IN THE

SUPREME COURT OF VIRGINIA

Record No. 081174

VIRGINIA DEPARTMENT OF HEALTH,

Petitioner,

v.

NRV REAL ESTATE, LLC,

Respondent.

APPELLANT'S REPLY BRIEF

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TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

APPELLANT'S REPLY BRIEF

The Appellant, Health Department[1], by counsel, respectfully submits this Reply Brief pursuant to Rule 5:29 of the *Rules of the Supreme Court of Virginia*.

I. ARGUMENT

A. *Expressio Unius Est Exclusio Alterius* Prohibits the Application of the "Twelve-Month Rule" to Nursing Home Beds.

NRV argues that *expressio unius est exclusio alterius* does not apply to Virginia Code § 32.1-102.1. In taking this position, NRV asserts that the Court of Appeals erred when it held that *expressio unius est exclusio alterius* applied. *NRV Real Estate, LLC v. Va. Dep't of Health,* 51 Va. App. 514, 525, 659 S.E.2d 527, 533 (2008). While the Court of Appeals correctly concluded that *expressio unius est exclusio alterius* applied, it erred when it determined that the Health Department had administrative powers to expand the "twelve-month rule." To support its argument that *expressio unius est exclusio alterius* does not apply in this case, NRV relies on *Pine & Scott v. Commonwealth*, 121 Va. 812, 821-822, 93 S.E. 652, 654 (1917).

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[1] The defined terms used in the Health Department's Opening Brief are adopted and used herein.

NRV's reliance is misplaced. In *Pine & Scott* this Court interpreted the Constitution. Discussing the application of the rule of statutory construction, *expressio unius est exclusio alterius* to the construction of the Virginia Constitution, this Court stated:

> Only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned, in view of the known policy of the state, will be considered as prohibiting the powers of the legislature. The principle of the maxim should be applied with great caution to those provisions of the Constitution which relate to the legislative department, and the exclusion should not be made unless it appears to be a plainly necessary result of the language used.

Id. In *Pine & Scott*, this Court addressed "whether an act of the legislature is forbidden by the State Constitution..." and enunciated the *expressio unius est exclusio alterius* rule as the "granting of certain powers is the exclusion of all others." *Id.* This Court determined that *expressio unius est exclusio alterius* was inapplicable to the interpretation of the Constitution because "...the Constitution is not a grant of power, but a restriction upon an otherwise practically unlimited power...that the Constitution is to be looked to, not to ascertain whether a power has been conferred, but whether it has been taken away...." *Id.* Unlike the legislature, the Health Department's authority is solely derived from statute. The legislative enactments provide the authority for the Health Department's actions, while the Constitution serves to limit the legislature's authority.

Moreover, this Court specifically noted that "[t]he application of arbitrary rules of construction will be resorted to with hesitation, especially when it would bring about results contrary to the declared public policy of the State...." *Id.* at 821. The declared public policy of the Commonwealth in *Pine & Scott* was the statutory scheme enacted by the General Assembly relating to prohibition and the legislative authority over intoxicating liquors. *Id.* This Court considered the applicability of *expressio unius est exclusio alterius* in its analysis of the Constitution in light of the Commonwealth's public policy which was expressed in statute. Here, the Commonwealth's public policy relating to the "twelve-month rule" has been clearly defined by the legislature in statute, Virginia Code § 32.1-102.1.

Contrary to NRV's argument, it is well established that *expressio unius est exclusio alterius* applies to the construction of statutes such as Virginia Code § 32.1-102.1. *See GEICO v. Hall,* 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E. 2d 886, 887 (1992) (when the "mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute."); *Belton v. Crudup*, 273 Va. 368, 373, 641 S.E.2d 74, 77 (2007) (when the General Assembly enumerates specific exceptions to a rule, no others can exist); *Jackson v. Fid. & Deposit Co.*, 269 Va. 303,

313, 608 S.E.2d 901, 906 (2005) ("because the statute specifically lists exceptions...those exceptions are the only ones allowed by law."). Thus, the proper application of *expressio unius est exclusio alterius* in this case prohibits the application of the "twelve-month rule" to nursing home beds.

