



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GENESIS HEALTHCARE,)	
)	
Appellant Below,)	
Appellant.)	C.A. No.: 214, 2015
)	
v.)	
)	
DELAWARE HEALTH)	Court Below: The Superior Court
RESOURCES BOARD,)	In and For New Castle County,
)	C.A. No.: N13A-11-007-MJB
Appellee Below,)	
Appellee.)	

**AMENDED ANSWERING BRIEF OF APPELLEE
DELAWARE HEALTH RESOURCES BOARD**

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

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NATURE OF THE PROCEEDINGS

The Appellant in the instant appeal is Genesis Healthcare (“Genesis”), operator of the Silver Lake Center and market competitor of the Center at Eden Hill (“Eden Hill”). The Appellee is the Delaware Health Resources Board (“Board”), which granted a Certificate of Public Review (“CPR”) to Eden Hill in the administrative proceedings at issue. Eden Hill was never named as a party. This is the Answering Brief of Appellee Delaware Health Resources Board.

Consistent with the requirements in 16 *Del. C.* § 9305, Eden Hill submitted a Notice of Intent to file an application for a CPR on December 21, 2012. B007. Eden Hill filed their application for CPR on January 25, 2013. A31. The application was deemed complete on February 27, 2013. B007. A public hearing was requested by multiple parties and was held on May 3, 2013. B026. Review Committee meetings were held on May 3, 2013, May 30, 2013, June 27, 2013, July 30, 2013 and August 22, 2013. B026. On July 25, 2013 the Board met and approved updated bed need projections. A209. These updated projections changed the bed need from the shortage of 82 beds in Kent County found in the Health Resources Management Plan (“HRMP”) to a surplus of 55 beds. A16, A209. The Review Committee recommended approval of the application. A214. On August 22, 2013 the full Board voted to approve the application; this decision was memorialized in writing on September 13, 2013. A226; B043. On September 22,

2013 Genesis Healthcare moved the Board to reconsider its decision under 16 *Del. C.* § 9305(7). B044. The Board considered and ultimately denied Genesis Healthcare’s Motion for Reconsideration at its October 24, 2013 meeting. *Id.* On November 25, 2013 Genesis appealed the Board’s decision to the Superior Court pursuant to 16 *Del. C.* 9305(8). The Superior Court affirmed the Board’s decision on March 31, 2015, finding that “the Board clearly gave consideration to the statutory factors; and the decision was, ultimately, supported by substantial evidence and free from legal error.” Op.¹ at 20.

¹ References to the opinion of the Superior Court below, C.A. No.: N13A-11-007-MJB, are designated by the letters “Op.” followed by the page number in the Opinion provided by the Appellant in their opening brief.

SUMMARY OF THE ARGUMENT

1. **Denied.** The Superior Court did not err in its interpretation of 16 *Del. C.* § 9306. Section 9306 requires the Board to consider all seven statutory criteria. The Superior Court's interpretation of the statute is correct and its holding should be affirmed.

2. **Denied.** Section 9306 of Title 16 of the Delaware Code requires the Board to consider at least seven statutory criteria. The Board did so in this case. The Board did not commit legal error in considering all seven statutory criteria. The Board did not abuse its discretion in considering all seven statutory criteria when deciding to approve Eden Hill's application. The Board's decision should be affirmed.

3. **Denied.** The Board did not rewrite or modify its own governing regulations. The Board considered all seven statutory criteria, as mandated by the General Assembly, prior to approving the application of Eden Hill. The Board did not abuse its discretion in considering all seven statutory criteria when deciding to approve Eden Hill's application. The Board's decision should be affirmed.

4. **Denied.** The Board did not violate its statutory mandate to assure that health care developments not threaten the ability of health care facilities to provide services to the medical indigent. The Board thoroughly considered the impact of

Eden Hill on the medically indigent. The Board did not abuse its discretion and its decision should be affirmed.

5. The Board's decision is supported by substantial evidence and should be affirmed. This Court's review of the Board's action is limited to whether the Board's decision is supported by substantial evidence. *29 Del. C. § 10142(d)*. Genesis fails to allege that the Board's decision was not supported by substantial evidence. The record supports that the decision was supported by substantial evidence. Therefore, the decision should be affirmed.

