

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: March 18, 2015)

ENDOSCOPY ASSOCIATES, INC.

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v.

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C.A. No. PC-2014-0891

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RHODE ISLAND DEPARTMENT OF HEALTH

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DECISION

MCGUIRL, J. Appellant Endoscopy Associates, Inc. (Endoscopy Associates) appeals the January 28, 2014 decision of Hearing Officer Catherine Warren (Hearing Officer Warren) overturning the Rhode Island Department of Health’s (the DOH) grant of a Certificate of Need (CON), in effect denying Endoscopy Associates’ application to change its corporate structure. Jurisdiction in the instant matter is pursuant to G.L. 1956 § 42-35-15.

I

**Facts and Travel**

On January 10, 2013, Endoscopy Associates applied to the DOH for a CON in compliance with the Health Care Certificate of Need Act of Rhode Island, G.L.1956 §§ 23-15-1 et. seq. Endoscopy Associates sought approval to change its corporate structure from a physician ambulatory surgery center (PASC) to become a freestanding ambulatory surgery center (FASC). Under a PASC license, ownership is limited to physicians and surgical procedures may be performed only by these physician-owners. Sec. 23-17-2(13). However, under a FASC license, non-physicians may become owners and non-owner physicians are allowed to perform surgeries. R.I. Admin. Code 31-4-6:1.0 et seq. As “[n]o health care provider . . . shall . . . offer . . . new

institutional health services in Rhode Island [without] approval by the [DOH,]" § 23-15-4, Endoscopy Associates needed approval of this CON application in order to change their corporate structure.

In Endoscopy Associates' CON application, it notes that its "CON application is unique because it simply involves a request for a new license category." (Application at 10.) Indeed, it has requested a license to operate a FASC "in order to increase its options with respect to its ownership structure." Id. at 1. Endoscopy Associates was frank in stating that its "facility is presently satisfying existing need[.]" Id. at 10 (emphasis added). The CON application further states that Endoscopy Associates "projects a 92% utilization through 2015." Id. The application concedes that "if this CON is not granted, [Endoscopy Associates] will continue to meet the need and provide services." Id. Not only did Endoscopy Associates not apply for more rooms to perform endoscopy procedures, id. at 9, it also denied having any current "plans to change its ownership structure[.]" Id. at 1.

After a series of public hearings as well as a positive recommendation from the Project Review Committee, the Health Services Council (HSC), an advisory body for DOH, voted 8-4 to recommend the approval of the CON proposal as both needed and affordable as required by the Health Care Certificate of Need Act of Rhode Island. Subsequently, on August 5, 2013, DOH Director Dr. Michael Fine approved the CON application. This CON application was granted subject to the condition that there would be "no increase in [the] existing number of endoscopy rooms in the facility[.]" (HSC Minutes at 2, July 16, 2013.) In response, Blackstone Valley

Surgicare (Blackstone) appealed this decision, contending that Endoscopy Associates failed to meet its burden of demonstrating an unmet public need. R23-15-CON, § 17.1.<sup>1</sup>

With regard to public need, the General Assembly has mandated:

“No [CON] approval shall be made without an adequate demonstration of need by the applicant at the time and place and under the circumstances proposed, nor shall the approval be made without a determination that a proposal for which need has been demonstrated is also affordable by the people of the state.” Sec. 23-15-4(b).

The Rules and Regulations for the DOH define “public need” as “a substantial or obvious community need for the specific new health care equipment or new institutional health service proposed and the scope thereof, in light of the attendant circumstances[.]” R23-15-CON, § 3.25. Section 4.3 requires consideration of “the availability of existing facilities, equipment and services, both statewide and on a local basis, which may serve as alternatives or substitutes for the whole or any part of the proposed new institutional health service or new health care equipment.”

The decision of the state agency may be administratively reviewed upon written request pursuant to DOH R23-15-CON, § 17, and § 23-15-6. This review, as per § 23-15-6, mirrors § 42-35-15 (The Administrative Procedures Act) almost exactly, requiring that the hearing officer “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Sec. 42-35-15; see Sec. 23-15-6 (“The procedures for judicial review [by a hearing officer] shall be in accordance with the provisions of § 42-35-15.”)

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<sup>1</sup> Section 17.1 states: “The decision of the state agency may be administratively reviewed at the written request of any affected person through an administrative review to be conducted by a hearing officer, hereinafter referred to as the administrative review agency, appointed by the Director of Health.”

