THE RISE AND FALL OF CERTIFICATE OF NEED IN PENNSYLVANIA: AN EXPERIMENT IN HEALTH CARE PLANNING AND THE ROLE OF THE COMMONWEALTH COURT

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I. INTRODUCTION AND HISTORY

Pennsylvania's Certificate of Need (CON) program is but one chapter in the long history of the government's attempts to control runaway health care costs.[1] The considered need to "do something" about health care costs has been part of the national conversation for many years, louder at some times than others, with numerous failed ideas and programs littering the landscape of good intentions.[2] Last year's acrimonious discussion of health care

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The contents of this article represent Mr. Steele's views only and do not represent the official position of the Commonwealth of Pennsylvania, the Office of General Counsel, or the Pennsylvania Department of Health.

[1] *See Certificate of Need: State Health Laws and Programs*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 30, 2009), http://www.ncsl.org/default.aspx?tabid=14373.

[2] *See The High Cost of Health Care*, N.Y. TIMES, Nov. 25, 2007, at C9.

reform and the passage of the Patient Protection and Affordable Health Care Act (2010 Health Care Act)[3] in March 2010 is but another marker in the long and checkered history of the government's attempts—for the most part, failed—to control the growth of health care services, limit the proliferation of health care facilities and equipment, and eliminate the resulting costs of underutilized facilities and services.[4]

After the end of World War II, faced with the aging infrastructure of a health care system ill-equipped to accommodate the needs of returning soldiers and the inevitable baby boom that followed, Congress passed the Hill-Burton Act.[5] The Act provided federal funds for the construction of hospitals and promoted the importance of local planning by denying reimbursement for certain costs if state planning agencies had not approved the projects beforehand.[6] The received wisdom of the time was that communities knew their own health care needs and how to provide for them best.[7] Local planning agencies sprang up and sought to assist in the identification of those needs, then they reviewed and approved projects to fulfill those needs.[8]

In 1972, amendments to the Social Security Act[9] included section 1122 reviews, which permitted state agencies to determine whether a proposed capital expenditure by a health care facility was consistent with area-wide or state plans for health care services.[10] In 1975, Congress passed the National Health Planning

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[3] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 42 U.S.C. §§ 18001-121)).

[4] Theodore R. Marmor, *U.S. Health Reform Failures: The Elusive Quest for Explanations*, 25 HEALTH AFFAIRS 872, 872-73 (2006) (book review).

[5] Hospital and Medical Facilities Amendments of 1964, Pub. L. No. 88-443, 78 Stat. 447 (codified as amended at 42 U.S.C. § 291 (2006)).

[6] *Id.* §§ 601, 605.

[7] *See generally* Paul A. Brinker & Burley Walker, *The Review of Economics and Statistics*, 44 THE MIT PRESS 208 (1962) (showing how states were able to use funding as each state determined).

[8] *Id.*

[9] 42 U.S.C. §§ 301-1397Mm (2006).

[10] Act of Oct. 30, 1972, Pub. L. No. 92-603, sec. 221, § 1122, 86 Stat. 1329, 1386 (codified as amended at 42 U.S.C. § 1320a-1(b) (2006)).

and Resources Development Act,[11] which allocated federal funding for state health planning efforts and required states to establish CON programs.[12] The fundamental assumption of federal efforts was that the excess supply of beds and the duplication of existing services resulted in the underutilization of expensive services, equipment, and facilities and were responsible for soaring health care costs.[13]

Out of this beginning, Pennsylvania enacted the Health Care Facilities Act[14] in 1979 and reposed authority for its implementation in the Department of Health (DOH or Department).[15] The Act's "Purposes" section announced that:

> [T]he health and welfare of Pennsylvania citizens will be enhanced by the orderly and economical distribution of health care resources to prevent needless duplication of services. Such distribution of resources will be further[ed] by *governmental involvement to coordinate the health care system.* Such a system will enhance the public health and welfare by making the delivery system responsive and adequate to the needs of its citizens, and assuring that new health care services and facilities are efficiently and effectively used . . . .[16]

In addition to addressing the need for governmental involvement in order to avoid duplication of services, the Act also addressed the need for a "coordinate[d] . . . health care system" where "all citizens receive humane, courteous, and dignified treatment" and health care services and facilities "continue to meet

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[11] National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (1975).

[12] *Id.* §§ 1603, 1610-13.

[13] *See* Roberta M. Roos, Note, *Certificate of Need for Health Care Facilities: A Time for Re-Examination*, 7 PACE L. REV. 491, 492 & n.7 (1987).

[14] Health Care Facilities Act, No. 1979-48, 1979 Pa. Laws 130 (codified as amended at 35 PA. STAT. ANN. §§ 448.101-.904b (West 2003)).

[15] *Id.* §§ 102, 201 (codified at 35 PA. STAT. ANN. §§ 448.102, 448.201 (West 2003)). The Health Care Facilities Act specifically eliminated the previous section 1122 reviews. *See id.* § 904 (codified as amended at 35 PA. STAT. ANN. § 448.904 (West 2003)).

[16] *Id.* § 102 (emphasis added).

high quality standards."[17] As part of this coordinated health care system, the Commonwealth was "to foster responsible private operation and ownership of health care facilities, to encourage innovation and continuous development of improved methods of health care and to aid efficient and effective planning using local health systems agencies."[18] It was the General Assembly's intent that the Department would "foster a sound health care system which provides for quality care at appropriate health care facilities throughout the Commonwealth."[19] Any inherent tension between and among the purposes of the legislation was not addressed.[20]

The CON program in Pennsylvania established a process by which health care providers seeking to make certain health care expenditures, build new facilities and beds, and establish new services had to first demonstrate "need" by the community for those proposed expenditures and services.[21] Pennsylvania attempted to encapsulate those needs in a document known as the State Health Services Plan (Plan),[22] which set forth "the standards and criteria against which [CON] applications are reviewed and upon which decisions are based."[23] The Plan included chapters addressing specific health care services and equipment and chapters that purported to establish quantitative levels of need in each geographic area of the Commonwealth.[24] The Act required the Plan to, inter alia, identify those clinically-related health services needed to serve Pennsylvanians, including those "medically underserved areas in rural and inner-city locations;" analyze the "availability, accessibility and affordability of . . . clinically related . . . services;" set forth "[q]ualitative and quantitative standards and criteria for the review of [CON]

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See id.*

[21] *Certificate of Need: State Health Laws and Programs*, *supra* note 1.

[22] *See* 35 PA. STAT. ANN. § 448.401c (West 2003) (expired 1996). The Plan, in greatly modified form, is now known as the State Health Improvement Plan. *State Health Improvement Plan*, PA. DEP'T OF HEALTH (2011), http://www.portal.state.pa.us/portal/server.pt/community/state_health_improvement_plan.html.

