

ENGLEWOOD HOSPITAL AND MEDICAL CENTER,

Appellant,

v.

NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES, POONAM ALAIGH, M.D., in her official capacity as COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES, and HACKENSACK UNIVERSITY MEDICAL CENTER,

Respondents.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO.: Am-430-10T2

M-4051-10

FILED APPELLATE DIVISION

MAR 21 2011

JULIA CLERK

BRIEF ON BEHALF OF RESPONDENTS NEW JERSEY DEPARTMENT AND COMMISSIONER OF HEALTH AND SENIOR SERVICES IN OPPOSITION TO MOTION FOR LEAVE TO [REDACTED] Appeal

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PRELIMINARY STATEMENT

In this appeal, Englewood Hospital and Medical Center (Englewood) seeks leave to appeal to challenge a notice issued by respondent, the Department of Health and Senior Services, pursuant to N.J.A.C. 8:33, calling for certificate of need (CN) applications to establish a new general hospital to serve Bergen County (the Notice). Englewood seeks to challenge the Notice on the grounds that it violates the governing statutes and regulations and constitutes arbitrary, capricious and unreasonable action by the Commissioner of Health and Senior Services.

Hackensack University Medical Center (HUMC) submitted a petition for a CN call to the Department, requesting that the Department issue a notice inviting CN applications to establish a new general hospital to serve Bergen County. As part of that petition, HUMC submitted documentation suggesting that there may be a need for a new hospital to serve Bergen County. By issuing the Notice, the Department has initiated a process by which the public, applicants and competing hospitals can all present information to the Department regarding such statutory and regulatory factors as: (i) whether there is currently a need for a new general hospital to serve Bergen County; (ii) whether that service can be economically accomplished and maintained; (iii) whether the service will have an adverse economic impact on the delivery of services in the region; (iv) whether the service will contribute to the orderly development of adequate and effective health care services; (v) whether there

are other facilities or services available to serve as alternatives or substitutes; and (vi) whether the service will have an adverse impact on access to health care services. The Notice simply begins the regulatory process pursuant to which the Department can evaluate whether it should grant or deny a CN to establish a new general hospital to serve Bergen County.

Because Englewood cannot demonstrate that the interests of justice require this court to interfere with the Department's carefully crafted administrative scheme for processing CN applications, its motion should be denied.

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. (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.

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.

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). 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 addition, the Act requires that the Department take into consideration the availability of facilities or services to serve as alternatives or substitutes, the need for special services or equipment, the possible economies and improvement in services to be anticipated from operation of regional facilities, the adequacy of financial resources and sources of present and future revenues, the availability of sufficient manpower and any other factors identified in the regulations. Ibid.

In addition to the statutory factors contained in the Planning Act, the Department's CN regulations also require each applicant to demonstrate how the proposed service will promote

access to low income persons, minorities and the medically underserved; how it will maintain or enhance quality of care; that it can be financially accomplished and maintained; that it will meet all applicable licensure regulations; how it will address unmet needs in the region; that it will have no adverse impact on access to health care services in the area; that the projected volume is reasonable; and that the applicant has an acceptable track record. N.J.A.C. 8:33-4.10.

The Department has established a regularized schedule, set forth at N.J.A.C. 8:33-4.1(a)2, for the submission of full-review² CN applications by health care providers. In accordance with that schedule, competitive (or batched) applications for new general hospitals may be submitted to the Department every five years, with applications for the next scheduled call due April 1, 2011. Ibid. The Department's acceptance of competitive applications submitted in accordance with the schedule "does not constitute a finding by the Department of need for the additional beds or services proposed in the application(s)." N.J.A.C. 8:33-4.1(a)3. If a health care provider wishes to submit an application for a CN outside the normal schedule, it can petition the Department to issue a call, pursuant to N.J.A.C. 8:33-4.1(a)4. Under that scenario, if the Department finds that there are

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).

