IN THE

SUPREME COURT OF VIRGINIA

Record No. 081174

VIRGINIA DEPARTMENT OF HEALTH,

Appellant,

v.

NRV REAL ESTATE, LLC,

Appellee.

OPENING BRIEF OF THE VIRGINIA DEPARTMENT OF HEALTH

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

APPELLANT'S OPENING BRIEF

The Appellant, Virginia Department of Health ("Health Department"), by counsel, respectfully submits this Opening Brief pursuant to Rule 5:27 of the Rules of the Supreme Court of Virginia. For the reasons set forth below, the judgment of the Court of Appeals should be reversed.

I. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

A. Nature of the Case

This case arises under the Virginia Medical Care Facilities COPN Law, Virginia Code § 32.1-102.1 *et seq.* (the "COPN Law"). Virginia Code § 32.1-102.3:2 only permits the Health Department to accept Certificate of Public Need ("COPN") applications for increases in nursing home beds in response to Requests for Applications ("RFA"). For the first time, a Virginia court has interpreted the so-called "twelve-month rule" found in Virginia Code § 32.1-102.1. The "twelve-month rule" provides that a "project" includes a list of specific services which a facility has not provided in the previous twelve months. Contrary to this Court's well established rules of statutory construction, the Court of Appeals interpreted the "twelve-month rule" to include nursing home beds, even though such beds are not enumerated in the "twelve-month rule." Moreover, hospital and nursing home beds are

defined as "project[s]" under separate provisions in the definition of "project."

In addition, the Court of Appeals erroneously concluded that the Health Department's refusal to accept the Appellee's, NRV Real Estate, LLC ("NRV"), COPN application to relocate hospital beds from Carilion Giles Memorial Hospital ("Giles Memorial") to its nursing home facility was arbitrary and capricious. In reaching its conclusion, the Court of Appeals significantly altered the established jurisprudence of this Court and incorrectly applied well-settled rules of statutory construction. Moreover, the Court of Appeals erred in its application of *Courtesy Motors, Inc. v. Ford Motor Co.*, 9 Va. App. 102, 384 S.E.2d 118 (1989). The remedy imposed by the Court of Appeals is also inconsistent with the requirements of Virginia Code § 32.1-102.6.

B. Material Proceedings Below

The Health Department refused to accept for review NRV's application to relocate 21 hospital beds from Giles Memorial to its nursing home facility, which would have added nursing home beds to the planning district. The Health Department issued letters dated August 11 and September 12, 2005, informing NRV that the COPN laws prohibited the Health Department from

accepting its COPN application for review. *A-155-156, A-157-158.*[1] NRV filed its Notice of Appeal on October 11, 2005, and filed its Petition for Appeal with the Circuit Court of Roanoke County.[2] *A-22-25.* The Circuit Court entered an Order dismissing NRV's Petition for Appeal on March 20, 2007. *A-149-153.* The Circuit Court correctly concluded that "no authority exists for the Health Department to accept NRV's COPN application." *A-151.* Citing the statutory maxim of *expressio unius est eclusio alterius*, the Circuit Court held that "[b]asic laws of statutory construction support the Health Department's position" and "because § 32.1-102.1 is silent with respect to the applicability of a 12-month rule to nursing home beds, the General Assembly did not intend for nursing home beds to be subject to the 12-month rule." *A-150.*

NRV appealed the Circuit Court's decision to the Court of Appeals, which reversed the Circuit Court on April 15, 2008. *A-131-147.* The Health Department filed a Petition for Rehearing *En Banc* on April 29, 2008, which was denied on May 22, 2008. *A-148.* On June 20, 2008, the Health Department timely filed its Notice of Appeal to this Court, pursuant to Rule

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[1] References to "A-__" refer to the Appendix filed with this Court.

[2] The appeal was heard below by the Honorable William N. Alexander, II, Judge of the Circuit Court of Franklin County, sitting by designation pursuant to Virginia Code § 32.1-102.9. *A-154.*

5:14(a). On January 7, 2009, this Court granted the Health Department's Petition for Appeal.

II. STATEMENT OF JURISDICTION[3]

This Court has jurisdiction because the Court of Appeals' decision "involves...matters of significant precedential value." Virginia Code § 17.1-410(B), § 17.1-411.[4] This is the first time a Virginia court has interpreted and applied the "twelve-month rule" found in the definition of "project" in Virginia Code § 32.1-102.1. The Court of Appeals' decision will dramatically impact the Health Department's ability to implement the COPN program in the manner prescribed by the General Assembly. The Court of Appeals' decision permits nursing homes to circumvent the normal COPN process to obtain additional beds in direct contravention to the mandates of the General Assembly.

In rendering its decision, the Court of Appeals significantly altered the legal principle *expressio unius est exclusio alterius.* The Court of Appeals

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[3] A Statement of Jurisdiction is included in the Health Department's Opening Brief because Rule 5:27 requires that "[t]he form and contents...shall conform in all respects to the requirements of the petition for appeal set forth in Rule 5:17(c)" which requires a Statement of Jurisdiction.