B. The Health Department Lacks Authority to Expand the "Twelve-Month Rule" to Include Nursing Home Beds.

NRV concedes that nursing home services are not included in the list of services subject to the "twelve-month" rule found in Virginia Code § 32.1-102.1. *See* NRV Brief at pg. 10. Notwithstanding the plain language of Virginia Code § 32.1-102.1, NRV argues that the Health Department has the administrative discretion to expand the "twelve-month" rule to include nursing home services. NRV relies on *NRV Real Estate, LLC* and *Bader v. Norfolk Redev. & Housing Auth.*, 10 Va. App. 697, 702, 396 S.E.2d 144 (1990), which held that an administrative agency "has incidental powers which are reasonably implied as a necessary incident to its expressly granted powers for accomplishing [its] purposes," to support its position.

While the Health Department has incidental powers, those powers must be "reasonably implied" from the statutory authority it is granted. A plain reading of Virginia Code § 32.1-102.1 dispels NRV's argument that the Health Department could reasonably imply that it had the authority to

expand the "twelve-month rule" to include nursing home beds. Virginia Code § 32.1-102.1(5) defines a "project" to include:

> **Introduction into an existing medical care facility of any new** cardiac catheterization, computed tomographic (CT) scanning, gamma knife surgery, lithotripsy, magnetic resonance imaging (MRI), magnetic source imaging (MSI), medical rehabilitation, neonatal special care, obstetrical, open heart surgery, positron emission tomographic (PET) scanning, psychiatric, organ or tissue transplant service, radiation therapy, nuclear medicine imaging, except for the purpose of nuclear cardiac imaging, substance abuse treatment, or such other specialty clinical services as may be designated by the Board by regulation, **which the facility has never provided or has not provided in the previous 12 months**.

(Emphasis added). The General Assembly expressly limited any administrative discretion when it provided that the "twelve-month rule" can only be expanded to include nursing home beds if the Board of Health promulgates regulations designating "nursing home beds" as "specialty clinical services" for which the "twelve-month rule" applies. *See* Virginia Code § 32.1-102.1. It is undisputed that the Board of Health has chosen not to expand the "twelve-month rule" through regulation. The General Assembly did not delegate such discretion to the Health Department. As such, it cannot be "reasonably implied" from the plain language of Virginia Code § 32.1-102.1 that the Health Department has administrative discretion to expand the "twelve-month rule" to include nursing home beds.

Moreover, NRV's argument that an interpretive rule has been created fails. Interpretive rules, by nature, are guidelines "...subject to less deference and weight on review than a 'legislative rule.' *Bader* at 702. In *Bader*, the Court of Appeals considered what weight to give a written hearing determination chart used by the agency as an "'interpretive rule,' without the binding force of law." The Court relied on *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), for the proposition:

> [interpretive rules] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors to which give it power to persuade, if lacking power to control.

Id. (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). NRV is attempting to equate formal guidance documents used in prior cases with what it considers to be the unwritten policy of the Health Department. However, assuming *arguendo* that an interpretive rule exists, it has no persuasive authority in this case because as discussed below, the Health Department's rejection of NRV's application was consistent with prior pronouncements, validly reasoned and thoroughly considered.

C. Certification for Long-Term Care Reimbursement Permits Hospitals to Provide Nursing Home Services in Hospital Beds.

NRV mischaracterizes the Health Department's position regarding the types of beds at issue in this case. The Health Department's position is clear. If a nursing home is issued a COPN for nursing home beds and subsequently licenses those nursing home beds, then the beds are nursing home beds regardless of whether they are certified for long-term care reimbursement from Medicare or Medicaid. However, if a hospital receives a COPN for hospital beds and subsequently licenses those beds as hospital beds, the only way they can be treated as nursing home beds are if those beds have been certified for long-term care reimbursement by Medicare and Medicaid. Absent certification, a hospital bed cannot in any way be treated as a nursing home bed. The fact that nursing home beds are not required to be Medicaid certified is irrelevant.