6. This Court should not consider statements made after the Board's decision in this matter. Genesis cites to comments made three months following the Board's decision in Eden Hill. This Court must decide this case based on the record before the Board at the time of their decision. *Tenneco Oil Co. v. Dep't of Energy*, 475 F. Supp. 299, 307 (D. Del. 1979).

7. Genesis' failure to join Eden Hill as a party deprived the Superior Court of jurisdiction over this matter. The Superior Court has held that CPR holder is an indispensable party and that failure to join the holder will result in dismissal. *Sussex Med. Investors, L.P. v. Delaware Health Res. Bd.*, 1997 WL 524065 (Del. Super. Apr. 8, 1997).

STATEMENT OF FACTS

Delaware established its Certificate of Need (the precursor to the CPR) in 1978. 61 *Del. Laws* Ch. 393 § 1 (1978). In 1987, the General Assembly transitioned the Certificate of Need-granting authority from a state agency to a Health Resources Management Council. 66 *Del. Laws* Ch. 90 § 1 (1987). The Council was comprised of 15 members and included representation from “consumer, provider, business, government and insurer representation. A majority of members shall be other than health care providers.” *Id.* In 1994, the Health Resources Management Council became the Health Resources Board and its specific membership requirements were codified. 69 *Del. Laws* Ch. 251 § 1 (1994). Since 2012, the Board has been comprised of:

[A Chair; a Vice chair;] 1 representative of the Delaware Health Care Commission; 1 representative from the Department of Health and Social Services recommended by the Secretary of the Department of Health and Social Services; 1 representative of labor; 1 representative of the health insurance industry; 1 representative with knowledge and professional experience in health care administration; 1 representative licensed to practice medicine in Delaware; 1 representative with knowledge and professional experience in long-term care administration; 1 representative of a provider group other than hospitals, nursing homes or physicians; 1 representative involved in purchasing health care coverage on behalf of State employees; 1 other representative involved in purchasing health care coverage for employers with more than 200 employees; and 4 representatives of the public-at-large.

16 *Del. C.* § 9303(b).

The Board is tasked with developing the Health Resources Management Plan, reviewing CPR applications, gathering and analyzing data, addressing healthcare issues, adopting bylaws and coordinating with other agencies as appropriate. 16 *Del. C.* § 9303(d). In the present case, the Board reviewed and approved the application of the Center at Eden Hill.

The Board adopts the facts articulated by the Superior Court found on pages three through eight of the Opinion below.

ARGUMENT

I. THE BOARD DID NOT COMMIT LEGAL ERROR OR ABUSE DISCRETION WHEN IT APPROVED THE CERTIFICATE FOR PUBLIC REVIEW AND ITS DECISION SHOULD BE AFFIRMED.

A. Question Presented: Whether the Board could, permissibly, fail to consider six of the seven statutorily mandated review criteria in 16 *Del. C.* § 9306.

B. Scope of Review: This Court has held, “[a] board’s decision is not reviewed on the merits of the case, but on ‘the record to determine whether the lower tribunal exceeded its jurisdiction, committed errors of law or proceeded irregularly.’” 29 *Del. C.* § 10142(c); *Adjile, Inc. v. City of Wilmington*, 875 A.2d 632, 635 (Del. 2005) (citing *Reise v. Bd. Of Bldg. Appeals of the City of Newark*, 746 A.2d 271, 274 (Del. 2000)). This Court has held that a “Board will be found to have abused its discretion only where its decision has exceeded the bounds of reason in view of the circumstances.” *Jain v. Delaware Bd. of Nursing*, 72 A.3d 501 (Del. 2013).

