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June 23, 2023

VIA E-MAIL(ctappfilings@sccourts.org)
The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: **CareAlliance Health Services, *et al.*, vs. SCDHEC, *et al.***
Appellate Case No. 2020-001323

Dear Ms. Kitchings:

I am writing as counsel for Appellants Walterboro Community Hospital, Inc. and Trident Medical Center, LLC ("Appellants") in response to the Court's June 13, 2023 correspondence in the above-referenced matter. In your letter, you ask the parties to advise the Court of their positions on what effect, if any, the passage of 2023 Act No. 20 ("Act") has on the above appeal and what course the Court should take in this case in light of the new law. As requested by the Court, the parties have conferred on these issues but were unable to reach agreement. Therefore, in compliance with your instructions, please find below a brief summary of the Appellants' salient positions regarding the effect of the Act on this matter.

The Act, which was signed by Governor McMaster on May 16, 2023, significantly revised the State Certification of Need and Health Facility Licensure Act[1] (S.C. Code Ann. §§ 44-7-110 *et seq.*) to eliminate Certificate of Need ("CON") requirements for all providers except nursing homes. For hospital providers, the General Assembly adopted a transition period, ending January 1, 2027, that keeps in place the existing CON requirements for establishing a new hospital. Under the Act, when the transition period ends, the CON law is automatically repealed as to hospitals.

This matter concerns the Appellants' appeal of the July 8, 2020 order of the Administrative Law Court ("ALC") upholding the July 23, 2018 decision of the Respondent Department of Health and Environmental Control ("DHEC") to grant the Respondent Medical University Hospital Authority ("MUHA") a CON to establish a new 180-bed hospital in Berkeley County, South Carolina. Because of the transition period described above, the CON law that governed this case at its filing remains applicable. Thus, the CON issues raised in this appeal remain subject to adjudication by the Court.

[1] One of the revisions was to change the name of the Act to "The State Health Facility Licensure Act."

Similarly, the Act did not amend the substance of the existing requirement that a party appealing an ALC decision favorable to the applicant must post an appeal bond upon the filing of the appeal.[2] In this case, Appellants challenged the constitutionality of the appeal bond requirement. On November 25, 2020, the Court issued its order denying the parties' cross-motions regarding the appeal bond issue but granted the parties the right to brief their arguments in full. Because the alleged unconstitutional attributes of the appeal bond were unchanged by Act No. 20, this issue remains ripe for adjudication by the Court.

Finally, Appellants note that the Act amends S.C. Code Ann. § 44-7-210(G) to add a provision stating, in relevant part, that "[a]n affected person who was a party to the contested case has a right to appeal to the Supreme Court final decisions issued by the Administrative Law Court for a contested case arising from the department's decision to grant or deny a Certificate of Need application." Prior to the passage of the Act, S.C. Code Ann. § 44-7-220 governed judicial appeals of CON decisions by providing for review in accordance with S.C. Code Ann. § 1-23-380 of the Administrative Procedures Act. That section states with regard to judicial review that "except as otherwise provided by law, an appeal is to the court of appeals." With the passage of the Act, the law now provides that appeals of CON decisions be filed with the Supreme Court, rather than this Court. For the reasons briefly discussed below, Appellants assert that, notwithstanding this change in the law, this case should be argued before this Court, as is the current posture of the case.

Resolution of this issue hinges on whether the Act's change in appellate courts applies retroactively to pending appeals or only prospectively to appeals filed on or after May 16, 2023, the effective date of the Act. Appellants take the position that this provision of the Act must be applied prospectively for following reasons.

