

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

Civil Action

M-4051-10

**BRIEF AND APPENDIX OF APPELLANT ENGLEWOOD
HOSPITAL AND MEDICAL CENTER IN SUPPORT OF ITS
MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL**

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PRELIMINARY STATEMENT

On February 18, 2011 the Department of Health and Senior Services issued a call for a certificate of need application that by its terms is limited to the reopening of the closed Pascack Valley Hospital ("PVH") in Bergen County ("the Call") [A1a-4a].¹ Movant-appellant Englewood Hospital Medical Center ("EHMC") is an acute care hospital in Bergen County that would be in competition with a reopened PVH in a shrinking market for inpatient service in the County. EHMC moves for leave to appeal the issuance of the Call on the grounds that (i) the Commissioner of Health violated N.J.A.C. 8:33-4.1(a)4 by failing to identify any extraordinary circumstances warranting issuance of a limited call, and (ii) the Call is unsupported by findings of fact that support a *prima facie* need for a reopened PVH and ignores facts showing that there is no such need. As such, the Commissioner's action is arbitrary and capricious.

The Call seeks to reopen Pascack Valley Hospital ("PVH") in Westwood. In 2007 after years of declining utilization and declining revenue, PVH closed and entered bankruptcy. In December 2007, the then Commissioner of Health issued a Certificate of Need approving the closure, based on the finding that PVH's services could be adequately provided by the

¹ "A__a" shall refer to Appellant EHMC's appendix, attached hereto.

remaining general acute care hospitals in the region. Nevertheless, the Commissioner provided a two year period for PVH to reopen under new ownership, ending in December 2009. Hackensack University Medical Center ("HUMC") bought the PVH physical plant out of bankruptcy but failed to reopen the facility within the time allowed.

The 2007 findings of the former Commissioner have been justified by subsequent events. EHMC, HUMC and the other two non-profit general hospitals in Bergen County have absorbed the patient load formerly served by PVH. New emergency facilities have sharply decreased emergency department loads from what they were immediately after PVH closed. Inpatient demand continues to decline in Bergen County, and there is an ample reserve of inpatient bed capacity. The only reason for the current Commissioner even to consider the reopening of PVH is demand expressed by local residents and by elected officials, including a campaign promise from the Governor. Community desire, however, is not a factor that the Health Care Facilities Planning Act, N.J.S.A. 26:2H-8, and the implementing regulations, N.J.A.C. 8:33-4.9(a) and 4.10, allow the Commissioner to consider.

Leave to appeal is warranted because the Commissioner has disregarded her own regulations in issuing the Call and because the interest of justice requires that EHMC not be burdened by an

unnecessary course of administrative proceedings to oppose the reopening of a facility for which there is no *prima facie* showing of need. The Court should grant leave to appeal and vacate the Call as arbitrary, capricious and contrary to law.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. The Closure of Pascack Valley Hospital

After six consecutive years of declining patient-days and increasing percentages of unoccupied beds [A71a], Pascack Valley Hospital, located in Westwood, New Jersey, closed its doors and entered Chapter 11 bankruptcy in September 2007.

On December 27, 2007, the Commissioner of Health issued a Certificate of Need authorizing the closure. [A5a-10a]. The Certificate of Need provided that the purchaser of the hospital's physical plant could apply for a transfer of the hospital license and reopen the facility within two years. [A8a].

In March 2008 a joint venture of HUMC and Touro University bought the physical assets of PVH from the bankruptcy estate. [A75a]. On April 22, 2008, the Attorney General waived review of the purchase under the Community Healthcare Asset Protection Act ("CHAPA"), N.J.S.A. 26:2H-7.10, based on representations by PVH and HUMC that the asset sale did not involve the transfer of a general acute care hospital on the property. [Id.].

