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MAY 28 2015

**SC Court of Appeals**

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Sisters of Charity Providence Hospitals, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 South Carolina Department of Health )  
 and Environmental Control and Lexington )  
 Health Services District, Inc. d/b/a )  
 Lexington Medical Center, )  
 )  
 Respondents. )  
 )

Docket No.: 14-ALJ-07-0332-CC

**ORDER TO ENFORCE  
AUTOMATIC STAY**

**FILED**

September 22, 2014

**SC ADMIN. LAW COURT**

This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant to a Motion to Enforce Automatic Stay filed by Petitioner Sisters of Charity Providence Hospitals (Providence) against Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center (LMC). Providence seeks an Order affirming the existence and imposition of an automatic stay upon all activities undertaken by LMC in relation to its expansion of services by opening a second open heart surgery unit (Open Heart Suite) and third catheterization laboratory (Cath Lab) without first obtaining the requisite Certificates of Need (CON). For the reasons set forth below, Providence's Motion to Enforce Automatic Stay is granted.

**BACKGROUND**

On April 29, 2014, Providence received notice of DHEC approvals in regards to LMC's Open Heart Suite and Cath Lab projects (Cardiovascular Care Projects) via a response from LMC to a Freedom of Information Act (FOIA) request regarding these projects. On May 14, 2014, Providence filed a request that the DHEC Board conduct a Final Review Conference regarding the DHEC Staff's actions in approving the Cardiovascular Care Projects. On June 25, 2014, the Board notified Providence of its decision not to conduct a Final Review Conference in this matter.

Pursuant to South Carolina Code Section 44-1-60(F) (Supp. 2013), when the DHEC Board declined to conduct a Final Review Conference, the decisions of the DHEC Staff to approve LMC's Cardiovascular Care Projects became DHEC's Final Agency Decisions. On

July 9, 2014, Providence filed a Request for Contested Case Hearing with this Court asserting that LMC was not eligible to receive the DHEC approvals for a third cardiac catheterization laboratory and second open heart surgery unit. Providence contends that LMC is not permitted to occupy and use a third cardiac catheterization laboratory and second open heart surgery unit because LMC has not received a CON from DHEC for either of these projects. On July 24, 2014, Providence filed a Motion for Summary Judgment and Motion to Enforce Automatic Stay. On July 25, 2014, LMC filed a Motion to Dismiss for lack of subject matter jurisdiction by this Court. In separate Orders, the Court denied LMC's Motion to Dismiss and granted in part Providence's Motion for Summary Judgment. Because the Court denied Providence's Motion for Summary Judgment in part, the Court now considers Providence's Motion to Enforce Automatic Stay.

### DISCUSSION

Providence argues that because it properly filed a contested case in this matter, an automatic stay was imposed on LMC's Cardiovascular Care Projects pursuant to S.C. Code Ann. § 1-23-600(H)(2) (Supp. 2013). LMC, on the other hand, argues that neither the Department's reports of visits nor the plan approval in this case gave rise to a contested case and that this Court therefore lacks subject matter jurisdiction to hear Providence's Motion to Enforce Automatic Stay. LMC also argues that because Providence untimely filed its request for review before the DHEC Board, the Court lacks procedural jurisdiction to hear this Motion. LMC further contends that the purpose of the automatic stay is to preserve the status quo until a decision is rendered in a contested case. LMC asserts that because it has been using its Open Heart Suite and Cath Lab, and has patients scheduled for procedures in those rooms every day, the Court would alter the status quo by enforcing the automatic stay. Finally, LMC argues that enforcing the automatic stay would be moot because the decisions of the Department have already been fully implemented.

According to S.C. Code Ann. § 1-23-600(H)(2) (Supp. 2013), "[a] request for a contested case hearing for an agency order stays the order. . . . A request for a contested case hearing for a decision to issue a new license **stays all actions for which the license is a prerequisite . . . .**" (emphasis added). For the reasons set forth in the Court's Order Denying Motion to Dismiss, the Court lacks neither subject matter jurisdiction nor procedural jurisdiction to hear this matter, and Providence properly filed this matter as a contested case. As such, the automatic stay under

