IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2005 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Nos. 32669 and 32670

FAIRMONT GENERAL HOSPITAL, INC.
Petitioner Below, Appellee

v.

UNITED HOSPITAL CENTER, INC., and
WEST VIRGINIA UNITED HEALTH SYSTEM, INC.
Respondents Below, Appellants,

and

WEST VIRGINIA HEALTH CARE AUTHORITY,
Respondent Below, Appellant.

Appeal from the Circuit Court of Marion County
Honorable Fred L. Fox, II, Judge
Civil Action No. 04-P-63

REVERSED and REMANDED

Submitted: October 5, 2005
Filed: November 29, 2005

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The Opinion of the court was delivered by JUSTICE BENJAMIN.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syllabus Point 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).

2. Section I(W) of the Certificate of Need Standards of the State Health Plan for the Renovation-Replacement of Acute Care Facilities and Services approved on January 7, 1997 is invalid insofar as it requires the replacement facility be within five miles of the original facility. The five mile limitation is invalid because it (1) conflicts with W. Va. Code § 16-2D-6(d) (1999); (2) is a criterion not included within the criteria for certificate of need reviews set forth in W. Va. Code § 16-2D-6(a) (1999) or in 65 C.S.R. § 7-12; (3) was promulgated by the executive department of state government without clear legislative public policy objectives and guidelines; (4) precludes a balanced consideration of the statutory criteria for certificate of need reviews as set forth in W. Va. Code § 16-2D-6 (1999); (5) conflicts with, rather than supports, the findings and declarations of the Legislature set forth in W. Va. Code § 16-29B-1 (1997) and W. Va. Code § 16-2D-1 (1977); and (6) is arbitrary and capricious.

BENJAMIN, JUSTICE:

These consolidated cases[1] are before the Court upon the appeals of United Hospital Center, Inc. ("UHC"),[2] West Virginia United Health Care System, Inc. ("WVUHS"),[3] and the West Virginia Health Care Authority ("Authority")[4] from the November 24, 2004 Opinion/Order of the Circuit Court of Marion County, West Virginia, in Civil Action No. 04-P-63, being an administrative appeal styled *Fairmont General Hospital, Inc., Petitioner, v. West Virginia Health Care Authority, United Hospital Center, Inc., and West Virginia United Health System, Inc., Respondents.* The November 24, 2004

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[1] Appellants United Hospital Center, Inc. and West Virginia United Health System, Inc. jointly, and Appellant West Virginia Health Care Authority, Inc. separately, filed petitions for appeal (Nos. 050368 and 050369) with this Court from an Opinion/Order of the Circuit Court of Marion County, West Virginia, entered on November 24, 2004, in Civil Action No. 04-P-63. In a Stipulation filed with the Court on March 14, 2005, the three Appellants and the Respondent, Fairmont General Hospital, Inc., agreed and stipulated, pursuant to Rule 3(d) of the West Virginia Rules of Appellant Procedure, that the proceedings in connection with the petitions of appeal be consolidated. The petitions for appeal were granted on May 9, 2005, and consolidated. The joint petitions for appeal of United Hospital Center, Inc. and West Virginia United Health System, Inc. were assigned Case No. 32669 and the separate petition for appeal of the West Virginia Health Care Authority was assigned Case No. 32670.

[2]UHC, a non-profit corporation, owns and operates a 375-bed regional referral hospital in Clarksburg, West Virginia.

[3]WVUHS is a non-profit corporation which serves as the sole member of UHC and West Virginia University Hospitals, Inc.

[4]The Authority was formally known as the West Virginia Health Care Cost Review Authority. The Legislature changed its name in 1997. *See* W. Va. Code § 16-29B-5 (2001). The Authority, an autonomous division of the Department of Health and Human Resources, administers the certificate of need program as provided in W. Va. Code § 16-2D-1, *et seq.* *See* W. Va. Code § 16-29B-5 and W. Va. Code § 16-2D-5(a) (1999).

Opinion/Order of the circuit court reversed the May 3, 2004 decision of the Office of Judges,[5] which had affirmed a decision by the Authority, dated October 24, 2003, to approve UHC's and WVUHS' application for a certificate of need[6] to construct a hospital facility in Bridgeport, West Virginia, to replace UHC's existing hospital facility located in Clarksburg, West Virginia.

