

DISCUSSION

Subsection I(1)

In subsection I(1) of its Motion to Alter or Amend (Reconsider), addressing the Court's Order Denying Motion to Dismiss, LMC argues that the April 9 letter from Providence to DHEC concerning its status as an "affected person" with regard to an additional OR and/or Cath Lab at LMC posed a "significant and material question of fact [as to] whether Providence had knowledge of these projects prior to April 29, 2014." This argument conflates the standards for motions to dismiss and for summary judgment. Whether there exists a genuine issue of material fact is relevant to a summary judgment analysis, not a dismissal analysis. But even under a summary judgment analysis, and even if there was a genuine issue of fact as to whether Providence had knowledge of LMC's projects prior to April 29, 2014, this fact is immaterial because S.C. Code Ann. §§ 44-7-110 et seq. (2002 and Supp. 2013) (CON Act) requires both LMC and Providence to give notice in a specific manner. This Court cannot ignore the plain and unambiguous language of the General Assembly and allow a lesser form of notice than is specifically required by the Act. *See Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535-36, 725 S.E.2d 693, 695 (2012) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature. . . [and] must follow the plain and unambiguous language in a statute and have no right to impose another meaning.") (internal quotation marks omitted).

Here, the type of notice that LMC and the DHEC are required to provide to the public and affected parties is specified in Sections 44-1-60(B), (E)(1), 44-7-200(B), (D), and 44-7-210(A), (C). For instance, Section 44-7-210(C) requires that "[n]otice of the [staff] decision must be sent to . . . affected persons who have asked to be notified. . . ." Section 44-1-60(E)(1) adds that this notice of staff decision "**must be sent by certified mail, return receipt requested** to the applicant . . . who have requested in writing to be notified. . . ." (emphasis added). Director Templeton's statement could not be a department or staff decision as to whether a CON should be granted to LMC for either of its projects because it did not refer to these specific projects, was addressed only to the "regulated community," and LMC had not even submitted an

subsection III(1), which is the only issue that LMC raised concerning the Court's Order to Enforce Automatic Stay, the Court will not issue an amended version of that Order.

application on which a department or staff decision regarding CON issuance could be rendered.² Because no decision was made, no notice of a department or staff decision was sent to Providence by certified mail, returned receipt requested, as required by Sections 44-160(E)(1) and 44-7-210(C); and because no staff decision was mailed to the applicant, the fifteen-day time period for an affected person to file a request for a final review could not begin to run pursuant to Sections 44-1-60(E)(2) and 44-7-210(C). In sum, there was no notice provided per Section 44-7-200(B), (D) before this written request was sent in, and no staff decision, and thus no notice thereof, issued after the written request was sent in per Sections 44-1-60(E)(1) and 44-7-210(C) to initiate the fifteen-day period to submit a request for review (RFR) per Section 44-1-60(E)(2) and 44-7-210(C). Therefore, it does not matter that Providence provided its written request to be notified as an affected person on April 9.

Subsection I(8)

In subsection I(8) of its Motion to Alter or Amend (Reconsider), LMC argues that the Court erred in concluding that the State Health Plan requires a CON for the services that LMC sought to expand, because “the *Plan* requirements for open heart surgery based on a per suite or per unit standard are arbitrary, capricious and contrary to law, which is a factual issue pending before the Court.” The Court has amended the language set forth in its Order to clarify that a CON is required for the **type of** services that LMC sought to expand, assuming a capital expenditure was made on that expansion. The Court also notes that there remains a genuine issue of material fact as to whether a capital expenditure was made for the Open Heart Suite project. But the determination of whether requirements in the State Health Plan are arbitrary, capricious, and contrary to law is a question of law, not a question of fact. *See MRI at Belfair, LLC v. S.C. Dep’t of Health and Envtl. Control*, 379 S.C. 1, 7 n.4, 664 S.E.2d 471, 474 n.4 (2008) (“The issue [of] whether the Plan standards satisfy the statutory requirements is a legal conclusion based on statutory interpretation principles. Thus, no factual findings are necessary to determine compliance with [the statute]”).

² LMC itself did not appear convinced that the Templeton letter authorized it to ignore the requirements of the CON Act, as evidenced by the fact that LMC officials met with DHEC officials *after* issuance of the June 28, 2013, letter to ascertain the licensing requirements for the proposed projects – a meeting of which neither party advised any affected persons.