On March 12, 2003, Hearing Officer Warren of the Department of Administration issued a detailed written decision reversing the DOH decision. She noted that she did not “weigh the evidence upon which findings of fact are based but . . . merely review[ed] the record to determine whether there is legally competent evidence to support the administrative decision.” (Decision at 15.) Hearing Officer Warren noted the DOH found that “the health care market is changing and with a different licensing category, [Endoscopy Associate’s] practice could respond to the needs of Rhode Islanders and be ready to respond to the changes that are occurring in health care[.]” *Id.* at 16. However, she found that the DOH failed to weigh the factors in § 23-15-4(g)<sup>2</sup> for a proper determination of substantial community need. (Decision at

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<sup>2</sup> The General Assembly explicated the considerations of the DOH “in conducting reviews and determining need:

- “(1) The relationship of the proposal to state health plans that may be formulated by the state agency;
- “(2) The impact of approval or denial of the proposal on the future viability of the applicant and of the providers of health services to a significant proportion of the population served or proposed to be served by the applicant;
- “(3) The need that the population to be served by the proposed equipment or services has for the equipment or services;
- “(4) The availability of alternative, less costly, or more effective methods of providing services or equipment, including economies or improvements in service that could be derived from feasible cooperative or shared services;
- “(5) The immediate and long term financial feasibility of the proposal, as well as the probable impact of the proposal on the cost of, and charges for, health services of the applicant;
- “(6) The relationship of the services proposed to be provided to the existing health care system of the state;
- “(7) The impact of the proposal on the quality of health care in the state and in the population area to be served by the applicant;
- “(8) The availability of funds for capital and operating needs for the provision of the services or equipment proposed to be offered;
- “(9) The cost of financing the proposal including the reasonableness of the interest rate, the period of borrowing, and the

20.) In reversing the DOH decision, she remarked that Endoscopy Associates “was trying to shoehorn a request into a statute and regulation that does not cover this kind of request . . . [and that] this type of application is not really anticipated in the CON process.” Id. at 20-21. Endoscopy Associates filed a timely request for review of the administrative decision by this Court pursuant to § 42-35-15 and DOH R23-15-CON, § 18 on February 27, 2013.

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equity of the applicant in the proposed new institutional health service or new equipment;

“(10) The relationship, including the organizational relationship of the services or equipment proposed, to ancillary or support services;

“(11) Special needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing within the state;

“(12) Special needs of entities such as medical and other health professional schools, multidisciplinary clinics, and specialty centers; also, the special needs for and availability of osteopathic facilities and services within the state;

“(13) In the case of a construction project:

“(i) The costs and methods of the proposed construction;

“(ii) The probable impact of the construction project reviewed on the costs of providing health services by the person proposing the construction project; and

“(iii) The proposed availability and use of safe patient handling equipment in the new or renovated space to be constructed.

“(14) Those appropriate considerations that may be established in rules and regulations promulgated by the state agency with the advice of the health services council;

“(15) The potential of the proposal to demonstrate or provide one or more innovative approaches or methods for attaining a more cost effective and/or efficient health care system;

“(16) The relationship of the proposal to the need indicated in any requests for proposals issued by the state agency;

“(17) The input of the community to be served by the proposed equipment and services and the people of the neighborhoods close to the health care facility who are impacted by the proposal;

“(18) The relationship of the proposal to any long-range capital improvement plan of the health care facility applicant.

“(19) Cost impact statements forwarded pursuant to subsection 23-15-6(e).”

## II

### Standard of Review

This Court “sits as an appellate court with a limited scope of review” when reviewing decisions by administrative agencies such as the Department of Health. Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). It may reverse, modify, or remand an agency’s decision only if the

“substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

“(1) In violation of constitutional or statutory provisions;

“(2) In excess of the statutory authority of the agency;

“(3) Made upon unlawful procedure;

“(4) Affected by other error or law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Sec. 42-35-15(g).

“Even in a case in which the [Superior C]ourt might be inclined to view the evidence differently and draw inferences different from those of the agency[,] it may not on questions of fact, substitute its judgment for that of the agency whose action is under review[.]” Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 805 (R.I. 2000) (internal citations omitted). Indeed, standing in its appellate role, this Court is “limited to an examination of the record to determine whether ‘some’ or ‘any’ legally competent evidence exists to support” the agency decision. Mine Safety, 620 A.2d at 1259 (citing Sartor v. Coastal Res. Mgmt. Council, 542 A.2d 1077, 1082-83 (R.I. 1988)); see also Arnold v. R.I. Dep’t of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003) (holding that legally competent evidence is “relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance”) (internal citations omitted.) As

such, this Court may not reverse a decision unless it is “totally devoid of competent evidentiary support in the record,” Bunch v. Bd. of Review, R.I. Dep’t of Emp’t & Training, 690 A.2d 335, 337 (R.I. 1997) (internal citations omitted), or any reasonable inferences that can be drawn from the record. Guarino v. Dep’t of Soc. Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980).

With regard to questions of law, this Court conducts its review de novo. Arnold, 822 A.2d at 167. However, this Court must afford an agency “great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency.” Town of Richmond v. R.I. Dep’t of Env’tl. Mgmt., 941 A.2d 151, 157 (R.I. 2008) (internal citations omitted).