Having considered the Appellants' petitions for appeal, the record submitted to the Court, the briefs of the Appellants and Appellee, the *amicus curiae* brief of the Affiliated Construction Trades Foundation, and the oral argument of counsel, we reverse the circuit court's Opinion/Order of November 24, 2004, in Civil Action No. 04-P-63, for the reasons stated below.

I.

BACKGROUND

On July 18, 2002, UHC and WVUHS filed an application with the Authority seeking the issuance of a certificate of need to permit construction of a 318-bed hospital

[5] The agency of the State designated by the Governor to review final decisions of the Authority. *See* W. Va. Code § 16-2D-10(a) (1999).

[6] A "certificate of need' is defined in the Authority's Certificate of Need Rule, 65 C.S.R. 7.2.6, as meaning " a document issued by the [West Virginia Health Care Authority] which indicates that a proposed new institutional health service is in compliance with the intent, purposes and provisions of W. Va. Code § 16-2D-1 et seq., and that a need exists for the proposed new institutional health service."

facility on a 125-acre site in Bridgeport, West Virginia, immediately off the Jerry Dove exit on I-79. The new UHC hospital would replace UHC's existing 375-bed hospital located at Route 19 South and Davisson Run Road on the southwest side of Clarksburg, West Virginia.

In its October 24, 2003 decision, the Authority considered the record before it, including arguments for and against the granting of a certificate of need for a replacement hospital for UHC. In its decision, the Authority considered the statutory requirements set forth in W. Va. Code § 16-2D-9(b) (1999), which declares that "[a] certificate of need may only be issued if the proposed new institutional health service is: (1) Found to be needed; and (2) Except in emergency circumstances that pose a threat to public health, consistent with the state health plan."[7] In keeping with W. Va. Code § 16-2D-5(b), this determination by the Authority included consideration of "the certificate of need standards" ("standards"). Included within these standards, was a limitation that replacement hospital facilities be no more than five miles from the hospital facility being replaced. Attention, in part, was focused on concerns that the proposed site of the replacement hospital was too far from UHC's

[7]The phrase "consistent with the state health plan" is found in at least three other provisions of Article 2D of Chapter 16 of the W. Va. Code: In W. Va. Code § 16-2D-5(d) and (e) and in W. Va. Code § 16-2D-9(f)(1). The phrase also appears in W. Va. Code § 9-5-19(d)(1) (2003). "State health plan" is defined in W. Va. Code § 16-2D-2(ee) (1999) as meaning "the document approved by the governor after preparation by the former statewide health coordinating council, or that document as approved by the governor after amendment by the former health care planning council or the state agency." The "document" is neither defined nor described. The current state agency is known as the "West Virginia Health Care Authority." W. Va. Code § 16-29B-5(1997).

existing hospital, being some eight miles away.

In addition to its consideration of the Certificate of Need Standards, which are *not* legislative rules, the Authority also considered the Certificate of Need Rule,[8] which is a legislative rule. The Certificate of Need Rule appears in 65 C.S.R. 7-1 to -28. Section 65 C.S.R. 7-2 of the Certificate of Need Rule defines certain terms used therein, including the term, "Consistent with the State Health Plan", in subsection 2.7. As therein defined, the term means "a determination made by the [Authority] that the preponderance of the evidence supports the achievement of the applicable provisions of the State Health Plan [which would include the five-mile provision in the Plan] unless the Plan is in conflict with any statute or this rule."

In its October 24, 2003 decision granting UHC's and WVUHS' certificate of

[8] The Authority's Certificate of Need Rule is not the same as the Certificate of Need Standards. The Certificate of Need Rule is a legislative rule promulgated pursuant to Chapter 29A of the W. Va. Code. *See* W. Va. Code § 16-2D-8 (1999). This rule were promulgated by the Authority some years before its consideration of the proposed UHC replacement hospital in this case. Citing W. Va. Code § 16-2D-3(b)(5), 7(u) and 8(c) (1999), all relating to emergency rules, as its statutory authority, this Certificate of Need Rule was established to implement the provisions of the Certificate of Need program found in W. Va. Code § 16-2D-1 *et seq*., and became effective as of July 1, 2000. The Certificate of Need Standards, on the other hand, are a part of the State Health Plan and exist by virtue of executive department action alone. The procedure for amending or modifying the Certificate of Need Standards is set forth in W. Va. Code § 16-2D-5(l). That procedure requires the Authority to "file with the secretary of state, for publication in the state register, a notice of proposed action, including the text of all proposed amendments and modifications [of the Certificate of Need Standards], and a date, time and place for receipt of general public comment."

