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APPELLATE DIVISION

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THE VALLEY HOSPITAL, INC.,
 Appellant,
 v.
 THE NEW JERSEY DEPARTMENT OF
 HEALTH AND SENIOR SERVICES AND
 DR. POONAM ALAIGH, in her
 official capacity as
 COMMISSIONER OF THE NEW JERSEY
 DEPARTMENT OF HEALTH AND SENIOR
 SERVICES,
 Respondents.

SUPERIOR COURT OF NEW JERSEY
 APPELLATE DIVISION
 DOCKET NO:

Civil Action

Sat Below: Commissioner Poonam
 Alaigh, MD, MSHCPM, FACP

AM-431-10T2
 M-4054-10

BRIEF OF APPELLANT THE VALLEY HOSPITAL, INC. IN SUPPORT OF
 MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

The Department of Health and Senior Service's (the "DHSS") decision on February 18, 2011 to publish a notice in the New Jersey Register (the "Notice") canceling the regularly scheduled statewide call for certificate of need applications for a new general hospital on April 1, 2011, and issuing a limited special call for certificate of need applications for a new acute care hospital in Bergen County (the "Call"), merits immediate review by the Appellate Division. The Court's intervention is warranted because the DHSS' baseless decision represents an impermissible departure from the applicable regulations governing certificates of need, and, if not reversed, would allow the DHSS to subvert the process established to ensure the orderly provision of high quality health care services to the State.

The DHSS' decision was prompted by Hackensack University Medical Center's ("HUMC") submission of a petition on December 16, 2010 seeking a call for certificate of need applications for a new general hospital in Westwood, New Jersey (the "Petition"). This Petition is yet another attempt by HUMC to compel the opening of an acute care hospital at the now defunct Pascack Valley Hospital ("PVH") site. HUMC, along with Touro University School of Medicine ("Touro"), purchased the real estate comprising the former PVH campus at a bankruptcy court auction in February 2008. Pursuant to the Certificate of Need issued by the DHSS on December 28, 2007 closing PVH ("2007 Closure CN"),

HUMC had to comply with all statutory and regulatory requirements and commence operations within a 24-month period in order to re-establish an acute care hospital at PVH. Rather than meet these preconditions, HUMC has attempted to bypass the legal process for determining need and obtaining proper approval for the opening of a new general hospital.

Indeed, HUMC submitted a certificate of need application to transfer ownership of PVH ("HUMC CN") and a public hearing was scheduled on the matter well before the expiration of the two-year deadline on December 28, 2009. Nevertheless, when it appeared that the DHSS' staff was prepared to recommend denial of the application, HUMC made the calculated decision to request that the DHSS defer its consideration for up to six months or until January 7, 2010. HUMC then requested reactivation of the HUMC CN on January 5, 2010, after the deadline in the 2007 Closure CN had already passed. By delaying the process, it appears that HUMC hoped to benefit from a change in the administration.

HUMC's strategy has culminated in the DHSS arbitrarily and capriciously issuing the Call without a finding of need or extraordinary circumstances. In fact, there is no need for a new acute care hospital in Bergen County. As such, this limited call is unwarranted and in contravention of both the letter and spirit of the DHSS' own regulations governing certificates of need; put simply, this maneuver flies in the face of rational

health care planning. Additionally, the narrowly tailored Call -- which favors a single provider: HUMC -- further demonstrates the arbitrary and capricious nature of the DHSS' actions. Thus, given the public interest at stake and the possible conservation of time and resources, the interests of justice weigh in favor of granting this motion for leave to appeal the DHSS' decision to issue the Call (the "Motion").

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Petition And Call For Certificate Of Need Applications For A New Hospital In Bergen County.

On December 16, 2010, HUMC submitted its Petition to the DHSS to issue the Call. (Pa5). Importantly, HUMC's Petition did not make a bona fide showing of need for a new acute care hospital. Instead, HUMC made conclusory and unsupported assertions of need. For instance, the occupancy rates and divert data submitted in HUMC's Petition are outdated.¹ Furthermore, the Petition fails to address the implications of the Patient Protection and Affordable Care Act, which due to bundled and episode care reimbursement and the creation of accountable care organizations, will most assuredly serve to reduce admissions and the length of hospital stays, thereby further eroding occupancy rates at hospitals across the nation.

