

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of: :
 : No. 11AP-41
 : (ODH No. 9006-01-09)
Regency Village Certificate of Need :
Application, : (REGULAR CALENDAR)
 :
Appellant. :

D E C I S I O N

Rendered on September 30, 2011

Michael DeWine, Attorney General, and *Barbara Pfeiffer*, for
appellee Ohio Department of Health.

Simon Groner, for appellant.

APPEAL from the Ohio Department of Health

KLATT, J.

{¶1} Appellant, MSI Regency Ltd. ("Regency"), appeals from an adjudication order issued by the Director of Health ("Director") that denied Regency a certificate of need to replace an outdated skilled nursing facility with a newly constructed skilled nursing facility. For the following reasons, we affirm the order of the Director.

{¶2} In October 2002, Regency purchased a continuing care retirement community located in North College Hill, Ohio. The community consisted of a 12-acre campus with three buildings. One building housed a skilled nursing facility, while the other two buildings contained independent living and residential care housing. The skilled nursing facility included 100 licensed long-term care beds.

{¶3} On June 20, 2005, Regency applied to the Department of Health ("Department") for a certificate of need ("CON") authorizing the renovation of a vacant building on Regency's campus to serve as a new skilled nursing facility. In its CON application, Regency stated that the residents of its skilled nursing facility would remain in that facility while renovation occurred. Upon completion of the new skilled nursing facility, Regency would move the residents directly from the existing skilled nursing facility into their rooms in the new facility.

{¶4} Shortly before the Director issued a decision on Regency's CON application, Regency revised its construction plans. Regency decided that, instead of renovating an existing building, it would demolish the building and construct the new skilled nursing facility in its place. This amendment to the project did not alter the plan of care calling for the residents to remain in place until Regency could move them into the new skilled nursing facility.

{¶5} On November 1, 2005, the Director granted Regency a CON to proceed with its proposed project. Regency then requested that the United States Department of Housing and Urban Development ("HUD") guarantee its construction loan. At that time, Regency discovered that HUD would only insure loans for single-phase construction projects. Regency had originally planned two phases: first, the demolition of the vacant building and construction of the new skilled nursing facility, and second, the demolition of the existing skilled nursing facility and construction of a new residential care facility in its place. Confronted with HUD's refusal to insure a loan to construct a multi-phase project, Regency decided to execute the entire project in a single phase. This meant that

Regency had to completely close its continuing care retirement community during construction.

{¶6} Regency representatives met with community residents on December 15, 2005 and informed them that they would have to relocate to another facility. On that same day, Regency notified the Department that the skilled nursing facility would close by March 31, 2006.

{¶7} The Department responded to Regency's notification with a letter dated January 6, 2006. In that letter, the Department reminded Regency that its CON "require[d] the [long-term-care] residents to be permitted to remain in the existing * * * building until the new structure [was] completed and residents could move directly into the new facility." The Department warned Regency that "[f]ailure to comply with this aspect of the approved project may initiate procedures to withdraw the certificate of need."

{¶8} Despite the Department's warning, Regency did not discontinue transferring the residents of its skilled nursing facility to other facilities. Rather, Regency chose to contest that its CON required the residents of the skilled nursing facility to remain in place during construction. In a January 10, 2006 letter, Regency set forth its position and explained why it decided to close. Regency also requested that the Department determine whether Regency's deviation from the plan of care for the residents of its skilled nursing facility constituted a reviewable activity. By January 26, 2006, Regency's skilled nursing facility was empty of residents and was deemed closed.