need, the Authority, at pages 61-62, made the following rulings:

> The West Virginia Certificate of Need Rule, 65 C.S.R. § 7-1 *et seq*. does not require an application for a certificate of need to be *perfectly consistent* with the [State Health Plan]. Rather, the [Certificate of Need] Rule defines the term "consistent with the State Health Plan" to mean "a determination made by the [Authority] that the preponderance of the evidence supports the achievement of the applicable provisions of the State Health Plan . . . . 65 C.S.R. § 7-2.7.
>
> The development of the applicant's proposed replacement hospital eight miles rather than five miles from the existing hospital *is not materially inconsistent with the definition of a "replacement" facility*. The current [Certificate of Need] Standards for the "Renovation-Replacement of Acute Care Facilities and Services", although not applicable to this case, define a "replacement" to be within fifteen (15) miles of the original facility.[9] The applicant had the option to file its application under the current standards and elected not to do so due to the cost of filing a new application.[10]
>
> The [Authority] has carefully considered the arguments on this issue and finds that the proposed location of the replacement facility more than five miles from the original facility does not automatically require the Authority to reject the proposal. In the present case, the facility is to be located approximately eight miles from the existing one.

(Emphases added.)

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[9] Actually, "in the same county or within fifteen (15) miles of the original facility."

[10]The applicants paid a fee of $265,174 to file it certificate of need application. A fee in like amount would have been required had the applicants refiled their application after October 9, 2002, when the five-mile limitation was replaced with "in the same county or within the fifteen (15) miles of the original facility."

Pursuant to W. Va. Code § 16-2D-10, Fairmont General Hospital, as an "affected person" defined in W. Va. Code § 16-2D-2(a) (1981), sought review by the Office of Judges of the Authority's decision of October 24, 2003. In its decision of May 3, 2004, the Office of Judges affirmed the Authority's decision, stating at page 5:

> The Authority articulated its rationale in arriving at the conclusion that "8 miles" was consistent, albeit not exact, with the 5-mile limit in the applicable Standards for hospital replacement. The Authority acknowledged that it could require UHC to execute a "new filing' to meet strict compliance with the five mile language of the standard in place at the time of their [sic] application. This, however, would be a superfluous act. The Authority was well within its discretion in finding *substantial compliance*, in spite of the 3-mile deviation from the Standard.

(Emphasis added.)

Pursuant to W. Va. Code § 16-2D-10, Fairmont General Hospital appealed the May 3, 2004 decision of the Office of Judges to the Circuit Court of Marion County. The circuit court, in an Opinion/Order entered on November 24, 2004, reversed the decisions of both the Authority and the Office of Judges on the ground that the replacement hospital would not, when constructed, be within five miles of the hospital to be replaced. In reversing the Office of Judges, the circuit court relied upon Section I (W) of the State Health Plan Certificate of Need Standards, entitled "Renovation-Replacement of Acute Care Facilities and Services", which, in relevant part, declared:

> Replacement: A project for the . . . construction . . . of a physical plant or facility as a result of which:

* * * * * *

> 2. All hospital beds are, or will be, located within five miles of the original facility following completion of the project.[11]

(These quoted provisions will hereinafter be referred to either as the "five-mile limitation" or simply as "the limitation".) In its eighth Conclusion of Law, the circuit court stated that "[n]o exception exists which would allow the [Authority] to deviate from the regulatory mileage limit." UHC, WVUHS, and the Authority thereupon appealed the circuit court's decision to this Court.

Since the parties agree that the sole issue to be decided by the Court in this appeal is whether UHC's and WVUHS' proposed replacement hospital is "consistent with the state health plan", as required by W. Va. Code § 16-2D-9(b)(2) (1981), and specifically with the plan's requirement that a replacement hospital be "located within five miles of the original

[11] The quoted provisions of the Certificate of Need Standards were approved by the Governor on January 7, 1997, and were in effect when UHC's and WVUHS's application for a certificate of need was declared complete by the West Virginia Health Care Authority on August 2, 2002. Some two months after that date, specifically on October 9, 1992, the Governor approved revisions in the quoted provisions, which are set forth in Section I (EE) of the Certificate of Need Standards and which, in relevant part, declare that "All beds in the replacement facility must be located in the same county or within fifteen (15) miles of the original facility." The Appellants and the Appellee agree that Section I (W) of the Certificate of Need Standards that was approved by the Governor on January 7, 1997, and that was in effect on August 2, 2002, rather than Section I (EE) of those Standards that was approved by the Governor on October 9, 2002, controlled the disposition of the application for the certificate of need and control the outcome of this appeal.

facility", it is not necessary to further review (1) the facts upon which the Authority found that the replacement hospital is needed since that finding is not challenged on appeal; (2) UHC's and WVUHS' application filed with the Authority seeking a certificate of need; or (3) the administrative proceedings before the Authority which culminated in its issuance of the certificate of need sought by UHC and WVUHS.