¹ It should be noted that the occupancy rates cited by HUMC are based on maintained and not licensed beds. In reality, the occupancy rate for Bergen County hospitals averages 65.8% based on data submitted to the State. Further, the divert statistic HUMC cited was based on 2008 data; current divert statistics for Bergen County demonstrate ample access to emergency care.

Additionally, HUMC's own Petition contradicts a press release HUMC, itself, issued in October 2010, which acknowledged that "[i]n New Jersey, a number of hospitals have closed over the past decade due to financial constraints, reimbursement deficits, and competition for beds in a saturated market." (emphasis added). (Pa50).

Moreover, HUMC implicitly concedes in its Petition that there is no need for another acute care hospital in Bergen County by asking the DHSS to focus its attention on tangential factors aside from need:

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. (Pa5).

In that regard, the Legislature and the DHSS' regulations set forth the factors which must be weighed by the Commissioner in determining whether to grant a certificate of need. See N.J.S.A. 26:2H-8; N.J.A.C. 8:33-4.9; N.J.A.C. 8:33-4.10. These factors do not include stimulating the local economy or impacting local employment.

Nonetheless, on February 18, 2011, the DHSS published the Notice canceling the regularly scheduled certificate of need

call for any new general hospitals set to take place on April 1, 2011, and issuing the limited Call. (Pa1). Prior to issuing the Call, the Commissioner did not make a finding of need or of "extraordinary circumstances that warrant such a call" as required by N.J.A.C. 8:33-4.1(a)(4). The Notice merely states that the DHSS initiated the Call "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." (Pa1). Moreover, the Commissioner specifically states in the Notice that issuance of the Call "does not constitute a finding of need" by the DHSS. (Pa2).

In issuing the Notice, the Commissioner does not mention or appear to consider the demonstrated lack of need in the area for a new acute care hospital. For example, the most recent state commissioned study regarding New Jersey's hospital system published by the New Jersey Commission on Rationalizing Health Care Resources in 2008, commonly known as the "Reinhardt Report," specifically found that there is no need for additional beds in Bergen County. (Pa52). The Reinhardt Report expressly states: "There is currently an oversupply of hospital beds in every hospital market area in New Jersey," especially in the Hackensack, Ridgewood and Paterson area. (Pa54). The Bergen County Master Plan Conference also confirmed the Reinhardt Report findings in May of 2010 which went on to conclude that Bergen County had the "highest proportion of hospitals below the

statewide average financial viability score. The Commission predicts at least one hospital [in Bergen County] will close by 2015." (Pa58). In addition, Moody's Investors Service Report dated November 16, 2010, provides that:

Moody's outlook for New Jersey not-for-profit hospitals is negative. The dominant factors include weak financial performance compared to the rest of the country . . . very competitive and fragmented local markets, and a tough payer environment. The Great Recession and New Jersey's weakened economy will result in continued pressures on not-for-profit hospitals which already include lackluster or declining patient volumes . . . requiring even greater rounds of expense cuts to stabilize financial performance . . . we anticipate more hospital closures, payment defaults or bankruptcy filings over the next several years. (Pa110).

Furthermore, The Valley Hospital and Englewood Hospital Medical Center ("EHMC") submitted letters in opposition to HUMC's petition for a call. In a letter dated January 4, 2011, EHMC vigorously disputed the need for an additional acute care hospital in the area. (Pa59). In essence, EHMC basically reiterated the findings of the Reinhardt Report and concluded that "a hospital closing can help surrounding hospitals and is precisely what the hospital system needs." (Pa59). Additionally, EHMC noted that the neighboring hospitals still had unused capacity (e.g., EHMC is licensed for 520 beds, but only operates 340), and that since the closing of PVH, the other surrounding hospitals have met the health care needs of the community with exceptional quality. (Pa59). As a result, EHMC concluded that there was no need for an additional acute care hospital in

Bergen County, and that "adding beds to an already saturated market is both illogical and irresponsible." (Pa59).

