IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

NANTICOKE MEMORIAL HOSPITAL, INC. Appellant, v. DELAWARE HEALTH RESOURCES BOARD, a Delaware Independent Public Instrumentality; and SEAFORD SPECIALTY SURGERY CENTER, LLC, a Delaware Limited Liability Company, Appellees.	)	C.A. No. 07A-12-005 RFS

MEMORANDUM OPINION

Upon Appellees' Motions to Dismiss Appellant's Appeal of the Delaware Health Resources Board. Granted.

Submitted: September 18, 2008
Decided: December 30, 2008

David R. Hackett, Esquire, Griffin & Hackett, P.A., Georgetown, Delaware, Attorney for Appellant.

Thomas E. Hanson, Jr., Esquire and Katherine J. Neikirk, Esquire, Morris James LLP, Wilmington, Delaware, Attorney for Appellee Seaford Specialty Surgery Center, LLC.

Patricia D. Murphy, Esquire, Delaware Department of Justice, Dover, Delaware, Attorney for Appellee Delaware Health Resources Board.

STOKES, Judge

This is my decision regarding Seaford Surgery Center's ("Seaford")and the Delaware Health Resources Board's ("Board" or "DHRB") ("Appellees") Motions to Dismiss Nanticoke Memorial Hospital's ("Appellant") appeal of the Board's approval of a free-standing surgery center in Seaford, Delaware. For the reasons set forth herein, the Motions are granted.

STATEMENT OF FACTS

Seaford Specialty Surgery Center is a Delaware limited liability company which has sought to open a free-standing multi-specialty ambulatory surgery center ("ASC"). All but one of the physician investors is a member of the Hospital Medical Staff at Nanticoke Memorial Hospital. Nanticoke is a Delaware 501(c)(3) non-profit corporation. The hospital is located in Seaford, Delaware and provides a wide range of medical services to the community. It primarily draws its patients from Sussex County and neighboring counties in Delaware and Maryland.

Appellant maintains six operating rooms at the hospital. Of those, only four are currently utilized. Appellant has claimed that since all of its operating rooms are not being used, the community does not require an ASC. Seaford has alleged that Appellant suffers from management issues, frequent turnover of staff and executives, and problems scheduling operating room times. Seaford claims that the ASC will help alleviate some of these difficulties and allow doctors and patients to schedule procedures more efficiently.

In order to establish a new health care facility, one must obtain a Certificate of Public Review ("CPR") from the Delaware Health Resources Board. 16 *Del. C.* § 9304(1). Seaford submitted an application for a CPR in May 2006. The application was

declared complete by the Board on June 21, 2006. On June 22, the Board Chair appointed a Review Committee. The Review Committee held its first meeting on August 3. Both parties were given the opportunity to address the Committee. A second meeting was held on September 20. Seaford submitted a letter signed by Appellant that the two intended to form a partnership to build the ASC. The Committee recommended that the Board approve the application.

The Board held a meeting on October 26; however the proposed joint venture was still being negotiated at that time. The Board deferred action until the venture was finalized. On January 22, 2007, Appellant sent a letter to the Board that it was withdrawing from the ASC venture due to anticipated lost revenues as a result of the project. Seaford requested leave to submit a revised application. On April 26, the Board passed a motion granting Seaford an additional 90 days to complete the application. On May 3, the revised application was submitted. Appellant submitted a memorandum opposing the application at the Review Committee meeting on June 4, which Appellant and Seaford both attended. The Committee voted to recommend that the Board deny the application.

Seaford alleged that Appellant's memorandum was a "surprise" and that it had not had time to rebut it. Seaford requested time to review and respond to the memorandum and filed a reply on June 19. The Review Committee met on June 26 to finalize its report, at which time Appellant filed a second memorandum.

On June 28, the Board met to make a final decision on the application. This decision was postponed at Seaford's request because the Committee's report had only been received the day before. The Board Chairperson extended the review period an

additional 180 days on July 9. The Board voted to approve the Chairperson's extension of the review period on July 26. On August 23, Seaford asked the Board to decide on the application without consideration by the Review Committee. The Board denied that request; however it directed the Review Committee to hold a another meeting to create a second recommendation for the Board, due to concerns over the standard the committee used at the first meeting.

Appellant objected to the Board's actions both in granting the extension and in calling for a second meeting. Appellant submitted a memorandum to the Review Committee on October 1. The second meeting was held on October 9, at which testimony was heard on behalf of Appellant and Seaford. The Committee voted to recommend approval of the application to the Board.