II.

STANDARD OF REVIEW

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. pt.1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).

III.

DISCUSSION

Although the parties agree that the ultimate question for the Court to determine is whether the site approved by the Authority for the construction of UHC's replacement hospital eight miles from the hospital to be replaced is "consistent with the state health plan" and concentrate their advocacy on the intent of that phrase, we believe the first issue to be considered is the threshold determination of whether the five-mile limitation as imposed by the

Authority and the Governor conflicts with provisions of W. Va. Code § 16-2D-1 *et seq*., or is not authorized by legislative guidelines provided for the exercise of powers conferred upon the executive department. In other words, is the limitation a legally valid restriction?[12] The parties to the appeal and the *amicus* accepted the validity of the limitation without discussion.[13] However, before this Court entertains a discourse between the parties on the question of whether "substantial, but not perfect" consistency compels a finding of compliance under the law, we must first consider the legal validity of the underlying mileage limitation which itself is at the heart of this appeal and which serves as the necessary predicate to any consideration

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[12] W. Va. Code § 29A-5-4(e) (1998) provides that "the Court may consider and decide errors which are not assigned or argued." *De Novo* review on appeal means that the result and not the language used in or reasoning of the lower tribunal's decision is at issue. A reviewing court may affirm a lower tribunal's decision on any grounds. *See GTE South, Inc. v. Morrison*, 199 F. 3d 733, 742 (4th Cir., 1999) ("if the administrative order reaches the correct result and can be sustained as a matter of law, we may affirm on the legal ground even though the agency relied on a different rationale").

[13] Even though they accepted its validity, the Court would have been helped in its understanding of the limitation had the parties, particularly the Authority, informed the Court as to (1) whether the original Certificate of Need Standards contained a mileage limitation on the site of a replacement hospital; (2) whether there was a mileage limitation amended into the Certificate of Need Standards between the original Standards and January 6, 1997; (3) the reason the five-mile limitation was amended into the Certificate of Need Standards effective with the Governor's approval thereof on January 7, 1997; (4) whether the five-mile limitation was suggested by the Governor or originated with the Authority or its predecessor agency; (5) what was the change in circumstances, if any, or reason that called for modification and enlargement of the mileage limitation brought about by the October 2002 amendment of the Certificate of Need Standards and whether the modification was suggested by the Governor or originated with the Authority or its predecessor agency; (6) why there is a geographic limitation on the site of a replacement hospital but not on the site of a new hospital that does not replace an existing one; and (7) the source of statutory authority for Sections I(W) and the later Section I(EE) of the Certificate of Need Standards for the Renovation-Replacement of Acute Care Facilities and Services.

of "consistency" and "compliance."

A. Validity of the Five-Mile Limitation

We commence with the Authority's Certificate of Need Rule which defines in Subsection 2.7 thereof (65 C.S.R. § 7-2.7) the phrase "consistent with the state health plan" as used in the Rule to mean "a determination made by the [Authority] that the preponderance of the evidence supports the achievement of the applicable provisions of the State Health Plan *unless the Plan is in conflict with any statute or this rule*." (Emphasis added.) Here, the Authority has appropriately recognized that a proposed replacement hospital for which a certificate of need is sought is not required to be consistent with a provision in the State Health Plan, such as the five-mile limitation, if the provision conflicts with a statute or the Certificate of Need Rule.