Likewise, The Valley Hospital submitted a letter in opposition to HUMC's Petition on January 18, 2011, citing the bed need studies conducted over the past eleven years, all of which have concluded that "New Jersey has too many hospitals and too many hospital beds." (Pa61). The Valley Hospital also highlighted the statewide decline in demand and occupancy rates at area hospitals, and contended that any need for acute care beds could be addressed through "less costly and more reasonable approaches" than re-opening an unnecessary hospital. (Pa61). The letter then goes on to discuss the significant harm to existing local hospitals that would result from the opening of a new hospital in the region. (Pa62).

Lastly, the proposed notice for the call HUMC attached to its Petition restricted the applications to:

(1) applicants that have site control of property in Westwood, Bergen County; (2) applicants that have property with existing permitted/zoned use as an acute care hospital; (3) applicants that have a demonstrated ability to implement the project expeditiously, to restore critical health resources to the surrounding communities; (4) applicants that own a facility that previously operated as a hospital, and can return that facility to service quickly; and (5) applications that do not request licensure of more than a total of 130 beds. (Pa42).

Following HUMC's proposal, the actual Notice requires each certificate of need applicant responding to the Call to demonstrate:

1. Compliance with N.J.A.C. 8:33-4.4(a) that it has or will have control or authority over the proposed location of a new general hospital;
2. That it will enhance and increase physician education and retention in New Jersey and provide additional residency slots;
3. That the project will enhance quality of care and promote integration within the overall system of service provided in Bergen County;
4. That it has the ability to license the project within two years of any certificate of need approval; and
5. That it will limit its total number of licensed beds and bassinets to the lowest number of beds and bassinets required to meet the need identified in its application. (Pa2).

B. Closure Of PVH And Purchase Of PVH Assets By HUMC

In order to place the Notice at issue in its proper context, it is important to provide a brief history of HUMC's efforts to re-open a new acute care hospital at the former PVH site. On September 24, 2007, Pascack Valley Hospital Association ("PVHA") filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. As required by N.J.A.C. 8:33-3.2(b), PVHA then applied to the DHSS for a certificate of need to close PVH. On December 28, 2007, the DHSS issued the 2007 Closure CN approving the application to close PVH. (Pa44). Consistent with N.J.A.C. 8:33-4.9, the 2007 Closure CN specifically found that the PVH is no longer needed, particularly since there was "sufficient bed capacity in Bergen County to enable the remaining health care system to bridge any gaps in services." (Pa46).

In approving the closure of PVH, the DHSS did not approve or permit any future purchaser to re-open a hospital, but merely noted that in the event a future purchaser were to seek approvals to re-establish a hospital at the site, it "must comply with all statutory and regulatory requirements and must commence operation" within 24-months. (Pa47). This 24-month period expired on December 28, 2009.

In February 2008, HUMC and Touro were the successful bidders in a bankruptcy auction of the real estate comprising the former PVH campus, raising the question as to whether the transfer of these assets was subject to DHSS review and approval by the Attorney General ("AG") pursuant to the Community Health Care Assets Protection Act ("CHAPA"), N.J.S.A. 26:2H-7.10. Based on representations made by PVHA's and HUMC's respective counsel that the property was not to be operated as a hospital and the transaction was, therefore, not subject to CHAPA, the Attorney General's office did not object to the asset transfer.