Giles Memorial received a COPN for hospital beds. It subsequently obtained certification from DMAS to receive long-term care reimbursement for 21 hospital beds. Once certified for long-term care reimbursement, Giles Memorial was permitted to provide nursing facility services in its 21 hospital beds, even though it never had a COPN to operate 21 nursing home beds. However, the 21 beds at issue remained licensed as hospital beds. *See* 12 VAC 5-371-30(F). When Giles Memorial decertified the

beds and ceased providing nursing facility services on September 24, 2004, it was left with a COPN for 21 hospital beds that remained licensed as hospital beds. *A-8.* Giles Memorial subsequently surrendered its license to operate these hospital beds, thereby reducing the inventory of hospital beds by 21. Thus, the 21 beds NRV seeks to relocate from Giles Memorial no longer existed in any capacity. In other words, Giles Memorial did not have nursing home beds to be relocated to NRV. The Health Department explained this rationale in its August 11, 2005, letter:

> [a]lthough your application seems to imply that Giles Memorial had 21 nursing home beds available to be relocated, Giles Memorial does not now have such beds. **Giles Memorial has never had nursing home beds, per se, but it did have 21 hospital beds certified for Medicaid nursing facility ("NF") reimbursement until September 24, 2004, on which date those NF beds were de-certified pursuant to the hospital's request. Since September 24, 2004, Giles Memorial has not had any beds that qualify as nursing home beds within the meaning of the statute governing the [COPN] program. Since January 1, 2005, Giles Memorial has been licensed for a total of 25 beds**, which it identifies as 22 medical/surgical beds and three intensive care unit beds. **Therefore, Giles Memorial does not have "nursing home" beds that could be relocated pursuant to a [COPN]**....Accordingly, execution of the proposed project would result in an addition of nursing home beds in PD 4.

A-156 (Emphasis added). Once the hospital beds were de-certified, they could not be considered nursing home beds. Once the beds were de-licensed, they ceased to exist. Thus, no nursing home beds were available

for NRV to relocate. The Health Department could not accept NRV's application for review because Virginia Code § 32.1-102.3:2.A explicitly prohibited the Health Department from doing so:

> [T]he Commissioner of Health shall only approve, authorize or accept applications for the issuance of any [COPN] pursuant to this article for any project which would result in an increase in the number of beds in a planning district in which nursing facility or extended care services are provided when such applications are filed in response to Requests For Applications (RFAs).

It is undisputed that no RFA had been issued for nursing home beds. Because no RFA has been issued, the plain and unambiguous language of Virginia Code § 32.1-102.3:2.A prohibited the Health Department from accepting NRV's application.

D. The Issue Before This Court Is Whether the "Twelve-Month Rule" Applies to Nursing Home Beds.

Contrary to NRV's argument, the critical question is not the duration of a COPN, but whether the "twelve-month rule" applies to nursing home beds. As discussed *supra*, it is clear that the "twelve-month rule" does not apply to nursing home beds. This Court need not address NRV's argument regarding the duration of a COPN to resolve the Assignments of Error and Questions Presented by the Health Department. *See City of Fairfax v. Shanklin*, 205 Va. 227, 229-30, 135 S.E.2d 773, 775-76 (1964) ("...the

courts are not constituted...to render advisory opinions, to decide moot questions or to answer inquiries which are merely speculative.").

