STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION
BOARD OF MEDICINE

Final Order No. AHCA-95-00406 Date 3-16-95
FILED
Agency for Health Care Administration
AGENCY CLERK
R.S. Power, Agency Clerk
By: Brandon
Deputy Agency Clerk

IN RE: THE PETITION FOR DECLARATORY STATEMENT OF CHARLES E. CERNUDA, M.D. AND ST. JOSEPH'S PHYSICIAN ASSOCIATES INC.
/ Index No. 95-DS-002

FINAL ORDER

This cause came before the Board of Medicine (hereinafter Board) pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, on February 10, 1995, for the purpose of considering the Petition for Declaratory Statement filed on behalf of Charles E. Cernuda, M.D. and St. Joseph's Associates Inc. (hereinafter Petitioners) of which Dr. Cernuda is a member. No person or entity has sought to intervene as a party. Having considered the petition, the arguments of counsel, the applicable law, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions.

FINDINGS OF FACT

1. Petitioner Charles E. Cernuda, M.D. is licensed to practice medicine in the State of Florida pursuant to Chapter 458, Florida Statutes, and is one of 380 individual shareholders in St. Joseph's Physician Associates (hereinafter SJPA).

2. The facts asserted by Petitioners are as follows: The Petitioner, Dr. Cernuda is a shareholder (one share of stock) in SJPA which is comprised of 379 other shareholder physicians, 6 shareholder osteopathic physicians, 4 shareholder podiatric

physicians, and 3 shareholder dentists who each hold a similar interest in SJPA. SJPA is a Florida corporation that owns 50% of the outstanding stock of Hospitals' Home Health Care of Hillsborough County, Inc., d/b/a St. Joseph's Home Health Services (hereinafter SJHHS). SJHHS operates a licensed home health entity which provides medical services including several of the designated health services set forth in Subsection 455.236(3)(d), Florida Statutes. SJPA elects three of the six directors of SJHHS. Both SJPA and SJHHS employ Dr. Cernuda as a part-time executive director.

3. Petitioner, Dr. Cernuda and other shareholders in SJPA wish to refer patients for home health services (both "designated" and "other") provided by SJHHS.

4. Petitioners request the Board to review the above stated facts and to state whether shareholders in SJPA are "investors" in SJHHS for purposes of Section 455.236, Florida Statutes, do thereby prohibited from making the indicated referrals.

5. This Petition was noticed by the Board in Vol. 21, No. 6, dated February 10, 1995, Florida Administrative Weekly (p. 892).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Sections 120.565 and 455.236, Florida Statutes, and Rule Chapter 28-4, Florida Administrative Code.

2. The Petition for Declaratory Statement is in substantial compliance with the provisions of Section 120.565, Florida Statutes and Rule Chapter 28-4, Florida Administrative Code.

3. Subsection 455.236(4)(a), Florida Statutes, mandates the following prohibtion:

> A health care provider may not refer a patient for the provision of designated health services to an entity in which the health care provider is an investor or has an investment interest.

4. In that Petitioners have admitted that they are health care providers as defined in Subsection 455.236(3)(h), Florida Statutes, and that they would be making referrals as defined in Subsection 455.236(3)(l), Florida Statutes, the issue left in question is whether or not the health care providers in Dr. Cernuda's specific circumstances are investors or have an investment interest as defined in Subsection 455.236(3)(j) and (k), Florida Statutes.

5. Subsection 455.236(3)(j), Florida Statutes, defines an investment interest as follows:

> ...an equity or debt security issued by an entity, including, without limitation, shares of stock in a corporation, units or other interests in a partnership, bonds, debentures, notes, or other equity interests or debt instruments...

The subsection sets forth certain exceptions to the definition. However, the parties have made no suggestion that any of the enumerated exceptions have any application to the questions presented in this Petition for Declaratory Statement.

6. Subsection 455.236(3)(k), Florida Statues, defines an investor as follows:

> ...a person or entity owning a legal or beneficial ownership or investment interest, directly or indirectly, including without limitation, through an immediate family member, trust, or another entity related to the investor within the meaning of 42 C.F.R. section 413.17, in an entity.

7. 42 C.F.R. section 413.17 defines the term related to the provider (investor)as follows:

> ...the provider (investor) to significant extent is associated or affiliated with or has control of or is controlled by the organization furnishing the services, facilities, or supplies.

8. Petitioners assert that the 50% stock interest in SJHHS by SJPA does not create an investment interest in SJHHS that is attributable to any shareholder in SJPA. Furthermore, the Petition asserts that shareholders of SJPA are not investors because their indirect interest in SJHHS does not meet the threshhold established for such relationships in 42 C.F.R. section 413.17.

9. Although it is reasonable to argue that the shareholders in SJPA do not hold an investment interest in SJHHS for purposes of Section 455.236, Florida Statutes, it is clear that each of those shareholders has an investment interest in SJPA. The Board concludes that the more key analysis of the stated issues relates to the term investor as set forth in Subsection 455.236 (3)(k), Florida Statutes. The Board concludes that each share

holder also shares a community of intertest with the other health care provider/shareholders in the success of SJHHS and in the provision of designated health services by SJHHS. Therefore, the Board concludes that each shareholder's investment interest in SJPA results in such shareholders being investors in SJHHS. Each shareholder is a person owning a legal or beneficial ownership or investment interest in an entity that owns 50% of the entity providing the designated health care services. Pursuant to 42 C.F.R. section 413.17, such indirect interest is related to the provider because the community of interest of the shareholders' in SJPA results in each shareholder being to a significant extent affiliated or associated with SJHHS.

10. In that each shareholder in SJPA is an investor in SJHHS, Subsection 455.236(4)(a), Florida Statutes, prohibits such shareholder from referring patients to SJHHS for the purpose of receiving designated health services.

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED:

The shareholders of SJPA are investors within the meaning of Subsection 455.236(3)(k), Florida Statutes, in each of the situations set forth in the Petition for Declaratory Statement and are therefore prohibited from referring patients to SJHHS for the purpose of receiving designated health service pursuant to the prohibition set forth in Subsection 455.236(4), Florida Statutes.

This Final Order takes effect upon filing with the Clerk of the Agency for Health Care Administration.

Done and Ordered this 13 day of March, 1995.

BOARD OF MEDICINE

Gary E. Winchester M.D.
GARY E. WINCHESTER, M.D.
CHAIRMAN

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE AGENCY FOR HEALTH CARE ADMINISTRATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THIS FINAL ORDER.

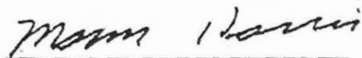
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to Charles E. Cernuda, M.D. and St. Joseph's Physician Associates c/o Don B. Weinbren, Attorney at Law, 2700 Barnett Plaza, 101 East Kennedy Boulevard, Post Office Box 1102, Tampa, Florida 33601-1102 this ________ day of ____________________, 1995.

____
EXECUTIVE DIRECTOR

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by certified mail to Charles E. Cernuda, M.D., 4900 North Habana Avenue, Tampa, Florida 33614-6815, St. Josephs' Physician Associates, Inc., Post Office Box 4227, Tampa, Florida 33677, Don Weinbren, Esquire, 2700 Barnett Plaza, 101 East Kennedy Boulevard, Post Office Box 1102, Tampa, Florida 33601-1102, and by interoffice delivery to Larry G. McPherson, Chief Medical Attorney, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-0792, at or before 5:00 p.m., this 16 day of March, 1995.



STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
BOARD OF MEDICINE

CHARLES E. CERNUDA, M.D. an individual Florida licensed physician, and ST. JOSEPH'S PHYSICIAN ASSOCIATES, as Representative for 380 Individual Physician-Shareholders Petitioners, vs. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF MEDICINE, Respondent.	:	Case No. ________

PETITION FOR DECLARATORY STATEMENT

Petitioners, Charles E. Cernuda, M.D. ("Dr. Cernuda") and St. Joseph's Physician Associates ("SJPA"), by and through their undersigned counsel, and pursuant to § 120.565, Fla. Stat. (1993), and Rules 28-4.001 through 4.007 of the Florida Administrative Code, respectfully submit this petition to the Department of Business and Professional Regulation, Board of Medicine ("Respondent"), seeking a declaratory statement with respect to § 455.236, Fla. Stat. (1993), a copy of which is attached to this petition as Exhibit A.

Dr. Cernuda and SJPA understand that this petition will be placed on Respondent's agenda for discussion in a public meeting, and they request the opportunity to be heard at such meeting with regard to the issues presented herein. Dr. Cernuda and SJPA believe that there are no genuine issues of material fact, and that

their petition presents a pure question of the applicability of § 455.236, Fla. Stat. (1993) to the undisputed set of facts described herein.

I. STANDING

1. Dr. Cernuda is a physician licensed by Respondent to practice medicine in the State of Florida, and is actively engaged in the practice medicine in the State of Florida.

2. Dr. Cernuda owns one (1) share of stock in SJPA.

3. Dr. Cernuda has standing to bring this petition because, as a licensee of Respondent, he is a health care provider who is subject to, and directly affected by, the provisions of § 455.236, Fla. Stat. (1993).

4. SJPA is a Florida corporation, with its principal place of business in Hillsborough County, Florida.

5. SJPA owns 50% of the outstanding stock of Hospitals' Home Health Care of Hillsborough County, Inc., d/b/a St. Joseph's Home Health Services ("SJHHS").

6. SJPA is wholly owned by 393 individual physicians (none of whom own any shares of stock in SJHHS), of which 380 are licensed physicians, 6 are licensed osteopathic physicians, 4 are licensed podiatric physicians, and 3 are licensed dentists.

7. SJPA has standing to bring this petition on behalf of its physician-shareholders, who are licensees of Respondent and health care providers subject to, and directly affected by, the provisions

of § 455.236, Fla. Stat. (1993), under Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So.2d 928 (Fla. 1st DCA 1990) and Federation of Mobile Home Owners of Florida, Inc. v. Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, 479 So.2d 252 (Fla. 2d DCA 1985), copies of such cases being attached to this petition as Exhibit B and C, respectively.

II. QUESTION PRESENTED

8. Whether an individual physician-shareholder of SJPA falls outside of the definition of an "investor" in SJHHS within the meaning of § 455.236(3)(l), Fla. Stat. (1993), under any one or a combination of the following circumstances:

(a) when the individual physician-shareholder is not a director or officer of either SJPA or SJHHS;

(b) when the individual physician-shareholder is one of nine members of the Board of Directors of SJPA;

(c) when the individual physician-shareholder is a member of the Board of Directors of SJPA and is one of three members of the Board of Directors of SJHHS appointed by SJPA (when the other three members of SJHHS' Board of Directors are appointed by an unrelated party);

(d) when the individual physician-shareholder is an officer of SJPA and/or of SJHHS; and

(e) when the individual physician-shareholder is employed by

SJHHS as its Medical Director subject to the terms of a written employment agreement (the material terms of which are set forth below).

III. STATEMENT OF UNDISPUTED FACTS

9. SJPA is a Florida corporation which currently has 393 shareholders, each of whom owns one (1) share of common stock. Three hundred eighty of the shareholders are physicians licensed by Respondent to practice medicine in the State of Florida.

10. SJPA owns 50% of the outstanding common stock of SJHHS, The other 50% of the stock in SJHHS is owned by St. Joseph's Ancillary Services, Inc. ("SJAS"), an entity unrelated to SJPA and its individual physician-shareholders.