On July 31, 2008, HUMC filed the HUMC CN. (Pa64). The DHSS subsequently determined that the application was administratively complete and transmitted it to the State Health Planning Board ("SHPB") for consideration. The SHPB scheduled a public hearing on the application for July 23, 2009, but prior to that hearing HUMC requested that the DHSS defer consideration of its application for up to six months, or until January 7, 2010. (Pa65). It was not until January 5, 2010 that HUMC

requested that the DHSS reactivate the HUMC CN. (Pa49). By delaying the DHSS' review, it appears that HUMC hoped that a change in the administration would lead to a more favorable assessment of its application.²

C. Applicability Of The Permit Extension Act To The Time Within Which HUMC Could Re-Open PVH Pursuant To The 2007 Closure CN

Meanwhile, the Permit Extension Act of 2008 (PEA) was enacted effective September 6, 2008. See N.J.S.A. 40:55D-136.1. In order to "prevent the wholesale abandonment of approved projects and activities due to the present unfavorable economic conditions," the Legislature enacted the PEA to toll most development approvals for a specified period of time in expectation that economic conditions would improve. See N.J.S.A. 40:55D-136.2(m). By letter of December 10, 2009, HUMC asked the DHSS for a written determination that the 2007 Closure CN constituted an "approval" within the meaning of the PEA of 2008, N.J.S.A. 40:55D-136.1 to 136.6, and the administrative notice issued by the DHSS pursuant to the PEA, thereby extending the time within which PVH could be reopened. (Pa73). The Valley Hospital and EHMC filed written oppositions to HUMC's application with the DHSS.

² Governor Christopher Christie expressed his support for the re-opening of PVH during his run for office: "I want to make it really clear that [Lieutenant Governor] Kim [Guadagno] and I both favor the reopening of this hospital [PVH]." More recently, in July 2010, Governor Christie reiterated, "My position philosophically has not changed since the campaign I think Pascack should be reopened." (Pa66).

While awaiting the DHSS' determination, HUMC filed a Complaint for Declaratory Judgment in the Law Division on December 21, 2009, seeking a declaration of rights by the court, under both the PEA and the Health Care Facilities Planning Act ("HCFPA"), N.J.S.A. 26:2H-1 to 26. The DHSS issued a final decision on December 23, 2009 (the "Final Decision"), and HUMC filed an ex parte application with the Law Division seeking an Order to Show Cause to compel the DHSS to withdraw the Final Decision and to cease from taking any adverse action with respect to the 2007 Closure CN. (Pa75). The Law Division denied that application the same day, without prejudice to HUMC's right to file a notice of appeal to the Appellate Division. (Pa78).

When HUMC did not file an appeal from either the Final Decision or the Law Division's denial of its ex parte application, The Valley Hospital filed a motion to transfer HUMC's complaint to the Appellate Division, which was granted on March 4, 2010. This matter has been briefed and is still pending. (Pa119). HUMC then moved in the Appellate Division to stay the PEA matter pending the DHSS' decision on whether to issue a certificate of need, but the motion was denied on February 3, 2011.

LEGAL ARGUMENT

POINT I

THE INTERESTS OF JUSTICE MANDATE IMMEDIATE
REVIEW OF THE DHSS' DECISION TO ISSUE A CALL
FOR CERTIFICATE OF NEED APPLICATIONS FOR A
NEW ACUTE CARE HOSPITAL IN BERGEN COUNTY.

The Valley Hospital has satisfied the elements required for leave to appeal the DHSS' decision to issue the Call.

Pursuant to Rule 2:2-4, the Appellate Division "may grant leave to appeal, in the interests of justice . . . from an interlocutory decision or action of a state administrative agency or officer, if the final judgment, decision or action thereof is appealable as of right pursuant to R. 2:2-3(a)." The moving party must demonstrate "that the desired appeal has merit, and that 'justice calls for [an appellate court's] interference in the cause.'" Brundage v. Estate of Carl V. Carambio, 195 N.J. 575, 599 (2008) (quoting Romano v. Maglio, 41 N.J. Super. 561, 568 (App. Div.) certif. denied, 22 N.J. 574 (1956), cert. denied, 353 U.S. 923, 77 S. Ct. 682, 1 L. Ed. 2d 720 (1957)). The granting of leave to appeal is discretionary. Id.