[4] *See, e.g. Bottoms v. Bottoms*, 249 Va. 410, 457 S.E.2d 102, 104 (1995) (appeal granted where applying settled law to novel facts had significant precedential value); *Board of Supervisors of King & Queen County v. King Land Corp.*, 238 Va. 97, 380 S.E.2d 895 (1989) (appeal granted where propriety of issuance of permit had significant precedential value).

misapplied well-settled decisions of this Court that establish basic rules of statutory construction and created a new rule of statutory construction in their stead.

Finally, the Court of Appeals' decision modifies the standard of review in Administrative Process Act ("APA") appeals. It is well-settled that "judicial interference is permissible only for relief against the arbitrary or capricious action that constitutes a clear abuse of delegated discretion." *Johnston-Willis, Ltd. v. Kenley,* 231, 243, 369 S.E.2d 1, 8 (1988) (quoting *Va. Alcoholic Beverage Control Comm'n v. York St. Inn, Inc.*, 220 Va. 310, 315, 257 S.E.2d 851, 855 (1979)). The Court of Appeals decision effectively replaces this standard of review with a new standard permitting a court to reverse a case decision when it determines an agency acted arbitrarily, regardless of whether the General Assembly has delegated the agency any discretion. This Court must reverse the Court of Appeals decision.

III. STATEMENT OF FACTS

The General Assembly established the "twelve-month rule" in the definition of "project" in Virginia Code § 32.1-102.1(5) providing:

> 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.) Thus, the "twelve-month rule" defines "project" as a specific list of health care services that a medical care facility has never provided or has not provided within twelve months. If the medical care facility has provided one of the specified services within the previous twelve months, then that service does not constitute a "project" and the facility would not be required to obtain a new COPN. Nursing home and hospital beds are defined as "projects" in different subparagraphs of Virginia Code § 32.1.102.1, which do not include "twelve-month rule" language.

On August 1, 2005, NRV attempted to file a COPN application to add 21 nursing home beds to its Radford Nursing facility. *A-155.* NRV sought to add the 21 nursing home beds by relocating 21 licensed hospital beds. The hospital beds NRV sought to relocate had previously been certified for Medicaid nursing facility reimbursement by the Department of Medical Assistance Services ("DMAS"). *A-156.* On September 24, 2004, the Medicaid nursing facility reimbursement beds operated by Giles Memorial were de-certified pursuant to the hospital's request. *A-28.* Once the

hospital beds were de-certified for Medicaid nursing facility reimbursement, the beds could no longer be considered, if they ever could be, nursing home beds. Giles Memorial subsequently de-licensed the 21 hospital beds, reducing its total complement of hospital beds to 25. *A-156.* Therefore, the 21 nursing home beds NRV sought to transfer in its August 1, 2005, application did not exist. By letter dated August 11, 2005, the Health Department explained to NRV that:

> [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.) The Health Department responded to NRV's application on September 12, 2005 noting that "we cannot accept the above-cited application for review, because the proposed project would result in an impermissible increase in the supply of nursing home beds." *A-*

157. The Health Department also stated that "[i]nasmuch as there is no current and no prospective request for applications ("RFA") seeking applications to develop additional nursing home beds in PD 4, we cannot accept your application." *A-157.*

NRV appealed the Health Department's letters to the Circuit Court which affirmed the Health Department's action. *A-149-153.* The Circuit Court correctly interpreted the "twelve-month rule." The Court properly applied the principle *expressio unius est exclusio alterius* and this Court's well-established rules of statutory construction when it determined that the "twelve-month rule" does not apply to nursing home beds and that the Health Department was precluded by law from accepting NRV's COPN application. *A-150-151.* NRV appealed and the Court of Appeals reversed the Circuit Court. *A-131-147.* This Court subsequently granted the Health Department's Petition for Appeal on January 7, 2009.

IV. ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in concluding that the Health Department had administrative discretion to apply the twelve-month rule to nursing home beds.

2. The Court of Appeals erred by concluding that the legal principle of *expressio unius est exclusion alterius* did not preclude the expansion of the twelve-month rule to include nursing home beds.

3. The Court of Appeals erred by incorrectly applying the standard of review when it determined that the Health Department's action was arbitrary and capricious and constituted an abuse of delegated discretion when the General Assembly had not delegated discretion to the Health Department.

4. The Court of Appeals erred in its application of *Courtesy Motors, Inc. v. Ford Motor Co.*, 9 Va. App. 102, 384 S.E. 2d 118 (1989), when it determined that the Health Department's action was a departure from and indistinguishable from prior administrative decisions and that the Health Department acted arbitrarily in disregarding its prior precedent.

5. The Court of Appeals erred when it ordered the Health Department to comply with the requirements of Virginia Code § 2.2-4020 on remand when its basic law only permits informal fact-finding conferences pursuant to Virginia Code § 2.2-4019.

