

HACKENSACK UNIVERSITY MEDICAL CENTER, <div style="text-align: right;">Appellants,</div> <div style="text-align: center;">v.</div> 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, <div style="text-align: right;">Respondents.</div>) SUPERIOR COURT OF NEW JERSEY) APPELLATE DIVISION) DOCKET NO.: A-3193-09T1)) Appeal from Order of February) 22, 2010 Transferring Matter) from Superior Court of New) Jersey, County of Bergen, Law) Division)) Docket No. in the Court) Below: BERL-L-4151-09)) Sat Below: Hon. Peter E.) Doyne, A.J.S.C.)))
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BRIEF AND APPENDIX ON BEHALF OF RESPONDENTS NEW JERSEY
 DEPARTMENT AND COMMISSIONER OF HEALTH AND SENIOR SERVICES

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APPELLATE DIVISION

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- Da7 Letter from Patricia A. Celano, Esq., counsel for HUMC/Touro to DAG Ganzman, dated March 7, 2008, regarding the anticipated sale of Pascack's real property to HUMC
- Da9 Letter from Frank R. Ciesla, Esq. to John A. Calabria, dated December 16, 2009, objecting to HUMC's position that the PEA extends its time to obtain approval for the transfer of ownership of Pascack Valley Hospital
- Da13 Proposed Order to Show Cause filed in the Law Division, Bergen County, by Hackensack University Medical Center on December 21, 2009

- Da16 Order by the Honorable Robert C. Wilson, J.S.C., dated December 23, 2009 denying HUMC's order to show cause.
- Da19 Notice of Motion to Transfer Case to Appellate Division, filed on behalf of The Valley Hospital, Inc., dated December 30, 2009
- Da22 Notice of Cross-Motion to Transfer Case to Appellate Division, filed on behalf of Englewood Hospital and Medical Center, dated January 13, 2010

PRELIMINARY STATEMENT

In this appeal, Hackensack University Medical Center (HUMC) seeks a declaratory judgment that the Permit Extension Act of 2008 (the Extension Act) automatically extends its time to obtain a certificate of need (CN) from the Department of Health and Senior Services to reopen Pascack Valley Hospital (PVH). This issue was originally brought before the Department by HUMC, and the Commissioner of Health and Senior Services issued a final agency decision declaring that the Extension Act does not toll the 24-month period within which HUMC was required to obtain a CN and commence operations. HUMC now challenges that final agency decision.

HUMC argues that the Extension Act tolled a condition in a CN letter authorizing the closure of PVH, which permitted the retention of the PVH hospital license for a 24-month period. The purpose of the condition was to permit a prospective purchaser, such as HUMC, to obtain a CN approving the transfer of the ownership of the hospital during that 24-month period. Although HUMC applied for such a CN, its application was not approved by the time the 24-month period ended, and the license expired. The Extension Act extends governmental approvals affecting the physical development of property. HUMC never received a CN approving the reopening of PVH, and the Extension Act cannot be read to enlarge its time to obtain such an approval.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

The CN Process

Since 1971, the establishment of healthcare facilities in New Jersey has been governed by the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1, et seq. (The Planning Act). The Planning Act gives the Department "central responsibility for the development and administration of the State's policy with respect to health planning, hospital and related health care services," N.J.S.A. 26:2H-1, and grants the Commissioner broad powers commensurate with those responsibilities. N.J.S.A. 26:2H-1, 26:2H-5, 26:2H-8.

One of the central features of the Planning Act was the creation of the CN process, which requires prospective health care providers to submit proposals to the Department for review and approval before a license to operate a healthcare facility may be issued. N.J.S.A. 26:2H-7; In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 423 (2008). As the Court in Virtua-West Jersey noted, the CN process facilitates "top-down regulatory control over the health care delivery system through the requirements of State identification of health care needs and prior approval for additions or changes to the allocation of health care

¹ The procedural history and facts of this case are interrelated and have therefore been combined to avoid repetition and for the convenience of the court.

services among providers." Id. at 416. The Planning Act provides that the Department should only issue a CN where it finds that the project proposed in the CN application is:

necessary to provide required health care in the area to be served, can be economically accomplished and maintained, will not have an adverse economic or financial impact on the delivery of health care services in the region or Statewide, and will contribute to the orderly development of adequate and effective health care services.