As there is no DHSS process to challenge the Call, the Court should exercise its discretion to intervene in this case because (1) an important issue of public importance is at stake, and (2) the appeal will end a lengthy administrative process and substantially conserve time and resources.

First, when an issue of public importance is at stake, leave to appeal is properly granted. See e.g. Am. Employers' Ins. Co. v. Elf Atochem N. Am., 157 N.J. 580, 586 (1999) ("Because the matter involves issues of important public policy. . . we granted leave to appeal."); Repair Master, Inc. v. Borough of Paulsboro, 352 N.J. Super. 1, 7 (App. Div. 2002) ("We granted leave to appeal. . . and accelerated the matter because of the public interest.").

Here, there are significant issues of public interest at stake. In 1971, the Legislature enacted the HCFPA, N.J.S.A. 26:2H-1 to -26. A central component of the HCFPA is the creation of the certificate of need requirement, which "mandated that health care facilities and services could not be expanded or instituted without the Commissioner's identification of a need and prior approval of the change through issuance of a [certificate of need]." In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 423 (2008) (citing N.J.S.A. 26:2H-7). "State identification of a need was pivotal to maintaining control over competition, proliferation of services, and quality of service." Id. at 423-24.

The certificate of need regulatory system underwent substantial changes in the late 1990s, and certain health care services became exempt from the certificate of need requirement, leaving their availability open to market forces. See id. at 416, 424. For those services it did not exempt, the Legislature

explained that the certificate of need requirement was necessary 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 . . . 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).

Acute general care hospitals are one of the services for which the Legislature retained the prerequisite of a certificate of need. See N.J.S.A. 26:2H-7, N.J.S.A. 26:2H-7a, N.J.S.A. 26:2H-7c. Thus, new general hospitals cannot be instituted without the Commissioner's identification of a need and prior approval of the change through issuance of a certificate of need. As part of this process, the applicable regulations plainly indicate that the Commissioner may only issue special calls to solicit certificate of need applications at times other than those set forth in the periodic call schedule upon a finding of "extraordinary circumstances." N.J.A.C. 8:33-4.1(a)(4). Since the Commissioner has made no finding of need or extraordinary circumstances requiring a special call for a new acute care hospital in Bergen County, and in fact there is none, the Notice is defective and the Call by the DHSS threatens the orderly provision of high quality health care planning services to the region.

Secondly, as the New Jersey Supreme Court has reaffirmed, the Appellate Division may properly exercise its discretion and grant leave "where the appeal, if sustained, will terminate the litigation and thus very substantially conserve the time and expense of the litigants and the courts" Brundage, supra, 195 N.J. at 599 (quoting Romano, supra, 41 N.J. Super. at 568). Although there is no litigation pending in the case at hand, the Call begins a lengthy and time consuming administrative process during which an exorbitant amount of both public and private time and money will be expended. The competitive certificate of need process includes the completion of lengthy applications, the submission of written statements in response to those applications, review of those applications and issuance of a recommendation by the SHPB, and review of all materials and drafting of a detailed decision by the Commissioner. See N.J.S.A. 26:2H-1, et seq.; N.J.A.C. 8:33-1.1, et seq. As a result, if the Call is later invalidated and the entire process deemed null and void, the parties involved will have wasted enormous resources all for naught. Thus, a grant of leave to appeal the DHSS' decision to issue the Call could "very substantially conserve [] time and expense" for the DHSS and the public.

POINT II

**THE DHSS ACTED ARBITRARILY, CAPRICIOUSLY,
AND UNREASONABLY BY ISSUING A CALL FOR
CERTIFICATE OF NEED APPLICATIONS FOR A NEW
ACUTE CARE HOSPITAL IN BERGEN COUNTY.**

It is well settled that an action of an administrative agency must be overturned on appeal if it is arbitrary, capricious, or unreasonable. See Figueroa v. New Jersey Dep't of Corr., 414 N.J. Super. 186, 190-91 (App. Div. 2010) (quoting Circus Liquors, Inc. v. Governing Body of Middletown Tp., 199 N.J. 1, 10 (2009)). Appellate review of an administrative action is generally restricted to three inquiries: (1) whether "the agency's action violates express or implied legislative policies," that is, did the agency follow the law; (2) whether the record contains "substantial evidence to support the findings on which the agency based its action"; and (3) whether "in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Ibid.

