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| ENGLEWOOD HOSPITAL AND MEDICAL CENTER, | : | SUPERIOR COURT OF NEW JERSEY |
| | : | APPELLATE DIVISION |
| | : | |
| Appellant, | : | DOCKET NO. AM-430-10T2 ; m-441870 |
| | : | |
| v. | : | <u>Civil Action</u> |
| | : | |
| NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES, et al., | : | |
| | : | |
| Respondents. | : | |

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|------------------------------------------------------------------|---|------------------------|
| THE VALLEY HOSPITAL, INC., | : | |
| | : | |
| Appellant, | : | DOCKET NO. AM-431-10T2 |
| | : | |
| v. | : | <u>Civil Action</u> |
| | : | |
| THE NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES, et al., | : | |
| | : | |
| Respondents. | : | |

**CONSOLIDATED BRIEF AND APPENDIX ON BEHALF OF
RESPONDENT/INTERVENOR HACKENSACK UNIVERSITY MEDICAL CENTER IN
OPPOSITION TO MOTIONS FOR LEAVE TO APPEAL**

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PRELIMINARY STATEMENT

The Commissioner of the Department of Health & Senior Services has promulgated a regulation holding that certificate of need applications will be automatically entertained for new acute care hospitals, on a statewide basis, every 5 years. Shortly before the next application "call" date, set for April 1, 2011, the Commissioner narrowed the statewide call, and instead invited applications for a certificate of need to open a new acute care hospital in Bergen County within two years of final approval. From this legally unexceptional event, two objecting hospitals seek the extraordinary remedy of interlocutory review, before the Commissioner has even received a single application.

The objectors argue that because the call was outside the general call schedule, the Commissioner was required to issue a decision finding "extraordinary circumstances" before entertaining applications. Not only is the Commissioner's procedural decision to simply entertain applications not worthy of interlocutory review, but on the merits the motions are plainly foreclosed by precedent. In the case of In re Application of Virtua-West Jersey Hosp. Vorhees for a Certificate of Need, 194 N.J. 413, 426 (2008), the Supreme Court held that no particular finding of need is required for the Commissioner to forego a scheduled and general statewide call,

for a narrower invitation to receive applications relating to a more specific geographic region or type of service. In this case, the Commissioner's decision to limit the fixed call for statewide applications for acute care hospitals to a narrower call for hospitals in Bergen County is entirely consistent with, and controlled by Virtua West. This instance, like that presented in Virtua West, constituted an "intersection of specific needs" subsumed within needs "pursuant to a general call schedule." Virtua West, supra, 194 N.J. at 431. Unable to confront the dispositive weight of Virtua West head on, the objectors do not even make an attempt to distinguish that case.

Beyond that, the objectors have confused consideration of the merits of opening a new hospital with the Commissioner's decision to receive applications. As to the former, there will be an ample opportunity for the objectors to have their arguments heard in the context of the public hearing process that is mandated by statute. The Commissioner will then issue a final agency decision based on the evidence in the record. There is simply no cause or basis, on this scant record, to interfere with the regulatory process at this early stage. The motions should accordingly be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

HUMC is a New Jersey non-profit corporation that presently operates a 775-bed acute care hospital located in Hackensack, New Jersey, in the County of Bergen. (38a)². From 1959 until late 2007, Pascack Valley Hospital Association, Inc. ("PVHA"), operated a now-defunct acute care hospital located in Westwood, New Jersey, known as Pascack Valley Hospital ("Pascack Valley"). Pascack Valley was licensed to operate 275 beds and served a market consisting of 14 municipalities in northern Bergen County, and portions of Rockland County in the State of New York. (5a).

Several factors contributed to Pascack Valley's demise. Principally, Pascack Valley's management was slow to react to changing patient expectations and declining reimbursement rates, and found itself hamstrung by uneconomical collective bargaining agreements. (12a). Competing hospitals seized upon this opportunity to siphon off a critical mass of Pascack Valley's patient base. (12a).