"extraordinary circumstances that warrant such a call prior to the next scheduled submission date," the Department is authorized to issue a special call. Ibid.

An application for the establishment of an acute care general hospital is subject to full review. 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. 8:33-4.5(a). The Department must also review the application against the review criteria contained in the Planning Act and N.J.A.C. 8:33-4.10. 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. The Commissioner is

empowered to make the final decision on the application. N.J.A.C.
8:33-4.15.

HUMC's Efforts to Reopen PVH

On September 24, 2007, Pascack Valley Hospital Association, Inc. (Pascack) filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. At the time of the bankruptcy filing, Pascack operated Pascack Valley Hospital (PVH), a 275-bed acute care general hospital licensed by the Department. (Pa44). 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, the Commissioner approved Pascack's application for a CN to close. (Pa44-Pa48). One of the conditions in the 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." (Pa47). 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 closure approval letter, the extension of the hospital's license expired on December 28, 2009.

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

In February 2008, Pascack auctioned off the real estate comprising the hospital's campus, and HUMC was the successful bidder. No provision was made in the sale documents for the transfer of ownership in PVH to HUMC. 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. (Pa64). However, before that application could be acted upon, HUMC asked the Department to defer consideration of the petition for up to six months. (Pa65).

In December 2009, HUMC sought an acknowledgment by the Department that the Permit Extension Act of 2008 (PEA) extended the 24-month period set forth in the Commissioner's December 28, 2007 approval letter. (Pa73-Pa74). Englewood and another area hospital, The Valley Hospital, Inc. (Valley), opposed HUMC's request, and on December 23, 2009, the Department issued a final agency decision holding that the PEA did not apply to the 24-month period within which Pascack was permitted to retain the PVH license and, therefore, did not extend HUMC's time to obtain approval of its CN application for the transfer of ownership of PVH to HUMC. (Pa97-99). In the meantime, HUMC filed a declaratory judgment action in the Law Division, essentially seeking the same relief it had previously sought from the Department. That action was transferred to the Appellate Division on March 4, 2010, and has now been fully briefed. Hackensack University Medical Center v. New

Jersey Department of Health and Senior Services, et al., Docket No. A-3193-09T1.

On December 16, 2010, HUMC submitted to the Department a Petition to Substantiate Need for a Call to Be Issued for Certificate of Need Applications to Open a New Acute Care Hospital in Westwood, New Jersey. (Pa5-Pa43). The Department issued the Notice calling for applications for a new general hospital to serve Bergen County on February 18, 2011. (Pa1-Pa4). The Notice provided that, "[i]n lieu of the April 1, 2011 general call for proposed new general hospitals, the Department is providing notice of a limited certificate of need call as described below." (Pa1). The Department explained in the Notice that it was initiating the call in response to documentation submitted by a petitioner "indicating that there may be a potential need for a new general hospital in this area of approximately 125 beds." Ibid. The Department noted that a maximum of one new hospital would be considered for approval pursuant to the Notice, and emphasized that

[i]ssuance of this call does not constitute a finding of need by the Department for any new general hospital affected by the call, and the Department reserves the right to disapprove all applications submitted in response to the call if the Department determines that they have not satisfactorily demonstrated need or otherwise comply with the requirements of N.J.S.A. 26:2H-8, N.J.A.C. 8:43G-1.1 et seq. and N.J.A.C. 8:33-1.1 et seq.

[Pa2.]

The Department expressly invited other hospitals to submit documentation to the Department in response to the applications, specifically addressing "the proposed new hospital's anticipated impact on the delivery and quality of care of health care services provided by the alternative provider . . . and . . . the impact of technological and/or medical advances on the future need for acute care services in Bergen County." (Pa3). According to the Notice, applications in response to the Notice must be submitted to the Department by June 1, 2011. (Pa4).