[N.J.S.A. 26:2H-8.]

In the 1990's, after the CN requirements came under criticism "as slow and unresponsive to market changes," the Legislature considered eliminating the CN process and allowing the market to regulate for cost-effectiveness and quality. In re Virtua-West Jersey, supra, 194 N.J. at 424. In 1998, it established a Certificate of Need Review Commission to evaluate the merits of deregulation and "assess, among other things, the impact of deregulated facilities or services on urban hospitals, the overall quality of health care delivered, and access to care." Ibid. The Commission concluded that certain services should be exempted from the CN process, and the Legislature amended the Planning Act based on that recommendation. Id. at 416. At the same time, the Legislature retained the CN process for those health care services in which the Commission had found that limiting the proliferation of such services was necessary in order to protect the viability of the services and providers, to protect urban

hospitals, and to "guard against the closing of important facilities and the transfer of services from facilities in a manner which is harmful to the public interest." N.J.S.A. 26:2H-6.1(h). Notably, the Legislature retained the CN requirement for acute care general hospitals. N.J.S.A. 26:2H-2; N.J.S.A. 26:2H-7.

If an entity wishes to establish an acute care hospital within the State, it must generally do so through the Department's competitive call process. N.J.A.C. 8:33-4.1(a). Under that process, an entity may request that the Department issue a call for applications to establish a hospital in a particular area, but before a call will be issued, the Department must determine whether there is a need for a hospital in that area. N.J.A.C. 8:33-4.1(a)4. If the Department determines that there is no need, then no call is issued, and no applications will be accepted for consideration.

Under the Department's CN rules, however, an 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. N.J.A.C. 8:33-3.3. Nevertheless, among the factors that the Department must consider in evaluating whether to grant a CN, including a CN approving a transfer in ownership of a hospital, are whether a hospital "is necessary to provide required health care in the area to be served" and whether the proposed hospital will have "an

adverse economic or financial impact on the delivery of health care services in the region" N.J.S.A. 26:2H-8.

An applicant may request in writing that its CN application be deferred for up to six months. N.J.A.C. 8:33-4.7(a). If the application is not reactivated within that six month period, a new application must be submitted. Ibid. If an applicant no longer wishes its application to be considered, it may withdraw the application, pursuant to N.J.A.C. 8:33-4.8.

An application for the transfer of ownership of an acute care hospital is subject to full review.² N.J.A.C. 8:33-3.3(a)1. Under the full review process, both the Department and the State Health Planning Board (the SHPB) review CN applications. N.J.A.C. 8:33-4.1(a). Once received, the Department reviews each application to ensure that it meets the provisions of N.J.A.C. 8:33-4.4(a) through (d). Applications that do not meet the requirements must be returned as not acceptable for processing. N.J.A.C. 8:33-4.4(e).

If an application is found to be acceptable for processing, the Department then reviews the application to determine if it is complete, and provides the applicant with the opportunity to supplement its application in response to any specific completeness questions posed by the Department. N.J.A.C.

² CN applications may be subject to full review, pursuant to N.J.A.C. 8:33-4.1(a), or expedited review, pursuant to N.J.A.C. 8:33-4.1(b).

8:33-4.5(a). The Department must also review the application against the general review criteria contained in N.J.A.C. 8:33-4.9. Only then can the application be forwarded to the SHPB with Department staff's analysis of the application and recommendations on the actions that should be taken. The SHPB conducts its own review, pursuant to N.J.A.C. 8:33-4.13, and forwards recommendations to the Commissioner. If the application involves the transfer of ownership of an existing general acute care hospital, or the closure or elimination of a health care facility or service that requires review by the SHPB (such as the closure of an acute care general hospital), then at least one public hearing must be held in the service area. N.J.S.A. 26:2H-5.8(c). The Commissioner is empowered to make the final decision on the application. N.J.A.C. 8:33-4.15.

Once a CN is granted, the successful applicant generally has five years in which to implement its CN. N.J.A.C. 8:33-3.10(a)1. If the project has not been licensed within that period of time, the CN is automatically deemed terminated. N.J.A.C. 8:33-3.10(a)3. "Under the Department's regulatory scheme, a CN is the governmental approval issued by the Department to authorize the construction, reconstruction, conversion, structural alteration, relocation or enlargement of a health care facility; a license is not issued until all development is completed, and licensure requirements are met." (Pa561).