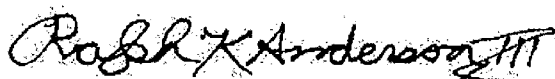
Section 1-23-600(H)(2) applies. The purpose of the automatic stay is indeed to preserve the status quo until a decision is rendered in a contested case. However, a stay in relation to a new-licensing decision “stays all actions for which the license is a prerequisite.” In this case, the issue is whether a CON, which is a certificate and thus a “license” under S.C. Code Ann. § 1-23-505 (Supp. 2013), is a prerequisite for LMC’s expansion of its existing services via its second Open Heart Suite and third Cath Lab. Therefore, these expanded services must be stayed pursuant to the automatic stay under Section 1-23-600(H)(2). Because Providence properly and timely filed a contested case with this Court on July 9, 2014, the automatic stay has, since that date, been in effect and shall be enforced. Nevertheless, as the Court has granted summary judgment in favor of Providence as to LMC’s Cath Lab, the automatic stay under Section 1-23-600(H)(2) is moot as to LMC’s activities relating to the Cath Lab.<sup>1</sup>

**ORDER**

**IT IS THEREFORE ORDERED** that Providence’s Motion to Enforce the Automatic Stay is **GRANTED**. LMC must cease and desist from any further activities relating to the Open Heart Suite pending a final decision on the issue of whether a CON was required prior to LMC’s engagement of those activities.

**IT IS FURTHER ORDERED** that the automatic stay will begin **five (5)** calendar days from the date of the issuance of this Order.

**AND IT IS SO ORDERED.**



\_\_\_\_\_  
Ralph King Anderson, III  
Chief Administrative Law Judge

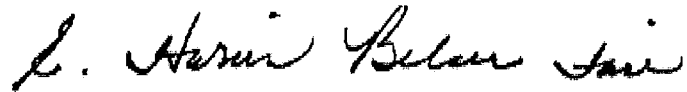
September 22, 2014  
Columbia, South Carolina

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<sup>1</sup> As discussed in the Court’s Order Granting Summary Judgment, though that automatic stay may be moot as to LMC’s Cath Lab, pursuant to S.C. Code Ann. § 1-23-630(A) (2005), the Court still has the power to “issue those remedial writs as are necessary to give effect to its jurisdiction.” Therefore, the Court stays LMC’s activities relating to the Cath Lab until LMC properly files the requisite CON application, should LMC choose to do so.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



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E. Harvin Belser Fair  
Judicial Law Clerk

September 22, 2014  
Columbia, South Carolina

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Sisters of Charity Providence Hospitals, )  
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                   Petitioner, )  
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 South Carolina Department of Health )  
 and Environmental Control and Lexington )  
 Health Services District, Inc. d/b/a )  
 Lexington Medical Center, )  
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                   Respondents. )  
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Docket No.: 14-ALJ-07-0332-CC

**AMENDED ORDER DENYING  
MOTION TO DISMISS**

This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant to a Motion to Dismiss filed by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center (LMC) seeking to dismiss a Request for Contested Case Hearing filed by Petitioner Sisters of Charity Providence Hospitals (Providence). LMC argues that neither its expansion of services by the construction of a second open heart surgery unit (Open Heart Suite) and third catheterization laboratory (Cath Lab) nor the decisions or actions of the South Carolina Department of Health and Environmental Control (Department or DHEC) relating thereto gives the Court subject matter jurisdiction to hear this matter as a contested case. In the alternative, LMC argues that Providence did not file a timely Request for Final Review (RFR) by the Board of Health and Environmental Control (Board) and therefore deprived this Court of subject matter jurisdiction to hear this matter as a contested case. The Court held a hearing on this motion on September 3, 2014. The Court issued an Order Denying the Motion to Dismiss on September 22, 2014. LMC filed a Motion to Alter or Amend (Reconsider) the Order Denying Motion to Dismiss on October 2, 2014. As a result of LCM's Motion to Reconsider, the Court amends the Order Denying Motion to Dismiss.

**FACTUAL/PROCEDURAL BACKGROUND**

The director of DHEC, Catherine Templeton, in a letter dated June 28, 2013, announced that effective July 1, 2013, DHEC was suspending the Certificate of Need (CON) program as a result of the failure of the South Carolina House of Representatives to override Governor Haley's

**FILED**

October 23, 2014

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veto of funding for the CON program. After receiving Templeton's letter, several health care entities filed an action in the South Carolina Supreme Court seeking declaratory judgment as to DHEC's obligation to enforce and to fund the CON program. The Court held that despite the House of Representatives' decision to sustain the Governor's veto, DHEC had a duty to administer and fund the CON program. *Amisub of S.C., Inc. v. S.C. Dep't of Health and Envtl. Ctrl.*, 407 S.C. 583, 757 S.E.2d 408 (2014), *reh'g denied* (May 22, 2014). LMC acknowledged that it was aware that this case was pending before the Supreme Court when it proceeded with the expansion and construction at issue.