V. QUESTIONS PRESENTED

1. Did the Court of Appeals incorrectly apply the legal principle of *expressio unius est exclusio alterius*? (Assignment of Error 1, 2 and 3).

2. Did the Court of Appeals incorrectly apply the standard of review? (Assignment of Error 1 and 3).

3. Did the Court of Appeals incorrectly apply the *Courtesy Motors, Inc. v. Ford Motor Co.*, 9 Va. App. 102, 384 S.E. 2d 118 (1989), test when it concluded that the Health Department's action was a departure from and indistinguishable from prior administrative precedent and that the Health Department acted arbitrarily in disregarding its prior precedent? (Assignment of Error 4).

4. Did the Court of Appeals err when it ordered the Health Department on remand to make findings "as required by [Virginia] Code § 2.2-4020"? (Assignment of Error 5).

VI. PRINCIPLES, ARGUMENT AND AUTHORITIES

NRV contends, and the Court of Appeals agreed, that the "twelve-month rule" applies to nursing home beds. *A-138, NRV Real Estate, LLC v. Va. Dep't of Health,* 51 Va. App. 514, 526, 659 S.E.2d 527, 533 (2008). This is contrary to the plain language of Virginia Code § 32.1-102.1 and § 32.1-102.3:2. Moreover, the position taken by the Court of Appeals and NRV is inconsistent with this Court's interpretation and application of the statutory maxim *expressio unius est exclusio alterius* and other well-established rules of statutory construction. In reversing the Circuit Court,

the Court of Appeals made several significant errors of law and substantially altered long-standing rules of statutory construction.

A. Standard of Review

1. COPN Laws

The COPN statutes, Virginia Code § 32.1-102.1 through § 32.1-102.13, were enacted to assure that a public need for a proposed medical care facility exists and to generally administer a comprehensive plan of medical care facility development that reflects the public's health care needs. Under this statutory framework, "[n]o person shall commence any project without first obtaining a certificate issued by the Commissioner." Virginia Code § 32.1-102.3(A).

In accordance with Virginia Code § 32.1-102.3:2, the Commissioner is prohibited from accepting applications or issuing a COPN for any increase in nursing home beds unless the applications for additional beds are filed in response to an RFA. Virginia Code § 32.1-102.3:2. An RFA may issue only if, under the applicable regulations—in this case 12 VAC 5-230-610[5]—a projected bed need is found in a particular planning district, based upon measurable statistics used as factors in an equation.

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[5] When NRV attempted to file its COPN application, the projected bed need formula was found at 12 VAC 5-360-40. On February 15, 2009, 12 VAC 5-360-40 was repealed and replaced with 12 VAC 5-230-610.

Virginia Code § 32.1-102.6 provides the administrative review process for COPN applications. Notably, once an application is accepted for review, specific statutory time frames must be followed for the review and ultimate decision. A decision must be made on the application within that timeframe or it is deemed approved. Virginia Code § 32.1-102.6(E) and (F).

2. Standards for Review

This Court has determined that when the language of a statute is plain and unambiguous, a court is bound by the plain meaning of that language. *Cummings v. Fulghum*, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001); *Earley v. Landsidle*, 257 Va. 365, 369, 514 S.E.2d 153, 155 (1999); *Ragan v. Woodcroft Vill. Apartments*, 255 Va. 322, 325, 497 S.E.2d 740, 742 (1998). A court must determine the intent of the General Assembly from the words contained in the statute, unless a literal construction of the statute would yield an absurd result. *Cummings*, 261 Va. at 77, 540 S.E.2d at 496; *Earley,* 257 Va. at 369, 514 S.E.2d at 155; *Ragan,* 255 Va. at 325-26, 497 S.E.2d at 742. With regard to an agency's decision on legal issues, the standard of review to be applied on appeal depends upon the nature of the legal question involved. *Johnston-Willis, Ltd. v. Kenley,* 231, 243, 369 S.E.2d 1, 8 (1988). Where the question "involves an interpretation which is

within the specialized competence of the agency and the agency has been entrusted with wide discretion by the General Assembly, the agency's decision is entitled to special weight in the courts." *Id.* 6 Va. App. at 244, 369 S.E.2d at 8. In such an instance, "judicial interference is permissible only for relief against the arbitrary or capricious action that constitutes a clear abuse of delegated discretion." *Id.* (quoting *Va. Alcoholic Beverage Control Comm'n v. York St. Inn, Inc.*, 220 Va. 310, 315, 257 S.E.2d 851, 855 (1979)).

B. The Court of Appeals incorrectly applied well-settled rules of statutory construction.

While citing well-settled rules of statutory construction, the Court of Appeals erred in its application of those rules to this case. This Court should reverse the Court of Appeals' decision and correct these significant errors.

