THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 2014-ALJ-07-0332-CC

Sisters of Charity Providence Hospitals, ...Respondent,

v.

South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc. d/b/a Lexington Medical Center,

Of Whom South Carolina Department of Health and Environmental Control is the .....Respondent,

and Lexington County Health Services District, Inc. d/b/a Lexington Medical Center is the .....Appellant.

RECORD ON APPEAL
VOLUME 1 OF 2

David B. Summer, Jr., SC Bar #7974
Faye A. Flowers, SC Bar #2043
Amber B. Carter, SC Bar #78706
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450 (29201)
Post Office Box 1509
Columbia, South Carolina 29202
Telephone: 803.255.8000
Facsimile: 803.255.8017
E-mail: davidsummer@parkerpoe.com
E-mail: fayeflowers@parkerpoe.com
E-mail: ambercarter@parkerpoe.com

Attorneys for Appellant
Lexington County Health Services District, Inc., d/b/a Lexington Medical Center

James G. Long, III, SC Bar #64103
Jennifer J. Hollingsworth, SC Bar #73535
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
Telephone: 803.771.8900
Facsimile: 803.253.8277
E-mail: JLong@nexsenpruet.com
E-mail: JHollingsworth@nexsenpruet.com

Attorneys for Respondent
Sisters of Charity Providence Hospitals

Ashley C. Biggers, SC Bar #17225
Vito M. Wicevic, SC Bar #100265
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
Telephone: 803.898-3350
Facsimile: 803.898-3367
E-mail: biggerac@dhec.sc.gov
E-mail: Vito.Wicevic@dhec.sc.gov

Attorneys for Respondent
South Carolina Department of Health and Environmental Control

INDEX

RECORD VOLUME I OF 2

PLEADINGS **PAGE**

RECORD VOLUME 2 OF 2

TRANSCRIPTS

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 GRANTING MOTION FOR SUMMARY JUDGMENT**

This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant a Motion for Summary Judgment made by Petitioner Sisters of Charity Providence Hospitals (Providence) at a hearing on a Motion to Compel filed by Providence against Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center (LMC).[1]

BACKGROUND

The underlying case arises from LMC's expansion of services by constructing a second open heart surgery unit (Open Heart Suite) and third catheterization laboratory (Cath Lab) without first obtaining a Certificate of Need (CON) from the South Carolina Department of Health and Environmental Control (Department or DHEC). On October 23, 2014, this Court issued an Amended Order Denying LMC's Motion to Dismiss, and an Amended Order Granting Partial Summary Judgment in favor of Providence (collectively, Orders).[2] As a result of those Orders, the Court found that a narrow question of fact existed as to whether LMC made a capital expenditure for the operation of a second open heart surgery suite. Therefore, allowing for discovery relating to the capital expenditure for the second open heart surgery suite, the Court scheduled this case for a hearing beginning Tuesday, May 19, 2015.

[1] In light of Providence's decision to move for summary judgment at the April 8, 2015 hearing following a stipulation by LMC as to having made a capital expenditure, and based on the Court's decision to grant Providence's Motion for Summary Judgment, Providence's Motion to Compel is rendered moot.

[2] The Court also issued an Order Enforcing Automatic Stay and an Amended Order Denying Motion to Lift Automatic Stay with respect to further activities relating to the Open Heart Suite

On March 4, 2015, Providence filed a Motion to Compel discovery. On March 5, 2015, the Court issued an Order denying LMC's Motion to Stay the proceedings in this case. On March 16, 2015, LMC filed a Memorandum in Response to Motion to Compel. In response, on March 20, 2015, Providence filed a Memorandum in Further Support of Motion to Compel. On March 25, 2015, LMC filed a letter in reply to Providence's Memorandum in Further Support of Motion to Compel. On April 8, 2015, the Court held a hearing on Providence's Motion to Compel.

DISCUSSION

As the Court already found in its Order Denying LMC's Motion to Dismiss, S.C. Code Ann. §§ 44-7-110 et seq. (CON Act) was in effect during the period at issue and applies to LMC's Open Heart Suite project. Also, as the Court found in its Amended Order Granting Partial Summary Judgment, LMC is a "health care facility" pursuant to S.C. Code Ann. § 44-7-130(10) (Supp. 2013); and its Open Heart Suite would be LMC's second open heart surgery operating room, thus expanding on its existing open heart surgery services. The standards and criteria for open heart surgery services is prescribed in the State Health Plan on pages VIII-17 to VIII-21. And as the Court noted in that same Order, DHEC, at the September 3, 2014 hearing, conceded that had its director not issued the June 28, 2013 letter regarding the purported suspension of the CON program, DHEC would have required a CON for the Open Heart Suite because it "would have been an expansion of an existing service that has standards in the State Health Plan." Thus, the only remaining question is whether LMC made a capital expenditure for the Open Heart Suite project. If it did, then a CON would be required pursuant to Section 44-7-160(4) (Supp. 2013).

At the April 8, 2015 hearing on Providence's Motion to Compel, counsel for LMC, while preserving other issues for appeal, stipulated that LMC made a capital expenditure for the operation of a second open heart surgery suite. As this resolved any remaining factual dispute in this matter, Providence then moved for summary judgment. "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001). Because LMC stipulated to having made a capital expenditure for the operation of a second open heart surgery suite, summary judgment is appropriate. Because LMC made a capital expenditure, LMC was required to obtain a CON as a matter of law. Therefore, I find

that LMC is required to obtain a CON to expand its open heart surgery services and operate its Open Heart Suite.

ORDER

IT IS THEREFORE ORDERED that Providence's Motion for Summary Judgment is **GRANTED**.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

April 29, 2015
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).

E. Harvin Belser Fair
Judicial Law Clerk

April 29, 2015
Columbia, South Carolina

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 GRANTING IN PART AND DENYING IN PART MOTION TO ALTER OR AMEND (RECONSIDER) AMENDED ORDER GRANTING PARTIAL SUMMARY JUDGMENT**

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Motion to Alter or Amend (Reconsider) filed on November 3, 2014 by Respondent Lexington Health Services District, Inc., d/b/a Lexington Medical Center (LMC) in response to the Court's Amended Order Granting Partial Summary Judgment.

DISCUSSION

LMC argues that the Court erred in making the following statement in footnote 6 of its Amended Order Granting Partial Summary Judgment: "In remanding this matter, the Court finds that the Department's pledge not take [sic] action against LMC was unlawful and void." LMC contends that the matter before the Court is not being remanded to the Department. LMC also contends that whether the Department can be held to its pledge not to take action against LMC was not directly raised by the parties and requires a further development of facts before that determination can be made.

In response to LMC's argument, the Court hereby amends its Amended Order Granting Partial Summary Judgment by changing the disputed sentence to read as follows: "In remanding this matter, the Court finds that the Department's pledge not to take action against LMC was unlawful and void." Also, though LMC did not raise the following matter, the Court will also amend its Order by replacing an erroneously placed comma immediately preceding the disputed sentence with a period. All other grounds to alter or amend (reconsider) are hereby denied.

ORDER

IT IS THEREFORE ORDERED that LMC's Motion to Alter or Amend Reconsider is **GRANTED IN PART AND DENIED IN PART.**

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

December 16, 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).

E. Harvin Belser Fair
Judicial Law Clerk

December 16, 2014
Columbia, South Carolina

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 **AMENDED ORDER DENYING MOTION TO LIFT AUTOMATIC STAY**

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Motion to Lift Automatic Stay filed on September 23, 2014 by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center (LMC) in response to the Court's Reconsideration Order and Orders Denying LMC's Motion to Dismiss, Granting Partial Summary Judgment in favor of Petitioner Sisters of Charity Providence Hospitals (Providence), and Enforcing Automatic Stay with respect to further activities relating to the Open Heart Suite (collectively, Orders). A hearing was held on this matter on October 22, 2014 at the ALC in Columbia, SC.

BACKGROUND

This matter was initially before the ALC pursuant to a Motion to Dismiss filed by LMC, a Motion for Summary Judgment filed by Providence, and a Motion to Enforce Automatic Stay filed by Providence (collectively, Motions). The underlying case arises from LMC's expansion of services by constructing a second open heart surgery unit (Open Heart Suite) and third catheterization laboratory (Cath Lab) without first obtaining a Certificate of Need (CON). On September 22, 2014, this Court issued its Orders on the Motions.

On October 2, 2014, LMC filed a Motion to Alter or Amend (Reconsider) the Court's Orders. On October 13, 2014, Providence filed its Memorandum in Opposition to Motion to Alter or Amend. On October 23, 2014, the Court issued a Reconsideration Order granting LMC's Motion in part and denying it in part. The Court also issued Amended Orders Denying

LMC' Motion to Dismiss and Granting Partial Summary Judgment in favor of Providence. Although it amended its Orders to clarify its position, the Court still held that it had subject matter jurisdiction and procedural jurisdiction to hear this matter as a contested case and that LMC must first obtain a CON before resuming operation of the Cath Lab. As to the Open Heart Suite, the Court ruled that it would allow further discovery but only as to the factual question of whether LMC made a capital expenditure for the Open Heart Suite. Finally, the Court issued an Order Enforcing Automatic Stay of LMC's activities with respect to further activities relating to the Open Heart Suite.[1] In light of the Court's rulings, on September 23, 2014, LMC filed a Motion to Lift Automatic Stay, which the Court now addresses.[2]

DISCUSSION

South Carolina Code Ann. § 1-23-600(H)(4) states that "[u]pon motion by any party [to lift automatic stay imposed pursuant to subsection (H)(2)], the [ALC] shall lift the stay for good cause shown or if no irreparable harm will occur, then the stay shall be lifted." At the outset, an implicit prerequisite to seeking to lift a stay is that the activity has been initially determined to be valid. Though LMC contends that its expansion of its Open Heart Suite was authorized by the Department, it has not established that it ever sought a CON, a non-applicability determination, or an exemption for these services. Moreover, the CON Act is, and has been, in effect throughout the events at issue, and DHEC has all the while been responsible for enforcing it. *See 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). Accordingly, LMC has not yet demonstrated lawful grounds to expand its Open Heart Suite. The activity of LMC thus cannot support a contention that a stay should be lifted for it to continue to provide its services, because there has been no underlying determination that those services are proper.

Good Cause

Whether there is good cause involves an evaluation of the facts of the specific case. *See Shapiro v. Massengill*, 661 A.2d 202, 211 (Md. Ct. Spec. App. 1995) ("The concept of 'just cause' does not lend itself to a mathematically precise definition. Indeed, '[t]here is no single

[1] The Court saw no need to alter or amend its Order Enforcing Automatic Stay.

[2] The Court also held that the automatic stay imposed pursuant to S.C. Code § 1-23-600(H)(2) (Supp. 2013) was moot as to LMC's activities relating to the Cath Lab, in light of the Court's grant of summary judgment in favor of Providence on the Cath Lab issue.

definition of what constitutes good cause . . . .'") (quoting Stanley Mazeroff, *Maryland Employment Law* § 3.3(A), at 189 (1990)); *Peebles v. Moore*, 269 S.E.2d 694, 698 (N.C. Ct. App. 1980) ("What constitutes 'good cause' depends on the circumstances in a particular case. . . .."). Therefore, LMC must demonstrate that the circumstances of this case raise sufficient reasons to depart from the sound reasons for the existence of an automatic stay. *See Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000) (the burden of proof is upon the party asserting the affirmative of an issue).

LMC argues that good cause exists to lift the automatic stay imposed, pursuant to S.C. Code § 1-23-600(H)(4) (Supp. 2013), because the fundamental purpose of the automatic stay – to maintain the status quo – is not being served. LMC contends that because Providence filed its request for contested case review of the Department's decision concerning the Open Heart Suite months after it was in operation and LMC is using the Open Heart Suite on a daily basis, the stay must be lifted to maintain the status quo. The purpose of the automatic stay is indeed to preserve the status quo until a decision is rendered in a contested case. *See Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990). However, an automatic stay arising in relation to a review of a new-licensing decision "stays all actions for which the license is a prerequisite." Section 1-23-600(H)(2). In this case, the remaining issue before this Court is whether a CON, which is a certificate and thus a "license" under Section 1-23-505, is a prerequisite for LMC's expansion of its existing services via its second Open Heart Suite. Therefore, the automatic stay is serving its fundamental purpose of maintaining the status quo by stopping the actions for which a CON is arguably prerequisite. *See Santee Cooper Resort, Inc. v. S .C. Pub. Serv. Comm'n,* 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) ("[A] stay is a stopping."). In sum, LMC's actions do not justify being elevated to the level of "status quo."

LMC argues that the Court should consider the timing of the stay and the impairment resulting from the imposition of a stay. Specifically, LMC argues that "[b]ecause of the urgent nature of the procedures performed in the surgery suite, requiring LMC to discontinue its existing business operations will adversely impact LMC's patients because they will have to be rescheduled and their care delayed." However, the CON Act through the State Health Plan sets forth the standards by which the need for expansion of services is determined; determinations of need are based upon a factual analysis taking into consideration those regulations. Here, LMC's

proclaimed urgency derives not from a lawful determination of need for the services themselves but from the scheduling of services for an Open Heart Suite in which the propriety of those services has yet to be established. LMC thus wishes to begin a service for which there does not appear to have been a formal determination of its lawfulness (via a CON, non-applicability determination, or an exemption), and contends that it is urgent to maintain that activity because it has established utilization of that service. That reasoning is simply unsound.

Additionally, in weighing the effect of the stay upon the parties, it is notable that LMC took a risk when it decided to proceed without a CON. The Department even informed LMC of the risk of proceeding with its expansion of services without a CON. Therefore, since LMC was aware of the potential for an adverse ruling regarding the need for a CON, it should have anticipated the need to make arrangements for these patients. Moreover, if LMC's position was adopted, the automatic stay would be turned on its head by essentially adopting a presumptive lift of stay in all CON matters where patients are receiving "urgent" treatment. This Court addressed a similar argument in *MRI at Belfair, LLC, v. S.C. Dep't of Health and Envtl. Control*, Docket No. 07-ALJ-07-0538-CC (S.C. Admin Law J. Div. May 22, 2008) by stating the following:

> Lifting the stay based upon the normal, foreseeable delay, expense, and lost profits associated with an applicant's inability to continue with a project due to the operation of the automatic stay would contradict the legislative purpose of imposing one. Consequently, the court finds that a movant must show circumstances other than those generally suffered by prospective permittees or licensees to lift the stay. Moreover, the harm demonstrated by those circumstances must outweigh that which will be suffered by the other parties.

The Court likewise finds any harm suffered by LMC to be foreseeable and of the sort generally suffered by prospective licensees.[3]

Furthermore, according to Standard 5(A) on page VIII-19 of the State Health Plan, with two exceptions that are of no consequence in the instant case, "[n]ew open heart surgery services shall be approved only if the following conditions are met: A. Each existing unit in the service area . . . is performing an annual minimum of 350 open heart surgery procedures per open heart surgery unit for adult services (70 percent of functional capacity). . . ." According to LMC's

[3] Though the standard for lifting the automatic stay under Section 1-23-600 was amended after *MRI at Belfair, LLC*, the inquiry above is still a relevant consideration as to the question of good cause.

own affiant, Tod Augsburger, LMC performed only 212 open heart surgery procedures for fiscal year ending September 30, 2013, 264 procedures for the fiscal year during which the affidavit was sworn (August 11, 2014), and expects to perform 300 by September 30, 2014. Thus, should a CON for an additional open heart surgery unit under the State Health Plan be required in this case, LMC would not even qualify for it because it would not meet the 350-procedure threshold to justify a substantial expansion of existing open heart surgery services.[4]

Weighing the foreseeable and minimal harm against other factors, such as the harm that unauthorized services would have on South Carolina's citizens and on other service providers in the Service Area, the Court finds no good cause to lift the automatic stay.[5] Unauthorized services, which are violations of the law, simply cannot serve as the foundation for good cause.

Irreparable Harm

Like the term "good cause," the term "irreparable harm" is not defined in Section 1-23-600. "What constitutes irreparable harm is generally a factual determination made after considering the particular circumstances of a case." *School Comm. of City of Pawtucket v. Pawtucket Teachers' Alliance Local No. 930*, 365 A.2d 499, 502 (R.I. 1976). Whether a wrong is irreparable is a question that is "not decided by narrow and artificial rules." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 36 (Ct. App. 2005) (quoting *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939)). Nevertheless, it has been

---

[4] Standard 5 also contains a section B, requiring a projection of a minimum of 200 annual open heart surgery procedures per open heart surgery unit within three years after initiation. Both this section and section A above must be satisfied.

[5] LMC attempts to analogize this case to *Amisub of S.C. Inc. d/b/a Piedmont Med. Ctr. v. S.C. Dept. of Health and Envtl. Control*, Docket No. 08-ALJ-07-0063-CC (July 23, 2008), in which the ALC found that expenditure of a large sum of money to complete a construction project was sufficient to lift the stay and allow respondents to proceed with construction. However, that case is distinguishable in that the lifting of the stay in that case did not allow potentially unauthorized service to patients. The Court in that case also noted that the challenged party's "actions in proceeding to construct the building without obtaining legal authorization from the ALC does not appear to be based upon a disregard for the law or a cavalier attitude to proceed at its own risk." Nevertheless, this Court finds, as discussed above and in its previous Orders, that LMC proceeded at its own risk, even being warned on several occasions by the Department that there was a risk of an adverse opinion – that the law, which LMC had access to, could still be in effect (as the Supreme Court would later confirm in *Amisub*).

Moreover, LMC asserts that this Court in *Piedmont, supra* rejected the balancing test from *MRI at Belfair, supra*. Though this Court did say that it "d[id] not find that the determination of whether to lift a stay should be made following a strict 'balancing of the harms test,'" it also said that "[n]evertheless, I do not find the standard used in determining whether to grant an equitable stay to be off base in these determinations. . . . Here, the decision should . . . be made by weighing or considering all relevant factors that reflect upon whether the stay should or should not be lifted."

held that, to be irreparable, the harm must be "neither remote nor speculative, but actual and imminent." *Gracepointe Church v. Jenkins*, No. 2:06-CV-1463-DCN, 2006 WL 1663798 (D.S.C. June 8, 2006) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)); *accord Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144 (2d Cir. 1999). Moreover, while some courts have held that the injury must be "great" and not "merely serious or substantial,"[6] others have held that "when the threatened harm is more than *de minimis*, it is not so much the magnitude but the irreparability that counts."[7]

In determining irreparable harm in CON contested cases, the Court should consider the purposes of the CON Act. These purposes are as follows:

> promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State

Therefore, the determination in this case should be made considering those factors.

LMC contends that its project did not waste healthcare dollars because it used existing space and equipment. LMC further asserts that "[t]he surgery suite provides high quality, necessary services that serve the public needs by allowing LMC to more efficiently provide care to its patients and avoid inconvenient scheduling of procedures." However the satisfaction of these purposes cannot be determined because no CON was ever issued. In fact, LMC circumvented the normal vetting process of a CON by failing to seek a non-applicability determination or an exemption. Without the benefit of the facts to be gained by that review, LMC asserts that there will be no irreparable harm. Furthermore, the opposing affidavits suggest that LMC's services could result in unnecessary duplication, as well as underutilization among the other units of existing providers in the Service Area – underutilization that the State Health Plan seeks to avoid. Condoning such medical services, even temporarily, is "in direct derogation" of the CON Act's purpose of promoting quality healthcare to the citizens of South Carolina. *See Dema v. Tenet Phys. Servs.-Hilton Head, Inc.*, 383 S.C. 115, 124, 678 S.E.2d 430, 435 (2009).

---

[6] *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262 (10th Cir. 2004) (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001)).

[7] *Enterprise Intern., Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) (quoting *Canal Auth. v. Callaway*, 489 F.2d 567, 575 (5th Cir. 1974)).

LMC also contends that Providence has not been harmed by LMC's Open Heart Suite and will not be harmed by lifting the automatic stay. It argues that any harm to Providence is "purely speculative," and that "Providence suffers no loss of patients or any other harms from the operation of the surgery suite during the pendency of this action." The basis for LMC's position is two-fold. The first basis is an affidavit from Jeffrey A. Travis, M.D., which mentions the inconvenience of having one cardiovascular surgical suite – that it required "h[im], the other cardiovascular surgeon, and the clinical staff to perform surgeries later into the night and on weekends." It also states that "[b]ecause of the significant health risks and stresses associated with transfer and patient preferences, patients awaiting open heart surgery generally are not transferred to other facilities." (Resp.'s Exhibit "B," ¶ 10). The second basis is the fact that Providence was unaware of LMC's Open Heart Suite, from which LMC infers that had Providence been "suffering irreparable harm from the operation of the surgery suite, it would certainly realized it sooner."

As to the first basis, the CON Act establishes the procedure to insure quality health care in this State. As explained above, the Act requires a determination of need for certain services before those services may be offered to the public. It is undisputed that the threshold exists to insure that providers are performing a sufficient number of procedures to maintain proficiency. Here, should the Court find that a CON is required, the number of heart surgery procedures currently being performed at LMC are below the 350-procedure threshold required to obtain a CON to expand an existing health service. Therefore, under the policies of the State Health plan, there is a risk of harm to other facilities within the Service Area in approving an open heart suite under the facts of this case. Also, LMC's argument that patients awaiting open heart surgery are generally not transferred to other facilities is questionable. According to the affidavit of Edward M. Leppard, M.D., who has practiced for thirty (30) years at Providence Hospital, "only a small percentage of open heart surgery is performed on an 'emergent' basis," meaning that "the procedure must be done without delay"; and "transferring a patient for open heart surgery is common." Thus, even if LMC were to perform enough open-heart procedures to warrant a second Open Heart Suite pursuant to the State Health Plan, LMC could take patients away from, i.e. irreparably harm, other providers in the Service Area, which is what the CON Act and, by extension, the State Health Plan aim to avoid. Therefore, LMC failed to establish that there is no

risk of irreparable harm to other facilities within the Service Area if the automatic stay was lifted.

Moreover, the inconvenience of having one cardiovascular surgical suite is not a basis for irreparable harm but rather a basis for good cause. In other words, even if it was inconvenient to transfer patients, that fact does not establish that other hospitals would not be harmed by LMC utilization of a second Open Heart Suite. Further, even if the Court were to consider this argument under the good cause analysis, LMC does not sufficiently explain why its existing Open Heart Suite would not accommodate the needs of its patients. LMC's argument that there may be harm to the interest of its patients is founded upon its own view of need. And again, the procedures currently being performed at LMC are below the 350 procedure threshold required to obtain a CON to expand an existing health service. Therefore, it is questionable whether a need exists or whether the services are lawful.

As to the second basis, the Court is not persuaded by LMC's argument. The argument is based upon the premise that if the harm is not noticed, it does not exist. Following that assumption, no harm would ever occur to a person or entity unless it is noticed. Thus, stealing funds from a wealthy individual, for example, would not cause irreparable harm as long as the wealthy individual does not realize that someone is stealing from him/her. I find that LMC's faulty reasoning and the inference it begets fail to establish a lack of harm. There is simply insufficient evidence for this Court to leap to the conclusion that because the loss of patients may not have been noticed, there was no harm from that loss.

Moreover, LMC has not even established that no harm was noticed by Providence.[8] Rather, LMC presumes that Providence did not notice any harm based upon its interpretation of what Providence would have done had it been harmed. That reasoning is based upon speculation, which is an insufficient basis for this Court to conclude that harm has not occurred, much less whether that harm would not be irreparable. I therefore find that that LMC has failed to establish that there would be no irreparable harm to Providence, other providers, and/or the citizens of South Carolina by lifting the automatic stay and allowing it to continue providing unauthorized health services.

---

[8] Notably, it is LMC's burden to establish that no other providers in the service area, not just Providence, would be harmed. Its argument in that regard is based purely upon conjecture.

ORDER

IT IS THEREFORE ORDERED that LMC's Motion to Lift Automatic Stay is **DENIED.** LMC must continue to 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.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

December 1, 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).

E. Harvin Belser Fair
Judicial Law Clerk

December 1, 2014
Columbia, South Carolina

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 DENYING MOTION TO LIFT AUTOMATIC STAY**

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Motion to Lift Automatic Stay filed on September 23, 2014 by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center (LMC) in response to the Court's Reconsideration Order and Orders Denying LMC's Motion to Dismiss, Granting Partial Summary Judgment in favor of Petitioner Sisters of Charity Providence Hospitals (Providence), and Enforcing Automatic Stay with respect to further activities relating to the Open Heart Suite (collectively, Orders). A hearing was held on this matter on October 22, 2014 at the ALC in Columbia, SC.

BACKGROUND

This matter was initially before the ALC pursuant to a Motion to Dismiss filed by LMC, a Motion for Summary Judgment filed by Providence, and a Motion to Enforce Automatic Stay filed by Providence (collectively, Motions). The underlying case arises from LMC's expansion of services by constructing a second open heart surgery unit (Open Heart Suite) and third catheterization laboratory (Cath Lab) without first obtaining a Certificate of Need (CON). On September 22, 2014, this Court issued its Orders on the Motions.

On October 2, 2014, LMC filed a Motion to Alter or Amend (Reconsider) the Court's Orders. On October 13, 2014, Providence filed its Memorandum in Opposition to Motion to Alter or Amend. On October 23, 2014, the Court issued a Reconsideration Order granting

LMC's Motion in part and denying it in part. The Court also issued Amended Orders Denying LMC' Motion to Dismiss and Granting Partial Summary Judgment in favor of Providence. Although it amended its Orders to clarify its position, the Court still held that it had subject matter jurisdiction and procedural jurisdiction to hear this matter as a contested case and that LMC must first obtain a CON before resuming operation of the Cath Lab. As to the Open Heart Suite, the Court ruled that it would allow further discovery but only as to the factual question of whether LMC made a capital expenditure for the Open Heart Suite. Finally, the Court issued an Order Enforcing Automatic Stay of LMC's activities with respect to further activities relating to the Open Heart Suite.[1] In light of the Court's rulings, on September 23, 2014, LMC filed a Motion to Lift Automatic Stay, which the Court now addresses.[2]

DISCUSSION

South Carolina Code Ann. § 1-23-600(H)(4) states that "[u]pon motion by any party [to lift automatic stay imposed pursuant to subsection (H)(2)], the [ALC] shall lift the stay for good cause shown or if no irreparable harm will occur, then the stay shall be lifted." At the outset, an implicit prerequisite to seeking a stay to continue an activity is that the activity has been initially determined to be valid. Though LMC contends that its expansion of its Open Heart Suite was authorized by the Department, it has not established that it ever sought a CON, a non-applicability determination, or an exemption for these services. Moreover, the CON Act is, and has been, in effect throughout the events at issue, and DHEC has all the while been responsible for enforcing it. *See 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). Accordingly, LMC has never received a lawful authorization to expand its Open Heart Suite. The unauthorized activity of LMC thus cannot support a contention that a stay should be lifted for it to continue to provide its services, because there has been no underlying determination that those services are proper.

---

[1] The Court saw no need to alter or amend its Order Enforcing Automatic Stay.

[2] The Court also held that the automatic stay imposed pursuant to S.C. Code § 1-23-600(H)(2) (Supp. 2013) was moot as to LMC's activities relating to the Cath Lab, in light of the Court's grant of summary judgment in favor of Providence on the Cath Lab issue.

Good Cause

Whether there is good cause involves an evaluation of the facts of the specific case. *See Shapiro v. Massengill*, 661 A.2d 202, 211 (Md. Ct. Spec. App. 1995) ("The concept of 'just cause' does not lend itself to a mathematically precise definition. Indeed, '[t]here is no single definition of what constitutes good cause . . . .'") (quoting Stanley Mazeroff, *Maryland Employment Law* § 3.3(A), at 189 (1990)); *Peebles v. Moore*, 269 S.E.2d 694, 698 (N.C. Ct. App. 1980) ("What constitutes 'good cause' depends on the circumstances in a particular case. . . ."). Therefore, LMC must demonstrate that the circumstances of this case raise sufficient reasons to depart from the sound reasons for the existence of an automatic stay. *See Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000) (the burden of proof is upon the party asserting the affirmative of an issue).

LMC argues that good cause exists to lift the automatic stay imposed, pursuant to S.C. Code § 1-23-600(H)(4) (Supp. 2013), because the fundamental purpose of the automatic stay – to maintain the status quo – is not being served. LMC contends that because Providence filed its request for contested case review of the Department's decision concerning the Open Heart Suite months after it was in operation and LMC is using the Open Heart Suite on a daily basis, the stay must be lifted to maintain the status quo. The purpose of the automatic stay is indeed to preserve the status quo until a decision is rendered in a contested case. *See Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990). However, an automatic stay arising in relation to a review of new-licensing decision "stays all actions for which the license is a prerequisite." Section 1-23-600(H)(2). In this case, the remaining issue before this Court is whether a CON, which is a certificate and thus a "license" under Section 1-23-505, is a prerequisite for LMC's expansion of its existing services via its second Open Heart Suite. Therefore, the automatic stay is serving its fundamental purpose of maintaining the status quo by stopping the actions for which a CON is arguably prerequisite. *See Santee Cooper Resort, Inc. v. S .C. Pub. Serv. Comm'n,* 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) ("[A] stay is a stopping."). In sum, LMC's unauthorized actions do not justify being elevated to the level of "status quo."

LMC further argues that the Court should consider the timing of the stay and the impairment resulting from the imposition of a stay. Specifically, LMC argues that "[b]ecause of the urgent nature of the procedures performed in the surgery suite, requiring LMC to discontinue

its existing business operations will adversely impact LMC's patients because they will have to be rescheduled and their care delayed." However, the CON Act through the State Health Plan sets forth the standards by which the need for expansion of services is determined; determinations of need are based upon a factual analysis taking into consideration those regulations. Here, LMC's proclaimed urgency derives not from a lawful determination of need for the services themselves but from the scheduling of services for an Open Heart Suite in which the propriety of those services has yet to be established. LMC thus wishes to begin a service that has yet to be lawfully authorized and contends that it is urgent to maintain that activity because it has established utilization of that service. That reasoning is simply unsound.

Additionally, in weighing the effect of the stay upon the parties, it is notable that LMC took a risk when it decided to proceed without a CON. The Department even informed LMC of the risk of proceeding with its expansion of services without a CON. Therefore, since LMC was aware of the potential for an adverse ruling regarding the need for a CON, it should have anticipated the need to make arrangements for these patients. Moreover, if LMC's position was adopted, the automatic stay would be turned on its head by essentially adopting a presumptive lift of stay in all CON matters where patients are receiving "urgent" treatment. This Court addressed a similar argument in *MRI at Belfair, LLC, v. S.C. Dep't of Health and Envtl. Control*, Docket No. 07-ALJ-07-0538-CC (S.C. Admin Law J. Div. May 22, 2008) by stating the following:

> Lifting the stay based upon the normal, foreseeable delay, expense, and lost profits associated with an applicant's inability to continue with a project due to the operation of the automatic stay would contradict the legislative purpose of imposing one. Consequently, the court finds that a movant must show circumstances other than those generally suffered by prospective permittees or licensees to lift the stay. Moreover, the harm demonstrated by those circumstances must outweigh that which will be suffered by the other parties.