[23] 35 PA. STAT. ANN. § 448.103 (West 2003).

[24] tit. 35, § 448.401c.

applications;" and establish an exceptions process to the Plan's "standards and criteria in order to reflect local experience or ensure access or to respond to circumstances which pose a threat to public health and [welfare]."[25] Thus, consistency with the Plan became one of the requirements for the issuance of a CON.[26]

The process by which providers sought to spend money over a certain amount, establish new services and facilities, and add beds or expand certain services began with a determination by the Department that the proposed project was indeed reviewable under the Act, and therefore required a CON in order to proceed.[27] Next followed the submission of a CON application—a lengthy, cumbersome document that required analyses of whether the project was needed and whether it was financially and economically feasible—to the Department's Division of Need Review.[28]

In the first few years of Pennsylvania's CON program, an applicant submitted its CON application to both the Department and the local health systems agency (HSA).[29] HSAs were funded by federal monies and comprised of professional planners who first reviewed a CON application, held a public hearing on the application if requested, and then made a recommendation to the Department's Division of Need Review.[30] A planner in the division was assigned to review the application and, if requested by either the applicant or an opponent, hold a public hearing.[31] Public hearings, especially when they involved hospitals with loyal and passionate constituencies, often became dramatic productions, allowing opponents of the project to appear and make a case

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[25] *Id.*

[26] 35 PA. STAT. ANN. § 448.707 (West 2003) (expired 1996).

[27] Health Care Facilities Act, No. 1979-48, § 701, 1979 Pa. Laws 130, 142-43 (codified as amended at 35 PA. STAT. ANN. § 448.701 (West 2003) (expired 1996)).

[28] *See* 28 PA. CODE § 401.5(a)-(b) (2008); William H. Maruca, Esq., *PA's Certificate of Need Sunset*, PHYSICIAN'S NEWS DIG. (Feb. 1997), http://www.physiciansnews.com/law/297maruca.html.

[29] tit. 28, § 401.5(b).

[30] *See id.* § 401.5(e)(1), (g)(1)-(2); Maruca, *supra* note 28.

[31] tit. 28, § 401.5(e)(1).

against the issuance of a CON.[32] Dueling lawyers and experts engaged and, with projects not only holding the promise of great earnings but also placing other facilities in the area at a perceived competitive disadvantage, the review process became contentious and litigious and consumed vast amounts of time, energy, and money.[33]

Despite the purposes articulated in both state and federal law, it was difficult—if not impossible—for the CON program to address the issue of duplication of services or to deny a hospital's CON application because the proposal duplicated beds or services at another facility.[34] With competition from physician groups and for-profit entrepreneurs threatening hospitals' bottom lines, hospitals sought to ensure the economic health of their organizations by attempting to put together a comprehensive array of services, including expensive, cutting-edge technology to ensure a return on investment dollars and to attract and maintain a loyal following.[35] It did not matter that some research showed that quality results for certain procedures improved as certain minimum numbers were performed, or that the mere fact of constructing a building, establishing a service, or acquiring equipment would assure its use (if you build it, they will come); a hospital without the newest equipment or advanced surgery programs risked being viewed as second-tier and experiencing difficulties in attracting both physicians and patients.[36]

Local concerns were also raised about the impact upon area jobs and the consequent financial and economic viability of

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[32] *Id.* § 401.5(e)(2), (5)(i); *see, e.g.*, Mark Schulman, *Hospitals Fight over Service*, TIMES-NEWS ONLINE, May 21, 2011, http://www.blueridgenow.com/article/20110521/articles/105211010 (demonstrating how a CON hearing can draw both support and opposition from the community).

[33] *See* Maruca, *supra* note 28; *see also* James B. Simpson, *Full Circle: The Return of Certificate of Need Regulation of Health Facilities to State Control*, 19 IND. L. REV. 1025, 1050 (1986).

[34] *See* Andrew K. Dolan, *Who Has Standing to Appeal Certificate-of-Need Decisions?*, 1978 UTAH L. REV. 155, 155-56 (1978).

[35] *See* Maruca, *supra* note 28.

[36] *See id.*

communities due to both the absence of a competitive hospital and the disapproval of needed construction or services.[37]

With so much of a community invested in health care projects, it was perhaps inevitable that state and local political representatives also became involved in the CON process, weighing in on the need for projects in their districts.[38] But if support took many forms, so too did opposition, which evolved into conflict between the facilities with the latest technological developments and services and those without them.[39] In this roiling admixture of interests, the Department's review attempted to determine whether a need in fact existed for a proposed project.[40] Within this context, the Department conducted exhaustive reviews and was required to make written findings that provided the basis for its final decision.[41] The Act required the Department to provide these written findings to the applicant, any opponents, and others upon written request.[42] Even then, however, the process was far from over.[43]

The Department's denial of a CON application could be appealed by the applicant, and an approval could be appealed by opponents.[44] The Act reposed the responsibility for hearing those appeals in the State Health Facility Hearing Board (Board).[45] Contrary to many other administrative proceedings where a de novo review is required by the reviewing tribunal, the Board was permitted to review only the information provided in the

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[37] *See* Patrick John McGinley, Comment, *Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a "Managed Competition" System*, 23 FLA. ST. U. L. REV. 141, 157-59 (1995).

[38] *See* David Wenner, *Pennsylvania Mulls Health Care Certificates of Need*, PENNLIVE.COM (Sept. 03, 2008, 4:08 PM), http://www.pennlive.com/midstate/index.ssf/2008/09/pennsylvania_mulls_health_care.html.

[39] *See* Maruca, *supra* note 28.

[40] *See* 28 PA. CODE § 401.4(a)(3) (2008).

[41] 28 PA. CODE § 401.5(g)(11) (2008).

[42] 35 PA. STAT. ANN. § 448.702(f)(1) (West 2003) (expired 1996); tit. 28, § 401.5(g)(11).

[43] *See, e.g.*, Stewart v. Dep't of Health, 593 A.2d 14, 15 (Pa. Commw. Ct. 1991) (demonstrating the appeal process).

[44] 35 PA. STAT. ANN. § 448.502(a)(i) (West 2003) (repealed 1996); *see* tit. 28, § 401.5(j)(1).

[45] tit. 35, §§ 448.501-.502 (repealed 1996); tit. 28, § 401.5(j)(1).

proceeding before the HSA and the Department, and it could hear no evidence that, "by the exercise of reasonable diligence," could have been provided by proponents and opponents to the Department during the review.[46] This led to a legal conundrum: if the Department's decision had to be based solely on the record, and if the Board could hear no evidence that, by the exercise of reasonable diligence, could have been submitted in the proceeding before the Department, then what was the purpose of a hearing? Why would the Board not simply review the record of the proceedings before the Department? Nevertheless, the Board held hearings, wrote opinions, and issued decisions.[47] Participants dissatisfied with the Board's decision could then appeal to the Commonwealth Court of Pennsylvania,[48] and with those appeals, a body of law regarding Pennsylvania's CON program developed.