The Closure of PVH

On September 24, 2007, Pascack Valley Hospital Association, Inc. (Pascack) filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. (Pa553). At the time of the bankruptcy filing, Pascack operated PVH, a 275-bed acute care general hospital licensed by the Department. (Pa1). Four days later, on September 28, 2007, Pascack submitted a CN application to the Department seeking authority to close the hospital.³ Ibid.

On December 28, 2007, then-Commissioner Fred M. Jacobs, M.D., J.D., approved Pascack's application for a CN to close.

Pa1-Pa5). One of the conditions in the Jacobs letter permitted Pascack to retain its hospital license "for a period of time not to exceed 24 months, commencing on the date of approval of this closure application." (Pa4). 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, provided such a purchaser could be found. (Pa554). The Jacobs letter made clear that, before a potential purchaser could reopen the hospital, it would have to "comply with all statutory and regulatory requirements," which included applying for a CN to approve the transfer and receiving the approval by the SHPB and the Commissioner. The Jacobs letter also provided that

³ Pursuant to N.J.A.C. 8:33-3.2(b), "the closure of a general hospital requires a certificate of need"

any future purchaser who intends to re-establish an acute care hospital at the PVH site must "commence operation prior to the expiration of the 24 month period." (Pa4). The 24-month period was based on N.J.A.C. 8:33-3.2(a), which requires that, if a health care facility closes or substantially ceases operations "for any consecutive two-year period," the facility must obtain a CN in order to reopen. Under the terms of the Jacobs letter, the extension of the hospital's license expired on December 28, 2009.

HUMC's Purchase of the PVH Site

In February 2008, Pascack auctioned off the real estate comprising the hospital's campus, and HUMC was the successful bidder. (Pa7-Pa34). No provision was made in the sale documents for the transfer of ownership in PVH to HUMC. In fact, in a letter to Deputy Attorney General Jay Ganzman addressing the issue of whether the Community Health Care Assets Protection Act, N.J.S.A. 26:2H-7.10, et seq. (CHAPA), applied to that transaction, Pascack's counsel wrote that the transfer to HUMC did not involve the transfer of any of Pascack's licenses or related operating rights. (Da3). Counsel for HUMC later wrote to DAG Ganzman confirming that

[i]f in the future, [HUMC] desire[s] to seek to transfer any of the [Pascack] Licensure Rights, [it] will not do so without first obtaining both (i) any approvals required by the [Department]; and (ii) to the extent necessary, any approvals required by the Attorney General, under [CHAPA] or her common law jurisdiction or otherwise.

[Da8.]

Five months later, on July 31, 2008, HUMC submitted a CN application to the Department seeking approval of the transfer of ownership of PVH to HUMC. (Pa35-Pa132).

HUMC's Application for Approval of the Transfer

As part of the application review process, the Department transmitted completeness questions to HUMC. (Pa133-Pa504). One of the completeness questions asked HUMC to provide confirmation that Pascack consented to the transfer. (Pa140).⁴ In March 2009, Pascack and HUMC reached an agreement pursuant to which Pascack agreed to consent to a transfer of PVH to HUMC. (Pa555). The agreement was presented to the Bankruptcy Court for approval and two neighboring hospitals, Valley and respondent Englewood Hospital and Medical Center (Englewood), strenuously objected, arguing that the reopening of the hospital would have a devastating effect on the viability of their hospitals. Ibid. The Bankruptcy Court approved the agreement between Pascack and HUMC, thus clearing the way for the Department's consideration of the CN application for the approval of the transfer of ownership. Ibid.

⁴ The Department's regulations require that before ownership of an acute care hospital can be transferred, the owner of the hospital must apply for and receive a CN from the Department authorizing the transfer; because Pascack held the hospital license, the Department determined that Pascack's consent was an essential requirement.

In June 2009, the Department finalized its review of the completeness questions and responses and deemed the application complete. Ibid. However, on July 7, 2009, prior to the issuance of the Department Staff's recommendations, HUMC sent a letter to Deputy Commissioner Matt D'Oria, requesting that the Department defer consideration of its CN application for up to six months i.e., January 7, 2010), pursuant to N.J.A.C. 8:33-4.7(a). (Pa555-Pa556). The Department granted that request. (Pa556).