The Court likewise finds any harm suffered by LMC to be foreseeable and of the sort generally suffered by prospective licensees.

Furthermore, according to Standard 3 on page VIII-18 of the State Health Plan, "[t]he capacity of an open heart surgery program is 500 open heart procedures per year for the initial open heart surgery unit and each additional dedicated open heart surgery unit . . . ." According to LMC's own affiant, Tod Augsburger, LMC performed only 212 open heart surgery

procedures for fiscal year ending September 30, 2013, 264 procedures for the fiscal year during which the affidavit was sworn (August 11, 2014), and expects to perform 300 by September 30, 2014. Thus, LMC would not even qualify for a CON for an additional open heart surgery unit under the State Health Plan because it would not meet the 500-procedure threshold to justify a substantial expansion of existing open heart surgery services.

Weighing the foreseeable and minimal harm against other factors, such as the harm that unauthorized services would have on South Carolina's citizens and on other service providers in the Service Area, the Court finds no good cause to lift the automatic stay.[3] Unauthorized services, which are violations of the law, simply cannot serve as the foundation for good cause.

Irreparable Harm

Like the term "good cause," the term "irreparable harm" is not defined in Section 1-23-600. "What constitutes irreparable harm is generally a factual determination made after considering the particular circumstances of a case." *School Comm. of City of Pawtucket v. Pawtucket Teachers' Alliance Local No. 930*, 365 A.2d 499, 502 (R.I. 1976). Whether a wrong is irreparable is a question that is "not decided by narrow and artificial rules." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 36 (Ct. App. 2005) (quoting *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939)). Nevertheless, it has been held that, to be irreparable, the harm must be "neither remote nor speculative, but actual and imminent." *Gracepointe Church v. Jenkins*, No. 2:06-CV-1463-DCN, 2006 WL 1663798 (D.S.C. June 8, 2006) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812

[3] LMC attempts to analogize this case to *Amisub of S.C. Inc. d/b/a Piedmont Med. Ctr. v. S.C. Dept. of Health and Envtl. Control*, Docket No. 08-ALJ-07-0063-CC (July 23, 2008), in which the ALC found that expenditure of a large sum of money to complete a construction project was sufficient to lift the stay and allow respondents to proceed with construction. However, that case is distinguishable in that the lifting of the stay in that case did not allow potentially unauthorized service to patients. The Court in that case also noted that the challenged party's "actions in proceeding to construct the building without obtaining legal authorization from the ALC does not appear to be based upon a disregard for the law or a cavalier attitude to proceed at its own risk." Nevertheless, this Court finds, as discussed above and in its previous Orders, that LMC proceeded at its own risk, even being warned on several occasions by the Department that there was a risk of an adverse opinion – that the law, which LMC had access to, could still be in effect (as the Supreme Court would later confirm in *Amisub*).

Moreover, LMC asserts that this Court in *Piedmont*, *supra* rejected the balancing test from *MRI at Belfair*, *supra*. Though this Court did say that it "d[id] not find that the determination of whether to lift a stay should be made following a strict 'balancing of the harms test,'" it also said that "[n]evertheless, I do not find the standard used in determining whether to grant an equitable stay to be off base in these determinations. . . . Here, the decision should . . . be made by weighing or considering all relevant factors that reflect upon whether the stay should or should not be lifted."

(4th Cir. 1991)); *accord Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144 (2d Cir. 1999). Moreover, while some courts have held that the injury must be "great" and not "merely serious or substantial,"[4] others have held that "when the threatened harm is more than *de minimis*, it is not so much the magnitude but the irreparability that counts."[5]

In determining irreparable harm in CON contested cases, the Court should consider the purposes of the CON Act. These purposes are as follows:

> promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State

Therefore, the determination in this case should be made considering those factors.

LMC contends that its project did not waste healthcare dollars because it used existing space and equipment. LMC further asserts that "[t]he surgery suite provides high quality, necessary services that serve the public needs by allowing LMC to more efficiently provide care to its patients and avoid inconvenient scheduling of procedures." However the satisfaction of these purposes cannot be determined because no CON was ever issued. In fact, LMC circumvented the normal vetting process of a CON by failing to seek a non-applicability determination or an exemption. Without the benefit of the facts to be gained by that review, LMC asserts that there will be no irreparable harm. Furthermore, the opposing affidavits suggest that LMC's services could result in unnecessary duplication, as well as underutilization among the other units of existing providers in the Service Area – underutilization that the State Health Plan seeks to avoid. Condoning unauthorized medical services, even temporarily, is "in direct derogation" of the CON Act's purpose of promoting quality healthcare to the citizens of South Carolina. *See Dema v. Tenet Phys. Servs.-Hilton Head, Inc.*, 383 S.C. 115, 124, 678 S.E.2d 430, 435 (2009).

LMC also contends that Providence has not been harmed by LMC's Open Heart Suite and will not be harmed by lifting the automatic stay. It argues that any harm to Providence is "purely speculative," and that "Providence suffers no loss of patients or any other harms from the

---

[4] *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262 (10th Cir. 2004) (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001)).

[5] *Enterprise Intern., Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) (quoting *Canal Auth. v. Callaway*, 489 F.2d 567, 575 (5th Cir. 1974)).

operation of the surgery suite during the pendency of this action." The basis for LMC's position is two-fold. The first basis is an affidavit from Jeffrey A. Travis, M.D., which mentions the inconvenience of having one cardiovascular surgical suite – that it required "h[im], the other cardiovascular surgeon, and the clinical staff to perform surgeries later into the night and on weekends." It also states that "[b]ecause of the significant health risks and stresses associated with transfer and patient preferences, patients awaiting open heart surgery generally are not transferred to other facilities." (Resp.'s Exhibit "B," ¶ 10). The second basis is the fact that Providence was unaware of LMC's Open Heart Suite, from which LMC infers that had Providence been "suffering irreparable harm from the operation of the surgery suite, it would certainly realized it sooner."

As to the first basis, the CON Act establishes the procedure to insure quality health care in this State. As explained above, the Act requires a determination of need for certain services before those services may be offered to the public. It is undisputed that the threshold exists to insure that providers are performing a sufficient number of procedures to maintain proficiency. Here, the number of heart surgery procedures currently being performed at LMC are well below the 500-procedure threshold required to obtain a CON to expand an existing health service. Therefore, under the policies of the State Health plan, there is a risk of harm to other facilities within the Service Area in approving an open heart suite under the facts of this case. Also, LMC's argument that patients awaiting open heart surgery are generally not transferred to other facilities is questionable. According to the affidavit of Edward M. Leppard, M.D., who has practiced for thirty (30) years at Providence Hospital, "only a small percentage of open heart surgery is performed on an 'emergent' basis," meaning that "the procedure must be done without delay"; and "transferring a patient for open heart surgery is common." Thus, even if LMC were to perform enough open-heart procedures to warrant a second Open Heart Suite pursuant to the State Health Plan, LMC could take patients away from, i.e. irreparably harm, other providers in the Service Area, which is what the CON Act and, by extension, the State Health Plan aim to avoid. Therefore, LMC failed to establish that there is no risk of irreparable harm to other facilities within the Service Area if the automatic stay was lifted.

Moreover, the inconvenience of having one cardiovascular surgical suite is not a basis for irreparable harm but rather a basis for good cause. In other words, even if it was inconvenient to

transfer patients, that fact does not establish that other hospitals would not be harmed by LMC utilization of a second Open Heart Suite. Further, even if the Court were to consider this argument under the good cause analysis, LMC does not sufficiently explain why its existing Open Heart Suite would not accommodate the needs of its patients. LMC's argument that there may be harm to the interest of its patients is founded upon its own view of need. However, again, the procedures currently being performed at LMC are well below the 500-procedure threshold required to obtain a CON to expand an existing health service. Therefore, it is questionable whether a need exists or whether the services are lawful.

As to the second basis, the Court is not persuaded by LMC's argument. The argument is based upon the premise that if the harm is not noticed, it does not exist. Following that assumption, no harm would ever occur to a person or entity unless it is noticed. Thus, stealing funds from a wealthy individual, for example, would not cause irreparable harm as long as the wealthy individual does not realize that someone is stealing from him/her. I find that LMC's faulty reasoning and the inference it begets fail to establish a lack of harm. There is simply insufficient evidence for this Court to leap to the conclusion that because the loss of patients may not have been noticed, there was no harm from that loss.

Moreover, LMC has not even established that no harm was noticed by Providence.[6] Rather, LMC presumes that Providence did not notice any harm based upon its interpretation of what Providence would have done had it been harmed. That reasoning is based upon speculation, which is an insufficient basis for this Court to conclude that harm has not occurred, much less whether that harm would not be irreparable. I therefore find that that LMC has failed to establish that there would be no irreparable harm to Providence, other providers, and/or the citizens of South Carolina by lifting the automatic stay and allowing it to continue providing unauthorized health services.

ORDER

IT IS THEREFORE ORDERED that LMC's Motion to Lift Automatic Stay is **DENIED**. LMC must continue to cease and desist from any further activities relating to the

[6] Notably, it is LMC's burden to establish that no other providers in the service area, not just Providence, would be harmed. Its argument in that regard is based purely upon conjecture.

Open Heart Suite pending a final decision on the issue of whether a CON was required prior to LMC's engagement of those activities.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

November 5, 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).

E. Harvin Belser Fair
Judicial Law Clerk

November 5, 2014
Columbia, South Carolina

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 GRANTING IN PART AND DENYING IN PART MOTION TO ALTER OR AMEND (RECONSIDER)**

This matter was initially before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Motion to Dismiss filed by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center (LMC), a Motion for Summary Judgment filed by Petitioner Sisters of Charity Providence Hospitals (Providence), and a Motion to Enforce Automatic Stay filed by Providence. The underlying case arises from LMC's expansion of services by constructing a second open heart surgery unit (Open Heart Suite) and third catheterization laboratory (Cath Lab) without first obtaining a Certificate of Need (CON) from the South Carolina Department of Health and Environmental Control (Department or DHEC). On September 22, 2014, this Court issued an Order Denying LMC's Motion to Dismiss, an Order Granting Partial Summary Judgment in favor of Providence, and an Order Enforcing Automatic Stay with respect to further activities relating to the Open Heart Suite (collectively, Orders).

On October 2, 2014, LMC filed a Motion to Alter or Amend (Reconsider) the Court's Orders. On October 13, 2014, Providence filed its Memorandum in Opposition to Motion to Alter or Amend. Some of the arguments in LMC's Motion warrant reconsideration and clarification of the original Orders. Accordingly, I am issuing Amended Orders addressing these matters. The remaining arguments that warrant discussion will be addressed below.[1]

[1] The Court stands by its opinions without amendment or further discussion with respect to subsections I(3), (5)-(7), (12), (15), and (17); subsection II(4); and subsection III(1). Also, because the Court stands by its opinion as to

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).

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

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 not 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

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.

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).

E. Harvin Belser Fair
Judicial Law Clerk

October 23, 2014
Columbia, South Carolina

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 **AMENDED ORDER GRANTING PARTIAL SUMMARY JUDGMENT**

This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant to a Motion for Summary Judgment filed by Petitioner Sisters of Charity Providence Hospitals (Providence) against Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center (LMC). Providence asks the Court to grant summary judgment because LMC violated the Certificate of Need Act (CON) by failing to obtain the requisite CONs for its expansion of services for the construction of a second open heart surgery unit (Open Heart Suite) and third catheterization laboratory (Cath Lab). The Court held a hearing on this motion on September 3, 2014. The Court issued an Order Granting Partial Summary Judgment on September 22, 2014. LMC filed a Motion to Alter or Amend (Reconsider) the Order Granting Partial Summary Judgment on October 2, 2014. As a result of LMC's Motion to Reconsider, the Court amends the Order Granting Partial Summary Judgment, and summary judgment is granted in part and denied in part.

FACTUAL/PROCEDURAL BACKGROUND

In a letter dated June 28, 2013, the director of South Carolina Department of Health and Environmental Control (DHEC), Catherine Templeton, announced that effective July 1, 2013, the Department was suspending the CON program because the House of Representatives failed to override Governor Haley's veto of funding for the program. After receiving Templeton's letter, several health care entities filed an action in the South Carolina Supreme Court seeking declaratory judgment regarding DHEC's obligation to enforce and to fund the CON program.

The Court invalidated DHEC's suspension of the CON program, ruling that the General Assembly's failure to fund the CON did not negate DHEC's statutory mandate to administer the CON program. *Amisub of S.C., Inc. v. S.C. Dep't of Health and Envtl. Control*, 407 S.C. 583, 757 S.E.2d 408 (2014), *reh'g denied* (May 22, 2014). LMC was aware that this case was pending before the Supreme Court.

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. 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 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 did LMC apply for or obtaine a valid CON to offer the health care services contemplated by the Open Heart Suite and Cath Lab.

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.

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 Cardiovascular Care Projects. 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 Section 44-1-60(F) (Supp. 2013), 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 because LMC did not have a CON for a third Cath Lab and second Open Heart Suite, LMC should not permitted to occupy and to use them. On July 24, 2014, Providence filed a Motion for Summary Judgment and Motion to Enforce Automatic Stay.[1]

STANDARD OF REVIEW

Rule 68 of the South Carolina Administrative Law Court Rules provides that "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules." Rule 56(c) of the South Carolina Rules of Civil Procedure states that summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). However, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001). Moreover, "[t]he question of statutory interpretation is one of law for the court to decide." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 315, 731 S.E.2d 869, 870 (2012).

[1] On July 25, 2014, LMC filed a Motion to Dismiss for lack of subject matter jurisdiction by this Court, which the Court denied in a separate Order.

DISCUSSION

Providence argues that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law because the CON Act applied to LMC's Cath Lab and Open Heart Suite projects and LMC failed to acquire a CON for either of these projects. I agree that summary judgment is appropriate as to LMC's Cath Lab. However, because there remains a genuine issue of material fact as to whether LMC made a capital expenditure for the Open Heart Suite, the Court must deny summary judgment on that issue and will allow limited discovery pertaining to that one issue.

As an initial matter, LMC argues that this Court lacks subject matter jurisdiction to consider Providence's Motion for Summary Judgment. For the reasons set forth in the Court's Amended Order Denying LMC's Motion to Dismiss, this Court not only has subject matter jurisdiction to hear this matter but also procedural jurisdiction. Turning, then, to the Motion, I find that there is no genuine issue of material fact in this case as to the Cath Lab, but there is a genuine issue of material fact regarding the Open Heart Suite. The following material facts are undisputed:

(1) The CON Act was never suspended and DHEC was required by law to operate the program for fiscal year 2013-2014;

(2) Chapter VIII of the *2012-2013 South Carolina Health Plan* is entitled "Cardiovascular Care" and contains standards and criteria for both cardiac catheterizations and open heart surgery;

(3) LMC expended no less than $200,000 on the construction of the Cath Lab.;

(4) LMC is a "health care facility" as defined in the CON Act and previously received a CON to provide comprehensive cardiac services, including open heart surgery and therapeutic catheterizations on June 18, 2010;

(5) LMC did not obtain a CON prior to undertaking a Second Open Heart Surgery Suite or a Third Cardiac Catheterization Laboratory;

(6) Neither LMC nor DHEC notified the public of the applications for licensing and/or construction submitted by LMC to DHEC;[2]

[2] As discussed in the Court's Order Denying LMC's Motion to Dismiss, notice was required as a matter of law; and as further discussed in that Order, Catherine Templeton's June 28, 2013 letter was neither the actual notice required by the CON statute and Section 44-1-60 nor constructive notice.

(7) Providence received written notice from LMC of the DHEC approvals on April 29, 2014; and

(8) Providence filed its Request for Review with the DHEC Board on May 14, 2014.[3]

Cath Lab

Providence argues that LMC violated the CON Act as a matter of law by expanding and operating its Cath Lab without a CON. I agree. For the reasons set forth in the Court's Amended Order Denying LMC's Motion to Dismiss, S.C. Code Ann. §§ 44-7-110 et seq. (CON Act) was in effect during the period at issue and applies to LMC's Cath Lab and Open Heart Suite projects. Section 44-7-160(4) (Supp. 2013),[4] provides:

> 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) (2011). There is no dispute that LMC is a "health care facility" pursuant to S.C. Code Ann. § 44-7-130(10) (Supp. 2013). The Cath Lab would be LMC's third comprehensive catheterization laboratory, thus expanding on its comprehensive cardiac catheterization services. The standards and criteria for these services are prescribed in the State Health Plan, on pages VIII-5 to VIII-15. Indeed, at the September 3, 2014 hearing, DHEC conceded that had its director not issued the June 28, 2013 letter regarding the purported suspension of the CON program, DHEC would have required a CON for each of LMC's projects because "they would have been an expansion of an existing service that has standards in the State Health Plan." Therefore, the only remaining question is whether LMC made a capital expenditure for the Cath Lab project. According to DHEC's Plan Approval for the project, dated February 25, 2014, the cost of the Cath Lab project was $200,000. That cost

---

[3] The Court will not consider the evidence concerning the volume of cardiac services in South Carolina between 2009 and 2011 or the quality of those services. Whether the alleged "success and growth" of LMC's cardiac services program warrants expansion is a question for the Department to consider during review of a properly filed CON application.

[4] Providence's Motion for Summary Judgment and Memorandum in Support contained a scrivener's error, mistakenly referring to subsection (5) of Section 44-7-160 instead of subsection (4). However, Providence corrected this error in its Reply in Further Support of Summary Judgment and had also cited subsection (4) in its Request for a Contested Case Hearing filed July 9, 2014

was not disputed. Therefore, as a matter of law, LMC was required to first obtain a CON before undertaking the Cath Lab project.

Open Heart Suite

Providence also argues that LMC violated the CON Act as a matter of law by expanding its open heart surgery services and operating its Open Heart Suite without a CON. The same statutory and regulatory provisions that apply to the Cath Lab apply to the Open Heart Suite, except that the Open Heart Suite has different standards under the State Health Plan. The Open Heart Suite would be LMC's second open heart surgery operating room, thus expanding on its existing open heart surgery services. The standards and criteria for these services are prescribed in the State Health Plan, on pages VIII-17 to VIII-21. As noted above, at the September 3, 2014 hearing, DHEC conceded that had its director not issued the June 28, 2013 letter regarding the purported suspension of the CON program, DHEC would have required a CON for the Open Heart Suite because it "would have been an expansion of an existing service that has standards in the State Health Plan." Therefore, the only remaining question is whether LMC made a capital expenditure for the Open Heart Suite project. However, Providence has provided no evidence that LMC made a capital expenditure for its Open Heart Suite project, and therefore it remains a triable issue of fact that will require discovery.

Estoppel

Finally, LMC argues that even if it was required to have a CON prior to undertaking its projects, the Department should be estopped from enforcing this requirement because the Director of the Department, who was authorized to speak for the Department, acted within the scope of her authority when she declared that the CON program was suspended. LMC contends that every member of the regulated community therefore had a right to rely on the Director's directive regarding administration of the CON program. LMC further asserts that its reliance was justified because it took the additional steps of meeting with the Director to receive direct assurances regarding the lack of a requirement for a CON, as well as with the staffs from the Department's legal, constructions inspection, and licensing divisions to ensure compliance with all departmental requirements prior to operation. Consequently, LMC contends that Lexington had the right to expand its open heart surgery and cardiac catheterizations services without first obtaining a CON.

"A governmental body is not immune from the application of the doctrine of estoppel *where its officers or agents act within the proper scope of their authority. . . .*" *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (quoting *DeStefano v. City of Charleston,* 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991)) (emphasis in original). "*If estoppel is applicable against a government agency*, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." *Id.* at 236-37, 692 S.E.2d at 506 (emphasis added).

In this case, the Director of the Department is authorized to speak for the Department; but Director Templeton, as the Supreme Court discussed in *Amisub*, *supra*, was not authorized to contravene the authorizing CON statute by declaring the CON program suspended. "An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose." *S.C. Dep't of Nat. Res. v. McDonald*, 367 S.C. 531, 534, 626 S.E.2d 816, 818 (Ct. App. 2006). "The authority to enact, modify, or repeal legislation lies solely within the General Assembly's broader authority." *Amisub*, 407 S.C. at 595, 757 S.E.2d at 415. As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged. *City of Rock Hill v. S.C. Dep't of Health and Envtl. Control*, 302 S.C. 161, 394 S.E.2d 327 (1990); *City of Columbia v. S.C. Dep't of Health and Envtl. Control*, 292 S.C. 199, 355 S.E.2d 536 (1987). Because Templeton exceeded the scope of her authority by issuing her June 28, 2013 letter, estoppel will not lie against the Department. *See DeStefano v. City of Charleston*, 304 S.C. 250, 258, 403 S.E.2d 648, 653 (1991) (quoting *S.C. Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987)) ("The public cannot be estopped . . . by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.").[5]

Moreover, even if estoppel was applicable against the Department, LMC should have been aware of the great risk that it took in carrying forward with its projects without a CON. In this case, the CON Act was available for LMC to read, there was no reliance on an erroneous

[5] LMC also contends that the determination not to grant Certificates of Need was, at the least, acquiesced in by the Board through silence. I need not address this novel approach to projecting the Department policy because the Board has no greater authority to disregard its statutory obligations than the Director.

CON Act (or even the Act itself). The CON Act is, and has been, in effect throughout the events at issue, and DHEC has all the while been responsible for enforcing it. Therefore, LMC was on "notice" that the Department's interpretation of the state of the CON program was incorrect. In addition, LMC conceded at the September 3, 2014 hearing that it, as well as the whole regulated community, was aware of the pending action before the Supreme Court regarding the Department's purported suspension of the CON program. Furthermore, the Department specifically advised LMC: "Please be on notice that any action by the General Assembly, the Judiciary, or third parties challenging the validity of a project undertaken without CON approval during the program's suspension is outside the control of the Department."[6] Therefore, LMC knowingly assumed the risk of receiving an adverse decision from the Supreme Court when it undertook its projects without obtaining the requisite CONs.

Conclusion

For the foregoing reasons, I find that summary judgment is appropriate as to issue of LMC's Cath Lab. Pursuant to S.C. Code Ann. § 1-23-630(A) (2005), the Court has the power to "issue those remedial writs as are necessary to give effect to its jurisdiction." Therefore, the Court hereby stays LMC's activities relating to the Cath Lab until LMC properly files the requisite CON application, should LMC choose to do so. However, because there remains a genuine issue of material fact as to the sole issue of whether LMC made a capital expenditure for the Open Heart Suite, the Court denies summary judgment as to that issue. Pursuant to ALC Rule 21(B), discovery will be available to the parties but will be limited to the sole issue of whether LMC made a capital expenditure for its Open Heart Suite.

ORDER

IT IS THEREFORE ORDERED that Providence's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART.**

---

[6] The Department also sets forth in its comment regarding the second Open Heart Surgery Suite that: *Should the General Assembly restore the CON program in the future, or should the court determine the program is not suspended, the Department will not take action to revoke any license issued during the suspension period for the facility or service for which the Act requires a CON review, unless otherwise instructed by the General Assembly or Judiciary.*" (italics in original). The Court was unable to find this language specifically addressing the Cath Lab. However, it would be fair to assume that the Department's commitment is also applicable to the Cath Lab, In remanding this matter, the Court finds that the Department's pledge not take action against LMC was unlawful and void.

IT IS FURTHER ORDERED that LMC cease and desist from any further activities relating to the Cath Lab unless and until LMC properly files and obtains the requisite CON application for that project.

IT IS FURTHER ORDERED that the remedial stay will be in effect **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

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).

E. Harvin Belser Fair
Judicial Law Clerk

October 23, 2014
Columbia, South Carolina

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 **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

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.[1] 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.

---

[1] 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),[2] 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.[3] 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

---

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

[3] 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).[4]

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

[4] 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.[5] 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.[6] I thus find that the State Health Plan unambiguously and

---

[5] 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.

[6] 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.[7] 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."[8] 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

---

[7] 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).

[8] 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 it 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 . . . ."[9] 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

[9] 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.[10] 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

[10] 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.[11] 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

[11] 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,[12] Providence had not been given statutorily-prescribed notice of specific activities to prompt it to make earlier inquiries.[13] 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.

---

[12] 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.

[13] 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

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).

E. Harvin Belser Fair
Judicial Law Clerk

October 23, 2014
Columbia, South Carolina

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 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. For the reasons set forth below, LMC's Motion to Dismiss is denied.

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 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.[1] On February 21, 2014, the Department approved the Shielding Plan developed by LMC for use of imaging modalities in 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 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 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.

Neither DHEC nor LMC provided any notice to the public or affected persons about the above-referenced DHEC Staff approvals relating to the Open Heart Suite and Cath Lab. Not until April 29, 2014, when LMC responded to a request for information under the Freedom of Information Act from Providence, did Providence have notice of these actions and approvals.

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),[2] when the DHEC

---

[1] 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."

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

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.[3] 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, the question here is not a matter of subject matter jurisdiction but rather 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) (emphasis added). 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). In this case, it is the third form of jurisdiction that is at issue, specifically, 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 were actions that could give rise to a contested case before this Court. 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

[3] 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.

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 are those decisions involving CONs. *See* Section § 44-7-210(E)-(G).[4]

It is undisputed that according to our Supreme Court in *Amisub*, S.C. Code Ann. §§ 44-7-110 et seq.(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 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[.]

[4] 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.

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.[5] 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.[6] I thus find that the State Health Plan unambiguously and unequivocally requires a CON for the services LMC sought to expand. 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."

---

[5] 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.

[6] 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. This matter is clearly distinguishable from the interests of the providers in *Ambulatory Surgery Ctr.*. 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 as it involves a CON, and Sections 44-1-60 and 44-7-210 provide sufficient due process for affected parties in CON matters.

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 does not dispute that Providence meets the criterion of an "affected person" under Section 44-7-130(1) (2002) and the other applicable statutes. Instead, 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) and 44-7-210(C), it is not an "affected party.". 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 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.[7] 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 framework by which the Department reaches it decisions. Section 44-7-210(A) provides that

[7] It is noteworthy that the Department never responded to Providence's FOIA request.

"[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 . . . ."[8] 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 following the Governor's veto. It has been 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

[8] The procedure differs with competing CON applications, but this case does not involve competing CON applications.

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 been 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 aptly, a premise that those responsibilities may be ignored. 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 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. 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.[9] Thus, though Providence is now challenging actions involving the implementation of a CON, the challenge to the current acts 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 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*

[9] 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.

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 made 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. Moreover, LMC seeks to utilize the fifteen-day timeframe to request a final review conference. That timeframe derives from Section 44-1-60(E). LMC's position is thus incongruous; it seeks to rely upon those portions of the statute that require fifteen days to respond but ignore those sections that require notice to Providence. This argument is further called into question by the fact that constructive notice establishes a duty to inquire but does not provide the official, actual notice from the Department required by the 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,[10] Providence had no reason to make earlier inquiries.[11] 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.

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

Ralph King Anderson, III
Chief Administrative Law Judge

September 22, 2014
Columbia, South Carolina

[10] 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.

[11] 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.

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).

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, 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 GRANTING PARTIAL SUMMARY JUDGMENT**

This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant to a Motion for Summary Judgment filed by Petitioner Sisters of Charity Providence Hospitals (Providence) against Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center (LMC). Providence asks the Court to grant summary judgment because LMC violated the Certificate of Need Act (CON) by failing to obtain the requisite CONs for its expansion of services for the construction of a second open heart surgery unit (Open Heart Suite) and third catheterization laboratory (Cath Lab). The Court held a hearing on this motion on September 3, 2014. For the reasons set forth below, Providence's Motion for Summary Judgment is granted in part and denied in part.

FACTUAL/PROCEDURAL BACKGROUND

In a letter dated June 28, 2013, the director of DHEC, Catherine Templeton, announced that effective July 1, 2013, the Department was suspending CON program because the House of Representatives failed to override Governor Haley's veto of funding for the program. After receiving Templeton's letter, several health care entities filed an action in the South Carolina Supreme Court seeking declaratory judgment regarding DHEC's obligation to enforce and to fund the CON program. The Court invalidated DHEC's suspension of the CON program, ruling that the General Assembly's failure to fund the CON did not negate DHEC's statutory mandate to administer the CON program. *Amisub of S.C., Inc. v. S.C. Dep't of Health and Envtl. Control*, 407 S.C. 583, 757 S.E.2d 408 (2014), *reh'g denied* (May 22, 2014). LMC was aware that this case was pending before the Supreme Court.

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. 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 February 21, 2014, the Department approved the Shielding Plan developed by LMC for use of imaging modalities in 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 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 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 did LMC applied for or obtained a valid CON to offer the health care services contemplated by the Open Heart Suite and Cath Lab.

Neither DHEC nor LMC provided any notice to the public or affected persons about the above-referenced DHEC Staff approvals relating to the Open Heart Suite and Cath Lab. Providence did not have notice of these actions and approvals until April 29, 2014, when LMC responded to a request for information under the Freedom of Information Act from Providence.

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 Cardiovascular Care Projects. 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 Section 44-1-60(F) (Supp. 2013), 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 because LMC did not have a CON for a third Cath Lab and second Open Heart Suite, LMC should not permitted to occupy and to use

them. On July 24, 2014, Providence filed a Motion for Summary Judgment and Motion to Enforce Automatic Stay.[1]

STANDARD OF REVIEW

Rule 68 of the South Carolina Administrative Law Court Rules provides that "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules." Rule 56(c) of the South Carolina Rules of Civil Procedure states that summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). However, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001). Moreover, "[t]he question of statutory interpretation is one of law for the court to decide." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 315, 731 S.E.2d 869, 870 (2012).

DISCUSSION

Providence argues that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law because the CON Act applied to LMC's Cath Lab and Open Heart Suite projects and LMC failed to acquire a CON for either of these projects. I agree that summary judgment is appropriate as to LMC's Cath Lab. However, because there remains a

[1] On July 25, 2014, LMC filed a Motion to Dismiss for lack of subject matter jurisdiction by this Court, which the Court denied in a separate Order.

genuine issue of material fact as to whether LMC made a capital expenditure for the Open Heart Suite, the Court must deny summary judgment on that issue and will allow limited discovery pertaining to that one issue.