11. SJHHS operates as a licensed home health agency which primarily provides medical services in the homes of patients. These services include, among other services, several of the "designated health services" that are described in § 455.236(3)(d), Fla. Stat. (1993), including physical therapy and clinical laboratory services.

12. SJPA and SJAS, as the shareholders of SJHHS, each elect three representatives to the Board of Directors of SJHHS. Any one of SJPA's representatives to the Board of Directors of SJHHS also may be a director of SJPA. At no time would any of SJAS' representatives be a shareholder, director or officer of SJPA.

13. Dr. Cernuda is employed by SJHHS on a part time basis as

its Medical Director. Pursuant to the terms of a written employment agreement between Dr. Cernuda and SJHHS, his duties as the Medical Director do not relate to management of SJHHS, Rather, his duties include: (1) educating the members of the Medical Staff of St. Joseph's Hospital, Inc. (another subsidiary of St. Joseph's Health Care Center, Inc.) on home health care issues, (2) advising the non-physician staff of SJHHS on medical issues, (3) consulting with attending physicians regarding alternative levels of care, (4) chairing the home health advisory committee of St. Joseph Hospital, Inc., and (5) providing assistance to and participating in planning and marketing efforts. The written employment agreement specifies that the amount of time required to perform such duties will not exceed 100 hours per year, to be expended at approximately 8 hours per month.

14. Dr. Cernuda also is employed by SJPA on a part time basis as its Executive Director. Pursuant to the terms of a written employment agreement between Dr. Cernuda and SJPA, he is an administrator, not the manager, of SJPA. His duties include: (1) performing routine business matters such as coordinating support personnel and outside counsel (e.g., attorneys, accountants and consultants) as directed by the Board of Directors, (2) coordinating activities of the Board of Directors and committees (including scheduling meetings, finding meeting locations and advising on agendas), (3) monitoring the status of SJPA's activities and investments, (4) serving as liaison between SJPA and its physician-shareholders, (5) providing status reports on SJPA

activities and investments to the Board of Directors and committees to enable the Board and committees to make informed decisions, and (6) assisting in analysis and development of new ventures. As Executive Director, Dr. Cernuda reports to the Board of Directors of SJPA.

15. Each individual physician-shareholder of SJPA has one vote in the election of the nine members of SJPA's Board of Directors, who are nominated by a Nominating Committee (which does not include Dr. Cernuda). The Bylaws of SJPA provide that the Board of Directors is to be composed of nine of its shareholders, consisting of four shareholders representing surgery specialties, four shareholders representing non-surgery specialties and one shareholder who is a hospital-based physician.

16. SJPA's shareholders have no legal or beneficial ownership interests in SJHHS. Unless an individual physician-shareholder of SJPA is serving as a director of SJHHS, he or she does not participate in the management or policy and decision-making of SJHHS.

IV. DISCUSSION AND CITATIONS OF APPLICABLE LAW

17. Section 455.236(3)(l), Fla. Stat. (1993) refers to the provisions of 42 C.F.R. §413.17 ("Section 413.17," a copy of which is attached to this petition as Exhibit D) to determine whether an indirect ownership interest in a referral entity is sufficient to classify the referring party as an "investor" for purposes of

applying the § 455.236 Fla. Stat. (1993) prohibition on self-referrals.

18. Specifically, Section 455.236(3)(l), Fla. Stat. (1993), defines an "investor" as:

> "a person or entity owning a legal or beneficial ownership or investment interest, directly or indirectly, including, without limitation, through an immediate family member, trust or another entity related to the investor within the meaning of 42 C.F.R. 413.17, in an entity."

19. "Investment interest" is defined in Section 455.236(k), Fla. Stat. (1993) as "an equity or debt security issued by an entity, including, without limitation, shares of stock in a corporation, units or other interests in a partnership, bonds, debentures, notes, or other equity interests or debt instruments." No such investment interest in SJHHS is owned by any physician-shareholder in SJPA.

20. The only means, therefore, by which an individual physician-shareholder in SJPA can be deemed to be an "investor" in SJHHS is by virtue of an indirect interest through an entity related to the physician-shareholder within the meaning of Section 413.17. This provision is found in the federal Medicare and Medicaid regulations issued by the Health Care Financing Administration of the United States Department of Health and Human Services. This regulation defines when a health care facility (called a "provider" in the regulation) may be reimbursed by the Medicare and Medicaid program for costs that the provider incurs for services, facilities or supplies furnished by an entity that is

related to the provider through common ownership or control. The principle of the regulation which applies to Section 455.236(3)(l), Fla. Stat. is when organizations are related through common ownership or control.

21. Specifically, Section 413.17(b)(1) states that an organization is related to a provider if "the provider to a significant extent is associated or affiliated with or has control of or is controlled by the organization . . . ." Section 413.17(b)(2) states that "common ownership exists if an individual or individuals possess significant ownership or equity in the provider and the institution or organization serving the provider". Section 413.17(b)(3) states that "control exists when an individual or an organization has the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization or institution."

22. Applying the principle of Section 413.17 to the questions presented in this petition, the issues are: (1) whether the ownership of stock in SJPA makes an individual physician-shareholder "related to" SJPA, so that SJPA's interest in SJHHS is deemed to be held by the individual physician-shareholder (the "common ownership analysis"), or (2) could an individual physician-shareholder be "related to" SJPA or SJHHS through his or her serving as a director or officer of either entity (the "control analysis").

23. Under the "common ownership analysis," no individual physician-shareholder (including Dr. Cernuda) owns "significant

ownership or equity" in SJPA. Each individual physician-shareholder (including Dr. Cernuda) owns only one share of a total of 393 outstanding shares in SJPA, or a 0.25% ownership interest in SJPA. Each individual physician-shareholder is entitled to only one vote to elect the Board of Directors of SJPA, so it would take an impractically large number of physicians together to exercise ownership control over SJPA. Thus, ownership of only 0.25% of SJPA (and no interest in SJHHS) does not confer the significant ownership power contemplated in Section 413.17 and § 455.236, Fla. Stat. (1993).

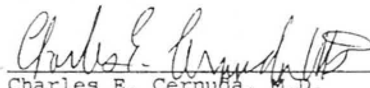
24. Under the "control analysis," acting as a director or officer of SJPA or SJHHS does not confer on any single physician the "power, directly or indirectly, significantly to influence or direct the actions or policies" of SJPA or SJHHS. As described in the facts set forth above, the Board of Directors of SJPA is composed of nine directors, and no single director or group of directors from any one medical specialty has such a "significant" influence over the Board that he, she or they would be able to direct the activities of SJPA. Likewise, because the authority to manage remains with the Board of Directors of SJPA, Dr. Cernuda's position as Executive Director of SJPA does not confer on him the "power, directly or indirectly, significantly to influence or direct the actions or policies" of SJPA.

25. Similarly, a physician serving on the Board of Directors of SJHHS does not have the "power, directly or indirectly, significantly to influence or direct the actions or policies" of

SJHHS. As described in the facts set forth above, even taken as a group, SJPA can only appoint three of SJHHS' six directors -- and therefore, neither SJPA nor any individual physician should be deemed to have the significant power to influence or control SJHHS that is contemplated in Section 413.17 and § 455.236, Fla. Stat. (1993). Finally, Dr. Cernuda's position as Medical Director of SJHHS does not confer on him the "power, directly or indirectly, significantly to influence or direct the actions or policies" of SJHHS.

V. REQUEST FOR RELIEF

Wherefore, based on the foregoing statement of undisputed facts and discussion of law, Petitioners respectfully request that Respondent enter a statement declaring that the Petitioners, and the individual physician-shareholders on whose behalf SJPA has sought this declaratory statement, are not "investors" in SJHHS within the meaning of § 455.236(3)(l), Fla. Stat. (1993).



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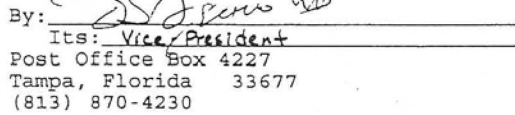
"PETITIONER"

St. Josephs' Physician Associates, Inc.



By: ______________________

Its: Vice President

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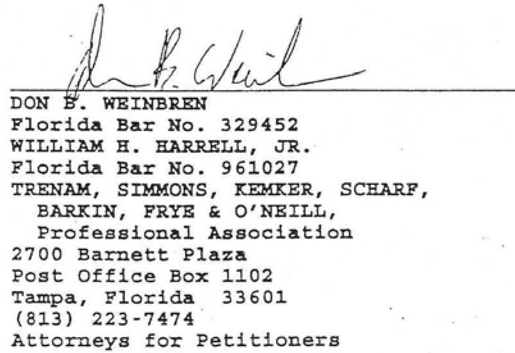
"PETITIONER"



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Attorneys for Petitioners

EXHIBIT A

accessible to anyone except members of the board, the department, and its staff who have a bona fide need to know such information. Any information supplied to the department by any other agency which is exempt from the provisions of chapter 119 or is confidential shall remain exempt or confidential pursuant to applicable law while in the custody of the department. These exemptions are subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(2) The department shall establish by rule the procedure by which an applicant, and the applicant's attorney, may review examination questions and answers. Examination questions and answers are not subject to discovery but may be introduced into evidence and considered only in camera in any administrative proceeding under chapter 120. If an administrative hearing is held, the department shall provide challenged examination questions and answers to the hearing officer. The examination questions and answers provided at the hearing are confidential and exempt from s. 119.07(1), unless invalidated by the hearing officer. This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(3) Unless an applicant notifies the department at least 5 days prior to an examination hearing of the applicant's inability to attend, or unless an applicant can demonstrate an extreme emergency for failing to attend, the department may require an applicant who fails to attend to pay reasonable attorney's fees, costs, and court costs of the department for the examination hearing.

History.—s. 5, ch. 79-36; s. 1, ch. 88-392; s. 8, ch. 90-228; s. 10, ch. 91-137; s. 3, ch. 91-140; s. 60, ch. 92-33; s. 29, ch. 92-149; s. 23, ch. 93-129.

[1]**Note.**—Section 60, ch. 92-33, amended s. 455.229, effective July 1, 1994 (effective date as modified by s. 23, ch. 93-129), to read:

455.229 Public inspection of information required from applicants; exceptions; examination hearing.—

(1) All information required by the [2]Department of Professional Regulation or the Agency for Health Care Administration of any applicant shall be a public record and shall be open to public inspection pursuant to s. 119.07, except financial information, medical information, school transcripts, examination questions, answers, papers, grades, and grading keys, which are confidential and exempt from s. 119.07(1) and shall not be discussed with or made accessible to anyone except members of the board, the [2]Department of Professional Regulation or the Agency for Health Care Administration, and staff thereof, who have a bona fide need to know such information. Any information supplied to the [2]Department of Professional Regulation or the Agency for Health Care Administration, by any other agency which is exempt from the provisions of chapter 119 or is confidential shall remain exempt or confidential pursuant to applicable law while in the custody of the department or the agency. These exemptions are subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(2) The [2]Department of Professional Regulation or the Agency for Health Care Administration shall establish by rule the procedure by which an applicant, and the applicant's attorney, may review examination questions and answers. Examination questions and answers are not subject to discovery but may be introduced into evidence and considered only in camera in any administrative proceeding under chapter 120. If an administrative hearing is held, the department or the agency shall provide challenged examination questions and answers to the hearing officer. The examination questions and answers provided at the hearing are confidential and exempt from s. 119.07(1), unless invalidated by the hearing officer. This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(3) Unless an applicant notifies the department or the agency at least 5 days prior to an examination hearing of the applicant's inability to attend, or unless an applicant can demonstrate an extreme emergency for failing to attend, the department or the agency may require an applicant who fails to attend to pay reasonable attorney's fees, costs, and court costs of the department or the agency for the examination hearing.