Back on the program front, as time passed and experience accumulated, it became obvious to many that while the CON program may arguably have increased access to some health care services, especially in underserved areas, a rising consensus developed that the CON program was doing nothing to restrain the meteoric rise of health care costs.[49] Concerns were also raised that a CON had become a franchise of sorts, insulating a CON-holder from competition from other providers in the geographic area.[50]

In 1987, Congress repealed the 1974 law, including the CON requirements, leaving it to the states to determine whether to continue their CON programs.[51] Many states quickly repealed their CON laws, and with the end of the federal mandate came the

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[46] *See* tit. 28, § 401.5(j)(2).

[47] *See Stewart*, 593 A.2d at 15-16.

[48] *See, e.g.*, Robert Packer Hosp. v. Dep't of Health, 631 A.2d 813, 813-14 (Pa. Commw. Ct. 1993) (appeal of the Board's determination to the Commonwealth Court of Pennsylvania by medical facilities' competitors); *Stewart*, 593 A.2d at 15 (appeal to the Commonwealth Court of Pennsylvania from a decision of the Board granting a CON to a facility).

[49] *See* McGinley, *supra* note 37, at 157-58.

[50] *See* Neil Inman, *Certificate of Need: Does It Actually Control Healthcare Costs?*, JOHN W. POPE CIVITAS INST. (Sept. 14, 2011), http://www.nccivitas.org/2011/certificate-of-need-does-it-actually-control-healthcare-costs/.

[51] *See* McGinley, *supra* note 37, at 148.

end of the federally-funded HSAs.[52] At approximately the same time, ideas were being bruited about that many thought could have a salutary effect on health care costs and perhaps obviate the need for government regulation such as CON.[53] These included managed care and the Medicare prospective payment system.[54] Some argued that the market should be allowed the unfettered (at least by government regulation) ability to control costs.[55] Still, others argued that health care is not a market economy because its consumers, who by and large do not pay the bills for health care services, do not seek the best price for services but rather go to their local hospital or the hospital that they believe has the best array of services.[56]

In any event, Pennsylvania did not repeal its CON Program at that time, and in 1992, the Act was amended to, among other things, include a sunset provision pursuant to which the CON program would automatically end after four years unless extended by the state legislature.[57] As the sunset date drew near, most of the major health care players in Pennsylvania supported an extension of the CON law, at least to cover certain services, and an extension was universally expected and supported by Governor Tom Ridge.[58] Nevertheless, the 1996 legislative session ended without the legislature authorizing an extension, and on December 18, 1996, the CON provisions of the Act sunset.[59]

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[52] *Certificate of Need: State Health Laws and Programs, supra* note 1.

[53] *See* Eleanor D. Kinney, *Making Hard Choices Under the Medicare Prospective Payment System: One Administrative Model for Allocating Medical Resources Under a Government Health Insurance Program*, 19 IND. L. REV. 1151, 1152-53 (1986) (discussing Medicare prospective payment systems); McGinley, *supra* note 37, at 143-44 (discussing managed care).

[54] *See* Kinney, *supra* note 53, at 1152-53; McGinley, *supra* note 37, at 143-44.

[55] *See* James F. Blumstein & Frank A. Sloan, *Health Planning and Regulation Through Certificate of Need: An Overview*, 1978 UTAH L. REV. 3, 5 (1978).

[56] *See* McGinley, *supra* note 37, at 153.

[57] Maruca, *supra* note 28.

[58] *See id.*

[59] *Id.*

Overnight, the health care landscape in Pennsylvania irrevocably changed.[60] Providers who heretofore had to navigate the arduous CON process to construct a building, add a bed, or establish a new service now seemingly had carte blanche to build and acquire.[61] What would be the consequence of this sea change? The Department responded to the demise of the CON program by announcing its intent to strictly enforce licensing provisions in the Act, including quality assurance requirements in the Plan, before issuing licenses.[62] Now, the emphasis would be on whether a proposed project met quality requirements, not on whether it was needed.[63] The Department's new focus aroused little opposition, as it was clearly authorized by statute.[64] In the ensuing years since the sunset of the CON program, the Department's licensure actions have been relatively uncontroversial and have gone a long way to ensure quality health care programs in Pennsylvania.[65]

The Department was not the only state agency that had to reconfigure its approach to regulating health care services in response to the unexpected demise of the CON program.[66] The Department of Public Welfare (DPW) claimed that it had depended upon CON for years to comply with its federal charge to safeguard against the unnecessary utilization of services and to ensure that Medical Assistance (MA) Program payments were "consistent with efficiency, economy and quality."[67] Consequently, the DPW sought to contain what it feared would be the inevitable consequence of the precipitous end to CON: the explosion of unneeded beds.[68]

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[60] *See id.*

[61] *See id.*

[62] *Id.*

[63] Maruca, *supra* note 28.

[64] *See* 35 PA. STAT. ANN. § 448.401c (West 2003) (expired 1996).

[65] *See generally Report of the Quality Assurance Programs July 1, 2006—June 30, 2007*, PA. DEP'T OF HEALTH, http://www.portal.state.pa.us/portal/server.pt/community/outpatient_facilities/14151/report_of_tth_quality_assurance_programs/558524 (last visited Oct. 15, 2011) (showing the effectiveness of licensing and discussing licensing actions).

[66] *See* 26 Pa. Bull. 5996 (Dec. 14, 1996); Maruca, *supra* note 28.

[67] 26 Pa. Bull. 5996 (Dec. 14, 1996).

[68] *See id.*; Maruca, *supra* note 28.

On December 14, 1996, four days before the CON provisions of the Act sunset, the DPW published a statement of policy (SOP) announcing that it would use its discretionary authority to refuse to enter into a provider agreement with an MA provider or would-be MA provider that sought to add or expand certain types of beds.[69] Specifically, the DPW's general policy would henceforth be that it would not enter into a provider agreement with facilities providing skilled nursing, inpatient psychiatric rehabilitation, and intermediate care for the mentally retarded if those facilities had not received a CON before December 18, 1996.[70] Those facilities without CONs seeking to provide any of the listed services were required to obtain an exception to the DPW's general policy by making a written request to the DPW and addressing many of the requirements of the now-defunct CON program.[71]

Not surprisingly, the DPW's exceptions process was met with claims in opposition stating that it lacked the statutory authority to operate what was, in effect, a mini-CON program.[72] This is evidenced by appeals to the commonwealth court,[73] which are addressed in the following sections.