Following DHEC's decision to suspend the CON program, LMC notified the Department's Bureau of Health Licensing and Division of Health Facilities Construction of its plans to open another Open Heart Suite and Cath Lab. On October 11, 2013, DHEC Staff issued a "Report of Visit" approving LMC's occupation and utilization of Operating Room #22 in its hospital as the Open Heart Suite.<sup>1</sup> On February 21, 2014, the Department approved the Shielding Plan developed by LMC for use of imaging modalities in the Cath Lab. On February 25, 2014, the DHEC Division of Health Facilities Construction issued a final Plan Approval to LMC for the construction of the Cath Lab. On March 20, 2014, the Department generated a Notice of Completion indicating that construction activity in the third Cath Lab had been completed. On April 10, 2014, the Department issued a Report of Visit approving utilization of the Cath Lab.

However, at no time prior to or since the acquisition of these approvals has LMC applied for or obtained a valid CON to offer the health care services contemplated by the Open Heart Suite and Cath Lab. Furthermore, there have been no facts alleged that either DHEC or LMC provided notice to the public or affected persons in the manner prescribed by the Section 44-1-60 or the CON Act about the above-referenced DHEC Staff approvals relating to the Open Heart Suite and Cath Lab. The only facts alleged concerning either DHEC or LMC giving notice to Providence of LMC's specific actions and approvals was that LMC provided a response to Providence's Freedom of Information request on April 29, 2014.

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<sup>1</sup> DHEC noted in its approval letter for LMC to "[p]lease be on notice that any action by the General Assembly, the Judiciary, or third parties challenging the validity of a license issued without CON approval, are outside the control of the Department."

On May 14, 2014, Providence filed a request that the DHEC Board conduct a Final Review regarding the DHEC Staff's actions in approving the Open Heart Suite and Cath Lab. On June 25, 2014, the Board notified Providence of its decision not to conduct a Final Review in this matter. Pursuant to South Carolina Code Ann. §44-1-60(F) (Supp. 2013),<sup>2</sup> when the DHEC Board declined to conduct a Final Review, the decisions of the DHEC Staff to approve LMC's projects became DHEC's Final Agency Decisions. On July 9, 2014, Providence filed a Request for Contested Case Hearing with this Court asserting that LMC was not eligible to receive the DHEC approvals for a third cardiac catheterization laboratory and second open heart surgery unit, and that LMC is not permitted to occupy and use a third cardiac catheterization laboratory and second open heart surgery unit because LMC has not received a CON from DHEC for either of these projects.<sup>3</sup> In response, on July 25, 2014, LMC filed a Motion to Dismiss for lack of subject matter jurisdiction by this Court.

## **DISCUSSION**

### **Jurisdiction**

As an initial matter, though subject matter jurisdiction must also be established, the ultimate question in this case is one of procedural jurisdiction. Our Supreme Court has stated on several occasions, "The word 'jurisdiction' does not in every context connote subject matter jurisdiction, but rather, is 'a word of many, too many, meanings.'" *In re Estate of Hover*, 407 S.C. 194, 207, 754 S.E.2d 875, 882 (2014) (quoting *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013)). "Specifically, '[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested.'" *Id.* at 208, 754 S.E.2d at 882 (quoting *Limehouse*, 404 S.C. at 104, S.E.2d at 572). In this case, the ultimate question is whether Providence failed to invoke the proper procedure such that it deprived this Court of its power to adjudicate Providence's claim.

In order to determine whether Providence failed to follow the proper procedure to invoke this Court's jurisdiction, the Court must first determine whether LMC's challenged activities

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<sup>2</sup> All citations to the S.C. Code will be referred to as "Section(s) . . ." and are from the 2013 Supplement unless otherwise noted.

<sup>3</sup> On July 24, 2014, Providence also filed a Motion for Summary Judgment and a Motion to Enforce Automatic Stay. However, the Court will address LMC's Motion to Dismiss first because it concerns this Court's jurisdiction to hear the matter, which is a threshold question that must be addressed before proceeding any further. Providence's Motions will be addressed in separate Orders.