[2]**Note.**—Abolished and duties transferred to the Department of Business and Professional Regulation by s. 3, ch. 93-220.

[1]455.232 Disclosure of confidential information.—

(1) No officer, employee, or person under contract with the department, or any board therein, or any subject of an investigation shall convey knowledge or information to any person who is not lawfully entitled to such knowledge or information about any public meeting or public record, which at the time such knowledge or information is conveyed is exempt from the provisions of s. 119.01, s. 119.07(1), or s. 286.011.

(2) Any person who willfully violates any provision of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, and may be subject to discipline pursuant to s. 455.227, and, if applicable, shall be removed from office, employment, or the contractual relationship.

History.—s. 2, ch. 85-311; s. 5, ch. 91-140; s. 83, ch. 91-224; s. 61, ch. 92-33; s. 30, ch. 92-149; s. 23, ch. 93-129.

[1]**Note.**—Section 61, ch. 92-33, amended s. 455.232, effective July 1, 1994 (effective date as modified by s. 23, ch. 93-129), to read:

455.232 Disclosure of confidential information.—

(1) No officer, employee, or person under contract with the [2]Department of Professional Regulation or the Agency for Health Care Administration, or any board therein, or any subject of an investigation shall convey knowledge or information to any person who is not lawfully entitled to such knowledge or information about any public meeting or public record, which at the time such knowledge or information is conveyed is exempt from the provisions of s. 119.01, s. 119.07(1), or s. 286.011.

(2) Any person who willfully violates any provision of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, and may be subject to discipline pursuant to s. 455.227, and, if applicable, shall be removed from office, employment, or the contractual relationship.

[2]**Note.**—Abolished and duties transferred to the Department of Business and Professional Regulation by s. 3, ch. 93-220.

455.236 Financial arrangements between referring health care providers and providers of health care services.—

(1) SHORT TITLE.—This section shall be known and may be cited as the "Patient Self-Referral Act of 1992."

(2) LEGISLATIVE INTENT.—It is recognized by the Legislature that the referral of a patient by a health care provider to a provider of health care services in which the referring health care provider has an investment interest represents a potential conflict of interest. The Legislature finds these referral practices may limit or eliminate competitive alternatives in the health care services market, may result in overutilization of health care services, may increase costs to the health care system, and may adversely affect the quality of health care. The Legislature also recognizes, however, that it may be appropriate for providers to own entities providing health care services, and to refer patients to such entities, as long as certain safeguards are present in the arrangement. It is the intent of the Legislature to provide guidance to health care providers regarding prohibited patient referrals between health care providers and entities providing health care services and to protect the citizens of Florida from unnecessary and costly health care expenditures.

(3) DEFINITIONS.—For the purpose of this section, the word, phrase, or term:

(a) "Board" means any of the following boards relating to the respective professions: the Board of Medicine as created in s. 458.307; the [1]Board of Osteopathic Medicine as created in s. 459.004; the Board of Chiropractic as created in s. 460.404; the Board of Podiatric Medicine as created in s. 461.004; the Board of Optometry as created in s. 463.003; the Board of Pharmacy as created in s. 465.004; and the Board of Dentistry as created in s. 466.004.

(b) "Comprehensive rehabilitation services" means services that are provided by health care professionals licensed under part I or part III of chapter 468 or chapter 486 to provide speech, occupational, or physical therapy services on an outpatient or ambulatory basis.

(c) "Department" means the [2]Department of Professional Regulation.

(d) "Designated health services" means, for purposes of this section, clinical laboratory services, physical therapy services, comprehensive rehabilitative services, diagnostic imaging services, and radiation therapy services.

(e) "Entity" means any individual, partnership, firm, corporation, or other business entity.

(f) "Fair market value" means value in arms length transactions, consistent with the general market value, and, with respect to rentals or leases, the value of rental property for general commercial purposes, not taking into account its intended use, and, in the case of a lease of space, not adjusted to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor where the lessor is a potential source of patient referrals to the lessee.

(g) "Group practice" means a group of two or more health care providers legally organized as a partnership, professional corporation, or similar association:

1. In which each health care provider who is a member of the group provides substantially the full range of services which the health care provider routinely provides, including medical care, consultation, diagnosis, or treatment, through the joint use of shared office space, facilities, equipment, and personnel;

2. For which substantially all of the services of the health care providers who are members of the group are provided through the group and are billed in the name of the group and amounts so received are treated as receipts of the group; and

3. In which the overhead expenses of and the income from the practice are distributed in accordance with methods previously determined by members of the group.

(h) [3]"HCCCB" means the Health Care Cost Containment Board as created in [3]s. 407.01.

(i) "Health care provider" means any physician licensed under chapter 458, chapter 459, chapter 460, or chapter 461, or any health care provider licensed under chapter 463 or chapter 466.

(j) "Immediate family member" means a health care provider's spouse, child, child's spouse, grandchild, grandchild's spouse, parent, parent-in-law, or sibling.

(k) "Investment interest" means an equity or debt security issued by an entity, including, without limitation, shares of stock in a corporation, units or other interests in a partnership, bonds, debentures, notes, or other equity interests or debt instruments. Except for purposes of s. 455.239, the following investment interests shall be excepted from this definition:

1. An investment interest in an entity that is the sole provider of designated health services in a rural area;

2. An investment interest in notes, bonds, debentures, or other debt instruments issued by an entity which provides designated health services, as an integral part of a plan by such entity to acquire such investor's equity investment interest in the entity, provided that the interest rate is consistent with fair market value, and that the maturity date of the notes, bonds, debentures, or other debt instruments issued by the entity to the investor is not later than October 1, 1996.

3. An investment interest in real property resulting in a landlord-tenant relationship between the health care provider and the entity in which the equity interest is held, unless the rent is determined, in whole or in part, by the business volume or profitability of the tenant or exceeds fair market value; or

4. An investment interest in an entity which owns or leases and operates a hospital licensed under chapter 395 or a nursing home facility licensed under chapter 400.

(l) "Investor" means a person or entity owning a legal or beneficial ownership or investment interest, directly or indirectly, including, without limitation, through an immediate family member, trust, or another entity related to the investor within the meaning of 42 C.F.R. s. 413.17, in an entity.

(m) "Referral" means any referral of a patient by a health care provider for health care services, including, without limitation:

1. The forwarding of a patient by a health care provider to another health care provider or to an entity which provides or supplies designated health services or any other health care item or service; or

2. The request or establishment of a plan of care by a health care provider, which includes the provision of designated health services or other health care item or service.

3. Except for the purposes of s. 455.239, the following orders, recommendations, or plans of care shall not constitute a referral by a health care provider:

a. By a radiologist for diagnostic imaging services.

b. By a physician specializing in the provision of radiation therapy services for such services.

c. By a medical oncologist for drugs and solutions to be prepared and administered intravenously to such oncologist's patient, as well as for the supplies and equipment used in connection therewith to treat such patient for cancer and the complications thereof.

d. By a cardiologist for cardiac catheterization services.

e. By a pathologist for diagnostic clinical laboratory tests and pathological examination services, if furnished by or under the supervision of such pathologist pursuant to a consultation requested by another physician.

f. By a health care provider who is the sole provider or member of a group practice for designated health services or other health care items or services that are prescribed or provided solely for such referring health care provider's or group practice's own patients, and that are provided or performed by or under the direct supervision of such referring health care provider or group practice.

g. By a health care provider for services provided by an ambulatory surgical center licensed under chapter 395.

h. By a health care provider for diagnostic clinical laboratory services where such services are directly related to renal dialysis.

i. By a urologist for lithotripsy services.

j. By a dentist for dental services performed by an employee of or health care provider who is an independent contractor with the dentist or group practice of which the dentist is a member.

k. By a physician for infusion therapy services to a patient of that physician or a member of that physician's group practice.

l. By a nephrologist for renal dialysis services and supplies.

(n) "Rural area" means a county with a population density of no greater than 100 persons per square mile, as defined by the United States Census.

(4) PROHIBITED REFERRALS AND CLAIMS FOR PAYMENT.—Except as provided in this section:

[4](a) A health care provider may not refer a patient for the provision of designated health services to an entity in which the health care provider is an investor or has an investment interest.

[4](b) A health care provider may not refer a patient for the provision of any other health care item or service to an entity in which the health care provider is an investor unless:

1. The provider's investment interest is in registered securities purchased on a national exchange or over-the-counter market and issued by a publicly held corporation:

a. Whose shares are traded on a national exchange or on the over-the-counter market; and

b. Whose total assets at the end of the corporation's most recent fiscal quarter exceeded $50 million; or

2. With respect to an entity other than a publicly held corporation described in subparagraph 1., and a referring provider's investment interest in such entity, each of the following requirements are met:

a. No more than 50 percent of the value of the investment interests are held by investors who are in a position to make referrals to the entity.

b. The terms under which an investment interest is offered to an investor who is in a position to make referrals to the entity are no different from the terms offered to investors who are not in a position to make such referrals.

c. The terms under which an investment interest is offered to an investor who is in a position to make referrals to the entity are not related to the previous or expected volume of referrals from that investor to the entity.

d. There is no requirement that an investor make referrals or be in a position to make referrals to the entity as a condition for becoming or remaining an investor.

3. With respect to either such entity or publicly held corporation:

a. The entity or corporation does not loan funds to or guarantee a loan for an investor who is in a position to make referrals to the entity or corporation if the investor uses any part of such loan to obtain the investment interest.

b. The amount distributed to an investor representing a return on the investment interest is directly proportional to the amount of the capital investment, including the fair market value of any preoperational services rendered, invested in the entity or corporation by that investor.

4. Each board and, in the case of hospitals, the Department of Health and Rehabilitative Services, shall encourage the use by licensees of the declaratory statement procedure to determine the applicability of this section or any rule adopted pursuant to this section as it applies solely to the licensee. Boards shall submit to the Department of Health and Rehabilitative Services the name of any entity in which a provider investment interest has been approved pursuant to this section, and the Department of Health and Rehabilitative Services shall adopt rules providing for periodic quality assurance and utilization review of such entities.

[4](c) No claim for payment may be presented by an entity to any individual, third-party payor, or other entity for a service furnished pursuant to a referral prohibited under this section.

[4](d) If an entity collects any amount that was billed in violation of this section, the entity shall refund such amount on a timely basis to the payor or individual, whichever is applicable.

[4](e) Any person that presents or causes to be presented a bill or a claim for service that such person knows or should know is for a service for which payment may not be made under paragraph (c), or for which a refund has not been made under paragraph (d), shall be subject to a civil penalty of not more than $15,000 for each such service to be imposed and collected by the appropriate board.