II. DISCUSSION OF COMMONWEALTH COURT DECISIONS

A. Scope and Standard of Review

Due to the complexities of the statutory scheme established by the General Assembly in the Act, most of the cases decided by the commonwealth court dealt with determining the scope and standard of review to be applied.[74] This has meant that the court

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[69] *See* 26 Pa. Bull. 5996 (Dec. 14, 1996).

[70] *Id.*

[71] 55 PA. CODE §§ 1101.42b(b), 1187.21a (2000).

[72] Millcreek Manor v. Dep't of Pub. Welfare, 796 A.2d 1020, 1024 (Pa. Commw. Ct. 2002).

[73] *See, e.g., id.* at 1023.

[74] In explaining the distinction between these two types of review, the Supreme Court of Pennsylvania has stated:

> "Scope of review" refers to "the confines within which an appellate court must conduct its examination." In other words, it refers to the *matters* (or "what") the appellate court is permitted to examine. In contrast, "standard of review" refers to the *manner* in which (or

examined the roles played by the Department, the Board, and the court itself in the review of CON decisions.[75]

In the case of *Rehab Hospital Services Corp. v. Health Systems Agency of Southwestern Pennsylvania*,[76] the court dealt with the Board's reversal of the grant of a CON to operate a hospital.[77] In this instance, the decision to approve the CON was made by the Secretary of Health, who rejected the recommendation of the Department's staff to disapprove the CON.[78] The Board found that the Secretary's decision was not based solely on the record, and therefore it violated section 702(f)(2) of the Act, which required that:

> All decisions of the [D]epartment shall be based solely on the record. No ex parte contact regarding the application between any employee of the [D]epartment who exercises responsibilities respecting the application and the applicant, any person acting on behalf of the applicant or any person opposed to the issuance of the [CON] shall occur after the commencement of a hearing on the application and before a decision is made by the [D]epartment.[79]

The court described the review and appeal process that occurred in this case in detail (a review and disapproval by the HSA, a recommended disapproval by Department staff followed

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> "how") that examination is conducted. In *Coker*, we also referred to the standard of review as the "degree of scrutiny" that is to be applied.

Morrison v. Dep't of Pub. Welfare, 646 A.2d 565, 570 (Pa. 1994) (citations omitted) (citing Coker v. S.M. Flickinger Co., 625 A.2d 1181, 1186 (Pa. 1993)).

[75] *See* Mercy Reg'l Health Sys. of Altoona v. Dep't of Health, 645 A.2d 924, 931-32 (Pa. Commw. Ct. 1994) (discussing how the Board makes findings of fact and credibility determinations, the Department limits the review to issues raised before it, and the court hears the appeals).

[76] Rehab Hosp. Servs. Corp. v. Health Sys. Agency of Sw. Pa., 475 A.2d 883 (Pa. Commw. Ct. 1984).

[77] *Id.* at 885.

[78] *Id.*

[79] *Id.* at 888 (quoting 35 PA. STAT. ANN. § 448.702(f)(2) (West 1993) (expired 1996)).

by approval by the Secretary, and a notice of appeal and hearing before the Board) and noted that this "somewhat cumbersome procedure [was] mandated by the Act."[80] The court found that the United States Congress and the Pennsylvania General Assembly were "concerned with rising health care costs and" that the CON program was established, in part, to foster competition by encouraging the development of health care facilities that could "treat inpatients at a lower per diem rate;" however, competition had diminished, as most costs were now reimbursed by health insurance.[81] The court determined that in reviewing applications for a CON, the Secretary of Health is not bound by recommendations of staff in approving or disapproving the application, and he or she can make an independent assessment based on his or her review of the application.[82] Furthermore, the court decided that the Secretary can also use his or her experience and background in the health care area to make the decision.[83] The court reasoned that consideration of general knowledge outside of the record did not constitute the type of ex parte contacts prohibited by the Act.[84]

The court noted that the scope of review of the Board in its review of decisions by the Department on CON applications is limited to "(1) [w]hether the decision of the Department is supported by substantial evidence, (2) [w]hether there was any violation of constitutional or statutory law or the regulations of the Department, [and] (3) [w]hether there was any prejudicial procedural error committed during the review."[85] The court concluded that "[t]he Board [had] exceeded its scope of review by substituting its own evaluation of the evidence for that of the Department."[86] As "[t]he Department's decision was . . . supported by substantial evidence in the record" and there were no constitutional errors or regulatory violations, the court reversed the

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[80] *Id.* at 885.

[81] *Id.* at 887.

[82] *Rehab. Hosp. Servs. Corp.*, 475 A.2d at 887.

[83] *Id.* at 887-88.

[84] *See id.* at 888.

[85] *Id.* (alteration in original) (citing 37 PA. CODE § 197.45(a)(1)-(3) (1996)).

[86] *Id.*

decision of the Board and reinstated the decision of the Department to issue a CON to Rehab Hospital.[87]

In the case of *Metropolitan Hospital v. Department of Health*,[88] the court upheld the Department's denial of a CON to Metropolitan Hospital to provide cardiac catheterization services and open-heart surgery.[89] The court noted that:

> We are aware, of course, that the Department is the ultimate trier of facts in decisions on [CONs]; and that on such applications the Board's . . . authority is limited . . . . Our scope of review also is limited, especially in reviewing the discretionary acts of an agency, and we note that under well established principles of administrative law we will not substitute judicial discretion for administrative discretion unless the agency or official acted in bad faith, fraudulently, capriciously, or committed a manifest abuse of power.[90]

While not technically making a decision regarding a CON application, the court engaged in an exhaustive discussion of the role of the Board in reviewing Department decisions in *Department of Health v. Brownsville Golden Age Nursing Home, Inc.*[91] In that case, the Board "lift[ed] the suspension imposed by the Department on new admissions" to a skilled nursing care

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[87] *Id.* The court also addressed the issue of ex parte contacts in the case of *Mercy Reg'l Health Sys. of Altoona v. Dep't of Health*, 645 A.2d 924, 928 (Pa. Commw. Ct. 1994). The Department had promulgated regulations providing that any contact with the Department that was recorded as part of the official application file would not constitute an ex parte contact, even if that letter or communication was not provided to all interested parties. *Id.* at 928-29. The court found that this regulation was contrary to the " 'common and approved usage' " of the term ex parte contact, which refers to any "communications between the decision-maker and one party outside of the record . . . where the other party does not have notice or the opportunity to contest." *Id.* at 929. The court determined that the regulation was an impermissible narrowing of the statutory prohibition against ex parte contacts. *Id.*

[88] Metro. Hosp. v. Dep't of Health, 527 A.2d 1067 (Pa. Commw. Ct. 1987).

[89] *Id.* at 1067.

[90] *Id.* at 1069.

