IN THE

Supreme Court of Virginia

RECORD NO. 081174

VIRGINIA DEPARTMENT OF HEALTH,

Appellant,

v.

NRV REAL ESTATE, LLC,

Appellee.

BRIEF OF APPELLEE

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

BRIEF OF APPELLEE

The Appellee, NRV Real Estate, LLC ("NRV"), by counsel, respectfully submits this Brief of Appellee pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia. For the reasons set forth herein, the judgment of the Court of Appeals of Virginia should be affirmed.

I. PRELIMINARY STATEMENT

This appeal presents an issue that lies at the core of Virginia administrative law: may an administrative agency, without notice or explanation, change a long-standing interpretive rule, and thereby cut off rights previously granted by the agency?

The specific question at issue in this case is fundamental to the Virginia Certificate of Public Need ("COPN") program. Once a healthcare provider has obtained COPN rights for its project, when (if ever) does an interruption in its services extinguish the provider's COPN rights? All parties affected by the COPN program require a clear answer to this question.

The COPN statute does not answer this latter question. Accordingly,

and necessarily, the Virginia Department of Health (the "Department") established an interpretive rule through a series of case decisions. The consistent application of this interpretive rule has allowed Virginia healthcare providers the predictability that is required to order their business affairs. Specifically, the Department repeatedly held that a nursing home may resume its nursing services after an interruption, without obtaining a new COPN, so long as that interruption of services was less than twelve months. This "Twelve-Month Interpretive Rule" fills a gap in the COPN statute, is grounded in practicality, and is consistent with the COPN statute. See Section IV.B., infra.

Relying on the Department's consistent interpretation, NRV filed an application seeking COPN approval to relocate twenty-one nursing home beds from a facility which had suspended operations approximately ten months earlier. In this case, however, the Department refused to apply the Twelve-Month Interpretive Rule. Instead, without notice or explanation, the Department refused to accept NRV's application. In a sudden and unexplained reversal of its consistent application of the Twelve-Month Interpretive Rule, the Department held that the COPN rights to those twenty-one nursing home beds had expired immediately upon the "decertification" of those beds from the state Medicaid program.

Consequently, the Department erroneously asserted that it would not review the NRV application. But because the Twelve-Month Interpretive Rule applied in this instance, the COPN rights to the nursing home beds continued to exist, and the Department acted arbitrarily and capriciously in refusing to consider the NRV application.

As the Court of Appeals correctly found, this case is analytically indistinguishable from the cases in which the Department applied the Twelve-Month Interpretive Rule. On prior occasions, the Department accepted (and approved) COPN applications to relocate nursing beds that had been decertified from the Medicaid program, as long as those beds had not been out of service for more than twelve months. To abandon the Twelve-Month Interpretive Rule without a reasoned explanation, the Court of Appeals held, is arbitrary and capricious. The Court of Appeals' decision is consistent with established Virginia law, and NRV respectfully requests that this Court affirm that decision

It is important to note what is not at issue in this case. NRV does not seek the award of a COPN in this litigation. Instead, NRV seeks only that the Department accept and consider NRV's COPN application. More broadly, a ruling in NRV's favor will not undermine the agency's authority. The Department will continue to possess full authority to issue

interpretations of law that best serve Virginia's patients and healthcare providers, as determined by the State Health Commissioner. The Court of Appeals simply held that the Department could not abruptly change its position on an interpretive rule of importance without providing a reasoned basis for that change. Because the Department failed to do so in this case, the Court of Appeals properly reversed the trial court's decision and remanded this matter to the Commissioner.

II. QUESTIONS PRESENTED

In accordance with Rule 5:28 of the Rules of the Supreme Court of Virginia, NRV states the following questions presented.[1]

1. Did the Court of Appeals err when it held that the Department has the authority to create a necessary interpretive rule governing the duration of nursing bed COPN rights following a suspension of operations? (Assignments of Error 1, 2, and 3)
2. Did the Court of Appeals err when it held that the Department acted arbitrarily and capriciously when it failed to provide a reasoned explanation for its departure from indistinguishable prior case

[1] NRV restates the questions presented to reflect more accurately the Assignments of Error alleged by the Department. See Va. Sup. Ct. R. 5:28(b). In doing so, NRV does not concede that the questions stated by the Department are meritorious.

decisions? (Assignment of Error 4)

3. Did the Court of Appeals err when it ordered the Department on remand to "state . . . the findings, conclusions, reasons, or basis . . . relevant to the basic law" under which the Department is operating, "as required by [Virginia] Code § 2.2-4020"? (Assignment of Error 5)

III. STATEMENT OF THE FACTS

A. Relocation of Nursing Home Beds Under Virginia COPN Law.

In relevant part, Virginia COPN law requires that the Department accept applications proposing to replace and relocate existing nursing home beds, and to determine whether a public need exists for that replacement and relocation. Va. Code §§ 32.1-102.1, -102.3. NRV proposed such a relocation in this case. Although the Department is prohibited from accepting applications to add new nursing home beds without first issuing a Request for Applications, applications to replace and relocate existing COPN-authorized nursing beds within a planning district must be accepted for review. Va. Code § 32.1-102.3:2.