As an initial matter, LMC argues that this Court lacks subject matter jurisdiction to consider Providence's Motion for Summary Judgment. For the reasons set forth in the Court's Order Denying LMC's Motion to Dismiss, this Court not only has subject matter jurisdiction to hear this matter but also procedural jurisdiction. Turning, then, to the Motion, I find that there is no genuine issue of material fact in this case. The following material facts are undisputed:

(1) The CON Act was never suspended and DHEC was required by law to operate the program for fiscal year 2013-2014;

(2) Chapter VIII of the *2011-2012 South Carolina Health Plan* is entitled "Cardiovascular Care" and contains standards and criteria for both cardiac catheterizations and open heart surgery;

(3) LMC expended no less than $200,000 on the construction of the Cath Lab.;

(4) LMC is a "health care facility" as defined in the CON Act and previously received a CON to provide comprehensive cardiac services, including open heart surgery and therapeutic catheterizations on June 18, 2010;

(5) LMC did not obtain a CON prior to undertaking a Second Open Heart Surgery Suite or a Third Cardiac Catheterization Laboratory;

(6) Neither LMC nor DHEC notified the public of the applications for licensing and/or construction submitted by LMC to DHEC;[2]

(7) Providence received written notice from LMC of the DHEC approvals on April 29, 2014; and

(8) Providence filed its Request for Review with the DHEC Board on May 14, 2014.[3]

---

[2] As discussed in the Court's Order Denying LMC's Motion to Dismiss, notice was required as a matter of law; and as further discussed in that Order, Catherine Templeton's June 28, 2013 letter was neither the actual notice required by the CON statute and Section 44-1-60 nor constructive notice. It is also noteworthy that though LMC argued in its Motion to Dismiss that Providence should have inquired earlier 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, LMC did not raise this argument in its Response to Motion for Summary Judgment.

[3] The Court will not consider the evidence concerning the volume of cardiac services in South Carolina between 2009 and 2011 or the quality of those services. Whether the alleged "success and growth" of LMC's cardiac services program warrants expansion is a question for the Department to consider during review of a properly filed CON application.

Cath Lab

Providence argues that LMC violated the CON Act as a matter of law by expanding and operating its Cath Lab without a CON. I agree. For the reasons set forth in the Court's Order Denying LMC's Motion to Dismiss, S.C. Code Ann. §§ 44-7-110 et seq. (CON Act) was in effect during the period at issue and applies to LMC's Cath Lab and Open Heart Suite projects. Section 44-7-160(4) (Supp. 2013),[4] provides:

> 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) (2011). There is no dispute that LMC is a "health care facility" pursuant to S.C. Code Ann. § 44-7-130(10) (Supp. 2013). The Cath Lab would be LMC's third comprehensive catheterization laboratory, thus expanding on its comprehensive cardiac catheterization services. The standards and criteria for these services are prescribed in the State Health Plan, on pages VIII-5 to VIII-15. Indeed, at the September 3, 2014 hearing, DHEC conceded that had its director not issued the June 28, 2013 letter regarding the purported suspension of the CON program, DHEC would have required a CON for each of LMC's projects because "they would have been an expansion of an existing service that has standards in the State Health Plan." Therefore, the only remaining question is whether LMC made a capital expenditure for the Cath Lab project. According to DHEC's Plan Approval for the project, dated February 25, 2014, the cost of the Cath Lab project was $200,000. That cost was not disputed. Therefore, as a matter of law, LMC was required to first obtain a CON before undertaking the Cath Lab project.

Open Heart Suite

Providence also argues that LMC violated the CON Act as a matter of law by expanding its open heart surgery services and operating its Open Heart Suite without a CON. The same statutory and regulatory provisions that apply to the Cath Lab apply to the Open Heart Suite,

---

[4] Providence's Motion for Summary Judgment and Memorandum in Support contained a scrivener's error, mistakenly referring to subsection (5) of Section 44-7-160 instead of subsection (4). However, Providence corrected this error in its Reply in Further Support of Summary Judgment and had also cited subsection (4) in its Request for a Contested Case Hearing filed July 9, 2014

except that the Open Heart Suite has different standards under the State Health Plan. The Open Heart Suite would be LMC's second open heart surgery operating room, thus expanding on its existing open heart surgery services. The standards and criteria for these services are prescribed in the State Health Plan, on pages VIII-17 to VIII-21. As noted above, at the September 3, 2014 hearing, DHEC conceded that had its director not issued the June 28, 2013 letter regarding the purported suspension of the CON program, DHEC would have required a CON for the Open Heart Suite because it "would have been an expansion of an existing service that has standards in the State Health Plan." Therefore, the only remaining question is whether LMC made a capital expenditure for the Open Heart Suite project. However, Providence has provided no evidence that LMC made a capital expenditure for its Open Heart Suite project, and therefore it remains a triable issue of fact that will require discovery.

Estoppel

Finally, LMC argues that even if it was required to have a CON prior to undertaking its projects, the Department should be estopped from enforcing this requirement because the Director of the Department, who was authorized to speak for the Department, acted within the scope of her authority when she declared that the CON program was suspended. LMC contends that every member of the regulated community therefore had a right to rely on the Director's directive regarding administration of the CON program. LMC further asserts that its reliance was justified because it took the additional steps of meeting with the Director to receive direct assurances regarding the lack of a requirement for a CON, as well as with the staffs from the Department's legal, constructions inspection, and licensing divisions to ensure compliance with all departmental requirements prior to operation. Consequently, LMC contends that Lexington had the right to expand its open heart surgery and cardiac catheterizations services without first obtaining a CON.

"A governmental body is not immune from the application of the doctrine of estoppel *where its officers or agents act within the proper scope of their authority. . . .*" *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (quoting *DeStefano v. City of Charleston,* 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991)) (emphasis in original). "*If estoppel is applicable against a government agency*, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable

reliance upon the government's conduct, and (3) a prejudicial change in position." *Id.* at 236-37, 692 S.E.2d at 506 (emphasis added).

In this case, the Director of the Department is authorized to speak for the Department; but Director Templeton, as the Supreme Court discussed in *Amisub*, *supra*, was not authorized to contravene the authorizing CON statute by declaring the CON program suspended. "An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose." *S.C. Dep't of Nat. Res. v. McDonald*, 367 S.C. 531, 534, 626 S.E.2d 816, 818 (Ct. App. 2006). "The authority to enact, modify, or repeal legislation lies solely within the General Assembly's broader authority." *Amisub*, 407 S.C. at 595, 757 S.E.2d at 415. As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged. *City of Rock Hill v. S.C. Dep't of Health and Envtl. Control*, 302 S.C. 161, 394 S.E.2d 327 (1990); *City of Columbia v. S.C. Dep't of Health and Envtl. Control*, 292 S.C. 199, 355 S.E.2d 536 (1987). Because Templeton exceeded the scope of her authority by issuing her June 28, 2013 letter, estoppel will not lie against the Department. *See DeStefano v. City of Charleston*, 304 S.C. 250, 258, 403 S.E.2d 648, 653 (1991) (quoting *S.C. Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987)) ("The public cannot be estopped . . . by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.").[5]

Moreover, even if estoppel was applicable against the Department, LMC's estoppel argument would still fail because the validity of the CON program could have been determined by a simple reading of the statute. In this case, there was no reliance on an erroneous CON Act (or even the Act itself). The CON Act is, and has been, in effect throughout the events at issue, and DHEC has all the while been responsible for enforcing it. Therefore, LMC was on "notice" that the Department's interpretation of the state of the CON program was incorrect. In addition, LMC conceded at the September 3, 2014 hearing that it, as well as the whole regulated community, was aware of the pending action before the Supreme Court regarding the Department's purported suspension of the CON program. Furthermore, the Department specifically advised LMC: "Please be on notice that any action by the General Assembly, the

[5] LMC also contends that the determination not to grant Certificates of Need was, at the least, acquiesced in by the Board through silence. I need not address this novel approach to projecting the Department policy because the Board has no greater authority to disregard its statutory obligations than the Director.

Judiciary, or third parties challenging the validity of a project undertaken without CON approval during the program's suspension is outside the control of the Department." Therefore, LMC knowingly assumed the risk of receiving an adverse decision from the Supreme Court when it undertook its projects without obtaining the requisite CONs.

Conclusion

For the foregoing reasons, I find that summary judgment is appropriate as to issue of LMC's Cath Lab. Pursuant to S.C. Code Ann. § 1-23-630(A) (2005), the Court has the power to "issue those remedial writs as are necessary to give effect to its jurisdiction." Therefore, the Court hereby stays LMC's activities relating to the Cath Lab until LMC properly files the requisite CON application, should LMC choose to do so. However, because there remains a genuine issue of material fact as to the sole issue of whether LMC made a capital expenditure for the Open Heart Suite, the Court denies summary judgment as to that issue. Pursuant to ALC Rule 21(B), discovery will be available to the parties but will be limited to the sole issue of whether LMC made a capital expenditure for its Open Heart Suite.

ORDER

IT IS THEREFORE ORDERED that Providence's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART.**

IT IS FURTHER ORDERED that LMC cease and desist from any further activities relating to the Cath Lab unless and until LMC properly files and obtains the requisite CON application for that project.

IT IS FURTHER ORDERED that the remedial stay will be in effect **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

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).

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, 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**

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.[1]

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

[1] 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).

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, 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-___-____-___ **REQUEST FOR CONTESTED CASE HEARING**

Pursuant to Rule 11 of the South Carolina Rules of Procedure for the Administrative Law Court ("RPALC"), the Petitioner, Sisters of Charity Providence Hospitals (hereinafter "Providence"), by and through its undersigned attorneys, respectfully requests a contested case hearing and reversal of the Staff decisions of the South Carolina Department Health & Environmental Control ("DHEC" or "Department") as described herein. The DHEC Board denied Providence's request to conduct a final review of these Staff decisions, thereby permitting the Staff decisions to become a final agency decision. In support of this request, Providence would show as follows:

1. The Court has jurisdiction over this matter under S.C. Const. Art. I, § 22; S.C. Code Ann. §§ 1-23-320; 1-23-600(B); 44-1-60(F) & (G) and 44-7-110 *et. seq.*; 24A S.C. Code Ann. Regs. 61-15 and 61-16; and Rule 11, RPALC.

2. Providence operates three open heart surgery units and six cardiac catheterization laboratories at its hospital located on Forest Drive in the City of Columbia, County of Richland, where it provides cardiovascular medical services for patients residing in Richland, Lexington, Kershaw Counties, as well as other counties in South Carolina.

3. Providence is an "affected person" and has standing to assert claims in this case.

4. The Certificate of Need Program requires a healthcare provider to obtain a Certificate of Need ("CON") prior to implementing certain projects and services. S.C. Code. § 44-7-110, *et seq.* The purposes of the CON Act are clearly set forth in the statute and are as follows:

- to promote cost containment;
- to prevent unnecessary duplication of health care facilities and services;
- to guide the establishment of health facilities and services which will best serve public needs; and
- to ensure that high quality services are provided in health care facilities in this state.

S.C. Code § 44-7-120.

5. Cardiac services such as open heart surgery and catheterization procedures are offered at three hospitals in the Midlands. Access to these services is plentiful and available. The State Health Planning Committee establishes a State Health Plan to guide the implementation and expansion of these highly complex, sophisticated, expensive and serious services in a manner to best serve the needs of South Carolina's citizens. The CON program is the regulatory process to accomplish the purpose to best serve the citizens of South Carolina.

6. Lexington Medical Center (hereinafter "LMC") seeks to occupy and utilize Operating Room #22 for open heart surgery ("2nd Open Heart Surgery Unit") and occupy and utilize a third cardiac catheterization laboratory ("3rd Cath Lab") (collectively the "LMC Heart Projects").

7. Pursuant to the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110, *et. seq.* (the "CON Act") and related regulations, the Department must approve the LMC Heart Projects prior to LMC being able to legally occupy and utilize the 2nd

Open Heart Surgery Unit or the 3rd Cath Lab. Specifically, the following statutes and regulations require Department approval:

(a) S.C. Code Ann. § 44-7-200 and S.C. Code Ann. Reg. 61-15 require that LMC obtain a Certificate of Need ("CON") from DHEC prior to construction of and opening and operating a 2nd Open Heart Surgery Unit and 3rd Cath Lab. As of this date, DHEC has not granted a CON for the LMC Heart Projects; and

(b) S.C. Code Ann. § 44-7-230(C) and S.C. Code Ann. Regs. 61-16 require plans and specifications for the LMC Heart Projects to be submitted by LMC and approved by DHEC Health Facilities Construction in a Plan Approval prior to the commencement of construction. Further, to occupy and use the 2nd Open Heart Surgery Unit and 3rd Cath Lab requires inspection and approval from DHEC Health Facilities Licensing. These approvals are contingent upon and require DHEC to first issue a CON to LMC for both the 2nd Open Heart Surgery Unit and 3rd Cath Lab prior to granting approvals for construction and/or licensing.

8. The DHEC approvals identified herein are subject to challenge through the Contested Case provisions set forth in S.C. Code Ann. § 1-23-310, § 1-23-600, and § 44-1-60. Specifically, Providence files this Contested Case to appeal the decision of the DHEC Board not to conduct a Final Review Conference, dated June 25, 2014. See **Exhibit A.**

9. On October 11, 2013, DHEC Staff issued an approval to LMC to occupy and utilize Operating Room #22 for open heart surgery, the "2nd Open Heart Surgery Unit". See **Exhibit B**. DHEC noted in its approval letter dated September 26, 2013 that "please be on notice that any action by the General Assembly, the judiciary, or a third party challenging the validity of a license issued without CON approval, are outside the control of the Department." See **Exhibit C**.

10. On February 25, 2014, the DHEC Division of Health Facilities Construction issued a final Plan Approval to LMC for a project proposed by LMC that involved the construction of a 3rd cardiac catheterization laboratory. (DHEC final Plan Approval for the 3rd Cath Lab attached as **Exhibit D.**)

11. On February 21, 2014, the DHEC Staff approved the shielding for the 3rd Cath Lab. (See email confirming approval attached as **Exhibit E.**)

12. On March 20, 2014, the DHEC Staff in the Division of Health Facilities Construction issued a Notice of Completion, Permit No. HTL-05000, to LMC for the 3rd Cath Lab. (Notice of Completion is attached as **Exhibit F**).

13. On April 10, 2014, the DHEC Staff Bureau of Health Facilities and Licensing granted approval to LMC to occupy and use a 3rd Cath Lab. (Approval to occupy the 3rd Cath Lab is attached as **Exhibit G.**)

14. The CON Act, specifically S.C. Code Ann. §§ 44-7-160 and 44-7-230(C), requires that a CON be issued for the LMC Heart Projects prior to LMC commencing construction, and that a CON be issued prior to the granting of a Plan Approval. Specifically, at least two subsections of S.C. Code Ann. § 44-7-160 applies to the LMC Heart Projects and require the issuance of a CON:

> 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:
>
> (2) a change in the existing bed complement of a health care facility through the addition of one or more beds or change in the classification of licensure of one or more beds.
>
> (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;

15. After a CON is issued, S.C. Code Ann. § 44-7-230(C) prohibits a provider from commencing a construction project until a Plan Approval is received by the Department:

> Prior to any construction authorized by a Certificate of Need, final drawings and specifications prepared by an architect or engineer legally registered under the laws of this State must be submitted to the department for approval. All construction must be completed in accordance with approved plans and specifications and prior approval must be obtained from the department for any changes that substantially alter the scope of work, function of construction, or major items of equipment, safety, or cost of the facility during construction.

16. It is undisputed that LMC has not obtained a CON from DHEC to authorize the LMC Heart Projects. As a result, LMC continues to operate the LMC Heart Projects in violation of the law. This Court should enjoin LMC's continued operation of the 2nd Open Heart Surgery Unit and the 3rd Cath Lab immediately and permanently until LMC complies with the law and obtains a CON.

17. Providence hereby files its Request for Contested Case Hearing with this Court. Reserving its right to raise any and all issues presented to the Department below and specifically incorporating all issues addressed in all filings with the Department related to this matter, Providence seeks reversal of DHEC's decision to grant Plan Approval to LMC for the LMC Heart Projects identified herein including, but not limited to, the following reasons:

(a) DHEC erred in failing to comply with the CON Act by granting a Plan Approval for the LMC Heart Projects without first requiring LMC to obtain a CON;

(b) DHEC erred in approving a license to LMC to operate the 3rd Cath lab without first requiring LMC to obtain a CON;

(c) DHEC continues to err in allowing LMC to operate the LMC Heart Projects without first requiring LMC to obtain a CON;

(d) DHEC continues to err in failing to comply with the CON Act, which requires a CON for the LMC Heart Projects prior to LMC commencing construction, so that

DHEC should prohibit LMC from commencing or continuing any construction on the LMC Heart Projects;

(e) DHEC erred in failing to comply with its long-established internal policies for the implementation of the CON Act and Licensure Act, by granting a Plan Approval to LMC for the Project before a CON was issued for the Project;

(f) DHEC erred in failing to comply with the procedures set forth in the DHEC Construction Project Information Form, which requires LMC to provide evidence that a CON has been granted for the Project before the form is complete and eligible for consideration by DHEC when considering a Plan Approval;

(g) DHEC's decision exceeds its statutory authority and is erroneous;

(h) DHEC's decision was affected by error of law;

(i) DHEC's decision was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and

(j) DHEC's decision was arbitrary and capricious.

Providence reserves the right to amend and supplement this Request as additional facts or information are discovered.

WHEREFORE, Providence seeks the following relief:

(a) Reversal of DHEC's decision to grant a Plan Approval for the LMC Heart Projects to LMC;

(b) Reversal of DHEC's decision to grant any license for the LMC Heart Projects to LMC;

(c) An Order requiring LMC to immediately cease and desist any use of the 2nd Open Heart Surgery Unit and 3rd Cath Lab and/or enjoining LMC from utilizing the LMC Heart Projects until LMC complies with the law and obtains a CON; and

(d) Such other and further relief as this Court deems just and proper.

James G. Long, III
Jennifer J. Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Petitioner,
Sisters of Charity Providence Hospitals

July 9, 2014
Columbia, South Carolina

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-___-___-___ **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Request for Contested Case Hearing** has been served on the parties named below via hand-delivery, addressed as shown below, this 9th day of July, 2014:

Ashley C. Biggers, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

Lisa Lucas Longshore
Clerk, Board of Health and
Environmental Control
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Attorney for Lexington Medical Center
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

Sharon A. Wedenie

NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

EXHIBIT A

D H E C
PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director
Promoting and protecting the health of the public and the environment

South Carolina Board of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201
Telephone: (803) 898-3309 Facsimile :(803) 898-3393 Email: Lisa.Longshore@dhec.sc.gov

June 25, 2014

U.S. Mail – Certified – Return Receipt

91 7199 9991 7033 6614 2635
Ralph W. Barbier, Esquire
Nexsen Pruet
Post Office Drawer 2426
Columbia, SC 29202

U.S. Mail
David B. Summer, Jr., Esquire
Parker Poe
Post Office Box 1509
Columbia, SC 29202

Via Interagency Mail Delivery
Ashley C. Biggers, Esq.
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: ***Docket No. 14-RFR-18*** *– Request Final Review of decision to allow Lexington Medical Center to open and operate a third Cardiac Catherization Laboratory and a second Open Heart Surgery Unit.*

Dear Council of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

EXHIBIT B

Facility Information		Audit Information	
Permit Number:	HTL-0500	Audit:	HTL ROV 20130911
Permit Type:	HL- Hospital or Institutional General Infirmary	Type:	L15 Initial Audit
		Date:	10/11/2013
Location Name:	LEXINGTON MEDICAL CENTER	Stop Date:	12/31/9999
Address:	2720 SUNSET BLVD	Auditor:	Kristen Juarez
City/State/Zip:	WEST COLUMBIA , SC , 29169-4810 , Lexington	Contact Name:	MICHAEL J BIEDIGER
Phone:	803-791-2115	Contact Email:	
E-Mail:			

Bureau of Health Facilities Licensing
2600 Bull St
Columbia SC 29201-1708

REPORT NOTICE: If applicable, this Report of Visit includes a detailed description of the conditions, conduct or practices that were found to be in violation of requirements. This inspection or investigation is not to be construed as a check of every condition that may exist, nor does it relieve the licensee (owner) from the need to meet all applicable standards, regulations and laws. The South Carolina Code of Laws requires this Department to establish and enforce basic standards for the licensure (permitting), maintenance, and operation of health facilities and services to ensure the safe and adequate treatment of persons served in this State. It also empowers the Department to require reports and make inspections and investigations as considered necessary. Furthermore, the Code authorizes the Department to deny, suspend, or revoke licenses (permits) or to assess a monetary penalty against a person or facility for (among other reasons), violating a provision of law or departmental regulations or conduct or practices detrimental to the health or safety of patients, residents, clients, or employees of a facility or service. If applicable to the type of report being made, the signature of the activity representative indicates that all of the items cited were reviewed during the exit discussion. If this Report of Visit is required by regulation to be made available in a conspicuous place in a public area within the facility, redaction of the names of those individuals in the report is required as provided by Sections 44-7-310 and 44-7-315 of the S.C. Code of Laws, 1976, as amended.

Report Notice

INSPECTION INFORMATION

Permission is hereby given to occupy Operating Room #22 to be utilized/designated for Open Heart Surgery.

The Department filed a petition on July 1, 2013, with the SC Supreme Court seeking a declaratory ruling as to the effect of the General Assembly's failure to appropriate funds to the Department for the administration of the CON program. Should the General Assembly restore the CON program in the future, or should the court determine the program is not suspended, the Department will not take action to revoke any license issued during the suspension period for a facility or service for which the Act requires CON review, unless otherwise instructed by the General Assembly or Judiciary. Please 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.

Is this an On-Site Visit?	YES
Select the Type of Inspection to be Performed:	HTL General Inspection
What Date Did the Auditor Arrive at the Facility?	10/11/2013
What Time Did the Auditor Arrive at the Facility?	9:00:31 AM
Licensed Capacity:	384
Current Census:	295
Facility Administrator:	Michael Biediger
Enter the name and title of the Facility/Activity Representative for this Report of Visit.	Michael Biediger
	YES

Is the Current Facility/Activity Administrator the same as the Administrator of Record?	
Are there any other individuals accompanying the auditor for this visit? • Sonya Turner and Lavonne Martin	YES
DHEC 0282 (05/2010) AUDIT - [Records Retention Schedule #SBH-F&S-17]	Retention
PROTECTED INFORMATION	
Is this information CONFIDENTIAL? This section names or identifies certain individuals related to cited violations. If you identify by name any patient, client, resident, or participant, you must check 'YES' by CONFIDENTIAL. Otherwise, check 'NO.' (The names of facility/activity staff members are NOT considered CONFIDENTIAL. If required for the audit, list the names of staff members in the citation.)	NO

EXHIBIT C

Tod Augsburger

From:	Biggers, Ashley [biggerac@dhec.sc.gov]
Sent:	Thursday, September 26, 2013 2:50 PM
To:	Tod Augsburger; mbiediger@lexmed.com
Cc:	Jamie Shuster
Subject:	LMC surgery rooms

Mr. Biediger and Mr. Augsburger,

It was a pleasure meeting with you yesterday afternoon. Following our discussion, I reviewed the hospital licensing statute and regulation, and I concur that there are no licensing provisions specific to open-heart surgery rooms that differ from the licensing provisions applicable to general surgery rooms. A licensed hospital seeking to convert a general surgery room to an open-heart surgery room need not apply for an amended license. Should any new construction, additions, or major alterations to the existing hospital be involved, Section 2003 of Regulation 61-15 would require submission of plans and specifications to the Department for review and approval. Otherwise, no official notification to the Department is required for the conversion.

As you know, the House of Representatives sustained Governor Haley's veto of the CON program in the state budget. The sustained veto shows the intention of both the Executive and Legislative branches to suspend the operation of the CON program for the fiscal year beginning July 1, 2013. The Department and other interested parties filed petitions with the SC Supreme Court seeking a declaratory ruling as to the effect of the General Assembly's failure to appropriate funds to the Department for administration of the CON program. On September 20, 2013, the SC Supreme Court granted one of the petitions and set a briefing schedule for the parties.

Should the Court determine the program is not suspended, or should the General Assembly restore CON funding in the future, the Department will not be inclined to take any enforcement actions under CON for activities that occurred during the program's suspension, unless otherwise instructed by the General Assembly or the Judiciary. Please be on notice that any action by the General Assembly, the Judiciary, or third parties challenging the validity of a project undertaken without CON approval during the program's suspension is outside the control of the Department.

Please feel free to contact me if I may be of any further assistance in this matter.

Sincerely,

Ashley

--
Ashley C. Biggers
Associate General Counsel
SC Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201
(803) 898-3362

Tod Augsburger

From: Biggers, Ashley [biggerac@dhec.sc.gov]
Sent: Thursday, September 26, 2013 2:55 PM
To: Tod Augsburger
Subject: Fwd: LMC surgery rooms

Mr. Augsburger,

I just received a message indicating that the email address I included for Mr. Biediger was invalid. Please do me the favor of forwarding this message to him.

Additionally, please note that the reference to 61-15 in the email was a typo. That should have read 61-16, the hospital licensing regulation.

Thank you,
Ashley

---------- Forwarded message ----------
From: **Biggers, Ashley** <biggerac@dhec.sc.gov>
Date: Thu, Sep 26, 2013 at 2:50 PM
Subject: LMC surgery rooms
To: taugsburger@lexmed.com, mbiediger@lexmed.com
Cc: Jamie Shuster <shustej@dhec.sc.gov>

Mr. Biediger and Mr. Augsburger,

It was a pleasure meeting with you yesterday afternoon. Following our discussion, I reviewed the hospital licensing statute and regulation, and I concur that there are no licensing provisions specific to open-heart surgery rooms that differ from the licensing provisions applicable to general surgery rooms. A licensed hospital seeking to convert a general surgery room to an open-heart surgery room need not apply for an amended license. Should any new construction, additions, or major alterations to the existing hospital be involved, Section 2003 of Regulation 61-15 would require submission of plans and specifications to the Department for review and approval. Otherwise, no official notification to the Department is required for the conversion.

As you know, the House of Representatives sustained Governor Haley's veto of the CON program in the state budget. The sustained veto shows the intention of both the Executive and Legislative branches to suspend the operation of the CON program for the fiscal year beginning July 1, 2013. The Department and other interested parties filed petitions with the SC Supreme Court seeking a declaratory ruling as to the effect of the General Assembly's failure to appropriate funds to the Department for administration of the CON program. On September 20, 2013, the SC Supreme Court granted one of the petitions and set a briefing schedule for the parties.

Should the Court determine the program is not suspended, or should the General Assembly restore CON funding in the future, the Department will not be inclined to take any enforcement actions under CON for activities that occurred during the program's suspension, unless otherwise instructed by the General Assembly or the Judiciary. Please be on notice that any action by the General Assembly, the Judiciary, or third parties challenging the validity of a project undertaken without CON approval during the program's suspension is outside the control of the Department.

Please feel free to contact me if I may be of any further assistance in this matter.

Sincerely,

Ashley

--
Ashley C. Biggers
Associate General Counsel
SC Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201
(803) 898-3362

--
Ashley C. Biggers
Associate General Counsel
SC Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201
(803) 898-3362

Tod Augsburger

From:	Tod Augsburger
Sent:	Thursday, September 26, 2013 7:04 PM
To:	Biggers, Ashley
Cc:	Tod Augsburger; mbliediger@lexmed.com; Jamie Shuster
Subject:	Re: LMC surgery rooms

Ashley, thank you so much for your prompt response and clarification. I look forward to working with Jamie to schedule the inspection at her convenience.

Thanks again,
Tod

On Sep 26, 2013, at 2:50 PM, "Biggers, Ashley" <biggerac@dhec.sc.gov> wrote:

> Mr. Biediger and Mr. Augsburger,
>
> It was a pleasure meeting with you yesterday afternoon. Following our discussion, I reviewed the hospital licensing statute and regulation, and I concur that there are no licensing provisions specific to open-heart surgery rooms that differ from the licensing provisions applicable to general surgery rooms. A licensed hospital seeking to convert a general surgery room to an open-heart surgery room need not apply for an amended license. Should any new construction, additions, or major alterations to the existing hospital be involved, Section 2003 of Regulation 61-15 would require submission of plans and specifications to the Department for review and approval. Otherwise, no official notification to the Department is required for the conversion.
>
> As you know, the House of Representatives sustained Governor Haley's veto of the CON program in the state budget. The sustained veto shows the intention of both the Executive and Legislative branches to suspend the operation of the CON program for the fiscal year beginning July 1, 2013. The Department and other interested parties filed petitions with the SC Supreme Court seeking a declaratory ruling as to the effect of the General Assembly's failure to appropriate funds to the Department for administration of the CON program. On September 20, 2013, the SC Supreme Court granted one of the petitions and set a briefing schedule for the parties.
>
> Should the Court determine the program is not suspended, or should the General Assembly restore CON funding in the future, the Department will not be inclined to take any enforcement actions under CON for activities that occurred during the program's suspension, unless otherwise instructed by the General Assembly or the Judiciary. Please be on notice that any action by the General Assembly, the Judiciary, or third parties challenging the validity of a project undertaken without CON approval during the program's suspension is outside the control of the Department.
>
> Please feel free to contact me if I may be of any further assistance in this matter.
>
> Sincerely,
>
> Ashley

--
Ashley C. Biggers
Associate General Counsel
SC Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201
(803) 898-3362

EXHIBIT D

February 25, 2014

Plan Approval - DHFC

Facility Information		Audit Information	
Facility License Number:	HTL-0500	Audit Name:	DHFC Project Plan Approval 20131114
Facility Name:	LEXINGTON MEDICAL CENTER	Type:	L20 Construction Project
Facility Address 1:	2720 SUNSET BLVD	End Date:	2/25/2014
Permit Type:	HL- Hospital or Institutional General Infirmary	DHFC Staff Name:	Walter Stellpflug
		DHEC Project Number:	361500
Facility City/State/Zip:	WEST COLUMBIA, SC 29169-4810 Lexington		
Phone 1:	803-791-2115		
Contact Name:	MICHAEL J BIEDIGER		
Contact Phone:	803-791-2000		

Health Regulation Memorandum

This office has completed a final check of the above referenced project; based on the applicable codes and minimum standards, the construction documents are approved. Walter Stellpflug, DHEC, Division of Health Facilities Construction (DHFC).

Notice PPA

Plan Approval Information	Plan Approval Data
Division of Health Facilities Construction 2600 Bull St Columbia SC 29201-1708	Report Notice

PROJECT PLAN APPROVAL: This office has completed a final check of the below referenced project; based on the applicable codes and minimum standards, the construction documents are approved.

The examination of the submitted documents does not relieve the Owner, Architect/Engineer, and Contractor, or their representatives from individual or collective responsibility to comply with the applicable codes and regulations. This review is not to be construed as a check of every item in the submitted documents and does not prevent authorities from hereafter requiring corrections of errors in plans or construction.