[91] Dep't of Health v. Brownsville Golden Age Nursing Home, Inc., 520 A.2d 926, 929-30 (Pa. Commw. Ct. 1987).

facility and refused to revoke the facility's license.[92] The Department appealed the Board's decision to the court.[93] The court contrasted the scope of review permitted under the Act in the Board's review of licensure appeals with the scope of review permitted in CON appeals.[94] Under the relevant provision of the Act,[95] "the Board has the power and the duty to hold *evidentiary* hearings and issue adjudications" with findings of fact and conclusions of law "in accordance with the Administrative Agency Law" in licensure appeals.[96] However, "[i]n CON appeals, the appellant [was] prohibited . . . from raising any issue before the Board which was not raised before the [HSA]" and the Department.[97] Section 506 of the Act provided that "the [B]oard shall entertain no evidence that the . . . [B]oard is satisfied the appellant was able, by the exercise of reasonable diligence, to have submitted before the [HSA] and the [D]epartment."[98] The court noted that this not only limited the evidence and testimony that could be presented before the Board, but it also limited the Board's role in reviewing that information.[99]

In the case of *Grandview Surgical Center, Inc. v. Holy Spirit Hospital of the Sisters of Christian Charity*,[100] the court addressed a complex fact scenario in applying this scope and standard of review.[101] The Department received an application from Grandview Surgical Center (Grandview) to construct "a multi-specialty ambulatory surgical center consisting of four operating rooms."[102] At the time, the Plan did not distinguish between "hospital inpatient operating room capacity" and outpatient "ambulatory surgical capacity."[103] "[T]he Department convened a

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[92] *Id.* at 927.

[93] *Id.*

[94] *Id.* at 929-30.

[95] 35 PA. STAT. ANN. § 448.805(a) (West 1993).

[96] *Brownsville Golden Age Nursing Home, Inc.*, 520 A.2d at 929-30.

[97] *Id.* at 929.

[98] *Id.* (quoting 35 PA. STAT. ANN. § 448.506 (West 1993) (repealed 1996)).

[99] *See Brownsville Golden Age Nursing Home, Inc.*, 520 A.2d at 929-30.

[100] Grandview Surgical Ctr., Inc. v. Holy Spirit Hosp. of the Sisters of Christian Charity, 533 A.2d 796 (Pa. Commw. Ct. 1987).

[101] *See id.* at 797-98.

[102] *Id.* at 797.

[103] *Id.* at 798.

task force" and determined that it was appropriate to develop a new policy on ambulatory surgery.[104] Consequently, the Department issued a document titled "CON Memorandum 85-15" that established a formula under which the Department could approve additional operating rooms if a region did not meet the announced goal of performing "50% of all surgical procedures . . . on an outpatient basis."[105] Since the hospitals in the region in which Grandview was to be located were only performing 36.5% of all surgeries on an outpatient basis, and because it was determined "that Grandview's charges for such services would be less than those of area hospitals," the Department approved the CON "application as an exception to the Plan."[106] Holy Spirit Hospital appealed and the Board reversed the Department's decision, determining "that Grandview did not meet its burden of demonstrating entitlement to an exception under the . . . Plan and that the Secretary's decision . . . violated [s]ection 707(a) of the Act," which required "CON applications to [be] consistent with the . . . Plan."[107]

The court first reviewed the authority of the Department to issue the CON memorandum.[108] The court analyzed the provisions of the Act and determined that there were provisions for the Department to adopt an interim policy under which CON applications could be reviewed and approved as exceptions to the Plan.[109] As to the Board's decision, Grandview objected "that the Board exceeded its statutory scope of review by impermissibly substituting its judgment for that of the Secretary."[110] The Department contended "that an appeal of . . . an exception [was] not within the Board's jurisdiction."[111]

The court found that, although there was some support in the Act for the idea that the Board did not have jurisdiction "in an

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[104] *Id.*

[105] *Id.*

[106] *Grandview Surgical Ctr., Inc.*, 533 A.2d at 798.

[107] *Id.* (citing 35 PA. STAT. ANN. § 448.707(a) (West 1993) (expired 1996)).

[108] *Id.* at 799-800.

[109] *Id.*

[110] *Id.* at 801.

[111] *Id.*

appeal from a departmental decision granting an exception to the . . . Plan," this conclusion would result in bifurcated proceedings where the grant of an exception would be appealed directly to the court, but the approval of the CON would be appealed to the Board.[112] "In the interest of judicial economy," the court found that the Board could hear "appeal[s] from a departmental grant of an exception to the . . . Plan."[113] As for the scope of review that the Board should apply to the review of a departmental grant of an exception to the Plan, the court found that the Board should not have used the substantial evidence standard, as the Department's action in granting an exception is discretionary rather than mandatory.[114] Accordingly, the appropriate standard of review in this instance would be a lesser standard, and the Board could not overturn the Department's decision "absent proof of fraud, bad faith or blatant abuse of discretion."[115] The court found "that the Department acted well within its discretion in finding Grandview's proposal a benefit to the health care marketplace."[116] Finally, the court found that the Department's decision was supported by substantial evidence, and it reversed the Board and remanded the case to the Department for issuance of a CON to Grandview.[117]

While it appeared that the court had resolved the issue of which standard of review the Board is to apply in reviewing departmental decisions on CON applications, the court's decision in *Mercy Regional Health System of Altoona v. Department of Health*,[118] which reversed its prior holdings in this area, suggested that the issue of the Board's scope of review had continued to concern the court for some time.[119] In the *Mercy Regional* case,

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[112] *Grandview Surgical Ctr., Inc.*, 553 A.2d at 801.

[113] *Id.*

[114] *Id.* at 802.

[115] *Id.*

[116] *Id.* at 803.

[117] *Id.* at 804.

[118] Mercy Reg'l Health Sys. of Altoona v. Dep't of Health, 645 A.2d 924 (Pa. Commw. Ct. 1994).

[119] *See id.* at 932 (stating that the Board must make its own "findings of fact, including credibility determinations," which is incongruous with the substantial evidence standard of review that was previously applied to Department determinations).

the parties had not directly raised this issue but rather concentrated on arguments related to an appropriate Board quorum and alleged ex parte contacts.[120] The court heard argument on this matter before a three-judge panel and then rescheduled argument en banc.[121] In its decision, the court noted that under section 505 of the Act, "[a]ll hearings before the [Board were] subject to the right of notice, hearing and adjudication in accordance with" the Administrative Agency Law at title 2, chapters 5 and 7 of the Pennsylvania Consolidated Statutes.[122] The court noted that the Board used the substantial evidence standard in reviewing the evidence and testimony presented at the hearing.[123] The court found that this standard of review was improper and remanded the matter to the Board.[124] The following paragraph is instructive not only on the court's reasoning, but also on its frustration with the nuances of the process set forth in the Act:

> The . . . Board's directive by the Act is to give notice, hear the case and issue an adjudication in compliance with the [Administrative Agency Law] which requires that reasonable examination and cross-examination be allowed. In light of this statutory requirement to be the forum for conflicting evidence, the . . . Board must also be the forum required to make findings of fact, including credibility determinations that resolve conflicts in the evidence, not simply recite the evidence given. Furthermore, after making findings of fact on conflicting evidence, a review of the Department's findings and recommendations for "substantial evidence" is incongruous. We agree with a prior opinion of this court

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[120] *See id.* at 927 (listing the petitioners' arguments, which alleged that the Board's vote was invalid, the Department engaged in ex parte communications, there were violations of due process and equal protection, and the decision was not supported by substantial evidence). For a discussion of the ex parte contacts issue, *see supra* note 87.