[4](f) Any health care provider or other entity that enters into an arrangement or scheme, such as a cross-referral arrangement, which the physician or entity knows or should know has a principal purpose of assuring referrals by the physician to a particular entity which, if the physician directly made referrals to such entity, would be in violation of this section, shall be subject to a civil penalty of not more than $100,000 for each such circumvention arrangement or scheme to be imposed and collected by the appropriate board.

[4](g) A violation of this section by a health care provider shall constitute grounds for disciplinary action to be taken by the applicable board pursuant to s. 458.331(2), s. 459.015(2), s. 460.413(2), s. 461.013(2), s. 463.016(2), or s. 466.028(2). Any hospital licensed under chapter 395 found in violation of this section shall be subject to the rules adopted by the Department of Health and Rehabilitative Services pursuant to [5]s. 395.0185(2).

(h) Any hospital licensed under chapter 395 that discriminates against or otherwise penalizes a health care provider for compliance with this act.

(i) The provision of paragraph (a) shall not apply to referrals to the offices of radiation therapy centers managed by an entity or subsidiary or general partner thereof, which performed radiation therapy services at those same offices prior to April 1, 1991, and shall not apply also to referrals for radiation therapy to be performed at no more than one additional office of any entity qualifying for the foregoing exception which, prior to February 1, 1992, had a binding purchase contract on and a nonrefundable deposit paid for a linear accelerator to be used at the additional office. The physical site of the radiation treatment centers affected by this provision may be relocated as a result of the following factors: acts of God; fire; strike; accident; war; eminent domain actions by any governmental body; or refusal by the lessor to renew a lease. A relocation for the foregoing rea-

sons is limited to relocation of an existing facility to a replacement location within the county of the existing facility upon written notification to the Office of Licensure and Certification.

(j) A health care provider who meets the requirements of paragraphs (b) and (i) must disclose his investment interest to his patients as provided in s. 455.25.

History.—s. 7, ch. 92-178.

[1]Note.—Substituted by the editors for a reference to the "Board of Osteopathic Medical Examiners" to conform to the renaming of the board by s. 85, ch. 92-149.

[2]Note.—Abolished and duties transferred to the Department of Business and Professional Regulation by s. 3, ch. 93-220.

[3]Note.—Section 407.01, which created the Health Care Cost Containment Board, was repealed by s. 82, ch. 92-33.

[4]Note.—Section 15, ch. 92-178, as amended by s. 55, ch. 93-129, and s. 2, ch. 93-228, provides that "[t]his act shall apply to referrals for designated health services made on or after [April 8, 1992], provided that with respect to an investment interest acquired before May 1, 1992, paragraph (a) of subsection (4) of [s. 455.236] shall not apply to referrals for designated health services occurring before October 1, 1994, and provided, further, that paragraphs (b)-(g) of subsection (4) of [s. 455.236] shall be effective on July 1, 1992, and provided further, that with respect to a facility which is providing a designated health service or other health care items or service which received its certificate of occupancy and began providing that service at that facility after May 1, 1991, and before January 1, 1992, [s. 455.236](4)(a)-(g) inclusive of this act shall not apply to referrals for such designated health services and other items or services occurring before October 1, 1996."

[5]Note.—Section 395.0185(2), as amended by s. 10, ch. 92-289, provides for adoption of rules by the Agency for Health Care Administration rather than the Department of Health and Rehabilitative Services.

455.237 Kickbacks prohibited.—

(1) As used in this section, the term "kickback" means a remuneration or payment back pursuant to an investment interest, compensation arrangement, or otherwise, by a provider of health care services or items, of a portion of the charges for services rendered to a referring health care provider as an incentive or inducement to refer patients for future services or items, when the payment is not tax deductible as an ordinary and necessary expense.

(2) It is unlawful for any health care provider or any provider of health care services to offer, pay, solicit, or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients.

History.—s. 8, ch. 92-178.

455.239 Designated health care services; licensure required.—

(1) An entity, as defined in s. 455.236, which furnishes designated health care services may not operate in this state unless licensed by the Department of Health and Rehabilitative Services pursuant to subsection (2).

(2) The department shall adopt rules for licensing requirements for designated health care services including, but not limited to, rules providing for:

(a) A licensure fee of not less than $400 and not more than $1,500 to be assessed annually;

(b) Parameters of quality with respect to the provision of ancillary services by respective entities;

(c) Periodic inspection of the facilities of an entity for the purpose of evaluating the premises, operation, supervision, and procedures of the entity to ensure compliance with quality parameters as established in department rules; and

(d) The submission by an entity of information on its ownership, including identification of the owners who are health care providers, as defined in [1]s. 455.251, and each investor's percentage of ownership.

History.—s. 10, ch. 92-178.

[1]Note.—No such section exists. The definition of "health care provider" appears in s. 455.236.

455.24 Advertisement by a health care provider of free or discounted services; required statement.—In any advertisement for a free, discounted fee, or reduced fee service, examination, or treatment by a health care provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, chapter 464, chapter 466, chapter 474, or chapter 486, the following statement shall appear in capital letters clearly distinguishable from the rest of the text: THE PATIENT AND ANY OTHER PERSON RESPONSIBLE FOR PAYMENT HAS A RIGHT TO REFUSE TO PAY, CANCEL PAYMENT, OR BE REIMBURSED FOR PAYMENT FOR ANY OTHER SERVICE, EXAMINATION, OR TREATMENT WHICH IS PERFORMED AS A RESULT OF AND WITHIN 72 HOURS OF RESPONDING TO THE ADVERTISEMENT FOR THE FREE, DISCOUNTED FEE, OR REDUCED FEE SERVICE, EXAMINATION, OR TREATMENT. However, the required statement shall not be necessary as an accompaniment to an advertisement of a licensed health care provider defined by this section if the advertisement appears in a classified directory the primary purpose of which is to provide products and services at free, reduced, or discounted prices to consumers and in which the statement prominently appears in at least one place.

History.—s. 1, ch. 84-161; s. 1, ch. 85-7; s. 6, ch. 86-90; s. 13, ch. 89-124; s. 31, ch. 92-149.

455.241 Patient records; report or copies of records to be furnished.—

(1) Any health care practitioner licensed by the department or a board within the department who makes a physical or mental examination of, or administers treatment or dispenses legend drugs to, any person shall, upon request of such person or the person's legal representative, furnish, in a timely manner, without delays for legal review, copies of all reports and records relating to such examination or treatment, including X rays and insurance information. However, when a patient's psychiatric, chapter 490 psychological, or chapter 491 psychotherapeutic records are requested by the patient or the patient's legal representative, the practitioner may provide a report of examination and treatment in lieu of copies of records. Upon a patient's written request, complete copies of the patient's psychiatric records shall be provided directly to a subsequent treating psychiatrist. The furnishing of such report or copies shall not be conditioned upon payment of a fee for services rendered.

[1](2) Except as otherwise provided in s. 440.13(2), such records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, such records may be furnished without written authorization to any person, firm, or corporation which has procured or furnished such examination or treatment with the patient's consent or when compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff. Such rec-

EXHIBIT B

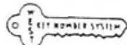
would award something extra irrespective of the testimony.

[2] The *sine qua non* of our system of trial by jury is that juries should be comprised of fair and impartial members who stand indifferent to the outcome of the proceeding. A prospective juror should be excused for cause if there is a reasonable doubt as to whether he or she will be able to render an impartial verdict based solely on the evidence and the law. *Club West, Inc. v. Tropigas of Florida, Inc.*, 514 So.2d 426 (Fla. 3d DCA 1987); *Hill v. State*, 477 So.2d 553 (Fla.1985); *Smith v. State*, 516 So.2d 43 (Fla. 3d DCA 1987); *Salazar v. State*, 564 So.2d 1245 (Fla. 3d DCA 1990).

[3, 4] Here, there was considerably more than a reasonable doubt as to the impartiality of the challenged prospective jurors. Such doubt was manifest and harmful to appellant. First, the city was forced to use its remaining peremptory challenges on prospective jurors Allen, Merrill, Horne and Gray, all of whom should have been excused for cause. Secondly, the city's counsel renewed his request that prospective jurors Johnson, Knosher, Bohannon and Carver be excused for cause. True, he did not specifically request additional peremptory challenges in so many words. However, had his renewed challenges for cause directed to the prospective jurors upon whom he had been required to expend his remaining peremptory challenges been granted, his peremptory challenges would have been restored and available to challenge the jurors Johnson, Knosher, Bohannon and Carver, who likewise should have been excused for cause. Thus, we view his unavailing renewed cause challenges as the functional equivalent of a request for additional peremptory challenges which was denied, thereby entitling him to raise the matter on appeal. To hold otherwise would be to embrace form and eschew substance.

REVERSED and REMANDED.

WIGGINTON and ALLEN, JJ., concur.



FLORIDA OPTOMETRIC ASSOCIATION and Alan P. Fisher, O.D., Appellants,

v.

DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF OPTICIANRY, Professional Opticians of Florida, Inc., and Charles Arnold, Appellees.

No. 89-2375.

District Court of Appeal of Florida, First District.

Sept. 5, 1990.

Optometric association and licensed optometrist appealed from declaratory statement of Board of Opticianry that opticians are permitted to use vision screening equipment to check customers' visual acuity. The District Court of Appeal, Allen, J., held that: (1) optometrists had standing to intervene and request formal hearing, and (2) failure of Board to provide optometrists with notice of declaratory statement proceedings, in manner prescribed by administrative code, with opportunity to petition for hearing under Administrative Procedure Act within 21-day period thereafter, deprived optometrists of clear point of entry due persons with standing to initiate proceedings under Act, and thus failure of optometrists to "timely" intervene in formal hearing proceedings, which were already under way, but of which optometrists were not even aware, did not constitute waiver of their right to clear point of entry.

Declaratory statement set aside and remanded.

1. Administrative Law and Procedure ⟹451

Physicians and Surgeons ⟹10

Optometrists had standing to intervene and request formal hearing with respect to

opticians' request for declaratory statement from Board of Opticianry that opticians could use vision screening equipment to check customers' visual acuity; optometrists alleged invasion of statutorily delineated, exclusive area of practice. West's F.S.A. § 120.57.

2. Administrative Law and Procedure ⇐450

Under administrative code, persons whose substantial interest may be affected by agency decision, such as final agency action of issuance of declaratory statement, must be provided a clear point of entry into formal proceedings, in other words, a clear opportunity to file petition for formal proceedings.

3. Administrative Law and Procedure ⇐452

Provision of administrative code requiring persons requesting hearing on agency decision to file petition with agency within 21 days of receipt of written notice of decision or within 21 days of receipt of written notice of intent to render decision does not apply to every agency decision; rule itself provides that different notice requirements may be prescribed by law or agency rule.

4. Administrative Law and Procedure ⇐505

Agency's notice of decision or intent to render decision must be sufficient to give persons with standing to initiate formal proceedings a clear point of entry to either initiate formal proceedings or intervene in already-existing proceedings directed to same agency decision. West's F.S.A. § 120.57.

5. Administrative Law and Procedure ⇐450, 451

Right of persons whose substantial interests may be affected by declaratory statement of agency to initiate formal proceedings or intervene in already-existing proceedings is not waived, unless such persons have failed to petition for formal hearing within period specified following notice given under applicable rule. West's F.S.A. § 120.57.

6. Administrative Law and Procedure ⇐505

Physicians and Surgeons ⇐10

Board of Opticianry's published notice of declaratory statement petition failed to comply with administrative code, where petition neither specified time limit for requesting hearing, nor referenced the relevant procedural rules.

