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NO. COA08-237

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2009

RIDGE CARE, INC., KERNER RIDGE, LLC,
MALLARD RIDGE, LLC, DEERFIELD RIDGE,
LLC, WALNUT RIDGE ASSISTED LIVING,
LLC, BLUESTONE ENTERPRISES, INC.,
Petitioners,

v.

N.C. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, Division of Facility
Services, Certificate of Need Section,
ROBERT J. FITZGERALD, in his Official
Capacity as Director of Facility Services,
and THE STATE OF NORTH CAROLINA,
Respondents,

North Carolina
Department of Health
and Human Services
No. 07 DHR 0169

Court of Appeals

v.

CARILLON ASSISTED LIVING, LLC,
Respondent-Intervenor.

Slip Opinion

Appeal by petitioners from Final Agency Decision signed 7 November 2007 by Jackie R. Sheppard of the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 28 August 2008.

Smith Moore, LLP, by Susan M. Fradenburg and Allyson Jones Labban, for petitioners-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Angel E. Gray, for respondents-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr. and Charles F. Marshall III, for respondent-intervenor-appellee.

GEER, Judge.

Petitioners Ridge Care, Inc. *et al.* appeal from a Final Agency Decision by the North Carolina Department of Health and Human Services ("DHHS") dismissing their contested case challenging a settlement entered into by DHHS and respondent-intervenor Carillon Assisted Living, LLC. Based upon this Court's prior opinion in *Carillon Assisted Living, LLC v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 265, 623 S.E.2d 629, *appeal dismissed and disc. review denied*, 360 N.C. 531, 633 S.E.2d 675-76 (2006), *appeal dismissed*, 361 N.C. 218, 641 S.E.2d 802 (2007) ("*Carillon I*"), we must conclude that this Court does not have subject matter jurisdiction over this appeal under N.C. Gen. Stat. § 131E-188 (2007), but rather any review of the Final Agency Decision must be pursued pursuant to N.C. Gen. Stat. § 150B-45 (2007). Accordingly, we grant Carillon's and respondents' motion to dismiss petitioners' appeal for lack of subject matter jurisdiction.

Facts

North Carolina began restricting the development of licensed adult care home facilities in 1997. That year, the General Assembly passed a bill that prohibited the development of any new assisted living facilities or addition of beds in such facilities unless they qualified for one of five statutory exemptions ("the moratorium"). The moratorium was renewed in 1998, 1999, and 2000 and continued in effect through 31 December 2001.

Carillon began developing assisted living facilities in North Carolina in 1996. In January 1999, Carillon brought suit against

DHHS, challenging the constitutionality of the moratorium and alleging that its assisted living facilities were exempt from the moratorium. The superior court held that 27 of Carillon's facilities were exempt from the moratorium. DHHS appealed and Carillon cross-appealed, but while the appeal was pending, the parties entered into a settlement agreement ("the 2000 Settlement") in which Carillon agreed to drop its constitutional challenge to the moratorium and give up the right to develop eight of the 27 facilities in exchange for the right to develop 19 adult care home facilities.

The 2000 Settlement specified: "Carillon, and any of Carillon's wholly-owned subsidiaries, shall be entitled to develop the assisted living facilities identified in Exhibit A to this agreement. The parties hereby agree that the moratorium is not applicable to development of the facilities described in Exhibit A." The 2000 Settlement also identified 43 facilities for which Carillon, during the four-month period between the date that the moratorium initially expired (30 June 1998) and the date that it was retroactively reinstated (30 October 1998), had filed plans to develop. The 2000 Settlement provided that Carillon reserved the right to challenge any legislation that purported to restrict the development of these projects, called the "gap projects."

In 2001, the General Assembly passed a session law which provided that after the expiration of the moratorium on 31 December 2001, any new assisted living facilities would be subject to the Certificate of Need ("CON") law and would have to obtain a CON

before development. 2001 N.C. Sess. Laws ch. 234 ("the 2001 Session Law"). The Session Law further provided that any person who had obtained an exemption under the moratorium was required to meet specified financing and construction deadlines in order to preserve the exemption. If the developer failed to meet those deadlines, the exemption would be lost. *Id.*

A dispute arose between DHHS and Carillon as to whether the facilities covered by the 2000 Settlement were subject to the 2001 Session Law's deadlines. DHHS contended that Carillon's facilities had been given exemptions under the moratorium and that Carillon, therefore, had to comply with the statutory deadlines for completion. Carillon filed a contested case with the Office of Administrative Hearings, arguing that it had an unconditional contract right to develop the facilities under the 2000 Settlement and was not subject to the deadlines.