On March 10, 2011, Englewood filed the instant motion.⁴

ARGUMENT

POINT I

ENGLEWOOD'S MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES COUNSELS AGAINST HEARING A CHALLENGE TO THE DEPARTMENT'S NOTICE BEFORE THE CN REVIEW PROCESS IS COMPLETED.

Exhaustion of administrative remedies covers situations where a claim is cognizable in the first instance by an administrative agency alone. Boss v. Rockland Elec. Co., 95 N.J. 33, 40 (1983). Indeed, it is based on the premise that an administrative agency with expertise on an issue should decide it in the first instance. Ibid.; Board of Educ. Asbury Park v. Asbury Park Ed. Ass'n, 155 N.J. Super. 76, 78 (App. Div. 1977). See also

⁴ One day earlier, on March 9, 2011, Valley filed a similar motion for leave to appeal in The Valley Hospital, Inc. v. New Jersey Department of Health and Senior Services, et al.

Abbott v. Burke, 100 N.J. 269, 296-97 (1985). Because the doctrine is not an absolute jurisdictional prerequisite, a litigant may bypass an administrative agency where the issue is purely one of law. N.J. Civil Serv. Ass'n. v. State, 88 N.J. 605, 613 (1982). Nonetheless, administrative review is clearly desirable and preferred, to ensure that claims are heard by a body possessing expertise in the area and that a factual record is developed to thus obviate the need for additional review. Abbott v. Burke, supra, 100 N.J. at 297-98.

In Paterson Redevelopment Agency v. Shulman, 78 N.J. 378, cert. denied, 444 U.S. 900 (1979), the Court explained the doctrine of exhaustion of administrative remedies thus:

[I]t is a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts. In this respect the rule ensures that claims will be heard, as a preliminary matter, by the body having expertise in the area. This is particularly important where the ultimate decision rests upon factual determinations lying within the expertise of the agency or where agency interpretations of relevant statutes or regulations are desirable.

[Id. at 386-87.]

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

The burden properly rests with the party challenging the agency's actions to show that the agency's actions were arbitrary, capricious or unreasonable. Bergen Pines Hosp. v. Dep't of Human Servs., 96 N.J. 456, 477 (1984).

In this matter, Englewood seeks to prevent the Department from implementing its administrative CN review process to assess whether a new general hospital should be established to serve Bergen County. If that process is allowed to proceed, applicants, the public and competing hospitals, including Englewood, will all have the opportunity to present information to the Department addressing each of the statutory and regulatory factors, and the Department, the SHPB and the Commissioner will all be able to evaluate the information presented and make a reasoned, fully-informed decision based on a complete record as to whether or not a new general hospital should be established to serve Bergen County. The factual inquiry will include an examination into whether such a hospital is necessary to provide required health care in the area to be served, whether it would have an adverse economic impact on the delivery of services in the region, whether it would contribute to the orderly development of adequate and effective health care services, whether there are other facilities or services available to serve as alternatives or substitutes and whether it would have an adverse impact on access to health care services in the area. Because the Department has the special expertise (and statutory authority) to conduct these factual inquiries, this court should permit the CN review process to move forward.

Englewood also argues that the Notice should be vacated by this court because there is no need for another general hospital to serve Bergen County and because the record does not contain substantial evidence to support the issuance of the Notice. However, whether there is a need for an additional hospital to serve Bergen County is an issue that will be thoroughly analyzed during the full review process, and once a decision is made, a complete record will exist.

Because Englewood cannot demonstrate that this court should interfere with the Department's carefully crafted administrative scheme for processing CN applications, its motion should be denied.

POINT II

ENGLEWOOD CANNOT DEMONSTRATE THAT INTERLOCUTORY REVIEW OF THE DEPARTMENT'S ISSUANCE OF A CALL FOR CN APPLICATIONS IS NECESSARY IN THE INTEREST OF JUSTICE.