The general rules concerning determinations of the applicability of statutory amendments are summarized by this Court in *State v. Hilton,* 406 S.C. 580, 585, 752 S.E.2d 549, 551-552 (Ct. App. 2013):

> "[L]egislative intent is paramount in determining whether a statute will have prospective or retroactive application." *State v. Bolin,* 381 S.C. 557, 561, 673 S.E.2d 885, 887 (Ct.App.2009). When the legislative intent is not clear, courts "adhere to the presumption that statutory enactments are to be given prospective rather than retroactive application." *Id.* at 561, 673 S.E.2d at 886–87. "[A]bsent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature." *Edwards v. State Law Enforcement Div.,* 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011).

With regard to the exception for procedural amendments, the Supreme Court in *Hyder v. Jones*, 271 S.C. 85, 88-89, 245 S.E.2d 123, 125 (1978), notes that this exception is "generally considered inapplicable...to a statute that supplies a legal remedy where formally there was none...Changes of procedure. *i.e.*, of the form of remedies are said to constitute an exception, but that exception

[2] The Act did amend the appeal bond requirement to change its reference from the "Court of Appeals" to the "Supreme Court."

does not reach a case where before the statute there was no remedy whatever. To supply a remedy where previously there was none of any kind is to create a right of action."(*citing* Judge Cardozo in *Jacobus v. Colgate*, 217 N.Y. 235, 111 N.E. 837 (1916).

Appellants assert that the change in jurisdiction of the reviewing court in the middle of an appeal process that began over three years ago cannot be considered merely procedural in nature for purposes of determining its application. Prior to the amendment and at the time this appeal was filed, Appellants' only path to exercise its right of judicial review of the ALC's decision was to file a timely appeal to this Court. Appeal to the Supreme Court was not available to the Appellants.

Act No. 20 is silent on whether the change in appellate courts applies retroactively to cases pending in the Court of Appeals. Act No. 20 is also silent on whether, in light of the sudden vesting of jurisdiction in the Supreme Court, pending appeals can be transferred from this Court to the Supreme Court, which had no jurisdiction at the time the appeal was filed. Under the general rule, the Legislature's silence dictates a finding that the amendment was intended to apply prospectively. Furthermore, applying a retroactive interpretation of this amendment that results in the loss of jurisdiction by this Court over pending CON cases would violate Article 1, § 22 of the South Carolina Constitution.[3] *See Bailey v. State,* 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992) ("This Court has long recognized that legislative acts are to be construed in favor of constitutionality and will be presumed constitutional absent a showing to the contrary."); *Henderson v. Evans,* 268 S.C. 127, 132, 232 S.E.2d 331, 333–34 (1977) ("Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation.").

Appellants contend that proper application of the rules of construction in this case indicates that the Legislature intended for the change in the reviewing court to apply prospectively only to appeals filed after the effective date of the Act. As held by the Supreme Court in *Hyder:*

> In the construction of statutes there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary. Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973). No statute will be applied retroactively unless that result is so clearly compelled as to leave no room for reasonable doubt:
>
> > [T]he party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt. It is not necessary that the Court shall be satisfied that the Legislature did not intend a retroactive effect. It is enough, if it is not satisfied that the Legislature did intend such effect. Ex Parte Graham, 47

[3] Article I, § 22 of the South Carolina Constitution, entitled "Procedure before administrative agencies; judicial review," provides that "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have ***in all such instances*** the right to judicial review." (Emphasis added).

S.C. Law (13 Rich. Law) 53 at 55-56 (1864). See also: Pulliam v. Doe, 246 S.C. 106, 142 S.E.2d 861 (1965).

Hyder, 271 S.C. at 87-88, 245 S.E.2d at 125. There is no such evidence in Act No. 20 of a corresponding intention of the General Assembly that CON cases pending before the Court of Appeals be transferred to the Supreme Court.

For the reasons discussed above, the Appellants do not believe that the amendments to the law made by 2023 Act No. 20 affect the substance of the arguments in this case or the ability of the Court to review this matter. Therefore, Appellants request that this Court proceed with this matter in accordance with its usual procedures.

With best regards, I am

Sincerely,

William R. Thomas by JAS

William R. Thomas

WRT/jcp

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