On November 15, 2007, the Board met and heard testimony from both Appellant and Seaford. The Board voted to approve a CPR for Seaford after hearing testimony and considering the Committee's report. On November 20, Appellant requested administrative reconsideration of the CRP grant under 16 *Del. C.* § 9305(7). At its December 13 meeting, the Board denied the request. Appellant now attempts to appeal the decision of the Board to the Superior Court under 16 *Del. C.* 9305(8).

STANDARD OF REVIEW

The Delaware Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing court is to determine whether substantial evidence exists on the record to support findings of fact and to correct any errors of law. *Hellings v. City of Lewes Bd. Of Adjustment*, 1999 WL 624114 (Del. Supr.) at *2. Substantial evidence means such

relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Holowka v. New Castle County Bd. Of Adjustment*, 2003 WL 21001026 (Del. Super.) at *3. Substantial evidence is "more than a scintilla, but less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

Questions of law are reviewed de novo. *McDonalds v. Fountain*, 2007 WL 1806163 (Del. Super. 2007) at *1. Absent error of law, the standard of review for a Board's decision is abuse of discretion. *Opportunity Center, Inc. v. Jamison*, 2007 WL 3262211 (Del. Supr. 2007) at *2. The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances." *Willis v. Plastic Materials*, 2003 WL 164292 (Del. Super. 2003) at *1.

DISCUSSION

Appellees have moved for this Court to dismiss this appeal on two grounds. The first is that Appellant lacks standing to appeal the decision of the Board, which represents a legal issue. Seaford also claims that substantial evidence supports the Board's decision, and it should thus be affirmed. After consideration, Appellees' Motions to Dismiss will be granted on the first ground; consequently, there is no need to rule on the second.

Appellees argue that the statute which grants the right to appeal Board decisions to Superior Court, 16 *Del. C.* § 9305(8), does not grant standing to non-applicants. Conversely, Appellant contends that it does not preclude appeals for non-applicants. The statute states the following:

> *Appeal -- Applicant.* --A decision of the Board following review of an application pursuant to subdivision (5) of this section, an administrative reconsideration pursuant to subdivision (7) of this section, or the denial of a request for extension of a Certificate of Public Review pursuant to

> § 9307 of this title, may be appealed within 30 days to the Superior Court. Such appeal shall be on the record. *Id.*

The statutory language itself does not state whether or not non-applicants have the right to appeal; however the heading does imply that the statute only applies to applicants. While statutory headings do not have the same force of law as textual language, they can be helpful to determine legislative intent.

In this regard, the Superior Court's decision in *Arbor Health Care Co. v. Del. Health Res. Bd.*, 1997 WL 817874 (Del. Super.) guides the result. The *Arbor* case was an appeal of a DHRB decision that granted a Certificate of Need to Broadmeadow Inv., L.L.C. for a 140 bed nursing home in New Castle County. *Id.* at *1. That decision was appealed by Arbor, the owner of another nursing home in the same county. In a thoughtful opinion, the Court ruled that Arbor did not have standing to appeal, stating:

> Under 16 Del. C. § 9305(8), only an applicant has the right to appeal a Board decision to the Superior Court. The general public, including an "interested" non-party, has never had a right to appeal to the Superior Court under any version of Chapter 93. While it is debatable whether the heading to subdivision (8) is part of the law, this Court has no doubt that it is clear evidence of the General Assembly's intent, examined in the light of Chapter 93's statutory history, to continue providing to the applicant alone a right of appeal to the Superior Court. *Id.* at *7.

While Arbor did not contest the application at the hearing in the same way that Appellant did, the language of that decision is clear that only the applicant has the right to appeal. The *Arbor* decision governs this case, and Appellant does not have standing in this appeal.

Recognizing the force of this precedent, Appellant has argued that this Court should overturn *Arbor*. Because there is no legitimate basis for ignoring it, I decline to do so. Appellant has argued that the Court erred in its interpretation of Section 9305(8)

because it essentially overrode the plain meaning of an unambiguous statute. For that argument to succeed, that would have to mean that the statute clearly granted the right of appeal to all persons. Sections 9305(6) and 9305(7) state that any person may request a public hearing in the course of review and for administrative reconsideration. However, the appeals statute, Section 9305(8), declines to use such language. Further, as observed in *Arbor*, what had been clear became somewhat less so with amendments.