B. NRV's Application for a COPN.

NRV submitted a COPN application in August, 2005, seeking approval to replace and relocate twenty-one nursing beds from Carilion Giles Memorial Hospital ("Giles Memorial") to Radford Nursing Home

("Radford"). It is undisputed that those beds had been operated by Giles Memorial as nursing facility beds and were carried within the Department's inventory of COPN-authorized nursing home beds. See NRV Real Estate, LLC v. Virginia Dep't of Health, 51 Va. App. 514, 521 n.2, 659 S.E.2d 527, 531 n.2 (2008). Approximately ten months prior to NRV submitting its COPN application to relocate Giles Memorial's nursing home beds – while Giles Memorial was still operating the nursing home beds – NRV had entered into an agreement with Giles Memorial giving NRV the contractual right to operate and relocate the nursing beds from Giles Memorial to Radford. That agreement was consistent with numerous other nursing bed relocation projects which had been accepted and approved by the Department. A-159 to -235. Shortly after entering into that agreement, on September 24, 2004, Giles Memorial voluntarily suspended operation of its nursing home beds and "decertified" the beds from the Medicaid program.

NRV filed its COPN application in reliance on the Department's previous adoption of a "Twelve-Month Interpretative Rule." The Department had, through a series of administrative case decisions, established a consistent policy and practice of requiring new COPN authorization when a nursing home service had been interrupted for longer than twelve months. See, e.g., A-159 to -182. Under this interpretive rule,

as long as nursing home beds do not remain out of service for more than twelve months, COPN authorization for those beds continues to exist. Accordingly, the Department permitted nursing home operators to move those COPN-authorized beds to new facilities through the normal COPN review process.

NRV filed its application only ten months after the suspension of operations at Giles Memorial, and thus submitted the application well within the twelve-month period established by the Department's consistent prior decisions.

C. The Department's Case Decision.

Rather than considering NRV's application, the Department refused to accept it. In a letter dated August 12, 2005, the Department took the unprecedented position that Giles Memorial's nursing home beds had ceased to exist for COPN purposes on the date the beds were decertified for Medicaid purposes, September 24, 2004. A-156. The Department did not explain the basis for its departure from the Twelve-Month Interpretive Rule for nursing home beds, or even acknowledge its prior application of the policy. A-155, -156.

Counsel for NRV responded to the Department by letter dated August 30, 2005, drawing the Department's attention to its established policy and

practice of applying the Twelve-Month Interpretive Rule. A-31 to -130. The Department, by letter dated September 12, 2005, again refused to accept NRV's application, without addressing its unexplained departure from precedent. A-157.

IV. PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

A. Standard of Review.

The Court's review of an agency's compliance with its statutory authority is a question of law requiring *de novo* review. See Alliance to Save the Mattaponi v. Commonwealth, 270 Va. 423, 442, 621 S.E.2d 78, 88 (2005). Issues of statutory interpretation fall outside an agency's specialized competence and are not entitled to deference by a reviewing court. Commonwealth v. Barker, 275 Va. 529, 536, 659 S.E.2d 502, 505 (2008). Virginia Code § 2.2-4029 requires a reviewing court to reverse an agency's error of law, including the agency's failure to comply with "statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter . . . ." Va. Code §§ 2.2-4027, -4029; see, e.g., Browning-Ferris Indus. of South Atlantic, Inc. v. Residents Involved in Saving the Env't, Inc., 254 Va. 278, 284, 492 S.E.2d 431, 434 (1997). A reviewing court must reverse the decision of an administrative agency when the agency acts arbitrarily and capriciously. See Smith v. Liberty

Nursing Home, Inc., 31 Va. App. 288, 293-294, 522 S.E.2d 890, 896 (2000); Bd. of Zoning Appeals v. Glassner Bros. Corp., 242 Va. 197, 200, 408 S.E.2d 895, 897 (1991).

B. The Court of Appeals correctly held that the Department's creation of a necessary interpretive rule lies well within the Department's authority.

1. Virginia COPN law requires an interpretive rule determining the duration of COPN rights after a healthcare facility has suspended its services.

The fundamental issue in this case is a question for which proper administration of the Virginia COPN program requires an answer: When does an interruption in COPN-authorized nursing home services result in the expiration of previously granted COPN rights? Are COPN rights lost by a day-long, year-long, or decade-long suspension of services, if at all? For certain specialized clinical services, the question is clearly answered by the COPN statute, which includes the following among a listing of "projects" that are subject to COPN approval:

> [the] [i]ntroduction 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 twelve months.

Va. Code § 32.1-102.1 (emphasis supplied). Nursing home services are not included in the list of specialty clinical services specified in Virginia Code section 32.1-102.1.

For all services of COPN-regulated providers and medical care facilities – including those of hospitals and nursing homes – that are not mentioned in Virginia Code § 32.1-102.1's provision for specialty clinical services, the statute does not identify when a new COPN is required to resume interrupted healthcare services. Simply put, for established nursing and hospital services, there is no default rule in the Virginia COPN statute that establishes when a provider must reapply for COPN authorization after suspending its services. In particular, and importantly for this case, nothing in Virginia law establishes that new COPN authorization is required to resume nursing home services if the facility suspends operations for a single day or if the facility is decertified from Medicaid.