Please keep this office informed in writing of the start of construction , progress of construction (at each 10% completion point), and to any developments (e.g. addendums, change orders, etc.). Inspections are required for this project.

Please post the Construction Project Information Form(s) in a conspicuous location. If you have any questions concerning construction of your facility, please do not hesitate to contact me at (803) 545-4215.

Project Plan Approval

Plan Approval Information	Plan Approval Data
Design Professional (Name, Firm, Address, Contact Info):	Design

LMC-00005

Comments

- *Perkins + Will*
  330 S. Tryon Street
  Charlotte, NC
  Architect Contact: Ms. Julie Mullen/ Mr. David Harrison
  Tel: 704-972-5655/ 704-972-5632
  Email: julie.mullen@perkinswill.com
  Email: david.harrison@perkinswill.com

  Owner Contact: Mr. Brooks Williams
  Tel: 803-791-2217

Professionals Information

Project Information:
Comments

- *Lexington Medical Center- Cath Lab 3*
  Drawings dated 02/12/14

  Project Description: Project scope shall includes but not limited to Cath Lab Upfit existing space including equipment room and minor renovation of control room and nearby shower room, corridor, nurse area and alcove.

Project Info:

Square Footage of Project:
Comments

- *1,669 SF*

Project Size:

Cost of Project:
Comments

- *$200,000*

Project Cost:

Additional Observations

Plan Approval Information	Plan Approval Data
Additional Observations:	N/A

Record Retention

Plan Approval Information	Plan Approval Data
DHEC 0262 (05/2010) AUDIT - [Records Retention Schedule #SBH-F&S-17]	Retention

EXHIBIT E

Dale Thompson

From: Brooks Williams
Sent: Friday, February 21, 2014 12:33 PM
To: Dale Thompson; Jason Jones; Cynthia Greene
Cc: Yu, Kevin (GE Healthcare)
Subject: FW:

SC DHEC has approved the Shielding Plan for Cath. Lab 3. See below.

Brooks Williams, LEED AP
Construction Project Manager
Lexington Medical Center
2720 Sunset Blvd.
West Columbia, SC 29169
Phone: (803) 791-2217
Cell: (803)-518-3112

From: Tracy Schening [mailto:sdpc98@hotmail.com]
Sent: Friday, February 21, 2014 12:29 PM
To: Brooks Williams
Subject:

The shielding has been approved.

Lexington Medical Center Cath Lab 3: Log # 1081690

EXHIBIT F

DHEC
Construction
Final Approval

Assessment Corrections: **All**

Facility Information	Contact Information	Audit Information
Permit Number: HTL 0500		Audit Name: DHEC Notice of Completion 20131114
Facility Name: LEXINGTON MEDICAL CENTER		Type: L20 Construction Project
Address: 2720 SUNSET BLVD		Start Date: 3/20/2014 1:36:05 PM
City/State/Zip: WEST COLUMBIA, SC 29169-4810		End Date: 3/20/2014 1:36:57 PM
Lexington		Inspector: Mark Bishop
Phone 1: 803-791-2115		Application Version: WebAuditor version 2.5
	Contact Name: MICHAEL J BIEDIGER	
	Contact Phone: 803-791-2000	
	Contact Email:	

Audit Level Notes

1-7/7 All

NOTICE NOC

Division of Health Facilities Construction
2600 Bull St
Columbia SC 29201-1708

Report Notice

NOTICE OF COMPLETION: THE BELOW REFERENCED PROJECT/FACILITY WAS INSPECTED FOR FINAL CONSTRUCTION INSPECTION AND DETERMINED THAT THERE ARE NO KNOWN DEFICIENCIES THAT WOULD PRECLUDE THE PROJECT/FACILITY FROM LICENSURE.

*Owner/Architect - Licensing will be coordinating with you to schedule a visit to license the area under the NOC scope of work.

If you have not been contacted within a week of receiving this notification, please contact the Bureau of Health Facilities Licensing: (803) 545-4370.

NOTICE OF COMPLETION

DHEC Project Number:
Comments:
- *DHEC Project # - 361000*

DHEC Project Number

CON Number(s):
Comments:
- *N/A*

CON Number(s)

Type of NOC (Phased or Completed):
Comments:
- *Completed Project*

Completed Project NOC

LMC-00007

RECORD 000113

Notice of Completion Narrative: Comments *Cath Lab Upfit*	Notice of Completion Information

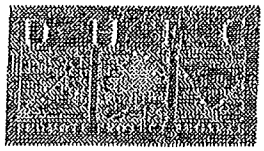
ADDITIONAL OBSERVATIONS

	Answer
Additional Observations:	N/A

RECORD RETENTION

	Answer
OHEO 0282 (05/2010) AUDIT - (Records Retention Schedule #SBH-FAS-17)	Retention

EXHIBIT G



Facility Information		Audit Information	
Permit Number:	HTL-0500	Audit:	HTL ROV 20131001
Permit Type:	HL- Hospital or Institutional General Infirmary	Type:	L15a Initial - Unit Increase
Location Name:	LEXINGTON MEDICAL CENTER	Date:	04/10/2014
Address:	2720 SUNSET BLVD	Stop Date:	04/10/2014
City/State/Zip:	WEST COLUMBIA , SC , 29169-4810 , Lexington	Auditor:	Michell Hatcher
Phone:	803-791-2115	Contact Name:	MICHAEL J BIEDIGER
E-Mail:		Contact Email:	

Bureau of Health Facilities Licensing
2600 Bull St
Columbia SC 29201-1708

REPORT NOTICE: If applicable, this Report of Visit includes a detailed description of the conditions, conduct or practices that were found to be in violation of requirements. This inspection or investigation is not to be construed as a check of every condition that may exist, nor does it relieve the licensee (owner) from the need to meet all applicable standards, regulations and laws. The South Carolina Code of Laws requires this Department to establish and enforce basic standards for the licensure (permitting), maintenance, and operation of health facilities and services to ensure the safe and adequate treatment of persons served in this State. It also empowers the Department to require reports and make inspections and investigations as considered necessary. Furthermore, the Code authorizes the Department to deny, suspend, or revoke licenses (permits) or to assess a monetary penalty against a person or facility for (among other reasons), violating a provision of law or departmental regulations or conduct or practices detrimental to the health or safety of patients, residents, clients, or employees of a facility or service. If applicable to the type of report being made, the signature of the activity representative indicates that all of the items cited were reviewed during the exit discussion. If this Report of Visit is required by regulation to be made available in a conspicuous place in a public area within the facility, redaction of the names of those individuals in the report is required as provided by Sections 44-7-310 and 44-7-315 of the S.C. Code of Laws, 1976, as amended.

Report Notice

INSPECTION INFORMATION

A scheduled visit was made for the purpose of an initial Health Licensing inspection for a Cardiac Diagnostic and Interventional Cath Lab. A Notice of Completion dated March 20, 2014, from Health Facility Construction was recieved in Health Licensing for a Cath Lab Upfit. A walk through inspection of Cath Lab #3 was completed. All necessary equipment and supplies are present. A crash cart is present with required supplies. The oxygen, air, and suction outlets were tested and found to be functioning properly. Staff will be present in the room at all times a patient is present. Permission is granted for occupancy of Cath Lab #3.

Is this an On-Site Visit?	YES
Select the Type of Inspection to be Performed:	HTL General Inspection
What Date Did the Auditor Arrive at the Facility?	4/10/2014
What Time Did the Auditor Arrive at the Facility?	9:15:00 AM
Licensed Capacity:	414
Current Census:	378
Facility Administrator:	Michael Biediger
Enter the name and title of the Facility/Activity Representative for this Report of Visit.	Dale Thompson, Cynthia Greene
Is the Current Facility/Activity Administrator the same as the Administrator of Record?	YES

LMC-00001

RECORD 000116

Are there any other individuals accompanying the auditor for this visit?	NO
DHEC 0282 (05/2010) AUDIT - [Records Retention Schedule #SBH-FAS-17]	Retention
PROTECTED INFORMATION	
Is this information CONFIDENTIAL? This section names or identifies certain individuals related to cited violations. If you identify by name any patient, client, resident, or participant, you must check 'YES' by CONFIDENTIAL. Otherwise, check 'NO.' (The names of facility/activity staff members are NOT considered CONFIDENTIAL. If required for the audit, list the names of staff members in the citation.)	NO

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 **MOTION TO ENFORCE AUTOMATIC STAY AND MEMORANDUM IN SUPPORT**

Pursuant to Rule 19 of the South Carolina Rules of Procedure for the Administrative Law Court, Petitioner Sisters of Charity Providence Hospitals ("Providence") hereby moves the Court for an Order requiring Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center ("LMC") to abide by the automatic stay that applies to the final agency decisions of the South Carolina Department of Health and Environmental Control ("DHEC") that are the subject of this contested case. The grounds for this motion are as follows:

PROCEDURAL HISTORY

This contested case proceeding pending before this Court arises out of a challenge by Providence to the actions of DHEC in approving the licensure of two cardiovascular care projects initiated by LMC without a valid certificate of need ("CON"). On April 29, 2014, LMC responded to a Freedom of Information Act request made by Providence and, for the first time, provided written notice that LMC had obtained multiple approvals from DHEC to engage in projects for which a CON was required but not obtained. Providence learned through the response by LMC that two projects had been undertaken by LMC without CON Approval – the construction and renovation of a third cardiac catheterization laboratory and the conversion of an

existing surgery suite to a second open heart surgery unit. Through these projects, LMC has been authorized to open and operate a third cardiac catheterization laboratory and a second open heart surgery unit, for which LMC did not first obtain a CON in direct violation of the law.

Following receipt of this documentation, Providence timely filed a Request for Final Review Conference with the DHEC Board. The Board denied the request for final review and Providence timely filed this Request for Contested Case Proceeding. Though Providence has contemporaneously filed a Motion for Summary Judgment on the basis that the Court has all of the materials facts necessary on which judgment as a matter of law should be rendered in Providence's favor, Providence files this Motion to confirm the existence of an immediate stay as to all activities undertaken by LMC following the improper DHEC approvals pending the Court's ruling on the dispositive motion.

THE AUTOMATIC STAY

As this Court is familiar, upon the filing of a contested case proceeding, an automatic stay is imposed on all conduct that purports to be authorized by the agency decisions under review. Specifically, South Carolina Code Section 1-23-600(H)(2) plainly states: "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;" The effect of the filing of this contested case proceeding is that all activities purportedly authorized by the DHEC decisions under review are stayed pending further Order of this Court. LMC is required by law to have ceased all activities in the third cardiac catheterization laboratory and the second open heart surgery unit as of the filing of this proceeding on July 9, 2014.

Providence seeks an Order from this Court affirming the existence of the automatic stay and requiring LMC to provide assurances to the Court that is has not and is not acting in violation

of the law. The automatic stay provision of the APA is to be read expansively and certainly applies to this situation when a formal CON is required before initiating the services. *See MRI at Belfair, LLC, v. S.C. Dept. of Health and Envtl. Control*, Docket No. 07-ALJ-07-0538-CC (S.C. Admin Law J. Div. Apr. 30, 2008) (Order Enforcing Automatic Stay attached as **Exhibit A**). There is no justifiable reason to allow LMC to violate the law and ignore the automatic stay.

CONCLUSION

For the reasons set forth herein, Providence respectfully requests that this Court issue its Order affirming the existence and imposition of the automatic stay imposed upon the filing of this matter under Section 1-23-600(H)(2) of the South Carolina Code.

James G. Long, III
Jennifer Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Petitioner,
Sisters of Charity Providence Hospitals

July 24, 2014
Columbia, South Carolina

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 **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Motion to Enforce Automatic Stay and Memorandum of Law in Support** has been served on counsel of record via hand-delivery, addressed as shown below, this 24th day of July, 2014:

Ashley C. Biggers, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Attorney for Lexington County Medical Center
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

Sharon A. Wendice

NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

EXHIBIT A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC; Hilton Head Regional Medical Center; and Hilton Head Imaging, Inc., Petitioners, vs. South Carolina Department of Health and Environmental Control and Southern MRI, Respondents.	Docket No. 07-ALJ-07-0538-CC **ORDER ENFORCING AUTOMATIC STAY**

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC") on the motion of the Petitioners, MRI at Belfair, LLC; Hilton Head Regional Medical Center; and Hilton Head Imaging, Inc. ("Petitioners"), to enforce a statutory automatic stay against Respondent Southern MRI. The court held an expedited hearing on this motion on April 29, 2008. Upon consideration of the parties' written memoranda and oral argument at the motions hearing, the court grants the Petitioners' motion.

On September 19, 2007, Respondent South Carolina Department of Health and Environmental Control ("Department") granted Southern MRI's request for a non-applicability determination ("N/A Determination") regarding its proposal to purchase and operate a magnetic resonance imaging ("MRI") unit and computer tomography ("CT") unit in Beaufort County, South Carolina. Upon exhaustion of the administrative process with the Department, MRI at Belfair, LLC and Hilton Head Regional Medical Center timely filed a request for a contested case hearing before the ALC challenging the Department's determination. Hilton Head Imaging, Inc. later intervened as a Petitioner.

The South Carolina Certificate of Need ("CON") program for health care facilities and services is comprised of the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110 to 44-7-370 (2002 & Supp. 2007) ("CON Act"); the associated CON regulations, 24A S.C. Code Ann. Regs. 61-15 (Supp. 2007); and the State Health Plan. The

PJG

purpose of the CON program is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2002).

DISCUSSION

The issue before the court is whether a formal determination by the Department pursuant to 24A S.C. Code Ann. Regs. 61-15 § 102.3 that the certificate of need requirements are *not applicable* to a particular project (an N/A Determination) constitutes a "license" as defined in the South Carolina Administrative Procedures Act ("APA"), thus triggering the automatic stay found in S.C. Code Ann. § 1-23-600(G)(2). Because an N/A Determination constitutes permission from the Department to forego CON review, and because the Department's permission to eschew the CON process is required by law when a question exists as to the particular project, the court finds that the Department's N/A Determination in this matter is automatically stayed pursuant to § 1-23-600(G)(2).

The CON Act provides:

> A person or health care facility as defined in this article[1] *is required to obtain a Certificate of Need from the department before undertaking* any of the following:
> . . .
> (6) the acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of that prescribed by regulation; . . .

S.C. Code Ann. § 44-7-160(6) (emphasis added). The Department's regulations specify the applicable monetary threshold as $600,000. 24A S.C. Code Ann. Regs. 61-15 § 102.1.f. Thus, a health care facility is required to obtain a CON from the Department prior to undertaking the acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of $600,000. The regulations go on to state, "When any question exists, a potential applicant shall forward a letter requesting a *formal determination* by the Department as to the applicability of the certificate of need requirements to a particular project." Id. § 102.3 (emphasis added).

The APA defines "license" as "the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or *similar form of permission* required by law. . . ." S.C. Code Ann. § 1-23-310(4) (emphasis added). The APA further provides for an automatic

[1] There is no dispute that Southern MRI is a "person or health care facility" as defined in the CON Act.

PJG

stay of an agency decision to issue a new license when a contested case hearing is requested. § 1-23-600(G)(2) ("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."). After a contested case hearing is initiated before the ALC, any party may move for the presiding administrative law judge to lift the automatic stay. § 1-23-600(G)(4).

The central question before the court is whether an N/A Determination constitutes an agency decision to issue a new license triggering the automatic stay. "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (citing Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Knotts v. S.C. Dep't of Natural Res., 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002). Further, the court should construe each part or section of the CON statutes and regulations together. See Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001) ("It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Date Systems Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

The Petitioners argue that an N/A Determination falls within the statutory definition of "license" because it constitutes permission to proceed in a particular manner—without CON review. Additionally, they contend that such a construction of the term "license" is consistent with the legislative purposes behind the CON Act, specifically with regard to cost containment, as well as the expressed intent of 2006 S.C. Act No. 387[2]—which contained the automatic stay provision codified at § 1-23-600(G)(2)—to have uniformity of procedures for contested cases and appeals from administrative agencies.

[2] Subsection (G)(2) of § 1-23-600 was enacted via 2006 S.C. Act No. 387. Section 53 of Act 387 provides: "This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling."

PJG

By contrast, Southern MRI[3] argues that an N/A Determination is not a license under the APA's definition, but rather is simply a determination by the Department that a license is not needed. Further, it contends that an N/A Determination, unlike a CON, is not required by law, since a person or health care facility is free to proceed without one if no question exists regarding the applicability of the CON requirements.

The court finds, reading the CON Act and the Department's regulations together, that the law requires: (1) that a person or health care facility *must* obtain a CON *before* it acquires medical equipment to be used for diagnosis or treatment whose total project cost exceeds $600,000; and (2) that when any question exists, the potential applicant *must* obtain a formal determination by the Department that the CON requirements do not apply to its proposed project. This "formal determination" falls within the APA's expansive definition of "license" in that it constitutes a form of agency permission required by law. Accordingly, the automatic stay of § 1-23-600(G)(2) applies. It is therefore

ORDERED that the Petitioners' motion to enforce the automatic stay of § 1-23-600(G)(2) is GRANTED. It is further

ORDERED that Southern MRI is prohibited from proceeding with the project that is the subject of the instant contested case proceeding or in any other way acting upon the Department's determination of non-applicability dated September 19, 2007 during the pendency of this matter before the ALC, unless otherwise ordered by the court.

IT IS SO ORDERED.

Paige J. Gossett

PAIGE J. GOSSETT
Administrative Law Judge

April 30, 2008
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 30th day of April, 2008

By: Jennifer E Wallace
Judicial Law Clerk

[3] The Department takes no position as to whether the automatic stay provision of § 1-23-600(G)(2) applies to its N/A Determination.

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 **MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT**

Pursuant to Rule 19 of the South Carolina Rules of Procedure for the Administrative Law Court and Rule 56 of the South Carolina Rules of Civil Procedure, Petitioner Sisters of Charity Providence Hospitals ("Providence") hereby moves the Court for summary judgment against Respondents South Carolina Department of Health and Environmental Control ("DHEC" or "Department") and Lexington Health Services District, Inc. d/b/a Lexington Medical Center ("LMC") in this contested case proceeding. Providence respectfully requests that this Court issue its Order finding in favor of Providence and ordering LMC to cease and desist the offering of the cardiovascular care outlined in this Motion until such time as LMC has applied for and been issued a valid Certificate of Need ("CON"). The grounds for this motion are set forth below:

I. BACKGROUND

These proceedings arise out of actions taken by LMC in establishing health care services in violation of the law without the proper legal authority required by the State Certification of Need and Health Facility Licensure Act ("CON Act"), codified at Section 44-7-110, *et seq.*, of the South Carolina Code of Laws. On October 11, 2013, DHEC Staff issued an approval to LMC to occupy and utilize Operating Room #22 for open heart surgery, which would be a second open heart

surgery unit at LMC. (DHEC's approval attached as **Exhibit A.**)[1] On February 25, 2014, the DHEC Division of Health Facilities Construction issued a final Plan Approval to LMC for a project proposed by LMC that involved the construction of a third cardiac catheterization laboratory. (DHEC final Plan Approval attached as **Exhibit B.**) 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 Second Open Heart Surgery Unit or the Third Cardiac Catheterization Laboratory (collectively referred to as "Cardiovascular Care Projects").

By statute, the Department is the sole agency for control and administration of the CON program. S.C. Code Ann. § 44-7-140. The CON Act requires a certificate of need be obtained by a person or health care facility before undertaking "the offering of a health service by or on behalf of a health care facility which has not been offered by the facility in the preceding twelve months and for which specific standards or criteria are prescribed in the South Carolina Health Plan." *Id.* at § 44-7-160(5).

LMC acted in concert with the Department and divisions therein obtaining various approvals other than any approval from the CON division, as evidenced by the additional correspondence included with Providence's Request for Contested Case Proceeding. Neither DHEC nor LMC provided any notice to the public or affected persons about the above referenced DHEC Staff approvals relating to the Cardiovascular Care Projects. Not until April 29, 2014, when LMC responded to a request for information under the Freedom of Information Act from Providence, did Providence have notice of the actions and approvals described herein. On May 14, 2014, Providence filed its 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,

[1] DHEC noted in its approval letter that "please be on notice that any action by the General Assembly, the judiciary, or a third party challenging the validity of a license issued without CON approval, are outside the control of the Department." Exhibit A.

2014, the DHEC 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), 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, 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. Providence submits that this proceeding is ripe for summary judgment, as there are no genuine issues of material fact that would warrant review by this Court and, as a matter of law, this Court should find that LMC has acted in violation of the CON Act and should be Ordered to cease and desist the Cardiovascular Care Projects until such time as LMC has applied for and been granted the appropriate CONs.

II. STANDARD OF REVIEW

Rule 56(c), SCRCP, provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Rife v. Hitachi Constr. Machinery, Co.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. Ap. 2005). "The question of statutory interpretation is one of law for the court to decide." *Alltel Communications, Inc. v. S.C. Dept. of Revenue*, 399 S.C. 313, 315, 731 S.E.2d 869, 870 (2012).

As shown herein, the facts underlying this proceeding are not in dispute. The only dispute

is a purely legal issue – specifically, whether LMC's operation of a third cardiac catheterization laboratory and a second open heart surgery unit without first obtaining a valid CON is a violation of the law. When the Court is faced with a purely legal issue for which there are no factual issues to resolve, summary judgment is appropriate. *See Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565 575-76, 757 S.E.2d 399, 404 (2014).

III. ARGUMENTS

A. LMC's failure to obtain a CON prior to undertaking the Cardiovascular Care Projects is in violation of the law.

LMC's actions in undertaking new covered health services without first obtaining a valid CON are in violation of the law. The CON Act is clear and unambiguous:

> 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:
>
> (5) the offering of a health service by or on behalf of a health care facility which has not been offered by the facility in the preceding twelve months and for which specific standards or criteria are prescribed in the South Carolina Health Plan;

S.C. Code Ann. § 44-7-160(5); *see also* 24A S.C. Code Ann. Regs. 61-15 § 102(1)(e). It is undisputed that LMC is a hospital and therefore meets the statutory definition of "health care facility." S.C. Code Ann. § 44-7-130(10). It is further undisputed that the offering of open heart surgery and cardiac catheterizations in the second open heart surgery unit and the third cardiac catheterization laboratory by LMC are health services "for which specific standards or criteria are prescribed in the South Carolina Health Plan." *Id.* § 44-7-160(5). Chapter VIII of the *2011-2012 South Carolina Health Plan* is entitled "Cardiovascular Care" and contains standards and criteria for both cardiac catheterizations and open heart surgery. *See* **Exhibit C**, *2011-2012 South Carolina Health Plan*, VIII-1 to VIII-23. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the

statute according to its literal meaning." *Centex Intern., Inc. v. S.C. Dept. of Revenue*, 406 S.C. 123, 139, 750 S.E.2d 65, 69 (2013); *see also Sloan v. Hardee*, 371 S.C. 495, 498-500, 640 S.E.2d 457, 459 (2007). In this case, the application of the statutory and regulatory requirements to obtain a CON before offering the services of the third cardiac catheterization laboratory and second open heart surgery unit are clear and are not susceptible to any other interpretation.

The explicitly stated purposes of the CON Act are four-fold: "to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120. All four of these purposes are squarely presented and protected by the Cardiovascular Care standards and criteria in the South Carolina Health Plan, which explains:

> Both cardiac catheterization and open heart surgery programs require highly skilled staffs and expensive equipment. Appropriately equipped and staffed programs serving larger populations are preferable to multiple, minimum population programs. Underutilized programs may reflect unnecessary duplication of services in an area, which may seriously compromise quality and safety of procedures and increase the cost of care.

(Exhibit C, *2011-2012 South Carolina Health Plan*, VIII-2.) Nearly eight years ago, this Court addressed a dispute between these same parties over LMC's request for a CON to offer open heart surgery in Lexington County. In the contested case proceeding before Judge Geathers, the Court denied the requested CON,[2] finding that excess capacity for open heart surgery existed in the service area and he very accurately predicted that: "the use rate for open-heart surgery will continue to decline in South Carolina, such that, even with an increasing population in LMC's service area, the number of open-heart surgery procedures performed in the Midlands in the future will, at best, be stagnant and, in all likelihood, will continue to decline." *Lex. Co. Health Svcs.*

[2] Subsequent to the ALC Final Order denying LMC a CON to offer open heart surgery at its campus, LMC established the service through the transfer of an existing open heart surgery suite from Providence in 2010. *See* **Exhibit C**, *2011-2012 South Carolina Health Plan* at VIII-23.

Dist., Inc. v. S.C. Dept. of Health and Envtl. Control, Docket No. 04-ALJ-07-0365-CC, 2006 WL 2899943 *7 (Sept. 15, 2006) (Opinion attached as **Exhibit D**). At the time of Judge Geathers' prediction, the 2004 volume of open heart surgeries in South Carolina was 5,850. *Id.* Based on the data in the current South Carolina Health Plan, the volumes have consistently declined from 5,053 in 2009; to 4,870 in 2010; and 4,568 in 2011. The absolute lack of any additional need for the services makes LMC's conduct even more egregious and dangerous for existing providers and patients they serve. Providence and other existing providers, as well as the community, have been and are being adversely affected by LMC's refusal to comply with the law. Such egregious conduct in flagrant violation of the law demands swift action by this Court, to include an order that LMC cease and desist the offering of those health services provided in the additional open heart surgery unit and cardiovascular laboratory.

B. DHEC's incorrect interpretation of the law does not afford a basis to validate LMC's prior and continued violations of the law.

The CON Act is in full force and effect, none of its provisions being suspended or eliminated prior to LMC's undertaking of the prohibited conduct. The terms of the Act are clear and leave no ambiguity as to the applicability of the CON requirements to LMC's proposed health services. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Charleston Cty. Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (internal citations omitted).

DHEC's temporary internal suspension of the CON program following the Governor's

funding veto and statements regarding the CON program were soundly rejected by the Supreme Court. As a result, DHEC had no authority to suspend or eliminate LMC's legal obligation to obtain a CON before undertaking the additional open heart surgery unit or cardiac catheterization laboratory. Following the Governor's veto, numerous health care providers and the Department petitioned the South Carolina Supreme Court for direction on the status of the CON program in light of the funding veto. In *Amisub of S.C. Inc. v. S.C. Dept. of Health and Envtl. Ctrl.*, 407 S.C. 583, 757 S.E.2d 408 (2014), *reh'g denied* (May 22, 2014), the Supreme Court unequivocally rejected the Department's actions and statements that the Governor's funding veto authorized the suspension of the CON program. Specifically, the Supreme Court explained: "the Governor has no authority to utilize the line item veto power to negate the effect of a long-standing permanent law. The authority to enact, modify, or repeal legislation lies solely within the General Assembly's broader power." *Id.* at 595, 757 S.E.2d at 415. "The failure to fund the CON program does not negate the directive issued by the General Assembly (and detailed in the CON Act) mandating DHEC administer the program." *Id.* at 599, 757 S.E.2d at 417. In conclusion, the Supreme Court stated: "we declare that DHEC has a duty to administer and fund the CON program for Fiscal Year 2013-2014 as contemplated by the CON Act." *Id.* at 603, 757 S.E.2d at 419. Since the issuance of this opinion on April 14, 2014, both LMC and the Department knew that any attempts to avoid or ignore the requirements of the CON Act were not in compliance with the law. Despite this knowledge, LMC has continued to act in violation of the law.

Not only has the Supreme Court considered and rejected the proposition that the CON Act was not in effect or was otherwise suspended following the Governor's veto in June 2013, but this Court has considered and rejected requests by providers to waive the applicability of the CON Act's requirements where action was taken in violation of its express terms prior to the Supreme Court's ruling. In *Trident Neurosciences Ctr., LLC d/b/a HealthSouth Rehab. Hosp. of Charleston*

v. S.C. Dept. of Health and Envtl. Control, Docket No. 14-ALJ-17-0103-CC (June 10, 2014), this Court issued its Order Granting Summary Judgment against the Department and Trident Medical Center,[3] who had acted in concert during the purported suspension in allowing the licensing of a rehabilitation unit to Trident Medical Center without the issuance of a CON. (Order attached as **Exhibit E.**) Rehabilitation facilities, like cardiac catheterizations and open heart surgery, are a covered service under the *2011-2012 South Carolina Health Plan* and therefore require the acquisition of a CON before implementation of the service. *See* S.C. Code Ann. § 44-7-160(5). In rejecting Trident's arguments of reliance on the Department's decision not to implement the CON program during the suspension and the actions of other licensing departments in approving CON projects, this Court explained that, "because the CON program was still in effect, and DHEC could not suspend the CON program but instead was required to fund its operation, a CON was therefore always required for licensing those projects requiring one pursuant to statute." *Trident Neurosciences Ctr., LLC*, at 7.

The circumstance in which LMC finds itself is not recent or unique and substantial legal authority exists denying any right to rely on misstatements of an agency's staff. LMC cannot proceed with its covered health services without first obtaining a CON based on the erroneous position of DHEC following the governor's veto.

> Misrepresentations by government officials acting within the proper scope of their authority may subject the government to estoppel. However, estoppel is not appropriate where a government official or employee with limited authority erroneously provides advice beyond the scope of his authority. Estoppel will not lie against a government entity where a government employee gives erroneous information in contradiction of statute. Simply stated, equity follows the law.
>
> *Morgan v. S.C. Budget and Control Bd.*, 377 S.C. 313, 319, 659 S.E.2d 263, 267 (Ct. App.

[3] Notably, LMC is represented by the same law firm as Trident Medical Center, Parker Poe, LLC. It is unclear why LMC would not have ceased operations in violation of the law in order to proceed with obtaining a CON as required by the CON Act in light of the decisive ruling by this Court in the HealthSouth case. Clearly, LMC is aware of the ruling but chooses to ignore it.

2008). LMC, as was the Morgan plaintiff, is unable to use the Department's temporary failure to enforce the CON program as a basis to continue with covered health services for which a CON was required but was not obtained. The CON Act has been and remains the law of this State, and LMC's compliance with its clear and unambiguous terms is required. Providence submits that this Court must order LMC to cease and desist all activities for which a CON was required but not obtained until such time as LMC has applied for and been granted the appropriate CONs.

IV. CONCLUSION

For the reasons stated herein, Providence respectfully requests that this Court grant judgment in its favor as a matter of law and order LMC to cease and desist the cardiovascular care projects identified herein pending proper regularly approvals.