Despite that representation, on July 31, 2008 a joint venture of HUMC and a for-profit hospital operator, Legacy Hospital Partners, applied to DHSS to transfer the PVH license and reopen a full general acute care hospital at the site. [A107a]. DHSS deemed the application complete in May 2009. [A108a]. However, in July 2009 HUMC withdrew the application and requested a stay. [Id.]. It did not request that the application move forward until January 2010, after the change of administration. [A76a].²

On December 10, 2009, HUMC requested confirmation by DHSS that the two year period in which to reopen PVH was extended by the Permit Extension Act, L. 2008, c. 78. [A108a]. On December 21, 2009, HUMC filed a declaratory judgment action in Bergen County Superior Court against DHSS, EHMC and Valley Hospital, seeking a ruling that the Permit Extension Act extended the two year period to reopen PVH. [A109a]. The trial court transferred the matter to this Court on February 22, 2010, Hackensack University Medical Center v. Department of Health and Senior Services, 2010 N.J. Super. Unpub. LEXIS 2293 (Law Div. February 22, 2010), where it remains pending. [A106a-117a].

² As a candidate, in July 2009 Governor Christie had promised to reopen PVH. See, infra, at 10.

B. The Effect of the Closure of Pascack Valley Hospital

The DHSS staff report recommending approval of the Certificate of Need application to close PVH concluded that there were a sufficient number of unoccupied hospital beds in the four other non-profit Bergen County hospitals³ to absorb the patients formerly served by PVH and provide accessible inpatient care for the PVH service area. [A15a].

In issuing the Certificate of Need, Commissioner Jacobs found that there was sufficient regional bed capacity to meet the regional need for inpatient acute care services after PVH closed. [A6a-7a]. He concluded:

I have also taken into consideration the statutory requirement to determine whether the action proposed will have an adverse economic or financial impact on the delivery of healthcare services in the region or statewide and will contribute to the orderly development of adequate and effective healthcare services. I note the project will result in closure of a 275 bed acute care facility which is currently underutilized. And, as previously noted, there will be sufficient regional bed capacity to meet the need for inpatient acute care services even after the closure of PVH. As to whether the discontinuance of acute inpatient services at PVH would contribute to the development of adequate and effective health care services, I find that the discontinuance would strengthen the nearby hospitals located in PVH's service area by increasing their occupancy and contributing toward rationalizing the delivery of inpatient acute care services in the region.

[A7a].

³ HUMC, Valley Hospital, EHMC and Holy Name Hospital

Events since 2007 have confirmed the Commissioner's findings that there is no need for an acute care hospital at the PVH site. The volume of former PVH patients has been absorbed by the other hospitals in Bergen County. [A83a].⁴ Even with the closure of PVH, hospital discharges in Bergen County have declined, from over 100,000 in 2007 to less than 98,000 in 2009. [A77a]. Occupancy rates of the four Bergen hospitals have also declined. [A84a]. There is an ample reserve of bed capacity in the region. [A83a].⁵

The same is true of emergency services. Since PVH closed, EHMC and Holy Name Hospital have expanded their emergency departments and HUMC operates a satellite emergency department at the PVH facility. [A81a]. Emergency department diverts⁶ have drastically declined at EHMC, Holy Name and Valley since PVH closed and these new facilities opened. [A82a].

As Commissioner Jacobs predicted, the closing of PVH has strengthened the finances of the four remaining hospitals. Despite the continuing decline in demand for acute care services, all show improvement in three critical measures of

⁴ HUMC, which is the most distant of the four hospitals from PVH [A80a], showed the smallest absorption of PVH volume. [A78a].

⁵ The figures for HUMC and Valley hospital overstate their occupancy because they include "observation patients" where an outpatient is held for observation but not admitted.

⁶ A "divert" exists when an emergency department must decline to treat an emergency patient because the department's capacity is fully absorbed.

financial health - current ratio, operating margin, and days of cash on hand - since PVH closed in 2007. [A85a-86a].

In sum, the Commissioner's findings in the 2007 Certificate of Need have proved to be correct. The four non-profit general hospitals in Bergen County have absorbed PVH's former patients, they have more than adequate inpatient and emergency services, and their financial condition has been improved by the closure of an under-utilized and financially unsound competitor.