The administrative law judge ("ALJ") ruled in Carillon's favor, concluding that the 2000 Settlement had granted Carillon an unconditional right to develop the projects set out in the settlement agreement and that the 2000 Settlement did not amount to an exemption from the moratorium. The ALJ, therefore, concluded that the deadlines in the 2001 Session Law did not apply to the 2000 Settlement projects. On review of the ALJ's decision, DHHS reversed it and entered a Final Agency Decision that Carillon was required to comply with the deadlines. DHHS' decision was subsequently upheld by the Superior Court.

Carillon appealed to this Court. In *Carillon I*, 175 N.C. App. at 270, 623 S.E.2d at 633, this Court concluded that the trial court had erred in affirming the Final Agency Decision because the 2001 Session Law was inapplicable to both Carillon's settlement projects and its gap projects. Judge Jackson dissented, *id.* at 272, 623 S.E.2d at 635 (Jackson, J., dissenting), and the case was appealed to the North Carolina Supreme Court based on that dissent. Before oral arguments could be heard, however, the parties entered into a settlement agreement ("the 2007 Settlement"), and the appeal was dismissed. In the 2007 Settlement, the parties agreed that DHHS would drop its appeal in exchange for Carillon's agreement to develop fewer beds in fewer counties.

Subsequently, Ridge Care, along with the other petitioners in this case, all of whom are North Carolina corporations formed to operate adult care homes in the State, filed a contested case to challenge the validity of the 2007 Settlement. None of petitioners had intervened in the proceedings that resulted in the 2007 Settlement, although Ridge Care had filed a motion in the Supreme Court for leave to file an amicus brief.

Carillon successfully moved to intervene in the contested case challenging the 2007 Settlement. Respondents and Carillon then moved to dismiss the contested case. On 26 July 2007, the ALJ issued a Final Order of Dismissal, holding that, under *Carillon I*, Carillon had a contractual right to develop the facilities that was not subject to the CON law, that the 2007 Settlement was not arbitrary or capricious, that DHHS did not exceed its authority or

jurisdiction or fail to act as required by law, and that the 2007 Settlement was not unconstitutional. The ALJ amended his decision on 6 August 2007 to correct a clerical error. On 7 November 2007, DHHS adopted the ALJ's decision as amended as its Final Agency Decision.

On 6 December 2007, petitioners appealed the Final Agency Decision to this Court pursuant to N.C. Gen. Stat. §§ 131E-188(b) and 7A-29 (2007).¹ Carillon and respondents have moved to dismiss petitioners' appeal for lack of subject matter jurisdiction.

Discussion

In its motion to dismiss petitioners' appeal, Carillon contends that this Court lacks subject matter jurisdiction because this case is a "garden-variety" administrative law dispute for which initial judicial review lies in the superior court under N.C. Gen. Stat. § 150B-45 (providing that a petitioner challenging a Final Agency Decision must file a petition for judicial review in the superior court). Petitioners, however, contend that their appeal is governed by N.C. Gen. Stat. § 131E-188.

N.C. Gen. Stat. § 131E-188(a) authorizes "any affected person" to bring a contested case "[a]fter a decision of the Department to issue, deny or withdraw a certificate of need or exemption or to issue a certificate of need pursuant to a settlement agreement with an applicant to the extent permitted by law" N.C. Gen.

¹Petitioners simultaneously filed a petition for judicial review and complaint for declaratory judgment in Wake County Superior Court. Petitioners sought a stay of that proceeding pending a final decision as to this appeal.

Stat. § 131E-188(b) further provides that "[a]ny affected person who was a party in a contested case hearing shall be entitled to judicial review" of a Final Agency Decision by appeal "to the Court of Appeals as provided in G.S. 7A-29(a)." N.C. Gen. Stat. § 7A-29(a) in turn states that any appeal from a final order or decision of DHHS under N.C. Gen. Stat. § 131E-188(b) "as of right lies directly to the Court of Appeals."

Petitioners contend that the 2007 Settlement was in effect an agency decision to give Carillon an exemption from the CON law, making this a contested case under N.C. Gen. Stat. § 131E-188(a) (a "CON contested case") for which appeal lies directly in the Court of Appeals. There are essentially two circumstances under which a case can be designated a CON contested case such that a petitioner can bypass the superior court and appeal directly to the Court of Appeals.