7. Administrative Law and Procedure ⇐451

Physicians and Surgeons ⇐10

Optometrists' petition to intervene in declaratory statement proceedings before Board of Opticianry was timely under administrative code, where it was filed just 11 days following publication of notice of petition for declaratory statement, even though such filing occurred only three days before meeting of Board.

8. Administrative Law and Procedure ⇐451

Physicians and Surgeons ⇐10

On opticians' petition for declaratory statement as to whether they could use vision screening equipment to check customers' visual acuity, failure of Board of Opticianry to provide optometrists with notice of declaratory statement proceedings, in manner prescribed by administrative code, and with opportunity to petition for hearing within 21-day period thereafter, deprived optometrists of clear point of entry due persons with standing to initiate administrative proceedings, and thus failure of optometrists to "timely" intervene in formal hearing proceedings, which were already under way, but of which optometrists were not even aware, did not constitute waiver of their right to clear point of entry. West's F.S.A. § 120.57.

9. Administrative Law and Procedure ⇐508

Provision of Administrative Procedure Act regarding hearings on agency decisions which affect substantial interests is inapplicable to petition for declaratory statement limited to narrow issue on applicability of specified statutory provision or any rule or order of agency to petitioner in his particular set of circumstances only, since such

petitioner has no right to hearing on his petition, and no one other than petitioner will normally be affected by declaratory statement. West's F.S.A. §§ 120.565, 120.57.

10. Administrative Law and Procedure ⟹470

Provision of Administrative Procedure Act on hearings on agency decisions which affect substantial interests is applicable where question presented by petition for declaratory statement is not narrowly drawn, and thus when substantial interests of other parties may be implicated. West's F.S.A. §§ 120.565, 120.57.

11. Administrative Law and Procedure ⟹508

Declaratory statements are not to be used as vehicle for adoption of broad agency policies, nor should they be used to provide interpretations of statutes, rules or orders which are applicable to entire class of persons. West's F.S.A. § 120.565.

12. Administrative Law and Procedure ⟹508

Declaratory statements should only be granted where petition has clearly set forth specific facts and circumstances which show that question presented relates only to petitioner and his particular set of circumstances. West's F.S.A. § 120.565.

13. Administrative Law and Procedure ⟹508

Petitions for declaratory statements which provide only cursory factual recitation or which use broad, undefined terms, such as "vision screening equipment" and "visual acuity," should be carefully scrutinized. West's F.S.A. § 120.565.

14. Administrative Law and Procedure ⟹508

Declaratory statement petitions by associations, rather than individuals, should be inherently suspect. West's F.S.A. § 120.565.

15. Administrative Law and Procedure ⟹508

Agency should either decline to issue declaratory statement or should comply with statutory provision governing rule making, when agency is called upon to issue declaratory statement in response to question which is not limited to specific facts and specific petitioner, and which would require response of such a general and consistent nature as to meet definition of a rule. West's F.S.A. §§ 120.54, 120.565.

Leonard A. Carson, John D.C. Newton, II, and Kimberly L. King of Carson & Linn, P.A., Tallahassee, for appellants.

Robert A. Butterworth, Atty. Gen., and Theresa M. Bender, Asst. Atty. Gen., Tallahassee, for appellee Department of Professional Regulation, Bd. of Opticianry.

Wilson Jerry Foster, Tallahassee, for appellees Professional Opticians of Florida, Inc., and Charles Arnold.

ALLEN, Judge.

This is an appeal by the Florida Optometric Association and Allen P. Fisher, an optometrist licensed under Chapter 463, Florida Statutes (optometrists) from a declaratory statement[1] issued by the Board of Opticianry (Board). The optometrists argue (1) that the Board erred in finding that they lacked standing to participate in the proceedings; (2) that the Board erred in finding that their petition to intervene in the proceedings was untimely; and (3) that the declaratory statement addressed a question of general applicability and, therefore, should have been addressed by rule, rather than by declaratory statement. Because our agreement with the optometrists' first two arguments requires us to set aside the declaratory statement, we do not decide the third issue presented.

On March 30, 1989, appellees, Professional Opticians of Florida, Inc., and Charles Arnold, an optician licensed under Chapter 484, Florida Statutes, filed a petition for declaratory statement with the Board. The

1. Section 120.565, Florida Statutes.

petition first acknowledged that Chapter 484, Florida Statutes, defines "opticianry," [2] and provides that "[i]t is unlawful for any optician to engage in the diagnosis of the human eyes, attempt to determine the refractive powers of the human eyes, or, in any manner, attempt to prescribe for or treat diseases or ailments of human beings[,]" [3] and then offered the following question:

> Is an optician permitted to use vision screening equipment such as a Titmus Vision Tester to check a consumer's visual acuity (both far and near), with or without a correction?

The Titmus Vision Tester is an ophthalmic instrument designed for rapid and precise measurement of visual performance. It can be used to test near, intermediate and distance vision, for each eye alone or for both working together; muscle balance; color perception; depth perception; and peripheral vision.

In accordance with the directive of Section 120.565, Florida Statutes, the Board provided public notice of the petition in the April 21, 1989 edition of the Florida Administrative Weekly. The notice provided,

> NOTICE IS HEREBY GIVEN that the Board of Opticianry has received a Petition for Declaratory Statement from the Professional Opticians of Florida, Inc. and Charles Arnold, in which the petition asks whether an optician is permitted to use vision screening equipment to check a consumer's visual acuity, with or without a correction. The Petition has been assigned the number 89–DS–1. Copies of the Petition may be obtained from LouElla Cook, Executive Director, 130 North Monroe Street, Tallahassee, Florida 32301.

15 Fla.Admin. Weekly 1699 (April 21, 1989).

One week earlier, in the April 14, 1989 edition of the Florida Administrative Weekly, a notice of a May 5, 1989 meeting of the Board had been published. It provided:

> The Florida State Board of Opticianry will hold the following meeting to which all persons are invited:
>
> DATE AND TIME: Friday May 5, 1989, commencing at 9:00 A.M.
>
> PLACE: Department of Professional Regulation, Conference Room, 130 North Monroe Street, Tallahassee, Florida 32399–0750
>
> PURPOSE: To conduct Regular Board Business. If a person decides to appeal any decision made by the Board with respect to any matter considered at this meeting or hearing, he will need a record of the proceedings, and for such purpose, he may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence from which the appeal is to be based.
>
> A copy of any item on the agenda may be obtained by writing to: Ms. LouElla Cook, Executive Director, Board of Opticianry, 130 North Monroe Street, Tallahassee, Florida 32399–0750. You will be charged $.17 per page for the number of copies desired.

15 Fla.Admin. Weekly 1599 (April 14, 1989).

The agenda for the May 5, 1989, meeting listed several matters as being set for "hearings" and "final order action," but agenda item IV, which was the only reference to the petition for declaratory statement, merely provided,

> IV. PETITION FOR DECLARATORY STATEMENT 89 DS–1
>
> A. PROFESSIONAL OPTICIANS OF FLORIDA & CHARLES ARNOLD.

Further, the agency file for 89 DS–1 gave no indication as to what action, if any, was to be taken on the petition at the May 5 meeting.

On May 2, 1989, the optometrists filed a petition to intervene in the declaratory statement proceedings and requested a formal hearing under Section 120.57(1), Florida Statutes. In their petition, the optometrists asserted that their substantial interests would be determined by an affirmative answer to the question presented in the petition for declaratory statement. Specifi-

2. Section 484.002(3), Florida Statutes.

3. Section 484.013(3), Florida Statutes.

cally, they asserted that the Titmus Eye Tester can be used to determine the refractive power of the human eyes, and that, while such determinations are made by optometrists as part of their practice, opticians are expressly prohibited from making such determinations. The optometrists' petition contended, therefore, that an affirmative answer to the question presented in the petition for declaratory statement would permit licensed opticians to engage in the practice of optometry, contrary to the provisions of Chapters 463 and 484, Florida Statutes.

At the meeting of the Board on May 5, 1989, counsel for the Board indicated that the Board would be conducting a hearing on the petition for declaratory statement. Counsel for the optometrists was present and made a brief argument in support of the petition to intervene and for a formal hearing under Section 120.57, Florida Statutes. The Board took the optometrists' petition under advisement, but did not allow them to participate as parties in the hearing. The hearing consisted of presentation of testimony by Charles Arnold and argument by counsel for Arnold and the Professional Opticians of Florida, Inc.

At the August 4, 1989 meeting of the Board, the Board voted to deny the optometrists' petition for two reasons: because it was untimely and because the optometrists lacked standing to participate.[4] As to the petition for declaratory statement, the Board voted to approve the following response,

> ORDERED AND ADJUDGED that use of the Titmus Vision Tester and similar vision screening equipment is not prohibited to licensed opticians to determine the visual acuity of consumers (both far and near) so long as the optician does not engage in the diagnosis of the human eye, does not attempt to determine the refractive powers of the human eyes and does not attempt to prescribe for or treat diseases or ailments of human beings.

The Board action was incorporated into a final order dated October 17, 1989. This appeal is from that final order.

The optometrists first contend that the Board erred by concluding in its final order that the optometrists had "failed to allege a substantial interest in [the declaratory statement proceedings] sufficient to warrant their intervention and [did] not have standing to participate." We agree with the optometrists' contentions.

A two-part test is applied in evaluating whether a person has alleged a "substantial interest" sufficient to entitle such person to initiate a 120.57 proceeding or intervene in proceedings already pending.[5] The person must allege:

> (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Agrico Chemical Co. v. Department of Envtl. Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), *review denied*, 415 So.2d 1359 (Fla.1982).

In *Florida Medical Ass'n v. Department of Professional Regulation*, 426 So.2d 1112 (Fla. 1st DCA 1983), we applied the *Agrico Chemical* test to a case closely analogous to the present case. There, we held that an association of medical doctors had standing to challenge a proposed rule of the Board of Optometry that would have authorized optometrists to prescribe certain legend drugs. We held that the first prong of the *Agrico Chemical* test, "injury-in-fact," was satisfied by the association's allegations of threatened injury; i.e., that absent the proposed rule, patients would have to seek the services of a physician for treatment involving use and prescription of the legend drugs. We then held that the second prong of the test, the "zone of interest" requirement, was satisfied by the association's allegation that the prescribing of the

4. The final order denying the optometrists' petition did not assert an absence of disputed issues of fact, nor do the appellees so contend on appeal. See *McDonald v. Department of Banking and Finance*, 346 So.2d 569, 578 (Fla. 1st DCA 1977).

5. See Section 120.52(12)(b) and the first sen-

legend drugs was delineated by statute as being exclusively within the authority of physicians under Chapter 458, Florida Statutes, and not within the authority of optometrists under Chapter 463, Florida Statutes. On this point, we said:

> It necessarily follows that an agency's determination of what forms of treatment are permissible or prohibited within each health care profession is within the "zone of interest" protected by the statutes. The rule at issue here, according to petitioners, allows optometrists to provide a form of treatment for which they are not qualified, and which has not been authorized by the legislature under Chapter 463. They allege further that the activities permitted by the rule are encompassed within the "practice of medicine," which the legislature has declared to be the exclusive domain of physicians licensed under Chapter 458. [footnote omitted]. The practice of medicine or attempt to practice medicine without a license is a felony of the third degree. Section 458.327 (Florida Statutes). If the contentions of appellant are correct, the rule purports to authorize acts by optometrists which are unlawful under Chapter 458, and contrary to the stated purposes of both Chapters 463 and 458.
>
> We find, contrary to the ruling of the hearing officer, that the petition in behalf of the physician and the medical associations satisfies the "zone of interest" requirement. We note appellee's contention that appellants must assert an injury solely within the "zone of interest" protected by Chapter 463. This is incorrect. Since the crux of the controversy involves the claim that Chapter 463 does not authorize the rule, it is obvious that the effect of other statutes must be considered in determining standing.