Subsection I(13)

In subsection I(13) of its Motion to Alter or Amend (Reconsider), LMC argues that Providence received notice that the Department would be allowing all projects to proceed without CONs and would continue to inspect and license without regard to the CON requirements. LMC also argues that Providence could have acted sooner than April 29, 2014 to protect its interests as evidenced by its April 9, 2014 letter to the Department claiming its status as an affected person.³ In response to these arguments, the Court reasserts its response in its subsection I(1) discussion above.

Subsection I(14)

In subsection I(14) of its Motion to Alter or Amend (Reconsider), LMC argues that the Court's conclusion that Providence's challenge to the implementation of the CON emanated from DHEC's decision not to follow its own CON law and give notice of its initial decision is contradictory to the Court's ultimate holding that Providence timely filed its Request for Review. LMC contends that the Department provided notice on June 28, 2013, months before Providence's filed challenge on May 14, 2014. This argument is based on the erroneous premise that Director Templeton's June 28, 2013 statement was sufficient notice. Templeton's letter, however, did not provide sufficient notice in light of Section 44-1-60 and the CON Act. Moreover, because the CON Act was, according to the South Carolina Supreme Court in *Amisub of S.C., Inc. v. S.C. Dept. of Health and Envtl. Control*, 407 S.C. 596, 757 S.E.2d 415 (2014), in full effect during the entire period at issue, and both the Department and LMC failed to provide the statutorily specified and required notice pursuant to the CON Act (and Section 44-1-60), the entire process where a CON was required was void *ab initio*.

Subsection I(16)

In subsection I(16) of its Motion to Alter or Amend (Reconsider), LMC argues that the Court erred in finding that Providence reasonably and promptly filed its RFR within fifteen days of receiving Providence's Freedom of Information (FOIA) request. The Court herein reasserts its responses to subsections 1 and 14 above.

³ The Court amended its Order with respect to the argument raised in FN 7 in LMC's Motion to Alter or Amend (Reconsider).

LMC agrees that Providence did not know or should not have known prior to April 29, 2014 of LMC's projects. The only statement in the Court recitation concerning April 29, 2014 was in fact 7 – that Providence received written notice from LMC of the DHEC approvals on April 29, 2014. There can be no dispute that LMC notified Providence of the DHEC approvals in its response to Providence's FOIA request -- that document is found in Exhibit A to Providence's Memorandum in Opposition to Motion to Dismiss. And as to the Department's decision not to require a CON for any projects undertaken after July 1, 2013, it is not disputed whether Providence knew about the Templeton's statement concerning suspension of the CON program – just whether her statement constitutes sufficient legal notice.

Furthermore, fact 1 was noticed from the Supreme Court's ruling in *Amisub, supra*. Fact 2 is attached as Exhibit C to Providence's Motion for Summary Judgment, and is certainly not a mere argument of counsel. Fact 3 is supported by Exhibit B to Providence's Motion for Summary Judgment. This is set forth plainly in the DHEC plan approval document. There can be no dispute as to this fact, and it is also not a mere argument of counsel. Fact 4 is taken almost verbatim from LMC's own Response to Motion for Summary Judgment; indeed, LMC itself considered this an "undisputed fact[.]" As to fact 5, it is undeniable that LMC did not obtain a CON; had it, this case would not exist, at least in its present form. Moreover, there is evidence in Exhibits B, C, and F attached to Providence's Request for Contested Case Hearing, that the Department never issued a CON to LMC when it approved its projects. The CON number was considered "N/A" and the Department included a warning to LMC of the possibility of an adverse ruling as to "the validity of a license issued without CON approval[.]" which the Department considered outside of its control. As to fact 6, LMC may disagree about the nature of Templeton's notice, but that is a question of law, not of fact; and that notice, for the reasons stated in the Order Denying LMC's Motion to Dismiss, was not the type of notice specified by the CON Act and was not even notice of **LMC's specific projects**. Having already discussed fact 7, the Court will not do so again. Finally, fact 8 can hardly be disputed, and it is evidenced by an Acknowledgement of Request for Final Review from the Department, found in Exhibit A of Providence's Memorandum in Opposition to Motion to Dismiss.

Subsection II(6)

In subsection II(3) of its Motion to Alter or Amend (Reconsider), LMC argues that the Court erred in finding that LMC is not entitled to assert estoppel against DHEC because the issue

Subsection I(18)

In subsection I(18) of its Motion to Alter or Amend (Reconsider), LMC argues that the Court erred in its finding that “Providence had no reason to make earlier inquiries,” because “Providence presented no affidavits or testimony concerning what it knew and when it knew it” The Court has clarified its determination regarding this issue in its Amended Order. Nevertheless, the Court otherwise finds that its decision in its initial Order was sound.

