Conn. Ruling Highlights Keys To Certificate-Of-Need Appeals

By **Conor Duffy, Ben Jensen and Michael Lisitano** (August 22, 2023)

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On July 25, the Connecticut Supreme Court **issued an opinion** in High Watch Recovery Center Inc. v. Department of Public Health[1] that addresses the subject of the right to file an appeal of a certificate-of-need, or CON, decision under the Connecticut Uniform Administrative Procedure Act.[2]

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 public 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 the 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 separate hearing when one was already scheduled.[3]

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 matter qualifies as a contested case.

Understanding the distinction between mandatory and discretionary public hearings is an essential consideration for parties to CON proceedings to avoid foreclosing potential appellate rights.

Background of the Case

Underlying Law

Under the statutory scheme applicable to CON proceedings, public hearings on applications can occur in one of two ways.

First, under Connecticut General Statutes Section 19a-639a(e),[4] the Office of Health Strategy 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.[5]

Second, under Section 19a-639(f)(2),[6] the 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.[7]

The Parties

The High Watch case arises from a CON application submitted in 2017 to the Office of Health Care Access, now the Health Systems Planning Unit within OHS, by Birch Hill Recovery Center LLC to establish a new substance use disorder treatment facility in Kent, Connecticut.

After the application was deemed complete, the OHCA notified Birch Hill that a discretionary hearing under General Statutes Section 19a-639a(f)(2) would be held on the application.[8]

Following the OHCA's determination to hold a hearing, High Watch Recovery Center Inc., an existing substance use disorder treatment facility in Kent, submitted a petition requesting designation as an intervenor in advance of the hearing to oppose the proposal. OCHA granted the request and High Watch was granted intervenor status pursuant to General Statutes Section 4-177a.[9]

Underlying Facts

The OHCA held two hearings on the application.

At the first hearing, High Watch presented testimony in opposition to the application and cross-examined witnesses, and the hearing officer characterized the hearing as contested. The OHCA subsequently issued a proposed final decision to deny the application.

Birch Hill filed a brief in opposition to that proposed decision and requested oral argument. Following the submission of briefs and oral argument, the OHCA and Birch Hill entered into an agreed settlement that would have granted the CON subject to certain conditions.[10]

High Watch then appealed the agreed settlement in Superior Court under the APA.

The court determined that it had no jurisdiction to hear the appeal on the ground that the underlying matter was not a contested case because the hearing had been discretionary and not mandatory by statute.

Therefore, the court held that it lacked jurisdiction under the APA to hear the appeal as the OHCA's agreed settlement did not constitute a final decision subject to appeal.[11]

The Connecticut Appellate Court affirmed this decision,[12] holding that the original public hearing was scheduled on a discretionary basis under Section 19a-639(f)(2), and the request to intervene did not convert the hearing to a mandatory one under Section 19a-639(e) because High Watch did not specifically request a public hearing or confirm that it was an entity with five or more people.[13]

High Watch then filed an appeal to the Connecticut Supreme Court.

Supreme Court Decision

In the Supreme Court, High Watch argued that when the agency has already scheduled a public hearing, it would be redundant and nonsensical to require an intervenor 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.[14]

First, the Supreme Court declined to adopt the Appellate Court's interpretation of Section 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, particularly given that the agency was already aware that High Watch, licensed by the Department of Public Health as a 78-bed substance use treatment facility, met the requirement.[15]

Second, the Supreme Court also declined to impose rigid requirements around the request for the public hearing itself. 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 High Watch 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."[16]

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 had jurisdiction under the APA to hear the appeal.[17]

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 the OHS — formerly the OHCA — in recent years.

The decision reiterates that how the agency characterizes a public hearing or a decision is not necessarily dispositive under the APA. The decision emphasizes how important it is for CON parties to build an administrative record that supports a finding that the case is or becomes contested.

The facts of the case are unique in that the OHCA decided almost immediately after deeming the application complete to hold a hearing, and actually scheduled the hearing within 30 days of doing so, and further that the OHCA actually held a second public hearing on the same application with a different hearing officer.

As a result, the High Watch'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.

Due to the significant number of hearings held on CON matters, longer delays between an application being deemed complete and the hearing being scheduled and held have become more common. 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 would be viewed similarly by courts.

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.

Parties should therefore carefully consider how to build an administrative record in advance of potential intervention or other circumstances that could convert a CON proceeding into a contested case and thus allow parties to have their day in court to review an agency final decision.

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[1] High Watch Recovery Center Inc. v. Dept. of Public Health et. al., 347 Conn. 317 (2023).

[2] Conn. Gen. Stat. § 4-166 et. seq.

[3] High Watch, 347 Conn. at 327.

[4] "Except as provided in this subsection, the unit shall hold a public hearing on a properly filed and completed certificate of need application if three or more individuals or an individual representing an entity with five or more people submits a request, in writing, that a public hearing be held on the application. For a properly filed and completed certificate of need application involving a transfer of ownership of a large group practice, as described in subdivision (3) of subsection (a) of section 19a-638, when an offer was made in response to a request for proposal or similar voluntary offer for sale, a public hearing shall be held if twenty-five or more individuals or an individual representing twenty-five or more people submits a request, in writing, that a public hearing be held on the application. Any request for a public hearing shall be made to the unit not later than thirty days after the date the unit determines the application to be complete." Conn. Gen. Stat. §19a-639a(e).

[5] 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.

[6] "The unit may hold a public hearing with respect to any certificate of need application submitted under this chapter. The unit shall provide not less than two weeks' advance notice to the applicant, in writing, and to the public by publication in a newspaper having a substantial circulation in the area served by the health care facility or provider. In conducting its activities under this chapter, the unit may hold hearings with respect to applications of a similar nature at the same time." Conn. Gen. Stat. §19a-639(f)(2).

[7] High Watch, 347 Conn. at 329. See also Summit Hydropower P'ship v. Comm'r of Envtl. Prot., 226 Conn. 792, 811-12 (1993); Middlesex Hosp. v. Dep't of Pub. Health, No. CV13-6022693-S, 2014 WL 3360781, at *4 (Conn. Super. Ct. May 27, 2014).

[8] High Watch, 347 Conn. at 321-22.

[9] Id. at 322-23.

[10] Id. at 323-24.

[11] High Watch, 347 Conn. at 324-25.

[12] High Watch Recovery Center Inc. v. Dept. of Public Health, 207 Conn. App. 397 (2021).

[13] High Watch, 347 Conn. at 325-26.

[14] Id., 347 Conn. at 327.

[15] Id. at 330-31.

[16] Id. at 332-33.

[17] Id. at 334-35.