However, if this Court determines that the duration of a COPN is at issue, the Health Department has consistently interpreted its laws tying the duration of certain COPNs to licensure. In *Albermarle Health Investors*, the Health Department explained:

> ...the nursing home beds now at Jefferson Park will be de-licensed effective July 19, 2001, and will be removed from the inventory of authorized nursing home beds. However, if a COPN is issued for some relocation and re-use of these beds prior to July 19, 2001, the beds will remain part of the authorized inventory of nursing home beds, subject to completion of the COPN-approved projects for their use.

A-163. This interpretation is consistent with the Health Department's position in the present case. Here, after discussing the decertification of Giles Memorial's Hospital Beds, the Health Department advised NRV that the beds were de-licensed:

> Since January 1, 2005, Giles Memorial has been licensed for a total of 25 beds....Therefore, Giles Memorial does not have 'nursing home' beds that could be relocated pursuant to a [COPN] that could be issued no sooner than approximately December 1, 2005. Accordingly, execution of the proposed project would result in an addition of nursing home beds in PD 4.

A-156. NRV argues that the duration of a COPN cannot be tied to its licensure status because services such as "computed tomography and

magnetic resonance imaging, may be performed in facilities that do not even require licensure." NRV Brief at 31. Unlike nursing home or hospital beds, unlicensed services such as computed tomography and magnetic resonance imaging services are subject to the "twelve-month rule." *See* Virginia Code § 32.1-102.1. Thus, providers of those services are statutorily permitted to re-start those services without acquiring a new COPN if they do so within twelve months of ceasing to provide services.

E. The Health Department Acted Consistently With Its Administrative Precedent.

NRV mistakenly asserts that the Health Department's rejection of NRV's COPN application is a departure from its administrative precedent. There are two types of administrative precedent that NRV points to. First, NRV points to cases in which nursing homes sought to relocate nursing home beds. As discussed *supra*, long-term care certification was not an issue in those cases because the nursing homes received COPNs for, and licensed the beds as, nursing home beds. Thus, the beds being relocated were nursing home beds for which they had a COPN. Moreover, they were licensed as nursing home beds and, therefore, were in existence at the time the COPN applications were accepted for review and approved. *See Albermarle Health Investors, LLC, A-163* ("...the nursing home beds now at Jefferson Park will be de-licensed effective July 19, 2001, and will be

removed from the inventory of authorized nursing home beds."); *Lee Nursing and Rehabilitation Center, A-191, A-189* ("[t]he proposed projects involve a reasonable plan to relocate and replace existing nursing home beds..." and a COPN needed to be awarded while the nursing home beds were in existence or they "...would otherwise disappear from the approved inventory....); *Montgomery Health Investors, A-235* (Upon approval of the COPN application, Meadowbrook Nursing Center would "relinquish[ ] the ninety beds..." that would be relocated to Montgomery Health Investors.).

The second type of administrative precedent that NRV relies include hospitals that received a COPN for hospital beds and received certification for those beds for long-term care reimbursement, but remain licensed as a hospital pursuant to 12 VAC 5-371-30(F). These cases are readily distinguishable from the present case because the beds at issue remained certified for long-term care when the COPN applications were accepted for review and approved. *See Lexington Health Investors, LLC, A-233-34* ("There is an evident need to maintain the nursing home capacity represented by the 50 beds proposed to be relocated from Stonewall Jackson Hospital" and the State Health Commissioner was only willing to authorize 50 nursing home beds for Rockbridge Nursing and Rehabilitation Center if the hospital "...applied for and been granted a new hospital

license that reflects a decrease in its physical bed capacity of fifty beds...."); *Woodstock Health Investors, LLC, A-232* (the award of existing beds providing nursing facility services from Shenandoah Memorial Hospital would only be approved if the beds at the hospital were "...closed and de-licensed in conjunction with this project.")[2].