[121] *Mercy Reg'l Health Sys. of Altoona*, 645 A.2d at 926.

[122] *Id.* at 931 (quoting 35 PA. STAT. ANN. § 448.505 (West 1993) (repealed 1996)) (citing 2 PA. CONS. STAT. §§ 501-88, 701-54 (2006)).

[123] *Id.* at 931-32.

[124] *Id.* at 932.

> that "[A] [sic] more unorthodox, complicated and convoluted appeal process is not imaginable."[125]

The court remanded the case to the Board and directed it to issue "an adjudication with findings of fact that resolve[d] conflicts in the evidence and conclusions of law deciding the case rather than [simply] reviewing the Department's decision."[126]

Subsequent to this decision, and until the sunset of the CON provisions of the Act in December 1996, the Board's adjudications and orders contained findings of fact and conclusions of law that reviewed the evidence presented before the Department and the Board, and the Board applied a preponderance of the evidence standard to reach its conclusions.[127]

B. Standing

The court also issued multiple decisions dealing with the issue of standing, focusing on when a case could be appealed and the determination of which parties and individuals were permitted to file appeals.

In *Mercy Hospital v. Department of Health*,[128] the Department had issued a determination of reviewability to Mercy Hospital upon receipt of a notice that the hospital planned to "activate" a rehabilitation care unit.[129] While Mercy Hospital claimed that the notice was to confirm an earlier telephone conversation with the Department in which it stated that this activation was not reviewable under the Act, "the Department treated [the notice] as a letter of intent requesting a determination as to reviewability and [determined] . . . that the proposal was reviewable as an addition[al] health [care] service."[130] After appeal of this determination to the Board and "following a hearing, the Board affirmed the Department's determination and dismissed the

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[125] *Id.* (citations omitted).

[126] *Id.*

[127] *See* Pa. Dep't of Health v. N. Hills Passavant Hosp., 674 A.2d 1141, 1147 (Pa. Commw. Ct. 1996).

[128] Mercy Hosp. v. Dep't of Health, 450 A.2d 761 (Pa. Commw. Ct. 1982).

[129] *Id.* at 761.

[130] *Id.*

[h]ospital's appeal."[131] Mercy Hospital appealed to the court and the Department filed a motion to quash, arguing that the "Board's decision [was] interlocutory and . . . not within [the court's] jurisdiction over 'final orders' of state government agencies pursuant to . . . the Judicial Code."[132]

The court stated that an order would be considered final "if (1) it [was] separable from and collateral to the main cause of action; (2) the right involved [was] too important to be denied review; and (3) the question presented [was] such that . . . postpone[ment of review] until final judgment in the case [would result in] the claimed right [being] irreparably lost."[133] In analyzing the Department's decision, the court found that a determination of reviewability was not "separable from or collateral to the" Department's eventual decision of whether to grant a CON to the new health care service.[134] In fact, the court found that the determination of reviewability was the "very underpinning" of a decision to approve or deny a CON, as "it establishe[d] the Department's right to review the proposal."[135] The court also found that while the right to contest a determination of reviewability was important, it was not "too important to be denied review," and the arguments regarding the appropriateness of issuing a determination of reviewability could be raised after the Department issued a decision to approve or deny a CON.[136]

In *Southern Chester County Medical Center v. Department of Health*,[137] the court considered the opposite issue from that raised in the *Mercy Hospital* case: whether it was possible to appeal from determinations of nonreviewability.[138] The Department had found that a proposal from Southern Chester Medical Center to add medical/surgical beds was not reviewable under the CON process

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[131] *Id.*

[132] *Id.* at 761-62.

[133] *Id.* at 762.

[134] *Mercy Hosp.*, 450 A.2d at 761-62.

[135] *Id.* at 762.

[136] *Id.* (quoting Pugar v. Greco, 394 A.2d 542, 545 (Pa. 1978)).

[137] S. Chester Cnty. Med. Ctr. v. Dep't of Health, 494 A.2d 885 (Pa. Commw. Ct. 1985).

[138] *Id.* at 886; *see Mercy Hosp.*, 450 A.2d at 761.

because there would be no capital expenditure involved.[139] "The [local] HSA appealed this determination of nonreviewability to the Board[,] . . . [which] determined that the Department's decision was not supported by substantial evidence. . . . [and] that the proposal was subject to [CON] review."[140] The hospital and the Department argued that the review of a determination of nonreviewability was "not within the Board's jurisdiction."[141] The court noted that the Board's "powers and duties" regarding the review of CON applications were set forth in section 502(a) of the Act, which provided that:

> (a) The . . . [B]oard shall have the powers and its duties shall be:
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> (1) To hear appeals from departmental decisions on applications for [CONs] or amendments thereto.
>
> . . . .
>
> (3) To hear appeals from decisions of the [D]epartment which require a person to obtain a [CON] for major medical equipment or the acquisition of an existing health care facility.[142]

"The Board [argued] that the omission of appeals from determinations of non-reviewability from [s]ection 502 . . . was clearly inadvertent . . . and that [s]ection 502(a)(1) [was] broad enough to encompass determinations of non-reviewability because sending a letter of intent to the Department [was] an integral part of the" CON application procedure.[143]

The court found "that the statutory provision for the Board's authority [was] clear," and that provision did not state that a determination of nonreviewability was appealable to the Board.[144] The court cited to the Statutory Construction Act[145] in ruling that it

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[139] *S. Chester Cnty. Med. Ctr.*, 494 A.2d at 886.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 886-87 (quoting 35 PA. STAT. ANN. § 448.502(a)(1), (3) (West 1993) (repealed 1996)).

[143] *Id.* at 887 (citations omitted).