PVHA's management then embarked on a poorly-executed expansion project, but this proved to be too little, too late. Awash in red ink, PVHA became insolvent after it unwisely spent \$80 million to build a new wing, and the incremental revenue

¹The procedural history and statement of facts are combined because they are intertwined, and in the interests of brevity.

² Citations to 1a, 2a, 3a, etc., are to movant Englewood Hospital & Medical Center's appendix.

derived from that expansion proved insufficient to make the debt service payments. (25a; 11a-12a).

Facing a cash crisis, and in technical default of its bonds, on September 27, 2007, PVHA filed a Chapter 11 petition with the United States Bankruptcy Court for the District of New Jersey, in In re Pascack Valley Hospital Association, Inc., Case No. 07-23686 (RG). By November 21, 2007, PVHA had terminated substantially all of its employees, transferred its patients to other facilities, and ceased operations. (14a).

As required by the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 et seq. ("HCFPA"), PVHA held an operating license issued by the Department to operate an acute care hospital. Under the HCFPA, PVHA was prohibited from closing the hospital without a certificate of need granting permission to close, and PVHA so applied on September 28, 2007.

The rapid deterioration and ensuing bankruptcy of PVHA was a seismic shock to a community that had received care at Pascack Valley for nearly 50 years. Those members of the community that participated in the ensuing public hearing process were unanimous in supporting the continued operation of a hospital at the Pascack Valley site. (14a-15a). As noted by the Department's staff, in its formal recommendation:

Thirty-eight members of the public spoke at [the November 20] hearing. All 38 who spoke during the hearing opposed the closure of [Pascack Valley]. A

few people asked the Department to allow the license to remain inactive for a period of two years to facilitate the possible purchase of [Pascack Valley] and the reopening of the hospital as an acute care facility. (14a-15a).

The Department's ultimate findings reflect the stark reality that Pascack Valley had no choice but to close because it was facing "ongoing operating losses (\$50 million in four years) and a serious, non-reversible liquidity crisis" and had been forced to enter bankruptcy because, despite efforts, "no strategic partner came forward to continue [Pascack Valley] as an acute care institution." (13a). Since this liquidity crisis resulted more from management mis-steps than a contraction of need, staff recommended preservation of the hospital's operating license to facilitate a re-opening by a purchaser in bankruptcy. (16a).

On December 28, 2007, one month after Pascack Valley had substantially ceased operations, the Commissioner issued a certificate of need approving Pascack Valley's closure. (5a). The Commissioner's decision was premised upon the acknowledgement that PVHA had experienced "significant and growing financial losses" that made closure "fiscally required." (7a). The Commissioner did not affirmatively find that there was a lack of need for a hospital. Instead, he simply noted that given the circumstances, "there is sufficient bed capacity

in Bergen County to enable the remaining health care system to bridge any gaps in services" arising from the closure. (7a).

The Commissioner endorsed the staff recommendation and credited the unanimous support in favor of keeping the hospital open. (6a). He fashioned closure conditions intended to facilitate a timely reopening of the hospital under new management or ownership. Rather than terminate Pascack Valley's license, the Commissioner granted PVHA, or any qualified purchaser of the facility, the right to re-activate the operating license for a period of 24 months, upon meeting the regulatory standards for a transfer of ownership. (8a).

Shortly after Pascack Valley's closure, PVHA auctioned all of its assets under the supervision of the Bankruptcy Court. Having taken note of the license re-activation approval, HUMC stepped forward to acquire and reopen Pascack Valley as a 128-bed acute care hospital, less than half the size of the previous facility. (11r)³. In several transactions concluding in June 2008, HUMC paid a total of \$53.25 million for the Pascack Valley site, and then entered into a joint venture with LHP Hospital Group, Inc., to re-open Pascack Valley as "Hackensack University Medical Center North at Pascack Valley." LHP's participation included a capital infusion of \$80 million to completely renovate and modernize the facility. (11r-12r).