As demonstrated below, the DHSS' issuance of the Call warrants reversal on appeal based on all three of these factors, and thus granting the Motion is within the sound discretion of this Court.

A. The DHSS' Issuance Of The Call Was Arbitrary And Capricious Because It Violated Express Or Implied Legislative Policies.

An agency's action qualifies as arbitrary, capricious, or unreasonable if it violates expressed or implied legislative policies. Ibid.; Cooper Univ. Hosp. v. Jacobs, 191 N.J. 125, 143-144 (2007) ("[I]t is well settled that administrative action cannot be . . . inconsistent with the legislative intent,

policy, or delegation of authority."). If an agency violates a State statute or its own regulations, its conduct is per se arbitrary and capricious because it contravenes legislative policy. See County of Monmouth v. Dept. of Corrections, 236 N.J. Super. 523, 525 (App. Div. 1989).

1. **The DHSS' Issuance Of The Call Was Arbitrary And Capricious Because There Was No Finding Of Need Or Extraordinary Circumstances.**

The application process for a certificate of need begins with the DHSS issuing a "call" in the New Jersey Register, which invites the submission of certificate of need applications for a specific service or equipment. See N.J.A.C. 8:33-4.1(a). For various categories of health care services or equipment, the DHSS' regulation, N.J.A.C. 8:33-4.1(a)(2), sets forth a schedule with periodic dates upon which it will issue a "call" and accept certificate of need applications. See In re Virtua-West, supra, 194 N.J. at 425. For example, the regulation provides that the DHSS will accept certificate of need applications for new general hospitals on April 1, 2006 and every five years thereafter. See N.J.A.C. 8:33-4.1(a)(2).

The Commissioner also has the authority to issue "special calls" to solicit certificate of need applications at times other than those set forth in the periodic call schedule. See N.J.A.C. 8:33-4.1(a)(4). However, she may only do so based upon a finding of "extraordinary circumstances":

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) (emphasis added).

Although the term "extraordinary" is not defined by the DHSS' regulations, the Appellate Division has considered the term in other circumstances and explained that the "dictionary includes among its definitions of the word: exceptional to a very marked extent: most unusual: far from common . . . rarely equaled: singular, phenomenal: strikingly impressive" Flagg v. Township of Hazlet, 321 N.J. Super. 256, 260 (App. Div. 1999) (quoting Webster's Third New International Dictionary Unabridged 807 (1971)).

Here, the DHSS canceled a statewide call for new general hospitals, which was scheduled for April 1, 2011 pursuant to the periodic call schedule, and instead issued a "special call" for a new general hospital to serve Bergen County only. (Pa1). Contrary to N.J.A.C. 8:33-4.1(a)(4), the Notice does not set forth any circumstances that would qualify as "extraordinary" need in order to warrant announcement of this "special call." The sole reason the DHSS provided for issuing the Call was that HUMC requested it. It cannot be that the unilateral demand of a self-interested private entity qualifies as "phenomenal" or "strikingly impressive" circumstances.

Moreover, the Supreme Court has explained that if the Commissioner issues a "special call" for certificate of need

applications, that call must be "based on a departmental finding of a need for the new or enhanced health care service." In re Virtua-West, supra, 194 N.J. at 428-29. The Call issued by the DHSS in this case contravenes the Supreme Court's determination because there was no "departmental finding of need." In fact, the Notice explicitly states:

Issuance 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 (Pa2).

The AG, herself, on behalf of the DHSS and the Commissioner, has represented to this Court that the exact chain of events that took place here -- issuance of a "special call" based solely on an applicant's request and without a Departmental finding of need -- is impermissible:

[A]n 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. (Pa90).

