

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re: Certificate of Need Application of	:	
Countryside Health Care Center,	:	
	:	No. 14AP-411
(JCTH Countryside Real Estate, LLC,	:	(ODH No. 9058-01-12A)
	:	
Appellant).	:	(REGULAR CALENDAR)
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D E C I S I O N

Rendered on December 9, 2014

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*Benesch, Friedlander, Coplan & Aronoff LLP, Harry M. Brown and Daniel J. O'Brien, for appellant JCTH Countryside Real Estate, LLC.*

*Michael DeWine, Attorney General, and Melissa L. Wilburn, for appellee Ohio Department of Health.*

*Rolf Goffman Martin Lang LLP, Ira S. Goffman and Michele Conroy, for Objector-appellee.*

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Appellant, JCTH Countryside Real Estate, LLC, appeals the May 5, 2014 adjudication order of the Interim Ohio Director of the Ohio Department of Health denying appellant's application for a Certificate of Need ("CON"). The appeal involves the question of whether an applicant has the legal authority or has entered into a contract to operate long-term care nursing home beds controlled by its parent corporation. For the reasons that follow, we affirm the adjudication order of the interim director of health.

**I. Facts and Procedural History**

{¶ 2} Three distinct legal entities are involved in the appeal. Appellant is the applicant for the CON and the proposed owner of the new facility. JCTH Holdings, Inc. owns 100 percent of appellant and entered into an option agreement to purchase 50

licensed long-term care beds to be used by the new facility. Countryside Health Care Center, LLC is the proposed operator of the new facility.

{¶ 3} On October 23, 2012, appellant filed an application for a CON with the Ohio Department of Health ("ODH") seeking authority for a \$5,255,787 project to construct and operate a long-term care facility in Trumbull County to be known as Countryside Health Care Center. The proposed project sought the purchase and relocation of 50 licensed long-term care beds from the Imperial Skilled Care Center in Warren, Ohio, Trumbull County, to the new facility.

{¶ 4} JCTH Holdings, Inc. is not the applicant, the proposed owner, or the proposed operator, and it has not entered into a contract with appellant or Countryside Health Care Center, LLC regarding the beds to be transferred. JCTH Holdings, Inc. did, however, enter into an option contract with Little Forest Medical Center, LLC, to purchase the 50 beds.

{¶ 5} After a series of questions from ODH and responses by appellant, ODH declared the CON complete on March 22, 2013.

{¶ 6} Orange Village Care Center, a Trumbull County nursing home, and Liberty Health Care Center, Inc., another Trumbull County nursing home, filed written comments with ODH in April 2013. In May 2013, Health Services Policy Analyst, Sherrye Holloway, of ODH, recommended granting the CON. On May 17, 2013, ODH issued a letter granting the CON to appellant to construct and operate Countryside Health Care Center in Trumbull County.

{¶ 7} Orange Village Care Center filed a notice of appeal and requested an adjudication hearing. Liberty Health Care Center and O'Brien Memorial Health Care Center filed a separate notice of appeal and also requested an adjudication hearing. The objectors are long-term care facilities located in the area to be served by the proposed project.

{¶ 8} A hearing was conducted on October 21 and 22, 2013, with all parties subsequently filing post-hearing briefs. The hearing examiner recommended the application be denied, citing appellant's failure to satisfy Ohio Adm.Code 3701-12-23.2(B), which concerns control of the beds to be relocated under a CON application.

{¶ 9} In his adjudication order, the interim director of health stated:

The applicant did not satisfy the requirement of Ohio Admin. Code 3701-12-23.2(B) in that neither the applicant, nor the proposed owner nor the proposed operator, has the legal authority to operate the beds or has entered into a contract to obtain the legal authority to operate the beds that are subject to the CON.

{¶ 10} In other words, the interim director interpreted the rule in such a way that appellant and its sole member and 100 percent owner JTCH Holdings, Inc., cannot be treated as a single entity for purposes of compliance with Ohio Adm.Code 3701-12-23.2(B).

## **II. Assignment of Error**

{¶ 11} Appellant has assigned the following single assignment of error for our review:

The Adjudication Order of the Interim Director of Health is not supported by reliable, probative and substantial evidence and is not in accordance with the law.

## **III. Standard of Review**

{¶ 12} In an appeal to this court of an adjudication order for a CON, "[t]he court shall affirm the director's order if it finds, upon consideration of the entire record and any additional evidence admitted under division (F)(2) of this section, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order." R.C. 3702.60(F)(3). "Analysis of whether the evidence supports the director's decision is essentially a question of the absence or presence of the requisite quantum of evidence." *In re Wedgewood Health Care Realty, L.L.C.*, 176 Ohio App.3d 554, 2008-Ohio-2950, ¶ 7 (10th Dist.).