were actions that could give rise to a contested case before this Court. The Court has subject matter jurisdiction to hear challenges to the grant or denial of a CON. *See* Sections 44-1-60(G) and 44-7-210(E). But LMC argues that none of the Department’s decisions for which Providence seeks review meets the definition of “contested case” set forth in Section 1-23-505(3) because they do not involve ratemaking, price fixing, licensing or other proceedings in which Providence has any legal rights which are required to be determined after opportunity for a hearing. First, the definition of “contested case” includes “**but [is] not restricted to**” ratemaking, price fixing, and licensing. Section 1-23-505(3) (emphasis added). Indeed, even following the specific terms set forth in Section 505(3), the definition of a license also includes a “certificate, approval . . . or similar form of permission required by law.” Section 1-23-505(4). Irreducibly, a Certificate of Need is a “certificate.” Furthermore, even LMC, in referencing the Department’s actions in this case, referred to those actions as an “approval.” Also, according to Section 44-1-60(A), “the issuance, denial, renewal, suspension or revocation of permits [and] licenses” is not the only action of the Department that gives rise to a contested case; rather, there are also “**other actions** of the Department which give rise to a contested case . . . .” One type of “other actions” giving rise to a contested case is those decisions to grant or deny CON applications. *See* Section § 44-7-210(E)-(G).<sup>4</sup>

It is undisputed that according to our Supreme Court in *Amisub*, S.C. Code Ann. §§ 44-7-110 et seq. (2002 and Supp. 2013) (CON Act) was never suspended, regardless of Director Templeton’s June 28, 2013 letter, and that DHEC was required by law to operate the CON program for fiscal year 2013-2014. 407 S.C. at 603, 757 S.E.2d at 419. The question then

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<sup>4</sup> LMC attempts to divert the issue away from CON requirements by arguing that its expansion of existing services via its Open Heart Suite and Cath Lab, and the Department’s decisions concerning them, were licensing matters involving construction and that third parties have no right to appeal licensing decisions – only licensees and only after a denial of the license, which did not happen here. However, though licensing standards must also be met, licensing requirements are distinct from CON requirements, and the two categories are thus set forth separately under chapter 7 of Title 44. The issue in this case is whether LMC’s actions required a CON. At the September 3, 2014 hearing, the Department stated that a CON application has to address construction plans and inform the Department what the construction will be, but that there is a separate licensing requirement involving the Department’s inspection of the construction. Thus, the final approval of the completed construction in this case was part of a separate licensing requirement. The construction plans, on the other hand, had to be included in the CON application, because the construction plans had to first receive Department approval before construction could begin, pursuant to 3 S.C. Code Ann. Regs. 61-16 § 2003.1, 2 (2011). Therefore, LMC’s failure to file a CON application, which would have required inclusion of LMC’s construction plans, gives this Court jurisdiction to hear this matter as a contested case.

becomes whether LMC's expansion of existing services via the Open Heart Suite and Cath Lab required CONs. According to Section 44-7-160:

A person or health care facility as defined in this article is required to obtain a Certificate of Need from the department before undertaking any of the following:

\* \* \*

(4) a capital expenditure by or on behalf of a health care facility which is associated with the addition or substantial expansion of a health service for which specific standards or criteria are prescribed in the South Carolina Health Plan[.]

See also 3 S.C. Code Ann. Regs. 61-15 § 102(1)(d) (Supp. 2013). Pages VIII-5 to VIII-15 of the (current) 2012-2013 South Carolina Health Plan (State Health Plan) set forth specific Certificate of Need standards or criteria for cardiac catheterization. Standard 5 on page VIII-7 addresses the expansion of existing diagnostic cardiac catheterization and Standard 10 on page VIII-12 addresses expansion of an existing comprehensive cardiac catheterization service.<sup>5</sup> Pages VIII-17 to VIII-21 of the same State Health Plan set forth specific standards or criteria for open heart surgery, including expansion of existing open heart surgery service (Standard 7, p. VIII-20). In fact, the very first standard, on page VIII-18 of the State Health Plan, states that "The establishment *or addition* of an open heart surgery unit requires Certificate of Need review, as this is considered a *substantial expansion* of a health service." (emphasis added).

In this case, LMC sought to expand its existing comprehensive cardiac catheterization services by opening a third Cath Lab and a second Open Heart Suite. Based on a plain reading of the State Health Plan, it sets forth standards or criteria that must be met for each respective expansion to receive a CON.<sup>6</sup> I thus find that the State Health Plan unambiguously and

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<sup>5</sup> On page VIII-5, the State Health Plan defines "Comprehensive Catheterization Laboratory" as "a dedicated room or suite of rooms in which both diagnostic and therapeutic catheterizations are performed, in a facility with on-site open heart surgery backup." Because the Cath Lab in this case would provide both diagnostic and therapeutic catheterization procedures, it would be a comprehensive catheterization laboratory, thus providing comprehensive cardiac catheterization services.