First, N.C. Gen. Stat. § 131E-184(a) (2007) provides nine instances in which health care services developers or providers are not required to obtain a CON. If the petitioner is challenging DHHS' grant or denial of one of those statutory CON exemptions, the petitioner has a CON contested case and can appeal the Final Agency Decision directly to this Court. Second, the North Carolina courts have also recognized certain DHHS actions or decisions not enumerated in the statute as CON exemptions for which a direct appeal to this Court is authorized. *See, e.g., Hospice & Palliative Care v. N.C. Dep't of Health & Human Servs.*, 187 N.C. App. 148, 152, 652 S.E.2d 348, 350-51 (2007) (recognizing that

issuance of "No Review" letter is issuance of exemption under N.C. Gen. Stat. § 131E-188(b) that can be directly appealed to this Court); *Catawba Mem'l Hosp. v. N.C. Dep't of Human Res.*, 112 N.C. App. 557, 563, 436 S.E.2d 390, 393 (1993) (noting that superior court would not have jurisdiction to review Final Agency Decision that hospital did not have to obtain CON), *disc. review denied*, 336 N.C. 72, 445 S.E.2d 31 (1994).

Petitioners do not contend that the 2007 Settlement falls into one of the nine statutory exemptions authorizing direct appeal to this Court. Rather, petitioners contend that the 2007 Settlement falls into the second category of instances in which agency action has the effect of granting a CON exemption. This Court's prior decision in *Carillon I*, however, forecloses that argument.

In *Carillon I*, this Court held with respect to the 2000 Settlement: "The language of the settlement agreement is unambiguous. In exchange for the right to develop the settlement projects *without obtaining an exemption*, petitioner forfeited its right to litigate its remaining claims and constitutional challenges." 175 N.C. App. at 270, 623 S.E.2d at 633 (emphasis added). The Court noted that respondents had authority to settle the litigation and properly exercised that authority. *Id.* at 271, 623 S.E.2d at 633. The Court then concluded:

The 2001 Session Law is inapplicable to the settlement or gap projects. The statutory exemptions apply only to the moratorium. The settlement agreement does not provide [Carillon] solely a statutory exemption to develop the settlement projects. Rather, the agreement expressly provides that petitioner "shall be entitled to develop" the settlement

projects. The agreement also expressly provides, "[t]he parties hereby agree that the moratorium is not applicable to development of the facilities described in Exhibit A." Because the exemptions apply only to the moratorium and the moratorium is expressly inapplicable to petitioner by the settlement agreement, petitioner is not bound by the 2001 Session Law.

Id. at 272, 623 S.E.2d at 634.

Petitioners acknowledge that *Carillon I* held that the 2000 Settlement "provided [Carillon] with the right to develop the projects, not a right to exemption." They argue, however, that the Court "was not considering whether the adult care home beds at issue in that case could be generally 'exempt' from the Certificate of Need law because the 2000 Settlement Agreement was entered into before the certificate of need law included adult care homes in the definition of a new institutional health service requiring a CON." The *Carillon I* opinion, however, specifically states that "[r]espondents argue that petitioner's settlement projects are subject to the 2001 Session Law requiring a CON." *Id.* at 270, 623 S.E.2d at 633. The Court then concluded, after reviewing the 2000 Settlement and the State's authority to settle litigation, that "[p]etitioner's settlement projects are not subject to the 2001 Session Law[,] and "[t]he provisions of the moratorium and the 2001 Session Law are inapplicable to the gap projects." *Id.* at 272, 623 S.E.2d at 634 (emphasis added).

We are bound by our holding in *Carillon I*, including its reasoning – one panel of this Court cannot overrule another panel. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37

(1989). Consequently, because petitioners have not demonstrated that the Final Agency Decision involves the statutory exemptions set out in N.C. Gen. Stat. § 131E-184(a) and because *Carillon I* precludes us from concluding that the 2007 Settlement constituted an exemption from the CON law, petitioners were not entitled to appeal directly to this Court. We do not have subject matter jurisdiction and must grant Carillon's and respondents' motions to dismiss. Petitioners may still, however, obtain review by proceeding with their petition for judicial review in superior court pursuant to N.C. Gen. Stat. § 150B-45.

Dismissed.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).