> [T]his problem with the coverage and the meaning of § 9305(8) arose upon the revision of subdivision (8) by 69 *Del. Laws.* ch. 251 in 1994. What this revision did was make ambiguous what had previously been crystal clear-only the applicant had a right to appeal. This clarity, and the General Assembly's intent to limit appeals to applicants, becomes evident when one examines the history of Chapter 93…
>
> Finally, in 1994 the General Assembly gave shape to the current Chapter 93 of Title 16 with 69 *Del. Laws.* ch. 251, which deleted the prior Chapter 93 in its entirety and substituted the present version. It is only with this most recent enactment of § 9305(8) that the General Assembly dropped the explicit "applicant only" reference in the text. But, as previously noted, the General Assembly itself added the words "*Appeal-Applicant*" in prefatory language to subdivision (8). While that language may not have the force of law under 1 *Del. C.* § 306, the Court has no doubt, in light of the entire history of Chapter 93, that by its inclusion the General Assembly intended, consistent with prior enactments of § 9305(8), to grant only an applicant the right to appeal the Board's decision to the Superior Court, and not grant that right to anyone else. *Id.* at *3-4.

Given this background, the Court properly construed it.

Appellant attributes the word "Applicant" in the heading to "an artifact of the prior enactment or a mere anomaly." It further theorizes that the Code Reporter likely retained the word on his own. No evidence is presented to show that any of that occurred, and a mistake will not be assumed. *Arbor* found that the General Assembly was aware of the use of the heading. *Id.* at *4 n.4 Appellant even concedes on p. 23 of the answering brief that if the meaning of a statute is ambiguous, the headings can be an

aid to legislative intent. Nevertheless, there is no reason to overrule *Arbor* on the grounds that the headings should have been ignored.

Appellant further argues that the legislature's later amendment to the Enabling Statute changed the statutory framework that surrounded *Arbor*. In 1999, the statute was changed to read:

> It is the purpose of this chapter to assure that there is continuing public scrutiny of certain health care developments which could negatively affect quality of health care or threaten the ability of health care facilities to provide services to the medically indigent. This public scrutiny is to be focused on balancing concerns for costs, access and quality. 16 *Del. C.* § 9301.

The relevance of this change is the directive that the Board give special consideration to how a new facility would impact services to the medically indigent. The essence of Appellant's argument is that since *Arbor* predates this statutory change, the Court did not consider how the services that Appellant provides to the medically indigent affect its standing to appeal decisions of the Board. This argument is not persuasive because the legislature did not change Section 9305(8).

In American Jurisprudence, it is observed that:

> In determining the meaning of a statute, it is proper to consider contemporary action of the legislature, although, as a rule, the intent of the legislature is indicated by its action, and not by its failure to act. On the other hand, the silence of the legislature, when it has authority to speak, may sometimes give rise to an implication as to the legislative purpose, the nature and extent of that implication depending on the nature of the legislative power and the effect of its exercise. Thus, the fact that the legislature has not seen fit by amendment to express disapproval of a contemporaneous or judicial interpretation of a particular statute, has been considered to bolster such construction of the statute. In this respect, where a judicial construction has been placed upon the language of a statute for a long period of time, so that there has been abundant opportunity for the lawmaking power to give further expression to its will, the failure to do so amounts to legislative approval and ratification of the construction placed upon the statute by the courts. These rules are

> particularly applicable where the statute is amended in other particulars. 73 Am. Jur. 2d *Statutes* §84 (2008).

This principle has been recognized in Delaware law for construction placed on a statute by a court that was not one of last resort. *Mayor and Council of Wilmington v. St. Stanislaus Kostka Church*, 108 A.2d 581, 585 (Del. 1954). While courts have not always bound themselves with this principle, it has been recognized that it "supplies an aid to construction, useful at times in resolving statutory ambiguities." *American Ins. Co. v. Iaconi*, 89 A.2d 141 (Del. 1952). The courts have also assumed legislative awareness of a statute's history, in addition to its judicial interpretation.

> (1) [W]henever the Legislature enacts a provision, it is presumed to have had in mind the previous statutes relating to the same subject matter, (citation omitted) and (2) Legislative language is interpreted on the assumption that the Legislature is aware of judicial decisions. (Citation omitted). *State v. Purcell*, 336 A.2d 223, 226 (Del. Super. 1975).

Arbor's judicial construction of the statute has now stood for eleven years. Indeed, an earlier Superior Court case made the same interpretation, albeit in dicta, which was affirmed by the Supreme Court.