{¶9} In a series of written determinations, the Director found that the relocation of the residents of the skilled nursing facility was a reviewable activity, and that Regency violated R.C. 3702.53(C) because it did not carry out that reviewable activity in substantial

accordance with the approved application for the CON. The Director withdrew the CON and imposed on Regency a \$207,355 civil penalty and a three-year ban on applying for any new CON. Regency timely filed R.C. Chapter 119 administrative appeals from each of the Director's determinations (i.e., the February 23, 2006 reviewability ruling, the March 6, 2006 imposition of sanctions, and the May 15, 2006 withdrawal of the CON). Those appeals were consolidated before one hearing examiner. After a hearing, the hearing examiner recommended that the Director affirm all his previous actions. In a January 7, 2008 adjudication order, the Director followed the hearing examiner's recommendation.

{¶10} Regency appealed the January 7, 2008 adjudication order to this court. We affirmed the Director's finding that Regency violated R.C. 3702.53(C), the withdrawal of the CON, and the imposition of a three-year moratorium on the filing of new CON applications. *In the Matter of MSI Regency Village, Ltd.*, 10th Dist. No. 08AP-64, 2008-Ohio-3830, ¶28. However, we reversed the imposition of the \$207,355 civil penalty, and we remanded the matter for the Director to impose a \$3,000 civil penalty. *Id.*

{¶11} Regency appealed this court's ruling, but the Supreme Court of Ohio declined jurisdiction over the case. *In re MSI Regency Village, Ltd.*, 120 Ohio St.3d 1457, 2008-Ohio-6813. The Director then issued a revised journal entry reducing the amount of the civil penalty from \$207,355 to \$3,000. Regency paid the civil penalty the next day.

{¶12} On March 10, 2009, Regency filed a second CON application seeking approval to construct a new skilled nursing facility to replace its outdated skilled nursing facility. One of the criteria for attaining a CON to replace a long-term care facility is that the facility being replaced must be an "existing health care facility." Former Ohio

Adm.Code 3701-12-23.2(E).¹ The Director denied Regency's application because Regency's skilled nursing facility, having closed four years prior, did not qualify as an "existing health care facility."

{¶13} Regency filed an R.C. Chapter 119 appeal from the denial of its CON application. Regency and the Department agreed to allow the hearing examiner to decide Regency's appeal based on joint stipulated facts and exhibits. After consideration of the joint stipulations and the parties' arguments, the hearing examiner recommended that the Director affirm his decision to deny Regency a CON. On December 16, 2010, the Director issued an adjudication order in which he adopted the hearing examiner's recommendation.

{¶14} Regency now appeals the December 16, 2010 adjudication order, and it assigns the following errors:

[I.] [The Department] erred in denying Regency's 2009 CON application, because [the Department] did not toll the "existing health care facility" status that Regency's facility had when Regency initiated its administrative appeal against [the Department] in 2006, and the filing of the 2009 CON application entirely depended on the final outcome of the 2006 administrative appeal.

[II.] [The Department] erred in denying Regency's 2009 CON application, because [the Department] had previously established that under the law of this case [the Department] would protect from expiring the "existing health care facility" status that Regency's facility had when Regency initiated its administrative appeal against [the Department] in 2006, by tolling the statute of limitation that governed the facility's status until the appeal is finally resolved.

[III.] [The Department] erred in denying Regency's 2009 CON application, because [the Department] did not apply the

¹The Director relied on the version of Ohio Adm.Code 3701-12-23.2 that was effective when Regency submitted its CON application. See 2008-2009 Ohio Monthly Record 2-335, effective Sept. 1, 2008. We also apply this version of the administrative code section.

equitable tolling doctrine and preserve the "existing health care facility" status that Regency's facility had when Regency initiated its administrative appeal against [the Department] in 2006, and the filing of the 2009 CON application entirely depended on the final outcome of the 2006 administrative appeal.

