DOCKET NO.: HHB-CV-19-6052661-S

HIGH WATCH RECOVERY CENTER, INC.	:	SUPREIOR COURT
	:	
	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	
	:	TAX AND ADMINISTRATIVE APPEALS SESSION
STATE OF CONNECTICUT, DEPARTMENT OF PUBLIC HEALTH, ET AL.	:	MAY 30, 2024

MEMORANDUM OF DECISION

The defendant, the State of Connecticut Department of Public Heath (the department) and the co-defendant, Birch Hill Recovery Center, LLC (Birch Hill), move to dismiss the complaint of the plaintiff, High Watch Recovery Center, Inc. (High Watch) for lack of subject matter jurisdiction. High Watch seeks to appeal the department's March 28, 2019 decision (the decision) granting a Certificate of Need (CoN) to Birch Hill to open a substance abuse recovery facility in Kent, Connecticut (the facility). The defendants argue that High Watch has no standing to challenge the decision because it has not demonstrated that it has been classically[1] aggrieved by the decision. In response, High Watch asserts that its specific legal interests were harmed by the decision because (1) the defendants' private settlement discussions deprived High Watch of its right to be heard as an intervenor in the underlying CoN proceeding, and (2) approval of Birch Hill's recovery facility will inevitably harm High Watch's ability to attract patients able to pay with commercial insurance, which monies, in turn, underwrite High Watch's treatment of indigent patients.

[1] It is undisputed that High Watch does not assert statutory aggrievement.

Electronic notice sent to 1) Atty J. Mirman, 2) Atty R. McOwen, and 3) Atty K. Dowd. A. Jordanopoulos, clerk 5/30/24

The court grants the defendants' motions to dismiss. It is settled law that intervenor status alone is insufficient to establish aggrievement and alleged procedural failures at the administrative agency level cannot themselves create aggrievement. Secondly, the court concludes that protecting the business models of competitors is not within the zone of interests protected by the relevant CoN approval statute, General Statutes § 19a-639(a). Therefore, High Watch asserts a legal interest that is not protected by § 19a-639(a). Finally, even if such were not the case, general claims of future financial injury are too speculative to support aggrievement. The court's reasoning is set forth in more detail below.

FACTS

The relevant facts of this matter have been set forth in prior court rulings. See *High Watch Recovery Center, Inc.* v. *State of Connecticut, Department of Public Health*, 347 Conn. 317, 297 A.3d 531 (2023); *High Watch Recovery Center, Inc.* v. *State of Connecticut, Department of Public Health*, 207 Conn. App. 397, 263 A.3d 935 (2021); *High Watch Recovery Center, Inc.* v. *State of Connecticut, Department of Public Health*, CV196052661S, 2019 WL 5066922 (Conn. Super. Ct., September 16, 2019) (Cohn, JTR). The court presumes familiarity with the facts set forth in the foregoing decisions.

LEGAL STANDARD

"Pleading and proof of aggrievement are prerequisites to the trial court's jurisdiction over the subject matter of a plaintiff's appeal. . . . In order to have standing to bring an administrative appeal, a person must be aggrieved. . . . Standing . . . is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it

is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the decision, as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the agency's decision has specially and injuriously affected that specific personal or legal interest. . . . Aggrievement does not demand certainty, only the possibility of an adverse effect on a legally protected interest. . . ." (Internal quotation marks omitted.) *Mayer* v. *Historic Dist. Comm'n of Town of Groton*, 325 Conn. 765, 772-73, 160 A.3d 333 (2017) (hereinafter *Mayer*).

"The second prong of the aggrievement test requires the plaintiff to demonstrate that its asserted interest has been specially and injuriously affected in a way that is cognizable by law. . . . In considering whether a plaintiff's interest has been injuriously affected by an administrative decision, we have looked to whether the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for [its] complaint. . . . Standing concerns the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (Citations omitted; internal quotation marks omitted.)

Med-Trans of Connecticut, Inc. v. *Dep't of Pub. Health & Addiction Servs.*, 242 Conn. 152, 159-160, 699 A.2d 142 (1997).

"Although the adverse effect on the plaintiffs' legally protected interest need not be certain to establish aggrievement, it nevertheless is well settled that, even when property values are at issue, 'speculative concern . . . even if true does not rise to the level of aggrievement. Allegations and proof of mere generalizations and fears are not enough to establish aggrievement.'" *Mayer*, 325 Conn. at 785.

LEGAL ANALYSIS

a. Intervenor status; procedural irregularities

High Watch first asserts that it has been aggrieved because the department hearing officer granted High Watch intervenor status which included the right to receive copies of all pleadings. See Docket Entry No. 149.00, at 9-10. High Watch contends that the defendants' decision to engage in bilateral settlement discussions that did not include High Watch deprived High Watch of its ability to participate in the negotiations and be heard on the eventual settlement.[2] Id. The court is not convinced.