1. The Court of Appeals erred by incorrectly applying the principle of *expressio unius est exclusio alterius*.

The Court of Appeals' determination that the rules of statutory construction and the plain language of the statute do not prohibit the Health Department "from applying the twelve-month rule or variations thereof to other areas by virtue of its administrative powers" is plainly wrong. *A-137, NRV Real Estate, LLC v. Va. Dep't of Health*, 51 Va. App. at 526, 659

S.E.2d at 533 (2008). The Court of Appeals recognized that the principle of *expressio unius est exclusio alterius* was applicable to this case, but erred in its application. *A-137-138, NRV Real Estate, LLC v. Va. Dep't of Health,* 51 Va. App. at 525-526, 659 S.E.2d at 533 (2008). The maxim *expressio unius est exclusio alterius* applies 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." *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)).

In *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 608 S.E.2d 901 (2005), this Court held that "the 'legislature chose, with care, the words it used when it enacted the . . . statute,'" *Id.* at 313 (quoting *Simon v. Forer,* 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003)). This Court has further stated that "[c]ourts cannot 'add language to the statute the General Assembly has not seen fit to include.'" *Id.* (quoting *Holsapple v. Commonwealth*, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003)). Applying the maxim *expressio unius est exclusio alterius* this Court has stated "because the statute specifically lists exceptions...those exceptions are the only ones allowed by law." *Jackson v. Fid. & Deposit Co.* 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005). Virginia Code § 32.1-102.1

specifically provides a list of services to which the "twelve-month rule" applies. To affirm the Court of Appeals' holding that the addition of nursing home beds to the list of services to which the "twelve-month rule" applies is permissible "...would violate the principle of *expressio unius est exclusio alterius*" *Id.* at 313, 906.

The Court of Appeals' decision undermines and significantly alters the *expressio unius est exclusio alterius* principle by creating a significant exception to this Court's long-standing interpretation of it. The Court of Appeals effectively held that while the General Assembly may identify a specific item or list of items to which a statute applies, an agency may expand the enumerated items through its administrative powers. This is inconsistent with the *expressio unius est exclusio alterius* principle. In this case, the plain language of Virginia Code § 32.1-102.1 precludes the courts and the Health Department from adding nursing home beds to the list of services for which the "twelve-month rule" applies. Thus, the proper application of *expressio unius est exclusio alterius* prohibits the addition of nursing home beds to the list of services enumerated in Virginia Code § 32.1-102.1. *See, e.g. 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); *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.

2d 886, 887 (1992) (citing *Tate v. Ogg*, 170 Va. 95, 103, 195 S.E. 496, 499 (1938)) (holding that 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.").

The definition for "project" in Virginia Code § 32.1-102.1(5) also includes the following provision:

> **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 delegated authority to the Board of Health to expand the "twelve-month rule" to include specialty clinical services not specifically enumerated, but only by regulation. It is undisputed that the Board of Health has not promulgated regulations expanding the services enumerated. In *Commonwealth v. Brown,* this Court held that "when a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall

not be done another way." 259 Va. 697, 705, 529 S.E.2d 96, 100 (2000) (citation omitted).

While it is correct that the Health Department "has incidental powers which are reasonably implied as a necessary incident to its expressly granted powers for accomplishing [its] purposes," such discretion is limited. *Bader v. Norfolk Redev. & Housing Auth.*, 10 Va. App. 697, 702, 396 S.E.2d 144 (1990). The incidental powers an agency has rests in the method or manner in which the statute is implemented. *See Jackson v. W.*, 14 Va. App. 391, 419 S.E.2d 385. In other words, the discretion afforded an agency is in the "how" an agency applies a statute, not "whether" it can apply the statute.

In this case, the General Assembly expressly limited any administrative discretion by the plain language of Virginia Code § 32.1-102.1. The "twelve-month rule" can only be expanded to include nursing home beds if the Board of Health uses its statutorily delegated discretion to designate "nursing home beds" by regulation as other "specialty clinical services" for which the "twelve-month rule" applies. *See* Virginia Code § 32.1-102.1. The Board of Health has not chosen to expand the rule.

The General Assembly did not delegate such administrative discretion to the Health Department, which is subservient to the Board of

Health. *See* Virginia Code § 32.1-16. It granted the discretion only to the Board of Health and only through the adoption of regulations. The Court of Appeals, therefore, committed error in its failure to properly apply the principle of *expressio unius est exclusio alterius* and in determining that the Health Department could expand the scope of the "twelve-month rule" through its administrative powers.[6]

2. The Court of Appeals failed to correctly apply the standard of review.

a. The Health Department's action did not constitute a clear abuse of delegated discretion.

The Court of Appeals held that the Health Department acted arbitrarily and capriciously in rejecting NRV's COPN application. *A-145, NRV Real Estate, LLC v. Va. Dep't of Health,* 51 Va. App. at 534, 659 S.E.2d at 537 (2008). It is well-established that "judicial interference is permissible only for relief against the arbitrary or capricious action that constitutes a clear abuse of delegated discretion." *Id.* (quoting *Va. Alcoholic Beverage Control Comm'n v. York St. Inn, Inc.*, 220 Va. 310, 315, 257 S.E.2d 851, 855 (1979)). *See Johnston-Willis, Ltd. v. Kenley*, 6 Va. App.