{¶15} A CON applicant may appeal an adjudication order denying the application to the Tenth District Court of Appeals. R.C. 3702.60(B). This court must affirm the adjudication order if it finds "that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 3702.60(F)(3). In the absence of such a finding, this court must reverse, vacate, or modify the adjudication order. *Id.*

{¶16} By each of its assignments of error, Regency argues that the Director erred in denying Regency's CON application on the basis that Regency's original skilled nursing facility did not constitute an "existing nursing facility." Pursuant to former Ohio Adm.Code 3701-12-23.2(E), the Director could not approve an application for a certificate of need to replace an existing long-term care facility unless "[t]he facility being replaced * * * [was] a long term care facility * * * that [was] an existing health care facility." A long-term care facility was an "existing health care facility" if it was: (1) "staffed and equipped to provide health care services, and [was] actively providing health care services," or (2) "provided services for at least three hundred sixty-five consecutive days within the twenty-four months immediately preceding the date a certificate of need application [was] filed with the director of health." R.C. 3702.51(L)(1) and (2); former Ohio Adm.Code 3701-12-01(K)(1) and (2).²

²Like the Director, we apply the version of Ohio Adm.Code 3701-12-01 that was effective on the date that Regency submitted its second CON application. See 2008-2009 Ohio Monthly Record 2-322, 2-323.

{¶17} Here, Regency sought to replace a skilled nursing facility that it closed on January 26, 2006. Regency filed its CON application with the Director on March 10, 2009. Applying R.C. 3702.51(L) and former Ohio Adm.Code 3701-12-01(K), the Director determined that Regency's skilled nursing facility did not qualify as an "existing health care facility" because it was not actively providing health care services, nor had it provided such services at any time during the two years preceding March 10, 2009.

{¶18} On appeal, Regency argues that its skilled nursing facility constitutes an "existing health care facility" under R.C. 3702.51(L)(2) and former Ohio Adm.Code 3701-12-01(K)(2) because it provided 365 consecutive days of service during the applicable two-year look-back period. According to Regency, the Director erred in failing to take into account the time Regency spent pursuing its prior administrative appeal when he applied the two-year look-back period. Regency asserts that the Director should have begun the two-year look-back period on March 16, 2006, April 4, 2006, or May 23, 2006, which, respectively, are the dates on which Regency initiated the appeals of the reviewability ruling, the imposition of sanctions, and the withdrawal of its CON. Looking back two years from any of these three dates, the Director would have found that Regency was operating an "existing health care facility."

{¶19} Regency cites three reasons for its assertion that the Director erred in applying the look-back period. Each of the three reasons corresponds with one of Regency's assignments of error. By its first assignment of error, Regency argues that legislative intent required the Director to exclude from the two-year look-back period the time during which Regency was pursuing its prior administrative appeal. To support this argument, Regency relies on legislative intent that it contends is apparent in R.C.

3702.525(A), 3702.54(B)(1), 3702.544, and 3702.55. Each of these statutes contains a deadline for performing a required action, as well as a provision that that suspends the deadline to allow for an administrative appeal.

{¶20} R.C. 3702.525(A) sets the deadline by which the holder of a CON must undertake certain, enumerated actions. It states:

Not later than twenty-four months after the date the director of health mails the notice that the certificate of need has been granted or, if the grant or denial of the certificate of need is appealed under section 3702.60 of the Revised Code, not later than twenty-four months after issuance of an order granting the certificate that is not subject to further appeal, each person holding a certificate of need * * * shall[.]

By its plain language, R.C. 3702.525(A) extends the period in which the CON holder must undertake the required actions if the grant or denial of a CON is appealed. Therefore, the holder of a CON subject to such an appeal receives sufficient time to act after resolution of the administrative appeal.

{¶21} R.C. 3702.54 addresses the imposition of sanctions for a violation of R.C. 3702.53. The sanctions include a civil penalty and the refusal of the Director to accept for review any CON application filed by the offender or successor of the offender for a period of one-to-three years. R.C. 3702.54(A) and (B). R.C. 3702.54(B)(1) provides that the moratorium on the acceptance of new CON applications shall begin "after the director mails the notice of the director's determination * * * or, if the determination is appealed under section 3702.60 of the Revised Code, the issuance of the order upholding the determination that is not subject to further appeal." Therefore, R.C. 3702.54(B)(1) suspends imposition of a moratorium during appeal, giving the offender an opportunity to seek full review of the Director's determination before the moratorium, if upheld, begins.