Status as an intervenor in an administrative proceeding is not sufficient to establish aggrievement. See *New England Rehab. Hosp. of Hartford, Inc.* v. *Comm'n on Hosps. &*

[2] To the extent High Watch contends that the defendants' settlement discussions violate notions of fundamental fairness, see *Grimes* v. *Conservation Commission,* 243 Conn. 266, 273 n.11, 703 A.2d 101 (1997), the court is similarly not convinced. High Watch has not pointed the court to any legal support for the proposition that it is fundamentally unfair for parties in litigation to engage in settlement discussions to resolve their dispute.

Health Care, 226 Conn. 105, 132, 627 A.2d 1257 (1993) (hereinafter *New England Rehab.*; *Concerned Citizens for the Pres. of Watertown, Inc.* v. *Plan. & Zoning Comm'n of Town of Watertown*, 118 Conn. App. 337, 344, 984 A.2d 72 (2009), cert. denied, 294 Conn. 934, 987 A.2d 1029 (2010) ("[M]ere status . . . as a party or a participant in a hearing before an administrative agency does not in and of itself constitute aggrievement for the purposes of appellate review.") (Internal quotations omitted.) This is because to allow intervenor status to establish aggrievement would have the effect of giving the hearing officer – not the court – the authority to determine aggrievement. *New England Rehab.*, supra, 226 Conn. 132-33 ("If designation as a party in an agency proceeding were construed to be the equivalent of the right to be a party in a judicial proceeding, an agency's presiding officer would be vested with the authority to decide not only who could appear before the agency and what rights they would have during that proceeding, but also who could challenge an adverse decision of the agency in court.") Secondly, "[i]t is well settled that . . . procedural deficiencies, even if they cause the loss of an opportunity to be heard, do not by themselves establish classical aggrievement." *Mayer*, 325 Conn. at 788; see also *Andross* v. *West Hartford*, 285 Conn. 309, 341, 939 A.2d 1146 (2008) (loss of opportunity to be heard at public hearing not sufficient to establish aggrievement); *Edgewood Village, Inc.* v. *Housing Authority*, 265 Conn. 280, 293, 828 A.2d 52 (2003), cert. denied, 540 U.S. 1180, 124 S. Ct. 1416, 158 L. Ed. 2d 82 (2004) ("[C]onsistent with the statutory requirement to provide general notice to the community, the defective notice not only affected the plaintiffs, but also every other resident of [the city], who, for whatever reason, wished to be heard[.]"); *Brouillard* v. *Connecticut*

Siting Council, 52 Conn. Supp. 196, 206, 39 A.3d 1241 (2010) (plaintiff cannot challenge "procedural irregularities, constitutional infirmities, and errors" without first establishing "classical aggrievement, which would permit him to appeal"), aff'd, 133 Conn. App. 851, 38 A.3d 174, cert. denied, 304 Conn. 923, 41 A.3d 662 (2012).

b. Zone of interests

High Watch next claims that it is aggrieved by the department's decision because approval of a CoN for Birch Hill will harm High Watch's ability to attract commercially insured patients whose insurance payments High Watch uses to underwrite the costs of caring for indigent patients. See Docket Entry No. 149.00, at 11-13; Docket Entry No. 100.31, at ¶¶ 51(b) and (c). The court concludes that the business model of a competitor is not within the zone of interests protected by the CoN statute, General Statutes § 19a-639(a).[3]

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[3] General Statutes § 19a-639(a) states:

(a) In any deliberations involving a certificate of need application filed pursuant to section 19a-638, the unit shall take into consideration and make written findings concerning each of the following guidelines and principles:

(1) Whether the proposed project is consistent with any applicable policies and standards adopted in regulations by the Office of Health Strategy;

(2) The relationship of the proposed project to the state-wide health care facilities and services plan;

(3) Whether there is a clear public need for the health care facility or services proposed by the applicant;

(4) Whether the applicant has satisfactorily demonstrated how the proposal will impact the financial strength of the health care system in the state or that the proposal is financially

"As a general rule, allegations 'that a governmental action will result in competition harmful to the complainant's business would *not* be sufficient to qualify the complainant as an aggrieved person.'" (Emphasis in original) *United Cable Television Servs. Corp.* v. *Dep't of Pub. Util. Control*, 235 Conn. 334, 343-44, 663 A.2d 1011 (1995) (hereinafter *United Cable*

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feasible for the applicant;