³ Citations to 1r, 2r, 3r, etc., refer to HUMC's appendix, submitted herewith.

On July 31, 2008, HUMC applied to the Department for a certificate of need to transfer and re-activate the license to operate Pascack Valley. (75a). After several rounds of follow-up communications between HUMC and the Department, on May 15, 2009, the Department determined that HUMC's application was administratively complete for processing, and would be taken under advisement by the State Health Planning Board on July 23, 2009. (76a).

From the earliest stages of the bankruptcy case, HUMC's efforts to re-open Pascack Valley have been challenged at every turn, and in every conceivable way, by appellants herein, two competing local hospitals - The Valley Hospital ("Valley") and Englewood Hospital & Medical Center ("Englewood") (collectively, the "objectors")⁴. The objectors, charitable institutions both, went so far as to jointly bid \$45 million for the Pascack Valley site, just to keep it out of HUMC's hands and prevent the

⁴ The Sills Cummis firm, Englewood's counsel, implies that HUMC misrepresented its intention to re-open Pascack Valley, in a 2008 letter to the Attorney General addressing the applicability of the Community Healthcare Assets Protection Act ("CHAPA"). (Englewood Brief at 3-4). Sills Cummis, however, omits the fact that it was PVHA's counsel in the bankruptcy case, before it switched sides and undertook to represent Englewood. In a letter, dated February 29, 2008, it was actually Gary W. Herschman, Esq., of the Sills firm who advised the Attorney General that there was "no intention whatsoever to re-activate the hospital's license." (1r). Thereafter, HUMC's counsel separately wrote to the Attorney General to correct that assertion - after Sills Cummis refused to correct its prior statement - advising that HUMC "may seek to reopen an acute care general hospital at the site at a future date." (7r).

hospital from re-opening. (13r). In fact, their bid included a proposed stipulation that PVHA would see to it that Pascack Valley's operating license was "irrevocably cancelled, abandoned, decertified, released and terminated."

The objectors managed to delay HUMC's acquisition of the property and the licensing proceeding by filing numerous tactical motions in the Bankruptcy Court. None of those efforts were ultimately successful on the merits, but the Department could not deem the certificate of need application complete until the litigation concerning ownership of the site, and the right to apply for re-opening had been resolved, nearly a year later.

Fortunately, on September 6, 2008, the Permit Extension Act of 2008, N.J.S.A. 40:55D-136.1 et seq., was enacted. On November 17, 2008, the Department published a bulletin in the New Jersey Register in which it stated that the expiration of any certificates of need, and associated operating licenses, were automatically tolled. See 40 N.J.Reg. 6657(c) (Nov. 17, 2008). On December 10, 2009, HUMC requested that the Department confirm that the 24-month license re-activation deadline was automatically tolled, and cited approximately 10 other instances where the Department had done so. (76a).

When HUMC did not receive a response, it filed an action in the Law Division for a declaration of its rights under the

Permit Extension Act. (76a). The next day, the outgoing Commissioner of the Department issued a purported final agency decision stating her view that the Permit Extension Act did not extend the re-activation period. (76a). HUMC's challenge to that decision is now pending before this Court, in a related matter, Hackensack University Medical Center v. Dept. of Health & Senior Services, et al., Docket No. A-3193-09T1, but the Department has not otherwise denied the application.

HUMC has not abandoned its appeal, but on December 16, 2010, it filed with the Department a petition to substantiate the need for a call to receive certificate of need applications for the opening of a new acute care hospital in Westwood, New Jersey. (20a). The objectors each made written submissions vigorously opposing the petition and were afforded the opportunity to make presentations to senior Department staff. (Pa59-Pa63⁵; 61a-105a).