In the absence of the Twelve-Month Interpretive Rule (or another rule imposed by the Department), COPN regulations contemplate that COPN rights continue indefinitely. 12 VAC 5-220-440(C) ("A [COPN] shall be considered for an indefinite extension by the commissioner when

satisfactory completion of a project has been demonstrated . . . .").[2] Properly seen in this light, application of the Twelve-Month Interpretive Rule to nursing homes is a rule of limitation, not of extension. The COPN statute does not provide for the termination of COPN rights upon a suspension of services. Thus if the Department was correct that it cannot apply the Twelve-Month Interpretive Rule to nursing beds, then the beds at issue still remain in the COPN inventory, available for relocation by NRV.

Because the statute does not provide a COPN termination date for a nursing facility or hospital if a provider suspends operations, the Department had to establish a rule indicating when a new COPN is required to resume those services. Hospitals and nursing facilities need to know the duration of a COPN if the healthcare provider interrupts its services. This administrative line-drawing is essential to ensure the proper implementation and administration of the COPN program. Likewise, if a COPN endures perpetually, a nursing facility might suspend operations for many years, only to resume services later. This uncertainty would undercut

[2] For existing COPN rights, the Commissioner has the authority to affirmatively revoke those rights only upon the happening of particular events, none of which is relevant here. See Va. Code § 32.1-102.4; 12 VAC 5-220-460.

the entire purpose of the Virginia COPN program, which is to provide for the reasoned, predictable delivery of healthcare services.

In light of this regulatory uncertainty, the Department repeatedly held that nursing facilities do not need to reapply to obtain COPN rights if the facility resumed – or applied to relocate – its services within twelve months of the suspension of services. This rule has the administratively beneficial result that the duration of nursing home COPNs is consistent with the duration of COPNs for specialty clinical services.

2. The Department has inherent authority to create rules of interpretation necessary to accomplish its purpose, including creation of the Twelve-Month Interpretive Rule.

As the Court of Appeals affirmed, the Department has the inherent authority to create a Twelve-Month Interpretive Rule applicable to nursing home beds. NRV Real Estate, LLC, 51 Va. at 526, 659 S.E.2d at 533. A fundamental tenet of Virginia administrative law provides that an agency, in addition to its statutory and regulatory authority to implement a regulatory program, "also has incidental powers which are reasonably implied as a necessary incident to its expressly granted powers for accomplishing the purposes" of its basic law. Bader v. Norfolk Redev. & Hous. Auth., 10 Va. App. 697, 702, 396 S.E.2d 141, 144 (1990). In general, administrative agencies are free to develop interpretative rulings, through their case

decisions, which may be relied upon in future cases. See NLRB v. Wyman-Gordon, Co., 394 U.S. 759, 765-66 (1969) ("Adjudicated cases may and do, of course, serve as a vehicle for the formulation of agency policies, which are applied and announced therein.") "While [i]t is of course true . . . that 'the doctrine of administrative interpretation will not be allowed to change the plain meaning of the statute,'" the plain meaning of the COPN law at issue is certainly not so plain and unambiguous as to require no interpretative rule at all. Commonwealth v. Appalachian Elec. Power Co., 193 Va. 37, 45, 68 S.E.2d 122, 126-127 (1951) (citing Superior Steel Corp. v. Commonwealth, 147 Va. 202, 206, 136 S.E. 666, 667 (1927)). In exercising its administrative power, an agency is not always required to proceed by published regulation, but may also choose to establish interpretive rules through its decision-making process. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 293 (1974) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."). Thus, the Department has administrative authority to create rules of decision to guide the Virginia COPN program.

Exercising its authority, the Department provided a gap-filling interpretive rule, answering the question of whether COPN rights for

nursing beds last for one day, one year, or ten years following an interruption in service. The Department, through a series of case decisions, exercised its authority by creating the Twelve-Month Interpretive Rule. Ironically, the Department's argument that it lacks authority to create a Twelve-Month Interpretive Rule for nursing homes, if taken at face value, would also mean that the Department lacks authority to create an interpretative rule that Medicaid decertification terminates nursing bed COPN rights. In essence, the Department's attack on its own administrative authority undermines the basis upon which it issued the erroneous case decision subject to this appeal.

3. The Department's application of the Twelve-Month Interpretive Rule to nursing home beds is entirely consistent with the COPN statute.

The Department's adoption of the Twelve-Month Interpretive Rule for nursing facilities is both necessary for the proper functioning of the Virginia COPN program and is entirely consistent with the COPN statute. In light of a statutory gap, the Department issued an interpretive ruling, through a series of case decisions, determining when a nursing facility was required to obtain new COPN authorization to resume an interrupted service. Because the COPN program requires an answer to this question, and the COPN statute does not address the question for services other than some

clinical specialty services, nothing in the statute bars the Department from deciding to set that period of time at twelve months. In fact, the choice of twelve months for nursing homes is administratively beneficial – there are not different COPN durations for different healthcare services. Furthermore, the choice of a twelve-month period reflects how the Department was guided by the COPN statute when deciding how long a nursing home could suspend operations before it could reopen without new COPN authorization.