Subsection I(19)

In subsection I(19) of its Motion to Alter or Amend (Reconsider), LMC argues that the Court erred in finding that it has jurisdiction as to the Cath Lab and the Open Heart Suite because these projects required a CON prior to implement. LMC argues that this finding is contradictory to the Court’s holding in its Order Granting Partial Summary Judgment that there remains a factual question as to whether LMC made a capital expenditure with respect to the Open Heart Suite and thus whether a CON was required for that project. However, the Court did not find that it has subject matter jurisdiction because a CON is required for both projects. Rather, the Court found that it has subject matter jurisdiction over both projects because both projects require a determination as to whether a CON was required. The Court did not determine that both projects require a CON; the Court found that jurisdiction existed to hear this case because it involved a challenge to the issuance or, in this case, the lack of issuance of a CON. The purpose of allowing discovery as to the expenditures for the Open Heart Suite is to determine whether a CON was required and thus should have been granted or denied by the Department. Nevertheless, the court’s Order has been amended to clarify its reasoning.

Subsection II(3)

In subsection II(3) of its Motion to Alter or Amend (Reconsider), addressing the Court’s Order Granting Partial Summary Judgment, LMC argues that the Court erred in its recitation of undisputed material facts, because LMC has disputed, and continues to dispute, “whether Providence knew or should have known, prior to April 29, 2014, of LMC’s projects and the Department’s decision not to require a Certificate of Need for any projects undertaken after July 1, 2013.” LMC further alleges that “no evidence was presented to the Court on these ‘facts[,]’ and [that] the argument of counsel is not evidence.” First, none of the eight (8) material facts that the Court sets forth in its Order Granting Partial Summary Judgment states or infers that

of estoppel is factual, and thus it is not appropriate to determine this issue via summary judgment. However, the issue of estoppel in this case does not involve a factual dispute but rather a question about the legal implications of, and applicability of estoppel to, Templeton's statement, and whether LMC's reliance was justifiable based on that statement. Clearly, no one disputes the contents of Templeton's statement. The South Carolina Supreme Court in *Amisub* found that the Governor (or by extension her appointed agency director) is not empowered to yield her power in a manner outside the scope of her authority. 407 S.C. at 596, 757 S.E.2d at 415. The Supreme Court quoted with agreement the Supreme Judicial Court of Massachusetts that "a 'principle of great importance in our tripartite form of government is that it is for the Legislature, not the executive branch, to determine finally which social objectives or programs are worthy of pursuit.'" *Id.* (quoting *Op. of the Justices*, 375 Mass. 827, 376 N.E.2d 1217, 1221 (1978)). And though the Supreme Court did not address whether a third party was entitled to rely on the Department's representations and actions prior to the Court's decision, this Court is extrapolating from what the Supreme Court did say and is now making a decision based thereon as the court of first instance.

Subsection III(1)

In subsection III(1) of its Motion to Alter or Amend (Reconsider), LMC argues that the Court erred in "misapprehend[ing] or overlook[ing] that the Certificate of Need Act requirements are not applicable to this matter and no contested case exists." This appears to be LMC's fundamental premise – that the CON Act does not apply. The Court simply, but comprehensively and fundamentally, disagrees with LMC's premise for the reasons set forth in its Order Denying Motion to Dismiss, Order Granting Partial Summary Judgment, and Order to Enforce Automatic Stay.

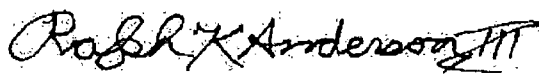
ORDER

IT IS THEREFORE ORDERED that LMC's Motion to Alter or Amend is **GRANTED IN PART AND DENIED IN PART**, in keeping with this Order.

IT IS FURTHER ORDERED that all additional factual findings in this Order are incorporated into the Amended Order Denying Motion to Dismiss and Amended Order Granting Partial Summary Judgment as findings of fact.

IT IS FURTHER ORDERED that all additional legal conclusions in this Order are incorporated into the Amended Order Denying Motion to Dismiss and Amended Order Granting Partial Summary Judgment as conclusions of law.

AND IT IS SO ORDERED.

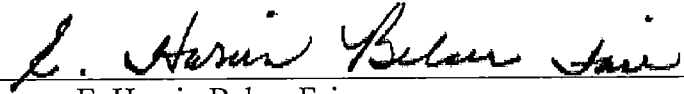
A handwritten signature in black ink that reads "Ralph King Anderson, III". The signature is written in a cursive, slightly slanted style.

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 above a horizontal line.

E. Harvin Belser Fair
Judicial Law Clerk

October 23, 2014
Columbia, South Carolina