HUMC's Reliance on the Extension Act

On December 10, 2009, just eighteen days before the PVH license was due to expire, counsel for HUMC sent a letter to the Department requesting confirmation that

the enactment of the [Extension Act], together with the Department's [Notice] and demonstrated administrative practice to issue [confirming] letters, constitutes an automatic extension of the 24-month period within which PVH may obtain a certificate of need to consummate the transfer of ownership to HUMC, and to obtain approval to re-activate the PVH operating licenses, until January 1, 2011.

[Pa509.]

On December 16, 2009, the Department received correspondence from counsel representing Valley and Englewood, offering opposition commentary concerning the request from HUMC. (Pa9-Da12). On that same date, counsel for HUMC submitted a letter to the Department responding to counsel's December 16th letter (Pa510-Pa516), and the following day, counsel for HUMC transmitted

a letter to the Department requesting that the Department modify conditions 1 and 2 of the Jacobs letter by extending the December 28, 2009 deadline to January 1, 2011 (Pa517-Pa520). On December 18, 2009, counsel for Valley and Englewood sent the Department a letter responding to the issues raised in HUMC's December 16, 2009 letter. (Pa600-Pa602).

On December 21, 2009, while the Department's decision was still pending, HUMC commenced a declaratory judgment action in the Law Division, Bergen County, essentially seeking the same relief it had previously sought from the Department. (Pa521-Pa542).

On December 23, 2009, Commissioner Heather Howard issued a final agency decision finding that

the automatic extension provided by the [Extension Act] and the Department's Notice does not apply to the 24-month period within which Pascack was permitted to retain the PVH license and, therefore, does not extend HUMC's time to obtain approval of its CN application for the transfer of ownership of PVH to HUMC.

[Pa553.]⁵

In reaching her decision, Commissioner Howard noted that "[i]n order for HUMC to establish that the [Extension Act] extends the time for Pascack to consummate the transfer of ownership to HUMC, it must demonstrate that the Department has granted an approval,

⁵ The previous day, December 22, 2009, Commissioner Howard had issued a decision letter with the same findings; however, on December 23rd, the Commissioner issued a corrected version of the letter, and directed the parties to substitute the December 23rd letter for the December 22nd letter.

and that the approval is specific to the development of property." (Pa560). Finding that HUMC's CN application for approval of the transfer of PVH to HUMC was still pending and had not been approved, the Commissioner determined that the application did not constitute a government "approval" under the Extension Act. Ibid. In addition, Commissioner Howard found that the Jacobs letter, which approved the closure of PVH, did not constitute an approval under the Extension Act because it did not involve the development of property. Ibid. She also found that the condition in the Jacobs letter that allowed Pascack to retain the PVH hospital license for a 24-month period did not constitute a government approval under the Extension Act because it did not affirmatively authorize the use of the PVH site, but instead merely allowed Pascack to retain the PVH license in the event a potential purchaser of PVH determined that it wished to apply for a CN to transfer ownership in the hospital. (Pa560-Pa561). Finally, Commissioner Howard noted that

when the [Extension Act] is read as a whole, it is clear that the intent of the Legislature was to extend approvals, permits and licenses that are required for the physical development of property, and not hospital licenses, which are not issued until after all physical development is complete and licensure requirements are met. Under the Department's regulatory scheme, a CN is the governmental approval issued by the Department to authorize the construction, reconstruction, conversion, structural alteration, relocation or enlargement of a health care facility; a license is not issued until all development is

completed, and licensure requirements are met. In this case, the [Jacobs letter] granted a CN to close a hospital, and that CN is not covered by the [Extension Act].

[Pa561 (emphasis in original).]

Commissioner Howard concluded that "the [Extension Act] and the Notice do not apply and, therefore, do not automatically extend the terms of the CN for the closure of PVH." Ibid. In addition, she denied HUMC's request to modify the conditions in the Jacobs letter. Ibid.