HUMC's petition demonstrates a clear need for the Department to consider approving the opening of a new hospital in Bergen County. Occupancy rates at HUMC have typically been in excess of 90%, and in the wake of Pascack Valley's closing most of the patients were absorbed by Valley, the closest hospital to Pascack Valley. (25a). Valley's inpatient

⁵ Citations to Pa1, Pa2, Pa, etc., are to appellant The Valley Hospital, Inc.'s appendix.

occupancy rate increased to 89.5% through the 2008 calendar year before dropping slightly starting in 2009 after a change was made to separately report inpatient and observational patients. (25a-27a). Observational patients, however, still occupy licensed acute care beds and consume scarce resources. (27a).

The strains upon the system have been reflected in the emergency services data. In the immediate aftermath of Pascack Valley's closure, the number of days when the Valley emergency room went on "divert" status increased 220%, and the incidences when Valley was on divert for at least a two-hour period increased 453%. (26a). It is probably no coincidence that after HUMC filed its application to re-open Pascack Valley, the incidence of reported diverts (reported by Valley) at Valley plunged. (26a).

In an area where minutes count, traffic studies show that the average ambulance trip to Pascack Valley from within its market area is 6 to 9 minutes, but increases to 12 to 17 minutes for patients that are now taken to Valley, HUMC or Englewood. (29a). Such delays are multiplied when considering the round trip time necessary for ambulance crews to return to their home base, and the increased wait times at crowded emergency rooms. (29a-30a).

In a report issued on January 24, 2008 by the New Jersey Commission on Rationalizing Health Care Resources, it was

suggested that by 2015 there could be excess capacity in the region of 765 beds. (28a). However, while the report stated that the estimated bed surplus was "the equivalent of between 2 and 3 hospitals of the average bed size" it emphasized that its finding "does not imply that 2 to 3 hospitals could be closed in the area without depriving New Jersey residents in the area of essential hospital services." (Pa53). Beyond the report's own equivocation, it is incontestably true that the conclusions drawn therein are stale because 3 local hospitals - totaling 696 beds - have since closed.

The report also confused the 256 primarily geriatric and long term care beds at the County hospital with the acute care beds that are actually at issue. (28a). After adjusting for the closures and misallocation, there is actually a net present need of 187 beds in the market area, which will increase if projections for the population in Bergen County to grow, and age, are realized. (28a; 31a). Overall, re-opening Pascack Valley will increase residency training slots, provide economic stimulus to the region, and except for the present objectors, is unanimously supported within the community. (32a-37a).

After considering all of these facts, on February 18, 2011, the Commissioner of the Department issued a notice cancelling a previously-scheduled statewide certificate of need call for new general hospitals. (1a). The notice provides that "in 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" for "a proposed new general hospital to serve Bergen County...because a petitioner has presented documentation indicating that there may be a potential need for a new general hospital in this area of approximately 125 beds." (1a).

The notice specifically provides that "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 regulatory requirements. (2a). The Commissioner expressly invited "existing New Jersey general hospitals to file a written submission with the Department in response to any submitted certificate of need applications. (3a).

Throughout the regulatory process, and before the Bankruptcy Court, the objectors have insisted that HUMC cannot obtain a transfer of Pascack Valley's license, and that the only appropriate way to re-open the hospital is through the filing of a petition with the Department for the issuance of a call to open a new acute care hospital. See, e.g., (133r-135r) ("we think the appropriate process is for the State to determine whether a call should be issued, not whether Pascack's license should be sold"); (160r) ("any [certificate of need] for the

establishment of a new general hospital must be in response to a 'call' issued by the Commissioner"); Letter, dated 4/13/09 at 3-4 (167r-168r) ("HUMC knows, however, that...the Department has the power to determine whether there is a need for another hospital in the region and to request (or "call") for applications...what HUMC is attempting to do is to subvert the "call" process"); (179r) (HUMC "conveniently avoids the requirement that a [certificate of need] for the establishment of a new acute care hospital must be in response to a 'call' issued by the Commissioner").