C. Merits of Argument: Genesis Health care bases its primary argument for reversal of the Superior Court’s decision on the Board’s finding that Eden Hill’s application did not meet the criteria relating to bed need. See App. Op. Br. at 3. Far from establishing the threshold prerequisite criteria to granting CPRs, the Delaware Health Resources Management Plan merely establishes “general principles intended to assist potential CPR applicants in understanding the Board’s

expectations and also to assist the Board itself in conducting CPR reviews, particularly in matters where specific guidelines are lacking.” B006. The HRMP assess “the supply of health care resources, particularly facilities and medical technologies, and the need for resources. Essential aspects of the plan...include a statement of principles to guide the allocation of resources, as well as rules and regulations which shall be formulated for use in reviewing Certificate of Public Review applications.” 16 *Del. C.* § 9303(d)(1). The Board’s finding that an application does not comport with the overall structure of the HRMP— or does not meet more than one of the seven statutory criteria—is not fatal, so long as consideration of the remaining criteria demonstrate the proposed development will “not negatively affect the quality of health care or threaten the ability of health care facilities to provide services to the medically indigent.” *See* 16 *Del. C.* § 9303(d)(2).

1. The Superior Court Properly Found That the Board Did Not Commit Legal Error.

Genesis argues that the Superior Court committed reversible error in accepting the Board’s application of its enabling statute. Genesis argues that the language in Section 9306, “as appropriate” gives the Board “discretion and flexibility in consideration of CPR applications.” App. Op. Br. at 22. However, this language does not cancel out the subsequent language that the Board must consider “at least” the seven listed criteria. 16 *Del. C.* § 9306. Genesis cites to the opinion

below as evidence to support their claim, “the statute says that these factors are considerations. The statute does not say an application must meet any or all of the factors in order to be approved.” Op. at 16. This sentiment was also shared by the Superior Court in 1997, “the statute itself does not prohibit the granting of a CON application in which the number of proposed beds exceeds the projected bed shortage.” *Arbor Health Care Co. v. Delaware Health Res. Bd. & Broadmeadow Inv., L.L.C.*, 1997 WL 817874, at *6 (Del. Super. May 20, 1997) *abrogated by Broadmeadow Inv., LLC v. Delaware Health Res. Bd.*, 56 A.3d 1057 (Del. 2012).² The enabling statute of the Board does not prohibit the granting of a CPR when projected bed need is not met. The HRMP, which must yield to the enabling statute, cannot permissibly narrow the Board’s jurisdiction.

Next, Genesis argues that the Board’s statute is flexible enough to allow the Board to weigh criteria. The Board would counter that no such language can be read into the statute and, alternatively, the statute is so flexible that no weighing is required. The General Assembly staffed the Board with experts in the field of healthcare. 16 *Del. C.* § 9303(b). In the present case, the Board examined all the factors and found that even though Eden Hill did not meet the first criteria, they

² In *Broadmeadow*, this Court held that a party aggrieved by the granting of a CPR could appeal that decision. This was the holding that abrogated *Arbor*. The *Broadmeadow* decision did not affect *Arbor*’s holding regarding the relationship between the statute and bed need.

met the other five which was enough to approve the application. The Board is trusted to carefully examine applications and approve or disapprove them based on their merits, not based on calculations.

Finally, Genesis argues that the threshold requirement in the HRMP is consistent with the legislative history and is not in direct contravention of the enabling legislation. However, relationship to the HRMP (which includes projected bed need as well as other considerations such as charity care) is only one of the seven statutorily required criteria. 16 *Del. C.* § 9306(1). Genesis fails to lay out how the Board could deny an application at the HRMP “threshold” stage and not be in violation of Section 9306’s mandate that the Board consider “at least” seven criteria. It is a practical impossibility to continue the inquiry after failing to meet a threshold. The Superior Court found that the “Plan cannot make compliance with bed needs a prerequisite to the consideration of *the other statutory factors.*” Op. at 18 (emphasis in original).

The Superior Court’s interpretation of the statute is correct and its holding should be affirmed.

2. The Board Did Not Commit Legal Error When it Considered All Seven Statutorily Mandated Review Criteria.

Genesis argues that the Board erred in “applying the rules and regulations that govern its decision making, as well as the statute that governs such decisions, to this finding.” App. Op. Br. at 27. As Genesis correctly points out, the HRMP states that “[c]onsistency with the projected bed needs derived from Guideline shall serve as a ‘threshold’ to be met in order for a Certificate of Public Review to be granted for additional nursing home beds.” A12. However, the enabling statute of the Board has no such language and, in fact, commands the HRB to consider “at least” the seven statutory criteria when deciding whether to approve an application. 16 *Del. C.* § 9306. The enabling statute also gives direction that “[d]ecisions shall reflect the importance of assuring that health care developments do not negatively affect the quality of health care or threaten the ability of health care facilities to provide services to the medically indigent.” 16 *Del. C.* § 9303(d)(2).

