

HACKENSACK UNIVERSITY MEDICAL
CENTER,

Plaintiff-Appellant,

v.

NEW JERSEY DEPARTMENT OF HEALTH
AND SENIOR SERVICES, HEATHER
HOWARD, in her official capacity :
as COMMISSIONER OF THE NEW
JERSEY DEPARTMENT OF HEALTH AND
SENIOR SERVICES, THE VALLEY
HOSPITAL, INC., and ENGLEWOOD
HOSPITAL AND MEDICAL CENTER,

Defendants-Respondents.

: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION

: DOCKET NO. A-3193-09T1

: Civil Action

:
: On Appeal From a Final Agency
: Decision of the New Jersey
: Department of Health & Senior
: Services, via Transfer from
: the Superior Court of New
: Jersey, Law Division, Bergen
: County

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APPELLATE DIVISION

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT
HACKENSACK UNIVERSITY MEDICAL CENTER

FEB 23 2011

SUPERIOR COURT
OF NEW JERSEY

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PRELIMINARY STATEMENT

The issue presented by this appeal could not be more straightforward: the Permit Extension Act of 2008 (the "Act"), as amended, tolled the running of expiration dates on all development approvals in effect for the duration of the prescribed extension period. Appellant HUMC seeks a declaratory judgment that an approval embedded within a 2007 certificate of need decision allowing Pascack Valley Hospital ("PVH") to close, was tolled by the Act. That approval - the preservation of PVH's operating license for 24-months notwithstanding the closure - is squarely within the expansive language of the statute.

Stripped of all surplusage, the respondents' arguments collectively reduce to two unpersuasive points. First, respondents assert that the 2007 CN is not an "approval" because the immediate result of that decision was the closure, and not the opening of a hospital. This argument ignores, however, that embedded within the 2007 CN was the decision, contrary to the Department's established practice, to preserve the hospital's operating license for 24-months. The Department does not dispute that the purpose in preserving the license, rather than terminating it, was to allow an opportunity for PVH to re-open under new ownership without having to pursue the more cumbersome de novo CN process for opening a new facility. Thus, to the

extent that the preservation of the operating license was a regulatory act that allowed the resumption in hospital operations to proceed to the next step, it was plainly an approval within the meaning of the Act. Respondents' singular focus on the initial consequence of the 2007 CN asks this Court to turn a blind eye to the entirety of the Department's decision.

Second, respondents assert that the decision to grant the license re-activation right is not an approval because it is not the "final" step in allowing the hospital to re-open. Before that could happen, the Department would still have to grant HUMC's still-pending application to assume ownership of, and to re-open PVH¹. That argument should be rejected. The Act does not *only* apply to final development approvals; on its face, the statutory language applies to any regulatory approval that advances a project. Since the decision to preserve the operating license was a key step in allowing the re-opening of the hospital, it is an approval within the meaning of the Act.

Accordingly, the Court should issue a declaratory judgment holding that the 2007 CN decision to preserve PVH's operating

¹After HUMC filed its opening brief, the Department issued a call for de novo certificates of need to open new acute care hospitals serving the County of Bergen. This represents an alternative and independent route to seek the re-opening of Pascack Valley Hospital, and an option that HUMC intends to pursue.

license for 24-months was an approval within the meaning of the Act, the expiration of which is tolled until June 30, 2013.

ARGUMENT

**THE 2007 CERTIFICATE OF NEED IS AN
APPROVAL FOR A DEVELOPMENT WITHIN
THE MEANING OF THE PERMIT
EXTENSION ACT**

The operative language of the Permit Extension Act of 2008 is quite simple and provides, in relevant part, that "for any governmental approval in existence during the extension period, the running of the period of approval is automatically suspended for the extension period." See N.J.S.A. 40:55D-136.4(a). As explained in HUMC's opening brief, the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 et seq. ("HCFPA") requires a health care facility owner to obtain a certificate of need to initiate, expand, modify or terminate a regulated health care service, including an acute care hospital, or to transfer the ownership thereof. If a new service is being initiated, an operating license is issued after the Department grants a certificate of need, and, further, after the recipient of the certificate of need demonstrates compliance with the Department's substantive licensing care standards. See N.J.A.C. 8:43G-2.2 and -2.5.