Now that HUMC has pursued precisely the course of action that the objectors have urged, they have shifted position and are arguing that the call process is so inappropriate that the Department's position requires interlocutory review. This Court should see these motions for what they are: a transparent attempt to forestall a decision on the merits, and to protect the objectors' business interests at the expense of public health. The motions for leave to appeal are devoid of merit, and should be denied⁶.

⁶The objectors have each filed motions which are separately docketed, and in Valley's case HUMC was not named as a party. HUMC files this consolidated brief in opposition to both motions, and respectfully requests that it be considered, together with its cross-motion to intervene in the Valley matter.

ARGUMENT

**LEAVE TO APPEAL SHOULD BE DENIED
BECAUSE THE INTERESTS OF JUDICIAL
ECONOMY AND JUSTICE WILL BE
DISSERVED BY DISRUPTION OF THE
ONGOING PROCEEDINGS BEFORE THE
DEPARTMENT**

Interlocutory appeals have long been disfavored by our courts. As stated by the Supreme Court in In re Appeal of Pennsylvania Railroad Co., 20 N.J. 398, 409 (1956), leave to appeal will be granted only in "exceptional cases where, on a balance of interests, justice suggests the need for a review in advance of final judgment." To like effect, the Court emphasized in Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div.), certif. den. 22 N.J. 574 (1956), cert. denied 353 U.S. 923 (1957), that the power to review non-final orders "is very sparingly exercised," in deference to the "strong public interest in uninterrupted proceedings at the trial level with a single and complete review." The judiciary's "inhospitable attitude" toward interlocutory appeals is thus deeply entrenched in the law. State v. Reldan, 100 N.J. 187, 205 (1985), quoting Clifford, "Civil Interlocutory Appellate Review in New Jersey," 47 Law & Contemporary Problems 87, 97 (1984).

Under these well-established standards, the objectors' motions for interlocutory review clearly warrant denial. The licensing and operation of acute care hospitals is governed by

the HCFPA. In furtherance of the statutory objectives, "the Legislature mandated that health care facilities and services could not be expanded or instituted without the Commissioner's...prior approval through issuance of" a certificate of need. See Virtua-West, supra, 194 N.J. at 423 (2008); N.J.S.A. 26:2H-7. A certificate of need is required to open, close, modify, or transfer ownership of an acute care hospital facility. See N.J.A.C. 8:33-3.1 et seq.

To facilitate the orderly review of certificate of need applications, the Department has promulgated a regulation, N.J.A.C. 8:33-4.1, that establishes a fixed "call" schedule for the receipt and processing of applications. The regulation "frees the Commissioner from any implied finding of need for a service based solely from processing a CN request submitted pursuant to the general invitation for CN applications." Virtua West, supra, 194 N.J. at 416-17. In February of each year, the Commissioner is required to publish "an anticipated schedule for receipt of certificate of need applications subject to full review procedures for a two-year period." N.J.A.C. 8:33-4.1(a).

In addition to the February schedule publication, the regulation also sets a fixed schedule for the receipt of certificate of need applications for a number of specified regulated services, including applications to open "new general hospitals." Under the fixed schedule, applications for

certificates of need to open new general hospitals are received commencing on April 1, 2006, and every 5 years thereafter. N.J.A.C. 8:33-4.1(a)(2). Thus, the next fixed statewide call for new hospitals was set to take place on April 1, 2011.

The regulation separately authorizes the Commissioner to "announce additional or special calls for certificate of need applications beyond those identified in the yearly notice" or to "delete announced calls from the yearly notice" by publishing a notice in the New Jersey Register. N.J.A.C. 8:33-4.1(a). In addition, the regulation reserves discretionary authority for the Commissioner to issue special calls for certificate of need applications for discrete healthcare services when there is a prima facie showing of the need to consider applications. Virtua West, supra. Specifically, for services "with longer than annual submission schedules, the Commissioner may announce special calls for receipt of certificate of need batched applications 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).

