as a rebuttal witness on the third day of the administrative hearing.

{¶31} Muencz also testified the projected time frame for the project had been updated to make the application more accurate, with the proposed start date for operations now listed as 2010 (rather than 2009). Muencz testified that moving the time frame for the proposed project back 12 months would not have an impact on construction costs, and he remained persuaded that the cost projections were reasonable. In response, appellant called John McKay as a rebuttal witness; McKay testified that he believed the applicant's cost per square foot, listed as $110 per square foot, "is substantially less than we are experiencing currently." (Tr. 204.)

{¶32} Ohio Adm.Code 3701-12-20 addresses general CON review criteria. Ohio Adm.Code 3701-12-20(A) requires an applicant for a CON to provide "sufficient information to enable the director to perform a thorough review of the application" in relation to the relevant criterion established by the regulations. Ohio Adm.Code 3701-12-20(B)(1) provides in part that, for projects involving any new construction, renovation or remodeling, the director shall consider the "costs, methods and type of construction."

Pursuant to Ohio Adm.Code 3701-12-20(J), the director shall consider "the short-term and long-term financial feasibility and the cost effectiveness of the project and its financial impact upon the applicant, other providers, health care consumers and the medicaid program." Ohio Adm.Code 3701-12-23.2(D) provides that the applicant is to demonstrate "that replacement of the facility or relocation of the beds is more cost-effective or otherwise more feasible for the applicant than renovation of the facility being replaced or from which the beds are being relocated."

{¶33} Ohio Adm.Code 3701-12-08(G) states:

> After notice of an application's completeness is mailed under paragraph (E) or (F)(1) of this rule, the applicant may supply and the director may request additional information pertinent to review of the application in relation to the criteria established by this chapter, as this chapter is in effect at that time. The applicant shall not make any amendment of the application that alters the site of the reviewable activity specified in accordance with paragraph (B) of this rule, the activity's scope, or its cost.

{¶34} In the instant case, the hearing examiner addressed and rejected appellant's argument that amendments to the application, occurring approximately one year after the initial projections, necessarily resulted in increased costs. The hearing examiner, while acknowledging the requirements for amendments under Ohio Adm.Code 3701-12-08(G), determined that the amendments made by the applicant to the original CON application "produced no alteration to the site, scope, or projected cost of the proposed project."

{¶35} As to evidence of the project's financial feasibility, the hearing examiner found that amendments made by the applicant following the initial testimony of Cummins "addressed many of the deficiencies identified by Mr. Cummins in his prior testimony,"

and that the amendments of projected figures involving "rates of occupancy, rates of compensation, costs, and equity were changed to make the application more accurate," as well as "more appropriate in form." The hearing examiner thus found that the previous deficiencies identified by appellant's expert witness regarding the initial application documents were "dissipated" through the amendments presented at the hearing. The hearing examiner concluded that appellant failed to demonstrate that the figures presented by the applicant in its amended projected financial information were "so unreasonable or unreliable as to support a recommendation of denial of the application," nor was the hearing examiner persuaded that appellant had shown, by a preponderance of evidence, that the proposed project was not financially feasible.

{¶36} The director, noting that R.C. 3702.52(C)(3) permits an applicant to supplement the record, similarly concluded that the amendments at issue, made in response to issues raised by appellant, "were not substantial" and did not change the "site, scope and cost of the proposed project." The director further determined that appellant had failed to carry its burden of showing that the proposed project was not needed or that granting the project would not be in accordance with the applicable statutes and regulations.

{¶37} Upon review, we find reliable, probative, and substantial evidence to support the director's determinations. As indicated above, appellant's rebuttal witness, McKay, challenged the cost per square foot of the project. While appellant argues that the testimony of McKay established that projected construction costs, one year out, would be substantially greater ($125 to $140 per square foot) than the projected costs submitted by the applicant ($110 per square foot), the hearing examiner heard testimony by Muencz

that the projected costs were reasonable, and that moving the project back 12 months would not require revised cost amounts. On cross-examination, McKay acknowledged that costs vary depending on the area of the state. When asked whether a project may become more or less expensive in an environment in which fewer projects are underway, he responded: "I don't think there's an answer to that question because * * * it depends on the climate of the people that we're dealing with." (Tr. 208.)

{¶38} Presented with conflicting testimony as to whether the delay in the project would increase costs, the hearing examiner found credible the testimony of appellee's expert, and we decline to disturb that determination. Although this court may engage in a "limited weighing of the evidence, it may not substitute its judgment for that of ODH as to the credibility of witnesses or weight to be given the testimony," but, rather, must give "due deference to the administrative resolution of evidentiary conflicts." *In re Wedgewood* at ¶7.