Therefore, upon appeal to this court, it is incumbent upon appellant to demonstrate that either the factual findings of the Department are not supported by reliable, probative, and substantial evidence or that the Department inappropriately applied the law to the findings of fact. Although this court may engage in a very limited weighing of the evidence upon an appeal of this nature, we may not substitute our judgment for that of the Department as to the credibility of witnesses and the weight to be given the testimony.

*In re Knolls of Oxford*, 10th Dist. No. 02AP-514, 2003-Ohio-89, ¶ 13.

{¶ 13} This court adheres to the cautious exercise of deference to an agency's legal interpretation of a rule, as it did in *In re 4307 Care, L.L.C. Certificate of Need*, 10th Dist. No. 05AP-672, 2006-Ohio-2071, ¶ 12. In that case, this court stated:

Courts must afford due deference to an agency's interpretation of the rules it is required to administer, but only so long as the agency's interpretation is reasonable and consistent with the plain language of the rules. *State ex rel. Saunders v. Indus. Comm.*, 101 Ohio St.3d 125, 802 N.E.2d 650, 2004-Ohio-339, at ¶ 41; *State ex rel. Celebreeze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382, 627 N.E.2d 538, 1994-Ohio-486. Deference to an agency's interpretation "may be disregarded or set aside when judicial construction makes it imperative to do so." *Glassco v. Ohio Dept. of Job & Family Services*, Franklin App. No. 03AP-871, 2004-Ohio-2168, at ¶ 11.

#### **IV. Discussion**

{¶ 14} In this case, the interim director concluded that appellant, as applicant, did not demonstrate that it or the operator of the proposed project had control of the long-term care beds or had entered into a contract to obtain the legal authority to operate the beds as required by the rule. On appeal, we must decide, as a matter of law, whether JCTH Holdings, Inc., and appellant may be treated as a single entity in order to demonstrate compliance with Ohio Adm.Code 3701-12-23.2(B)(2). The current version of Ohio Adm.Code 3701-12-23.2 provides, as follows:

(A) In addition to review under other applicable provisions of the Administrative Code, the director shall not approve an application for a certificate of need to replace an existing long-term care facility or to relocate existing long-term care beds from one site to another unless the application meets all of the criteria prescribed by this rule.

(B) Applications submitted for a certificate of need to replace an existing long-term care facility or to relocate existing long-term care beds from one site to another must meet the following criteria:

(1) The applicant or the person proposed to own or operate the facility must have the legal authority to operate the long-term care beds that are subject to the certificate of need; or

(2) The applicant or the person proposed to own or operate the facility must have entered into a contract to obtain the legal authority to operate the beds that are subject to the certificate of need.

{¶ 15} The rule quoted above is the current version of the rule and became effective September 2, 2013, after the issuance of the CON on May 17, 2013. The prior version of Ohio Adm.Code 3701-12-23.2(B), in effect from February 1, 2011 through September 1, 2013, reads as follows:

(B) The applicant or the person proposed to own or operate the replacement facility or the facility to which the beds will be relocated:

(1) Owns the operating rights to the facility being replaced or from which the beds are being relocated and is the licensed operator of the facility;

(2) Has entered into a contract to acquire the right to operate the facility being replaced or has acquired or entered into a contract to acquire the beds being relocated; or

(3) In the case of an application to relocate approved beds, is the holder of the certificate of need for the beds or is proposed in the application to enter into a contract to acquire the certificate.

{¶ 16} Thus, under both versions of the rule, the Ohio Administrative Code uses mandatory language that in relocating existing long-term care beds from one site to another, the applicant or the person proposed to own or operate the facility must have entered into a contract to obtain the legal authority to operate the beds that are subject to the CON. Here, appellant is the applicant and proposed owner of the facility. Countryside Health Care Center, Inc. is the proposed operator of the new facility. However, it is JCTH Holdings, Inc. that entered into an option to purchase the 50 licensed long-term care beds to be relocated to the proposed new facility.

{¶ 17} Appellant argues that JTCH Holdings, Inc. and appellant should be treated as a single entity because JCTH Holdings, Inc. has the ultimate controlling interest in

appellant and therefore, appellant did not need to enter into a contract to obtain the legal authority to operate the beds. As a practical matter, there is a common identity between appellant and its sole member and 100 percent owner JCTH Holdings, Inc. Also, Joseph Cilone is the president of both appellant and JCTH Holdings, Inc.

{¶ 18} Initially ODH agreed with this view. As stated by ODH at page 14 of its post-hearing brief:

In this case, it was fully contemplated that the Applicant would be the ultimate transferee of the beds once the CON was granted. When Ms. Holloway asked the Applicant to confirm a transfer of the beds from JCTH Holdings, Inc., to the Applicant, the response was, "This statement confirms that all 50 beds will be transferred from JCTH Holdings, Inc., to Countryside Real Estate, LLC [sic]. The entities are under common ownership and the entities plan to complete the transfer upon receipt of final CON approval."

