STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 15 DHR 02422

Wp-Beulaville Health Holdings Llc Petitioner, v. N C Department Of Health And Human Services, Division Of Health Service Regulation, Adult Care Licensure Section Respondent.	**FINAL DECISION**

This matter came on for hearing before Administrative Law Judge Philip E. Berger, Jr. on March 29, 2016, in Raleigh, North Carolina, on the cross-motions of Petitioner WP-Beulaville Health Holdings, LLC ("WP-Beulaville" or "Petitioner") and Respondent NC Department of Health and Human Services ("DHHS"), Division of Health Service Regulation, Adult Care Licensure Section ("DHSR") (collectively, "Respondent") for summary judgment. Christopher W. Jones and Amanda G. Ray from Womble Carlyle Sandridge and Rice, LLP appeared on behalf of Petitioner, and Adrian W. Dellinger, Assistant Attorney General, appeared on behalf of Respondent.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is designed to eliminate formal trials where only questions of law are involved. Summary judgment should be used cautiously, with due regard to its purposes and a cautious observance of its requirements. *See Brown v. Greene*, 98 N.C. App. 377, 390 S.E.2d 695 (1990). The standard of review is whether there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *See Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). The burden of establishing a lack of any legally triable issue resides with the movant. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). Summary judgment is proper "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that [the moving] party is entitled to a judgment as a matter of law." Rule 56(c), N.C. Gen. Stat. § 1A-1. "An administrative law judge may grant . . . summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case." N.C. Gen. Stat. § 150B-34(e).

BASED UPON the record, the Undersigned makes the following Findings of Fact which shall also be Conclusions of Law.

1. Petitioner operates Autumn Village, an adult care home located in Duplin County, North Carolina.

2. “Adult care home” is defined by statute to mean: “An assisted living residence in which the housing management provides 24-hour scheduled and unscheduled personal care services to two or more residents, either directly or for scheduled needs, through formal written agreement with licensed home care or hospice agencies.” N.C. Gen. Stat. § 131D-2.1(3).

3. DHHS is an agency of the State of North Carolina.

4. Pursuant to N.C. Gen. Stat. § 131D-2.4(a), DHHS is responsible for inspecting and licensing adult care homes. Section 131D-2.4(a) provides:

> Except for those facilities exempt under G.S. 131D-2.3, the Department of Health and Human Services shall inspect and license all adult care homes. The Department shall issue a license for a facility not currently licensed as an adult care home for a period of six months. If the licensee demonstrates substantial compliance with Articles 1 and 3 of this Chapter and rules adopted thereunder, the Department shall issue a license for the balance of the calendar year.

5. DHHS has two subdivisions relevant to this case:

   a. the Adult Care Licensure Section of DHSR, the entity that issues and renews adult care facility licenses on behalf of DHHS; and

   b. the North Carolina Medical Care Commission, an entity created by statute with “the power and duty to adopt rules for the inspection and licensure of adult care homes and operation of adult care homes.” N.C. Gen. Stat. § 143B-165(13).

6. Petitioner (and was at all times relevant to this case) licensed by DHHS to operate Autumn Village as an adult care home.

7. Petitioner is (and was at all times relevant to this case) not licensed by DHHS to operate Autumn Village or any portion thereof as a special care unit.

8. Additional statutory requirements apply to an adult care home with a “special care unit” (“SCU”), which is defined as “a wing or hallway within an adult care home, or a program provided by an adult care home, that is designated especially for residents with Alzheimer's disease or other dementia, a mental health disability, or other special needs disease or condition as determined by the Medical Care Commission.” N.C. Gen. Stat. § 131D-4.6(a).

9. The Medical Care Commission is required by statute to adopt rules “for the licensure of special care units in accordance with G.S. 131D-4.6[.]” N.C. Gen. Stat. § 131D4.5(7).

10. Pursuant to N.C. Gen. Stat. § 131D-4.6(b), DHHS is responsible for inspecting and licensing special care units at adult care homes. Section 131D-4.6 provides in relevant part: "An adult care home that holds itself out to the public as providing a special care unit shall be licensed as such and shall, in addition to other licensing requirements for adult care homes, meet the standards established under rules adopted by the Medical Care Commission." N.C. Gen. Stat. § 131D-4.6(b).