{¶39} Concerning evidence as to the financial feasibility of the project, the parties presented competing testimony regarding the projected costs. As indicated above, appellant's expert (Cummins) initially testified, prior to the amendments submitted by appellee, that he would have difficulty concluding that the project was feasible. Following the amendments, appellee's witness, Muencz, testified that the cash flow statement showed positive cash flow in year two, and "significant cash flow in year three." (Tr. 118.) He noted various items that had been updated, including the "ramp up of the facility's census," which he described as "a more realistic ramp up" than the initial projection. (Tr. 119-20.) Muencz also updated per diem projections, which he described as a "more

conservative update than was originally submitted." (Tr. 120.) Muencz opined that the updated information reflected that the project was financially feasible.

{¶40} Cummins was then recalled to testify as a rebuttal witness, and the record supports the hearing examiner's finding that Cummins agreed that "many of the deficiencies cited in his original testimony had been remedied by the applicant through the amendments." Specifically, Cummins stated that the updated information "is more towards the correct form, in my opinion, of what should have been originally submitted in the CON application." (Tr. 192.)

{¶41} Upon review, there was evidence to support the administrative agency's finding that the figures presented by appellee, including projections in the amended materials, were reasonable, and that the amendments did not alter the site, scope or cost of the proposed project. We further find that the record sufficiently supports the determinations of the hearing examiner and director that appellant did not meet its burden of proving, by a preponderance of the evidence, that the project is not needed or that granting the CON would be contrary to statute. Based upon the record presented, we conclude there was reliable, probative, and substantial evidence to support the director's decision and that such decision is in accordance with law.

{¶42} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶43} Under the second assignment of error, appellant argues it was deprived of the right to a fair administrative hearing as required by due process. Appellant raises four separate issues under this assignment of error.

{¶44} Appellant first contends it was reversible error for ODH to fail to serve it with a document submitted by the hearing examiner as part of the report and recommendation. Specifically, appellant notes that, on the same day the hearing examiner filed his report and recommendation, the hearing examiner also filed a document entitled "Summary of Report and Recommendation" (hereafter "summary"). Appellant contends it was not aware of the filing of this document by the hearing examiner until the record was sent to this court, at which time the clerk of courts forwarded the notice of filing with ODH's summary letter. Appellant maintains that the actions of ODH resulted in a violation of statute (R.C. 119.09), as well as due process rights.

{¶45} In response, appellee argues that the document at issue, a three-page summary of the hearing examiner's report and recommendation, contains no information that was not previously set forth in the hearing examiner's 102-page report. Upon review of the document, we agree with appellee that the summary did not include any new information not already in appellant's possession and, therefore, appellant cannot demonstrate that the failure to timely receive the summary hindered it in filing objections to the hearing examiner's report and recommendation, or that it was otherwise prejudiced. See *In re Wedgewood Realty*, *L.L.C.,* 10th Dist. No. 06AP-273, 2006-Ohio-6734, ¶25 (while agency should not base its decision upon matters outside the record and in the absence of notice to the parties, appellant cannot show prejudice and, therefore, violation of due process where objectionable matters constituted evidence already part of the record).

{¶46} Appellant also argues that the hearing examiner erred in failing to require that the amended CON application be filed as a new application, asserting that it should

have been provided the opportunity to file a written objection to the amended CON application. In a somewhat related argument, appellant contends that the hearing examiner erred in permitting improper "sur-rebuttal." Specifically, appellant argues it was error to allow appellee to introduce Exhibit No. 7, a financial report. Appellant maintains that this document should have been admitted in appellee's case-in-chief.

{¶47} In allowing appellee's amendments to the CON application, the hearing examiner relied in part upon the language of Ohio Adm.Code 3701-12-08(G), which states in part: "After notice of an application's completeness is mailed * * * the applicant may supply and the director may request additional information pertinent to review of the application in relation to the criteria established by this chapter." In addressing objections to the hearing examiner's report, the director, while noting that the applicant "amended some of the particulars of the financials in response to issues raised by the Objector," interpreted the statutes and regulations as allowing an applicant to supplement the record, subject to the limitation that the applicant does not change the site, scope or cost of the proposed project.