Thus, the DHSS' issuance of the Call was clearly contrary to N.J.A.C. 8:33-4.1(a)(4), as well as the Supreme Court's and its own determination that a "special call" may not be issued without a finding of need. Consequently, the Call violated legislative policy and should be overturned.

2. The DHSS' Issuance Of The Call Was Arbitrary And Capricious Because There In Fact Is No Need For A New Acute Care Hospital In Bergen County.

As stated above, a special call issued by the DHSS must be predicated upon a finding of need or "extraordinary circumstances." The DHSS failed to make any such findings, and the reason for this failure is plain: there is undoubtedly no need for a new acute care hospital in Bergen County.

The DHSS already considered this very same issue when it authorized the closure of PVH. In issuing the 2007 Closure CN, the DHSS determined that PVH was no longer needed because there was sufficient bed capacity in Bergen County to handle any additional patients from the closed hospital. Echoing this sentiment, the bed studies conducted over the past eleven years, including the Reinhardt Report (Pa52), the Whitman Report (Pa137) and the Accenture Report (Pa153) commissioned by the New Jersey Hospital Association, have all concluded that there are too many hospitals and too many beds in New Jersey, particularly in Bergen County. Finally, a recent Moody's report also indicates that the outlook for New Jersey hospitals is negative, and it anticipates more hospital closures in the State over the next several years. (Pa110). HUMC, itself, has even conceded that a number of New Jersey Hospitals have closed due to "competition for beds in a saturated market." Not only did DHSS turn a blind eye to these facts, but it also ignored the opposition letters submitted by some of the other local hospitals establishing the lack of need and the negative impact that a new acute care hospital would have on these organizations

and the provision of quality health care to the community at large.

Any alleged need for the Call is further refuted by the DHSS' cancellation of several scheduled calls for other health care services in January of 2011. The DHSS cited, among other reasons, that a clear indication of additional need would be premature and that the DHSS is unable to evaluate the need for new or expanded services due to national health policy changes that have influenced admission rates. See e.g. 43 N.J.R. 65(a) and (b).

Similarly, DHSS' cancellation of the April 1, 2011 statewide call for applications for new general hospitals contradicts any alleged need for a new hospital in Bergen County, since it is one of the most over-bedded counties in the State. The 2010 New Jersey Census data indicates a relatively small increase in the population in Bergen County during the prior 10 years, compared with other counties in this State, putting it at the high end of the spectrum for licensed beds per resident. Clearly, the population increases in Somerset, Gloucester, and Cumberland Counties, which were three and four times greater than Bergen County, would more strongly militate in favor of need for hospitals in those counties. Thus, the DHSS' decision to accept certificate of need applications for only Bergen County is patently arbitrary and capricious.

In light of the demonstrated lack of need, it appears that the Call was issued merely to serve the interests of one

specific institution: HUMC. Although the DHSS ostensibly solicits certificate of need applications from the public, the Notice's terms are tailored so that they can only be met by HUMC and reflect the DHSS' predisposition to re-opening PVH without regard to the health care needs of Bergen County.³ For example, the DHSS' Notice requires the applicant to demonstrate that it "has or will have control or authority over the proposed location of a new general hospital." (Pa2). The only site large enough to establish a new hospital in Bergen County is the former PVH site, which is owned by HUMC. The Notice further requires that the applicant "ha[ve] the ability to license the project within two years of any certificate of need approval." (Pa2). However, as set forth by HUMC's petition, "[t]he lead time to construct a new hospital from the ground up can be seven to ten years, taking into account the state regulatory processes, architectural planning, state and local building and

³ The narrowly tailored terms found in the Notice are also arbitrary and capricious because they subvert the competitive process for awarding certificates of need. See In re Certificate of Need Application of Arnold Walter Nursing Home, 277 N.J. Super. 472, 477, 480 (App. Div. 1994). As recognized by the New Jersey Legislature and courts in the public bidding context, where a competitive process is required, a government entity cannot purport to create an open and competitive process, but then underhandedly eliminate all competition by creating limitations that only a single bidder can meet. See George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 41 (1994) ("[T]he specifications cannot be so precise as to knowingly exclude all but one prospective bidder."); see also In re Bayonne Park, Lincoln Park etc., 168 N.J. Super. 33, 39 (App. Div. 1979) ("[A]ny bidding practice which tends to favor one bidder over another. . . or which opens a door to possible corrupt considerations cannot be tolerated. . .").