[144] *Id.*

[145] 1 PA. CONS. STAT. §§ 1501-1991 (1975 & Supp. 2001).

would "not disregard th[e] clear language [of the Act] for an interpretation which the Board contend[ed] better comport[ed] with the spirit of the legislation."[146] The court noted that since the Department's determination was a final administrative decision, it met the definition of an adjudication as defined in the Administrative Agency Law.[147] Consequently, the appeal from such a determination would lie with the court.[148] The court found that the HSA and the health care provider had sufficient interest in the determination of nonreviewability that either of them could file an appeal with the court.[149] The case was remanded to the Department for an evidentiary hearing.[150]

In *Powers v. Department of Health* (*Powers I*),[151] the Commonwealth Court of Pennsylvania again dealt with the issue of standing to appeal from a determination of nonreviewability.[152] In that case, the Department had issued a determination of nonreviewability in response to a letter of intent proposing to operate a program of outpatient therapy for cancer treatment patients.[153] Dr. Powers, the owner of Cancer Treatment Associates P.C. also operated a cancer treatment center in the same area where the new center would be located.[154] Powers appealed the Department's determination of nonreviewability to the commonwealth court and requested a remand to the Department for a hearing; this was so he could raise issues regarding the impact of the proposed new center on Cancer Treatment Associates P.C.'s business and the incorrect information supplied by the owners of the proposed center.[155] Powers alleged "that the Department's failure to [provide Cancer Treatment Associates P.C. with] notice and an opportunity to be heard prior to issuing the determination of

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[146] *S. Chester*, 494 A.2d at 887 (citing 1 PA. CONS. STAT. § 1921(b) (1975 & Supp. 2001)).

[147] *Id.* (discussing 2 PA. CONS. STAT. § 101 (2006)).

[148] *Id.* (citing 42 PA. CONS. STAT. § 763 (2006)).

[149] *Id.* at 887.

[150] *Id.* at 888.

[151] Powers v. Dep't of Health (*Powers I*), 550 A.2d 857 (Pa. Commw. Ct. 1988).

[152] *Id.* at 859-60.

[153] *Id.* at 859.

[154] *Id.*

[155] *Id.* at 858-60.

non reviewability violated [his] constitutional rights as well as [his] rights under the Act and . . . the Administrative Agency Law."[156]

The Department and other respondents filed a preliminary objection based on Powers' standing to file an appeal.[157] The court first noted that in *Southern Chester*, it had decided that a determination of nonreviewability was an adjudication, and therefore an evidentiary hearing was required.[158] However, in that instance, the court held that an HSA had standing to appeal the matter based on section 506(a) of the Act.[159] In deciding whether to extend standing to Powers, the court noted that there was no entitlement for competitors to receive notice of a letter of intent;[160] therefore, the court concluded that the General Assembly did not intend "to confer upon [these parties] the rights to challenge the preliminary inquiry" as to whether a proposal is reviewable under the CON provisions of the Act.[161] Also, the court noted that there is no requirement for a facility to obtain a determination of nonreviewability.[162] The Act "obligated [a facility] to go through the CON review process" only if it fell "within the statutory criteria for a CON."[163] The court found the Department's response to the letter of intent "analogous to a private letter ruling from the Internal Revenue Service in a tax matter[, which] . . . gives no rights to a third party who has not sought the advice."[164] Also, the court found that granting standing to a competitor "would be contrary to the clear language of [s]ection 202 of the Act[,] . . . which provides that the Department and the [HSAs] 'shall in their planning and review activities foster competition.' "[165] Based on these considerations, the court

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[156] *Id.* at 859 (citation omitted).

[157] *Powers I*, 857 A.2d at 860.

[158] *Id.* at 861 (citing S. Chester Cnty. Med. Ctr. v. Dep't of Health, 494 A.2d 885, 887-88 (Pa. Commw. Ct. 1985)).

[159] *Id.* (citing 35 PA. STAT. ANN. § 448.506(a) (West 1993) (repealed 1996)).

[160] *Id.*

[161] *Id.* at 861-62.

[162] *See id.* at 862.

[163] *Powers I*, 857 A.2d at 862.

[164] *Id.*

[165] *Id.* (citing 35 PA. STAT. ANN. § 448.202 (West 1993)).

"sustain[ed] the preliminary objection pertaining to standing . . . and grant[ed] the motion to quash" the appeal.[166]

The court next addressed the issue of standing in the case of *Powers v. Department of Health* (*Powers II*).[167] Although this was the same Dr. Powers who was involved in *Powers I*, this case involved different health care facilities.[168] In this case, the Department received a proposal to establish a radiation therapy center and issued a determination that the proposal was not reviewable under the CON provisions of the Act.[169] After receipt of the initial letter, Dr. Powers and several other entities (petitioners) requested permission to intervene in the matter.[170] The Department granted the petitioners' request for intervention "but limited their status by indicating (1) that . . . status would cease when the Division of Need Review determined whether or not a CON review was needed and (2) that the grant of intervenor status did not confer upon them party standing 'in the Department's consideration of the notice of intent, or appeal rights with respect to the Department's ultimate determination on reviewability.' "[171] The "[p]etitioners . . . submit[ted] additional information to the Department."[172] After review of that information, "the Department issued [its] determination of nonreviewability."[173] The petitioners filed an appeal claiming "that the Department's determination . . . was erroneous as a matter of law and that the Department violated . . . the Administrative Agency Law [by failing to hold] a hearing[] and . . . by not rendering an adjudication containing . . . findings [of fact] and . . . conclusions" of law.[174]

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[166] *Id.*

[167] Powers v. Dep't of Health (*Powers II*), 570 A.2d 1350, 1351 (Pa. Commw. Ct. 1990).

[168] *Compare id.* at 1351 (Powers challenged the Department's determination that Health Images Pennsylvania, Inc.'s project did not require a CON application), *with Powers I*, 550 A.2d 857, 859 (Pa. Commw. Ct. 1988) (Powers challenged the Department's determination that North Central Health Services Corporation was not required to file a CON application for the project).

[169] *Powers II*, 570 A.2d at 1351-52.

[170] *Id.* at 1351.

[171] *Id.* at 1352.

[172] *Id.*

[173] *Id.*

[174] *Id.* (citations omitted).

The Department contended that the petitioners lacked standing, citing the court's decision in *Powers I*.[175] To counter that argument, petitioners maintained that they had standing under section 702 of the Administrative Agency Law "because they ha[d] a 'direct' interest in th[e] matter."[176] Petitioners also argued that, unlike the competitors in *Powers I*, "they had been granted intervenor status by the Department."[177] The court found that in order to determine if a competitor had a "direct interest" in a decision of an agency, it was necessary to look to the purpose of the underlying statute.[178] Contrary to the Supreme Court of Pennsylvania's decision in *In re El Rancho Grande, Inc.*,[179] where the court held that the purpose of the Liquor Code is "to restrain, not promote, the sale of liquor[,] . . . [so] a competitor had standing to appeal the grant of another's liquor license," one of the purposes of the Act is to encourage competition.[180] As for the granting of intervenor status, the court found that under Part II of the General Rules of Administrative Practice and Procedure,[181] admission as an intervenor by an agency "may not be construed as recognition by the agency that the intervenor has a direct interest in the proceeding or might be aggrieved by an order of the agency in the proceeding."[182] The court granted the motion to quash based on lack of standing.[183]

C. Post-CON Cases

The first post-CON case to reach the commonwealth court relating to the DPW's exception review process was *Millcreek*

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[175] *Powers II*, 570 A.2d at 1352 (citing *Powers I*, 550 A.2d 857, 862 (Pa. Commw. Ct. 1988)).