<sup>6</sup> LMC also argues that none of the Department's decisions give rise to a contested case pursuant to the Article I, Section 22 of the South Carolina Constitution, because the Department made no judicial or quasi-judicial decision affecting a private right of Providence with regard to LMC's projects. Lexington contends that Providence's interest is analogous to a party seeking future business, which the South Carolina Supreme Court in *S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 699 S.E.2d 146 (2010) found was not a private interest under Article I, Section 22. However, the Court need not address the Constitution in this matter, because the Court has already found that this matter could arise as a contested case because it pertains to the grant or denial of a CON application, and Sections 44-1-60 and 44-7-210 provide sufficient due process for affected parties in CON matters.

unequivocally requires a CON for the type of services LMC sought to expand pursuant to Reg. 61-15 § 102(1)(d) if a capital expenditure was made for that expansion.<sup>7</sup> Moreover, at the September 3, 2014 hearing, DHEC admitted that had Director Templeton not issued her June 28, 2013 letter regarding the purported suspension of the CON program, DHEC would have required a CON for each of LMC's projects. DHEC's staff specifically stated LMC's opening a third Cath Lab and a second Open Heart Suite "would have been an expansion of an existing service that has standards in the State Health Plan, a capital expenditure, . . . and the standards in the State Health Plan."

Finding that this case does involve a CON matter, over which this Court has subject matter jurisdiction to hear contested cases, the next question is whether Providence followed the appropriate statutory procedure, set forth in Sections 44-1-60 and 44-7-210, to file a contested case with the ALC. LMC argues that the Court lacks procedural jurisdiction because Providence failed to file its RFR within fifteen (15) calendar days of DHEC's delivery of its approvals to LMC as required under Section 44-1-60(E)(2). LMC also contends that because Providence **had not requested in writing to be notified** per Sections 44-1-60((E)(1), it is not an "affected party."<sup>8</sup> Though Providence failed to file an RFR within 15 calendar days of the Department's delivery of its decisions to LMC, Providence is not barred from filing for contested case review in this Court under the facts of this case.

#### Actual Notice

In this case, it is undisputed that Providence did not file its RFR with the Department within 15 calendar days of the Department's delivery of its decisions to LMC. Providence

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<sup>7</sup> However, as discussed in the Court's Amended Order Granting Partial Summary Judgment, there presently remains a genuine issue of material fact as to whether LMC made a capital expenditure for the Open Heart Suite, and thus whether a CON was ultimately required. In other words, because there was "an addition or substantial expansion of a health service for which specific standards or criteria are prescribed in the State Health Plan," if the Court finds that a LMC made a capital expenditure on its second Open Heart Suite project, then a CON will be required for its operation, pursuant to 3 S.C. Code Ann. Regs. 61-15 § 102(1)(d) (2011).

<sup>8</sup> In its Response to Motion for Summary Judgment, LMC also disputes that Providence has standing as an "affected person" under Section 44-7-130(1) because "the Certificate of Need program does not apply to this matter . . ." However, for the reasons discussed above, this Court fundamentally disagrees with LMC and finds that the CON requirements do indeed apply to this matter. Moreover, it is curious that in its Reply to Providence's Response to LMC's Motion to Dismiss, LMC cites to Section 44-7-320(C) (intending to cite to subsection (B)), which is part of the CON Act, which LMC argues does not apply, to support its "proposition[s] that the law specifically limits appeals of *adverse* inspection and licensing decisions to the *person or facility holding the license*" (emphasis in original) and that "[n]othing in the law . . . creates 'affected person' status for third parties to contest such a decision by the Department." At any rate, the Court has already addressed the error of LMC's position in footnote 4 above.

argues that it did not file its RFR within 15 days of the Department's delivery of its decisions because it was never given notice by the Department of either of LMC's projects. Providence further argues that though it heard rumors of LMC's activities, it never received any notice from the Department regarding these projects.

On April 9, 2014, Providence filed a FOIA request with the Department and LMC regarding cardiac projects. On April 29, 2014, Providence received notice of the Cath Lab and Second Open Heart Surgery Center via LMC's response to the FOIA request. Providence adds that it filed its RFR within 15 days of when it received notice of LMC's projects via LMC's response, i.e. May 14, 2014. In response, LMC argues that the 15-day deadline starts from the date of delivery **to the applicant** and to affected persons **who had requested to be notified**, relying on Section 44-1-60(E)(1)-(2) and *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 390 S.C. 418, 426, 702 S.E.2d 246, 250-51 (2010).