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[6] To be certain, Virginia Code § 32.1-20 vests the State Health Commissioner "with all the authority of the Board [of Health] when it is not in session...." However, no regulation has been promulgated by the Board of Health or the State Health Commissioner acting on behalf of the Board as required by the General Assembly to expand the scope of the twelve-month rule.

231, 244, 369 S.E.2d 1, 8 (1988). Thus, the Court of Appeals could only interfere with the Health Department's action if it found that the Health Department acted in such an arbitrary and capricious manner as to constitute a clear abuse of delegated discretion.

In determining whether a court may interfere with an agency's action, it must first determine whether the General Assembly delegated discretion to the agency. Only if there is a delegation of discretion may the court determine that an agency acted arbitrarily and capriciously in abusing that discretion. No abuse of delegated discretion, characterized by arbitrary or capricious action, can be found if no discretion has been delegated to the agency. The only way a court may find that the Health Department's action was arbitrary and capricious is if the court determines that § 32.1-102.1 grants the Health Department the authority to expand the "twelve-month rule."

A close reading of Virginia Code § 32.1-102.1 reveals that only the Board of Health has been delegated authority to expand the "twelve-month rule," and only by regulation. The Board has chosen not to promulgate any regulations expanding the "twelve-month rule" to include nursing home beds. The Health Department itself was not delegated any discretion by the General Assembly. Thus, the Health Department could not have

abused its "delegated discretion" in interpreting the "twelve-month rule" to prohibit NRV from relocating hospital beds to its nursing facility.

b. The Health Department's interpretation of its statutory scheme is entitled to deference.

It is also well established that the interpretation of the agency entrusted with the administration of a statute is entitled to deference by this Court. *See, e. g., Department of Taxation v. Westmoreland Coal,* 235 Va. 94, 366 S.E.2d 78 (1988); *Forst v. Rockingham,* 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); *Commonwealth v. Bluefield Sanitarium,* 216 Va. 686, 689, 222 S.E.2d 526, 528-29 (1976). This rule of statutory construction is particularly persuasive when the statute is part of a complex system administered by the agency, such as the administration of the COPN program. *See* Virginia Code §§ 32.1-102.1 through § 32.1-102.13.

The General Assembly only delegated discretion regarding the expansion of the "twelve-month rule" to the Board of Health. The General Assembly did not delegate any discretion to the Health Department. Thus, the Health Department could not have abused its "delegated discretion" in interpreting the "twelve-month rule" to prohibit NRV from relocating hospital beds to its nursing facility. The Health Department's interpretation of Virginia Code § 32.1-102.1 that it had no authority to accept NRV's application in this case because the "twelve-month rule" does not apply to

nursing home beds is therefore entitled to deference. The Court of Appeals erred by not affording the Health Department the appropriate amount of deference.

3. The Court of Appeals ignored the intent of the legislature in erroneously concluding that the Health Department had authority to apply the "twelve-month rule" to nursing homes.

The Court of Appeals' decision in this case expands the "twelve-month rule" to include nursing home beds, which is a construction far beyond that which the General Assembly intended it to include. Neither the Health Department nor the Court of Appeals has the authority to expand the "twelve-month rule" to include nursing home beds.

This Court has determined that "...the primary objective of statutory construction is to ascertain and give effect to legislative intent." *Turner v. Commonwealth,* 226 Va. 456, 459, 309 S.E.2d 337 (1983). "The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." *Commonwealth v. Zamani,* 256 Va. 391, 395, 507 S.E.2d 608 (1998). Moreover, when the language of a statute is plain and unambiguous, a court is bound by the plain meaning of that language. *Cummings,* 261 Va. at, 77, 540 S.E.2d at 496 (2001); *Earley*, 257 Va. at 369, 514 S.E.2d at 155 (1999); *Ragan*, 255 Va. at 325, 497 S.E.2d at 742 (1998). Therefore, "when a statute's language is

unambiguous, courts cannot give that language a construction that amounts to holding that the General Assembly did not mean what it actually has stated." *Volkswagen of America v. Smit*, 266 Va. 444, 587 S.E.2d 526 (2003). This Court has held:

> [w]e presume that the legislature chose, with care, the words it used when it enacted the statute. **Courts cannot add language to the statute the General Assembly has not seen fit to include. Nor are they permitted to accomplish the same result by judicial interpretation. Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning.**

Jackson v. Fid. & Deposit Co., 269 Va. 303, 608 S.E.2d 901, 906 (2005) (citations and internal quotation marks omitted) (Emphasis added).