> Under the current statutory scheme, after the decision is made by the Board, any person can request a public hearing for purposes of reconsideration of a Board decision. An applicant may appeal to the Superior Court after a denial following review by the Board or following an administrative reconsideration. *Beebe Medical Ctr. V. Certificate of Need Appeals Bd.*, 1995 WL 465318 (Del. Super. 1995) at *1n.2.

When the legislature amended the enabling statute, it had the opportunity to change Section 9305(8) in conjunction with the new directive to the Board. By declining to do so, this Court is entitled to infer that the General Assembly has ratified the interpretation set forth in *Arbor*. Appellant would have this Court use the change to the enabling statute

to reverse the *Arbor* decision, when the rules of statutory construction provide more reason to uphold it.

Appellant has cited *Beebe Medical Center v. Certificate of Need Appeals Board*, *supra*, to show precedent for someone other than the applicant having standing to appeal the granting of an application. That case is distinguishable from this one because the Certificate of Need was granted to Nanticoke and a Certificate of Need was denied to Beebe for competing services. *Id.* at *9. Beebe was allowed to appeal because it was a direct party to the application. When the Board granted Seaford's application, it was not in conflict with any applications submitted by Appellant. Appellant was not a party to the application in the way that Beebe was there.

Appellant has also cited *Trone v. Delaware Alcoholic Beverage Control Comm'n*, 2000 WL 33113799 (Del. Super. 2000), as a basis for considering any participant in the initial hearing a party to the application, thus granting them standing to appeal the decision. The *Trone* case dealt with a completely different statutory framework, however. Hearings for applications heard by the Delaware Alcoholic Beverage Control Commission ("DABCC") can be officially protested by 10 people who live within one mile of the premises. *Id*. at *1. Hearings for applications heard by the Board can be requested by any person. 16 *Del. C.* § 9305(6). A decision of the DABCC can be appealed to the Superior Court by "a party to such hearing." 4 *Del. C.* § 541(c). Finding the appropriate definition of that phrase is the focus of the *Trone* case. Decisions of the Board can be appealed to the Superior Court; however, the statute does not include the same language as § 541(c). 16 *Del. C.* 9305(8). The decision in *Trone* dealt with the issue of whether a party that had been allowed to contest the application at the hearing

without meeting the statutory standard to do so could be denied standing to appeal for that reason. *Trone* at *3. Appellees have not alleged that Appellant should not have been allowed to contest the application at the hearing; thus, the issue presented by this case and the language used in the statute are substantively different from those in *Trone*.

In addition, Appellant argues that standing should be required because of the decision in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994). The Delaware Supreme Court interpreted two statutes which stated that an appellant must have "1) an interest that is 2) substantially affected by an action of the Secretary of the DNREC." *Id.* at 899. The question involved the application of the words "substantially affected" to a union which desired to contest permits granted to Oceanport. In deciding the point, the Court found standing could be conferred by seeing if there were factual claims of injury and if a union's interests were within the zone of activity protected by the statute. This inquiry applied a test recognized by the United States Supreme Court in *Assoc. of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153-154 (1970). Ultimately, the Supreme Court determined that the union did not have standing under the Data Processing test.

However, as the Delaware Supreme Court recognized:

> While the general principles of standing are helpful in determining … status, the real determinant is the statutory language itself, for no party has a right to appeal unless the statute governing the matter has conferred a right to do so. *Oceanport* at 900.

Therefore, the *Data Processing* test only applies where the pertinent statute makes no provision of any appeals. *Id.* at 904. Because the statute here limits appeals to applicants, the *Data Processing* test is not relevant.

Finally, Appellant argues that the Court should rule on the merits in accord with the general policy of the law to do so. Of course, that proposition assumes the Court has a proper basis from which to proceed. Without standing, this Court does not have a firm foundation to exercise jurisdiction. In the case cited by Appellant, *Sussex Medical Investors, L.P. v. Delaware Health Resources Board*, 1997 WL 524065 (Del. Super. 1997), the Court dismissed the appeal on procedural grounds for sound policy reasons. *Id.* At *33. The relief sought by Appellant for a non-applicant to appeal can only be granted by future legislative changes. It cannot be accomplished through judicial rule making that would disrespect the separation of powers principle between the Judiciary and the General Assembly.

CONCLUSION

Considering the foregoing, Appellant does not have standing to appeal the Board's grant of a CPR to Seaford to this Court. Therefore, Appellees' Motions to Dismiss are granted.

IT IS SO ORDERED