The beds at issue in *Lexington Health Investors, LLC* and *Woodstock Health Investors, LLC* were licensed hospital beds certified for long-term care reimbursement at the time the COPN applications were accepted for review and approved. A simple review of Virginia law clarifies why the decertification and de-licensure of beds at Giles Memorial is a critical distinction that prohibits the Health Department from accepting NRV's application. Virginia Code § 32.1-102.1 defines "project" to include the "[i]ntroduction into an existing medical care facility of any nursing home service...regardless of the type of medical care facility in which those

[2] NRV also relies on *West Piedmont Health Investors, LLC*, an administrative proceeding not part of the record on appeal or the Appendix before this Court. To the extent that this Court considers this extra record administrative matter, the Health Department notes that West Piedmont was attempting to "relocate 25 beds from R.J. Reynolds-Patrick County Memorial Hospital..." and that "[a]lthough licensed as hospital beds, these beds are certified (under Medicaid and Medicare) for the provision of nursing facility and skilled nursing facility services." *See* Page 4 of 29. Thus, the beds, like those *Lexington Health Investors, LLC* and *Woodstock Health Investors, LLC,* were licensed hospital beds and certified for long-term care reimbursement at the time the COPN application was accepted for review and approved.

services are provided." Virginia Code § 32.1-102.1 defines "medical care facility" to include "nursing homes." Virginia Code § 32.1-123 defines a "nursing home" to be:

> **any facility or any identifiable component of any facility licensed pursuant to this article in which the primary function is the provision, on a continuing basis, of nursing services** and health-related services for the treatment and inpatient care of two or more nonrelated individuals, including facilities known by varying nomenclature or designation such as convalescent homes, skilled nursing facilities or skilled care facilities, intermediate care facilities, extended care facilities and nursing or nursing care facilities.

(Emphasis added). As such, a hospital that maintains a unit of hospital beds certified for long-term care reimbursement qualifies as a nursing home because it maintains an "identifiable component" of its licensed hospital facility for the "provision...of nursing services." The Health Department was permitted to accept and approve the COPN applications in *Lexington Health Investors, LLC* and *Woodstock Health Investors, LLC* because those facilities were providing nursing facility services. Thus, the RFA prohibition was inapplicable because it only applies to projects resulting in "an increase in the number of beds in a planning district in which nursing facility or extended care services are provided." *See* Virginia Code § 32.1-102.3:2. While the beds at *Lexington Health Investors, LLC* and *Woodstock Health Investors, LLC,* were licensed hospital beds,

because they were also certified for long-term care reimbursement at the time the COPN application was accepted for review and approved, they were considered to be providing nursing facility services. Because those COPN applications to relocate the beds would not increase the number of beds providing nursing facility services, the RFA prohibition was not triggered.

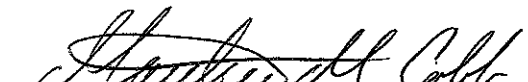
Once Giles Memorial decertified and de-licensed its hospital beds, it could no longer meet the definition of a "nursing home" because it no longer maintained a licensed component of its facility providing nursing services. Therefore, NRV was seeking to add nursing home beds to the planning district which Virginia Code § 32.1-102.3:2 only permits in response to an RFA.

II. CONCLUSION

For the reasons stated above and in the Health Department's Opening Brief, the judgment of the Court of Appeals should be REVERSED, and the Health Department's refusal to accept NRV's COPN application should be upheld.

Respectfully submitted,

VIRGINIA DEPARTMENT OF HEALTH

By: 
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RULE 5:26(D) CERTIFICATE

Pursuant to Rule 5:26(d), I certify that on this 30th day of March, 2009, an original and twelve copies of the Appellant's Reply Brief have been filed in the office of the clerk of the Supreme Court of Virginia, an electronic copy has been delivered to the clerk of the Supreme Court of

Virginia, and three copies have been mailed by first class, postage prepaid, U.S. Mail to counsel listed below:

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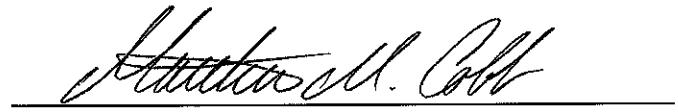

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