(5) Whether the applicant has satisfactorily demonstrated how the proposal will improve quality, accessibility and cost effectiveness of health care delivery in the region, including, but not limited to, provision of or any change in the access to services for Medicaid recipients and indigent persons;

(6) The applicant's past and proposed provision of health care services to relevant patient populations and payer mix, including, but not limited to, access to services by Medicaid recipients and indigent persons;

(7) Whether the applicant has satisfactorily identified the population to be served by the proposed project and satisfactorily demonstrated that the identified population has a need for the proposed services;

(8) The utilization of existing health care facilities and health care services in the service area of the applicant;

(9) Whether the applicant has satisfactorily demonstrated that the proposed project shall not result in an unnecessary duplication of existing or approved health care services or facilities;

(10) Whether an applicant, who has failed to provide or reduced access to services by Medicaid recipients or indigent persons, has demonstrated good cause for doing so, which shall not be demonstrated solely on the basis of differences in reimbursement rates between Medicaid and other health care payers;

(11) Whether the applicant has satisfactorily demonstrated that the proposal will not negatively impact the diversity of health care providers and patient choice in the geographic region; and

(12) Whether the applicant has satisfactorily demonstrated that any consolidation resulting from the proposal will not adversely affect health care costs or accessibility to care.

Television Servs. Corp.); *New England Rehab.*, 226 Conn. 127 ("The plaintiffs claim that the granting of the defendants' certificate of need application caused them to 'lose profits, revenues and their competitive positions in the health care community.' ... [These] allegations constitute no more than a suggestion of economic disadvantage caused by competition. This is not sufficient to qualify."); *Northeast Parking, Inc.* v. *Plan. & Zoning Comm'n of Town of Windsor Locks*, 47 Conn. App. 284, 289, 703 A.2d 797 (1997) ("Ordinarily, an allegation of adverse business competition is not sufficient to meet the classic aggrievement test."). There is a "limited exception" to this general rule. See *New England Cable Television Ass'n, Inc.* v. *Dept. of Public Utility Control*, 247 Conn. 95, 108, 717 A.2d 1276 (1998).

"Standing concerns the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *United Cable Television Servs. Corp.*, supra, 235 Conn. at 345. An existing competitor who is not within the "zone of interests" protected by the statute at issue has no standing to raise claims as to the general fitness of an applicant under that statute. Id., at 346. Nevertheless, "[w]hen our legislature has sought to include effects on existing businesses as a criterion for determining whether to issue a certificate, it has demonstrated its ability to do so." Id. at 347; see also id. at 351. For example, General Statutes § 13b-392 expressly requires the department of transportation to consider "existing motor transportation facilities *and the effect upon them* of granting [a] certificate. . . ." (Emphasis added.) See id. at 351; see also id. at 354-55 (referencing P.A. 92-137 which mandates that "each certificate of public convenience and necessity for a franchise issued pursuant to this section shall be

nonexclusive, and each such certificate issued for a franchise in any area of the state where an existing franchise is currently operating shall not contain more favorable terms or conditions than those imposed on the existing franchise." P.A. 92-137 is now incorporated into General Statutes § 16-331(g)).

"When construing a statute, our fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of the case. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes." (Internal quotation marks omitted.) *McCoy* v. *Comm'r of Pub. Safety*, 300 Conn. 144, 150, 12 A.3d 948 (2011); see also *United Cable Television Servs. Corp.*, 235 Conn. at 347. In this case, only subsections (8) and (9) of § 19a-639(a) mention existing facilities. See § 19a-639(a)(8) (requiring the department to consider "[t]he utilization of existing health care facilities and health care services in the service area of the applicant;" and subsection (9) requiring the department to consider "[w]hether the applicant has satisfactorily demonstrated that the proposed project shall not result in an unnecessary duplication of existing or approved health care services or facilities.")[4] Looking to the text of subsections (8) and (9) of § 19a-639(a) and their

[4] The court concludes that § 19a-639(a)(11)'s reference to "[w]hether the applicant has satisfactorily demonstrated that the proposal will not negatively impact the diversity of health care providers and patient choice in the geographic region" reflects the legislature's concern regarding vertical integration of health care providers, not a desire to protect business competitors. See H-1201, Conn. Gen. Assembly Proc., Vol. 57, Part 21, 6912-7260, 2014 18 64134714 v2 Proc., p. 238, Statement of Sen. Fasano ("Obamacare, whether it's good or bad,

relationship to other statutes,[5] the court concludes that subsections (8) and (9) are intended to protect the interests of the health care consuming public at large, not potential competitors.