If a service is terminated, the default result is revocation of the underlying operating license and the service

may only be reinitiated in response to a de novo call for certificates of need. N.J.A.C. 8:43G-2.5. Here, and in admitted recognition of the fact that the Department wanted to preserve the right to re-open PVH without a time-consuming call process, the Commissioner approved the closure of the hospital subject to the retention of the operating license. (Hb at 7)² ("The Department allowed the retention of the license in order to facilitate the submission by a potential purchaser of an application for a CN to approve the transfer of ownership of PVH..."). The net result of that decision is that a subsequent purchaser would simply need to obtain certificate of need approval to transfer ownership. "[A]n application for a CN to transfer ownership of an acute care hospital does not require a call, thus allowing the applicant to have the Department consider its application without a prior finding of need." (Hb at 4) (citing N.J.A.C. 8:33-3.3).

The Department's decision to preserve the operating license thus carries with it a substantial consequence, and is squarely within the Act. Under the Act, an "approval" is, in addition to a number of specifically enumerated actions, "any other government authorization of any development application or any permit related thereto whether that authorization is in the form

² "Hb" refers to the opposition brief filed by the Department of Health & Senior Services.

of a permit, approval, license, certification, permission, determination, interpretation, exemption, variance, exception, waiver, letter of interpretation, no further action letter, agreement or any other executive or administrative decision which allows a development or governmental project to proceed." N.J.S.A. 40:55D-136.3.

Furthermore, a "development" includes "the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any building or other structure or facility...or any use or change in the use of any building or other structure or land or extension of the use of land." Ibid. At its core, a certificate of need approval carries with it the Department's sanction to use a particular physical facility for a particular use, and to serve a particular geographic area.

The 2007 CN is within the Act because, first, the PVH site is a "development." Whether one looks at the 2007 CN as closing PVH or preserving the opportunity for PVH to re-open, the result is the "change in the use of any building or other structure or land or extension of the use of land." What was once a full service acute care hospital now only contains an emergency trauma service. As a consequence of the license preservation, HUMC now seeks to change the use of the facility - after \$80 worth of structural renovation work - into a smaller, 125-bed full service acute care hospital.

Further, the 2007 CN is an approval because it is a governmental authorization which "allows a development to proceed." Respondents initially argue that the 2007 CN is not an approval because it does not permit the development to "proceed" and only provides for the closure of PVH. This stilted reading of the 2007 CN only acknowledges the most immediate consequence of the decision. Beyond allowing PVH to close, the Department preserved the facility's operating license, the significance of which was to allow the re-opening of the hospital upon an application to transfer ownership, and without awaiting a call for de novo acute care hospitals. Because the Department preserved PVH's operating license, it substantially advanced the re-opening of the hospital from where it would otherwise have been in the regulatory process.

Respondents' assertion that this Court should not look beyond the procedural context of an application for closure ignores the exceedingly broad statutory language of the Act. Interestingly, no one disputes that the Act applies to certificates of need, and the Department itself has issued a notice proclaiming that the Act applies to "any approvals granted by the Department of Health and Senior Services, including, but not limited to, those issued under" the HCFPA. See 40 N.J.Reg. 6657(c) (November 17, 2008). To like affect, the Department has issued written confirmation to the holders of

at least ten other certificates of need that the Act applies. Respondents only attempt to distinguish those certificates of need on procedural grounds because there, the cause for the application was the initiation or expansion of a service, whereas here the approval initially came in the context of an application to terminate a service. However, regardless of the procedural context the substance of each decision was the same - as a result a determination was made that substantively permitted a development to proceed.

Respondents also contend that the 2007 CN is not an approval because it is not the final step allowing PVH to re-open. Certainly, additional regulatory approvals would be required in order to allow PVH to re-open, most significantly HUMC's pending application to transfer ownership of the facility and re-activate the operating license would also have to be granted. However, the decision to preserve the operating license is a substantial, threshold step that "allows a development to proceed." N.J.S.A. 40:55D-136.3. Nowhere within the text of the Act is there any suggestion that the only types of approvals that are extended are those which are final, and allow the implementation of the project without any further regulatory process. Respondents' argument simply erects additional statutory hurdles where none exist. See N.J.S.A.