Our review of applicable West Virginia law reveals that the five-mile limitation does, indeed, conflict with a statute, specifically, W. Va. Code § 16-2D-6(d), which provides that "[a]n application for a certificate of need may not be made subject to any criterion not contained in [W. Va. Code §16-2D-1 *et seq*.] or not contained in rules adopted pursuant to [W. Va. Code § 16-2D-8]." Similarly, according to W. Va. Code §16-2D-9(d), the "[i]ssuance of a certificate of need . . . may not be made subject of any condition unless the condition directly relates to criteria in [W. Va. Code § 16-2D-1 et seq.] or in rules adopted pursuant to [W. Va. Code § 16-2D-8]." It is apparent that the Legislature used "criterion" in W. Va. Code

§ 16-2D-6(d) and "condition" in W. Va. Code § 16-2D-9(d) as synonymous terms. The five-mile limitation is such a criterion or condition and it is not contained in either W. Va. Code § 16-2D-1 et seq. or in rules adopted by the Authority (or its predecessor agency) pursuant to W. Va. Code § 16-2D-8 (1999).

The minimum criteria for certificate of need reviews are set forth in W. Va. Code § 16-2D-6(a)(1)-(23) and (e), (f) and (g) (1999). Not one of those criteria contains a mileage limitation on the relocation of an existing hospital to which an application for a certificate of need therefor is made subject. Nor does the five-mile limitation directly relate to any of those criteria. W. Va. Code § 16-2D-6(b) authorizes the Authority to "include additional criteria which it prescribes by rules pursuant to [W. Va. Code § 16-2D-8]." 65 C.S.R. §7-12 of the Certificate of Need Rule sets forth "Review Criteria." Rather than being "additional criteria", the administrative "Review Criteria" repeat the statutory criteria.[14] Not one of the criteria set forth in Certificate of Need Rule, 65 C.S.R. §7-12, contains a mileage limitation on the relocation of an existing hospital. Nor does the five-mile limitation directly relate to any of

[14] Subsections 12.1, 12.1.a. and 12.1.1.b. thereof are copied verbatim from W. Va. Code § 16-2D-9(b)(1) and (2). Subsections 12.2, 12.2.a. through 12.2.e. thereof are copied substantially verbatim from W. Va. Code § 16-2D- 6(e) (1999); Subsections 12.3, 12.3.a. through 12.3.u. thereof are copied substantially verbatim from W. Va. Code § 16-2D-6(a)(1) through (21); Subsection 12.3.v. thereof is copied verbatim from W. Va. Code § 16-2D-6(a)(23); Subsection 12.3.w. thereof is adapted from W. Va. Code § 16-2D-6(a)(ll); Subsection 12.4. thereof is copied substantially verbatim from W. Va. Code § 16-2D-6(f); and Subsection 12.5. thereof is copied substantially verbatim from W. Va. Code § 16-2D-6(g).

those criteria.

Accordingly, since the five-mile limitation is not contained in, and does not directly relate to, any of the criteria in W. Va. Code § 16-2D-6 or in the Certificate of Need Rule, UHC's and WVUHS' application for a certificate of need and the Authority's issuance of the certificate could not validly be made subject to that limitation.

In *Department of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc.*, 447 So.2d 361 (Fla. Ct. App. 1984), the District Court of Appeal of Florida considered the validity of an administrative rule that prescribed "a threshold requirement for issuance of a certificate of need (CON) to a home health care provider that each existing provider within the service area must be seeing an average of 300 patients per day according to the census of the last calendar quarter." *Johnson and Johnson Home Services*, 447 So2d at 362. The court noted that "[t]he stated purpose of the rule was to halt the proliferation of home health agencies." *Id*. However, "[t]he record before the hearing officer showed that the rule of 300 was designed to protect the existing industry from competition." *Id*. at 362. The court concluded that "[t]here is no reasonable relationship shown between the prohibition of the rule and the health, morals, safety or welfare of the public. The rule is arbitrary and capricious and cannot stand." *Id*. at 363. The court then took note of the statutory criteria for evaluating applications for certificates of need, after which it stated: "The hearing officer correctly concluded that the rule of 300 precluded a balanced consideration of all statutory criteria. The

rule allows [the Department of Health and Rehabilitative Services] to ignore some statutory criteria and emphasize others, contrary to the legislative purpose it is supposed to implement. The rule exceeds delegated legislative authority." (Internal citations omitted)

Similarly, it may be said the five-mile limitation precludes a balanced consideration of all the statutory criteria for certificate of need reviews set forth in W. Va. Code § 16-2D-6. Consider only two of those criteria, the ones provided in Subsections 6(a)(11) and (15) of Article 2D. In Subsection 6(a)(11), the Authority is obligated in the case of the relocation of a health care facility to consider "the need that the population presently served has for the service, the extent to which that need will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the . . . relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, other medically underserved population, and the elderly, to obtain needed health care." Limiting the construction of a replacement hospital to within five miles of the existing hospital may diminish the ability of the described persons to obtain needed health care. As the Florida court said, such a limitation precludes a balanced consideration of the statutory criteria.