The Department's position in this litigation is that the Court of Appeals incorrectly applied the principle of statutory interpretation, *expressio unius est exclusio alterius*. Opening Brief at 13-18. In particular, the Department notes that because the Virginia COPN statute applies a twelve-month rule to certain specialty clinical services – which do not include nursing home beds – the Department is thereby forbidden from applying its Twelve-Month Interpretive Rule to nursing home beds. See Virginia Code § 32.1-102.1. In essence, the Department argues: 1) The COPN statute requires a COPN for designated "specialty clinical services" that a facility has not provided in the previous twelve months; 2) nursing home beds are not a specialty clinical service; 3) the "twelve-month" clause found in the COPN statute does not apply to nursing home beds; and 4) therefore, the

Commissioner is prohibited from creating any rule whatsoever for nursing beds. Open. Br. at 13-18.

NRV does not claim, and has never claimed, that nursing home beds are a specialty clinical service or that application of the Twelve-Month Interpretive Rule amounts to an amendment of the COPN statute. The Department's argument fails to recognize that the principle of *expressio unius* is not applicable to this case. In the absence of a default rule, application of the *expressio unius* principle fails to provide an answer to the underlying question: when does the resumption of suspended nursing home services require new COPN authorization?

Although the principle of *expressio unius est exclusio alterius* has been long recognized by this Court, this Court has also long recognized the inherent limits of the maxim:

> The maxim, *expressio unius est exclusio alterius*, though often of importance and value, is not of universal application . . . . 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.

Pine & Scott v. Commonwealth, 121 Va. 812, 821-22, 93 S.E. 652, 654 (1917) (emphasis added). For those services that are not specialty clinical services, such as nursing home beds and hospital beds, do COPN rights terminate one day after suspension of operations, one week, one month,

one year, or perhaps never? Because the COPN statute does not establish a COPN expiration date for established services, application of the *expressio unius* principle to Virginia Code § 32.1-102.1 does not resolve this question. "The principle of *expressio unius* is not absolute . . . it is only one of many possible indications of meaning." Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 719 (1991) (Scalia J., dissenting).

The Department's analysis relies on the implicit assumption that because nursing home services do not appear in the list of clinical specialty services, COPN rights for nursing beds terminate immediately upon an interruption of services. But the Department has not applied this interpretation in any other situation, recognizing the absurdity of requiring new COPN authorization for brief service interruptions. The Court of Appeals observed that under this scenario, "[a]ny closure for renovation or even cleaning, however temporary, would require a facility to obtain a new COPN." NRV Real Estate, LLC, 51 Va. App. at 526, 659 S.E.2d 527 at 533. Accordingly, the Court of Appeals held that the Department's interpretation of Virginia Code § 32.1-102.1, attempting to apply the principle of *expressio unius est exclusio alterius*, "would produce an impermissibly absurd result" and must be rejected. Id.

In addition to producing an absurd result, the Department's

"*expressio unius*" argument also relies upon a body of case law that is easily distinguishable from this case. For example, in Belton v. Crudup, this Court interpreted Virginia Code § 64.1-5.1(4), which establishes a general rule requiring that a claim of succession be filed within one year of the date of the decedent's death, except in certain specified circumstances where the limitation period does not apply. 273 Va. 368, 641 S.E.2d 74 (2007). In the Belton case, as in other *expressio unius* cases, the central issue was whether the facts of the case satisfied one of the exceptions to the general rule. If not, then the general rule applied. What distinguishes this case from Belton v. Crudup, and other "*expressio unius*" cases, is that the statutory provision at issue, Virginia Code § 32.1-102.1, does not contain a general rule followed by specified exceptions. Is it the "general rule" that, once healthcare operations cease, a COPN authorization lasts for a day, a year, or indefinitely? Without a general rule to fall back upon, application of the *expressio unius* principle fails as a tool of statutory construction.

In short, the Twelve-Month Interpretive Rule for nursing homes is entirely consistent with Virginia COPN law and, in fact, reflects sensible guidance from the COPN statute. Because the Twelve-Month Rule provided that no new COPN authorization was required for the nursing

facility to resume its service, the Department was obligated to accept NRV's COPN application.

4. The General Assembly is presumed to have approved of the application of the Twelve-Month Interpretive Rule to nursing home beds.

It is a well-settled principle of statutory construction that "where the construction of a statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly, such construction is entitled to great weight with the courts." Evelyn v. Marine Res. Comm'n, 46 Va. App. 618, 634, 621 S.E.2d 130, 138 (2005) (citing Dan River Mills, Inc., v. Unemployment Comp. Comm'n, 195 Va. 997, 1002, 81 S.E.2d 620, 623 (1954)). "The legislature is presumed to be cognizant of an agency's construction of its statute and when such construction continues without alteration, it is presumed that the legislature has acquiesced thereon." Huddock v. Indus. Comm'n, 1 Va. App. 474, 478, 340 S.E.2d 168, 171 (1986).