40:55D-136.6 (providing that Act should be interpreted liberally to effectuate its purposes).

Respondents' further suggestion that the standard of review is anything but de novo is also devoid of merit. According to the legislative findings of the Act, "obtaining an approval pursuant to existing statutory or regulatory provisions can be both costly in terms of time and financial resources, and insufficient to cope with the extent of the present financial situation." N.J.S.A. 40:55D-136.2(1). The Legislature thus tolled all such approvals automatically, by operation of law, finding that "it is the purpose of this act to prevent the wholesale abandonment of approved projects and activities due to the present unfavorable economic conditions, by tolling the term of those approvals for a period of time." N.J.S.A. 40:55D-136.2(m).

The plain intent of the Act is to effectuate extensions as a matter of law, and without the need for a costly and time-consuming regulatory approval process. Moreover, the statute is one of general applicability, and does not require the exercise of agency expertise. The Department's attempt to put its own gloss on the statutory language, leading to time-consuming litigation, is precisely the situation the Legislature intended to avoid.

Respondents suggest that the Legislature intended agencies to interpret the Act because it required publication of "notice in the New Jersey Register tolling all approvals in conformance with this act." N.J.S.A. 40:55D-136.5. However, this provision means exactly what it says: agencies were directed to do nothing more than publish a simple notice in the New Jersey Register advising of the "tolling of all approvals." Notably, the Act contains no delegation of authority to adopt implementing regulations, or to conduct adjudicatory hearings on a case by case basis. To the contrary, the statutory language suggests that agencies were simply to declare the tolling of all approvals across the board. The directive to issue a notice was not a mandate to subvert the very purpose of the Act to the Department's own policy objectives.

Finally, and in something of an odd coda to their argument, respondents contend that HUMC cannot challenge the merits of the position announced by the Department in its December 22, 2009 purported final agency decision because it has not filed a separate notice of appeal. HUMC's action for a declaratory judgment was pending before the Department ever issued its decision, and is now before this Court by order of the Law Division, pursuant to R. 1:13-4(a). That rule provides that upon the granting of a motion to transfer, "the action shall then be proceeded upon as if it had been originally commenced in

that court or agency." Therefore, to the extent that the Law Division determined that HUMC's declaratory judgment action was properly within the jurisdiction of the Appellate Division, it was not necessary for HUMC to file a duplicative notice of appeal³.

In ordering the transfer of the action, after the Department issued its December 22 pronouncement, the Law Division found that the relief HUMC was seeking was inextricably intertwined with the review of a state agency's action, or inaction. Thus, the Law Division found that "even providing HUMC the benefit of the doubt, filing a declaratory judgment action to construe the PEA to toll their certificate of need is nonetheless seeking the court's intervention to remedy the inaction of DHSS, which has authority over this process and which failed to toll the certificate of need approval. As such, the circumstances at hand...must be heard in the Appellate Division." (Op. at 22).

For this reason, explicit within the transfer decision is the holding that the declaratory judgment action challenges the Department's refusal to toll the expiration of the 2007 CN. Since the Law Division properly effectuated the transfer by

³ Respondents are correct in their assertion that there was an inadvertent misstatement, in the opening brief, that HUMC had filed a notice of appeal. Because a notice of appeal was not required once the Law Division ordered a transfer, HUMC only filed a Case Information Statement with this Court.

order pursuant to R. 1:13-4(a), there is no procedural defect in the manner in which the issues have been presented to the Court.

CONCLUSION

For the reasons set forth above, and for the additional reasons set forth in HUMC's opening brief, the Court should issue a declaratory judgment that the Permit Extension Act applies to the license re-activation right contained in the Department's 2007 CN decision, thereby extending the PVH operating license until June 30, 2013.

Respectfully submitted,

**DECOTIIS, FITZPATRICK
& COLE, LLP**

By: Michael R. Cole
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Dated: February 23, 2011