James G. Long, III
Jennifer Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Petitioner,
Sisters of Charity Providence Hospitals

July 24, 2014
Columbia, South Carolina

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 **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Motion for Summary Judgment and Memorandum in Support** has been served on counsel of record via hand-delivery, addressed as shown below, this 24th day of July, 2014:

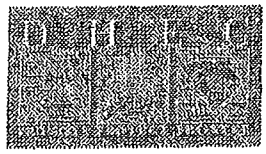
Ashley C. Biggers, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

David B. Summer, Jr., Esquire
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

Sharon A. Wenderie

NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

EXHIBIT A



Facility Information		Audit Information	
Permit Number:	HTL-0500	Audit:	HTL ROV 20130911
Permit Type:	HL- Hospital or Institutional General Infirmary	Type:	L15 Initial Audit
		Date:	10/11/2013
Location Name:	LEXINGTON MEDICAL CENTER	Stop Date:	12/31/9999
Address:	2720 SUNSET BLVD	Auditor:	Kristen Juarez
City/State/Zip:	WEST COLUMBIA, SC, 29169-4810, Lexington	Contact Name:	MICHAEL J BIEDIGER
Phone:	803-791-2115	Contact Email:	
E-Mail:			

Bureau of Health Facilities Licensing 2600 Bull St Columbia SC 29201-1708	
REPORT NOTICE: If applicable, this Report of Visit includes a detailed description of the conditions, conduct or practices that were found to be in violation of requirements. This inspection or investigation is not to be construed as a check of every condition that may exist, nor does it relieve the licensee (owner) from the need to meet all applicable standards, regulations and laws. The South Carolina Code of Laws requires this Department to establish and enforce basic standards for the licensure (permitting), maintenance, and operation of health facilities and services to ensure the safe and adequate treatment of persons served in this State. It also empowers the Department to require reports and make inspections and investigations as considered necessary. Furthermore, the Code authorizes the Department to deny, suspend, or revoke licenses (permits) or to assess a monetary penalty against a person or facility for (among other reasons), violating a provision of law or departmental regulations or conduct or practices detrimental to the health or safety of patients, residents, clients, or employees of a facility or service. If applicable to the type of report being made, the signature of the activity representative indicates that all of the items cited were reviewed during the exit discussion. If this Report of Visit is required by regulation to be made available in a conspicuous place in a public area within the facility, redaction of the names of those individuals in the report is required as provided by Sections 44-7-310 and 44-7-315 of the S.C. Code of Laws, 1976, as amended.	Report Notice

INSPECTION INFORMATION

Permission is hereby given to occupy Operating Room #22 to be utilized/designated for Open Heart Surgery.

The Department filed a petition on July 1, 2013, with the SC Supreme Court seeking a declaratory ruling as to the effect of the General Assembly's failure to appropriate funds to the Department for the administration of the CON program. Should the General Assembly restore the CON program in the future, or should the court determine the program is not suspended, the Department will not take action to revoke any license issued during the suspension period for a facility or service for which the Act requires CON review, unless otherwise instructed by the General Assembly or Judiciary. Please 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.

Is this an On-Site Visit?	YES
Select the Type of Inspection to be Performed:	HTL General Inspection
What Date Did the Auditor Arrive at the Facility?	10/11/2013
What Time Did the Auditor Arrive at the Facility?	9:00:31 AM
Licensed Capacity:	384
Current Census:	295
Facility Administrator:	Michael Biedlger
Enter the name and title of the Facility/Activity Representative for this Report of Visit.	Michael Biedlger
	YES

LMC-00107

RECORD 000138

Is the Current Facility/Activity Administrator the same as the Administrator of Record?	
Are there any other individuals accompanying the auditor for this visit? • Sonya Turner and Lavonne Martin	YES
DHEC 0282 (05/2010) AUDIT - [Records Retention Schedule #SBH-R&S-17]	Retention
PROTECTED INFORMATION	
Is this information CONFIDENTIAL? This section names or identifies certain individuals related to cited violations. If you identify by name any patient, client, resident, or participant, you must check 'YES' by CONFIDENTIAL. Otherwise, check 'NO.' (The names of facility/activity staff members are NOT considered CONFIDENTIAL. If required for the audit, list the names of staff members in the citation.)	NO

EXHIBIT B

February 25, 2014

Plan Approval - DHFC

Facility Information		Audit Information	
Facility License Number:	HTL-0500	Audit Name:	DHFC Project Plan Approval 20131114
Facility Name:	LEXINGTON MEDICAL CENTER	Type:	L20 Construction Project
Facility Address 1:	2720 SUNSET BLVD	End Date:	2/25/2014
Permit Type:	HL- Hospital or Institutional General Infirmary	DHFC Staff Name:	Walter Stellpflug
		DHEC Project Number:	361500
Facility City/State/Zip:	WEST COLUMBIA, SC 29169-4810 Lexington		
Phone 1:	803-791-2115		
Contact Name:	MICHAEL J BIEDIGER		
Contact Phone:	803-791-2000		

Health Regulation Memorandum

This office has completed a final check of the above referenced project; based on the applicable codes and minimum standards, the construction documents are approved. Walter Stellpflug, DHEC, Division of Health Facilities Construction (DHFC).

Notice PPA

Plan Approval Information — Plan Approval Date

Division of Health Facilities Construction
2600 Bull St
Columbia SC 29201-1708

Report Notice

PROJECT PLAN APPROVAL: This office has completed a final check of the below referenced project; based on the applicable codes and minimum standards, the construction documents are approved.

The examination of the submitted documents does not relieve the Owner, Architect/Engineer, and Contractor, or their representatives from individual or collective responsibility to comply with the applicable codes and regulations. This review is not to be construed as a check of every item in the submitted documents and does not prevent authorities from hereafter requiring corrections of errors in plans or construction.

Please keep this office informed in writing of the start of construction , progress of construction (at each 10% completion point), and to any developments (e.g. addendums, change orders, etc.). Inspections are required for this project.

Please post the Construction Project Information Form(s) in a conspicuous location. If you have any questions concerning construction of your facility, please do not hesitate to contact me at (803) 545-4215.

Project Plan Approval

Plan Approval Information — Plan Approval Date

Design Professional (Name, Firm, Address, Contact Info):

Design

LMC-00005

Comments

- *Perkins + Will*
  330 S. Tryon Street
  Charlotte, NC
  Architect Contact: Ms. Julie Mullen/ Mr. David Harrison
  Tel: 704-972-5655/ 704-972-5632
  Email: julie.mullen@perkinswill.com
  Email: david.harrison@perkinswill.com

  Owner Contact: Mr. Brooks Williams
  Tel: 803-791-2217

Professionals Information

Project Information:

Project Info:

Comments

- *Lexington Medical Center- Cath Lab 3*
  Drawings dated 02/12/14

Project Description: Project scope shall includes but not limited to Cath Lab Upfit existing space including equipment room and minor renovation of control room and nearby shower room, corridor, nurse area and alcove.

Square Footage of Project:

Project Size:

Comments

- *1,669 SF*

Cost of Project:

Project Cost:

Comments

- *$200,000*

Additional Observations

Plan Approval Information	Plan Approval Date

Additional Observations:

N/A

Record Retention

Plan Approval Information	Plan Approval Date

DHEC 0282 (05/2010) AUDIT - [Records Retention Schedule #SBH-F&S-17]

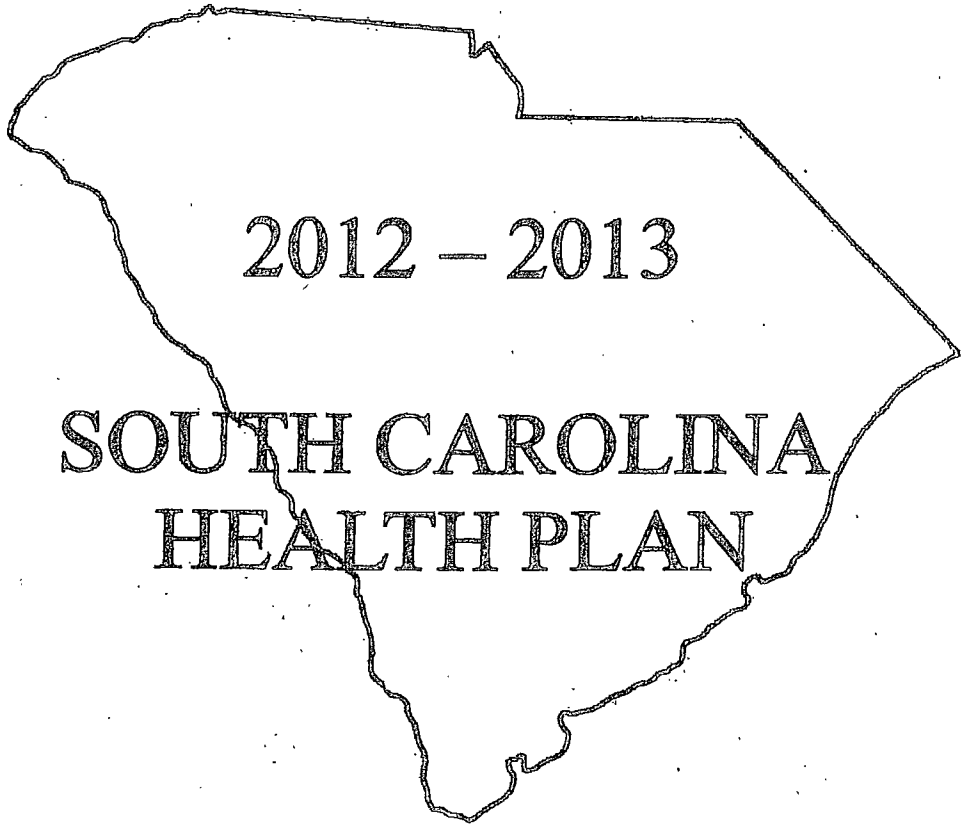
Retention

LMC-00006

EXHIBIT C

D H E C

PROMOTE PROTECT PROSPER



2012 – 2013

SOUTH CAROLINA HEALTH PLAN

EFFECTIVE 11/9/12

CHAPTER VIII

CARDIOVASCULAR CARE

Cardiovascular diseases are the leading cause of death in the United States, accounting for more than 40% of all deaths. The total death rate for all cardiovascular diseases in South Carolina is the second highest in the country. Approximately one-third of all heart attacks are fatal. The amount of heart muscle damaged during a heart attack is an important determinant of whether patients live or die - and what their quality of life will be if they survive.

Diagnostic and therapeutic cardiac catheterizations and open heart surgery are tools in the treatment of heart disease. During a cardiac catheterization, a thin, flexible tube is inserted into a blood vessel in the arm or leg. The physician manipulates the tube to the chambers or vessels of the heart so that pressure measurements, blood samples and photographs can be taken. Injections of contrast material allow blockages or areas of weakness to appear on x-rays. Other diagnostic and therapeutic procedures may also be performed. Diagnostic catheterizations take approximately one and one-half hours to perform, while therapeutic catheterizations average three hours.

Percutaneous Coronary Interventions (PCIs) are therapeutic catheterization procedures used to revascularize occluded or partially occluded coronary arteries. These interventions include, but are not limited to: bare and drug-eluting stent implantation; Percutaneous Transluminal Coronary Angioplasty (PTCA); cutting balloon atherectomy; rotational atherectomy; directional atherectomy; excimer laser angioplasty; and extractional thrombectomy.

These procedures may be performed on an emergent or elective basis. "Emergent or Primary" means that a patient needs immediate PCI because, in the treating physician's best clinical judgment, delay would result in undue harm or risk to the patient. An "Elective" PCI is scheduled in advance and performed on a patient with cardiac function that has been stable in the days prior to the procedure.

In 2011, the American College of Cardiology (ACC) and American Heart Association (AHA) revised their Guidelines for PCI. The previous version of the Guidelines allowed the provision of Emergent/Primary PCIs in hospitals without an on-site open heart surgery program if certain criteria could be met, but, due to the risk of arterial damage and the resulting need for immediate open heart surgery, elective PCI was contraindicated for institutions without on-site surgical backup. The new Guidelines state that:

> Elective PCI might be considered in hospitals without on-site cardiac surgery, provided that appropriate planning for program development has been accomplished and rigorous clinical and angiographic criteria are used for proper patient selection...Primary or elective PCI should not be performed in hospitals without on-site cardiac surgery capabilities without a proven plan for rapid transport to a cardiac surgery operating room in a nearby hospital or without appropriate hemodynamic support capability for transfer.

Hospitals without an open heart surgery program shall be allowed to provide Emergent/Primary and/or Elective PCIs only if they comply with all sections of Standard 7 or 8 of the Standards for Cardiac Catheterization.

Open heart surgery or cardiac surgery refers to an operation performed on the heart or intrathoracic great vessels. Coronary Artery Bypass Graft (CABG) accounts for 80-85% of all open heart surgery cases, where veins are extracted from the patient and grafted to bypass a constricted section of coronary artery. The thoracic cavity is opened to expose the heart, which is stopped and the blood is recirculated and oxygenated during surgery by a heart-lung machine. Another option is "beating heart surgery," like Minimally Invasive Direct Coronary Artery Bypass (MIDCAB), where the surgeon operates through a smaller incision rather than breaking the breastbone to open the chest cavity and no bypass machine is used. The success rate for CABG surgery is high; the American Heart Association reports that 90% of bypass grafts still work 10 years after they are put into place. The mortality rate continues to decline, but CABG still carries significant risks.

Both cardiac catheterization and open heart surgery programs require highly skilled staffs and expensive equipment. Appropriately equipped and staffed programs serving larger populations are preferable to multiple, minimum population programs. Underutilized programs may reflect unnecessary duplication of services in an area, which may seriously compromise quality and safety of procedures and increase the cost of care. Optimal performance requires a caseload of adequate size to maintain the skills and efficiency of the staff. Cardiac catheterization laboratories should perform a minimum of 500 diagnostic equivalents per year (diagnostic catheterizations are weighted as 1.0 equivalents, therapeutic catheterizations as 2.0). Emergent PCI providers should perform a minimum of 36 PCIs annually; all other therapeutic cath providers should perform a minimum of 300 therapeutic caths annually. For pediatric catheterization and adult congenital cath labs, diagnostic catheterizations are weighted as 2.0 equivalents, therapeutic catheterizations as 3.0, EP studies as 2.0, biopsies performed after heart transplants as 1.0 equivalents, and adult concomitant congenital heart disease procedures performed in these labs are included in the utilization calculations. A minimum of 150 procedures per year is recommended; half of these should be on neonates or infants. There should be a minimum of 200 adult open heart surgery procedures performed annually per open heart surgery unit; improved results appear to appear in hospitals that perform a minimum of 350 cases annually. Pediatric open heart surgery units should perform 100 pediatric heart operations per year, at least 75 of which should be open heart surgery.

A. Status of South Carolina Providers:

1. Cardiac Catheterizations:

The Certificate of Need standards for cardiac catheterization require a minimum of 500 cardiac equivalents per laboratory annually within 3 years of initiation of service. There are 32 facilities approved to provide cardiac catheterization services in fixed laboratories in South Carolina. Please note that in the spreadsheet of cardiac cath lab utilization, the columns showing the 2009 through 2011 total caths are now reported in cardiac equivalents rather than summing the number of diagnostic and therapeutic caths performed. Therefore, the 2009 totals are not comparable to those

reported in the previous Plan, but this modification gives a more accurate accounting of the total cath lab utilization for each facility.

Of the 31 facilities that have been offering cardiac caths for more than three years, 21 exceeded the minimum of 500 equivalents per lab in 2011. Baptist Easley Hospital, Bon Secours St. Francis Xavier, Carolina Pines, Hilton Head Hospital, Loris Community Hospital, Mary Black Memorial, Palmetto Health Baptist, Regional Medical Center–Orangeburg/Calhoun, Springs Memorial and Tuomey Hospital fell below the minimum. Village Hospital was approved for a diagnostic cath lab in November 2010. There are two mobile cath labs approved in the state, at Colleton Medical Center and Chester Regional Medical Center. The number of diagnostic catheterizations performed statewide decreased from 34,536 in 2010 to 33,801 in 2011.

Seventeen hospitals with open heart surgery programs provide therapeutic caths. They should be performing a minimum of 300 therapeutic caths annually within three years of initiation of service. Of the programs that had been operational for three full years, all but Carolinas Hospital System and Hilton Head Regional Medical Center performed the minimum number in 2011. In addition, Baptist Easley Hospital and Georgetown Memorial Hospital have received CONs to perform Emergent PCIs without open heart surgery back-up. Lexington Medical Center received a CON to perform Emergent PCIs without open heart surgery back-up in 2009, but then established comprehensive cath services through the transfer of an open heart surgery suite from Providence Hospital in 2010. The number of therapeutic catheterizations performed statewide increased from 15,684 in 2010 to 15,691 in 2011.

MUSC is the only facility providing pediatric cardiac catheterizations in South Carolina. The standard recommends a minimum of 600 cardiac equivalents per year; MUSC performed 1,177 equivalents in 2011.

2. Open Heart Surgery:

Currently 17 open heart surgery programs have been approved for the general public in South Carolina, in addition to the Veterans Administration (VA) Hospital in Charleston. Lexington Medical Center received a CON on 6/18/10 to establish open heart surgery services through the relocation of one open heart surgery suite from Providence Hospital. They expect to start performing surgeries in 2012. The number of open heart surgeries performed decreased from 4,870 in 2010 to 4,568 in 2011. A total of 34 open heart surgery suites were in operation in 2011. With a capacity of 500 surgeries per suite, the statewide capacity was 17,000 surgeries. The state average utilization rate of 26.9% equated to 133.4 surgeries per suite. Unused capacity remains in all programs in the state.

The Certificate of Need standard is for a facility to perform a minimum of 200 open heart surgeries per year per surgical suite within three years of initiation of service. Only Spartanburg Regional, Providence Hospital, Roper Hospital, and Trident Medical Center averaged at least 200 open heart surgeries per suite in 2011. Grand Strand Regional (193.5) came close to meeting this standard. Studies indicate that hospitals that perform a minimum of 350 total cases annually tend to have better outcomes than those that perform fewer cases. In 2011, only seven of the 16 existing programs performed more than 350 total surgeries.

MUSC is the only facility performing pediatric open heart surgery in South Carolina. National and state standards recommend a minimum of 100 pediatric heart operations per open heart surgical suite. MUSC has consistently exceeded this standard; in 2011, 199 pediatric open heart surgeries were performed there.

The Certificate of Need standards for Cardiac Catheterization and Open Heart Surgery follow.

B. Cardiac Catheterization:

1. Definitions:

"Cardiac Catheterization Procedure" is an invasive procedure where a thin, flexible catheter is inserted into a blood vessel; the physician then manipulates the free end of the catheter into the chambers or vessels of the heart. All activities performed during one clinical session, including angiocardiography, coronary arteriography, pulmonary arteriography, coronary angioplasty and other diagnostic or therapeutic measures and physiologic studies shall be considered one procedure.

"Comprehensive Catheterization Laboratory" means 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.

"Diagnostic Catheterization" refers to a cardiac catheterization during which any or all of the following diagnostic procedures or measures are performed: Blood Pressure; Oxygen Content and Flow Measurements; Angiocardiography, Coronary Arteriography; and Pulmonary Arteriography. The following ICD-9-CM Procedure Codes refer to diagnostic catheterizations:

37.21 Right Heart Cardiac Catheterization
37.22 Left Heart Cardiac Catheterization
37.23 Combined Right and Left Heart Cardiac Catheterization

"Diagnostic Catheterization Laboratory" means a dedicated room in which only diagnostic catheterizations are performed.

"Diagnostic Equivalents" are the measurements of capacity and utilization for cardiac catheterization laboratories. For adult labs, diagnostic catheterizations are weighted as 1.0 equivalents and therapeutic caths are weighted as 2.0 equivalents. For pediatric catheterization and adult congenital cath labs, diagnostic catheterizations are weighted as 2.0 equivalents, therapeutic catheterizations as 3.0, EP studies as 2.0, and biopsies performed after heart transplants as 1.0 equivalents.

"Percutaneous Coronary Intervention (PCI)" refers to a therapeutic procedure to relieve coronary narrowing, such as Percutaneous Transluminal Coronary Angioplasty (PTCA) or Coronary Stent Implantation. These procedures may be performed on an emergent or elective basis. "Emergent or Primary" means that a patient needs immediate PCI because, in the treating physician's best clinical judgment, delay would result in undue harm or risk to the patient. An "Elective" PCI is scheduled in advance and performed on a patient with cardiac function that has been stable in the days prior to the procedure.

"Therapeutic catheterization" refers to a PCI or cardiac catheterization during which, in addition to any diagnostic catheterization procedure, any or all of the following interventional procedures are performed: PTCA; Thrombolytic Agent Infusion; Directional Coronary Atherectomy; Rotational Atherectomy; Extraction Atherectomy; Coronary Stent Implants and Cardiac Valvuloplasty. The following ICD-9-CM Procedure Codes refer to therapeutic catheterizations:

00.66 Percutaneous Transluminal Coronary Angioplasty (PTCA) or Coronary Atherectomy
35.52 Repair of Atrial Septal Defect with Prothesis, Closed Technique
35.96 Percutaneous Valvuloplasty
36.06 Insertion of Coronary Artery Stent(s)
36.07 Insertion of Drug Eluting Coronary Artery Stent(s)
36.09 Other Removal of Coronary Artery Obstruction
37.34 Excision or Destruction of Other Lesion or Tissue of Heart, Other Approach

2. Scope of Services:

The following services should be available in both adult and pediatric catheterization laboratories:

A. Each cardiac catheterization lab should be competent to provide a range of angiographic (angiocardiography, coronary arteriography, pulmonary arteriography), hemodynamic, and physiologic (cardiac output measurement, intracardiac pressure, etc.) studies. These facilities should be available in one laboratory so that the patient need not be moved during a procedure.

B. The lab should have the capability of immediate endocardiac catheter pacemaking in cardiac arrest, a crash cart, and defibrillator.

C. A full range of non-invasive cardiac/circulatory diagnostic support services, such as the following, should be available within the hospital:

1. Nuclear Cardiology
2. Echocardiography
3. Pulmonary Function Testing
4. Exercise Testing
5. Electrocardiography
6. Cardiac Chest X-ray and Cardiac Fluoroscopy
7. Clinical Pathology and Blood Chemistry Analysis
8. Phonocardiography
9. Coronary Care Units (CCUs)
10. Medical Telemetry/Progressive Care

D. Each applicant shall document plans for providing cardiac rehabilitation services to its patients or plans for establishing referral agreements with facilities offering cardiac rehabilitation services.

Cardiac catheterization studies for elective cases should be available at least 40 hours a week. All catheterization laboratories should have the capacity for rapid mobilization of the study team for emergency procedures 24 hours a day, 7 days a week. All facilities offering cardiac catheterization

services should meet full accreditation standards for The Joint Commission (TJC) or similar accrediting body.

Certificate of Need Standards

1. The capacity of a fixed cardiac catheterization laboratory shall be 1,200 diagnostic equivalents per year. Adult diagnostic catheterizations (ICD-9-CM Procedure Codes 37.21, 37.22 and 37.23) shall be weighted as 1.0 equivalents, while therapeutic catheterizations (ICD-9-CM Procedure Codes 00.66, 35.52, 35.96, 36.06, 36.07, 36.09, and 37.34) shall be weighted as 2.0 equivalents. For pediatric and adult congenital cath labs, diagnostic caths shall be weighted as 2.0 equivalents, therapeutic caths shall be weighted as 3.0 equivalents, electrophysiology (EP) studies shall be weighted as 2.0 equivalents, and biopsies performed after heart transplants shall be weighted as 1.0 equivalents. The capacity of mobile cardiac catheterization labs will be calculated based on the number of days of operation per week.

2. The service area for a diagnostic catheterization laboratory is defined as all facilities within 45 minutes one way automobile travel time; for comprehensive cardiac catheterization laboratories the service area is all facilities within 60 minutes one way automobile travel time; a pediatric cardiac program should serve a population encompassing at least 30,000 births per year, or roughly two million people.

Diagnostic and Mobile Catheterization Services

3. New diagnostic cardiac catheterization services, including mobile services, shall be approved only if all existing labs in the service area have performed at a minimum of 500 diagnostic cardiac catheterization procedures per laboratory during the most recent year;

4. An applicant for a fixed diagnostic service must project that the proposed service will perform a minimum of 500 diagnostic equivalent procedures annually within three years of initiation of services, without reducing the utilization of the existing diagnostic catheterization services in the service area below 500 diagnostic cardiac catheterization procedures per laboratory.

5. Expansion of an existing diagnostic cardiac catheterization service shall only be approved if the service has operated at a minimum use rate of 80% of capacity (i.e. 960 equivalents per laboratory) for each of the past two years and can project a minimum of 500 procedures per year on the additional equipment within three years of its implementation.

6. An applicant for a mobile diagnostic catheterization laboratory must be able to project a minimum of 100 diagnostic equivalents annually for each day of the week that the mobile lab is located at the applicant's facility by the end of the third year following initiation of the service, without reducing the utilization of the existing diagnostic catheterization services in the service area below 500 diagnostic cardiac catheterization procedures per laboratory (i.e. an applicant wishing to have a mobile cath lab 2 days per week must project a minimum of

200 equivalents at the applicant's facility by the end of the third year of operation). In addition:

A. The applicant must document that the specific mobile unit utilized by the vendor will perform a combined minimum of 500 diagnostic equivalents per year;

B. The applicant must include vendor documentation of the complication rate of the mobile units operated by the vendor; and

C. If an application for a mobile lab is approved and the applicant subsequently desires to change vendors, the Department must approve such change in order to insure that appropriate minimum utilization can be documented.

Emergent and Elective PCI Without On-Site Cardiac Backup

7. In 2005, the ACCF/AHA/SCAI Writing Committee determined that Emergency PCI (Primary PCI) is reasonable in hospitals without on-site cardiac surgery, provided that appropriate planning for program development has been accomplished. Hospitals with diagnostic laboratories may be approved to perform emergency PCI without an on-site open heart surgery program only if all of the following criteria based on the 2005 ACC/AHA Guideline Update for PCI are met:

A. Therapeutic catheterizations must be limited to Percutaneous Coronary Interventions (PCIs) performed only in emergent circumstances (Primary PCIs). Elective PCI may not be performed at institutions that do not provide on-site cardiac surgery except as provided for in Standard 8 below.

B. The applicant has performed a minimum of 250 diagnostic cardiac cath procedures in the most recent year and can reasonably demonstrate that it will perform a minimum of 500 diagnostic catheterizations annually within three years of the initiation of services.

C. The hospital must acquire an intra-aortic balloon pump (IABP) dedicated solely to this purpose.

D. The chief executive officer of the hospital must sign an affidavit assuring that the criteria listed below are and will continue to be met at all times.

E. An application shall be approved only if it is consistent with the criteria from Smith et al., ACC/AHA/SCAI 2005 Guideline Update for Percutaneous Coronary Intervention: A Report of the American College of Cardiology/American Heart Association Task Force on Practice Guidelines (ACC/AHA/SCAI Writing Committee to Update the 2001 Guidelines for Percutaneous Coronary Intervention) and the 2007 Focused Update of the guidelines. A complete copy of the guidelines can be found at: www.acc.org/clinical/guidelines/ percutaneous/update/index.pdf

1. Criteria for the Performance of Emergency (Primary) PCI

   a. The physicians must be experienced interventionalists who regularly perform elective intervention at a surgical center (75 cases/year). The institution must perform a minimum of 36 primary PCI procedures per year.

   b. The nursing and technical catheterization laboratory staff must be experienced in handling acutely ill patients and comfortable with interventional equipment. They must have acquired experience in dedicated interventional laboratories at a surgical center. They participate in a 24-hour, 365-day call schedule.

   c. The catheterization laboratory itself must be well-equipped, with optimal imaging systems, resuscitative equipment, intra-aortic balloon pump (IABP) support, and must be well-stocked with a broad array of interventional equipment.

   d. The cardiac care unit nurses must be adept in hemodynamic monitoring and IABP management.

   e. The hospital administration must fully support the program and enable the fulfillment of the above institutional requirements.

   f. There must be formalized written protocols in place for immediate (within one hour) and efficient transfer of patients to the nearest cardiac surgical facility that are reviewed/tested on a regular (quarterly) basis.

   g. Primary (emergency) intervention must be performed routinely as the treatment of choice around the clock for a large proportion of patients with acute myocardial infarction (AMI) to ensure streamlined care paths and increased case volumes.

   h. Case selection for the performance of primary (emergency) angioplasty must be rigorous. Criteria for the types of lesions appropriate for primary (emergency) angioplasty and for the selection for transfer for emergent aortocoronary bypass surgery are shown in Section E.2.

   i. There must be an ongoing program of outcomes analysis and formalized periodic case review. Institutions should participate in a three-to-six month period of implementation during which time development of a formalized primary PCI program is instituted that includes establishing standards, training staff, detailed logistic development, and creation of a quality assessment and error management system.

2. Patient Selection Guidelines

   a. Avoid intervention in hemodynamically stable patients with:
      1) Significant (60%) stenosis of an unprotected left main (LM) coronary artery upstream from an acute occlusion in the left coronary system that might be disrupted by the angioplasty catheter.
      2) Extremely long or angulated infarct-related lesions with TIMI grade 3 flow.
      3) Infarct-related lesions with TIMI grade 3 flow in stable patients with 3-vessel disease.
      4) Infarct-related lesions of small or secondary vessels.
      5) Lesions in other than the infarct artery.

   b. Transfer emergent aortocoronary bypass surgery patients after PCI of occluded vessels if high-grade residual left main or multi-vessel coronary disease and clinical or hemodynamic instability are present, preferably with intra-aortic balloon pump support.

8. In 2011, the ACCF/AHA/SCAI Writing Committee determined that elective PCI might be considered in hospitals without on-site cardiac surgery, provided that appropriate planning for program development has been accomplished and rigorous clinical and angiographic criteria are used for proper patient selection. Hospitals with diagnostic laboratories that have been approved to perform primary PCI without on-site open heart surgical backup under the 2005 ACC/AHA Guideline Update for PCI must obtain a Certificate of Need in order to upgrade to designation as providing elective PCI without on-site cardiac surgery backup. The following standards must be met:

   A. The applicant has performed a minimum of 250 diagnostic cardiac cath procedures in the most recent year and can reasonably demonstrate that it will perform a minimum of 500 diagnostic catheterizations annually within three years of the initiation of services.

   B. All existing comprehensive cardiac catheterization facilities in the service area performed a minimum of 300 therapeutic catheterizations in the most recent year.

   C. An applicant must project that the proposed service will perform a minimum of 300 therapeutic catheterization procedures annually within three years of initiation of services, without reducing the cardiac catheterizations performed at existing comprehensive catheterization programs in the service area below the minimum thresholds of 300 therapeutic procedures and 500 diagnostic procedures at each facility.