Here, the objectors contend both that the February call for a new hospital in Bergen County is a "special" call, and that the Commissioner was required to issue an agency decision finding "extraordinary circumstances" akin to a substantive finding of need. However, Virtua West, the seminal case in this

area, imposes no such requirement. While the objectors, in their moving papers, virtually ignore Virtua West, that case, in fact, is a controlling precedent and is fully dispositive of the motions.

In Virtua West, the Department issued a separate call for certificate of need applications for changes in membership within "maternal and child health consortia" and for the addition of intermediate and intensive care bassinets to acute care hospitals, but did not refer to the overall status change that such hospitals could logically obtain, if such approvals were granted. The Department had already adopted a fixed call schedule, pursuant to N.J.A.C. 8:33-4.1(a), for the receipt of certificate of need applications for "maternal and child health needs" on an annual basis. That term, by express definition, included an increase in bassinets. Virtua West, 194 N.J. at 426. Prior to the issuance of the separate call for bassinets, the Department had issued an antecedent notice extracting and postponing the receipt of applications for bassinets from the more general call for maternal and child health needs, and eliminating the call as to a specific geographic region in its entirety.

Virtua was ultimately granted an increase in bassinets, and in consequence obtained a further approval to change its status to a "Regional Perinatal Center." A competing hospital

challenged the change in designation as ultra vires and outside the scope of the call.

The Court rejected the competitor's argument as a misapprehension of "the intersection of the scheduled annual call dates for CN submissions with specific calls for CN applications." Id. at 428. For those applications that are pursuant to the pre-scheduled call, the Commissioner is "not bound to any pre-determined identification of need." Id. at 428. Freed from the need to identify a need, the Court found that the Commissioner's more specific call for additional bassinets, within a defined geographic region, was subsumed within the pre-scheduled, and more general statewide call for maternal and child health needs in South Jersey. Id. at 703.

Moreover, the Court found that the core purpose of the call schedule is simply to provide notice, and that "having published a general call schedule inviting the submission of CN applications for maternal and child health needs...annually, thereafter, the Commissioner was free to limit or delete any portion of that general notice." Id. at 431. The competing hospital was "not harmed by the process followed by the Commissioner...[and] fully participated in the CN process, protesting Virtua's request at every level of review." Ibid.

Virtua West is directly on point, and is completely dispositive. Like that case, here the regulation identified a

fixed schedule for a statewide call to submit applications for certificates of need to open general hospitals. The next fixed statewide call was set to take place on April 1, 2011. Consistent with the regulation, the Commissioner duly issued a February notice terminating that call and issuing a much narrower call for new general hospitals in Bergen County that are capable of being opened within two years. The call for new hospitals within Bergen County is clearly subsumed within the much broader statewide call.

Since the call was pursuant to the fixed schedule, it did not require any showing of extraordinary circumstances, nor was the Commissioner required to make a prima facie showing of a need to consider applications. Like Virtua West, no substantive rights have been impacted by the notice and the objectors have been vocal participants at every level of the process.

The standard of review requires deference to the specialized or technical expertise of the agency charged with the administration of a regulatory scheme. In re Freshwater Wetlands Protection Act Rules, 180 N.J. 478, 488-89 (2004). The breadth of an agency's authority encompasses all express or implied powers necessary to fulfill the legislative scheme that the agency has been entrusted to administer. Virtua West, supra, 194 N.J. at 422-23. "A reviewing court should strive to give substantial deference to the interpretation an agency gives

to a statute that the agency is charged with enforcing." Id. at 423 (citation omitted). The Commissioner's interpretation of her own regulation is clearly supported by the record, and was rational on its face. It should not be disturbed, particularly on an interlocutory application.