[176] *Id.* at 1353 (citing 2 PA. CONS. STAT. § 702 (2006)).

[177] *Id.*

[178] *See id.* at 1353.

[179] *In re* El Rancho Grande, Inc., 437 A.2d 1150 (Pa. 1981).

[180] *Powers II*, 570 A.2d at 1353 (discussing *In re El Rancho Grande, Inc.*, 437 A.3d at 1153, 1155-56).

[181] 1 PA. CODE §§ 31.1-35.251 (2010).

[182] *Powers II*, 570 A.2d at 1353 (quoting tit. 1, § 31.3).

[183] *Id.*

Manor v. Department of Public Welfare.[184] There, the court determined, inter alia, that the hearing examiner of the DPW's Bureau of Hearings and Appeals (BHA) erred by refusing Millcreek the opportunity to challenge the DPW's policy,[185] using the appellate standard of abuse of discretion to review the DPW's actions,[186] "failing to address the issues raised by Millcreek and by precluding Millcreek from presenting evidence on the issues raised,"[187] failing to conduct a de novo review,[188] and exhibiting a "flagrant disregard of the law and . . . Millcreek's due process rights."[189] The commonwealth court vacated the BHA's decision and remanded the case to the BHA to conduct a de novo review.[190] The court in *Millcreek* directed the hearing examiner to give full consideration to the case as if the DPW had not previously ruled[191] and to consider and determine all the issues properly and adequately raised,[192] including whether the DPW's SOP was illegal and violative of federal law.[193] The court stated "that [b]efore a state agency may make an adjudicatory determination depriving an individual of a state protected interest, the agency must provide a hearing before an impartial adjudicator to conduct a de novo examination of all the factual and legal issues" raised in the appeal.[194]

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[184] Millcreek Manor v. Dep't of Pub. Welfare, 796 A.2d 1020, 1024 (Pa. Commw. Ct. 2002); *See* Appellant's Brief at 14, Eastwood Nursing & Rehab. Ctr. v. Dep't of Pub. Welfare, 910 A.2d 134 (Pa. Commw. Ct. 2006) (No. 1421 CD 2005) (explaining that *Millcreek Manor* was the first commonwealth court decision to review the DPW's exceptions process).

[185] *Millcreek Manor*, 796 A.2d at 1026.

[186] *Id.* at 1030.

[187] *Id.*

[188] *Id.* at 1028, 1030.

[189] *Id.* at 1028.

[190] *Id.* at 1023, 1030.

[191] *See Millcreek Manor*, 796 A.2d at 1029.

[192] *Id.* at 1028.

[193] *Id.* at 1030.

[194] *Id.* at 1029 (quoting Lawson v. Pa. Dep't of Pub. Welfare, 744 A.2d 804, 807 (Pa. Commw. Ct. 2000)). In *Lawson,* which did not involve the CON program or the DPW's exception request process, the court rejected the use of the substantial evidence test by the hearing examiner as well as the hearing examiner's review of the DPW's actions for "abuse of discretion" or "arbitrary and capricious action," because these are appellate standards of evidence

In a second case, *Eastwood Nursing & Rehabilitation Center v. Department of Public Welfare*,[195] the court addressed the substantive nature of the DPW's SOP and concluded, inter alia, that it was an unpromulgated regulation and violated federal law.[196] To reach its decision, the court considered the plain language of the SOP, the manner in which the DPW implemented the SOP, and whether the SOP restricted the DPW's discretion.[197] Based upon these considerations, the court concluded that the SOP did "not accurately reflect the meaning of [the DPW's] enabling legislation" and that the DPW failed to promulgate regulations to establish new rules for those seeking MA provider agreements.[198] "Because," opined the court, the "[DPW] issued eligibility and participation requirements through, what it calls, a[n SOP], the SOP violates state law and the [DPW]'s own regulations."[199] Subsequently, the DPW regularized its exceptions process by statutory amendment.[200]

III. CONCLUSION

The Commonwealth Court of Pennsylvania played a vital and essential role in the operation and implementation of Pennsylvania's CON program throughout the program's brief history by refining its process and constraining its reach. From its elucidation of both the standard and scope of review and its articulation of the role of an administrative tribunal such as the Board to its demarcation of the parameters of standing under the Act, the court was instrumental in untangling a convoluted process and infusing it with clarity, intellectual rigor, and deliberative common sense.

"applied by a fact finder to [a] determination[] of whether a burden of proof has been satisfied." *Millcreek Manor*, 796 A.2d at 1029 (citing *Lawson*, 744 A.2d at 807).

[195] Eastwood Nursing & Rehab. Ctr. v. Dep't of Pub. Welfare, 910 A.2d 134 (Pa. Commw. Ct. 2006).

[196] *Id.* at 148, 150.

[197] *Id.* at 146-48.

[198] *Id.* at 147.

[199] *Id.*

[200] *See* Act of June 30, 2007, sec. 1, § 443.1(8), 2007 Pa. Laws 49, 52 (codified as amended at 62 PA. STAT. ANN. § 443.1(8) (West 2010)).

Now, fourteen years after the sunset of the CON program in Pennsylvania, it could be said that the regulation of health care in the Commonwealth has settled down, the players all know what to expect, and the system has become properly more focused on quality. However, now that the federal government has once again taken a stab at controlling costs (and, it claims, increasing access) by the passage of the 2010 Health Care Act, Pennsylvania—along with all of the other states—face the prospect of uncertain times once again.[201] What sort of health care system will emerge after the implementation of this new federal effort remains to be seen, and no one—not experts, not government officials, not the courts—knows how this new venture will play out. At this point, we only "see through a glass, darkly;"[202] not much is clear, least of all the consequences that this far-reaching legislation will have on the lives and wallets of both consumers and the states. Whether this latest attempt by the federal government can successfully address the intractable issue of rising out-of-control health care costs and accomplish the goals that eluded the CON program in Pennsylvania and across the nation is a tale yet to be told.

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[201] Arnold J. Rosoff, *Of Stars and Proper Alignment: Scanning the Heavens for the Future of Health Care Reform*, 159 U. PA. L. REV. 2083, 2084-85 (2011).

[202] 1 *Corinthians* 13:12.