11. The Medical Care Commission has promulgated rules governing special care unit licensure, building requirements, policies and procedures, admission, resident profiles and care plans, staffing, and staff orientation and training. See 10A NCAC 13F.1301-10.

12. 10A NCAC 13F .1303 provides:

> A facility that advertises, markets or otherwise promotes itself as having a special care unit for residents with Alzheimer's Disease or related disorders and meets the requirements of this Section for special care units and the rules set forth in this Subchapter shall be licensed as an adult care home with a special care unit. The license shall indicate that a special care unit for residents with Alzheimer's Disease or related disorders is provided.

13. On July 26, 2013, the General Assembly imposed a three-year moratorium on the issuance of special care unit licenses (the "Moratorium"). *See* Appropriations Act of 2013 § 12G.1.(a), 2013 N.C. Sess. Laws 360; *see also* Appropriations Act of 2014 § 12G.5.(a), 2014 N.C. Sess. Laws 100 (making minor changes to moratorium); Current Operations and Capital Improvements Appropriations Act of 2015 § 12G.1.(a), 2015 N.C. Sess. Laws 241 (extending the Moratorium through July 2017). The Moratorium reads as follows:

> For the period beginning July 31, 2013, and ending June 30, 2017, the Department of Health and Human Services, Division of Health Service Regulation (Department), shall not issue any licenses for special care units as defined in G.S. 131D‑4.6 and G.S. 131E‑114. This prohibition shall not restrict the Department from doing any of the following:
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> (1) Issuing a license to a facility that is acquiring an existing special care unit.
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> (2) Issuing a license for a special care unit in any area of the State ***upon a determination by the Secretary of the Department of Health and Human Services that increased access to this type of care is necessary in that area*** during the three‑year moratorium imposed by this section.
>
> (3)

Current Operations and Capital Improvements Appropriations Act of 2015 § 12G.1.(a), 2015 N.C. Sess. Laws 241 (emphasis added.)

14. DHHS outlines on its website the process for "submit[ting] a request to the Secretary of DHHS for an exception for a SCU license." N.C. Division of Health Service Regulation, Special Care Unit (SCU) Moratorium Exception Request Process, http://www2.ncdhhs.gov/dhsr/scumoratorium.html (last visited May 31, 2016).

15. With respect to whether SCU licensure requirements must be satisfied prior to seeking an exception, DHHS' website states: "If licensure requirements have been met, the request for the exception will be reviewed." *Id*.

16. In practice, DHHS does not require a facility to hire and train additional SCU staff prior to seeking the exception for an SCU license.

17. On January 15, 2015, Petitioner sent a letter to DHHS requesting permission "to convert a total of twenty-four (24) licensed adult care home beds [located at Autumn Village] to SCU beds."

17. On February 5, 2015, DHHS sent a response letter to Petitioner stating that DHHS had declined to "review [its] exception request for licensure with a SCU designation."

18. As of January and February 2015, Petitioner had neither held itself out to the public as providing an SCU nor satisfied all the requirements for licensure as an SCU.

19. Petitioner timely filed its Petition for Contested Case Hearing on April 2, 2015.

20. Petitioner and Respondent concur that there is no dispute regarding the facts of this case, and the only issue to be determined by this the propriety of DHHS' process for evaluating self-described "exceptions" to the Moratorium.

21. Summary judgment is appropriate, in this case, because the "record shows that 'there is no genuine issue as to any material fact and [Petitioner] is entitled to a judgment as a matter of law'" in connection with DHHS's denial of Petitioner's request for an exception to the Moratorium. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

22. DHHS' position is that the Moratorium does not require it to take any action other than issuing or not issuing the license for an SCU. This assertion is contradicted by the plain language of the Moratorium, which indicates that a "need determination" should come before an SCU license is issued.

23. Specifically, the Moratorium states that DHHS may "[issue] a license for a special care unit in any area of the State ***upon a determination*** by the Secretary of the Department of Health and Human Services that increased access to this type of care is necessary in that area during the three-year moratorium imposed by this section." *Id.* (emphasis added).

24. "Upon" is defined as "immediately following on" or "thereafter." Webster's Third New International Dictionary 2517–18 (unabr. ed. 2002). The Act should be read as allowing DHHS to issue a license for a special care unit in any area of the State ***following a determination*** by the Secretary of the Department of Health and Human Services that increased access to this type of care is necessary in that area during the three-year moratorium imposed by this section.