Florida Medical Ass'n v. Department of Professional Regulation, 426 So.2d at 1117.

[1] In the present case, the allegations in the optometrists' petition to intervene and for a formal hearing are virtually the same as the allegations made by the medical association in *Florida Medical*. Consequently, we find the *Florida Medical* opinion controlling and hold that the optometrists had standing to intervene and request a formal hearing.

In concluding that the optometrists lacked standing, the Board relied upon our opinion in *Florida Soc'y of Ophthalmology v. Board of Optometry*, 532 So.2d 1279 (Fla. 1st DCA 1988). We find that the Board's reliance on that case reflects a misapprehension of our holding therein. The *Florida Soc'y of Ophthalmology* case is distinguishable from the present case in several respects. For purposes of the present analysis, the most material distinction is that *Florida Soc'y of Ophthalmology* did not involve an asserted invasion of a statutorily delineated, exclusive area of practice. Consequently, the "zone of interest" prong of the *Agrico Chemical* test was not satisfied. Conversely, in the present case, invasion of a statutorily delineated, exclusive area of practice is alleged, and the "zone of interest" prong is satisfied.

Next, the optometrists argue that the Board erred in finding that their petition to intervene was untimely. Resolution of this issue requires careful analysis of the interplay of a number of statutes and administrative rules.

The Board's contention that the optometrists' petition was untimely goes as follows. The Board gave notice of the petition for declaratory statement in accordance with the provisions of Section 120.565, Florida Statutes.[6] Upon being so notified,

6. 120.565 **Declaratory statement by agencies.**— Each agency shall provide by rule the procedure for the filing and prompt disposition of peti- ... circumstances only. The agency shall give notice of each petition and its disposition in the Florida Administrative Weekly, except that edu-

persons who believed their substantial interests might be affected by the declaratory statement, including the optometrists, had the opportunity to petition to intervene in the declaratory statement proceedings. The Board has provided, by Rule 21P-8.04, Florida Administrative Code, that any person entitled to petition for a declaratory statement may do so in accordance with Chapter 28-4, Florida Administrative Code. Rule 28-4.007, Florida Administrative Code, provides that an agency may, at its discretion, hold a hearing to dispose of a petition for declaratory statement and, if a hearing is held, it shall be conducted pursuant to Section 120.57, Florida Statutes. When the decision was made to hold a Section 120.57 formal hearing as part of the Board's May 5, 1989 meeting, the Board was required to give notice of the hearing only to the *parties* to the proceeding. *See* Section 120.57(1)(b)(2), Florida Statutes. Since the opticians were the only parties, only they were given written notice that a formal hearing would be held on May 5, 1989.[7] Finally, since a Section 120.57(1) hearing was being held, Rule 28-5.207, Florida Administrative Code, which provides that petitions to intervene must be filed at least five days prior to the final hearing, was applicable. Therefore, the Board reasons, the optometrists' petition to intervene, which was filed three days before the May 5, 1989 Board meeting, was two days late. As additional support for its position, the Board contends that agenda item IV for the May 5, 1989 meeting should have alerted the optometrists that Board action was forthcoming.

The optometrists counter that neither the notices published in the April 14 and April 21, 1989 editions of the Florida Administrative Weekly, nor the agenda item for the May 5, 1989 meeting, nor the agency file, gave them any indication that the Board would be holding a 120.57(1) hearing at the May 5, 1989 meeting. Therefore, they argue that there was no way for them to know, even by great diligence, that they needed to file their petition five days prior to the hearing in order to avoid the procedural bar of Rule 28-5.207, Florida Administrative Code.[8]

[2] The statute and rules relied upon by the Board must be read in conjunction with Rule 28-5.111, Florida Administrative Code, which provides:

> 28-5.111 **Point of Entry into Proceedings.** Unless otherwise provided by law or agency rule:
>
> (1) Persons requesting a hearing on an Agency decision which does or may determine their substantial interest shall file a petition with the Agency within twenty-one (21) days of receipt of written notice of the decision, or within twenty-one (21) days of receipt of written notice of intent to render such decision; whenever possible, an Agency shall issue a written notice of intent to render a decision prior to the decision and allow persons who may be substantially affected thereby twenty-one (21) days from receipt in which to request a hearing. The notice shall state the time limit for requesting a hearing and shall reference the Agency's procedural rules.
>
> (2) Any person who receives written notice of an Agency decision or who receives written notice of intent to render a decision and who fails to request a hearing within twenty-one (21) days, shall have waived his right subsequently to request a hearing on such matters.
>
> (3) The Agency may publish notice of its decision, or of its intent to render a decision in the Florida Administrative Weekly, newspapers of general circula-

7. Although the Board contends that it gave notice to the opticians in accordance with the requirements of Section 120.57(1)(b)(2), a copy of such notice was not placed in the agency file, nor is a copy of such notice included in the record on appeal.

57(1) hearing on the petition for declaratory statement at the Board's meeting. Section 120.57(1)(a) requires formal hearings under 120.57 to be conducted by hearing officers of the Division of Administrative Hearings. Since the Board is part of the Department of Professional

tion in the area affected by such decisions and may also, where appropriate, mail copies of its notice to applicants, competitors, and interested groups. Such action by the Agency may be used in establishing petitioner's date of receiving notice.

Thus, persons whose substantial interests may be affected by agency decision, such as the "final agency action" of issuance of a declaratory statement,[9] must be provided a clear point of entry into formal proceedings; i.e., a clear opportunity to file a petition for formal proceedings. *See Manasota-88, Inc. v. Department of Envtl. Regulation*, 417 So.2d 846 (Fla. 1st DCA 1982); *Capeletti Bros., Inc. v. Department of Transp.*, 362 So.2d 346 (Fla. 1st DCA 1978), *cert. denied*, 368 So.2d 1374 (Fla.1979).

[3,4] The twenty-one day notice requirement of Rule 28–5.111 does not apply to every agency decision. The rule itself provides that different notice requirements may be prescribed by law or agency rule. Nevertheless, whether Rule 28–5.111 or some other statutory or rule notice requirement applies to a particular agency decision, the notice must be sufficient to give persons with standing to initiate 120.57 proceedings a *clear point of entry* to either initiate 120.57 proceedings or intervene in already existing proceedings directed to the same agency decision. *Capeletti Bros., Inc. v. Department of Transp., supra*, and *Gulf Coast Home Health Servs. of Fla., Inc. v. Department of Health and Rehabilitative Servs.*, 515 So.2d 1009 (Fla. 1st DCA 1987).

[5] Although the declaratory statement statute, Section 120.565, Florida Statutes, provides that an agency "shall give notice of each petition [for declaratory statement] in the Florida Administrative Weekly," the statute does not specify the contents of the notice. Nor do the declaratory statement rules specify the contents of the notice, other than the Rule 28–4.001 directive that the agency "shall give notice of each petition, briefly stating the question presented, in the manner prescribed by Section 120.565, F.S." Clearly, however, a declaratory statement is an "agency decision," and Section 120.565 indicates that a declaratory statement is "final agency action." Consequently, the right of persons whose substantial interests may be affected by such agency decisions are not waived, unless they have failed to petition for a 120.57 hearing within the period specified following notice given under the applicable rule.

[6,7] Since no statute or rule superseded Rule 28–5.111 in the declaratory statement proceedings below, the Board was required to comply with the requirements of Rule 28–5.111 in giving notice of the declaratory statement proceedings. The published notice of the declaratory statement petition obviously failed to comply with Rule 28–5.111, in that it neither specified the time limit for requesting a hearing, nor referenced the relevant procedural rules. Further, even if the published notice of the petition for declaratory statement had complied with Rule 28–5.111, the optometrists' petition would have been timely, because it was filed just eleven days following the April 21, 1989 publication.

While it is true that a failure to timely petition to intervene in existing Section 120.57 proceedings has sometimes been held to constitute a waiver of the clear point of entry, the cases so holding are clearly distinguishable from the present case. Those cases involved failure to petition to intervene for many months, or even years, following public notice of proposed agency action or existing litigation. *See, e.g., St. Joseph Hosp. of Charlotte, Fla., Inc. v. Department of Health and Rehabilitative Servs.*, 559 So.2d 595 (Fla. 1st DCA 1989) (three months); *Inverness Convalescent Center v. Department of Health and Rehabilitative Servs.*, 541 So.2d 677 (Fla. 1st DCA 1989) (three years); *Rudloe v. Florida Dep't of Envtl. Regulation*, 517 So.2d 731 (Fla. 1st DCA 1987) (four months); *Gulf Coast Home Health Servs. of Fla., Inc. v. Department of Health and Rehabilitative Servs., supra* (nine months). None of these cases suggests that failure

9. See Section 120.565, Florida Statutes.

to petition to intervene in existing proceedings within a period less than the notice period applicable for the particular agency decision involved will serve as a waiver of the right to a clear point of entry.

[8] Accordingly, we hold that the Board's failure to provide the optometrists notice of the declaratory statement proceedings, in the manner prescribed by Rule 28-5.111, and an opportunity to petition for a hearing under Section 120.57 within a twenty-one day period thereafter, deprived the optometrists of the clear point of entry due persons with standing to initiate proceedings under Section 120.57. Further, we hold that the failure of the optometrists to "timely" intervene in the formal hearing proceedings, which were already under way, but of which the optometrists were not even aware, did not constitute a waiver of their right to a clear point of entry.

[9, 10] In *McDonald v. Department of Banking and Finance*, 346 So.2d 569, 577 (Fla. 1st DCA 1977), we said,

> Except when an agency acts by formal rulemaking (Section 120.54) *or by declaratory statement concerning the applicability of a statute, rule or order (Section 120.565)*, all agency action, on appropriate challenge, will mature into an order impressed with characteristics of the APA's Section 120.57.

McDonald, 346 So.2d at 577 (emphasis supplied). This language, which is followed by a discussion of the right of persons whose substantial interests are affected by agency action to a 120.57 hearing, means that Section 120.57 is generally not implicated in proceedings under Section 120.565. When a petition for declaratory statement is limited to a narrow question "as to the applicability of a specified statutory provision or of any rule or order of the agency *as it applies to the petitioner in his particular set of circumstances only*," Section 120.565 (emphasis supplied), there will normally be no person, other than the petitioner, who will be affected by the declaratory statement. Since a person who submits such a petition has no right to a 120.57 hearing, and no other person's substantial interests are affected by the declaratory statement, Section 120.57 is simply not applicable. However, where the question presented by the petition is not narrowly drawn, the substantial interests of other parties may be implicated. In the present case, the question presented clearly had the potential for affecting the substantial interests of persons other than the petitioners, and those persons were entitled to a clear point of entry to proceedings under Section 120.57. Therefore, it was the expansive nature of the question presented in the petition for the declaratory statement under review which made Section 120.57 and Rule 28-5.111 applicable.