Rule 2:2-4 allows appeals of interlocutory orders only by leave of the court in the "interest of justice." The grant of leave to appeal is "highly discretionary" and "is customarily exercised only sparingly." State v. Reldan, 100 N.J. 187, 205 (1985). Interlocutory review is permitted only in "exceptional cases where, on a balance of interests, justice suggests the need for a review." Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div.) (quoting Appeal of Pennsylvania R.R. Co., 20 N.J. 398, 409 (1956)), certif. denied, 22 N.J. 574 (1956), cert. denied, 353 U.S.

923, 77 S. Ct. 682, 1 L. Ed. 2d 720 (1957). Such relief runs counter to the strong judicial policy against piecemeal adjudication of controversies. In re App. of Pennsylvania R.R. Co., supra, 20 N.J. at 409; see also Reldan, supra, 100 N.J. at 205 (same).

Englewood argues that it should be permitted to challenge the issuance of the Notice now because the Department failed to make a determination of need or special circumstances prior to issuing the Notice, in contravention of the Department's CN regulations. In addition, Englewood argues that the interests of justice and judicial economy require that it not be burdened with administrative proceedings to oppose the establishment of a new hospital to serve Bergen County when there has been no prima facie showing of need. Englewood's entire challenge is premised on the flawed assumption that the Department's Notice constituted a "special call," pursuant to N.J.A.C. 8:33-4.1(a)4. However, the Notice was issued "in lieu of" the next regularly scheduled call for new hospitals, pursuant to N.J.A.C. 8:33-4.1(a)2. (Pa1). Thus, the Notice is not a "special call" issued prior to the next scheduled submission date for new general hospitals but, rather, a modification of the regularly scheduled general call, modified to focus on the geographic region in which there is an open question of need. The issuance of a call in accordance with N.J.A.C. 8:33-4.1(a)2 is not premised on a particularized assessment of need or

extraordinary circumstances but, instead, is issued in accordance with a schedule to allow for regularized review of those health care services subject to CN. See N.J.A.C. 8:33-4.1(a)3 ("Acceptance of batched applications submitted in accordance with the schedule in (a)2 above does not constitute a finding by the Department of need for the additional beds or services proposed in the application(s)."). Because the Department issued the modified call in accordance with the schedule set forth in N.J.A.C. 8:33-4.1(a)2, the Department was not required to make a determination of need or extraordinary circumstances before issuing the Notice.⁵

The publishing of the Notice is only the first of many steps necessary to determine whether or not a CN should be granted authorizing the establishment of a general hospital to serve Bergen County. The Notice itself does not threaten Englewood's operations in any way. Moreover, Englewood will have a full opportunity to submit documentation to the Department in response to any of the applications and, together with the public, will have an opportunity to present comments on the pending applications to the SHPB. The mere fact that Englewood is unhappy with the

⁵ Englewood also argues that the Commissioner's decision to issue the Notice may have been tainted by extraneous considerations, such as the impact on local employment, physician manpower shortages, requests of local politicians and residents, and whether a new hospital will stimulate the local economy. Even if the Commissioner's decision to issue the Notice was influenced by those factors (and there is no evidence that it was), Englewood will have ample opportunity during the CN review process to explore and refute any considerations it believes to be extraneous.

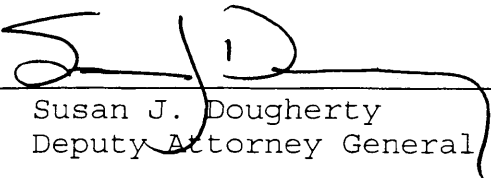
Department's decision to consider applications for a new general hospital to serve Bergen County is not sufficient grounds to warrant interrupting the agency's decision-making process. Granting leave in this case would invite the kinds of piecemeal appeals that could make a shambles of the carefully crafted administrative scheme for processing CN applications.

Because Englewood has failed to demonstrate that it is entitled to the extraordinary relief of an interlocutory review, its motion should be denied.

CONCLUSION

For the foregoing reasons, Englewood's motion for leave to appeal should be denied.

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Dated: March 21, 2011