{¶22} Like R.C. 3702.54(B)(1), R.C. 3702.544 suspends the imposition of a sanction so an offender can pursue an administrative appeal. R.C. 3702.544 states that each person required to pay a civil penalty:

[S]hall do so not later than sixty days after receiving the notice mailed under section 3702.532 of the Revised Code or, if the person appeals under section 3702.60 of the Revised Code the director of health's determination that a violation has occurred, not later than sixty days after the issuance of an order upholding the director's determination that is not subject to further appeal.

{¶23} Finally, R.C. 3702.55 requires a person to cease any activity that violates R.C. 3702.53 within 30 days of receiving notification that his or her conduct violates R.C. 3702.53. However, if the person appeals the Director's determination that a violation of R.C. 3702.53 occurred, then the deadline to stop the offending conduct is "thirty days after the person receives an order upholding the director's determination that is not subject to further appeal." R.C. 3702.55, thus, allows a person to avoid the effect of the Director's determination until he or she has challenged that determination through an administrative appeal and lost.

{¶24} Regency acknowledges that neither R.C. 3702.525(A), 3702.54(B)(1), 3702.544, nor 3702.55, explicitly modifies the operation of R.C. 3702.51(L) and former Ohio Adm.Code 3701-12-01(K). Instead, Regency *infers* from R.C. 3702.525(A), 3702.54(B)(1), 3702.544, and 3702.55 a legislative intent to preserve Regency's status as an "existing health care facility" during the pendency of its prior administrative appeal. Regency argues that R.C. 3702.525(A), R.C. 3702.54(B)(1), R.C. 3702.544, and R.C. 3702.55 all include tolling provisions to protect appellants from the harm that might result from the passage of time during the prosecution of an administrative appeal. According

to Regency, the General Assembly would have also included such a tolling provision in R.C. 3702.51(L) and former Ohio Adm.Code 3701-12-01(K) had it anticipated the instant situation.

{¶25} Regency's argument perverts the rules of statutory construction. Interpretation of a statute depends on the legislature's intent in enacting the statute. *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶20; *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St.3d 471, 2009-Ohio-5934, ¶25; *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, ¶31. A court first looks to the language of the statute itself to determine legislative intent. *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, ¶18; *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶9; *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶11; *In re A.B.* at ¶31. See also *State ex rel. Mager v. State Teachers Retirement Sys.*, 123 Ohio St.3d 195, 2009-Ohio-4908, ¶14 (holding that "[s]tatutory construction must begin with the language employed by [the legislature] and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"). If that language is clear and unambiguous, the court need not resort to any other means of interpretation, but must, instead, apply the statute as written. *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, ¶16; *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶51; *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, ¶20; *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶12.

{¶26} "There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for." *In re Estate of Roberts*, 94 Ohio St.3d 311, 317, 2002-Ohio-

791, quoting *Vought Industries, Inc. v. Tracy*, 72 Ohio St.3d 261, 265, 1995-Ohio-18. See also *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, ¶26 (holding that courts "are forbidden to add a nonexistent provision to the plain language" of a statute); *In re Adoption of Walters*, 112 Ohio St.3d 315, 2007-Ohio-7, ¶10 ("refrain[ing] from adding language to the statute and thereby requiring more than the legislature intended"). A court's duty is to apply the statute that exists, not to read words into it that are not there. *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169, ¶21-22; *Underwood* at ¶52.