W. Va. Code § 16-2D-6(a)(15) obligates the Authority to consider the accessibility of the proposed health services "to all the residents of the area to be served by the services." Again, an arbitrary five-mile limitation may well diminish the accessibility of the relocated hospital to the residents of the area to be served by the facility.

The circuit court in its Opinion/Order of November 24, 2004, stated in its twelfth Conclusion of Law that one purpose of the five-mile limitation "is to protect other area hospitals from the encroachment of new facilities into areas traditionally serviced by those other area hospitals." While it is not difficult to assume that such was the purpose of the limitation, the circuit court cited no source for the statement that such was the reason for the limitation. If that were the purpose of the limitation, and we can conceive of no other more logical one, we have found no clear legislative policies or guidelines that would have authorized the Authority and the Governor to incorporate a five-mile limitation into the Certificate of Need Standards, a subject we now consider in greater detail.

It is appropriate to ask where are the Legislature's public policy objectives and guidelines which provided authority to the Authority (or its predecessor agency) and the Governor to incorporate a five-mile limitation into the Certificate of Need Standards of the State Health Plan? This Court stated as recently as 2003 in *State ex rel. West Virginia Citizen Action Group v. West Virginia Economic Development Grant Committee,* 213 W. Va. 255, 580 S.E.2d 869 (2003), that

> the Legislature must articulate with sufficient clarity its public policy objectives to permit the executive department to effectuate those policy objectives and to educate the public as the legislature's intentions. We made clear in *Polan* [190 W. Va. 276, 438 S.E.2d 308 (1993)] that the Legislature cannot "grant . . . unbridled authority in the exercise of the power conferred upon . . . [an administrative agency]." Syl, Pt. 2, in part, 190 W. Va. at 277, 438 S.E.2d at 309.

Id. at 272, 886 (footnote omitted). In that same case, we recognized the concern raised by

another court "that caprice would control the decision making process in the absence of clear [legislative] guidelines." *Id.* We held therein "that when an enabling statute such as West Virginia Code § 29-22-18a(d)(3) extends discretion to the executive branch in contemplation of an expenditure of public funds with only a broad statement of legislative intent and insufficient legislative guidance for the execution of that legislative intent, the Legislature has wrongfully delegated its powers to legislate in violation of article six, section one of the state constitution." *Id.* at 272-3, at 886-7.

The Legislature has empowered the Authority to adopt amendments or modifications of the Certificate of Need Standards with the Governor's approval (W. Va. Code § 16-2D-5(l)(1) and (2)); to promulgate emergency rules to specify the health services which are subject to certificate of need review (W. Va. Code § 16-2D-3(b)(5)); to promulgate emergency rules to establish a review process for nonhealth related projects (W. Va. Code § 16-2D-7(u)) (1999); to adopt rules prescribing criteria in addition to those set forth in W. Va. Code § 16-2D-6 for certificate of need reviews (W. Va. Code § 16-2D-6(b)); and to promulgate certain additional rules, including emergency rules (W. Va. Code § 16-2D-8). What then were the public policy objectives and the guidelines provided to the Authority and the Governor by the Legislature that would have authorized the Authority and the Governor to incorporate the five-mile limitation into the Certificate of Need Standards? If there are no such objectives or guidelines or if they are insufficient to evidence a clear legislative intent, then in such case the Authority and the Governor have unbridled power, and may act with caprice and arbitrariness,

in violation of Article VI, § 1 of the State Constitution.

The Court's research indicates that the Legislature has not specified any clear public policy objectives or guidelines that would have authorized the five-mile limitation. If any such policies or guidelines can be said to exist, they are obscure in that they have to be ferreted out of the Legislature's findings and declarations in W. Va. Code § 16-29B-1 (which have more to do with the purposes of Article 29B than with the purposes of Article 2D of Chapter 16 of the W. Va. Code) and in the legislative findings in W. Va. Code § 16-2D-1. Even so, the limitation appears to conflict with, rather than to be supported by, those findings and declarations.