The General Assembly has amended the COPN statute on several occasions since the Department issued the Twelve-Month Interpretive Rule case decisions cited herein. See, e.g., Chapter 664 of the 2008 Virginia Acts of Assembly (amending Va. Code § 32.1-102.1 relating to the relocation of nursing home beds). In doing so, the General Assembly did

not reverse the Department's Twelve-Month Interpretive Rule or explicitly exclude nursing home beds and services from the Rule's reach. Furthermore, the General Assembly has amended Va. Code § 32.1-102.1 by two separate acts since the Court of Appeals issued its decision on April 15, 2008. Neither act alters the Court of Appeals' decision. See Chapter 67 of the 2009 Virginia Acts of Assembly; HB1598ER of the 2009 Virginia Acts of Assembly (Passed by the House of Delegates (Feb. 25, 2009) and the Senate (Feb. 27, 2009), and awaiting action by the Governor). If the General Assembly had considered the Court of Appeals' decision to have been in error, it could have amended Va. Code § 32.1-102.1 accordingly in either of these two recent bills. Because the General Assembly is presumed to be cognizant of the Department's practical construction of the COPN statute and regulations and to have approved such construction, the Department's historically consistent application of the Twelve-Month Interpretive Rule to nursing home beds and services must be upheld. The Department should not be allowed to arbitrarily and capriciously deviate from this established administrative policy without notice and reasoned explanation.

C. The Court of Appeals correctly held that the Department arbitrarily and capriciously departed from its indistinguishable administrative precedent when it refused to apply the Twelve-Month Interpretive Rule to NRV.

Although administrative agencies are given broad authority to implement their basic law, it is a recognized principle of administrative law that an agency may not deviate from its established precedent without providing a reasoned analysis for the departure. The Court of Appeals properly applied prior precedent to this case in reaching its conclusion.

In Courtesy Motors, Inc. v. Ford Motor Co., the Court of Appeals of Virginia previously recognized this fundamental principle of administrative law: "An agency may refuse to follow its own precedent, but it must not act arbitrarily in doing so." 9 Va. App. 102, 106, 384 S.E.2d 118, 120 (1989). The decision in Courtesy Motors is entirely consistent with a long-settled body of federal administrative law. See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973) ("Whatever the [agency's] ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."). If an agency deviates from its settled course of behavior, "*the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.*" Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 456 (2d Cir. 2007), cert. granted, 128 S. Ct. 1647 (Mar. 17, 2008) (citing N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor

Relations Auth., 757 F.2d 502, 508 (2d Cir. 1985); see also *In re* Charles A. Field Delivery Service, Inc., 488 N.E.2d 1223, 1225 (N.Y. 1985) ("A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious.").

Accordingly, when an agency is alleged to have deviated from its own precedent, the court must determine whether the case "is a departure and indistinguishable from decisions of the [agency], and, if so, whether the [agency] acted arbitrarily in disregarding the precedent." Courtesy Motors, 9 Va. App. at 106, 384 S.E.2d at 121. Applying Courtesy Motors in this case, the Court of Appeals examined the Department's relevant precedent and determined that "the agency previously held a prior position directly contrary to its position in this case." 51 Va. App. at 530, 659 S.E.2d at 535.

1. In prior cases, the Department developed a policy that COPN-authorized nursing home beds are available for relocation for one year after a suspension of operations.

It should be beyond dispute that the Department altered its policy in this case, without notice or explanation. As the Court of Appeals found, in a series of prior case decisions, the Department consistently accepted COPN applications for the relocation of nursing home beds which had previously suspended operations for a period of twelve months or less. 51

Va. App. at 529, 659 S.E.2d. at 535.

For example, in 2001, the Commissioner issued a COPN to Albemarle Health Investors to relocate 120 nursing home beds from Jefferson Park Center, a "non-operational nursing home and adult care residence facility . . . owned by the University of Virginia." See Commissioner's Decision in Albemarle Health Investors, LLC, COPN No. VA-03584 (Jul. 6, 2001); A-159 to -162. In its review of the project, the Department specifically applied the Twelve-Month Interpretive Rule, stating:

> Jefferson Park is a non-operational nursing home . . . . Absent some change in the status of Jefferson Park, it will remain a licensed nursing home until July 19, 2001, one year from the date on which the [Department] was notified that nursing home patient services had ceased to be provided at Jefferson Park. . . 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.

A-163 (emphasis added). In approving the relocation of the Jefferson Park Center's non-operational nursing home beds, the Commissioner relied upon the "evident need to maintain the nursing home capacity represented by the 120 beds . . . ." A-159 (emphasis added). The Commissioner clearly held the position that COPN rights survived the suspension of operations as long as relocation and re-use occurred within one year.

The Jefferson Park case is not unique. In December 2002, the Commissioner also issued a COPN for the relocation of 30 non-operational nursing home beds from Carter Hall Nursing Center to Brian Center Health and Rehabilitation, again citing the need to "retain beds that would otherwise disappear from the approved inventory" of nursing home beds. See Commissioner's Decision in Lee Nursing and Rehabilitation Center, COPN No. VA-03711 (Dec. 11, 2002); A-183 to -191. And also in 2002, the Department accepted for review a request by Botetourt Health Investors, LLC, to relocate non-operational nursing home beds from the previously-closed Burrell Nursing Center to a new facility, noting that the application "is not the addition of nursing home beds requiring a request for applications." A-33, -192. More recently, in 2007 – i.e., after the NRV case decision – the Commissioner permitted the opening of CLC Westhampton, a 125-nursing bed nursing home which had previously been operated by Glenburnie Rehabilitation and Nursing Center. Although the 125 beds operated by CLC Westhampton had been out of operation for more than twelve months, the Commissioner, on knowledge and belief, did not require CLC Westhampton to apply for a new COPN. See Open. Br. of App. in the Ct. of App. at 15 n.5.