{¶27} Here, R.C. 3702.51(L)(2) and former Ohio Adm.Code 3701-12-01(K)(2) unambiguously require a health care facility to have provided services for 365 consecutive days within the two-year period immediately preceding the date the applicant filed its CON application. Nothing in the plain language of R.C. 3702.51(L)(2) and former Ohio Adm.Code 3701-12-01(K)(2) provides for a modification of the two-year look-back period if a CON applicant pursues an administrative appeal during the relevant two years. Consequently, we must apply R.C. 3702.51(L)(2) and former Ohio Adm.Code 3701-12-01(K)(2) as written. We refuse, as Regency urges, to engraft a tolling provision onto R.C. 3702.51(L)(2) and former Ohio Adm.Code 3701-12-01(K)(2) that the General Assembly did not itself include. As the legislative intent is clear from the plain language of R.C. 3702.51(L)(2) and former Ohio Adm.Code 3701-12-01(K)(2), we do not look beyond that language. Accordingly, we overrule Regency's first assignment of error.

{¶28} By Regency's second assignment of error, it argues that a judicial admission that the Department made in related federal litigation required the Director to

expand the scope of R.C. 3702.51(L)(2) and former Ohio Adm.Code 3701-12-01(K)(2).

We disagree.

{¶29} While Regency's prior administrative appeal was pending, Regency filed a complaint in the United States District Court for the Southern District of Ohio alleging a 42 U.S.C. 1983 claim against several Department employees. The complaint also sought a temporary restraining order and preliminary injunction to prevent Regency's CON from expiring. Pursuant to R.C. 3702.525(A)(1), a CON expires if the holder does not begin construction within "twenty-four months after the date the director of health mails the notice that the certificate of need has been granted or, if the grant or denial of the certificate of need is appealed * * * [within] twenty-four months after issuance of an order granting the certificate that is not subject to further appeal." When Regency filed for injunctive relief, over 23 months had passed since the Director had issued Regency's CON. Regency sought an injunction so that if it succeeded on its administrative appeal of the withdrawal of the CON, the Director could not claim that the CON had expired due to Regency's failure to initiate construction within the statutory limitations period.

{¶30} The trial judge assigned to the case immediately convened a telephone conference on Regency's request for a temporary restraining order. In that conference, the Department's attorney represented that the tolling provision of R.C. 3702.525(A) applied to Regency, thus extending the time in which Regency had to begin construction. Accepting this representation as true, Regency withdrew its request for injunctive relief.

{¶31} Now, on appeal, Regency asserts that the Department's interpretation of R.C. 3702.525(A) expanded the tolling provision in that statute beyond its terms. R.C. 3702.525(A) suspends the running of the 24-month limitation period if a person

administratively appeals a "grant or denial of the certificate of need." Regency's appeal, however, did not arise from a grant or denial of a CON, but rather, the withdrawal of a CON. Thus, Regency argues that the Department's interpretation of R.C. 3702.525(A) constitutes a judicial admission that binds the Director to construe R.C. 3702.51(L)(2) and former Ohio Adm.Code 3701-12-01(K)(2) in a similarly expansive manner.

{¶32} A judicial admission is a distinct and unequivocal statement, made by a party or a party's counsel during a judicial proceeding, which acts as a substitute for evidence at trial. *Haney v. Law*, 1st Dist. No. C-070313, 2008-Ohio-1843, ¶7; *Beneficial Ohio, Inc. v. Primero, L.L.C.*, 166 Ohio App.3d 462, 2006-Ohio-1566, ¶12; *Scatamacchio v. W. Res. Healthcare*, 161 Ohio App.3d 230, 2005-Ohio-2690, ¶46; *Shepler v. Love* (Sept. 14, 2001), 6th Dist. No. H-00-022. While a judicial admission may arise from a statement of material and competent fact, no such admission results from a statement of a legal conclusion. *Faxon Hills Constr. Co. v. United Bhd. of Carpenters and Joiners* (1958), 168 Ohio St. 8, paragraph one of the syllabus ("To operate as a judicial admission, an allegation in a pleading must be an allegation of a material and competent fact and not a mere statement of a legal conclusion."); *Concrete Coring Co. v. Gantzer*, 1st Dist. No. C-020119, 2002-Ohio-6655, ¶17. See also *Faternal Order of Police Lodge No. 89 v. Prince George's Cty.* (C.A.4, 2010), 608 F.3d 183, 190, fn. 7 ("When counsel speaks of legal principles, as he conceives them and which he thinks applicable, he makes no judicial admission and sets up no estoppel which would prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the Court understands them."); *In re Teleglobe Communications Corp.* (C.A.3, 2007), 493 F.3d 345, 377 ("[Judicial admissions] must be statements of fact that require evidentiary proof,