On December 23, 2009, without notice to the Department or the other defendants in the Law Division action, HUMC submitted an order to show cause seeking entry of an order requiring the Department to withdraw the December 23, 2009 Decision Letter, and directing the Department to "cease from taking any and all adverse actions with respect to [HUMC's] certificate of need pending resolution of this matter." (Da13-Da15). On that same date, the Law Division signed an order denying the relief sought in the order to show cause, providing that HUMC may proceed directly to appeal the Decision Letter to the Appellate Division, and stating that the Law Division will defer upon such an application to the Appellate Division. (Da17). Curiously, HUMC served the Department with the summons and complaint filed in this action on December 24th but failed to serve a copy of its application for an order to show cause or the Law Division's order denying the relief sought in the order to show cause.

On December 30, 2009, Valley filed a motion in the Law Division action seeking to have the case transferred to this court (Da19-Da21), and on January 13, 2010, Englewood filed a cross-motion for the same relief (Da22-Da24). The Department submitted a brief in support of Valley's motion, and HUMC opposed both motions. On February 22, 2010, the Honorable Peter E. Doyne, A.J.S.C., granted Valley and Englewood's motions and directed counsel for Valley to submit an appropriate form of order (Pa623-Pa650). On March 4, 2010, Judge Doyne signed the Order transferring the matter to this court (Pa651-Pa652).

On January 5, 2010, HUMC sent a letter to the Department indicating that the hospital was "now ready to proceed with this project" and asking that the Department reactivate its review of HUMC's CN application. (Pa622).

ARGUMENT

THE EXTENSION ACT DID NOT EXTEND HUMC'S TIME TO OBTAIN APPROVAL OF ITS DEVELOPMENT PROJECT.

In 2008, the New Jersey Legislature enacted the Extension Act. The Legislative findings and declarations of the Extension Act cite the national recession and its severe impact on "the State's banking, real estate and construction sectors." N.J.S.A. 40:55D-136.2. That Section continues:

c. As a result of the crisis in the real estate finance sector of the economy, real estate developers and redevelopers, including homebuilders, and commercial, office, and industrial developers, have experienced an

industry-wide decline, including reduced demand, cancelled orders, declining sales and rentals, price reductions, increased inventory, fewer buyers who qualify to purchase homes, layoffs, and scaled back growth plans.

d. The process of obtaining planning board and zoning board of adjustment approvals for subdivisions, site plans, and variances can be difficult, time consuming and expensive, both for private applicants and government bodies.

. . . .

h. The construction industry and related trades are sustaining severe economic losses, and the lapsing of government development approvals would, if not addressed, exacerbate those losses.

. . . .

j. Due to the current inability of builders and their purchasers to obtain financing, under existing economic conditions, more and more once-approved permits are expiring or lapsing and, as these approvals lapse, lenders must re-appraise and thereafter substantially lower real estate valuations established in conjunction with approved projects, thereby requiring the reclassification of numerous loans which, in turn, affects the stability of the banking system and reduces the funds available for future lending, thus creating more severe restrictions on credit and leading to a vicious cycle of default.

k. As a result of the continued downturn of the economy, and the continued expiration of approvals which were granted by State and local governments, it is possible that thousands of government actions will be undone by the passage of time.

[Ibid.]

The stated purpose of the Extension Act is "to prevent the wholesale abandonment of approved projects and activities due to the present unfavorable economic conditions, by tolling the term of these approvals for a period of time, thereby preventing a waste of public and private resources." N.J.S.A. 40:55D-136.1(m). The official synopsis of the Extension Act describes it as "AN ACT concerning the extension of certain permits and approvals affecting the physical development of property located within the State of New Jersey" L. 2008, c. 78 (effective September 6, 2008) (emphasis added).

Section 4 of the Extension Act provides that:

For any government approval in existence during the extension Period, the running of the period of approval is automatically suspended for the extension period,⁶ except as otherwise provided hereunder; however, the tolling provided for herein shall not extend the government approval for more than six months beyond the conclusion of the extension period.

[N.J.S.A. 40:55D-136.4 (a).]

The term "approvals" is defined to include

any . . . State approval or permit granted under the general authority conferred by State law or rule or regulation, or any other government authorization of any development application or any permit related thereto

⁶ The "extension period" was originally defined as "the period beginning January 1, 2007 and continuing through July 1, 2010." L. 2008, c. 78, § 3 (effective September 6, 2008). That period was later extended to December 31, 2012. L. 2009, c. 336, § 1 (effective January 18, 2010).

whether that authorization is in the form 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 (emphasis added).]