Denial of the motions will also serve the interests of justice and judicial economy because it will allow the proceedings below to continue unimpeded - and will, in all probability, yield a final, appealable outcome disposing of the issues on their merits on a full record and in an orderly fashion, hopefully in the near future. See, e.g., Viviano v. CBS, Inc., 101 N.J. 538, 547 (1986) (judicial policy generally favors "the resolution of claims on their merits"); James v. Chevron U.S.A., Inc., 301 N.J. Super. 512, 549 (App. Div. 1997), aff'd 151 N.J. 279 (1998) (same). Appellate review may then proceed as of right, in due course.

The objectors complain that the Commissioner has not issued findings of fact and conclusions of law sufficient to substantiate her decision. At this point, however, the issuance of a call is simply a procedural event intended to notify the public, and the Commissioner is not yet at a point where she is required to render detailed findings of fact and conclusions of law.

The requirement within N.J.A.C. 8:33-4.1(a)(4) for a showing of extraordinary circumstances only applies when there is a special call *prior* to the scheduled general call. As was true in Virtua West, even if there was a special call, it was issued on virtually the same schedule as the general call. Moreover, issuance of the call clearly follows HUMC's detailed and comprehensive petition to substantiate need, and the facts and data set forth in the petition may be cited in support of the need for call.

The administrative process initiated by the call is only a first step in a lengthy regulatory process where all interested parties will have the opportunity to be heard. As noted in the call itself, there has not yet been a substantive finding of need, and this analysis will await the full regulatory process if the Department accepts HUMC's application. If the Department finds that the application is substantively complete, the full review process contemplates that the matter will be transmitted to the State Health Planning Board for an initial hearing and recommendation, N.J.A.C. 8:33-4.13, before being subject to a final decision by the Department. See N.J.A.C. 8:33-4.1. If the application is not accepted, or is deemed incomplete, then it must be re-filed during the next scheduled call. Furthermore, if the Department denies the application on the

merits, the applicant is entitled to a contested case hearing. See N.J.A.C. 8:33-1.2(f); N.J.A.C. 8:33-4.15.

The objectors' extended efforts to refute the substantive need for a new hospital as part of an interlocutory appeal, before the Department has even taken a position on the merits, attempts to short-circuit an extended regulatory process. It would be the height of unfairness, and contrary to the public interest to consign the certificate of need process, at this nascent stage, to the delay and disruption that will inevitably result from an interlocutory appeal simply because the objectors take issue with the Commissioner's procedural decision to entertain certificate of need applications. If the Commissioner accepts applications, she will then be called upon to make an ultimate finding of need, after a full hearing. There is simply no cause or basis to litigate that analysis before this Court, on a scant and undeveloped record, and where a substantive application has not even been submitted for review.

The objectors repeatedly make the spurious argument that the Governor's public support for re-opening Pascack Valley somehow renders the call process suspect. The Governor, to be sure, is entitled to this view. At the end of the day, however, the Commissioner's decision will be made on the merits, upon the receipt of evidence, and pursuant to the regulatory criteria. If any interested party believes that decision is not supported

by substantial credible evidence, is arbitrary and capricious, or contrary to law, then the judicial process can follow in the ordinary course.

HUMC, and the Department, have already been subjected to years of multiplicitous litigation over the re-opening of Pascack Valley, a facility that served the community for almost 50 years without an adverse impact on the objectors. Principles of judicial economy and fairness both favor denial of interlocutory review. In this case, as in most, the objections should be resolved in toto at the agency level, and appellate review, if deemed necessary by either side, can then follow in the ordinary, and proper, course. State v. Reldan, supra; Romano v. Maglio, supra. The motions should accordingly be denied.

CONCLUSION

The objectors' motions for leave to appeal the Commissioner's decision to replace the scheduled statewide call for certificate of need applications for new acute care hospitals with a narrower call applicable to the County of Bergen should be denied in all respects.

Respectfully submitted,

**DECOTIIS, FITZPATRICK,
& COLE, LLP**

By: Michael R. Cole
Michael R. Cole

Dated: March 21, 2011