The CoN process is administered by the Health Systems Planning Unit (HSPU) within the Office of Health Strategy. See General Statutes § 19a-612d. The HSPU exercises "independent decision making authority over all certificate of need decisions." Id. The HSPU is expressly required to conduct a state-wide health care facility utilization study on a biennial basis. See General Statutes § 19a-634. In conducting the biennial utilization study, HSPU is statutorily required to assess "(1) Current availability and utilization of acute hospital care, hospital emergency care, specialty hospital care, outpatient surgical care, primary care and clinic care; (2) geographic areas and subpopulations that may be underserved or have reduced access to specific types of health care services; and (3) other factors that the unit deems pertinent to health care facility utilization. . . . Such report may also include the unit's recommendations for addressing identified gaps in the provision of health care services and recommendations concerning a lack of access to health care

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the Affordable Care Act, has created vertical integration . . . ."); id., pp. 239-40 statement of Sen. Looney, ("One of the major concerns . . . is the acquisition of medical practices by hospitals and that now under this bill will be subject to a regulatory process of certificate of need to determine issues related to whether sufficient diversity of options will be available in the community when that happens on a large scale.").

[5] Subsections (8) and (9) of General Statutes § 19a-639(a) were enacted as part of a much larger budget bill in 2010. See P.A. 10-179. The legislative discussion of the larger budget bill contains no relevant discussion of what became § 19a-639(a). See H-1090, Conn. Gen. Assembly Proc., Vol. 53, Part 17, 5315-5590, 2010 Sess., pp. 5505-5578; S-609, Conn. Gen. Assembly Proc., Vol. 53, Part 12, 3555-3841, 2010 Sess., pp. 3744-3930

services." None of these factors suggest a legislative intent that in evaluating the utilization or duplication of state health care facilities, the HSPU should protect the interests of competitors to those facilities seeking a CoN.[6] Thus, considering § 19a-639(a)'s text and its relationship to other directly related statutes, the court concludes that subsections (8) and (9) of § 19a-639(a) are intended to protect the interests of the health care consuming public at large, not potential competitors to those seeking a CoN. Therefore, because High Watch's interest as a potential competitor to Birch Hill is not within the "zone of interests" protected by § 19a-639(a), High Watch has no standing to assert claims under its provisions.[7]

Finally, High Watch asserts that given the close geographic proximity of the proposed Birch Hill facility to High Watch's existing facility, it is likely that High Watch will lose revenue as some patients chose to go to Birch Hill rather than to High Watch. Such speculative financial concerns are insufficient to establish aggrievement. See *New England*

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[6] Additionally, the court takes judicial notice that the Office of Health Systems Planning public website describes its purpose as follows: "The major functions of Health Systems Planning (HSP) include the administration of the Certificate of Need (CoN) program; preparation of the Statewide Health Care Facilities and Services Plan; health care data collection, analysis and reporting; and hospital financial review and reporting. The CoN program promotes appropriate health facility and service development that addresses a public need." See https://portal.ct.gov/ohs/content/health-systems-planning (last visited May 24, 2024). None of these responsibilities suggest a legislative intent to protect the interests of competitors to those entities seeking certificates of need, as opposed to a legislative intent to protect the interests of the health care consuming public generally.

[7] It should be undisputed that nothing in § 19a-639(a) suggests that in reviewing applications for CoN's, the legislature intended the HSPU to consider a potential competitor's desired mix of insured and uninsured patients, or consider whether a potential competitor will be able to maintain an appropriate mix of insured and uninsured patients such that the competing facility can continue to offer care to indigent patients.

Rehab., 226 Conn. 127 ("A speculative loss of revenue is insufficient to confer standing and establish aggrievement."); *Connecticut State Med. Soc.* v. *Connecticut Bd. of Examiners in Podiatry*, 203 Conn. 295, 302, 524 A.2d 636, 640 (1987) ("[A]n allegation merely of competition likely to result in lost revenues is ordinarily insufficient to confer standing. . . ."); *AFSCME, Council 4, Loc. 681, AFL-CIO* v. *City of W. Haven*, 43 Conn. Supp. 470, 481, 662 A.2d 160 (Super. Ct. 1994), aff'd, 234 Conn. 217, 661 A.2d 587 (1995) ("A mere speculative injury, such as a suggestion of economic disadvantage caused by competition in the marketplace, is not sufficient to establish [aggrievement]."); *Mayer*, supra, 325 Conn. 785 ("[E]ven when property values are at issue, 'speculative concern . . . even if true does not rise to the level of aggrievement. Allegations and proof of mere generalizations and fears are not enough to establish aggrievement.'")

CONCLUSION

For all the foregoing reasons, the motions to dismiss are granted and this appeal is dismissed.

Budzik

Budzik, J.