In W. Va. Code § 16-29B-1 (1997),[15] the Legislature identified a number of threats to the health and welfare of the citizens of the State, two of them being "a fragmented system of health care [and] lack of integration and coordination of health care services." In order to alleviate those threats, the Legislature declared that "an entity of state government [presently, the Authority] must be given authority . . . to assure that the state health plan,

[15] Admittedly, the provisions of W. Va. Code § 16-29B-1 surveyed in this paragraph of the text did not become effective until ninety days after April 12, 1997, the date of passage of Ch. 102, Acts, Regular Session, 1997. That would have been some six months after January 7, 1997, the date the Governor approved the five-mile limitation. As of that date, the Legislature's findings and limitations contained in W. Va. Code § 16-29B-1 were even more limited and related exclusively to the containment of cost of acute care hospital services.

certificate of need program . . .serve to promote cost containment, access to care, quality of services and prevention." *Id.* The five-mile limitation may do more to promote, than to alleviate, "a fragmented system of health care," and a "lack of integration and coordination of health care services." In addition, the five-mile limitation may well be a hindrance, rather than a help, in promoting "access to care, quality of services and prevention." In any case, the Authority ought not be bridled, without clear legislative- permitting guidelines, by such a self-imposed arbitrary limitation as it goes about implementing its statutory mission, including its consideration of statutory criteria for certificate of need reviews.

In W. Va. Code § 16-2D-1 (1977), the Legislature declared it "to be the public policy of this State:

> (1) That the offering or development of all new institutional health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the institutional health services of the people of this state and to avoid unnecessary duplication of institutional health services, and to contain or reduce increases in the cost of delivering institutional health services.
>
> (2) That the general welfare and protection of the lives, health and property of the people of this state require that the type, level and quality of care, the feasibility of the providing such care and other criteria as provided for in this article or by the state health planning and development agency pursuant to provisions of this article, needed in new institutional health services within this State be subject to review and evaluation before any new institutional health services are offered or developed in order that appropriate and needed institutional health services are made available for

persons in the area to be served.

The five-mile limitation may well preclude the accomplishment of new institutional health services "in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the institutional health services of the people of this state." The limitation may also not permit the Authority to "avoid unnecessary duplication of institutional health services, and to contain or reduce increases in the cost of delivering institutional health services." In addition, the limitation may also restrict the Authority in how it can best provide for "the general welfare and protection of the lives [and] health of the people of this State," and make "available [new needed institutional health services] for persons in the area to be served."

All in all, the five-mile limitation bespeaks capriciousness and arbitrariness. That characterization is further supported by the facts (1) that within less than six years after the Authority (or its predecessor agency) and the Governor imposed the five-mile limitation, they extended it to fifteen miles and allowed a replacement hospital to be constructed within the same county as the existing facility regardless of distance; and (2) that the Authority in issuing a certificate of need to UHC and WVUHS ruled that eight miles "is not materially inconsistent with [five miles]." The Authority has thus itself acknowledged the arbitrariness of the restriction by greatly expanding its radius in 2002 and by giving the limitation an elasticity of its choosing in a specific case.

Accordingly, we hold that Section I(W) of the Certificate of Need Standards of the State Health Plan for the Renovation-Replacement of Acute Care Facilities and Services approved on January 7, 1997 is invalid insofar as it requires the replacement facility be within five miles of the original facility. The five mile limitation is invalid because it (1) conflicts with W. Va. Code § 16-2D-6(d) (1999); (2) is a criterion not included within the criteria for certificate of need reviews set forth in W. Va. Code § 16-2D-6(a) (1999) or in 65 C.S.R. § 7-12; (3) was promulgated by the executive department of state government without clear legislative public policy objectives and guidelines; (4) precludes a balanced consideration of the statutory criteria for certificate of need reviews as set forth in W. Va. Code § 16-2D-6 (1999); (5) conflicts with, rather than supports, the findings and declarations of the Legislature set forth in W. Va. Code § 16-29B-1 (1997) and W. Va. Code § 16-2D-1 (1977); and (6) is arbitrary and capricious. Since we now invalidate the five-mile limitation in the Certificate of Need Standards of the State Health Plan, it is not necessary for us to consider whether the site of UHC's and WVUHS' proposed replacement hospital is "consistent with [that limitation in] the state health plan" as required by W. Va. Code § 16-2D-9(b)(2).

IV.

CONCLUSION

The circuit court's Opinion/Order dated November 24, 2004 is reversed and this case is remanded for issuance of a certificate of need consistent with the West Virginia Health Care Authority's decision of October 24, 2003.

Reversed and remanded with directions.