The Court of Appeals' decision conflicts with this Court's holding in *Jackson v. Fid. & Deposit Co.* by erroneously adding nursing home beds to the list of services enumerated by the General Assembly. *See Jackson v. Fid. & Deposit Co.,* 269 Va. at 608, 608 S.E.2d at 906. The General Assembly clearly chose not to apply the provisions of the "twelve-month rule" to nursing home beds when it provided that applications for nursing home and hospital beds constituted "project[s]" under different subsections of the definition of "project" in Virginia Code § 32.1-102.1. The General Assembly could have included nursing home and hospital beds under the "twelve-month rule" had it desired, but clearly chose otherwise. In addition,

this Court has determined that "[a]mendments of the statutes or exceptions thereto can only be added by the legislature and not by the courts or the administrative officers of the State." *Richmond v. Henrico County*, 185 Va. 176, 189, 37 S.E. 2d 873, 879-880 (1946). *See Grigg et al. v. Commonwealth, 224 Va. 356, 297 S.E. 2d 799 (1982)* (holding that "[w]hen a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way.").

Citing *General Motors Corp. v. Dep't of Taxation*, 268 Va. 289, 293, 602 S.E.2d 123, 125 (2004), the Court of Appeals stated that "[i]t is well established that if the agency lacks statutory authority to apply the "twelve-month rule," any administrative action to the contrary is invalid." *A-136, NRV Real Estate, LLC v. Va. Dep't of Health,* 51 Va. App. at 524, 659 S.E.2d at 532 (2008). The General Assembly expressly limited the administrative discretion to expand the "twelve-month rule" to the Board of Health and required that such discretion only be accomplished through a properly promulgated regulation. This Court is bound by "the plain meaning of [the statutory] language." *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 544 S.E.2d 88, 90 (2001). This Court can only discern the General Assembly's intention "from the words appearing in the statute, unless a literal

construction of the statute would yield an absurd result." *Cummings v. Fulghum*, 261 Va. at 77, 540 S.E.2d at 496. The General Assembly's intent regarding the "twelve-month rule" is clear from the words it used enacting Virginia Code § 32.1-102.1. By only permitting expansion of the "twelve-month rule" through regulation, the General Assembly ensured that any expansion of that rule could only be accomplished through an open and public process. Because it lacks statutory authority to apply the "twelve-month rule," any action on the part of the Health Department to expand the rule to nursing homes would, therefore, be invalid.

Moreover, the decision's holding that the Health Department had "administrative powers" to include nursing home beds in the list of services covered by the "twelve-month rule" also violates this Court's precedent because neither the courts nor state agencies can amend or grant exceptions to statutes. Thus, the Court of Appeals' decision is inconsistent with this Court's binding precedent and this Court should reverse the Court of Appeal's decision.

The Court of Appeals held "that any cessation of service in nursing home beds necessitates a new COPN would produce an impermissibly absurd result." *A-137, NRV Real Estate, LLC v. Va. Dep't of Health,* 51 Va. App. at 526, 659 S.E.2d at 533 (2008). Contrary to the Court of Appeals'

decision and NRV's argument in opposition to the Health Department's Petition for Appeal, the duration of nursing home beds was not the issue presented to the Court of Appeals. The question presented was narrow, "[d]id the Circuit Court err in dismissing NRV's Petition for Appeal and holding that the Department was precluded from accepting NRV's Application for review based on its finding that the well-established Twelve-Month Rule does not apply to nursing home services?" for which the answer is clearly no.

Nevertheless, the cessation of nursing home service does not necessitate a new COPN. A nursing home is only required to surrender its license to operate if one of six conditions set forth in 12 VAC 5-410-130 are met. None of those conditions relate to temporary closure for cleaning or renovation. If a nursing facility is in a position where its effort to temporarily close its doors may result in surrender of its license, it can seek a variance to the licensure regulations pursuant to 12 VAC 5-371-80.

Moreover, the literal construction of Virginia Code § 32.1-102.1 cannot "yield an absurd result" because the General Assembly, in its wisdom, provided the Board of Health the ability to expand the services to which it applies through the regulatory process. NRV could have petitioned the Board of Health to promulgate regulations expanding the "twelve-month

rule" to include nursing home beds, but chose not to do so. *See* Virginia Code § 2.2-4007. The Court of Appeals' concern that the Health Department's position would produce an absurd result is, therefore, incorrect.

To the contrary, affirming the Court of Appeals' erroneous decision would cause an absurd result because under the Court of Appeal's reasoning, nursing facilities could now circumvent the RFA process to obtain nursing home beds by entering into contractual agreements with hospitals through which the hospital would seek Medicaid certification for its excess licensed hospital bed capacity. Once the hospital obtained long-term care reimbursement, it could de-certify and de-license the beds. The Health Department would then be required to process the nursing facility's COPN application to convert non-existent hospital beds to nursing home beds and relocate those beds to the nursing facility. The Court of Appeal's decision therefore permits nursing facilities to circumvent the RFA process, the very process by which public need is determined for nursing home beds, to obtain additional bed capacity.