C. The Special Call for Pascack Valley Hospital

DHSS regulations authorize the Department to issue a call for certificate of need applications for general acute care hospitals every five years, with the next call scheduled for April 2011. N.J.A.C. 8:33-4.1(a)2. On December 16, 2010, HUMC petitioned for a call limited to the reopening of PVH with a capacity of 125 beds as a branch facility of HUMC. [A20a-55a]. The petition concedes that hospital occupancy rates have been flat or declining since PVH closed. [A25a]. It uses stale 2007 data for emergency department diverts at one hospital, Valley, while ignoring the opening of new emergency facilities and the sharp drop in emergency diverts at Valley, EHMC and Holy Name over the past three years. [A26a]. The petition ignores insofar as possible the existence of EHMC, blandly asserting that Valley Hospital is the only institution with a significant presence in the former PVH service area. [A25a].

HUMC's petition argues that PVH should be reopened, not because inpatient bed capacity in Bergen County is inadequate, but because a hospital will provide employment and additional slots for physician training that will be funded by Medicare. [A32a-34a]. It relies heavily upon the support of elected officials and local residents for the reopening of the closed hospital.. [A34a-37a].

HUMC's conclusion tacitly concedes that the direct need for more acute care inpatient beds in Bergen County would not justify reopening PVH:

Traditionally the Certificate of Need process has been solely concerned with the documentation of the need for health care services, while ignoring the larger role that hospital and health care services play in each community. Slowly, policy makers have come to realize that decisions on health care cannot be made in a vacuum but rather must also take into account a myriad of related social, economic and other factors, including impact on local employment, potential to influence physician manpower shortage, and potential to stimulate the local economy, in addition to reviewing direct need for beds or services and limitations on access to those services.

[A54a]. However, employment, economic stimulus and community sentiment are not within the factors to be considered in issuing a certificate of need for a new acute care hospital. See N.J.S.A. 26:2H-8 (general criteria for certificate of need); N.J.A.C. 8:33-4.9(a)1 (same); N.J.A.C. 8:33-4.10 (specific criteria).

EHMC made a written and oral presentation in opposition to the application on February 11, 2011. [A61a-105a]. The presentation included the facts set out above in Part B.

On February 18, 2011, DHSS Commissioner Alaigh issued a call for a new general hospital in Bergen County limited to the reopening of PVH. [A1a-4a]. The notice cancels the statewide call for general hospitals provided for in N.J.A.C. 8:33-4.2(a)2. It restricts the call to applicants who have control over the site of a new general hospital and who can license the project within two years of certificate of need approval. [A2a]. In contrast to the usual allowance of five years to implement a Certificate of Need, N.J.A.C. 8:33-3.1(a)1, the Call requires a new hospital to be ready for licensure within two years. While the Call does not refer to PVH by name, the omission is disingenuous. As a practical matter, only HUMC, the owner of PVH's physical plant, can satisfy these conditions.

The Call does not refer to the 2007 Certificate of Need to close PVH. It does not find that extraordinary circumstances exist requiring a call limited to the reopening of PVH. It does not find that there is a need to reopen PVH. On the contrary, it states expressly that the Call does not "constitute a finding of need by the Department for any new general hospital affected by the call." [A2a]. It declares only that HUMC "has presented documentation indicating that there may be a potential need for

a new general hospital in this area of approximately 125 beds."
[Ala].

In sum, the Commissioner, without explanation, has issued a call tailored to the reopening of PVH under HUMC ownership despite the fact that the two year period for reopening in the 2007 closure Certificate of Need has expired, despite the fact that acute care bed usage continues to decline in Bergen County, and despite the fact that new emergency facilities have led to a drastic decline in emergency room diversions. The only changed circumstance since 2007 that favors reopening Pascack Valley Hospital is the Governor's campaign promise to do so. [A118a-122a].