However, the 15-day deadline to file a RFR does not exist in a vacuum but is part of a statutory framework by which the Department reaches its decisions. Section 44-7-210(A) provides that "[a]fter the department has determined that a [CON] application is complete, affected persons must be notified in accordance with departmental regulations. The notification to affected persons that the application is complete begins the review period . . . ."<sup>9</sup> Section 44-7-210(C) requires the Department staff to make a decision to grant or deny the CON and to issue the decision in accordance with Section 44-1-60(D). "Notice of the decision must be sent to the applicant and affected person who have asked to be notified. The decision becomes the final agency decision unless a timely written request for a final review is filed with the department as provided for in Section 44-1-60(E)." *Id.* Section 44-1-60(E)(1) provides that "[n]otice of a department decision must be sent by certified mail, returned receipt requested to . . . affected persons who have requested in writing to be notified. . . ." Subsection (E)(2) states that "[t]he staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the . . . affected person."

The Department presumed that the CON process was suspended at the time of its decisions. However, in *Amisub*, the Supreme Court made it clear that the CON Act was in effect

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<sup>9</sup> The procedure differs with competing CON applications, but this case does not involve competing CON applications.

following the Governor's veto. It was in full force and effect when LMC's undertook the conduct at issue. LMC argues that no decision has been made by the Department from which a request for a final review conference could be made. However, that assertion involves merely a matter of semantics. In this instance, though it is obvious that no written decision has been issued, the Department clearly determined that LMC could proceed without obtaining a CON. In making that determination, the Department also consequently determined that no affected party would be notified of its actions. Though these determinations may not have been exemplified by formal written decisions, they nonetheless were decisions made by the Department that involved significant CON determinations – determinations that, if treated as unappeasable decisions, will foreclose Providence's statutory right to seek review of the Department's decision. Therefore, the Department's decision to allow LMC to proceed without a CON must be treated as a decision pursuant to Section 44-1-60.

LMC also argues that, if the CON law was valid, then Providence was required to file its request a final review conference fifteen days from the date the Department gave notice of its decision to LMC. LMC's argument neglects consideration of the other provisions that would give Providence not only notice of the impending CON but would have given Providence the opportunity to notify the Department of its status as an affected person. The laws regulating CONs establish a step-by-step process by which CONs are approved. Presumably that procedure has to be followed before the CON is granted. It is that underlying presumption that explains the procedural complexity of this case.

LMC's conclusions regarding Providence's duty to notify the Department must be based upon either a presumption that LMC and the Department complied with their respective roles under Sections 44-1-60, 44-7-200, and 44-7-210 prior to the time for Providence's to submit its RFR or, more likely, upon a premise that those responsibilities may be ignored.<sup>10</sup> However, it is precisely LMC's and the Department's failures to comply with Sections 44-1-60, 44-7-200, and 44-7-210 that precluded Providence from performing its role under Sections 44-1-60 and 44-7-210. Sections 44-1-60(E) and 44-7-210(C) require the Department to give notice to, *inter alia*, affected persons who had requested in writing to be notified, and the 15-day time period in which those affected persons can request an RFR would begin upon mailing of the staff decision

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<sup>10</sup> It is quite clear from LMC's Response to Providence's Motion for Summary Judgment, page 1, footnote 2, that LMC does not believe that the CON Act applies in this case.

to the applicant. This also presumes that the initial notice requirements imposed upon the CON applicant pursuant to Section 44-7-200(B) (2002) and upon the Department pursuant to Sections 44-7-200(D) and 44-7-210(A) have been met. Section 44-7-200(B) requires the following:

Within twenty days before submission of a [ CON] application, the applicant shall publish notification that an application is to be submitted to the department in a newspaper serving the area where the project is to be located for three consecutive days. The notification must contain a brief description of the scope and nature of the project. No application may be accepted for filing by the department unless accompanied by proof that publication has been made for three consecutive days within the prior twenty-day period and payment of the initial application fee has been received.

The Department then has a duty, “[a]fter receipt of an application with proof of publication and payment of the initial application fee, [to] publish in the State Register a notice that an application has been accepted for filing. . . .” *Id.* Section 44-7-200(D). Assuming that the application is complete, Section 44-7-210(A), as mentioned above, requires the Department to notify affected persons in accordance with departmental regulations once that filed CON application is complete.