C. The Court of Appeals decision misapplies *Courtesy Motors, Inc. v. Ford.*

The Court of Appeals held that the Health Department failed to follow its prior precedent. In so doing, the Court of Appeals misapplied *Courtesy*

Motors, Inc. v. Ford Motor Co., 9 Va. App. 102, 384 S.E.2d 118 (1989). In *Courtesy Motors*, the Court held:

> At the outset, we note that in its ordinarily accepted meaning, the doctrine of *stare decisis* is inapplicable when applied to the decisions of an administrative agency. "An agency may refuse to follow its own precedent, but it must not act arbitrarily in doing so." C. Koch, *Administrative Law & Practice* § 6.57 (1985). Thus, the issue before us is not whether this case is or is not consistent with prior decisions of the commission or strictly speaking, distinguishable from earlier cases, but whether it is a departure and indistinguishable from decisions of the commission, and, if so, whether the commission acted arbitrarily in disregarding the precedent.

Id. at 106, 384 S.E.2d at 120-21. *Courtesy Motors* established a two-part test to determine whether an agency committed reversible error. The court must determine 1) whether the Health Department's action is a departure from and indistinguishable from prior decisions; and 2) if the first prong is met, whether the Health Department acted arbitrarily when it disregarded the prior precedent. The Court of Appeals confused the Health Department's legal position and misapplied *Courtesy Motors* when it concluded that the answer to each prong of the *Courtesy Motors* test was yes.

1. The Health Department's action was not a departure from or indistinguishable from prior decisions.

Giles Memorial received a COPN for hospital beds. It subsequently obtained certification from DMAS to receive long-term care reimbursement

for 21 hospital beds and was, therefore, permitted to provide long-term care. Although the hospital beds could, as a result, be treated as nursing home beds for purpose of receiving Medicaid reimbursement, the underlying COPN was never modified and remained for hospital beds, not nursing home beds. In fact, the beds remained licensed for hospital services. *See* 12 VAC 5-371-30(F). When Giles Memorial decertified the beds, it still had a COPN for hospital beds, not nursing home beds. 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. The Health Department explained this rationale in its August 11, 2005, letter to NRV:

> [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, AR-163 (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, there were no nursing home beds 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).

As such, the only mechanism that permits the Health Department to accept NRV's application for nursing home beds is the RFA process. It is undisputed that no RFA had been issued for nursing home beds in planning district four, the location of the proposed 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.

The Health Department's letter rejecting NRV's application passes the first prong of the *Courtesy Motors* test because it is not a departure

from and is distinguishable from its prior decisions. Specifically, the Court of Appeals relies upon prior decisions of the Health Department in the cases of *Montgomery Health Investors*, *Albemarle Health Investors, Windsor Health Investors, Kings Daughters Health Investors, Woodstock Health Investors* and *Lexington Health Investors*. Each of these cases differ significantly from NRV's application.

In each of the above cases, the Health Department was responding to applications to relocate existing nursing home beds from one facility to another. As previously discussed, the beds that NRV sought to relocate were hospital beds certified for Medicaid nursing facility reimbursement and once the beds were de-certified, they could only be considered hospital beds. Once the beds were de-licensed, they ceased to exist, and therefore no nursing home beds existed for NRV to relocate. *See e.g. A-163.* The discussion in each of the administrative cases the Court of Appeals relies upon clearly demonstrates that the issuance of the COPN permitting the relocation of existing nursing home beds occurred prior to the de-licensure of the existing nursing home beds. *See e.g. Windsor Health Investors, A-220; Lexington Health Investors, A-234.* Moreover, the beds at issue in the administrative precedent cited by the Court of Appeals were applications to relocate nursing home beds, not hospital beds certified for long-term care

reimbursement. *See Albemarle Health Investors, A-163; Windsor Health Investors, A-220; Kings Daughters Health Investors, A-227; Woodstock Health Investors, A-230; Montgomery Health Investors, A-235.*

The licensure status of the beds NRV sought to relocate is significant. The beds NRV was attempting to re-locate had already been de-licensed. *A-156.* As was noted by the Circuit Court, "Carilion Giles Memorial Hospital **decertified** the 21 beds and **surrendered its license to operate the beds** to the Health Department nearly eleven months prior to NRV's application." *A-149.* (Emphasis added.) De-licensure was not an issue in the cases that the Court of Appeals relied upon because these facilities were not in a position to lose nor had they already lost their licenses to operate the nursing home beds. *See A-183-191.* In *Albemarle Health Investors* the discussion primarily surrounded the fact that the nursing home had the potential to lose its license if there were not a change in the status of the facility:

> . . . absent some change, such as proposed in this COPN application, **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 project for their use.