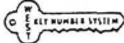
For their final point on appeal, the optometrists argue that the declaratory statement is invalid, because it addresses a question of general applicability, which should properly be addressed only by rule. Section 120.52(16), Florida Statutes, provides that a "rule," subject to certain exceptions not applicable here, is "each agency statement of *general applicability* that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency...." (Emphasis supplied). Conversely, Section 120.565, Florida Statutes, provides that a declaratory statement is merely intended to "set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency *as it applies to the petitioner in his particular set of circumstances only*." (Emphasis supplied). In reliance upon these definitions and the general scheme of Chapter 120, we have held that declaratory statements may not be used as a shortcut method of announcing a rule, thereby avoiding the rule adoption procedures of Section 120.54, Florida Statutes. *See Department of Professional Regulation, Bd. of Professional Engineers v. Florida Soc'y of Professional Land Surveyors*, 475 So.2d 939, 943 (Fla. 1st DCA 1985); *Mental Health Dist. Bd., II-B v. Florida Dep't of Health and Rehabilitative Servs.*, 425 So.2d 160, 162 (Fla. 1st DCA 1983); *Department of Admin. v. Harvey*, 356 So.2d 323, 325 (Fla. 1st DCA 1977); and *Price*

by the optometrists that the declaratory statement under review should be set aside, because it is limited to neither a particular petitioner, nor a particular set of circumstances. While the optometrists' argument on this point may have merit, we find it unnecessary to decide the issue presented, because the declaratory statement must be set aside as a result of our holdings under the first two arguments presented.

[11-15] We do observe, however, that declaratory statements and rules serve clearly distinct functions under the scheme of Chapter 120. Although the line between the two is not always clear, it should be remembered that declaratory statements are not to be used as a vehicle for the adoption of broad agency policies. Nor should they be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons. Declaratory statements should only be granted where the petition has clearly set forth specific facts and circumstances which show that the question presented relates only to the petitioner and his particular set of circumstances. Thus, petitions which provide only a cursory factual recitation or which use broad, undefined terms, such as "vision screening equipment" and "visual acuity," should be carefully scrutinized. Similarly, petitions by associations, rather than individuals, should be inherently suspect. When an agency is called upon to issue a declaratory statement in response to a question which is not limited to specific facts and a specific petitioner, and which would require a response of such a general and consistent nature as to meet the definition of a rule, the agency should either decline to issue the statement or comply with the provisions of Section 120.54 governing rulemaking.

Accordingly, we set aside the declaratory statement and remand this cause to the Board for further proceedings in accordance with this opinion.

ZEHMER and MINER, JJ., concur.



SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate, Appellant,

v.

Thomas F. ICARD, Jr., and Paul Icard, as Trustees; Thomas F. Icard, Jr., and Gene S. Icard, as Personal Representatives of the Estate of Thomas F. Icard, Deceased; and Gene S. Icard, Appellees.

No. 89-03005.

District Court of Appeal of Florida, Second District.

Sept. 7, 1990.

Rehearing Denied Oct. 10, 1990.

Inverse condemnation action was brought by residential property owners against airport authority. The Circuit Court, Manatee County, Scott M. Brownell, J., entered partial summary judgment finding that a taking had occurred, and airport authority appealed. The District Court of Appeal, Patterson, J., held that: (1) taking could not be found absent proof of substantial loss in market value, but (2) evidence of altitude and frequency of flights and amount of interference with enjoyment of the property was sufficient to support a taking, provided that owners could prove substantial market value damage.

Affirmed in part, reversed in part, and remanded.

1. Eminent Domain ⇐2(1.1)

A taking by airport authority of residential property by reason of aircraft overflights could not be found, and owners were not entitled to inverse condemnation relief, in absence of proof of substantial loss in market value.

2. Eminent Domain ⇐2(1.1), 300

Evidence of altitude of aircraft flights over residential property just over a mile

EXHIBIT C

LEHAN, Judge.

Defendant appeals from a judgment in favor of plaintiffs ejecting defendant from certain disputed land. The apparent basis for the judgment was that plaintiffs had acquired title to the land by adverse possession for the requisite period. The land was contiguous to land to which plaintiffs had record title. There was testimony that the disputed land and the land to which plaintiffs had record title had been enclosed for over seven years by a four foot high, galvanized chain link fence with the posts set in concrete. Defendant had record title to, and paid taxes on, the disputed land. We affirm.

Plaintiffs did not acquire title to the disputed land by adverse possession "without color of title" because they did not pay taxes on that land. *See Seddon v. Harpster*, 403 So.2d 409, 410 (Fla.1981). Defendant contends that plaintiffs also did not acquire title by adverse possession "with color of title." However, under the interpretation placed upon section 95.16, Florida Statutes (1983), in *Seddon* plaintiffs acquired title by adverse possession "with color of title" even though they did not have record title to the disputed land because "the disputed property ... is contiguous to the described land [described in plaintiffs' record title] and 'protected by a substantial enclosure.'" 403 So.2d at 411.

Under the facts of this case we cannot say the trial court erred in rejecting defendant's arguments that rezoning by plaintiffs' predecessor in title which did not interrupt plaintiffs' physical possession interrupted the statutory adverse possession period, that the chain link fence described above was not a "substantial enclosure" within the meaning of section 95.16, and that the possession by plaintiffs was not open and notorious because the fence became covered by vegetation.

Affirmed.

SCHOONOVER, J., ...

FEDERATION OF MOBILE HOME OWNERS OF FLORIDA, INC., Appellant,

v.

DEPARTMENT OF BUSINESS REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, Appellee.

No. 85-684.

District Court of Appeal of Florida, Second District.

Dec. 4, 1985.

Federation of Mobile Homeowners petitioned Department of Business Regulation, Division of Land Sales, Condominiums and Mobile Homes, for declaratory statement as to various questions involving Division's interpretations of certain undefined statutory terms. The Division dismissed petition on grounds that Federation failed to show it was affected, and Federation appealed. The District Court of Appeal, Lehan, J., held that Federation had standing to sue.

Reversed and remanded.

1. Declaratory Judgment ⇐300

Federation of mobile homeowners had standing to sue Department of Business Regulation, under West's F.S.A. § 120.565, for declaratory statement regarding certain undefined terms in Mobile Home Act, West's F.S.A. § 723.001 et seq., regarding set of circumstances involving at least three different mobile home parks containing over 200 mobile home tenants including members of federation.

2. Declaratory Judgment ⇐300

Failure of federation of mobile homeowners to allege specific number of members substantially affected by regulations

from having standing, where, although petition was on behalf of residents of three named mobile home parks, reference was to "not less than three" and "at least three" such parks, and stated that federation was constantly presented with questions regarding problems presented in request for declaratory statement.

3. Declaratory Judgment ⟹300

It was not necessary for association to allege with specificity each and every member affected in petition for declaratory statement, under West's F.S.A. 120.565; allegation necessary to obtain declaratory statement was not identical to "case or controversy" requirement for declaratory judgment suits.

John T. Allen, Jr. and Christopher P. Jayson of John T. Allen, Jr., P.A., St. Petersburg, for appellant.

Robin H. Conner and Karl M. Scheuerman, Staff Attys., Department of Business Regulation, Tallahassee, for appellee.

LEHAN, Judge.

The Federation of Mobile Home Owners of Florida, Inc. (the Federation) appeals the dismissal by the Department of Business Regulation, Division of Land Sales, Condominiums and Mobile Homes (the Division) of the Federation's petition for a declaratory statement pursuant to section 120.565, Florida Statutes (1983). The Federation is alleged to represent tenants in mobile home parks throughout Florida. The petition sought a declaratory statement as to various questions involving the Division's interpretations of certain undefined terms in chapter 723, Florida Statutes (Supp.1984), the Florida Mobile Home Act. Those questions are alleged to relate to a set of circumstances outlined in the petition which involve at least three different mobile home parks containing members of the Federation. It is indicated that each park contains over 200 mobile home tenants. The questions by their nature would seem to have general application to mobile home owners. It is alleged that the Federation is "barraged" with questions from its members in that regard and that the Federation needs the declaratory statement in order to advise its members. The Division's order dismissing the petition did so on the grounds that the Federation "failed to demonstrate that [it] is affected...." We reverse.

The grounds relied upon by the Division were of the type specifically rejected by the Florida Supreme Court in *Florida Home Builders Association v. Department of Labor & Employment Security*, 412 So.2d 351 (Fla.1982), and by the First District Court of Appeal in *Farmworker Rights Organization, Inc. v. Department of Health & Rehabilitative Services*, 417 So.2d 753 (Fla. 1st DCA 1982). The Division argues that *Florida Optometric Association v. Department of Professional Regulation*, 399 So.2d 6 (Fla. 1st DCA 1981), is the only case in point as to requirements for declaratory statements under section 120.565. *Florida Optometric*, which involved a request by certain associations to the Department of Professional Regulation for a declaratory statement as to the applicability to certain hypothetical circumstances of an agency rule, held that the associations in that case did not have standing to request such a statement because "they did not establish or allege that the rule had any potential impact upon the associations' interests as entities, or in any way applied to a particular set of circumstances involving the associations themselves." 399 So.2d at 6. However, *Florida Optometric* relied upon *Department of Labor & Employment Security, Division of Labor, Florida Home Builders Association v. Florida Building Trades Council*, 392 So.2d 21 (Fla. 1st DCA 1981), and *Florida Department of Education v. Florida Education Association/United AFT–AFL–CIO*, 378 So.2d 893 (Fla. 1st DCA 1979), and both of those cases were specifically overruled in *Florida Home Builders*.

Florida Home Builders involved a challenge to an agency rule under section 120.56. In that case the Florida Supreme Court held that "a trade association does

have standing under section 120.56(1) to challenge the validity of an agency rule on behalf of its members when that association fairly represents members who have been substantially affected by the rule." 412 So.2d at 352. The requirements for standing on the part of an association were spelled out as follows:

> [W]e have concluded that a trade or professional association should be able to institute a rule challenge under section 120.56 even though it is acting solely as the representative of its members. To meet the requirements of section 120.-56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.

412 So.2d at 353–54.

The Division argues that it should not be required to issue legal advice or to answer questions propounded out of curiosity. However, the Federation has made a showing of more than curiosity, and under the types of circumstances involved here the argument as to the giving of legal advice would more appropriately be addressed to the legislature. As the Florida Supreme Court said in *Florida Home Builders*, "Expansion of public access to the activities of governmental agencies was one of the major legislative purposes of the new Administrative Procedure Act." 412 So.2d at 352–53 (footnote omitted).

[1] The Division also argues that neither *Florida Home Builders* nor *Farmworker* involved a petition for a declaratory statement under section 120.565. *Florida Home Builders* involved a suit under section 120.56(1), Florida Statutes (1979), to challenge the validity of an agency rule. *Farmworker* involved a request for a formal administrative proceeding under section 120.57(1). However, just as the First standing requirements for associations as set forth in *Florida Home Builders* should be extended to section 120.57(1) proceedings," 417 So.2d at 754, we conclude that those same standing requirements should apply to section 120.565 proceedings. The Florida Supreme Court said in *Florida Home Builders*, after its foregoing characterization of a purpose of the Administrative Procedure Act as being to expand public access to governmental agencies,

> In our view, the refusal to allow this builders' association, or any similarly situated association, the opportunity to represent the interests of its injured members in a rule challenge proceeding defeats this purpose by significantly limiting the public's ability to contest the validity of agency rules. While it is true that the "substantially affected" members of the builders' association could individually seek determinations of rule invalidity, the cost of instituting and maintaining a rule challenge proceeding may be prohibitive for small builders. Such a restriction would also needlessly tax the ability of the Division of Administrative Hearings to dispose of multiple challenges based upon identical or similar allegations of unlawful agency action.

