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Connecticut Supreme Court Addresses Contested Case Issue in Ruling on Certificate of Need Appeals

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On July 25, 2023, the Connecticut Supreme Court issued an opinion in *High Watch Recovery Center, Inc. v. Dept. of Public Health* that addresses the subject of the right to file an appeal of a Certificate of Need (CON) decision under the Connecticut Uniform Administrative Procedure Act (APA). *High Watch* involved a case where a party was allowed to intervene in a CON proceeding after the state CON agency had already elected to hold a discretionary hearing on the application at issue. A trial court declined to hear the appeal, and the Appellate Court affirmed that declination, on the basis that there was no "contested case" and no right to appeal the decision in Superior Court because the intervenor never expressly requested a hearing. The Supreme Court reversed this holding, concluding that intervention in opposition to the application was sufficient to render the case contested without need for the intervenor to request a hearing that was already scheduled. The ruling is significant in that it rejects a rigid application of the statutes governing CON procedures and instead focuses on the substance of the public hearing at issue in assessing whether a contested case is presented. Understanding the distinction between mandatory and discretionary hearings is an essential consideration for parties to CON proceedings to avoid foreclosing potential appellate rights.

Background of the Case

Under the statutory scheme applicable to CON proceedings, public hearings on applications can occur in one of two ways. First, under Connecticut General Statutes § 19a-639a(e), the Office of Health Strategy (OHS) must hold a *mandatory* public hearing if three or more individuals or an individual representing an entity with five or more people submit a written request that a public hearing be held not less than 30 days after the application is deemed complete.[1] Second, under § 19a-639(f)(2), OHS may hold a *discretionary* public hearing on any CON application and must provide two weeks advance notice to the applicant and to the public of such hearing. This distinction is important because of prior cases holding that the right to judicial review under the APA attaches only to *mandatory* hearings and not to *discretionary* hearings that are "gratuitously held" by an

agency.

The *High Watch* case arises from a CON Application submitted in 2017 to the Office of Health Care Access (OHCA; now the Health Systems Planning Unit within OHS) to establish a new substance use disorder treatment facility in Kent, Connecticut. After the application was deemed complete, OHCA notified the applicant that it would hold a discretionary hearing under General Statutes § 19a-639a(f)(2) on the application.

Following OHCA's determination to hold a hearing, an existing substance use disorder treatment facility in Kent successfully intervened in advance of the hearing to oppose the proposal. The intervenor presented testimony in opposition to the application and cross-examined witnesses, and the Hearing Officer characterized the hearing as contested. OHCA subsequently proposed to deny the application, and then following a brief in opposition to that proposed decision filed by the applicant and an oral argument, OHCA and the applicant entered into an agreed settlement that would have granted the CON subject to certain conditions.

The intervenor then sought to appeal the agreed settlement in Superior Court under the APA. The Superior Court found that it had no jurisdiction to hear the intervenor's appeal. The basis for this finding was that the underlying matter was not a contested case because the hearing had been discretionary and not mandatory by statute, and therefore the Court had no jurisdiction under the APA to hear the appeal as OHCA's agreed settlement did not constitute a "final decision" subject to appeal. The Appellate Court affirmed this decision, finding that the original public hearing was scheduled on a discretionary basis under § 19a-639(f)(2), and the request to intervene did not convert the hearing to a mandatory one under § 19a-639(e) because the intervenor did not specifically request a public hearing or confirm that it was an entity with five or more people. The intervenor then filed an appeal to the Supreme Court.

Supreme Court Decision

In the Supreme Court, the intervenor argued that when the agency has already scheduled a public hearing, it would be "redundant and nonsensical" to require it to request a public hearing that has already been announced. To conclude otherwise, High Watch argued, is to elevate form over substance and is contrary to the law's strong presumption in favor of jurisdiction. The Supreme Court agreed.

First, the Supreme Court declined to adopt the Appellate Court's interpretation of § 19a-639(e) as requiring that a request for a public hearing must expressly state that it is being submitted on behalf of an entity of five or more people, as the agency was already aware that High Watch, licensed by the Department of Public Health as a seventy-eight bed substance use treatment facility, met the requirement.

Second, the Supreme Court also declined to impose rigid requirements around the request for the public hearing. In a situation where the agency had already announced it would conduct a public hearing, it would be illogical to expect a party looking to intervene to submit a request for a different hearing. The Court also reasoned that while the intervenor did not request a hearing, the request for intervenor status included the right to call witnesses, present evidence, and cross-examine witnesses "which, unmistakably, is a request to participate in a hearing and, of necessity, involves conduct that can occur only at a hearing."

In light of these findings, the Supreme Court reversed the Appellate Court and held that a contested

case was, in fact, present and that the Superior Court has jurisdiction under the APA to hear the appeal.

Key Takeaways

The decision is notable for its affirmance of appellate rights related to CON proceedings despite the holding of a hearing designated by the agency as “discretionary,” which has become more common for OHS (formerly OHCA) in recent years. The facts of the case are unique in that OHCA decided almost immediately after deeming the application complete to hold a hearing, and actually scheduled the hearing within 30 days of doing so. As a result, the intervenor’s petition to intervene actually came within 30 days after the application was deemed complete, which is potentially important legally because the “mandatory hearing” statute at issue in the case requires the public hearing request to be submitted within 30 days after a CON application is deemed complete.

It is therefore uncertain whether a petition to intervene in a discretionary hearing that is submitted later than 30 days after an application is deemed complete – which is often the case with hearings scheduled months after an application is deemed complete, and intervenor petitions only due 5 days prior to a hearing under the APA – would be viewed similarly by courts. However, this decision does not address that timing issue beyond noting the 30-day statutory requirement when describing the requirement.

Accordingly, it remains to be seen how broad the applicability of this ruling may be, but it is important for parties to understand that discretionary hearings can convert to mandatory hearings in certain circumstances and thus expand appellate rights under the APA.

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[1] While not relevant to this case, pursuant to General Statutes § 19a-639(f)(1), a mandatory public hearing must occur on any application concerning transfer of ownership involving a hospital.

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