As § 42-35-15(g) makes explicit that the Superior Court reviews “the decision of the agency[,]” this Court reviews the DOH’s decision rather than that of Hearing Officer Warren. Hearing Officer Warren is a member of the Department of Administration, not the DOH, and as a result, this Court affords no special deference to her decision to deny the CON application. See Robert E. Derecktor of R.I., Inc. v. United States, 762 F. Supp. 1019, 1022 (D.R.I. 1991) (requiring judicial deference “[w]here an agency’s decision is highly technical, and specialized knowledge is required”). Instead, this Court sits in a similar position as Hearing Officer Warren, examining “the record to determine whether ‘some’ or ‘any’ legally competent evidence exists to support” the DOH’s decision. Mine Safety, 620 A.2d at 1259 (internal citations omitted).

### **III**

#### **Discussion**

Endoscopy Associates asserts that the DOH put forth competent evidence to support its conclusion that there existed a demonstrable public need for it to change its corporate structure. It refers to a report by Harvey Zimmerman that was commissioned by the DOH entitled

“Assessment of Need for Ambulatory Surgery Capacity in Rhode Island in 2009” (Zimmerman Report). The Zimmerman Report projects that in 2013, while there will exist a need for 61 endoscopy rooms, there will only be 57.<sup>3</sup> (Zimmerman Report at 4.) Endoscopy Associates asserts that this projected need is competent evidence in support of the DOH’s grant of its CON application. Hearing Officer Warren found the Zimmerman Report “irrelevant in that [Endoscopy Associates] is currently providing endoscopy services in three (3) rooms and will continue to do so with approval.” (Decision at 15.)

In order to grant a CON application, there must exist “a substantial or obvious community need for the specific . . . new institutional health service proposed and the scope thereof, in light of the attendant circumstances[.]” R23-15-CON, § 3.25. Here, there is a total void of “competent evidentiary support in the record” backing the proposition that the restructuring of Endoscopy Associates’ license would fulfill a community need. Bunch, 690 A.2d at 337 (internal citations omitted). In its own application, Endoscopy Associates plainly states that its “facility is presently satisfying existing need[.]” (Application at 10) (emphasis added). The CON application further concedes that “if this CON is not granted, [Endoscopy Associates] will continue to meet the need[.]” Id. (emphasis added). Endoscopy Associates neither requested, id. at 9, nor was granted, more rooms to perform endoscopy procedures. (HSC Minutes at 2, July 16, 2013.) As such, any projection as to an increase in need for endoscopy rooms is of no moment.

The criteria to determine need, as set forth by § 23-15-4(g), relate to whether there exists a public need for the creation or expansion of health care facilities in relation to a particular kind of medical treatment. The public need criteria do not relate in any way to flexibility endowed by

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<sup>3</sup> The error in using a report issued in 2009 projecting need for 2013 in a 2013 application is self-evident.

corporate restructuring. Nevertheless, Endoscopy Associates readily concedes that its proposal requires the grant of a CON application. See Pl.’s Mem. in Supp. of Pet. For Review of Admin. Order at 2 (“Rhode Island law . . . requires that in order to have a FASC license, a CON must be obtained.”). Although it is apparent to this Court—as it was to Hearing Officer Warren—that the CON application process is not tailored for an application of this type, it is well-established that “questions of the wisdom, policy or expediency of a statute are for the Legislature alone.” In re House of Representatives (Special Prosecutor), 575 A.2d 176, 177 (R.I. 1990) (quoting Creditors’ Serv. Corp. v. Cummings, 57 R.I. 291, 298-99, 190 A. 2, 8 (1937)); see Gorham v. Robinson, 57 R.I. 1, 186 A. 832, 862 (1936) (“The wisdom or advisability of a particular statute is not a question for this court to determine[.]”). Regardless, Endoscopy Associates denied any current “plans to change its ownership structure[.]” (Application at 1.) As such, the most prudent approach at this point is for this Court to remand the application back to the DOH, which alone possesses the unique expertise to navigate its own statutory authority as well as its promulgated regulations to ascertain the proper channel for such a corporate restructuring. See Martin v. Occupational Safety & Health Review Comm’n, 499 U.S. 144, 151 (1991) (deferring to agency where application of a “regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives”).

#### IV

#### Conclusion

This Court concludes that DOH’s decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. No legally competent evidence exists in the record to support a conclusion that there was a substantial public need for Endoscopy

Associates to change its corporate licensure. Accordingly, this Court remands the decision to the DOH for additional proceedings. Counsel shall submit the appropriate judgment for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**COURT:** Providence County Superior Court

**DATE DECISION FILED:** March 18, 2015

**JUSTICE/MAGISTRATE:** McGuirl, J.

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