ARGUMENT

I. LEAVE TO APPEAL SHOULD BE GRANTED IN THE INTEREST OF JUSTICE AND JUDICIAL ECONOMY

Pursuant to R. 2:2-4, the Appellate Division "may grant leave to appeal, in the interest of justice, . . . from an interlocutory decision or action of a state administrative agency or officer." Leave to appeal should be granted "where there is some showing of merit and justice calls for [the Appellate Division's] interference in the cause." Romano v. Maglio, 41 N.J. Super. 561, 568 (App. Div.), certif. den., 22 N.J. 574 (1956). Leave to appeal is especially appropriate when the ruling below involves application of the law in

unprecedented circumstances. See Pippin v. Fink, 350 N.J. Super. 270 (App. Div. 2002); Hernandez v. Don Bosco Preparatory High, 322 N.J. Super. 1, 5 (App. Div.), certif. den., 162 N.J. 196 (1999); Ende v. Cohen, 296 N.J. Super. 350, 353-54 (App. Div. 1997). Finally, leave to appeal is also appropriate when the appeal, if sustained, would "very substantially conserve the time and expense of the litigants and the courts. . . ." Romano, supra, 41 N.J. Super. at 568. See also Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998) (granting leave to appeal in the interest of judicial economy).

The interest of justice standard is satisfied in this case because leave to appeal is necessary in order to (i) enforce the Commissioner's adherence to her own regulations; and (ii) prevent the agency, the parties, and, without doubt, the courts, "from embarking on an improper or unnecessary course of litigation." Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008) (citing Dinizo v. Butler, 315 N.J. Super. 317, 319 (App. Div. 1998)). The court should grant leave to appeal and invalidate the Call because the Call has been issued without legal authority and will subject EHMC and other opponents of reopening PVH to a needless and burdensome course of administrative proceedings.

II. THE CALL IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW
WITHOUT A REASONED FINDING OF EXTRAORDINARY CIRCUMSTANCES

A. The Commissioner Has Not Expressly Or Implicitly Found
The Extraordinary Circumstances N.J.A.C. 8:33-4.1(a)4
Requires For A Special Call

It is axiomatic that an administrative agency is bound by its own regulations unless and until they are changed by the statutory rulemaking process. Cooper Univ. Hosp. v. Jacobs, 191 N.J. 125, 143 (2007); County of Hudson v. Dept. of Corrections, 152 N.J. 60, 71 (1997). Here, DHSS regulations permit the Commissioner to announce "special calls" only "upon making a finding of extraordinary circumstances that warrant such a call prior to the next scheduled submission date." N.J.A.C. 8:33-4.1(a)4. As explained by the Supreme Court in In re Application of Virtua-West Jersey Hospital Vorhees for a Certificate of Need, 194 N.J. 413, 428 (2008), a special call must be based on a finding of need:

. . . when the Commissioner issues a "specific call" for CN applications, she must identify in advance, and with specificity as to geographic region if applicable, the particular need for which applications are sought. In other words, the Commissioner initiates the special call based on a departmental finding of a need for the new or enhanced health care service. [Emphasis added].

Once the Commissioner cancelled the general call for acute care hospitals scheduled for April 2011, see N.J.A.C. 8:33-4.1(a)2, her own regulation authorized her to issue a special call only

upon a finding that extraordinary circumstances presented an unfilled need for a new general hospital at the PVH site.

Moreover, "[i]t is well settled that administrative action cannot be arbitrary or capricious or inconsistent with the legislative intent, policy or delegation of authority." Cooper Univ. Hosp., supra, 191 N.J. at 143-44. Administrative action is arbitrary and capricious when "fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance . . . decisive but unreasoned." In re Certificate of Need Application of Arnold Walter Nursing Home, 277 N.J. Super. 472, 482 (App. Div. 1994).