The Board uses the HRMP as a guideline when deliberating on CPR applications and “[t]he Board clearly has the power to promulgate rules of procedure to govern matters before it, provided, however, that those rules do not extend beyond the statutory boundaries of its authority as delineated by the General Assembly.” *Smith v. Rodel, Inc.*, 2001 WL 755929, at *2 (Del. Super. June 19, 2001) *aff’d*, 784 A.2d 1081 (Del. 2001). In fact, the HRMP includes a footnote

that states, “The Board will always be bound by the enabling statute (16 Del. C., Chapter 93) which statute will apply if inconsistent with this Plan.” B006. In the case at hand, the Board noted that Eden Hill did not meet two criteria listed in Section 9306 (relationship to the HRMP and need of the population), but found that the application met the other five criteria. The HRMP cannot mandate that the inquiry ends with bed need projections, the statute requires more; and in the instant case, the Board did what the statute required.

In their Opening Brief, Genesis incorrectly notes that the “Board’s failure to abide by the Plan’s threshold requirement stemmed from the Review Committee’s incorrect interpretation of how to ‘weigh’ the seven criteria listed in the governing statute.” App. Op. Br. at 28. Genesis does not, and cannot, cite to any guidance in the statute or the Plan on how the Review Committee should weigh the seven criteria. There is none. Section 9306 identifies the criteria to be considered; it does not highlight that one criteria is more important than another. The Board must rely on the totality of the circumstances, and their expertise as a body, in deciding whether to approve applications for CPR.

Bed need is a factor, but it cannot be the only factor, as Genesis suggests. If the Board had discontinued its inquiry into Eden Hill’s application after finding that it did not meet projected bed need, the Board would have committed legal error. Because the Board exercised the discretion provided to it by law and did so

based upon substantial evidence and in a manner free from legal error, the Board's decision should be affirmed.

3. The Board Did Not Abuse its Discretion and Did Not Rewrite Its Regulation.

Genesis argues that the Board abused its discretion by rewriting its own regulation, the HRMP. However, Genesis provides no evidence of how the Board rewrote or modified the HRMP. The Board considered all seven statutory criteria, as mandated by the General Assembly, prior to approving the application of Eden Hill. At its very core, Genesis simply disagrees with the Board's outcome and its hyper-focus on the two criteria most important to its market position is telling. Ensuring competitive advantage for an existing market participant, such as Genesis, is not a legitimate use of the Board's authority. There was no abuse of discretion. Contrary to the law of Delaware requiring deference, Genesis herein seeks a reweighing of the § 9306 factors. The law of Delaware does not support Genesis' demand.

Projected bed need is a complex calculation and Kent County presents a special case, of which this Court should be made aware. The record in this matter reflects that the Delaware Veterans Home, located in Kent County, is currently, and was in 2013, considered a private nursing home even though it is State-run and only veterans of the United States military may reside at the long-term care facility

located in Milford. Consequently, all 150 beds at Delaware Veterans Home are assigned to Kent County, skewing the number of beds available. *See* B023 (presentation by Dr. Allison Shevock given to the HRB on July 25, 2013, as noted in Board meeting minutes on B012).

The Delaware Health Resources Board is comprised of experts and individuals with experience in the healthcare field who know that bed need is not the only factor in the success of a facility and that bed need projections are inconsistent, especially in Kent County. If the Board had ended their inquiry with bed need projection, as Genesis advocates, the Board would have abused its discretion by ignoring these important facts. The Board considered the full picture and its decision should be affirmed.

4. The Board Did Not Abuse its Discretion and Did Not Fail to Consider the Effect of the Project On the Medically Indigent.