25. The Moratorium's plain language shows that the allowance of an exception does not create any additional licensing requirement for prospective licensees. Instead, it creates a new and additional step in the process for DHHS. When DHHS assesses need pursuant to the Moratorium exception, the question before it is not whether it will issue a license to a prospective licensee. Rather, the question is whether DHHS is permitted to even consider issuing an SCU license in the subject area and, more specifically, whether need for care exists there. That question is wholly independent of whether to issue a license to a specific prospective licensee.

26. DHHS' stated basis for denial of Petitioner's exception request not only ignores the plain language of the statute, but it contemplates that Petitioner's burden is higher to get DHHS to perform the requisite need analysis under the Moratorium than it would be to actually get a license issued absent the Moratorium. Had the General Assembly wished to require that prospective licensees meet certain selected licensure requirements prior to DHHS performing the Moratorium need determination, it would have stated so. DHHS is not free to alter or add statutory language or create its own rules where none exist.

27. DHHS cannot impose a policy or procedure that is different with respect to its licensure analysis under the exception than it otherwise imposes. In doing so it has acted in an arbitrary and capricious manner. *Ward v. Inscoe*, 166 N.C. App. 586, 595, 603 S.E.2d 393, 399 (2004) (*quoting Lenoir Mem. Hosp. v. N.C. Dep't of Human Res*., 98 N.C. App. 178, 181, 390 S.E.2d 448, 450 (1990)) (holding that "[a]n agency's ruling is deemed arbitrary and capricious when it is "whimsical, willful[,] and [an] unreasonable action without consideration or in disregard of facts or law or without determining principle").

28. The Moratorium itself and none of the administrative rules enacted by the Medical Care Commission state or even indicate that anything prevents DHHS from granting an exception request prior to the facility meeting all applicable licensure requirements.

29. None of the administrative rules enacted by the Medical Care Commission state or even indicate that DHHS "***cannot*** issue a license prior to the facility meeting all applicable licensure requirements," which DSS claims is the basis for its February 5, 2015 decision. (Emphasis added.). In fact, DHHS acknowledges that it regularly does issue licenses before prospective licensees have actually met all licensure requirements necessary to operate an SCU. 10A NCAC 13F .1303 provides that "a facility that advertises, markets or otherwise promotes itself as having a special care unit . . . and ***meets the requirements of this Section for special care units*** and the rules set forth in this Subchapter shall be licensed as an adult care home with a special care unit," (emphasis added), and 10A NCAC 13F .1309 provides that "prior to establishing a special care unit, the administrator shall

document receipt of at least 20 hours of training specific to the population to be served for each special care unit to be operated." Yet, DHHS acknowledges that in practice it does not require an adult care home facility to meet **all** licensure requirements in 10A NCAC 13F, as it claims in its February 5, 2015 letter, as such facilities do not have to hire and train additional SCU staff prior to operating an SCU.

30. The policy DHHS has implemented regarding evaluating exceptions to the Moratorium stands in contrast to the procedures it employed during previous similar moratoriums. On August 8, 1997, the North Carolina General Assembly enacted Session Law 1997-443, s. 11.69 (the "1997 Moratorium") which contained a provision prohibiting the development of additional adult care facilities but exempting several categories of plans for assisted living projects from this prohibition. The 1997 Moratorium provided that a need determination be made by Department or the County Boards of Commissioners before licensure requirements were satisfied:

> (b) From the effective date of this Act until twelve months after the effective date of this Act, the Department of Health and Human Services shall not approve the addition of any adult care home beds for any type home or facility in the State, except as follows:
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> * * *
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> (4) If the Department ***determines that the vacancy rate of available adult care home beds in a county is fifteen percent (15%) or less of the total number of available beds in the county as of August 26, 1997, and no new beds have been approved or licensed in the county or plans submitted for approval*** in accordance with subdivision (1) or (2) of this section which would raise the vacancy rate above fifteen percent (15%) in the county, then the department may accept and approve the addition of beds in that county; or
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> (5) ***If a county board of commissioners determines that a substantial need exists for the addition of adult care home beds in that county***, the board of commissioners may request that a specified number of additional beds be licensed for development in their county. In making their determination, the board of commissioners shall give consideration to meeting the needs of Special Assistance clients. The Department may approve licensure of the additional beds from the first facility that files for licensure and subsequently meets the licensure requirements.