A sure symptom of arbitrary and capricious action is that the agency has not explained its decision in a manner that takes into account all evidence supporting and opposing it. See Mainland Manor Nursing and Rehabilitation Cntr. v. N.J. D.H.S.S., 402 N.J. Super. 562, 571 (App. Div. 2008) (agency must evaluate all relevant evidence and argument); Arnold Walter Nursing Home, supra, 277 N.J. Super. at 483 (agency decision must provide reviewing court with "insight into the objective aspects of the process and . . . its judgmental features"). To permit this Court to review administrative decisions, the bases for the decision must therefore be set forth by the agency. In re Application of Holy Name Hosp., 301 N.J. Super. 282, 292

(App. Div. 1997); see also Mainland Manor Nursing, 403 N.J. Super. at 571. "It is the agency head's obligation . . . to state the basis of decision with clarity; and, with sufficiency, to articulate the factual determinations and legal standards that inform the action taken." Arnold Walter Nursing Home, 277 N.J. Super. at 472.

It is also well-settled that an agency must "conduct an independent evaluation of all relevant evidence and legal arguments presented in support of and in opposition to proposed administrative agency action, such as approval of a certificate of need." Mainland Manor, 403 N.J. Super. at 571. "The failure to do so may make the agency's decision arbitrary and capricious and require a remand for reconsideration." Id.

The Call clearly does not comply with these standards. It makes no finding of extraordinary circumstances. It deliberately declines to find either actual or even *prima facie* need to reopen PVH. Instead, it states only that "there may be a potential need for a new general hospital in this area of approximately 125 beds." [A1a].

This conclusory statement is unsupported by findings or analysis. It ignores the Commissioner's findings in 2007 that PVH could be closed because the other Bergen County hospitals have sufficient bed capacity. [A6a-7a]. It ignores the evidence submitted by EHMC that usage of acute care hospital beds in

Bergen County has declined since PVH was closed. [A77a; A84a]. It makes no reference to the increased availability of emergency services in the region since PVH closed [A81a-82a]; indeed, it makes no reference to the issue of emergency services at all.

In December 2007 Commissioner Jacobs approved the closure of PVH as an unneeded and insolvent facility, with a proviso that the owners of the facility could reopen it as an acute care hospital if they did so within two years. [A8a]. HUMC, the owner of the facility, has not satisfied that proviso, and the two year window has shut. The Commissioner has not found that changed circumstances in the three years between the closure and HUMC's petition for a special call have created extraordinary circumstances. If anything, experience has shown that the four existing non-profit acute care hospitals are satisfying a declining demand for inpatient services and meeting the need for emergency services. There has been no "departmental finding of need for the new or enhanced health service." In re Application of Virtua-West Jersey Hospital Vorhees for a Certificate of Need, 194 N.J. at 428. Without an explanation of how experience or the passage of time has created an "extraordinary" need to reopen PVH, the Call is merely "an exercise of will or caprice . . . decisive but unreasoned." Arnold Walter Nursing Home, 277 N.J. Super. at 482.

B. The Commissioner's Decision Appears Tainted By Extraneous Considerations

The Commissioner's failure to explain her decision leaves open the possibility that she has improperly taken into account factors outside the scope of the Health Care Facilities Planning Act and DHSS's regulations implementing the Certificate of Need requirement. As the Supreme Court explained in In re Application of Virtua-West Jersey Hospital Vorhees for a Certificate of Need, 194 N.J. at 423-25, the requirement of a certificate of need is intended to protect the quality of health care by maintaining control over competition and proliferation of services. For that reason, the Act requires that the Commissioner balance the demonstrated need for the facility against any adverse impact on existing providers. Id., 194 N.J. at 433-35 (urban provider); see generally N.J.S.A. 26:2H-8 (no adverse economic or financial impact on delivery of health care services); N.J.A.C. 8:33-4.9(a) (availability of alternative facilities); N.J.A.C. 8:33-4.10(b) (no adverse impact on availability of health care services), 4.10(c) (no adverse effect on state's health care system).