"Development" is defined as

the division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any building or other structure or facility, or of any grading, soil removal or relocation, excavation or landfill or any use or change in the use of any building or other structure or land or extension of the use of land.

[Ibid.]

The Extension Act required that State agencies "place a notice in the New Jersey Register tolling all approvals in conformance with this act." N.J.S.A. 40:55D-136.5.

Courts have often observed that the clearest indication of a statute's meaning is its plain language. G.S. v. Dep't of Human Servs., 157 N.J. 161, 172 (1999). Where that language is clear, courts have not hesitated to apply the statute as written. State v. Butler, 89 N.J. 220, 226 (1982). They have also observed, however, that if the plain language creates uncertainties or ambiguities, or would lead to a result inconsistent with the purpose of the act, the court should construe the statute sensibly,

in a way that will best effectuate that intent. Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 392 (2001); New Jersey State League of Municipalities v. Dep't of Community Affairs, 158 N.J. 211, 224 (1999). Thus, a court's "overriding objective in determining the meaning of a statute is to 'effectuate the legislative intent in light of the language used and the objects sought to be achieved.'" McCann v. Clerk of City of Jersey City, 167 N.J. 311, 320 (2001).

Courts must give substantial weight and deference to the Commissioner's exercise of her statutorily delegated duties. See Saint Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 15 (2005); In re Freshwater Wetlands Protection Act Rules, 180 N.J. 478, 488-89 (2004); Texter v. Dep't of Human Servs., 88 N.J. 376, 382 (1982). Where an agency's interpretation of its own regulations is at issue, such interpretation is entitled to be accepted as against a competing view so long as it does not result in arbitrary, capricious or unreasonable action. Ibid.; Barone v. Dep't of Human Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987). Specifically referring to the CN process, this court has stated that:

in a "complex area where the Legislature has delegated a great amount of discretion to the administrative experts, deference must be accorded to the administrative agency's expertise and experience in its domain."

* * *

We must also give due regard to the agency's expertise where, as here, such expertise is a

pertinent factor. Further, when an agency is charged with enforcing a statute, its interpretation of that statute is entitled to substantial deference, and should "prevail provided it is not plainly unreasonable."

[In re Certificate of Need Granted to the Harborage, 300 N.J. Super. 363, 379-80 (App. Div. 1997) (citations omitted)].

A strong presumption of reasonableness is to be accorded to an "agency's exercise of its statutorily delegated duties," and this presumption is even stronger "when the agency has delegated discretion to determine the technical and special procedures to accomplish its task." In re App. of Holy Name Hosp., 301 N.J. Super. 282, 295 (App. Div. 1997). As this court has observed, "it is not our function 'to substitute [our] independent judgment for that of [an] administrative' agency, such as the Department, 'where there may exist a difference of opinion concerning the evidential persuasiveness of the relevant [proofs].'" In re Harborage, supra, 300 N.J. Super. at 379 (quoting First Sav. & Loan Ass'n v. Howell, 87 N.J. Super. 318, 321-22 (App. Div. 1965), certif. denied, 49 N.J. 368 (1967)). The burden properly rests with the party challenging the agency's actions to show that the actions were arbitrary, capricious or unreasonable. Bergen Pines Hosp. v. Dep't of Human Servs., 96 N.J. 456, 477 (1984).

HUMC argues that the Commissioner's December 23, 2009 decision letter is entitled to no deference because "the Permit Extension Act is a statute of general applicability which does not

require the exercise of the Department's particularized expertise." Pbl7. The Department disagrees. The fact that the Legislature required State agencies to file notices in the New Jersey Register identifying those approvals tolled in conformance with the Extension Act demonstrates the Legislature's recognition that the agencies are in the best position to determine which of their approvals fit within the definition of approvals covered by the Act. N.J.S.A. 40:55D-136.5. Moreover, the fact that HUMC initially sought a determination from the Department regarding the applicability of the Extension Act to the Department's December 28, 2007 decision letter indicates an initial acknowledgment by HUMC that the determination was for the Department to make.