Genesis also alleges that the Board violated its statutory requirement that it not threaten the ability of health care facilities to serve the medically indigent. Section 9303(d)(2) states, “[d]ecisions shall reflect the importance of assuring that health care developments do not negatively affect the quality of health care or threaten the ability of health care facilities to provide services to the medically indigent.” Genesis argues that by granting Eden Hill a CPR, Genesis and other comparable entities will be put in financial jeopardy and may have to “close their doors.” App.

Op. Br. at 33. Genesis' concern is that Eden Hill's service model, a short-term facility, is designed to take shorter-term, higher-paying patients, leaving longer-term, lower-reimbursement-rate patients for facilities such as Genesis. Genesis states that Eden Hill "has demonstrated a resistance to committing to serving the Medicaid population" and points to Eden Hill's reluctance to agree to mandated minimum Medicaid percentages. A34. However, Eden Hill's CPR application predicted that 25% of their patient population will access Medicaid as a primary payor and 75% will access Medicaid as a secondary payor. A45. The Review Committee did consider imposing minimum Medicaid utilization but were told by Eden Hill that this would not be possible. A152. However, the Review Committee determined that the impetus behind the request was to ensure that Eden Hill did not discharge patients early to avoid Medicaid becoming the primary payor. A174. The Review Committee determined that this could be determined through the nursing home utilization data, which is provided to the State by the nursing homes and collected, analyzed and presented to the Board. A174—176.

In reviewing Eden Hill's application, the Review Committee and the Board thoroughly considered the medically indigent. What they failed to consider to Genesis' satisfaction, was the impact on Genesis' bottom line. This was not an abuse of discretion and the Board's decision should be affirmed.

II. THE BOARD'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

A. Question Presented: Whether the Delaware Health Resources Board approval of Eden Hill's Certification of Public Review Application was supported by substantial evidence.

B. Scope of Review: Under 29 *Del. C.* § 10142, this Court's review of a Board's action, "in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency." Accordingly, this Court must determine whether the Board's decision is supported by substantial evidence and free from legal error. *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981). In doing so, the Court should "defer[] to the experience and specialized competence of the Board." *deJesus v. City of Wilmington*, 2014 WL 1275362 (Del. Super. Mar. 31, 2014). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Indus. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994). Substantial evidence is more than a scintilla but less than a preponderance of the evidence. *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965). On appeal from the Board, this Court is not responsible for weighing the evidence, determining questions of credibility or making its own factual findings. *Id.* Accordingly, this Court's review is limited to determining whether

“the evidence is legally adequate to support the Board's findings.” *Robinson v. First State Cmty. Action*, 2013 WL 4017392 (Del. Super. July 30, 2013).

C. Merits of Argument: The Board submits, and Genesis does not allege otherwise, that the decision to approve Eden Hill’s application was supported by substantial evidence. The Review Committee selected to review Eden Hill’s application met five times to discuss and deliberate on the application. B026. As required by 16 *Del. C.* § 9306, the Board, following a thorough review by the Committee, considered the seven required statutory criteria. The Review Committee found that the applicant did not meet either of the first two criteria due to a current surplus of beds in Kent County (following a new calculation of bed need on July 25, 2013). B035–B037. However, the Review Committee did find that the applicant met the other five criteria, citing the Center’s emphasis on shorter stays in the facility, existing relationships with healthcare providers and the potential for “reducing the need for costly institutionalization in the future.” B037–B040. The Review Committee also imposed three conditions on the application relating to Medicaid and Medicare certification, financing and labor. B041. Following questions and comments, the Board voted to approve the application with the conditions added by the Review Committee. B042.

The Board considered all seven factors as required by 16 *Del. C.* § 9306 and approved Eden Hill’s application with conditions. This action was adequate to

support the conclusion of approval. *deJesus v. City of Wilmington*, 2014 WL 1275362 (Del. Super. Mar. 31, 2014). There is no statutory requirement for the Board to weigh criteria in any way and it is not for this Court to weigh the evidence presented to the Board. *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965). The Board, which is comprised of public members and experts in the field of healthcare and healthcare facilities, thoroughly reviewed Eden Hill's application for a CPR and approved it. This decision is supported by substantial evidence and should, therefore, be affirmed.