After reviewing the Department's prior decisions, as discussed above,

the Court of Appeals correctly found that the Department "clearly took the position nursing homes could transfer beds one year from their date of closure." NRV Real Estate, LLC, 51 Va. App. 514 at 529, 659 S.E.2d at 535.

2. The Department's attempts to distinguish the NRV case from prior case decisions are without merit.

a. Decertification from the Medicaid program does not terminate COPN rights.

The Department seeks to distinguish the previous cases applying the Twelve-Month Interpretive Rule on the basis that Giles Memorial's nursing home beds were "decertified" from the Virginia Medicaid program at the time that Giles Memorial suspended its nursing operations. Open. Br. at 28. In essence, the Department argues that the decertification of the nursing beds from the Virginia Medicaid program changed the character of the beds from nursing to hospital beds, making them incapable of being relocated as nursing beds.

This argument fails because Medicaid participation, or "certification," is independent of the COPN program. Nursing facilities are not required to participate in the voluntary Medicaid program, and some Virginia nursing facilities exist only as non-Medicaid, private-pay nursing homes. Va. Code §§ 32.1-123, 32.1-325(E). The Department cites to no legal authority,

either in its case decision or its Opening Brief, for the proposition that nursing home beds must be Medicaid certified. On occasion, nursing facilities in Virginia have lost their Medicaid certification for failure to meet quality standards. The Department has treated Medicaid certification in those instances as independent from COPN rights, and has never held that a provider reapply for COPN authorization after losing its Medicaid certification. A-235. Just as a nursing facility may decline Medicaid certification altogether and keep its COPN, a facility's decertification has not triggered a requirement that a provider obtain new COPN authorization.

The fact of the matter is that until it refused to consider NRV's application, the Department treated the twenty-one Giles Memorial nursing beds as COPN-authorized nursing beds. Indeed, the Department has historically treated nursing beds at hospitals as carrying the same set of COPN rights as other nursing facility beds. For instance, the Giles Memorial beds were carried on the Department's inventory of COPN-authorized nursing home beds. See NRV Real Estate, LLC, 51 Va. App. at 521 n.2, 659 S.E.2d at 531 n.2. Furthermore, Giles Memorial and NRV clearly intended from the outset to maintain these beds in the nursing bed COPN inventory, entering into an agreement to resume this nursing service at a new location upon issuance of a COPN for the proposed relocation. A-

31 to -33, -155.

The Court of Appeals aptly found that the Department's argument regarding decertification is rebutted by its own administrative precedent. 51 Va. App. at 529, 659 S.E.2d at 534. In February 2000, the Commissioner approved a COPN for the relocation of 90 nursing home beds from Meadowbrook Nursing Center after noting that Meadowbrook had been terminated from "participation in Medicare and Medicaid" two years earlier. See Commissioner's Decision in Montgomery Health Investors, L.L.C., COPN No. VA-03491 (Feb. 3, 2000); A-235. In fact, the Commissioner did not view Meadowbrook's loss of Medicaid certification as terminating its COPN, but instead cited the loss of Medicaid certification as a fact supporting approval of the requested COPN. A-235.

Likewise, the Department has never claimed that NRV would have been barred from relocating the Giles Memorial nursing beds prior to decertification of those beds from the Medicaid program. Indeed, in 2008 the Department issued a COPN to relocate 25 beds (certified for nursing reimbursement) from Patrick County Hospital in Stuart, Virginia to a dedicated nursing home in Chatham, Virginia.[3] In doing so, the

[3] See Commissioner's Decision in West Piedmont Health Investors, LLC, COPN No. VA-04159 (June 30, 2008). NRV requests that this Court exercise its authority to take judicial notice of the Commissioner's case

Department confirmed that for COPN purposes, these beds were nursing beds. In its recommendation to the Commissioner, the Division of Certificate of Public Need described the project as follows:

> The present application proposes to relocate 25 beds from R.J. Reynolds-Patrick County Memorial Hospital ("Patrick County Hospital") in Stuart (Patrick County), which is part of the same PD 12 as are Pittsylvania County and Chatham. . . . Although licensed as hospital beds, these beds are certified (under Medicaid and Medicare) for the provision of nursing facility and skilled nursing facility services. Such beds are treated as nursing home beds by the Virginia COPN program for purposes of carrying out the relevant provisions of the *Code of Virginia* and the *State Medical Facilities Plan*.[4]

The only material difference between that case and the one at bar was the timing of the COPN application. The nursing home in the Patrick County Hospital case filed its application before the hospital suspended operations.

Thus the only issue here is the timing of the NRV application. The administrative cases cited by NRV clearly establish that, at the time NRV

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decision referenced above. See Va. Code § 8.01-386; Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 257, 369 S.E.2d 1, 15 (1988) (noting that the Commissioner's case decisions on COPN applications "remain in the custody of the agency's public records subject to judicial notice by all courts and agencies"). A copy of the referenced case decision will be submitted to the Court under separate cover on the same date as the filing of this Brief of Appellee.