412 So.2d at 353. We have no reason to believe that there is any determinative difference between the foregoing purpose of the rule challenge proceeding in *Florida Home Builders* and the purpose of this proceeding by an association under section 120.565, both proceedings having been initiated under the Administrative Procedure Act. The standing requirements have been met in the petition in this case.

[2] The Division alternatively argues that those standing requirements have not been met because the petition only deals with three mobile home parks which comprise only a small fraction of the owners represented by the Federation. However, as we have said, the petition, while referring to three mobile home parks, is on behalf of the residents of those parks and

least three" such parks. It also alleges that "[t]he Federation ... is constantly barraged with questions from its members and problems as are posed in this Request for Declaratory Statement. The Federation needs to know the Division's answer and how it will proceed in questions such as this in order to advise its members...." While the petition could have more specifically alleged the number of members substantially affected, we believe the threshold standing requirements of *Florida Home Builders* have been met.

[3] The Division further argues that no specific fact situations have been alleged in that the petition does not identify the Federation's members actually involved and that an actual present practical need for a declaratory statement must be shown. The Division cites *Couch v. State,* 377 So.2d 32 (Fla. 1st DCA 1979), as standing for the proposition that to obtain a declaratory statement under section 120.565 the "case or controversy" principles for declaratory judgments under chapter 86, Florida Statutes, must be followed. However, we do not believe it should be necessary in a situation like this for an association to allege with specificity each and every member affected. Also, in *Florida Home Builders* the Florida Supreme Court referred to the "case or controversy" requirement as to declaratory judgment suits before it set forth its above quoted standing requirements for declaratory statements under section 120.565. To the extent that those requirements for declaratory statements may be different from requirements for declaratory judgment suits, we must presume the Florida Supreme Court so intended.

This opinion is limited to only the issue of standing. We do not address whether all the questions posed by the Federation can or should be answered. We hold only that the Federation has standing to seek to have these questions answered.

Reversed and remanded for proceedings consistent herewith.

GRIMES, A.C.J., and CAMPBELL, J., concur.

CONTINENTAL COFFEE COMPANY OF FLORIDA and Harold Freund Baking Company of Florida, Appellants,

v.

Morris SKLAR, Appellee.

No. 85-704.

District Court of Appeal of Florida, Second District.

Dec. 4, 1985.

Trustee brought action against lessees for unlawful detainer and for damages for injury to leased property. The Circuit Court, Pinellas County, William L. Walker, J., awarded damages and held that lessees unlawfully occupied premises, and lessees appealed. The District Court of Appeal, Schoonover, J., held that: (1) substantial competent evidence existed to support imposition of damages on lessees, and (2) by entry into stipulation allowing lessees to possess property for period of time past expiration of oral lease, trustee lost right to claim that property was being held without consent.

Affirmed in part and reversed in part.

1. Landlord and Tenant ⟸55(3)

Substantial competent evidence supported imposition of damages on lessees for damage to leased property.

2. Stipulations ⟸14(1)

By entering into a stipulation allowing lessees to possess property for a period of time past expiration of oral lease, trustee lost right to claim that property was being held without consent. West's F.S.A. § 82.04(1).

Hywel Leonard of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for appellants.

EXHIBIT D

ose services in any cost reporting peod beginning on or after January 1, 74 but before April 28, 1988, may carry rward costs that are unreimbursed ider paragraph (b) of this section for e two succeeding cost reporting peris. However, no recovery may be ade in any period in which costs are ireimbursed because a provider's ists exceed the limitations on reimrsable costs (§ 413.30) or the ceiling the rate of hospital cost increases 413.40).

(2) *Reimbursement as a result of carryer.* The provider is reimbursed for the sts that are carried forward to a sucding cost reporting period—

(i) If total charges for services proded in that subsequent period exceed e total reasonable cost of the serves; and

(ii) To the extent that accumulation the costs being carried forward and e costs for the services provided in at subsequent period do not exceed e customary charges for those serves.

(3) *Two succeeding periods less than 24 onths.* If the two succeeding cost reorting periods are less than 24 full calr months, the provider may carry ard the unreimbursed costs for one iditional cost reporting period.

(4) *Example.* In the cost reporting peod ending September 30, 1982, a proider's reasonable costs were $100,000. he provider's customary charges for iose services were $90,000. The proider is reimbursed $90,000 less any deuctible and coinsurance amounts but permitted to carry forward the unrenbursed reasonable costs of $10,000 for e next two succeeding cost reporting eriods. If, in the cost reporting period nding September 30, 1983, customary harges to beneficiaries exceeded the asonable costs for those services by 10,000 or more, and the provider had no osts unreimbursed under § 413.30 or 413.40, the provider would recover the ntire $10,000 previously not reimursed. If, however, beneficiary charges or that cost reporting period exceeded osts by only $8,000, this amount 8,000) would be added to the provider's reimbursable costs for this period. he balance of the unreimbursed mount ($2,000) would be carried forard to the next cost reporting period.

(5) *New providers*—(i) *General rule.* A new provider whose cost reporting period begins before April 28, 1988, may carry forward costs that are unreimbursed from previous periods, as described in paragraph (b) of this section, during a provider's base period. The base period includes any cost reporting period beginning on or after January 1, 1974, and ending on or before the last day of its third year of operation. The unreimbursed costs may be carried forward for the five succeeding cost reporting periods. However, no recovery may be made in any period in which costs are unreimbursed because a provider's costs exceed the limitations on reimbursable costs (§ 413.30) or the ceiling on the rate of hospital cost increases (§ 413.40).

(ii) *Reimbursement as a result of carryover.* The new provider is reimbursed for the costs that are carried forward to a succeeding cost reporting period—

(A) If total charges for the services provided in that subsequent period exceed the total reasonable cost of the services; and

(B) To the extent that accumulation of the costs being carried forward and the costs for the services provided in that subsequent period do not exceed the customary charges for those services.

(iii) *Five succeeding periods less than 60 months.* If the five succeeding cost reporting periods are less than 60 full calendar months, the provider may carry forward the unreimbursed costs for one additional cost reporting period.

(iv) *Example.* A provider begins its operations on March 5, 1972. However, it begins to participate in the Medicare program as of January 1, 1973, and reports on a calendar year basis. Because the provider would be subject to the lesser of cost or charges principle for its cost reporting period beginning with January 1, 1974, it would be permitted to accumulate any unreimbursed costs (excess of costs over its charges) incurred during this reporting period. Therefore, because this cost reporting period ends before the end of the third year of operation, its carryover period would be the succeeding five cost reporting periods ending with December 31, 1979. If this provider had begun its operation on July 1, 1973, and become a participating provider as of the same date (with a fiscal year ending June 30), it would have been able to accumulate any unreimbursed costs for the two cost reporting periods ending June 30, 1975, and June 30, 1976. Its carryover period would then be the five cost reporting periods ending no later than June 30, 1981, in the case of costs unreimbursed in either of the reporting periods ending June 30, 1975, or June 30, 1976.

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§ 413.17 Cost to related organizations.

(a) *Principle.* Except as provided in paragraph (d) of this section, costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization. However, such cost must not exceed the price of comparable services, facilities, or supplies that could be purchased elsewhere.

(b) *Definitions*—(1) *Related to the provider.* Related to the provider means that the provider to a significant extent is associated or affiliated with or has control of or is controlled by the organization furnishing the services, facilities, or supplies.

(2) *Common ownership.* Common ownership exists if an individual or individuals possess significant ownership or equity in the provider and the institution or organization serving the provider.

(3) *Control.* Control exists if an individual or an organization has the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization or institution.

(c) *Application.* (1) Individuals and organizations associate with others for various reasons and by various means. Some deem it appropriate to do so to assure a steady flow of supplies or services, to reduce competition, to gain a tax advantage, to extend influence, and for other reasons. These goals may be accomplished by means of ownership or control, by financial assistance, by

management assistance, and other ways.

(2) If the provider obtains items of services, facilities, or supplies from an organization, even though it is a separate legal entity, and the organization is owned or controlled by the owner(s) of the provider, in effect the items are obtained from itself. An example would be a corporation building a hospital or a nursing home and then leasing it to another corporation controlled by the owner. Therefore, reimbursable cost should include the costs for these items at the cost to the supplying organization. However, if the price in the open market for comparable services, facilities, or supplies is lower than the cost to the supplier, the allowable cost to the provider may not exceed the market price.

(d) *Exception.* (1) An exception is provided to this general principle if the provider demonstrates by convincing evidence to the satisfaction of the fiscal intermediary (or, if the provider has not nominated a fiscal intermediary, HCFA), that—

(i) The supplying organization is a bona fide separate organization;

(ii) A substantial part of its business activity of the type carried on with the provider is transacted with others than the provider and organizations related to the supplier by common ownership or control and there is an open, competitive market for the type of services, facilities, or supplies furnished by the organization;

(iii) The services, facilities, or supplies are those that commonly are obtained by institutions such as the provider from other organizations and are not a basic element of patient care ordinarily furnished directly to patients by such institutions; and

(iv) The charge to the provider is in line with the charge for such services, facilities, or supplies in the open market and no more than the charge made under comparable circumstances to others by the organization for such services, facilities, or supplies.

(2) In such cases, the charge by the supplier to the provider for such services, facilities, or supplies is allowable as cost.

Subpart B—Accounting Records and Reports

§ 413.20 Financial data and reports.

(a) *General.* The principles of cost reimbursement require that providers maintain sufficient financial records and statistical data for proper determination of costs payable under the program. Standardized definitions, accounting, statistics, and reporting practices that are widely accepted in the hospital and related fields are followed. Changes in these practices and systems will not be required in order to determine costs payable under the principles of reimbursement. Essentially the methods of determining costs payable under Medicare involve making use of data available from the institution's basis accounts, as usually maintained, to arrive at equitable and proper payment for services to beneficiaries.

(b) *Frequency of cost reports.* Cost reports are required from providers on an annual basis with reporting periods based on the provider's accounting year. In the interpretation and application of the principles of reimbursement, the fiscal intermediaries will be an important source of consultative assistance to providers and will be available to deal with questions and problems on a day-to-day basis.

(c) *Recordkeeping requirements for new providers.* A newly participating provider of services (as defined in § 400.202 of this chapter) must make available to its selected intermediary for examination its fiscal and other records for the purpose of determining such provider's ongoing recordkeeping capability and inform the intermediary of the date its initial Medicare cost reporting period ends. This examination is intended to assure that—

(1) The provider has an adequate ongoing system for furnishing the records needed to provide accurate cost data and other information capable of verification by qualified auditors and adequate for cost reporting purposes under section 1815 of the Act; and

(2) No financial arrangements exist that will thwart the commitment of the Medicare program to reimburse providers the reasonable cost of services furnished beneficiaries. The data