{¶ 19} Appellant and ODH took the position that the rule does not require the direct owner to have entered into a contract to control the beds. Rather, they argued that a related entity could enter into a contract and that would be sufficient to satisfy the rule.

{¶ 20} The case most nearly touching on the present issue is *In re 4307 Care, L.L.C. Certificate of Need*. In that case, a related entity to the proposed lessee and operator of the facility contracted to acquire 20 long-term care beds. Then the related entity assigned its interest under the contract to the applicant. The court found compliance with Ohio Adm.Code 3701-12-23.2(B)(2) because the applicant was the assignee under a contract to acquire 20 long-term care beds. Under the logic of *In re 4307 Care, L.L.C. Certificate of Need*, a related entity of the applicant must assign a bed purchase agreement in order to satisfy Ohio Adm.Code 3701-12-23.2(B)(2). Therefore, mere common ownership with the applicant is insufficient to satisfy the mandate of the rule.

{¶ 21} Here, had JCTH Holdings, Inc. assigned its interest under the option agreement to appellant, there would be no dispute over compliance. But under a plain reading of the rule, the applicant or the proposed operator must have the legal authority to operate the beds. The rule makes no reference to an entity affiliated with or sharing common ownership with the applicant or proposed operator.

{¶ 22} Appellant makes several other arguments in support of its position. Appellant refers to R.C. 3702.523(B) which does not prohibit the transfer of a CON between affiliated or related persons if the transfer does not result in a change in the person that holds the ultimate controlling interest in the CON.

{¶ 23} This statute is inapplicable to the present appeal because it concerns transfer of a CON that has already been granted. Ohio Adm.Code 3701-12-23.2(A) states that "the director *shall not approve* an application for a certificate of need \* \* \* to relocate existing long-term care beds from one site to another unless the application meets all the criteria prescribed by this rule." (Emphasis added.)

{¶ 24} Appellant contends that its statement that JCTH Holdings, Inc. intends to transfer the beds to appellant demonstrates substantial compliance with the rule. The rule does not contemplate substantial compliance. As stated above, an applicant must meet all the criteria prescribed by the rule.

#### **IV. Disposition**

{¶ 25} Based on the mandatory language of Ohio Adm.Code 3701-12-23.2(B), we find the interim director's order to be supported by reliable, probative, and substantial evidence and to be in accordance with law. The single assignment of error is overruled, and the adjudication order of the Ohio Department of Health is affirmed.

*Judgment affirmed.*

BROWN, J., concurs.  
KLATT, J., dissents.

KLATT, J., dissenting.

{¶ 26} Because I believe that under the specific circumstances presented here, appellant and JCTH Holdings, Inc. should be considered as a single entity for purposes of Ohio Adm.Code 3701-12-23.2(B), I respectfully dissent.

{¶ 27} JCTH Holdings, Inc. owns 100 percent of appellant. Joseph Cilone is president of both appellant and JCTH Holdings, Inc. JCTH Holdings, Inc. owns an option to purchase the 50 licensed long-term care beds that are to be relocated to the proposed new facility. It is undisputed that JCTH Holdings, Inc. intended to transfer the beds at issue to appellant upon receipt of final CON approval.

{¶ 28} ODH initially granted appellant the CON to construct and operate the long-term care facility in Trumbull County with full knowledge that: (1) appellant was wholly-owned by JCTH Holdings, Inc.; (2) JCTH Holdings, Inc. held the option to acquire the beds; and (3) the beds would be transferred to appellant upon final approval of the CON. Appellant had no reason to believe that ODH would not continue to treat appellant and JCTH Holdings, Inc. as a single entity for purposes of Ohio Adm.Code 3701-12-23.2(B). It cannot be reasonably disputed that, as a practical matter, there is a common identity between appellant and JCTH Holdings, Inc. Moreover, ODH could have conditioned final CON approval on the transfer of the beds to appellant. Based on these specific facts, I believe that appellant and JCTH Holdings, Inc. should have been treated as a single entity for purposes of Ohio Adm.Code 3701-12-23.2(B).

{¶ 29} I also believe that R.C. 3702.523(B) supports this conclusion. This statute permits the transfer of a CON between affiliated or related persons/entities if the transfer does not result in a change in the person/entity that holds the ultimate controlling interest in the CON. I recognize that R.C. 3702.523(B) is not directly applicable here because it addresses the transfer of a CON—not approval of a CON application. Nevertheless, it is instructive because it points out the paramount importance of a single controlling interest. Ironically, if ODH had granted appellant a final CON, appellant could have transferred the CON to JCTH Holdings, Inc. pursuant to R.C. 3702.523(B). Yet, despite the single controlling interest, ODH refused to consider appellant and JCTH Holdings, Inc. as a single entity for purposes of appellant's CON application. Because JCTH Holdings, Inc. and appellant share a single controlling interest, I believe they should have been treated as a single entity for purposes of appellant's CON application. Because the majority reaches a different conclusion, I respectfully dissent.

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