[4] See note 3, infra. The quoted language is found at page 4 of the Division of Certificate of Public Need's Staff Summary, Analysis, and Recommendation (May 19, 2008) considered *in re* Commissioner's Decision in West Piedmont Health Investors, LLC, COPN No. VA-04159 (June 30, 2008).

submitted its application, no new COPN authorization was required for a facility seeking to resume its operations until twelve months after the date of service suspension. In these cases, the Department established an interpretive rule that a new COPN is required only if the interruption of service lasted more than twelve months. Because the Medicaid and COPN programs are independent, it is irrelevant whether a suspension of services occurs through the decertification of beds from the Medicaid program or by the facility simply ceasing to operate the service. In none of the prior cases described above did the Department assert that the loss of Medicaid certification would result in the immediate loss of COPN authorization for the beds. In reversing that principle without notice or reasoned explanation, the Department acted arbitrarily and capriciously.

b. Loss of facility licensure does not terminate COPN rights.

The Department further attempts to explain its departure from precedent with a newfound argument that Giles Memorial's nursing home beds "ceased to exist" when the facility's nursing home license terminated on January 1, 2005. Open. Br. at 28. This argument is little more than a *post hoc* justification for the Department's decision, which the Court of

Appeals properly rejected.[5] It is "a simple but fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." SEC v. Chenery, 332 U.S. 194, 196 (1947). "The reviewing court should not attempt itself to make up for such deficiencies; [the court] may not supply a reasoned basis for the agency's action that the agency itself has not given." Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

The Department, in its case decision, clearly states that its reason for not accepting NRV's application was that Giles Memorial's nursing home beds had been decertified for Medicaid reimbursement on September 24, 2004. A-156. And although the Department's decision mentions the facility license for Giles' Memorial, the Department's case decision does not claim that loss of licensure, which did not occur until January 1, 2005 – more than 3 months after the decertification and suspension of operations – was the basis for its decision. A-156. Accordingly, the Department's licensure

[5] The Court of Appeals found that Medicaid certification, and not facility licensure, was the appropriate factual issue upon which to examine the Department's precedent. 51 Va. App. at 529, 659 S.E.2d at 534 ("The narrow basis for the agency's decision accordingly limits the relevant similarities from other cases.").

argument is a *post hoc* argument that was not relied upon in the Department's case decision and which should not be considered by the Court.

Even if the Court considers the Department's newfound licensure argument, that argument does not support termination of Giles Memorial's COPN authorization for nursing home beds. The COPN law is entirely independent of licensure, is enacted for a distinct purpose, and is governed by a separate body of regulations. See Va. Code § 32.1-123, *et seq.*, and 12 VAC 5-371, -410 (governing licensure of medical care facilities); Va. Code § 32.1-102.1, *et seq.*, and 12 VAC 5-220 (governing the COPN program). The Department offers no statutory or regulatory authority for the proposition that loss of licensure results in a termination of COPN rights. In fact, many of the services requiring COPN authorization, such as computed tomography and magnetic resonance imaging, may be performed in facilities that do not even require licensure. See Va. Code § 32.1-125 (requiring licensure for hospitals and nursing homes). If a nursing home has its license suspended or revoked, the licensure regulations provide for the re-licensure of that facility – without the loss of COPN rights. 12 VAC 5-371-100. Furthermore, the COPN statute establishes that COPN regulation extends to "medical care facilities" – such as a nursing home or

hospital – "whether or not [the facility is] licensed or required to be licensed." Va. Code 32.1-102.1. Clearly, COPN rights are independent from a facility's licensure status.

Accordingly, the Department's argument that loss of licensure results in the automatic termination of COPN rights, because the facility somehow "ceases to exist," is simply unsupported by any applicable law or regulation, and directly contradicted by the many instances in which a COPN may exist, whether or not the COPN-holder possesses a facility license.[6]

In conclusion, NRV's application is analytically indistinguishable from the Department's precedent. Considering the narrow basis upon which the Department made its decision – Medicaid decertification – the Court of Appeals correctly found that the Department had previously permitted relocation of nursing home beds that had been decertified for Medicaid reimbursement. In addition, the Department had repeatedly applied the

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[6] The Department also attempts to distinguish this case from its prior precedent on the basis that none of the previous cases involved the relocation of hospital beds that had been certified by Medicaid. It should be noted, however, that two of the cases relied upon by the Court of Appeals and NRV did involve the relocation of nursing home beds from hospitals. See Commissioner's Decisions in Lexington Health Investors, L.L.C., COPN No. VA-03535 (Aug. 8, 2000) (authorizing the relocation of nursing home beds operated by Stonewall Jackson Hospital) and Woodstock Health Investors, L.L.C., COPN No. VA-03466 (Oct. 13, 1999) (authorizing the relocation of nursing home beds operated by Shenandoah Memorial Hospital). A-233, -230.

Twelve-Month Interpretive Rule, permitting relocation of non-operational nursing home beds, whether or not those beds were Medicaid certified.