N.C. Sess. Law. 1997-443, s. 11.69(b) (emphasis added).

31. In its process implemented under the 1997 Moratorium, "[o]nce an applicant qualified for an exemption, the Department's normal course of business was to send a letter

from the Adult Care Licensure Section notifying the applicant it was '***allowed to proceed with licensure***,' and to cite the specific statutory subsection under which the exemption was granted[.]" *Carillon Assisted Living, LLC v. North Carolina*, 03 DHR 1308, at 8 (OAH May 11, 2004) (emphasis added). This resulted in a two-step process whereby: (1) the Department first determined whether the applicant met an exemption to the 1997 Moratorium, and (2) the applicant was then permitted to "mobilize the necessary finances for the construction." *See Saint's Assisted Independent Living, Inc. v. North Carolina*, 04 DHR 1357 (OAH Apr. 19, 2005) (noting that the facility at issue applied for — and received — an exemption in 1997 and then unsuccessfully attempted to complete the financing, upfit, and licensing in 2001 before the exemption expired).

32. The Moratorium should be interpreted no differently than the 1997 Moratorium; the Moratorium also requires that DHHS make a "need determination" before an adult care home can be licensed as an SCU. Appropriations Act of 2015 § 12G.1.(a), 2015 N.C. Sess. Laws 241 (DHHS may "[i]ssu[e] a license for a special care unit in any area of the State upon a determination by the Secretary of the Department of Health and Human Services that increased access to this type of care is necessary in that area"). There is no legislative history, commentary, or other indication from the General Assembly that the purpose of the Moratorium is any different than that of previous moratoriums. .

33. The stipulated facts before the Court show that there is not and cannot be a reasonable basis for DHHS' decision to decline to "review [Petitioner's] exception request for licensure with a SCU designation" because it had not fulfilled the requirements for SCU licensure, and is therefore arbitrary and capricious. *Lewis v. N. Carolina Dep't of Human Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) ("Administrative agency decisions may be reversed as arbitrary or capricious if they . . . 'fail to indicate any course of reasoning and the exercise of judgment.'" (quoting *State ex rel. Com'r of Ins. v. N. Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980)).

34. DHHS has imported its own qualifier — "after all licensure requirements are met" — into the Moratorium language, so that it contemplates that DHHS may issue a license for a special care unit in any area of the State only after all licensure requirements are met and then upon a determination by DHHS that increased access to this type of care is necessary in that area. The Moratorium exception does not authorize DHHS to establish such additional hurdles for prospective licensees that appear neither in the licensing rules and regulations, nor in the Moratorium exception itself. *See AH N. Carolina Owner LLC v. N.C. Dep't of Health & Human Servs*., 771 S.E.2d 537, 542 (2015) (finding that although it was permitted to establish its own standards and criteria, DHHS' interpretation of the Certificate of Need statute was not a permissible construction when DHHS essentially wrote its own qualifier into the criteria); *High Rock Lake Partners, LLC v. N. Carolina Dep't of Transp*., 366 N.C. 315, 321, 735 S.E.2d 300, 304 (2012) (finding that the North Carolina Department of Transportation had acted contrary to the plain language of the Driveway Permit Statute when it imposed extra-statutory conditions on a land developer's driveway application).

35. Because it imposes an additional requirement on adult care homes that was not contemplated by either the General Assembly or the Medical Care Commission, DHHS acted erroneously, arbitrarily, and contrary to law, and its February 5, 2015 decision should be reversed. *Duke University Medical Center v. Bruton*, 134 N.C. App. 39, 52, 516 S.E.2d 633, 641 (1999) (upholding reversal of Division of Medical Assistance decision that was not codified in statute or rule because "[t]here is neither statutory nor regulatory authority for DMA's policy," and "DMA policy of denying Medicaid payments to otherwise eligible recipients on the grounds that they have failed to enroll in Medicare is an application of unpromulgated legislative rule and amounts to an unlawful procedure").

BASED ON the above Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Respondent's motion for summary judgment is **DENIED**; Petitioner's motion for summary judgment is **GRANTED**; and DHHS must evaluate and render a decision on Petitioner's exception request based on the materials Petitioner has submitted to DHHS to date and DHHS own internal need assessment within 30 days of issuance of this Order.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 29th day of June, 2016.

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Philip E Berger Jr.
Administrative Law Judge