III. THIS COURT SHOULD NOT CONSIDER STATEMENTS MADE THREE MONTHS FOLLOWING THE DECISION AT ISSUE IN THIS APPEAL.

A. Question Presented: Should this Court consider statements and decisions made by the Board three months after granting the Certificate for Public Review at issue in this appeal?

B. Scope of Review: Appeals from administrative boards are on the record. 29 *Del. C.* § 10142. The record that forms the basis for this appeal is the record that was before the Board when it made the decision to grant a CPR to Eden Hill:

The rule that issues or arguments not raised to an administrative agency cannot be considered by a reviewing court furthers the goal of permitting agencies to apply their specialized expertise ...and also discourages litigants before an agency from reserving an issue for appeal that may broaden the scope of the reviewing court's factual inquiry or induce a remand “if all else fails,”

Tenneco Oil Co. v. Dep't of Energy, 475 F. Supp. 299, 307 (D. Del. 1979) (internal quotations omitted).

C. Merits of Argument: Genesis cites to discussions concerning “the very next Kent County applicant” twice in its brief. App. Op. Br. at. 18, 30. This application was discussed three months after the Eden Hill CPR was granted, in November, 2013. A246. Although these transcripts were included in the packet of materials submitted to the Court as the “record,” they were not the record before the Board at the time of the Board’s decision and should not be considered by this Court.

Genesis cites to Delaware Supreme Court Rule 15(a)(vi) as evidence that this Court is obligated to examine these exchanges, and the decision that resulted, and use it to inform its decision. However, that rule pertains to permissive writings and mandates, “[t]he letter shall identify the arguments to which the cases relate and provide copies of the cases to the Court and opposing counsel. The letter shall not contain any argument.” Del. Sup. Ct. R. 15(a)(vi). Genesis has contradicted the very rule it cites, by providing argument. Genesis has provided no precedent under which this Court should consider later proceedings and discussions of an administrative Board when determining whether to affirm or reverse an earlier decision.

The discussions relating to the denial of the subsequent Kent County nursing home application are outside the record in this case and should not be considered by this Court.

IV. THE SUPERIOR COURT WAS DEPRIVED OF JURISDICTION WHEN GENESIS FAILED TO JOIN EDEN HILL AS AN INDISPENSABLE PARTY TO THE PROCEEDINGS BELOW.

A. Question Presented: Was Eden Hill an indispensable party under Superior Court Rule 19 such that failure to join them as a party deprived the Superior Court of jurisdiction over the matter below and should have resulted in dismissal?

B. Scope of Review: Under Delaware Superior Court Civil Rule 19(a), “[a] person ...shall be joined as a party in the action if...the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may...as a practical matter impair or impede the person's ability to protect that interest.” If the party is deemed indispensable under Delaware Superior Court Civil Rule 19(a), but cannot be joined, the court must determine whether to proceed or dismiss the action, considering four factors: “to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.” Del Supr. Ct. Rule 19(b); *Sussex Med. Investors, L.P. v. Delaware Health Res. Bd.*, 1997 WL 524065, at *2 (Del. Super. Apr. 8, 1997).

C. Merits of Argument: Genesis' failure to join Eden Hill as a party to this action deprived the Superior Court of jurisdiction over this matter, and therefore this Court sitting as reviewer on appeal. Eden Hill was granted a Certificate of Public Review on September 13, 2013. By Eden Hill's own admission, the cost of the proposed project is \$19 million and \$22 million. B007.

An almost identical case was brought before the Superior Court in 1997. *See Sussex Med. Investors, L.P. v. Delaware Health Res. Bd.*, 1997 WL 524065 (Del. Super. Apr. 8, 1997). In that case, an unsuccessful CPR applicant challenged the HRB's decision to not grant it a CPR (Certificate of Need or "CON" at that time) as well as the Board's decision to grant a CPR to five other applicants. *Id.* at *1. Sussex Medical Investors failed to join the successful applicants in their suit against the Board and their appeal was dismissed for failure to join an indispensable party. *Id.* at *12. The Superior Court found, "[i]t appears uncontradicted that the disposition of this appeal in the absence of the successful applicants may impair or impede their interests significantly." *Id.* at *6. Because the successful applicants could not be joined at the late stage, the Superior Court applied the four factors found in Superior Court Civil Rule 19(b) and found that, "[a]fter a weighing and balancing of the competing interests and the factors set forth in Rule 19(b), this Court is persuaded that the successful applicants for the Certificates of Need are indispensable parties to an appeal of the Board's Order"

and dismissed the case. *Id.*³ The court also found that although the successful applicant knew of the suit, they had “no duty to intervene.” *Id.* at *11. Most notably, that court found:

[Sussex Medical (“SMI”)] may well not have an alternative forum if its appeal is dismissed because it failed to join the successful Certificate of Need applicants as parties. Such dismissal, however, will not offend equity and good conscience because nothing prevented SMI from naming the successful applicants in the first instance. Further, nothing prevented SMI from petitioning the Board or this Court for a stay of the Board's September 27, 1996 Order to prevent the successful applicants from proceeding in reliance on that Order.

Id.

In the present case, it is undisputable that Genesis failed to join Eden Hill as a party. The time to perfect Genesis’ appeal has long passed. However, this Court should consider the impact this case has on Eden Hill, as the successful CPR applicant. As this Court has held, “[t]he Board is a nominal party to the appeal. While jurisdiction over the Board must be asserted in order to enforce any subsequent judicial ruling, the Board has no ‘interest’ in the outcome of judicial

³ This decision was affirmed by this Court in *Hackett v. Bd. of Adjustment of City of Rehoboth Beach*, 794 A.2d 596, 599 (Del. 2002), “the Superior Court explained that subsequent decisions of this Court have implicitly recognized that the failure to name an indispensable party to an appeal from an administrative agency to the Superior Court is not an amendable defect. We approve the holding of the Superior Court in *Sussex Medical* and conclude that its thoughtful analysis controls the result in this case.”

review. The Board, like a court from which an appeal is taken, is simply another tribunal, albeit an administrative one, operating at a lower level in the adjudicatory process.” *Hackett v. Bd. of Adjustment of City of Rehoboth Beach*, 794 A.2d 596, 599 (Del. 2002). While the Board is in a position to explain, and advocate for, its deliberation processes, Eden Hill has the true interest in these proceedings and should have been made a party from the beginning.

As the Superior Court held in *Sussex Medical*, and this Court reiterated in *Hackett*, successful CPR applicants are indispensable parties to these proceedings and failure to join them deprives the Superior Court of jurisdiction over these matters. This Court recently held, “parties cannot waive issues regarding appellate jurisdiction and cannot confer jurisdiction on this Court by agreement.” *Branch Banking & Trust Co. v. Eid*, 2015 WL 1969983, at *3 (Del. May 4, 2015). This Court has also held, “[n]either counsel nor this Court can waive a jurisdictional defect so as to confer jurisdiction which does not otherwise exist.” *Dixon v. Delaware Olds, Inc.*, 396 A.2d 963, 966 (Del. 1978).

The Board is aware that, under Delaware Supreme Court Rule 8, only questions that were fairly presented to the trial court may be presented to this Court. However, the Board argues that this question is raised in the interest of justice. Additionally, this Court recently held, “for more than two centuries, the United States Supreme Court has recognized that ‘[a] litigant generally may raise a

court's lack of subject-matter jurisdiction at any time in the same civil litigation, even initially at the highest appellate instance.” *Gunn v. McKenna*, 2015 WL 2405231, at *1 (Del. May 14, 2015). As noted above, the Board’s interests will not be affected by the outcome of this case. However, the Center at Eden Hill will be. The Center is preparing to construct a multi-million dollar facility and with no stay in place, could have broken ground over a year ago if it had chosen to do so. Eden Hill should have been joined as a party to this matter in November, 2013. When it was not, the Superior Court lacked jurisdiction to affirm the Board’s decision. Jurisdictional defects cannot be waived and it is improper for this matter to continue without Eden Hill.

CONCLUSION

WHEREFORE, for the reasons stated herein, Appellee the Delaware Health Resources Board respectfully requests that this Court affirm the decision of the Superior Court or, in the alternative, dismiss the matter for want of jurisdiction.

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

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DATE: July 24, 2015