not statements of legal theories."); *Roger Miller Music, Inc. v. Sony/ATV Publishing, LLC* (C.A.6, 2007), 477 F.3d 383, 394 (finding that counsel's statements did not constitute judicial admissions because they were "statements regarding * * * interpretation of the law given the facts of the case").

{¶33} A judicial admission is binding only in the lawsuit in which such admission is made. *Peckham Iron Co. v. Harper* (1884), 41 Ohio St. 100, 106; *Dombelek v. Ohio Bur. of Workers' Comp.*, 154 Ohio App.3d 338, 2003-Ohio-5151, ¶22-23. See also *Cooper v. Meridian Yachts, Ltd.* (C.A.11, 2009), 575 F.3d 1151, 1178, fn. 17 (" 'Normally judicial admissions are binding for the purpose of the case in which the admissions are made, not in separate and subsequent cases.' "); *Heritage Bank v. Redcom Laboratories, Inc.* (C.A.5, 2001), 250 F.3d 319, 329 (" [J]udicial admissions are not conclusive and binding in a separate case from the one in which the admissions are made.' "); *Higgins v. Mississippi* (C.A.7, 2000), 217 F.3d 951, 954 ("[A] judicial admission binds only in the litigation in which it is made.").

{¶34} Here, the statement at issue concerns statutory construction, which is a question of law. See *Akron Centre Plaza Ltd. Liability Co. v. Summit Cty. Bd. of Revision*, 128 Ohio St.3d 145, 2010-Ohio-5035, ¶10 (holding that "construction of * * * statutory language * * * is a question of law"). Consequently, the interpretation of R.C. 3702.525 that the Department set forth during the federal litigation does not constitute a judicial admission. Moreover, even if the Department's interpretation had qualified as a judicial admission, its binding effect would not extend beyond the federal litigation to this appeal. Accordingly, we overrule Regency's second assignment of error.

{¶35} By Regency's third assignment of error, it argues that the Director erred in refusing to apply the equitable tolling doctrine. We disagree.

{¶36} "The equitable tolling doctrine extends statutory deadlines in extraordinary circumstances for parties who were prevented from complying with them through no fault or lack of diligence of their own." *Neves v. Holder* (C.A.1, 2010), 613 F.3d 30, 36. The doctrine does not expand the limitations period beyond its statutorily mandated boundaries; it, instead, merely halts the limitations clock from ticking during the tolling period. *Colwell v. Tanner* (C.A.6, 2003), 79 Fed.Appx. 89, 91. See also *United States v. Buchanan* (C.A.4, 2011), 638 F.3d 448, 457 (holding that equitable "tolling operates to 'stop the clock' "); *Brown v. Ohio Dept. Of Job & Family Servs.*, 10th Dist. No. 08AP-239, 2008-Ohio-6523, ¶13 (holding that equitable tolling " 'halts [the limitations clock's] ticking after the limitations period has accrued' "). This court has previously affirmed the Director's use of equitable tolling to stop the clock on a statutory look-back period. *In the Matter of Holzer Consolidated Health Sys.*, 10th Dist. No. 03AP-1020, 2004-Ohio-5533, ¶12-16. However, equitable tolling is applied sparingly and only in exceptional circumstances, and whether it is appropriate depends on the particular facts of each case. *Brown* at ¶12, 15; *Byers v. Robinson*, 10th Dist. No. 08AP-204, 2008-Ohio-4833, ¶56-57.