LMC never provided notice that it would be submitting a CON application and never submitted a CON application. As a result, the Department never provided initial notice of an application being accepted for filing or a subsequent notice to Providence as an affected party of a completed filed CON application, much less of a formal staff decision on that application pursuant to Section 44-1-60(E)(1) (no staff decision was even made); therefore, the fifteen day deadline pursuant to Section 44-1-60(E)(2) never even began to run. Instead, the Department approved LMC’s activities that, by the Department’s own admission, required a CON pursuant to Section 44-7-160(4), Reg. 61-15 § 102(1)(d), and the State Health Plan.<sup>11</sup> Thus, though Providence is now challenging actions involving the implementation of a CON, this dispute emanates from DHEC’s decision not to follow its own CON laws and give notice of its initial decision. Furthermore, if the logic of DHEC and LMC is followed, DHEC could prevent any party from seeking a review of a decision simply by allowing the activity without ever issuing a decision even though the law mandates a decision. Providence could not request to be notified if it had no notice of the activities that would give rise to a future staff decision, i.e. from a CON

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<sup>11</sup> Though there are certain exemptions to CON review found in S.C. Code Ann. Regs. 61-15 § 104(2) (Supp. 2013), some of which require only a written determination from DHEC and some of which require no written determination at all, neither LMC nor DHEC has argued that any such exemptions apply in this case.

application that LMC should have filed. Since both the Department and LMC foreclosed Providence from the opportunity to make such a request, that argument assumes that Providence must fulfill a predicate that was impossible to fulfill.

Here, DHEC's blatant disregard in administering its own laws and regulations, including failing to provide notice to affected parties, leads the Court to consider the reasoning of *Hamm v. S.C. Pub. Serv. Cmm'n*, 287 S.C. 180, 336 S.E.2d 470 (1985). In *Hamm*, the Supreme Court held that despite the APA language to the contrary, the time to appeal ran from the date a decision was received because to do otherwise would potentially allow an agency to preclude judicial review of a case. That potentiality is realized in this case.

LMC nevertheless argues that in *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 390 S.C. 418, 702 S.E.2d 246, the Supreme Court rejected the applicability of *Hamm* to Section 40-1-60(E). However, because Providence cannot receive notice that was never mailed (or otherwise delivered), then under the facts of this case, *S.C. Coastal Conservation League* does not apply. Instead the notice-upon-receipt requirement must be read into Sections 44-1-60 and 44-7-210, as it was in *Hamm* and for the same reason as in *Hamm* – affected persons have an unquestionable right to notice and an opportunity to be heard. Moreover, even if LMC is correct that the Supreme Court in *S.C. Coastal Conservation League* rejected the applicability of *Hamm* to Section 40-1-60(E) under all circumstances, Providence's request for review is still not untimely. Rather, it is at most filed too soon. In *S.C. Coastal Conservation League*, the Court held that the Department's staff decision "did not become final until fifteen days after DHEC mailed the decision to the [affected person]." If we presume that a valid decision was initially issued, and thus apply the holding of *S.C. Coastal Conservation League* in this case, then since no decision has ever been mailed to Providence, the fifteen-day time period has not begun to run.

Nevertheless, when Providence received notice via LMC's response to Providence's FOIA request, on April 29, 2014, Providence acted reasonably and promptly by filing an RFR 15 days thereafter, even though all of LMC's and the Department's actions prior to this point were void *ab initio*. This right is expressly given by the applicable statutes and preserved in Article I, § 22 of the South Carolina Constitution (*see Ross v. MUSC*, 328, S.C. 51, 72 492 S.E.2d 62, 69 (1997) (Article I § 22 mandates notice and an opportunity to be heard at some point before an agency makes its final decision). Moreover, in *Smith v. S.C. Dep't of Mental Health*, 329 S.C.

485, 500, 494 S.E.2d 630, 638 (Ct. App. 1997) *aff'd sub nom. Smith v. SC Dep't of Mental Health*, 335 S.C. 396, 517 S.E.2d 694 (1999), the Court recognized that “[a]dministrative agencies are required to meet minimum standards of due process.” The *Smith* court notably cited S.C. Const. art. 1, § 3 for that proposition, thereby recognizing that the due process right exists apart from a necessity to seek review pursuant to Article I, Section 22. Therefore, Providence was not barred from filing a contested case with this Court regarding LMC’s *de facto* CON by failing to file its request within 15 days of the Department notifying LMC of its decision.