   D. The physicians must be experienced interventionalists who perform a minimum of 75 elective PCI cases per year and preferably at least 11 PCI procedures for STEMI each year. Ideally, operators with an annual procedure volume of fewer than 75

procedures per year should only work at institutions with an activity level of more than 600 procedures per year. Operators who perform fewer than 75 procedures per year should develop a defined mentoring relationship with a highly experienced operator who has an annual procedural volume of at least 150 procedures.

E. For cath labs in facilities without on-site surgical backup, there must be formalized written protocols in place for immediate (within one hour by appropriate transportation) and efficient transfer of patients to the nearest cardiac surgical facility that are reviewed and tested on a regular basis.

1. Applicants must provide documentation of an agreement with an ambulance or transport service capable of advanced life support and intra aortic balloon pump and that guarantees a thirty (30) minute or less response time from contact.

F. The catheterization laboratory must be well-equipped, with optimal imaging systems, resuscitative equipment, intra-aortic balloon pump (IABP) support, and must be well-stocked with a broad array of interventional equipment.

G. The nursing and technical catheterization laboratory staff must be experienced in handling acutely ill patients and comfortable with interventional equipment. They must have acquired experience in dedicated interventional laboratories at a surgical center. They participate in a 24-hour, 365-day call schedule.

H. The cardiac care unit nurses must be adept in hemodynamic monitoring and IABP management.

I. Applicants must offer primary percutaneous coronary intervention (PCI) services and procedures twenty-four (24) hours a day, seven (7) days a week, three hundred and sixty five (365) days a year.

J. Applicants must provide documentation to show that guidelines for determining patients appropriate for PCI procedures in a setting without on-site open heart backup consistent with standards of the American College of Cardiology have been developed and will be maintained.

K. Applicants must agree to participate in the South Carolina STEMI Alert/Mission Lifeline Program.

L. Every therapeutic cath program should operate a quality-improvement program that routinely:

1. reviews quality and outcomes of the entire program;
2. reviews results of individual operators;
3. includes risk adjustment;

4. provides peer review of difficult or complicated cases; and
5. performs random case reviews.

M. Every PCI program should participate in a regional or national PCI registry for the purpose of benchmarking its outcomes against current national norms.

N. An applicant for provision of elective PCI without on-site surgical backup agrees, as a condition for issuance of its Certificate of Need for such service, to discontinue therapeutic cardiac catheterization services and surrender the Certificate of Need for that service if they have failed to achieve 200 therapeutic cardiac catheterizations per year by the expiration of the first three years of operation of such services.

Comprehensive Catheterization Services

9. Comprehensive cardiac catheterization laboratories, which perform diagnostic catheterizations, PCI and other therapeutic procedures, shall only be located in hospitals that provide open heart surgery. New comprehensive cardiac catheterization services shall be approved only if the following conditions are met:

A. All existing comprehensive cardiac catheterization facilities in the service area performed a minimum of 300 therapeutic catheterizations in the most recent year; and

B. An applicant must project that the proposed service will perform a minimum of 300 therapeutic catheterization procedures annually within three years of initiation of services, without reducing the therapeutic cardiac catheterizations performed at existing comprehensive catheterization programs in the service area below 300 procedures at each facility.

10. To prevent the unnecessary duplication of comprehensive cardiac catheterization services, expansion of an existing comprehensive cardiac catheterization service shall be approved only if the service has operated at a minimum use rate of 80% of capacity (960 equivalents per lab) for each of the past two years and can project a minimum of 600 equivalents per year on the additional equipment within three years of its implementation. The 600 equivalents may consist of a combination of diagnostic and therapeutic procedures.

Pediatric Catheterization Services

11. New pediatric cardiac catheterization services shall be approved only if the following conditions are met:

A. All existing facilities have performed at a combined use rate of 80% of capacity for the most recent year; and

B. An applicant must project that the proposed service will perform a minimum of 500 diagnostic equivalent procedures annually within three years of initiation of services.

12. Expansion of an existing pediatric cardiac catheterization service shall only be approved if the service has operated at a minimum use rate of 80% of capacity (960 equivalents) for each of the past two years and can project a minimum of 500 equivalents per year on the additional equipment within three years of its implementation.

13. Documentation of need for the proposed service:

A. The applicant shall provide epidemiologic evidence of the incidence and prevalence of conditions for which diagnostic, comprehensive or pediatric catheterization is appropriate within the proposed service area, to include the number of potential candidates for these procedures;

B. The applicant shall project the utilization of the service and the effect of its projected utilization on other cardiac catheterization services within its service area, to include:

1. The number of patients of the applicant hospital who were referred to other cardiac catheterization services in the preceding three years and the number of those patients who could have been served by the proposed service;

2. The number of additional patients, if any, who will be generated through changes in referral patterns, recruitment of specific physicians, or other changes in circumstances. The applicant shall document the services, if any, from which these patients will be drawn; and

3. Existing and projected patient origin information and referral patterns for each cardiac catheterization service serving patients from the area proposed to be served shall be provided.

14. Both fixed and mobile diagnostic cardiac catheterization laboratories must provide a written agreement with at least one hospital providing open heart surgery, which states specified arrangements for referral and transfer of patients, to include:

A. Criteria for referral of patients on both a routine and an emergency back-up basis;

B. Regular communications between cardiologists performing catheterizations and surgeons to whom patients are referred;

C. Acceptability of diagnostic results from the cardiac catheterization service to the receiving surgical service to the greatest extent possible to prevent duplication of services; and

D. Development of linkages with the receiving institution's peer review mechanism.

15. The application shall include standards adopted or to be adopted by the service, consistent with current medical practice as published by clinical professional organizations, such as the American College of Cardiology or the American Heart Association, defining high-risk procedures and patients who, because of their conditions, are at high risk. For diagnostic catheterization laboratories, this description of patient selection criteria shall include referral arrangements for high-risk patients. For comprehensive laboratories, these high-risk procedures should only be performed with open heart surgery back-up. The cardiac team must be promptly available and capable of successfully operating on unstable acute ischemic patients in an emergency setting.

16. Cardiac catheterization services should be staffed by a minimum of two physicians licensed by the State of South Carolina who possess the qualifications specified by the governing body of the facility. Protocols should be established that govern initial and continuing granting of clinical staff privileges to physicians to perform diagnostic, therapeutic and/or pediatric catheterizations. Applicants must provide documentation that one (1) or more interventional cardiologist(s) will be required to respond to a call in a timely manner consistent with the hospital Medical Staff bylaws and clinical indications. In addition, standards should be established to assure that each physician using the service would be involved in adequate numbers of applicable types of cardiac catheterization procedures to maintain proficiency.

17. Applicants must agree to report annual the data on number of PCI procedures, type, and outcomes to the National Cardiovascular Data Registry Cat/PCI registry.

    A. Applicants must agree to provide accurate and timely data, including outcomes analysis and formal periodic external and internal case review by appropriate entities.

    B. The Department encourages all applicants and providers to share their outcomes data with appropriate registries and research studies designed to improve the quality of cardiac care.

Quality

No ideal rate has been established for PTCA [PCI] and the rates vary widely by area and population group. The IQI considers PCI to be a potentially over-used procedure and a more average rate equates to better quality care. However, high PCI utilization has not been shown to necessarily be associated with higher rates of inappropriate utilization. Source: http://www.qualityindicators.ahrq.gov/downloads/iqi/iqi_guide_v31.pdf

There are several national benchmarks for the treatment of heart attacks, such as administration of aspirin and time from door-to-treatment. Whynotthebest.org was established by The Commonwealth Fund to track the performance of hospitals in various measures of health care quality. According to

their website, every hospital that performs therapeutic cardiac caths in the state scored at least 96% on their composite ratings for heart attack care in 2010. Source: http://whynotthebest.org

Relative Importance of Project Review Criteria

The following project review criteria are considered to be the most important in evaluating certificate of need applications for this service:

a. Compliance with the Need Outlined in this Section of the Plan;
b. Community Need Documentation;
c. Distribution (Accessibility);
d. Projected Revenues;
e. Projected Expenses;
f. Ability of the Applicant to Complete the Project;
g. Financial Feasibility;
h. Staff Resources;
i. Adverse Effects on Other Facilities; and
j. Record of the Applicant.

The Department finds that:

(1) Diagnostic catheterization services are available within forty-five (45) minutes and therapeutic catheterization services within ninety (90) minutes travel time for the majority of South Carolina residents;

(2) Significant cardiac catheterization capacity exists in most areas of the State; and

(3) The preponderance of the literature on the subject indicates that a minimum number of procedures are recommended per year in order to develop and maintain physician and staff competency in performing these procedures.

The benefits of improved accessibility will be equally weighed with the adverse effects of duplication in evaluating Certificate of Need applications for this service.

CARDIAC CATHETERIZATION PROCEDURES

REGION/FACILITY	# CATH LABS	2009 ADULT DIAG	2009 ADULT THERP	2009 ADULT TOTAL EQUIV	2009 PED DIAG	2009 PED THERP	2009 PED OTHER	2009 PED TOTAL	2010 ADULT DIAG	2010 ADULT THERP	2010 ADULT TOTAL EQUIV	2010 PED DIAG	2010 PED THERP	2010 PED OTHER	2010 PED TOTAL	2011 ADULT DIAG	2011 ADULT THERP	2011 ADULT TOTAL EQUIV	2011 PED DIAG	2011 PED THERP	2011 PED OTHER	2011 PED TOTAL
I																						
ANMED HEALTH MEDICAL CENTER 1	4	1,807	1,301	4,509					1,911	1,230	4,371											
GREENVILLE MEMORIAL HOSPITAL	7	2,855	2,302	7,462					2,628	2,061	6,750					2,086	1,152	4,390				
SAINT FRANCIS - DOWNTOWN 2	4	2,077	1,401	4,879					2,275	1,418	5,111					3,047	2,617	8,281				
OCONEE MEMORIAL HOSPITAL	1	776		776					557		557					1,951	1,174	4,309				
BAPTIST MED CTR-EASLEY 3	1	400		400					368		368					675		675				
MARY BLACK MEMORIAL	1	150		150					105		105					292		292				
SPARTANBURG REGIONAL MEDICAL CTR	4	2,259	964	4,227					2,500	928	4,356					105		105				
VILLAGE HOSPITAL 4	1															2,067	850	3,767				
TOTAL REGION I	22	10,467	5,968	22,403					10,455	5,637	21,729					10,233	5,793	21,819				
II																						
CHESTER REGIONAL MEDICAL CENTER	MOBILE	95		95																		
SELF REGIONAL HEALTHCARE	2	1,137	386	1,828					110		110					27		27				
KERSHAWHEALTH	1	507		507					1,035	406	1,847					1,038	407	1,852				
SPRINGS MEMORIAL HOSPITAL	1	567		567					461		461					540		540				
LEXINGTON MEDICAL CENTER 5	2	1,242	16	1,274					489		489					413		413				
PALMETTO HEALTH BAPTIST	1	293		293					1,293	54	1,401					1,419	157	1,733				
PALMETTO HEALTH RICHLAND	4	3,338	1,245	5,828					320		320					277		277				
PROVIDENCE HOSPITAL	6	3,474	2,700	8,874					3,169	1,134	5,437					2,675	1,155	4,985				
PIEDMONT MEDICAL CENTER	3	1,422	759	2,940					3,332	2,742	8,616					3,213	2,543	8,299				
SOUTH CAROLINA HEART CENTER 6	2	1,750		1,750					1,328	762	2,852					1,480	715	2,910				
TOTAL REGION II	23	13,825	5,116	24,057					NO 2010 DATA REPORTED							NO 2011 DATA REPORTED						
III									11,538	5,099	21,733					11,082	4,977	21,036				
CAROLINA PINES REGIONAL MEDICAL CTR	1	62		62																		
CAROLINAS HOSPITAL SYSTEM	2	2,406	547	3,500					NO 2010 DATA REPORTED													
MCLEOD REGIONAL MEDICAL CENTER	5	1,504	595	2,604					1,228	240	1,708					30		30				
GEORGETOWN MEMORIAL HOSPITAL	1	611	63	737					1,540	619	2,878					936	257	1,510				
CONWAY HOSPITAL	1	585		585					695	77	850					1,433	573	2,579				
GRAND STRAND REGIONAL MED CTR 7	3	1,057	667	2,391					621		621					747	73	893				
LORIS COMMUNITY HOSPITAL	1	247		247					1,238	829	2,896					584		584				
TUOMEY	1	281		281					328		328					1,158	818	2,794				
TOTAL REGION III	15	6,753	1,872	10,457					204		204					231		231				
IV									5,955	1,765	9,485					185		185				
AIKEN REGIONAL MEDICAL CENTER	1	519	243	1,005												5,364	1,721	8,806				
BEAUFORT MEMORIAL HOSPITAL	1	482		482					448	279	1,006											
HILTON HEAD HOSPITAL	2	476	240	958					494		494					945	378	1,701				
COLLETON MEDICAL CENTER	MOBILE	0		0					454	231	916					681		681				
BON SECOURS ST. FRANCIS XAVIER	1	0		0					0		0					408	210	825				
MUSC MEDICAL CENTER 8	7	1,517	1,184	3,885	252	241	130	1,357	2		2							0				
ROPER HOSPITAL	3	1,843	910	3,763					1,694	1,227	4,148	266	252	133	1,421	7		7				
TRIDENT MEDICAL CENTER	2	1,429	370	2,169					1,804	582	3,868					1,734	1,262	4,258	260	219		1,177
REG MED CTR ORANGEBURG-CALHOUN	1	400		400					1,321	464	2,249					1,776	929	3,634				
RALPH HENRY VA MED CTR CHARLESTON	(1)								271		271					1,326	421	2,168				
TOTAL REGION IV	19	6,768	2,947	12,662	252	241	130	1,357	6,589	3,183	12,954	266	252	133	1,421	247		247				
STATEWIDE TOTALS	79	37,813	15,903	69,619	252	241	130	1,357	34,536	15,684	65,901	266	252	133	1,421	7,122	3,200	13,522	260	219		1,177
																33,801	15,691	65,183	260	219		1,177

1 CON ISSUED 5/14/09 FOR A 4TH CATH LAB, SC-09-24.
2 CON ISSUED 7/8/09 FOR A 4TH CATH LAB, SC-09-34; OPERATIONAL 12/30/09.
3 CON ISSUED 6/2/06 TO ALLOW EMERGENT PCI.
4 CON ISSUED 11/22/10 FOR A DIAGNOSTIC LAB, SC-10-34.
5 CON ISSUED 5/12/09 TO ADD 2ND LAB & ALLOW EMERGENT PCI, SC-09-23; CON ISSUED 6/18/10 TO ESTABLISH COMPREHENSIVE CATH SERVICES THROUGH TRANSFER OF AN OPEN HEART SUITE FROM PROVIDENCE HOSPITAL, SC-10-19.
6 DOCTORS OFFICE; PURCHASED BY PROVIDENCE HOSPITAL.
7 CON ISSUED 3/14/07 FOR A 3RD CATH LAB, SC-07-10.

C. Open Heart Surgery

1. Definitions

"Capacity" means the number of open heart surgery procedures that can be accommodated in an open heart surgery unit in one year.

"Open Heart Surgery" refers to an operation performed on the heart or intrathoracic great vessels. It is identified by the following ICD-9-CM procedure codes: 35.10-35.14, 35.20-35.28, 35.31-35.35, 35.39, 35.41-35.42, 35.50-35.51, 35.53-35.54, 35.60-35.63, 35.70-35.73, 35.81-35.84, 35.91-35.95, 35.98-35.99, 36.03, 36.09, 36.10-36.16, 36.19, 36.2, 36.91, 36.99, 37.10-37.11, 37.32-37.33.

An "Open Heart Surgery Unit" is an operating room or suite of rooms equipped and staffed to perform open heart surgery procedures; such designation does not preclude its use for other related surgeries, such as vascular surgical procedures. A hospital with an open heart surgery program may have one or more open heart surgery units.

"Open Heart Surgical Procedure" means an operation performed on the heart or intrathoracic great vessels within an open heart surgical unit. All activities performed during one clinical session shall be considered one procedure.

"Open Heart Surgical Program" means the combination of staff, equipment, physical space and support services which is used to perform open heart surgery. Adult open heart surgical programs should have the capacity to perform a full range of procedures, including:

1. repair/replacement of heart valves
2. repair of congenital defects
3. cardiac revascularization
4. repair/reconstruction of intrathoracic vessels
5. treatment of cardiac traumas.

In addition, open heart programs must have the ability to implement and apply circulatory assist devices such as intra-aortic balloon and prolonged cardiopulmonary partial bypass.

2. Scope of Services

A range of non-invasive cardiac and circulatory diagnostic services should be available within the hospital, including the following:

a. services for hematology and coagulation disorders;
b. electrocardiography, including exercise stress testing;
c. diagnostic radiology;
d. clinical pathology services which include blood chemistry and blood gas analysis;

e. nuclear medicine services which include nuclear cardiology;
f. echocardiography;
g. pulmonary function testing;
h. microbiology studies;
i. Coronary Care Units (CCU's);
j. medical telemetry/progressive care; and
k. perfusion.

Backup physician personnel in the following specialties should be available in emergency situations:

a. Cardiology;
b. Anesthesiology;
c. Pathology;
d. Thoracic Surgery; and
e. Radiology.

Each applicant shall document plans for providing cardiac rehabilitation services to its patients or plans for establishing referral agreements with facilities offering cardiac rehabilitation services.

Adult open heart surgery services should be available within 60 minutes one-way automobile travel for 90% of the population. A pediatric cardiac surgical service should provide services for a minimum service area population with 30,000 live births, or roughly 2 million people. Open heart surgery for elective procedures should be available at least 40 hours per week, and elective open heart surgery should be accessible with a waiting time of no more than two weeks. All facilities providing open heart surgery must conform with local, state, and federal regulatory requirements and should meet the full accreditation standards for The Joint Commission (TJC), if the facility is TJC accredited.

Certificate of Need Standards

1. 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.

2. Comprehensive cardiac catheterization laboratories shall only be located in hospitals that provide open heart surgery.

3. The capacity of an open heart surgery program is 500 open heart procedures per year for the initial open heart surgery unit and each additional dedicated open heart surgery unit (i.e., each operating room equipped and staffed to perform open heart surgery has a maximum capacity of 500 procedures annually).

4. There should be a minimum of 200 adult open heart surgery procedures performed annually per open heart surgery unit within three years after initiation in any institution in which open heart surgery is performed for adults. In institutions performing pediatric open heart surgery

there should be a minimum of 100 pediatric heart operations per open heart surgery unit; at least 75 should be open heart surgery.

5. New open heart surgery services shall be approved only if the following conditions are met:

A. Each existing unit in the service area (defined as all facilities within 60 minutes one way automobile travel, excluding any facilities located in either North Carolina or Georgia) is performing an annual minimum of 350 open heart surgery procedures per open heart surgery unit for adult services (70 percent of functional capacity). The standard for pediatric open heart cases in pediatric services is 130 procedures per unit. An exception to this requirement may be authorized should an applicant meet both of the following criteria:

1. There are no open heart surgery programs located in the same county as the applicant; and

2. The proposed facility currently offers cardiac catheterization services and provided a minimum of 1,200 diagnostic equivalents in the previous year of operation.

B. An applicant must project that the proposed service will perform a minimum of 200 adult open heart surgery procedures annually per open heart surgery unit within three years after initiation (the standard for pediatric open heart surgery shall be 100 procedures annually per open heart surgery unit within three years after initiation):

1. The applicant shall provide epidemiological evidence of the incidence and prevalence of conditions for which open heart surgery is appropriate within the proposed service area, to include the number of potential candidates for these procedures;

2. The applicant shall provide an explanation of how the applicant projects the utilization of the service and the effect of its projected utilization on other open heart surgery services, including:

a. The number of patients of the applicant hospital who were referred to other open heart surgery services in the preceding three years and the number of these patients who could have been served by the proposed service;

b. The number of additional patients, if any, who will be generated through changes in referral patterns, recruitment of specific physicians, or other changes in circumstances. The applicant shall document the services, if any, from which these patients will be drawn; and

c. The existing and projected patient origin information and referral patterns for each open heart surgery service serving patients from the area proposed to be served shall be provided.

6. No new open heart surgery programs shall be approved if the new program will cause the annual caseload of other programs within the proposed service area to drop below 350 adult procedures or 130 pediatric procedures per open heart surgery unit.

7. Expansion of an existing open heart surgery service shall only be approved if the service has operated at a minimum use rate of 70 percent of capacity for each of the past two years and can project a minimum of 200 procedures per year in the new open heart surgery unit. The applicant shall document the other service providers, if any, from which these additional patients will be drawn.

8. The application shall include standards adopted or to be adopted by the service, consistent with current medical practice as published by clinical professional organizations, such as the American College of Cardiology or the American Heart Association, defining high-risk procedures and patients who, because of their conditions, are at high risk and shall state whether high-risk cases are or will be performed or high-risk patients will be served.

9. Open heart surgery services should be staffed by a minimum of two physicians licensed by the State of South Carolina who possess the qualifications specified by the governing body of the facility. Protocols should be established that govern initial and continuing granting of clinical staff privileges to physicians to perform open heart surgery and therapeutic cardiac catheterizations. In addition, standards should be established to assure that each physician using the service will be involved in adequate numbers of applicable types of open heart surgery and therapeutic cardiac catheterizations to maintain proficiency.

10. The open heart surgery service will have the capability for emergency coronary artery surgery, including:

A. Sufficient personnel and facilities available to conduct the coronary artery surgery on an immediate, emergency basis, 24 hours a day, 7 days a week;

B. Location of the cardiac catheterization laboratory(ies) in which therapeutic catheterizations will be performed near the open heart surgery operating rooms; and

C. A predetermined protocol adopted by the cardiac catheterization service governing the provision of PTCA and other therapeutic or high-risk cardiac catheterization procedures or the catheterization of patients at high risk and defining the plans for the patients' emergency care. These high-risk procedures should only be performed with open heart surgery backup. The cardiac team must be promptly available and capable of successfully operating on unstable acute ischemic patients in an emergency setting.

11. The Department encourages all applicants and providers to share their outcomes data with appropriate registries and research studies designed to improve the quality of cardiac care.

Quality

Volume is a proxy measure for quality. Higher volumes have been associated with better outcomes although some low-volume hospitals have very good outcomes. There is a potential for variation in CABG rates between area populations.

There are several national benchmarks for the treatment of heart attacks, such as administration of aspirin and time from door-to-treatment. Whynotthebest.org was established by The Commonwealth Fund to track the performance of hospitals in various measures of health care quality. According to their website, every hospital that performs open heart surgery in the state scored at least 96% on their composite ratings for heart attack care in 2010. Source: http://whynotthebest.org

Relative Importance of Project Review Criteria

The following project review criteria are considered to be the most important in evaluating Certificate of Need applications for this service:

a. Compliance with the Need Outlined in this Section of the Plan;
b. Community Need Documentation;
c. Distribution (Accessibility);
d. Projected Revenues;
e. Projected Expenses;
f. Ability of the Applicant to Complete the Project;
g. Financial Feasibility;
h. Cost Containment;
i. Staff Resources; and
j. Adverse Effects on Other Facilities.

The Department makes the following findings:

1. Open heart surgery services are available within sixty (60) minutes travel time for the majority of residents of South Carolina;

2. Based upon the standards cited above, most of the open heart surgery providers are currently utilizing less than the functional capability (i.e. 70% of maximum capacity) of their existing surgical suites;

3. The preponderance of the literature on the subject indicates that a minimum number of procedures is recommended per year in order to develop and maintain physician and staff competency in performing these procedures; and

4. Increasing geographic access may create lower volumes in existing programs causing a potential reduction in quality and efficiency, exacerbate existing problems regarding the availability of nursing staff and other personnel, and not necessarily reduce waiting time since other factors (such as the referring physician's preference) would still need to be addressed.

5. Research has shown a positive relationship between the volume of open heart surgeries performed annually at a facility and patient outcomes. Thus, the Department establishes minimum standards that must be met by a hospital in order to provide open heart surgery. Specifically, a hospital is required to project a minimum of 200 open heart surgeries annually within three years of initiation of services. This number is considered to be the minimum caseload required to operate a program that maintains the skill and efficiency of hospital staff and reflects an efficient use of an expensive resource. It is in the public's interest that facilities achieve their projected volumes.

6. The State Health Planning Committee recognizes the important correlation between volume and proficiency. The Committee further recognizes that the number of open heart surgery cases is decreasing and that maintaining volume in programs is very important to the provision of quality care to the community.

The benefits of improved accessibility will not outweigh the adverse effects of duplication in evaluating Certificate of Need applications for this service.

REGION/FACILITY	# OPEN HEART UNITS	FY09 ADULTS	FY09 PEDS	FY10 ADULTS	FY10 PEDS	FY11 ADULTS	FY11 PEDS
I							
ANMED HEALTH MEDICAL CENTER	2	216		194		170	
GREENVILLE MEMORIAL MEDICAL CENTER	4	596		503		451	
ST FRANCIS - DOWNTOWN	2	392		381		353	
SPARTANBURG REGIONAL MEDICAL CENTER	2	400		450		463	
TOTAL REGION I	10	1,604		1,528		1,437	
II							
SELF REGIONAL HEALTHCARE	2	106		95		99	
LEXINGTON MEDICAL CENTER *1*	1			—		—	
PALMETTO HEALTH RICHLAND	2	438		384		356	
PROVIDENCE HOSPITAL *1*	3	692		669		637	
PIEDMONT MEDICAL CENTER	2	155		127		138	
TOTAL REGION II	10	1,391		1,275		1,230	
III							
CAROLINAS HOSPITAL SYSTEM	2	177		214		146	
MCLEOD REGIONAL MEDICAL CENTER	3	327		333		221	
GRAND STRAND REGIONAL MEDICAL CENTER	2	361		389		387	
TOTAL REGION III	7	865		936		754	
IV							
AIKEN REGIONAL MEDICAL CENTER	1	62		47		39	
HILTON HEAD HOSPITAL	1	67		64		76	
MUSC MEDICAL CENTER	3	378	209	361	210	314	199
ROPER HOSPITAL	2	462		470		485	
TRIDENT REGIONAL MEDICAL CENTER	1	224		189		233	
VA HOSPITAL (CHARLESTON)	1						
TOTAL REGION IV	9	1,193	209	1,131	210	1,147	199
STATEWIDE TOTALS	35	5,053	209	4,870	210	4,568	199

1 LEXINGTON SERVICE ESTABLISHED THROUGH THE TRANSFER OF AN OPEN HEART SUITE FROM PROVIDENCE 6/18/10, SC-10-19.

EXHIBIT D

2006 WL 2899943 (S.C.Admin.Law.Judge.Div.)

Administrative Law Court
State of South Carolina

***1 LEXINGTON**
COUNTY HEALTH SERVICES DISTRICT, INC., D/B/A
LEXINGTON
MEDICAL CENTER PETITIONERS

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SISTERS OF CHARITY
PROVIDENCE
HOSPITAL; AND PALMETTO HEALTH ALLIANCE, PALMETTO HEALTH RICHLAND RESPONDENTS

Docket Number 04-ALJ-07-0365-CC

September 15, 2006

APPEARANCES:

David B. Summer, Jr., Esquire

Faye A. Flowers, Esquire
For Petitioner Lexington Medical Center

Nancy S. Layman, Esquire

Ashley C. Biggers, Esquire
For Respondent South Carolina Department of Health and Environmental Control

James G. Long, III, Esquire

Philip Wesley Jackson, II, Esquire
For Respondent Providence Hospital

M. Elizabeth Crum, Esquire

Ariail B. Kirk, Esquire

Pamela A. Baker, Esquire
For Respondent Palmetto Health Richland

FINAL ORDER AND DECISION

STATEMENT OF THE CASE

The above-captioned matter comes before this Court upon the request of Petitioner Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC"), for a contested case hearing to challenge the decision of Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") to deny its application for a Certificate of Need (CON) for the development of an open-heart surgery program and therapeutic cardiac catheterization program at its hospital in West Columbia, South Carolina. The Department denied LMC's CON application based upon its finding that the implementation of LMC's proposed cardiac program would result in an unnecessary duplication of such services in the Midlands and would have an undue adverse impact upon existing providers of cardiac services in the area. Two of those existing providers, Respondents Sisters of Charity Providence Hospital ("Providence") and Palmetto Health Alliance, Palmetto Health Richland ("Palmetto"), intervened in this matter in support of the Department's decision to deny LMC's CON application.

Prior to a hearing on the merits of this matter, the parties conducted extensive discovery, generating some 30,000 pages of documents and deposing over 40 individuals, and this Court heard a number of motions on discovery issues and other preliminary matters. After timely notice to the parties, a contested case hearing on the merits of this case was held from February 13, 2006, through March 10, 2006, for a total of sixteen days of trial. During the hearing, all four parties presented witnesses and offered exhibits in support of their respective positions. A total of twenty-two witnesses testified at the hearing, and the Court admitted seventy-seven exhibits into evidence, in addition to receiving two proffers of evidence. The following witnesses were designated as experts in the following areas of specialization: Dr. James Morris and Dr. Reid Tribble in the area of Cardiovascular and Open-Heart Surgery; Dr. Edward Leppard in the area of Cardiovascular Surgery; Dr. Leon Khoury, Dr. Stan Juk, Dr. Barry Feldman, and Dr. Myron Bell in the field of Cardiology; Dr. Richard Boyer in the area of Emergency Medicine; Richard Baehr and David Levitt in the field of Healthcare Planning and Finance; Martin Brown in the area of Healthcare Finance; and Joel Grice in the field of Healthcare Planning.

*2 Having reviewed all of the documentary and testimonial evidence presented at the hearing, having considered the arguments of the parties made at the hearing and in their post-trial filings, and having followed the applicable law, I find that DHEC properly denied LMC's CON application for an open-heart surgery program at its West Columbia hospital because the implementation of the proposed program would conflict with the policies regarding the establishment of such programs set forth in the 2003 State Health Plan, would constitute an unnecessary duplication of cardiac services in the Midlands, and would have a materially adverse impact upon existing open-heart surgery providers in the market.

FINDINGS OF FACT

Having carefully considered all testimony, exhibits, and arguments presented at the hearing of this matter, and taking into account the credibility and accuracy of the evidence, I make the following Findings of Fact by a preponderance of the evidence:

I.The Parties

1. Petitioner LMC is a not-for-profit, governmental incorporated health services district that operates a vertically integrated health care system primarily serving the citizens of Lexington County, South Carolina. This system consists of a 346-bed acute care hospital located in West Columbia, South Carolina, a 388-bed nursing home and Alzheimer center, 6 community medical centers providing urgent care services throughout Lexington County, and a network of 36 physician practices employingapproximately 115 primary care and specialty physicians. In its CON application, LMC proposes to provide open-heart surgery and therapeutic cardiac catheterization ser-

vices at its main hospital campus in West Columbia, which is located near the intersection of Interstate 26 and Highway 378.