{¶48} We find no error in the admission of this information in the form of amendments to the application. This court previously rejected a similar argument in which the appellant claimed that allowing an applicant to furnish additional evidence at the hearing subverts the CON review process. *In re Application of Manor Care of Parma,* 10th Dist. No. 05AP-398, 2005-Ohio-5703. In *Manor Care*, this court found reasonable the director's interpretation that Ohio Adm.Code 3701-12-08(G) permits an applicant to present, or the director to request, additional evidence relevant to the review criteria, holding that "the language suggests the director may request additional information at any

time if the information may assist in making a determination. Id. at ¶17. This court additionally noted that language in R.C. 119.09 "implies * * * that the adjudication hearing is a de novo review of the application," and that "the director has discretion to 'order additional testimony to be taken or permit the introduction of further documentary evidence' even after the hearing examiner issues its written report setting forth findings of fact and conclusions of law." Id. at ¶18, quoting R.C. 119.09. We note, in the present case, both the hearing examiner and the director cited *Manor Care* in support of the amended application. Appellant's contention that the hearing examiner construed this court's decision in *Manor Care* more expansively than this court would have intended is not persuasive.

{¶49} Regarding the admission of appellee's Exhibit No. 7, the document at issue was submitted in response to objections made by appellant, in its case-in-chief, to the application; the hearing examiner permitted the introduction of this evidence, but also afforded appellant the opportunity to present additional evidence as to the amended CON, and permitted appellant to cross-examine appellee's witnesses. Under the circumstances, appellant has failed to demonstrate error by the hearing examiner or director in allowing the introduction of this document.

{¶50} Appellant next asserts that the hearing examiner erred in failing to make a recommendation to the director, and that such failure deprived it of a meaningful hearing and consideration of its claims. Appellant cites the language of R.C. 119.09, which provides in part that the hearing examiner "shall submit to the agency a written report setting forth the * * * examiner's findings of fact and conclusions of law and a recommendation of the action to be taken by the agency."

{¶51} Appellant's contention that the hearing examiner failed to make a "recommendation" is belied by the record. In the report, the hearing examiner made a determination that "the objector has failed to present a preponderance of evidence showing the proposed project is not needed or that to issue a certificate of need for the proposed project would not be in accordance with Ohio Revised Code sections 3702.51 to 3702.62 and the rules adopted under those sections." The report further states that the hearing examiner "therefore recommends to the Director of the Ohio Department of Health that the objection to the application not be sustained and the Director of the Ohio Department of Health determine, upon the amended certificate of need application, whether to grant or deny the certificate of need sought."

{¶52} Thus, although the hearing examiner did not specifically state that the CON should be "granted," the hearing examiner did recommend that appellant's objections to the application not be sustained, and the hearing examiner further determined that the objector had failed to present a preponderance of evidence supporting a recommendation of "denial." While not clear from the record, the hearing examiner may have refrained from specifically recommending that the director grant the CON application because, in addition to the specific objections raised by appellant, the director is required to consider other criteria in determining whether to grant a CON application. See, e.g., R.C. 3702.57; Ohio Adm.Code 3701-12-20; and 3701-12-23.2.

{¶53} The director, in addressing appellant's contention that the hearing examiner failed to fulfill his duties, found that R.C. 3702.52(C)(4) "does not require the Director * * * to delegate his adjudicatory function to the Hearing Examiner" or to "adopt in total the Hearing Examiner's findings of fact and conclusions of law, but instead must use the

Report and Recommendation as a basis for his decision." While recognizing that the hearing examiner "did not specifically recommend that I grant the CON application," the director nevertheless found that the hearing examiner's report and recommendation "contains findings of fact and conclusions of law that leads me to no other conclusion," and the director determined that nothing in the hearing record or report "suggests by a preponderance of the evidence that the proposed project is not needed or that granting the CON would not be in accordance with R.C. 3702.51 to R.C. 3702.62 or the rules adopted under R.C. 3702.57."

{¶54} In the present case, the hearing examiner prepared a comprehensive report, addressing all of the objections raised by appellant to the CON application, and clearly articulating the basis for his recommendation that appellant's objections be overruled. Because the report and recommendation contained sufficient information upon which the director could base a decision, we find no error with the hearing examiner's failure to specifically recommend that the director "grant" the CON application.

{¶55} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶56} Based upon the foregoing, appellee's motion to dismiss for lack of jurisdiction is denied, appellant's motion to remand the matter to ODH is denied, appellant's first and second assignments of error are overruled, and the order of the director of Ohio Department of Health is hereby affirmed.

Order affirmed.

BRYANT and TYACK, JJ., concur.

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