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June 23, 2023

VIA EMAIL

The Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina, 29211

RECEIVED

Jun 23 2023

SC Court of Appeals

**Re: Court of Appeals Letter regarding the Effect of the CON Act amendments on
CareAlliance Health Services v. SCDHEC Appellate Case No. 2020-001323**

Dear Ms. Kitchings:

We submit this letter on behalf of the Medical University Hospital Authority's (MUHA) in response to your June 13, 2023, request that we confer with counsel for the other parties in the above referenced appeal regarding the effect of Act 20 of 2023 (CON Act Amendments) on the above pending appeal. We have conferred with counsel for Walterboro Community Hospital, Inc., d/b/a/ Colleton Medical Center, counsel for Trident Medical Center, LLC d/b/a Trident Medical Center and Summerville Medical Center and counsel for the S.C. Department of Health and Environmental (DHEC) regarding the effect of Act 20 on the pending appeals. We are unable to reach agreement with counsel for Walterboro Community Hospital and Trident Medical Center regarding the effect of the CON Act Amendments on the pending appeals.

MUHA's position is that the procedural changes in the appellate process in Act 20 require the above referenced pending appeals to be transferred to the Supreme Court. DHEC agrees with MUHA's position that Act 20 requires the appeals to be removed to the Supreme Court. Prior to the adoption of Act 20, appeals from a final decision of the Administrative Law Court (ALC) had to be filed with the Court of Appeals. *See* S.C. code Ann. § 44-7-220(B). Act 20 expressly provides that the appeal from a final decision of the ALC be to the Supreme Court. *See* Act 20, Section 13, § 44-7-210(G) and § 44-7-220(B)(2), (C), (D)(1). Since the venue for appeal is a procedural change in the law, the change applies retroactively and the case should be transferred to the Supreme Court.

A principal exception to the presumption that an enacted statute applies prospectively is that if the statute is procedural or remedial, it operates retroactively. *Hercules Incorporated v. S.C. Tax Comm.* 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980). See *Allen V. S.C. Pub. Empl. Benefit Auth.*, 411 S.C. 611, 623, 769 S.E.2d 666, 672 (2015). The CON Act Amendments do not affect the right of appeal but the court to which the appeal is made.

Based on the amendments made to the CON Act, it is clear that the Legislature intended to shorten the time to get a final decision on CON matters. In addition to providing for an appeal to the Supreme Court instead of the Court of Appeals, Act 20 reduces:

- 1) the time for the Department to request additional information and the applicant's time to respond to the request after an application is filed (Sec. 12, § 44-7-200(D));
- 2) the time in which the Department must render a decision on the CON application after a public hearing (Sec. 13, § 44-7-210(A);
- 3) the number of requests for production and sets a deadline in which discover must be completed at the ALC (Section 13, § 44-7-210(F); and
- 4) the time in which the ALC must render its final decision on a CON contested case from eighteen (18) months to (12) months (Sec. 13, § 44-7-210(G).

Additionally, in an effort to reduce or prevent a party from seeking contested case review to delay implementation of a CON project, the Legislature strengthen the ability of a successful applicant

- 1) to be awarded attorney's fees after successfully defending a Department decision (Sec. 14 § 44-7-220(B)(1) (the ALC "shall award the party whose project is the subject of the appeal reasonable attorney's fees and costs incurred in the contested case");
- 2) to be awarded attorney's fees for "frivolous appeals" from the ALC (Sec. 14 § 44-7-220(B)(2)("the Supreme Court shall award the party whose project is the subject of the contested case reasonable attorney's fees and costs incurred in the appeal."); and
- 3). to be awarded attorney's fees, costs and damages at the conclusion of the contested case is the ALC finds the contested case to be frivolous (Sec. 14, § 44-7-220(D))¹

¹ Prior to the amendment, the award of fees, costs and damages was discretionary, S.C. Code Ann. § 44-7-210(C). Now it is mandatory.

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Obviously, requiring the contested case appeal to be filed with the Supreme Court furthers the legislative purpose of reducing the time to get a final decision in a CON matter. This “prioritize[s] timely access to health care services ...”.²

MUHA believes that the effect of the Act 20 changes requires the pending appeal to be transferred to the Supreme Court. With high regards,

Very truly yours,



M. Elizabeth Crum
MEC

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² See, Act 20, Sec. 11, § 44-7-190(C).