2. Respondent South Carolina Department of Health and Environmental Control is a state agency charged with, among other things, implementing South Carolina's Certificate of Need regulatory program, which includes licensing standards for the provision of open-heart surgery services and certain other cardiac care services.

3. Respondent Providence Hospital is a private charitable hospital that operates two hospital facilities in Columbia, including its main hospital and heart institute located on Forest Drive in downtown Columbia. Providence has provided open-heart surgery services since 1974 and is the second oldest open-heart surgery provider in South Carolina.

4. Respondent Palmetto Health Richland is a non-profit 579-bed general acute care hospital located in downtown Columbia near the intersection of Sunset Drive and South Carolina Route 277. Palmetto is the major teaching hospital in the Midlands and operates the area's only Level 1 trauma center. Palmetto has provided open-heart surgery services for twenty-five years and has recently opened a "heart hospital" specifically dedicated to providing cardiac services.

II.Regulatory Background

A. Generally

*3 5. This matter arises under South Carolina's comprehensive Certificate of Need (CON) regulatory program for health care facilities and services, which consists of the State Certification of Need and Health Facility Licensure Act found at S.C.Code Ann. §§ 44-7-110 to 44-7-370 (2002 & Supp. 2005), the accompanying CON regulations found at 24A S.C. Code Ann. Regs. 61-15 (Supp. 2005), and a State Health Plan which is revised at least biennially. The purpose of this regulatory scheme is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." See S.C. Code Ann. § 44-7-120 (2002).

6. The primary vehicle by which this regulatory program is implemented and its stated goals achieved is the requirement that a health care facility apply for, and receive, a CON from DHEC prior to undertaking certain major projects or providing certain new services. SeeS.C. Code Ann. §§ 44-7-120, 44-7-160 (2002). In determining whether to grant or deny an application for a CON, the Department evaluates the proposed project under the review criteria found in the CON regulations and under the policies and standards set out in the State Health Plan. SeeS.C. Code Ann. § 44-7-210(C) (2002). The project review criteria set forth in Regulation 61-15 include thirty-three separate criteria that fall into five general categories: (1) criteria related to the need for the proposed project, (2) criteria related to the economic considerations of the project, (3) criteria related to the project's impact on the resources of the health care system, (4) criteria related to the suitability of the site of the project, and (5) criteria related to certain special considerations, such as the project's ability to serve medically underserved groups. See 24A S.C. Code Ann. Regs. 61-15, §§ 801, 802. As required by the CON Act, the State Health Plan contains the following statistics, standards, and findings with regard to the various facilities and services regulated by the CON Act:

(1) an inventory of existing health care facilities, beds, specified health services, and equipment;
(2) projections of need for additional health care facilities, beds, health services, and equipment;
(3) standards for distribution of health care facilities, beds, specified health services, and equipment includ-

ing scope of services to be provided, utilization, and occupancy rates, travel time, regionalization, other factors relating to proper placement of services, and proper planning of health care facilities; and

(4) a general statement as to the project review criteria considered most important in evaluating certificate of need applications for each type of facility, service, and equipment, including a finding as to whether the benefits of improved accessibility to each such type of facility, service, and equipment may outweigh the adverse affects caused by the duplication of any existing facility, service, or equipment.

*4 S.C. Code Ann. § 44-7-180(B) (2002).

7. The 2003 State Health Plan was in effect at the time LMC filed its application for a CON to establish open-heart surgical services and therapeutic cardiac catheterization services and, therefore, the standards, findings, and policies set forth in the 2003 Plan are applicable to the review of LMC's CON application. See 24A S.C. Code Ann. Regs. 61-15, § 504. With regard to cardiovascular services, the 2003 State Health Plan sets forth separate definitions, standards, and review criteria for CONs for open-heart surgery and for cardiac catheterizations.

B. Standards and Definitions

8. Under the Plan, open-heart surgery is defined as "an operation performed on the heart or intrathoracic great vessels." See DHEC Ex. #2, at II-46. The most common open-heart surgery is coronary artery bypass grafting, or CABG, which is a highly invasive operation that entails harvesting a blood vessel from another area of the body and using it to bypass a blocked section of the coronary artery. These procedures are often done with the temporary use of a heart-lung bypass machine, although surgeons are increasingly performing CABGs while the patient's heart is still beating. Other open-heart surgeries include operations to repair congenital heart defects and surgeries to repair defects in the heart valves.

9. The Plan sets the capacity of an open-heart surgery program at 500 open-heart procedures per year for each open-heart operating room, and defines the service area for open-heart surgery services as the area within a 60-minute one-way automobile drive of the facility. See DHEC Ex. #2, at II-48. The Plan further emphasizes that an open-heart surgery program should perform a minimum of 200 open-heart surgeries per unit each year to maintain its proficiency, and that improved results in the quality of care are found when a program performs at least 350 open-heart surgeries per unit annually. See DHEC Ex. #2, at II-35, II-36.

10. A cardiac catheterization is an invasive medical procedure performed within a cardiac catheterization laboratory, also known as a "cath lab," during which a thin, flexible catheter is inserted into a blood vessel as a diagnostic or therapeutic tool for heart and circulatory conditions. See DHEC Ex. #2, at II-37. Diagnostic catheterizations involve the use of a catheter to inject dye in the blood vessel to determine the amount of blockage in an artery; the most common therapeutic catheterizations, also known as angioplastics, involve the use of an inflatable balloon to unblock a clogged artery, often with the insertion of a stent into the artery to keep the artery open. That is, as their names imply, diagnostic catheterizationssimply diagnose the extent of blockage in an artery, while therapeutic catheterizations actually treat the blockage itself.

11. The 2003 State Health Plan sets out different standards for CON approval of diagnostic cath labs and "comprehensive" cath labs that perform both diagnostic and therapeutic catheterizations. See DHEC Ex. #2, at II-38 to II-41. For example, the service area for a diagnostic cath lab is the area within a 45-minute one-way automobile drive of the lab, while the service area for a comprehensive cath lab reaches to a 60-minute one-way drive from the lab. Further, given the risks associated with therapeutic cardiac catheterization, comprehensive cath labs may only be located in hospitals that provide open-heart surgery services, whereas diagnostic cath labs may be located in facilities that do not offer open-heart surgery services. The capacity of a cath lab is also weighted according to the type of catheterization performed; specifically, under the

2003 State Health Plan, the capacity of a cath lab is defined to be 1,200 procedures annually, with diagnostic catheterizations eachcounting as one procedure and therapeutic catheterizations each counting as two procedures toward the total.

III.Application Process

*5 12. On April 21, 2004, Petitioner LMC submitted an application to the Department for a CON for the development of a comprehensive cardiac program at its West Columbia hospital, to include both open-heart surgical capabilities and therapeutic cardiac catheterization capabilities. Specifically, LMC proposed the addition of two dedicated open-heart surgery suitesâ "one of which would be designated as a "back-up" surgery suiteâ "and a second cardiac catheterization laboratory to complement its existing diagnostic catheterization laboratory. As part of the project, LMC would also develop additional services to support the proposed open-heart surgery program, including the creation of a separate, dedicated intensive care unit for cardiac patients. If approved, the proposed project would authorize LMC to perform open-heart surgery and provide comprehensive cardiac catheterization services.

13. By a letter dated May 21, 2004, the Department deemed LMC's CON application to be complete and set forth the most relevant project review criteria for the evaluation of LMC's application. These criteria, ranked in order of their importance, were as follows:

1. Compliance with the Need as outlined in the 2003 South Carolina Health Plan-1
2. Community Need Documentation-2a, 2b, 2c, 2e

Distribution (Accessibility)-3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h
Adverse Effects on Other Facilities-23a, 23b

3. Projected Revenues-6a, 6b, 6c

Projected Expenses-7
Financial Feasibility-15
Cost Containment-16c

4. Staff Resources-20a, 20b
5. Acceptability-4a, 4b

DHEC Ex. #1, at 524.

14. On August 10, 2004, the Department held a project review meeting concerning LMC's CON application. At the meeting, presentations were made by LMC in support of the project and by Providence and Palmetto in opposition to the proposed project.

15. Based upon LMC's CON application and the information collected during the project review process, the Department issued a decision denying LMC's application on October 22, 2004. In the decision, the Department concluded that, while LMC's project met the technical standards for adult open-heart surgical services set forth in the 2003 State Health Plan, the project was ultimately inconsistent with Sections 802(3)(a), 802(3)(b), and 802(23)(a) of Regulation 61-15, which address the unnecessary duplication of health care services and the adverse impact of proposed services upon existing providers. In particular, the Department found that this proposal would unnecessarily duplicate existing open-heart surgical services performed at Palmetto Health Richland Memorial Hospital and Providence Hospital because their services are geographically accessible to Lexington Medical Center's target population. Such duplication of services is not justifiable due to the reduction in the growth ofopen-heart surgical services that is occurring at this time. As a result, the proposed project would have an adverse impact on the current and projected use rates of these existing open-heart surgery providers. In addition, as documented in the 2003 State Health Plan, the State Health Planning Committee, recognizing the important correlation between volume and proficiency, further acknowledges that the number of open-heart surgery cases is decreasing and that maintaining volume in pro-

grams isvery important to the provision of quality care to the community.

*6 DHEC Ex. #1, at 846.

16. Petitioner LMC timely requested a contested case hearing before this Court to challenge the Department's denial of its CON application. Respondents Providence and Palmetto were subsequently granted leave to intervene in this matter in opposition to Petitioner's CON application.

IV. Availability and Use of Open-Heart Surgery Services in the Midlands

A. Generally

17. There are three existing open-heart surgery programs within LMC's service areaâ "that is, within a 60-minute one-way drive of LMC. These programs are located at Providence Hospital and Palmetto Health Richland Hospital in downtown Columbia and Aiken Regional Medical Center in Aiken, South Carolina. While there are three open-heart surgery providers within LMC's service area, there are no open-heart surgery programs located within the boundaries of Lexington County.

18. Providence Hospital currently has four open-heart surgery suites. With a stated capacity of 500 open-heart procedures per year for each operating room, Providence has a total annual capacity of 2,000 open-heart surgeries at the hospital. In fiscal year 2005, Providence performed 939 open-heart surgeries, leaving the hospital with an excess capacity of 1,061 heart surgeries, or over 50% excess capacity, for the year.

19. Palmetto Health Richland Hospital has two open-heart surgery units, for an annual capacity of 1,000 open-heart procedures at the hospital. In fiscal year 2005, Palmetto performed 410 open-heart surgeries at its hospital. Therefore, for 2005, Palmetto had an excess capacity of 590 open-heart surgeries, or 59% excess capacity.

20. Aiken Regional Medical Center is likewise well below its capacity for open-heart surgeries. With one open-heart surgical suite, Aiken Regional Medical Center has the capacity to perform 500 open-heart surgeries per year. However, in fiscal year 2004, Aiken only performed 107 open-heart surgical procedures, leaving the hospital with an excess capacity of 383 surgeries, or 78% excess capacity. In fact, this excess capacity for open-heart surgeries exists statewide, with few, if any, of South Carolina's open-heart surgery providers utilizing more than 50% of their capacity to perform open-heart surgeries in recent years.

21. Much of this excess capacity is the result of a state and national trend away from open-heart surgery toward other treatments for coronary artery disease, including the use of therapeutic catheterization to place stents in blocked vessels. During the 1980s and 1990s, both the number of open-heart surgeries performed and the use rate for such surgeries increased dramatically in South Carolina, leading to a proliferation of open-heart surgery programs in the state. However, with developments in the use of therapeutic catheterization to treat heart problems in the late 1990s and early 2000s, and, in particular, with the development of the drug-eluting stent to open blocked vessels in 2003, the number of open-heart surgeries performedin South Carolina has declined dramatically since the year 2000, reflecting a similar trend throughout the nation.

*7 22. After peaking at 6,473 surgeries in 2000, the number of open-heart surgeries performed in South Carolina has steadily declined, falling to 5,850 surgeries in 2004 despite an increase in the state's population during that time. Accordingly, the use rate for open-heart surgery in South Carolina has also shown a dramatic decline in the past several years, dropping from 164 surgeries per 100,000 residents in 2000 to 139 surgeries per 100,000 residents in 2004.

23. These statewide numbers are reflected in the data for the open-heart surgeries performed at Providence and Palmetto. The volume of open-heart surgeries performed at Providence has declined from a peak of around 1,100 surgeries per year in1998 and 1999 to the 939 surgeries performed in 2005, and the number of open-heart surgeries at Palmetto has fallen from a peak of 499 surgeries performed in 2002 to the 410 open-heart procedures performed in 2005 at the hospital.

24. I find that, based upon the evidence presented at the hearing, the use rate for open-heart surgery will continue to decline in South Carolina, such that, even with an increasing population in LMC's service area, the number of open-heart surgery procedures performed in the Midlands in the future will, at best, be stagnant and, in all likelihood, will continue to decline[FN1]

B. Lexington County Residents

25. Providence and Palmetto Hospitals are located in downtown Columbia, less than seven miles from LMC's main hospital campus in West Columbiaâ "the location of LMC's proposed open-heart surgery programâ "and approximately sixteen milesfrom downtown Lexington. Specifically, LMC is located approximately 6.4 miles from Providence and 6.7 miles from Palmetto. 26. In 2004, residents of Lexington County constituted approximately 20% of Providence's open-heart surgery patients and approximately 29% of Palmetto's open-heart surgery patients. And, the three largest cardiology groups in Richland County have offices in Lexington County and treat patients from Lexington County.

27. In fact, the overall use rate for open-heart surgery is significantly higher for residents of Lexington County than it is for Richland County residents, which would suggest that Lexington County residents have equal, if not greater, access to open-heart surgical services than residents of Richland County.

28. I find that there are no geographic, social, or economic barriers restricting the ability of Lexington County residents to access open-heart surgical services at either Providence or Palmetto.

C. Transfers of Open-Heart Surgery Patients

29. One of the primary concerns raised by LMC with regard to the accessibility of open-heart surgery to Lexington County residents is the time and inconvenience required to transfer patients from LMC to Providence or Richland for open-heart surgery, particularly in emergency situations.

30. However, according to the testimony of the medical experts presented at the hearing, emergency open-heart surgery is very rarely performed, and the vast majority of open-heart surgery procedures are elective procedures performed on stablepatients, scheduled at the convenience of the surgeon and the patient[FN2] For such scheduled surgeries on stable patients, the short transfer from LMC to Providence or Palmetto does not deny Lexington County residents access to open-heart surgical services.

*8 31. Further, the evidence presented at the hearing suggests that even these transfers of stable patients are fairly rare. As a result of the 1,532 diagnostic catheterizations performed at LMC in 2005, only 189 patientsâ "or approximately 12% of the total number of catheterizationsâ "were transferred from LMC's cath lab to either Providence or Palmetto for open-heart surgery.

32. Therefore, although some patients must be transferred from LMC to Providence or Palmetto for open-heart surgery, this fact alone does not demonstrate a need for an open-heart surgery program at LMC.

V. Availability and Use of Therapeutic Cardiac Catheterizations in the Midlands

A. Generally

33. There are three existing comprehensive cardiac catheterization programsâ "that is, programs performing both diagnostic and therapeutic catheterizationsâ "within a 60-minute one-way drive of LMC. These programs are located at Providence Hospital and Palmetto Health Richland Hospital in downtown Columbia and Aiken Regional Medical Center in Aiken, South Carolina. Given the risks associated with performing therapeutic cardiac catheterizations, these comprehensive cardiac catheterization laboratories are only authorized for hospitals that are approved for, and provide, open-heart surgical services. LMC currently is approved for, and provides, diagnostic cardiac catheterization services in one cardiac catheterization laboratory at its West Columbia hospital.

34. In these programs, Providence Hospital has six cardiac catheterization laboratories, Palmetto Health Richland has three cardiac catheterization laboratories (with a fourth cath lab approved, but not yet constructed), and Aiken Regional Medical Center has one cardiac catheterization laboratory, for a total of ten existing and one forthcoming comprehensive cardiac cath labs in LMC's service area. In 2004, Providence performed 2,749 therapeutic catheterizations in its six cath labs and Palmetto performed 791 therapeutic catheterizations in its three cath labs; in 2003, Aiken Regional Medical Center performed 323 therapeutic catheterizations in its cath lab.

35. With the increased preference for the use of therapeutic catheterization to treat common cardiac conditions, such as coronary artery disease, rather than open-heart surgery, I find that the use rate for therapeutic cardiac catheterizations in the Midlands will likely increase modestly over the next several years, resulting in modest increases in the number of therapeutic catheterizations performed during that time.

B. Lexington County Residents

36. As noted above, the comprehensive cardiac catheterization laboratories at Providence and Palmetto Hospitals are located less than seven miles from LMC's main hospital campus in West Columbia, the location from which it proposes to providetherapeutic cardiac catheterization services.

37. In 2004, residents of Lexington County constituted approximately 23% of Providence's therapeutic cardiac catheterization patients and approximately 31% of Palmetto's therapeutic cardiac catheterization patients. And, the three largest cardiology groups in Richland County have offices in Lexington County and treat patients from Lexington County.

*9 38. The use rate for therapeutic cardiac catheterization services is significantly higher for residents of Lexington County than it is for Richland County residents, which would suggest that Lexington County residents have equal, if not greater, access to therapeutic cardiac catheterization services than residents of Richland County.[FN3]

39. I find that, based upon the evidence presented at the hearing, there are no geographic, social, or economic barriers restricting the ability of Lexington County residents to access therapeutic cardiac catheterization services at either Providence or Palmetto.

C. Emergent Cardiac Catheterization Services

40. One of the primary concerns raised by LMC with regard to the accessibility of therapeutic cardiac catheterization services to Lexington County residents is the time and difficulty required to transfer patients from LMC to Providence or Richland for therapeutic cardiac catheterizations, particularly in emergency situations.

41. In 2005, LMC had 73,000 emergency room visits at the main emergency room in its West Columbia hospital, with 7,242 of those emergency room patients presenting with a cardiac diagnosis. Of those 7,242 emergency

cardiac patients in 2005, 69patientsâ "or less than 1% of the patients presenting with cardiac complaintsâ "were transferred to either Providence or Palmetto for emergency cardiac treatment for an acute myocardial infarction, i.e., heart attack. There was no concrete evidence presented at the hearing of this matter suggesting that the health of these transferred emergency patients, or the health of any other cardiac transferees from LMC to Providence and Palmetto, was compromised in any way by the transfers.

42. Further, the consensus of the clinical witnesses presented at the hearing is that the overwhelming majority of therapeutic cardiac catheterizations are scheduled procedures performed on stable patients and that only somewhere between 5% and 10% of cardiac patients require emergency cardiac intervention procedures such as therapeutic catheterizations.

VI.Impact of Lexington's Proposed Program upon Existing Providers in the Midlands

43. Based upon the likely referral patterns of LMC's county-wide network of employed physicians and upon LMC's existing high market share in the county for medical servicesâ "and, in particular, its high market share for diagnostic cardiaccatheterization services and other cardiovascular servicesâ "I find that a comprehensive cardiac services program at LMC will likely capture much, if not most, of the market for open-heart surgery and therapeutic catheterization in Lexington County. In particular, I find that, with such a program, LMC is likely to capture 65% or more of the market in these cardiac services for residents of Lexington County.

44. As noted above, Providence Hospital draws approximately one-fifth of its open-heart surgery and therapeutic cardiac catheterization patients from Lexington County and Palmetto Health Richland draws nearly one-third of its open-heart surgery and therapeutic catheterization patients from Lexington County. By capturing some two-thirds of these patients, a comprehensive cardiac program located at LMC will jeopardize these substantial patient bases for the programs at Providence and Palmetto and significantly reduce the number of open-heart and therapeutic catheterization procedures performed at those hospitals. Such reductions in the number of open-heart surgeries and therapeutic cardiac catheterizations will have several, serious adverse consequences for the cardiac programs at Providence and Palmetto.

*10 45. The potential reductions in the number of open-heart surgeries performed at Providence and Palmetto would adversely affect the quality of care provided in those programs. With the loss of the open-heart surgery cases captured by LMC, the annual volume of open-heart surgeries performed at both Providence and Palmetto would fall below 200 open-heart surgeries per suite, and thus both programs would fall below the minimum number of surgeries the Department considers necessary to maintaina program's proficiency and overall quality of care.

46. The potential reductions in the number of open-heart surgeries and therapeutic catheterizations performed at Providence and Palmetto would also have a substantial adverse financial impact upon the cardiac programs at those hospitals. Based upon the expert testimony presented at the hearing, the financial impact of these lost procedures would likely be a total annual loss of approximately eight million dollars for Providence and between 3.2 million and 4.5 million dollars for Palmetto.These financial losses would be magnified by the significant capital expenditures that both facilities have made in recent years to expand their cardiac services, including, most notably, the 77-million-dollar heart hospital opened by Palmetto in January 2006.

47. Further, the establishment of an open-heart surgery and therapeutic catheterization program at LMC would adversely impact the quality of care at existing programs in the Midlands by drawing highly trained, specialized medical staff, such as cardiovascular anesthesiologists and cardiac surgery nurses, away from those programs.

Such highly qualified and highly skilled staff are critical to the provision of quality cardiac care in these programs, and the loss of such personnel would havean adverse effect on the existing providers' ability to maintain the quality of their programs.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude the following as a matter of law:

I.Jurisdiction, Burden of Proof, and the Weight and Sufficiency of Evidence

1. This Court has jurisdiction over this contested case proceeding pursuant to S.C. Code Ann. §§ 1-23-310 et seq. (2005), S.C. Code Ann. § 1-23-600(B) (Supp. 2005), S.C. Code Ann. § 44-7-210(E) (2002), and 24AS.C. Code Ann. Regs.61-15, § 403 (Supp. 2005).

2. The contested case hearing conducted before this Court in a CON matter is a trial *de novo*, "in which â the whole case is tried as if no trial whatsoever had been had in the first instance,"' and the administrative law judge conducting the hearing is the sole fact-finder, who "must make sufficiently detailed findings supporting the denial or grant of a permit application." Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004) (quoting from Blizzard v. Miller, 306 S.C. 373, 412 S.E.2d 406 (1991) and Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002), respectively).

*11 3. LMC, as the moving party in this matter, bears the burden of proof in this contested case. S.C. Code Ann. § 44-7-210(E) (2002); 24A S.C. Code Ann. Regs. 61-15, § 403(1) (Supp. 2005); see also Leventis v. S.C. Dep't of Health & Envtl.Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue); 2 Am. Jur. 2d Administrative Law § 354 (2004) (same). Therefore, LMC must prove, by a preponderance of the evidence, that the Department improperly denied its application for a CON to establish an open-heart surgery and therapeutic cardiac catheterization program at its West Columbia hospital. See Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (holding that the standard of proof in an administrative proceeding is generally the preponderance of the evidence); see also Nat'l Health Corp. v. S.C. Dep't of Health & Envtl. Control, 298 S.C. 373, 379, 380 S.E.2d 841, 844 (Ct. App. 1989) (holding that the preponderance of the evidence standard applies in CON disputes).

4. The preponderance of the evidence "is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1182 (6th ed. 1990). "The preponderance of the evidence means such evidence, as when considered and compared with that opposed to it, has more convincing force and produces in the mind the belief that what is sought to be proved is more likely true than not true." Alex Sanders & John S. Nichols, Trial Handbook for South Carolina Lawyers § 9.5, at 371 (2d ed. 2001) (citing to Frazier v. Frazier, 228 S.C. 149, 89 S.E.2d 225 (1955)).

5. The test for the sufficiency of a proffer of evidence to warrant a finding is as follows:

> A verdict or finding must be based on the evidence and must be based on the facts proved. Under this well established rule, although difficulty of proof does not prevent the assertion of a legal right, the verdict or finding cannot rest on surmise, speculation, or conjecture. Furthermore, a verdict of the jury or a finding of the court cannot be supported only by guesswork. Also, it has been said that the verdict or finding cannot rest on supposition, assumption, imagination, suspicion, arbitrary action, whim, percentage, or conclusions

that are in conflict with undisputed fact.

The evidence on which the verdict or finding is based must be competent, legal evidence received in the course of the trial, credible, and of probative force, and must support every material fact. The decision should be against the party having the burden of proof where there is no evidence, or the evidence as to a material issue is insufficient[.]

32A C.J.S. Evidence § 1339, at 757-58 (1996); see also S.C.Code Ann. § 1-23-320(i) (2005) ("Findings of fact shall be based exclusively on the evidence and on matters officially noticed."). Probative evidence is "[e]vidence that tends to prove or disprove a point in issue." Black's Law Dictionary 579 (7th ed. 1999).

*12 6. The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Furthermore, a trial judge who observes a witness is in the best position to judge the witness's demeanor and veracity and to evaluate the credibility of his testimony. See, e.g., Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Wallace v. Milliken & Co., 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).

7. The South Carolina Rules of Evidence are applicable to this contested case proceeding. SeeS.C. Code Ann. § 1-23-330(1) (2005). Under those rules, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. An expert is granted wide latitude in determining the basis of his or her opinion, and where an expert's testimony is based upon facts sufficient to form an opinion, the trier of fact must weigh its probative value. Small v. Pioneer Machinery, Inc., 329 S.C. 448,470, 494 S.E.2d 835, 846 (Ct. App. 1997).

8. "[E]xpert testimony is essential in cases which involve a subject of special technical science, skill, or occupation of which the members of the jury or the trial court are not presumed to be specially informed." 32A C.J.S. Evidence § 729, at 85 (1996). For example, the South Carolina Supreme Court has held that, in medical malpractice cases, "the plaintiff must use expert testimony... unless the subject matter lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." Pederson v. Gould, 288 S.C. 141, 143, 341 S.E.2d 633, 634 (1986).

9. In general, "expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence... [;] the triers of fact cannot, and are not required to, arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding to the contrary of the opinion." 32A C.J.S. Evidence § 727, at 82-83 (1996). However, the trier of fact may give an expert's testimony the weight he or she determines it deserves. Florence County Dep't of Soc. Servs. v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). Further, the trier of fact may accept the testimony of one expert over that of another. See S.C. Cable TelevisionAss'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 417 S.E.2d 586 (1992).

II.Certificate of Need Program

10. As referenced in the Findings of Fact, South Carolina regulates the distribution of certain major health care facilities and services throughout the state under a Certificate of Need program administered by DHEC. SeeS.C. Code Ann. §§ 44-7-110 through 44-7-370 (2002 & Supp. 2005) (setting out the "State Certification of Need and Health Facility Licensure Act"). The purpose of this regulatory scheme is to "promote cost containment, prevent unnecessary duplication of health carefacilities and services, guide the establishment of health facilities and ser-

vices which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2002).

*13 11. Under this regulatory program, a health care facility is required to obtain a Certificate of Need (CON) from DHEC prior to undertaking, among other things, "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 State Health Plan." S.C. Code Ann. § 44-7-160(4) (2002); 24A S.C. Code Ann. Regs. 61-15, § 102(1)(d) (Supp. 2005). Open-heart surgery and therapeutic cardiac catheterization are services for which the 2003 State Health Plan contains specific standards and criteria and, therefore, a health care facility is required to obtain a CON from the Department prior to establishing or substantially expanding such services. See DHEC Ex. #2, at II-33 through II-53 (setting forth standards, definitions, and licensing criteria for cardiac catheterization and open-heart surgery services); see also DHEC Ex. #2, at II-48 ("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.").

12. In determining whether to issue a CON to an applicant, the Department evaluates the proposed health care service or facility under the licensure standards and criteria set out in the State Health Plan for the particular service or facility and under the general project review criteria set out in Section 802 of Regulation 61-15. SeeS.C. Code Ann. § 44-7-210(C) (2002); 24A S.C. Code Ann. Regs. 61-15, § 307(1) (Supp. 2005). Accordingly, the Department may not issue a CON unless the application for the proposed project complies with *both* the State Health Plan *and* the regulatory project review criteria. SeeS.C. Code Ann. § 44-7-210(C) (2002); 24A S.C. Code Ann. Regs. 61-15, § 307(1) (Supp. 2005). Therefore, while "no project may be approved unless it is consistent with the State Health Plan," 24A S.C. Code Ann. Regs. 61-15, § 801(3) (Supp. 2005), such compliance is not sufficient in itself for the issuance of a CON, and "[t]he Department may refuse to issue a Certificate of Need even if an application is in compliance with the State Health Plan but is inconsistent with project review criteria or departmental regulations," 24A S.C. Code Ann. Regs. 61-15, § 307(1); see also S.C.Code Ann. §44-7-210(C). Whether LMC's proposed comprehensive cardiac program complies with these two sets of licensing standards will be discussed, in turn, below.

III.LMC's Compliance with the 2003 State Health Plan

A. State Health Plan Standards for Open-Heart Surgery

13. The 2003 State Health Plan contains detailed definitions, standards, and Departmental findings governing the issuance of Certificates of Need for open-heart surgery and for cardiac catheterization services. See DHEC Ex. #2, at II-33 to II-53. With regard to open-heart surgical services, the Plan sets out ten technical requirements an applicant must satisfy in order to be granted a CON to provide such services. See DHEC Ex. #2, at II-48 to II-50.

*14 14. The first two of these standards reiterate that the establishment or addition of an open-heart surgery unit is a substantial expansion of a health service that requires CON review and that comprehensive cardiac catheterization laboratories, which perform therapeutic cardiac catheterizations, may only be located in hospitals that provide open-heart surgery. DHEC Ex. #2, at II-48 (Standards 1 and 2). In the case at hand, LMC has applied for a CON for its proposed open-heart surgery program and seeks to provide therapeutic cardiac catheterization services only as part of a comprehensive cardiac care program, which includes the proposed open-heart surgery services.

15. Subsequent standards state that the capacity of an open-heart surgery operating room is 500 open-heart surgeries per year and require a hospital to perform a minimum of 200 open-heart surgeries annually in each open-heart surgery unit by its third year of operation. DHEC Ex. #2, at II-48 (Standards 3, 4, and 5.B). Similarly, a hospital may only expand an existing open-heart surgery program if it has operated at 70% capacity for the two years prior to its CON application and can project a minimum of 200 open-heart procedures per year in the new open-heart surgery unit. DHEC Ex. #2, at II-49 (Standard 7). In the instant case, LMC projects that it will perform just over 200 open-heart surgeries in its program by its third year of operation; Respondents project that the number of open-heart surgeries performed at LMC by its third year of operation will be closer to 300 surgeries. In either case, LMC satisfies these standards, although only for one dedicated open-heart surgery operating room.[FN4]

16. Additional standards provide that a new open-heart surgery program may only be approved if all existing open-heart surgery providers in the service area, i.e., within a 60-minute one-way drive of the proposed program, are performing an annual minimum of 350 open-heart surgery procedures per open-heart surgery unit and the new program will not cause any of the existing programs to drop below 350 procedures per year for each open-heart surgery unit. See DHEC Ex. #2, at II-48, II-49 (Standards 5.A and 6). However, there is a narrow exception to this requirement, commonly known as the "single county" exception, that allows the establishment of a new open-heart surgery program at a hospital regardless of the number of open-heart surgeries being performed at other programs in the service area, so long as (1) there are no other open-heart surgery programs located in the same county as the proposed program and (2) the proposed facility currently offers cardiac catheterization services and provided a minimum of 1,200 catheterizations in the prior year. DHEC Ex. #2, at II-48 (Standard 5.A).[FN5] Here, LMC satisfies this single-county exception, and thus satisfies Standards 5.A and 6, because there are no other open-heart surgeryproviders in Lexington County and LMC performed over 1,200 diagnostic catheterizations in the year preceding its CON application.