Id. A-163. The requested COPN was awarded on July 6, 2001, prior to the date on which the beds would have been de-licensed. NRV was aware of the de-certified and de-licensed status of Giles Memorial's beds, and yet still attempted to obtain a COPN. *See A-32.*

The DCOPN Staff Summary excerpt referenced above in *Albemarle Health Investors* leaves no room for alternate interpretation—it is invalid to grant a COPN for nursing home beds following the de-licensure of a facility's beds. Taking into account the fact that Giles Memorial had surrendered its license for 21 hospital beds "nearly 11 months prior to NRV's application," the Circuit Court correctly determined that the Health Department's rejection of NRV's application was appropriate. *A-149-153.*

These differences clearly distinguish NRV's application from the Health Department's past administrative precedent. There can be no debate that the de-certification of hospital beds from Medicaid nursing facility reimbursement and de-licensure of the hospital beds eliminating the existence of the beds suffice to distinguish the cases. Therefore, the Health Department's action in this case is not a departure from and indistinguishable from its prior precedent. Thus, the first prong of the *Courtesy Motors* test is not met.

2. Even if the Health Department departed from prior decisions, its action was not arbitrary.

Assuming *arguendo* that the Court of Appeals was correct, and the Health Department's rejection of NRV's COPN application was a departure from and indistinguishable from its prior administrative precedent, the second prong of the *Courtesy Motors* test cannot be met. This Court has clearly held that an agency's interpretation of its statutes cannot override their plain meaning. *See Volkswagen of America v. Smit*, 266 Va. at 453, 587 S.E.2d at 531, (quoting *Hampton Roads Sanitation Dist. Comm'n v. City of Chesapeake*, 218 Va. 696, 702, 240 S.E.2d 819, 823 (1978)) ("[a]n erroneous interpretation of a statute by those charged with its enforcement cannot be permitted to override [the statute's] clear meaning."). *See also Richmond v. Henrico County*, 185 Va. at 189, 37 S.E.2d at 879-880 (1946); *Finnerty v. Thornton Hall, Inc.*, 42 Va. App. 628, 634, 593 S.E.2d 568 (2004); *Bader v. Norfolk Redev. & Housing Auth.*, 10 Va. App. at 700-01, 396 S.E.2d at 143-142 (1990).

Likewise, prior Health Department administrative decisions cannot supersede the code sections they implement. If the acceptance of prior COPN applications would have been the result of an erroneous interpretation of Virginia law, the Health Department cannot be bound by such precedent. The clear and unambiguous language of Virginia Code §

32.1-102.1 and § 32.1-102.3:2.A precludes application of the so-called "twelve-month rule" to nursing homes and prohibits the Health Department from accepting NRV's application.

The Health Department is also entitled to implement a rational, reasoned change in policy interpretation and is afforded allowance to deviate rationally from prior interpretations, especially when the change in interpretation brings it in line with the law. The Health Department's denial of NRV's application brought it into compliance with the plain language of Virginia Code § 32.1-102.1. Thus, the Health Department cannot be bound to its past administrative precedent and cannot act arbitrarily in taking action consistent with its statutory authority, even if that action is contrary to its administrative precedent. *See Montana Power Co. v. Environmental Protection Agency,* 608 F.2d 334 (9th Cir. 1979).

D. The Court of Appeal's instructions for the remand to the Health Department violates its basic laws.

This Court should reverse the Court of Appeals to correct the significant errors of law discussed *supra*. However, should this Court determine that the Health Department erred by refusing to accept NRV's COPN application, it should still set aside the Court of Appeals' decision. While the Court of Appeals correctly recognized that if it found error, the proper remedy was a remand to the agency, it committed error by requiring

the Health Department to comply with Virginia Code § 2.2-4020 and "state...the findings, conclusions, reasons, or basis thereof...relevant to the basic law under which the agency is operating." *A-146.* The Health Department's basic laws specifically preclude it from complying with the requirements for a formal administrative hearing pursuant to Virginia Code § 2.2-4020. Virginia Code § 32.1-102.6(E) requires the Health Department to only hold an Informal Fact Finding Conference pursuant to Virginia Code § 2.2-4019 and establishes strict timelines that the Health Department must adhere to in completing its administrative review; otherwise, an application is deemed approved. The Health Department's basic law, therefore, precludes it from affording the process set forth in Virginia Code § 2.2-4020 for a formal administrative hearing.

The Court of Appeals erred by requiring the Health Department to conduct a formal administrative hearing in accordance with Virginia Code § 2.2-4020 rather than the Informal Fact Finding Conference required by Virginia Code § 32.1-102.6 and § 2.2-4019. Thus, if this Court affirms the Court of Appeals' decision in all other respects, it should set aside its decision and fashion a remedy that complies with the Health Department's basic law.

IV. CONCLUSION

For the reasons stated above, 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,

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RULE 5:26(D) CERTIFICATE

Pursuant to Rule 5:26(d), I certify that on this 17th day of February, 2009, an original and twelve copies of the Appellant's Opening 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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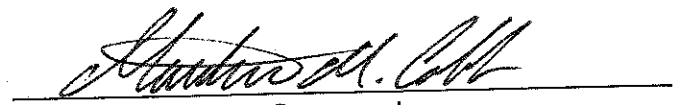

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