In 1998 the Act was amended to eliminate the certificate of need requirement for many health care services, leaving their availability to the market. See generally N.J.S.A. 26:2H-6.1 (Legislature's findings supporting 1998 amendment). The

requirement was retained for specific services, however, including new general acute care hospitals. See N.J.S.A. 26:2H-2a (defining "health care facility"); N.J.A.C. 8:33-3.1 (certificate of need requirement). As to the services for which the certificate of need requirement was retained, the Legislature explained that it was necessary to protect the financial viability of existing providers:

For reasons of maintaining the quality of certain health care services, a limitation of the proliferation of such services may continue to be essential to protect the viability of the services as well as the providers now rendering them, to protect the role of such institutions as urban hospitals, whose importance to the Statewide health care system is indisputable, 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).

For those reasons, the Act requires a certificate of need, rather than a certificate of want. It is an insufficient reason that local residents desire a facility, or that elected officials - local or statewide - desire it, or that it may bring employment to a locality. Those are factors outside the scope of the Act and the regulations.

In this case, HUMC's petition to the Commissioner rests largely upon these extraneous considerations, and its conclusion expressly invokes them. [A54a]. As demonstrated above, there is substantial evidence i) that an acute care hospital at the

PVH site was unneeded when the Commissioner issued the December 2007 Certificate of Need, ii) that the remaining non-profit hospitals in Bergen County are meeting the need for general hospital services, and iii) that the closing, as the Commissioner predicted, has financially strengthened those hospitals. To offset that evidence, HUMC requests that the Commissioner consider local community sentiment and political support for reopening an unneeded facility under the financial auspices of HUMC. [Id.]. Nothing in N.J.S.A. 26:2H-8 or its implementing regulations allows the Commissioner to do so.

Nor does the Act allow the Commissioner to consider the effect of a new facility on employment in its locale. Moreover, HUMC's argument that a reopened PVH will provide an economic stimulus is specious. HUMC is the largest acute care hospital in Bergen County, but it is the most distant from the former PVH [A80a], and its admissions showed the least impact after PVH closed. [A78a]. Reopening PVH as a branch of HUMC is an effort to capture a larger share of the former PVH inpatient market at the expense of EHMC and Valley, the two hospitals best located to serve that area. In light of the continuing decline in demand for inpatient beds in Bergen County, this is a zero sum game in which HUMC would prosper at the expense of its

competitors.⁷ Whatever employment might be gained by the reopening of PVH would be offset by the contraction of services at EHMC and other Bergen County hospitals.

It is the Court's role to ensure that the Commissioner has followed the law and DHSS regulations. Virtua-West Jersey Hospital, supra, 194 N.J. at 422 (Court should overturn action where "agency did not follow the law"); County of Hudson, supra, 152 N.J. at 71 (finding that agency is bound by its own regulations). The Commissioner's conclusory language in the Call leaves this Court to speculate whether her decision was in any way influenced by the extraneous factors HUMC advanced. Without a detailed analysis that takes into account the full administrative record, this Court cannot determine that the Commissioner's decision was not influenced by factors that the Act does not authorize her to consider. That alone requires the Court to vacate the Call. In re Certificate of Need Application of Arnold Walter Nursing Home, 277 N.J. Super. at 480-82.

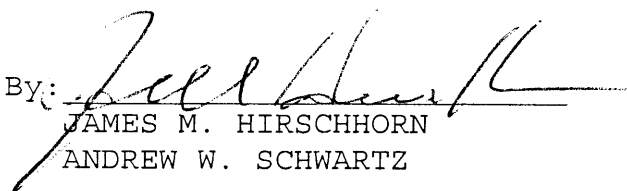
⁷ HUMC's petition asserts that a reopened PVH will attract substantial patient volume from Rockland County, New York. [A25a]. EHMC has demonstrated that PVH never did so. [A92a].

CONCLUSION

For the foregoing reasons, the Court should grant leave to appeal and vacate the Call as contrary to N.J.A.C. 8:33-4.1(a)4 and unsupported by reasoned findings and analysis.

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Dated: March 10, 2011