The Legislature has delegated significant discretion to the Department with respect to the implementation of the CN process, N.J.S.A. 26:2H-7; In re Virtua-West Jersey, supra, 194 N.J. at 416, and has also delegated to the Department the authority to determine which of its approvals constitutes an approval covered by the Extension Act. N.J.S.A. 40:55D-136.5. The Department's experience and expertise regarding the CN process is, therefore, essential to a determination of whether the condition in the December 28, 2007 approval constitutes an approval tolled by the Extension Act.

HUMC acknowledges that the Extension Act does not extend its pending application for a CN authorizing the transfer of

ownership of PVH because that application has not been approved. Instead, HUMC argues that the Extension Act extends the condition in the Jacobs letter that permitted Pascack to retain its license for a period of 24 months. HUMC takes the position that because the retention of the PVH license concerns the "use or change in the use of" a building, it constitutes an "affirmative act of approval." The Department disagrees.

When the Extension Act is read sensibly and in its entirety, the intent of the Legislature is clear. The purpose of the Extension Act was to extend approvals, permits and licenses that authorized the physical development of property. Recognizing this, the Department issued a notice acknowledging that only CNs "specific to development" were extended under the Act. The CN granted Pascack to close the hospital can hardly be considered a CN specific to development. Nor can it reasonably be said that the condition allowing Pascack to retain its hospital license for 24 months authorized the physical development of the hospital property. Rather, the retention of the license simply left open the possibility that, sometime during that 24-month period, an entity interested in purchasing the hospital could submit a CN application for approval of the transfer of the ownership of the hospital. The condition itself did not approve any such transfer.

The 24-month period in the Jacobs letter was not arbitrary. The CN rules provide that if a health care facility

closes or substantially ceases operations "for any consecutive two-year period," the facility must obtain a CN in order to reopen. N.J.A.C. 8:33-3.2(a). The reason for this requirement is simple. If a health care facility wishes to reopen after remaining closed for a consecutive two-year period, the reopening is "tantamount to the initiation of a health care service," thus requiring a new CN application. 30 N.J.R. 2270(b) (June 15, 1998), at 2274. Here, Pascack closed its doors even before the Commissioner granted its CN to close. Thus, the region has now been operating without a hospital at the PVH site for nearly three years. The Extension Act was certainly not designed to upset the deliberate CN process that weighs public need as a critical element in making health care determinations.

HUMC points to the fact that the Department has acknowledged the applicability of the Extension Act to at least ten other development projects and argues that the Department's refusal to do so in this case is inconsistent with those other instances. However, an examination of the record demonstrates that, in each of those ten cases, the approval tolled by the Extension Act was a CN authorizing the establishment, expansion or relocation of a health care facility.⁷ Try as it might, HUMC cannot escape the fact that

⁷ See Pa657-Pa661 (establishment of 60-bed assisted living facility); Pa662-Pa668 (establishment of specialty hospital); Pa669-Pa676 (expansion of intensive and intermediate bassinets); Pa677-Pa683 (expansion of intensive neonatal bassinets); Pa684-Pa690 (expansion of intensive neonatal bassinets); Pa691-Pa698

it has not obtained approval through the issuance of a CN for the development project it proposes.⁸

CONCLUSION

For the foregoing reasons, this court should affirm the Department's determination that the Extension Act does not extend HUMC's time to obtain approval for its proposed development project.

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Dated: February 9, 2011

establishment of intensive neonatal bassinets); Pa699-Pa705 (establishment of 120-bed long term care facility); Pa706-Pa710 (establishment of 50-bed assisted living facility); Pa711-Pa719 (expansion of assisted living beds); Pa720-723 (relocation of pediatric rehabilitation unit).

⁸ HUMC also argues that the Extension Act applies to the condition in the Jacobs letter permitting Pascack to retain the hospital license for 24 months because HUMC's development project cannot proceed without the PVH license. That simply is not true. PVH's license is not required in order for HUMC to proceed with its development project to reopen PVH. Even without the license, HUMC may request that the Department issue a call for a hospital in the area, and if the Department finds that there is a need for such a call, HUMC could apply for a CN to establish a hospital at the PVH site. In fact, HUMC filed a petition for a call with the Department on December 16, 2010.