zoning approvals, financing approvals, and construction time." (Pa38). In contrast, HUMC's petition explains that "an applicant that fully possesses property previously utilized as a hospital and still zoned for this use could require just two years to achieve full project implementation." (Pa38). As a result, by requiring the hospital to be licensed within merely two years, the DHSS essentially disqualifies all other candidates aside from HUMC.⁴

Ultimately, there is no need for another acute care hospital in Bergen County, and the DHSS has acted arbitrarily and capriciously by issuing the limited Call in dispute -- particularly since the Call is improperly aimed to benefit HUMC and its ongoing efforts to force the re-opening of PVH. Therefore, the DHSS' decision should be reversed.

B. The DHSS' Issuance Of The Call Was Arbitrary And Capricious Because It Was Unsupported By The Record.

An agency's action must be reversed if the record does not contain "substantial evidence to support the findings on which the agency based its action." Figueroa, supra, 414 N.J. Super. at 190-91 (quoting Circus Liquors, supra, 199 N.J. at 10)); see also Plata v. Division of Alcoholic Beverage Control, 360 N.J. Super. 92, 100 (App. Div. 2003) ("[An appellate court] will

⁴ There is no basis for the exclusionary criteria in the Notice, other than that they were requested by HUMC. Moreover, since the DHSS has not yet determined whether or not there is even a need for a new general hospital in Bergen County, it cannot claim that these narrowly tailored specifications are somehow necessary in order to provide required health care.

reverse the decision [reached by a State administrative agency]. . . if it is not supported by substantial credible evidence in the record as a whole."). As stated above, the DHSS has not supported its decision to issue the Call with any findings of need, let alone substantial evidence. Rather, the DHSS simply issued the Call at the behest of HUMC. Thus, the DHSS failed to develop a complete record, and its decision was arbitrary and capricious because it was not supported by "substantial credible evidence."

C. The DHSS' Issuance Of The Call Was Arbitrary And Capricious Because The Agency Erred In Reaching A Conclusion That Could Not Have Been Made On A Showing Of The Relevant Factors.

Even if the Court finds that the DHSS engaged in an independent analysis of need for a new acute care hospital in Bergen County, which The Valley Hospital in no way concedes, the agency clearly misapplied the legislative policies to the facts when it issued the Call. "[I]t is incumbent on the agency to explain its decision in sufficient detail to assure [the reviewing court] that the agency actually considered the evidence and addressed all of the issues before it." Green v. State Health Benefits Comm'n, 373 N.J. Super. 408, 414 (App. Div. 2004). "Failure to address critical issues, or to analyze the evidence in light of those issues, renders the agency's decision arbitrary and capricious and is grounds for reversal." Id. at 415.

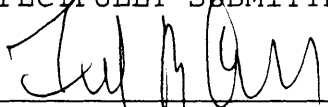
Here, the statutes and regulations heretofore referenced were promulgated to ensure rational health care planning and high quality health care services to the region. Pursuant to this regulatory scheme, the DHSS is required to make a finding of need or extraordinary circumstances prior to issuing a special call for services. As shown infra in subsection II(A)(2), however, the DHSS has failed to consider all of the evidence establishing that there is absolutely no need for a new acute care hospital in Bergen County. Thus, by issuing the Call in the absence of any need, the DHSS has misapplied the legislative policies to the facts and its arbitrary and capricious decision should be reversed on appeal.

CONCLUSION

For the reasons set forth above, the Court should grant leave to appeal the DHSS' Call for certificate of need applications for a new acute care hospital in Bergen County, New Jersey.

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RESPECTFULLY SUBMITTED,

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