3. The Court of Appeals correctly applied Virginia law to conclude that the Department's failure to provide a reasoned explanation for its decision was arbitrary and capricious.

The Court of Appeals correctly held that the Department's failure to provide a reasoned explanation for its departure from the Twelve-Month Interpretive Rule constituted a sudden and unexplained deviation from its analytically indistinguishable precedent. "Agency action will be set aside as arbitrary and capricious if the agency fails to provide a reasoned explanation for its decision." Fox Television Stations, 489 F.3d at 457. Within its decision, "*the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.*" Id. at 456; see also Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) (condemning "[s]udden and unexplained change" in agency interpretation and "change that does not take account of legitimate reliance on prior interpretation"); Ramaprakash v. FAA, 346 F.3d 1121, 1125 (D.C. Cir. 2003) ("An agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making.").

Here, the Department made no effort to explain its precedent. Even

after counsel for NRV made the Department aware of its prior cases in a letter dated August 30, 2005, the Department merely affirmed its earlier position. A-31, -157; see 51 Va. App. at 533, 659 S.E.2d at 537 ("In the present case, the agency provided NRV no reasons for its departure from its prior practice of considering nursing homes licensed and capable of transferring beds for twelve months after operations ceased."). The Department's failure to explain why it had rejected the Twelve-Month Interpretive Rule constituted arbitrary and capricious action.

Contrary to the Department's assertions, application of the principles embodied in Courtesy Motors to this matter does not rob the agency of flexibility. Rather, if an agency wishes to adopt an interpretation of law differing from its historical practice when the underlying facts are analytically indistinguishable, the agency must simply offer the parties reasoned explanation and notice of a policy shift. See, e.g., Satellite Broadcasting Co., Inc. v. FCC, 824 F. 2d 1, 3-4 (D.C. Cir. 1987) (holding that "[t]he agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation."). As the Court of Appeals noted, "It is one thing for the [agency] to change its mind, but quite another to be double-minded. The former may or may not be arbitrary, depending on the circumstances.

The latter, however, almost certainly is." Boyd v. People, Inc., 43 Va. App. 82, 91, 596 S.E.2d 100, 105 (2004) (citing Smiley, 517 U.S. at 742).

In summary, because the Department gave no notice or reasoned explanation for its shift in interpretation of COPN law, and because there is no rational basis on which the Department can differentiate the NRV case from prior decisions, the Department acted arbitrarily and capriciously in failing to apply the Twelve-Month Interpretive Rule in this instance. Accordingly, the nursing home beds at issue were not new beds. Rather, NRV's application was for the relocation of existing nursing home bed inventory, and the Department erred as a matter of law in refusing to accept the application for review. Thus, the Court of Appeals' decision must be affirmed.

D. The Court of Appeals has authority under Virginia Code § 2.2-4029 to direct the Department to "state . . . the findings, conclusions, reasons, or basis . . . relevant to the basic law" under which the Department is operating, whether or not such is strictly required by Virginia Code § 2.2-4020.

Under Virginia's Administrative Process Act, a reviewing court has clear authority to "compel agency action unlawfully and arbitrarily withheld . . . ." Va. Code § 2.2-4029. When a court finds that a case decision is unlawful, as in this case, the court "shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the

court may permit or direct in accordance with law." Id. Speaking of the predecessor statute to Virginia Code § 2.2-4029, this Court has stated, "The statute is equally explicit, however, in granting to the [reviewing court] . . . the discretion to specify exactly what shall be done on remand." Virginia Bd. of Med. v. Fetta, 244 Va. 276, 280, 421 S.E.2d 410, 412 (1992) (holding that the reviewing court had authority to order the Board of Medicine to dismiss charges against the physician-appellee on remand).

The Court of Appeals held that the appropriate remedy was remand to the agency for acceptance of NRV's application and for additional explanation of its arbitrary disregard of prior policy interpretation. 51 Va. App. at 534, 659 S.E.2d at 537. Whether or not Virginia Code § 2.2-4020 strictly applies to the Department's review of COPN applications, the Court of Appeals properly exercised its discretion to order the agency to "give a sufficient resolution to its conflicting precedent to permit judicial review." Id. 51 Va. App. at 535, 659 S.E.2d at 537; see Harrison v. Ocean View Fishing Pier, LLC, 50 Va. App. 556, 651 S.E.2d 421 (2007). The Court of Appeal's reference to Virginia Code § 2.2-4020, even if error, is harmless.

V. STATEMENT OF RELIEF

NRV respectfully requests that this Honorable Court affirm the decision of the Court of Appeals of Virginia and award to NRV its

reasonable costs and attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d), I certify that on this 16th day of March, 2009, fifteen copies, along with an electronic copy, of this Brief of Appellee have been filed in the office of the clerk of the Supreme Court of Virginia at the address below:

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and that on this 16th day of March 2009, three copies of this Brief of Appellee have been hand delivered to:

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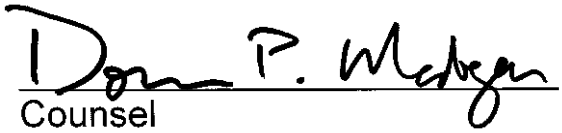

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