{¶37} A litigant seeking equitable tolling must demonstrate that he or she diligently pursued his rights, but some extraordinary circumstance stood in his or her way and prevented timely action. *Holland v. Florida* (2010), ___ U.S. ___, 130 S.Ct. 2549, 2562; *Byers* at ¶52. Here, Regency argues that it acted diligently in filing its second CON

application given the strictures of former R.C. 3702.542.³ According to Regency, former R.C. 3702.542 prohibited it from submitting a second CON application unless it first paid the civil penalty. Regency contends that the Director should not penalize it for exercising its right to appeal, rather than immediately paying the civil penalty. Because Regency had no control over the lapse of time during the appellate process, Regency asserts that it is not to blame for the belated filing of its second CON application.

{¶38} The statutory restriction at the core of Regency's argument, former R.C. 3702.542, stated:

When the director of health determines that a person has violated section 3702.53 of the Revised Code, the person shall pay the civil penalty imposed under division (A) of section 3702.54 of the Revised Code, but the director shall not apply division (B) of section 3702.54 of the Revised Code to the person if the person both:

(A) Not later than thirty days after the director mails the notice under section 3702.532 of the Revised Code, applies under section 3702.52 of the Revised Code for a certificate of need to conduct the activity that constitutes the violation;

(B) In accordance with a timetable established by the director, ceases conducting the activity or using the equipment or facility for which the certificate of need is sought until and unless the certificate of need is granted.

If the person fails to apply for a certificate of need within the thirty-day period or fails to cease conducting the activity or using the equipment or facility in accordance with the timetable established by the director, the director shall apply division (B) of that section.

We do not read this statute as making payment of the civil penalty a precondition to submitting a CON application. Rather, former R.C. 3702.542 provided a way for an

³ The General Assembly repealed former R.C. 3702.542 in Am.Sub.H.B. No. 1, effective October 16, 2009. See 2009 (No. 4) Ohio Legis.Serv. L-709, L-2480.

offender to avoid the application of the moratorium portion of the two-pronged sanction by completing the tasks set forth in R.C. 3702.542(A) and (B). If the offender did not complete both of the tasks, then the Director had to apply both the civil penalty and the moratorium to the offender. Whether or not the offender succeeded in avoiding the moratorium, the offender always remained responsible for paying the civil penalty.

{¶39} Because Regency appealed the imposition of the moratorium, R.C. 3702.54(B)(1) suspended the commencement of the moratorium until "the issuance of the order upholding the determination [that Regency violated R.C. 3702.53] that [was] not subject to further appeal." Thus, the moratorium began on April 1, 2009—the date on which the ruling of the Supreme Court of Ohio declining jurisdiction over the prior administrative appeal was no longer subject to appeal to the United States Supreme Court. Prior to that date, nothing prevented Regency from submitting a new CON application.

{¶40} As no statute impeded Regency's ability to file a second CON application, we determine that Regency alone is at fault for its failure to file the application in sufficient time to qualify as an "existing health care facility." Regency closed its skilled nursing facility on January 26, 2006. The closing meant that to constitute an "existing health care facility" Regency had to submit a CON application prior to January 26, 2007—the last date on which the skilled nursing facility still was an "existing health care facility" under R.C. 3702.51(L)(2) and former Ohio Adm.Code 3701-12-01(K)(2). Regency, however, chose to wait until March 10, 2009—over three years after the deadline. Given this voluntary delay, Regency cannot establish that it diligently pursued its rights.

Accordingly, we conclude that the Director did not err in refusing to apply the equitable tolling doctrine, and we thus overrule Regency's third assignment of error.

{¶41} For the foregoing reasons, we overrule all Regency's assignments of error, and affirm the adjudication order of the Director of Health.

Order affirmed.

BRYANT, P.J., and BROWN, J., concur.