#### Constructive Notice

LMC next argues that Director Templeton’s June 28, 2013 letter placed Providence on notice to inquire about any project that could affect Providence. In this case, the application of the doctrine of constructive notice is unclear. “While inquiry/constructive notice has served in some contexts as a sufficient substitute for actual notice, it is not the same as actual notice.” *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 63-65, 504 S.E.2d 117, 122-23 (1998). “It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts.” *Anderson v. Buonforte*, 365 S.C. 482, 492, 617 S.E.2d 750, 755 (Ct. App. 2005). Constructive notice is a court doctrine that derives from the courts’ need to determine when a cause of action arises as a result of receiving notice. In this case, there is no such variable. As explained above, Section 44-1-60 and the CON laws provide a specific statutory framework for how notice is given to affected parties.

LMC failed to file a CON application, and DHEC failed to notify Providence, as an affected party, of that filing or of any of LMC’s activities. Since LMC has not provided the Court with any case law supporting the theory of “inquiry notice” when an agency openly announces it will not follow its own regulatory process, the Court concludes that Sections 44-1-60(E), 44-7-200(B), (D), and 44-7-210(A) establish the means by which notice occurs. Furthermore, even if constructive notice applies to the facts of this case, the fifteen-day timeframe to request a final review conference would be questionable. That timeframe derives from Section 44-1-60(E), which is part of an overall statutory scheme in which an affected person is made aware of the impending CON issues. Such a narrow time frame does not appear to be reasonable in a constructive notice application. Moreover, constructive notice establishes

a duty to inquire but does not provide the official, actual notice from the Department required by Section 44-1-60(E)(2) as the predicate to initiate the fifteen-day timeframe.

Nevertheless, even assuming the applicability of constructive notice in this case, Providence had no legal reason to believe that LMC or any other provider would proceed with projects without first obtaining a CON. Furthermore, Director Templeton's letter gave no actual notice of any specific activities that providers may decide to pursue. LMC suggested that Providence should have made monthly inquiries of the Department about any cardiac projects undertaken during the CON "suspension" period. However, Templeton's letter did not provide facts about provider activities sufficient to put Providence on inquiry notice about those activities. Moreover, any inquiry timetable would be without borders in this case because no such timetable exists, either by statute or regulation. LMC's suggestion of a periodic inquiry would impose a burden on an affected person to constantly file FOIA requests on the chance of potential activity occurring without notice. Such an imposition would create an absurdity by essentially transforming the Department's burden of providing notice into an affected person's burden to ferret out its own notice.

LMC further argues that Providence should have exercised due diligence in inquiring about LMC's projects based on six occasions of reports of visit and plan approval by the Department that occurred between September 26, 2013 and April 10, 2014. For the same reasons given above, though Providence perhaps could have discovered these incidents by inquiring of the Department,<sup>12</sup> Providence had not been given statutorily-prescribed notice of specific activities to prompt it to make earlier inquiries.<sup>13</sup> Moreover, this case cannot be dismissed based upon LMC's speculation as to what Providence should have done and what the response thereto may have been.

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<sup>12</sup> It is a bit speculative as to whether the Department would have responded to earlier inquiries, as the Department never responded to Providence's April 9, 2014 FOIA request. Perhaps LMC would have responded to earlier inquiries, though this is also merely conjectural.

<sup>13</sup> LMC also mentions that even if its projects required a CON, the Department can be estopped from enforcing the law as to those projects at this time. This argument has nothing to do with jurisdiction of this Court, and it will be addressed in detail in the summary judgment order.

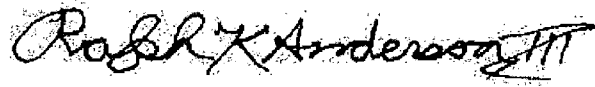
**CONCLUSION**

The Court has subject matter jurisdiction in this case; and because Providence invoked the proper procedure in this case, the Court also has procedural jurisdiction to hear this matter as a contested case.

**ORDER**

**IT IS THEREFORE ORDERED** that LMC's Motion to Dismiss is **DENIED**.

**AND IT IS SO ORDERED**



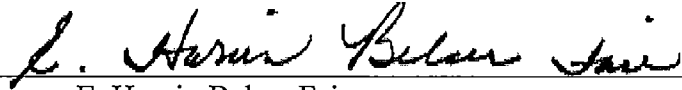
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Ralph King Anderson, III  
Chief Administrative Law Judge

October 23, 2014  
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in cursive script, reading "E. Harvin Belser Fair", is written over a horizontal line.

E. Harvin Belser Fair  
Judicial Law Clerk

October 23, 2014  
Columbia, South Carolina