*15 17. The remaining standards require open-heart programs to adopt standards for treating high-risk patients, to have appropriate physician staffing, both in terms of numbers and proficiency, and to provide the capability to perform emergency coronary artery surgery. DHEC Ex. #2, at II-49 to II-50 (Standards 8, 9, and 10). While LMC's application may not have been as detailed as other applications for open-heart surgery programs with regard to these standards, LMC did provide sufficient information in its application to demonstrate that its program would be able to satisfy these operational standards.

B. State Health Plan Findings and Policies with regard to Open-Heart Surgery

18. In addition to setting forth the technical standards discussed above, the 2003 State Health Plan also contains six specific findings made by the Department regarding the need for open-heart surgery services in South Carolina and a generaldiscussion of the appropriate distribution of open-heart surgery services in the state. See DHEC Ex. #2, at II-35 (general discussion), II-51 to II-52 (specific findings).

19. The six specific findings regarding the need for open-heart surgery services note that "[o]pen-heart surgery services are available within sixty (60) minutes travel time for the majority of residents of South Carolina" and that "most of the open heart surgery providers are currently utilizing less than the functional capability (i.e. 70% of maximum capacity) of their existing surgical suites." DHEC Ex. #2, at II-51 to II-52 (Findings 1 and 2). These findings further recognize thatclinical research has shown that "a minimum number of procedures is recommended per year in order to develop and maintain physician and staff competency in performing these procedures" and that "a positive relationship [exists] between the volumeof open heart surgeries performed annually at a facility and patient outcomes." DHEC Ex. #2, at II-52 (Findings 3 and 5).

20. Two further findings speak most directly to the issues raised in this case and are particularly relevant to the resolution of this matter. The Department's fourth finding states, in full:

Increasing geographic access may create lower volumes in existing programs causing a potential reduction in quality and efficiency, exacerbate existing problems regarding the availability of nursing staff and other personnel, and not necessarily reduce waiting time since other factors (such as the referring physician's preference) would still need to be addressed.

DHEC Ex. #2, at II-52 (Finding 4). In a similar vein, the sixth finding reads, as follows:

The State Health Planning Committee recognizes the important correlation between volume and proficiency. The Committee further recognizes that the number of open heart surgery cases is decreasing and that maintaining volume in programs is very important to the provision of quality care to the community.

DHEC Ex. #2, at II-52 (Finding 6).

*16 21. These findings are echoed in the general discussion of the distribution of open-heart surgical services found in the overview discussion for the Plan's section on cardiac services:

Both cardiac catheterization and open heart surgery programs require highly skilled staffs and expensive equipment. Appropriately equipped and staffed programs serving larger populations are preferable to multiple, minimum population programs. Underutilized programs are a less efficient use of an expensive resource and often reflect unnecessary duplication of services in an area. This may seriously compromise quality and safety of procedures and increase cost of care. Optimal performance requires a caseload of adequate size to maintain the skills and efficiency of the staff.... There should be a minimum of 200 adult open heart surgery procedures performed annually per open heart surgery unit; improved results appear to increase in hospitals that perform a minimum of 350 cases annually.

DHEC Ex. #2, at II-35; see also DHEC Ex. #2, at II-36 (emphasizing that the CON standard of 200 open-heart surgeries per year per surgical suite "should not be interpreted as an optimal level of operation," because such a volume "amounts to less than 5 procedures per week and clearly does not fully utilize the resources required to staff a cardiac surgery program").

22. I find that LMC's proposed open-heart surgery program conflicts with these findings and policies set out in the 2003 State Health Plan. It cannot be overemphasized that, while the establishment of an open-heart surgery program at LMC would minimally increase geographic access for such services, a program at LMC would also significantly reduce volumes in existing providers and exacerbate staffing problems in the area, thus causing a potential reduction in the quality of care in the existing open-heart surgery programs in the Midlands. Crucially, the establishment of an open-heart program at LMC would likely reduce the open-heart surgery volumes at Providence and Palmetto to at or below the minimum threshold for competency in such procedures, i.e., below 200 open-heart surgeries per year per open-heart surgical suite, and would put LMC only marginally above that threshold. As a result, the Midlands would have "multiple, minimum population programs," rather than fewer, larger, and more competent programs as recommended by the State Health Plan.

23. Therefore, while LMC's CON application generally complies with certain technical standards for open-heart surgical services put forth in the State Health Plan, the project as a whole conflicts with the findings and policies expressed in the Plan regarding the distribution of open-heart surgery services and must ultimately be deemed to

be inconsistent with the Plan.

IV.LMC's Compliance with Regulatory Project Review Criteria

24. Section 802 of Regulation 61-15 sets out thirty-three project review criteria that are used to review all projects requiring CON approval. Of particular relevance to the case at hand are the project review criteria related to the unnecessary duplication of services and the adverse impact of a project upon existing providers. See 24A S.C. Code Ann. Regs. 61-15, § 802(3)(a), (b) (Supp. 2005) (unnecessary duplication of services), § 802(23)(a), (b) (Supp. 2005) (adverse effects on other facilities).

A. Unnecessary Duplication of Existing Services

*17 25. Criteria 3(a) and 3(b) in Section 802 of Regulation 61-15 provide that the "[u]nnecessary duplication of services and unnecessary modernization of services will not be approved" and that a "proposed service should be located so that it may serve medically underserved areas (or an underserved population segment) and should not unnecessarily duplicate existing services or facilities in the proposed service area." 24A S.C. Code Ann. Regs. 61-15, § 802(3)(a), (b). In its denial of LMC's application, the Department found that LMC's proposed open-heart surgery program would violate these project review criteria by unnecessarily duplicating existing open-heart surgical services provided at Providence and Palmetto. See DHEC Ex. #1, at 846. This determination must be sustained. With three existing open-heart surgery providers within LMC's service area, each of which has greater than 50% *excess* capacity for open-heart surgery procedures, and with the overall use rate for open-heart surgery declining, LMC's proposed open-heart surgery program would constitute an unnecessary duplication of those services and is, therefore, inconsistent with Section 802(3)(a) and (3)(b) of Regulation 61-15. Further, given the number of Lexington County residents that receive open-heart surgical services at Providence and Palmetto and the high overall use rate for open-heart surgery among Lexington County residents, LMC's proposed open-heart surgery program will not serve a medically underserved area, but rather, will constitute an unnecessary duplication of existing open-heart surgery services in the Midlands. Accordingly, LMC's proposed project is further inconsistent with Section 802(3)(b).

B. Adverse Impact upon Existing Providers

26. Criterion 23(a) of Section 802 addresses the adverse impact of a proposed project upon existing facilities in the area and requires that "[t]he impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services." 24A S.C. Code Ann. Regs. 61-15, § 802(23)(a). In its denial of LMC's application, the Department found that LMC's proposed open-heart surgery programwould violate this project review criterion by having an adverse impact on the current and projected use rates of the existing open-heart surgery programs at Providence and Palmetto. See DHEC Ex. #1, at 846. This determination must be sustained. The establishment of an open-heart surgery program at LMC would draw a significant number of patients from existing providers and drive open-heart surgery volumes at those providers below the recommended level to maintain quality of care, while only providing a minimal increase in geographic accessibility for open-heart surgical services in the Midlands.

27. Further, criterion 23(b) of Section 802 states that "[t]he staffing of the proposed service should be provided without unnecessarily depleting the staff of existing facilities or services or causing an excessive rise in staffing costsdue to increased competition." 24A S.C. Code Ann. Regs. 61-15 § 802(23)(b). While the Department did not cite to Section 802(23)(b) in its denial of LMC's application, the competition for staffing created by the establishment of an open-heart surgery program at LMC would have an adverse impact upon existing open-heart surgery providers in the Midlands. This new program would likely draw critical staff away from existing programs and, at the very least, increase the staffing costs of existing providers as they seek to replace and retain

the highly skilled and specialized staff necessary for the operation of an open-heart surgery program.

*18 28. Therefore, LMC's proposed open-heart surgery program is also inconsistent with the adverse impact project review criteria found at Section 802(23) of Regulation 61-15.

29. In sum, regardless of whether or not LMC complies with the State Health Plan, these inconsistencies with the regulatory project review criteria related to the unnecessary duplication of services and the adverse impact upon existing providers are grounds, in and of themselves, upon which to deny LMC's CON application. SeeS.C. Code Ann. § 44-7-210(C); 24A S.C. Code Ann. Regs. 61-15, § 307(1).

V.Conclusion

30. While LMC's proposed open-heart surgery program satisfies certain technical standards for such services set out in the 2003 State Health Plan (at least for a single open-heart surgery unit), the proposed program is inconsistent both with the findings and policies for the distribution of open-heart surgery programs set out in the Plan and with the regulatory project review criteria regarding the unnecessary duplication of existing services and the adverse impact of a proposed service upon existing providers. Accordingly, the Department's decision to deny LMC's CON application to provide open-heart surgery at its West Columbia hospital must be sustained.

31. Further, because LMC does not qualify for a CON to perform open-heart surgery, its joint CON application to perform therapeutic cardiac catheterizations must also be denied, as such services may only be provided in a hospital that has an open-heart surgery program. See DHEC Ex. #2, at II-39, II-48 (providing under the 2003 State Health Plan, in Standard 7 for cardiac catheterization services and Standard 2 for open-heart surgical services, that the lack of a formal open-heart surgery program at a hospital is an "absolute contraindication" for the hospital to perform therapeutic cardiac catheterizations).

32. Finally, it must be noted that this Court does not operate in a vacuum and is well aware of the social and political wrangling that has occurred regarding LMC's application for a CON to provide comprehensive cardiac services. However, while I am sensitive to the concerns raised by interested parties on both sides of this issue, I do not possess unfettered discretion such that I can, by judicial fiat, decide whether LMC should be authorized to perform open-heart surgery. Rather, in reaching a decision in this matter, I am constrained by the evidentiary record presented through the conduct of the trial in this case and by the applicable law. In particular, it must be emphasized that the South Carolina General Assembly has chosen to closely regulate the distribution of certain health care facilities and services, including open-heart surgery and cardiac catheterization, under a comprehensive Certificate of Need program consisting of the CON Act, its accompanying regulations, and the State Health Plan. It is the standards set forth under that regulatory program that I am bound to apply in this matter. And, under those standards, the conclusion is inescapable that LMC's proposed open-heart surgery services, if authorized, wouldconstitute an unnecessary duplication of existing open-heart surgical services in the Midlands and would have an unduly adverse impact upon existing providers of open-heart surgery in the area.

*19 Never has it been more true in an administrative case that a judge "ought to live an eagle's flight beyond the reach of fear or favor, praise or blame, profit or loss." William S. McFeely, Frederick Douglass 318 (1991) (quoting Douglass'sdisappointed response to the United States Supreme Court's 1883 decision in The Civil Rights Cases). When this case is viewed in such an impartial light, the Department's decision to deny LMC's CON application must be sustained.

ORDER

Based upon the Findings of Fact and Conclusions of Law stated above,

IT IS HEREBY ORDERED that the Department's decision to deny Petitioner Lexington Medical Center's CON application for the development of an open-heart surgery program and therapeutic cardiac catheterization program at its hospital in WestColumbia, South Carolina, is **SUSTAINED.**

AND IT IS SO ORDERED.

John D. Geathers
Administrative Law Judge
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201-3731

FN1. Notably, while there was some disagreement as to the extent of this decline, all of the experts presented at the hearing, including Petitioner's health planning expert, agreed that the use rate for open-heart surgery in LMC's service area, and the state as a whole, would continue to decline in coming years.

FN2. For example, the standard of care for treating the most common emergent cardiac condition, an ongoing acute myocardial infarction, or heart attack, is to open the blocked artery by performing a therapeutic catheterization, such as an angioplasty, on the patient, rather than performing a complex, open-heart surgery, such as a CABG, on the patient.

FN3. In fact, 356 patients were transferred from LMC's diagnostic cath lab to receive therapeutic cardiac catheterization at either Providence or Palmetto in 2005.

FN4. These projections would only authorize LMC to establish *one* open-heart surgery operating room, rather than the *two* rooms it requested in its CON application. The standards in the 2003 State Health Plan clearly require a hospital to project a minimum of 200 open-heart procedures annually for *each* open-heart surgery unit, i.e., operating room, it seeks to establish. See DHEC Ex. #2, at II-48, II-49 (Standards 4, 5.B, and 7); see also DHEC Ex. #2, at II-47 (defining an "open heart surgery unit"). Further, neither the State Health Plan nor the CON Act and regulations authorize or provide standards for a "back-up" open-heart surgery operating room, and, in practice, hospitals simply move open-heart surgery equipment into a standard operating room on those rare occasions in which the dedicated open-heart surgery rooms are unavailable. Therefore, regardless of the prudence of LMC's request for a "back-up" open-heart surgery operating room to supplement its primary open-heart surgery unit, LMC would not be authorized for such an additional open-heart surgery operating room under the State Health Plan unless it can project at least 200 surgeries for the room, which LMC has not done in this case.

FN5. While this exception is only explicitly stated with respect to Standard 5.A, it must be read naturally to apply to Standard 6 as well. Any other reading would reach an absurd result in which the prohibition upon causing existing programs tofall below 350 procedures annually in Standard 6 essentially renders the single-county exception a nullity or restricts the exception to apply only in an exceedingly rare set of circumstances.

2006 WL 2899943 (S.C.Admin.Law.Judge.Div.)

END OF DOCUMENT

EXHIBIT E

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Trident Neurosciences Center, LLC d/b/a HealthSouth Rehabilitation Hospital of Charleston, Petitioner, vs. South Carolina Department of Health and Environmental Control and Trident Medical Center, Respondents.	Docket No. 14-ALJ-17-0103-CC **ORDER GRANTING HEALTHSOUTH'S MOTION FOR SUMMARY JUDGMENT**

FILED
June 10, 2014
SC ADMIN. LAW COURT

This matter comes before the South Carolina Administrative Law Court (ALC or Court) on a Motion for Summary Judgment (Motion) filed on April 18, 2014 by Petitioner Trident Neurosciences Center, LLC d/b/a HealthSouth Rehabilitation Hospital of Charleston (HealthSouth) pursuant to Rule 19 of the South Carolina Administrative Law Court Rules (SCALCR) and Rule 56(c) of the South Carolina Rules of Civil Procedure (SCRCP). In its Motion, HealthSouth requests that all South Carolina Department of Health and Environmental Control (DHEC) licenses issued to Respondent Trident Medical Center, LLC's (Trident) be declared void; that Trident be required to cease operation of its rehabilitation unit (Rehab Unit); and all other relief that this Court deems just and proper. For the reasons set forth below, the Court grants HealthSouth's Motion for Summary Judgment.

BACKGROUND

On June 28, 2013, DHEC Director Catherine Templeton announced that as of July 1, 2013, the agency was suspending its operation of the State's Certificate of Need (CON) program as a result of the failure of the South Carolina House of Representatives to override Governor Haley's veto of funding for the DHEC staff who administered the program.[1] In her letter, Ms.

[1] On July 1, 2013, DHEC filed an action in the original jurisdiction of the South Carolina Supreme Court asking the Court to determine whether the agency could lawfully administer the CON program as a result of the veto of the funds designated to cover the agency's costs to staff the program. On July 18, 2013, several nursing homes and hospitals, including HealthSouth, and their respective state associations (the Providers) filed a parallel action in the original jurisdiction of the Court asking the Court to declare that DHEC's suspension of the CON program was unlawful. The Providers also asked the Court to dismiss DHEC's action. The Supreme Court granted the Providers'

Templeton stated that "[s]uspending the program has the practical effect of allowing new and expanding health care facilities to move forward without the Certificate of Need process." At the time DHEC suspended the CON program, both Trident and HealthSouth had competing applications for 14 inpatient rehabilitation beds that were being reviewed by the CON Division.[2] On August 26, 2013, Trident submitted to DHEC an application to amend its license to add a 14-bed rehabilitation unit to its existing facility. In addition to its licensure application, Trident submitted schematic construction drawings to the DHEC Division of Health Facilities Construction (Construction Division).

On November 6, 2013, after receiving verbal approval from DHEC's Division of Health Facilities Construction but without a CON, Trident began renovations on a medical/surgical unit to convert it into a 14-bed Rehab Unit on its hospital campus.

On January 2, 2014, DHEC's Division of Health Facilities Construction provided written approval of Trident's final construction plans. DHEC issued final plan approval for the Rehab Unit based upon its contention that the requirement to obtain a CON for the Rehab Unit, found in the State Certification of Need and Health Facility Licensure Act and its regulations, had been repealed, suspended, or otherwise abolished by the Governor's sustained line-item veto of certain funding for the CON Program in the 2013 Appropriations Act.

On January 13, 2014, HealthSouth requested that the DHEC Board conduct a Final Review Conference to reverse the staff's approval of Trident's final construction plans. The DHEC Board declined to conduct a Final Review Conference regarding this decision. On February 10, 2014, HealthSouth filed a request for a contested case hearing asserting that because Trident did not have a CON, DHEC could not lawfully issue a final plan approval to Trident for the Rehab Unit, and Trident could not commence construction of the Rehab Unit. On February 27, 2014, HealthSouth filed a Motion to Enforce Automatic Stay pursuant to S.C. Code

---

petition for declaratory judgment (CON Declaratory Judgment Action) and the motion to dismiss DHEC's petition. *Amisub, et al. v. DHEC*, Appellate Case No. 2013-001530, September 20, 2013. The Supreme Court's online docket summarizes the case as follows: "This case is before the Court in its original jurisdiction to consider whether the South Carolina Department of Health and Environmental Control (DHEC) is required to continue administering and funding the Certificate of Need Program after the House of Representatives sustained the Governor's line-item veto of funding for the program in the 2013–2014 General Appropriations Act." Oral argument on the matter was held before the Supreme Court on March 6, 2014. On April 14, 2014, the Supreme Court ruled against DHEC. On May 22, 2014, the Supreme Court denied DHEC's Petition for Rehearing.

[2] In addition to these applicatons, Roper St. Francis HealthCare System also had an application pending for the 14 inpatient rehabilitation beds that the *South Carolina Health Plan*.identified as being needed in the greater Charleston area.

Ann § 1-23-600(H)(2) (Supp. 2013). On March 4, 2014, Trident filed a Motion to Dismiss or, in the Alternative, Motion to Lift the Automatic Stay. On March 10, 2014, HealthSouth filed an amended request for a contested case hearing asserting the additional claim that the Rehab Unit cannot be licensed because Trident commenced construction before receiving final plan approval or other written permission to commence construction from DHEC.

In its March 26, 2014 order, this Court granted HealthSouth's Motion to Enforce the Automatic Stay and denied Trident's Motion to Dismiss. Also on March 26, 2014, the Court held a telephonic hearing regarding Trident's Motion to Permit DHEC to Issue a License to Trident (Licensure Motion) subject to certain limitations. The Court granted Trident's Licensure Motion in a March 27, 2014 order and scheduled a hearing on Trident's Motion to Lift the Automatic Stay. Before the Court ruled on Trident's Motion to Lift the Automatic Stay, the South Carolina Supreme Court handed down its decision in *Amisub* on April 14, 2014. In light of the Supreme Court's decision, HealthSouth filed this Motion for Summary Judgment and Trident filed a Response and Request for Stay.[3] On May 6, 2014, this Court granted Trident's Request for Stay pending the Supreme Court's decision on the Petition for Rehearing filed in the *Amisub* case.[4] On May 22, 2014, the Supreme Court denied the Petition for Rehearing in *Amisub*. Therefore, this Court lifts its stay and now considers HealthSouth's Motion for Summary Judgment.

STANDARD OF REVIEW

Rule 68, SCALCR provides that "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules." Rule 56(c), SCRCP provides that a trial court may grant a motion for summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

---

[3] Trident also requested a hearing on its response and request with a court reporter present. However, the Court is sufficiently apprised of the arguments on both sides of this case and does not consider a hearing necessary. Therefore, Trident's request for a hearing was denied.

[4] In its Order Granting Trident's Request for Stay, the Court rejected all of Trident's other grounds for a stay.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). However, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001).

DISCUSSION

In its Motion, HealthSouth argues that the Supreme Court's decision in *Amisub* confirms that the reasoning underlying DHEC's licensure of Trident's Rehab Unit is erroneous as a matter of law, that the issuance of a CON is a prerequisite to the licensing of Trident's Rehab Unit, and that summary judgment in HealthSouth's favor is therefore appropriate. In its response to HealthSouth's Motion, Trident argues that it relied on DHEC's representation, via Catherine Templeton's June 28, 2013 letter, that the State's CON program had been suspended when it submitted an amended license application to add 14 beds to its hospital facility in North Charleston on August 26, 2013. Trident also argues that it relied on the verbal approval of DHEC Division of Health Facilities Construction (Construction Division) on November 6, 2013, to begin construction on the 14-bed Rehab Unit as well as the written approval of Trident's final construction plans on January 2, 2014.

The Court rejects Trident's detrimental reliance argument. In *Texaco, Inc. v. Wasson*, the South Carolina Supreme Court explained that the Department was not estopped from assessing additional taxes based on the use of an improper accounting method even though Department employees had expressly and in writing authorized the taxpayer to use that method "until such time as the South Carolina Tax Commission grants permission to change such method." 269 S.C. 255, 264-65, 237 S.E.2d 75, 79 (1977). Similarly, in *TNS Mills, Inc. v. S.C. Dep't of Revenue*, the taxpayer contended that the Department had the authority to grant a property tax exemption retroactively. Its contention was based in part on a memorandum prepared and issued

by a Department employee opining that a recently-enacted statute gave the Department authority to accept exemption applications at any time. The South Carolina Supreme Court rejected that contention, holding instead that "[a]lthough [the employee] believed the Department had the authority to grant retroactive exemptions, and exemptions may have been granted under this erroneous view, neither the Commission nor the courts are bound by his erroneous interpretation." 331 S.C., 611, 621-22, 503 S.E.2d, 471, 477 (1998); *see also S.C. Coastal Council v. Vogel*, 292 S.C. 449, 357 S.E.2d 187 (Ct. App. 1987) ("The public cannot be estopped ... by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment."); *Quail Hill*, 387 S.C. at 236, 692 S.E.2d at 506 ("A governmental body is not immune from the application of the doctrine of estoppel *where its officers or agents act within the proper scope of their authority ... The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.*") (italics in original) (quoting *DeStefano v. City of Charleston*, 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991)). The Supreme Court in *Quail Hill* affirmed that the government was not estopped from contesting erroneous statements made by its staff. 387 S.C. at 238, 692 S.E.2d at 507 ("[W]e agree with County's argument that the RU zoning classification was a mistaken statement of law and, thus, could not be used to estop County from enforcing it.").

In this case, the director of DHEC may have said that new and expanding health care facilities could move forward without the Certificate of Need process, but her statement did not give the Department the authority to do that which the law did not authorize it to do, and therefore any reliance on that statement was not justified. *See S.C. Dep't of Natural Res. v. McDonald*, 367 S.C. 531, 534, 626 S.E.2d 816, 818 (Ct. App. 2006) ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose."). Moreover, based upon Trident's own statements at the March 7, 2014 hearing, Trident acknowledged that it was aware of the risk of an adverse decision from the Supreme Court when it began construction of its Rehab Unit. Specifically, counsel for Trident engaged in the following colloquy with the Court:

> Court: Can I ask you – You spent over two million dollars knowing that there's a case before the Supreme Court. You may say that what they're doing is improper.
>
> Counsel: Correct. They did. And the Supreme Court –

Court: Kind of a risky move, huh.

Counsel: I don't know that it's a risky move, Your Honor, other than the fact that if the Supreme Court (cough) because the Supreme Court could very well come back and say look, all of you who relied on a state agency and spent a lot of money –

Court: They could very well do a lot of things, but **they could also very well come back and say the CON program is, uh, is still in effect and still must be followed.**

Counsel: And I...And I will tell you this, Your Honor –

Court: And that's where the risky move –

Counsel: That goes into the Motion for Stay and Irreparable Harm. Because **you're right: the Supreme Court could very well come back and say, All right, everybody who took the risk, sorry – you've gotta go back and get a CON; you've gotta cease and desist – you know – whatever program you've got.** I think there's some seventy different healthcare facilities out there that have been given the go-ahead, according to the South Carolina Hospital Association, and that's in Terence VanArkel's...uh...affidavit. We've been told they can get – a lot of people are gonna be told to stop if they come back and do that, but where's the harm to HealthSouth in the interim? So, as I say, **if Trident's allowed to go forward, and the Supreme Court comes back in three months and says: Sorry, DHEC was wrong, you stop. That's three months of operations. Trident's gotta stop.** There's no harm to HealthSouth. . . .

(emphasis added).

Trident thus acknowledged that it knowingly took a risk of receiving an adverse decision from the Supreme Court when it began construction of its Rehab Unit without obtaining a CON. Therefore, even if the court could consider Trident's detrimental reliance theory, I find that Trident assumed that risk at its own peril and cannot therefore argue that it justifiably relied on DHEC. *See Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 532 S.E.2d 876 (2000) (To claim equitable estoppel, a party must show: "(1) a lack of knowledge and the means of knowledge of truth as to facts in question; (2) justifiable reliance upon the conduct of the party estopped; and (3) prejudicial change in the position of the party claiming estoppel."). But even had Trident not been aware of the risk that it faced, its detrimental reliance argument would still fail for the reasons given above.

Finally, Trident argues that the Supreme Court's decision in *Amisub* is "silent regarding those projects that have been approved and/or licensed by DHEC during the CON suspension period." I disagree.

The Supreme Court declared the following in its *Amisub* decision:

> [W]e hold that DHEC has a duty to administer the CON program, as contemplated by the CON Act, for Fiscal Year 2013–2014.
>
> * * *
>
> We have held that the permanent law mandating the CON program was not affected by House of Representatives' decision to sustain Veto 20. Under the CON Act, DHEC's responsibility to administer the CON Act is not discretionary, and thus, DHEC must comply with the CON Act—a duty that inevitably encompasses funding the CON program. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 2014 WL 1425057, at *8 (S.C. Apr. 14, 2014).

Regardless of whether the Supreme Court specifically mentioned those projects that have already been licensed, the implication of the Supreme Court's ruling is clear: because the CON program was still in effect, and DHEC could not suspend the CON program but instead was required to fund its operation, a CON was therefore always required for licensing those projects requiring one pursuant to statute. And the Supreme Court cannot retroactively make actions legal that would necessarily be illegal according to the Court's own interpretation of state law.

ORDER

IT IS THEREFORE ORDERED that HealthSouth's Motion for Summary Judgment is **GRANTED.**

IT IS FURTHER ORDERED that all DHEC licenses issued to Trident for its Rehab Unit are **VOID.**

IT IS FURTHER ORDERED that Trident must cease operation of its Rehab Unit.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

June 10, 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).

E. Harvin Belser Fair
Judicial Law Clerk

June 10, 2014
Columbia, South Carolina

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 **MOTION TO DISMISS**

Pursuant to Rule 19, ALC Rules of Procedure, and Rule 12(b)(6), SCRCP, the Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center[1] ("LMC") hereby moves to dismiss the Request for Contested Case Hearing filed by the Petitioner Sisters of Charity Providence Hospitals ("Providence") on the grounds that the Court lacks subject matter jurisdiction in this case or, in the alternative, that the untimely filing of the request for final review before the Board of Health and Environmental Control ("Board") forecloses the remedy of contested case review and prevents Providence from invoking the subject matter jurisdiction of the Court in this case.

I. BACKGROUND

The Respondent Department of Health and Environmental Control ("Department") has been designated by the General Assembly as the as the sole state agency for control and administration of the granting of Certificates of Need (CON) and the licensure of health facilities. S.C. Code Ann. § 44-7-140 (2002); *Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC*, 387 S.C. 79, 83, 690 S.E.2d 783, 785 (2010). As such, the

[1] Petitioner incorrectly names LMC in its Request for Contested Case review. The correct name of the Respondent is "Lexington County Health Services District, Inc. d/b/a Lexington Medical Center."

Department has the exclusive subject matter jurisdiction to determine whether a violation of the CON Act has occurred. *Dema v. Tenet Physician Serv. – Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 433 (2009); *Inmed Diagnostic Serv., LLC v. MedQuest Assoc., Inc.*, 358 S.C. 270, 594 S.E.2d 552 (2004). There is no private right of enforcement for alleged violations of the CON and licensing laws. *Dema*, 383 S.C. at 122, 678 S.E.2d at 434

On June 18, 2010, with no opposition from any competitor of LMC, the Department approved the establishment of a comprehensive cardiac services program at LMC. The approval of LMC's program came about as a result of an agreement between Providence and LMC that Providence would de-license one of its open heart surgery suites with the understanding that LMC would apply for a CON to provide comprehensive cardiac services to fill the need generated by the closure of Providence's surgery suite. As part of its comprehensive cardiac services program, LMC was also approved to provide therapeutic catheterization services.[2]

At the opening of its comprehensive cardiac services program, LMC utilized one surgery suite for the performance of open heart surgery and other cardiac surgery procedures and two catheterization laboratories for the performance of diagnostic and therapeutic catheterization procedures. Due to the overwhelming success of its program, LMC began planning for expansion to meet the critical needs of its patients. These plans included upfitting existing space in the hospital for use as a second open heart operating room ("2nd Open Heart Suite") and a third catheterization laboratory ("3rd Cath Lab").

Effective July 1, 2013, before LMC could begin implementing its expansion plans, the Department announced to the public and all members of the regulated community that the CON Program was suspended as a result of the failure of the House of Representatives to override

[2] LMC opened its diagnostic catheterization laboratory in February 2002, after gaining approval from the Department without opposition from any other provider.

Governor Haley's line-item veto of funding for the CON Program. The suspension of the CON program was not some mistaken pronouncement of the law by a low level government employee. The suspension of the CON Program was an action of the Department, clearly taken after due deliberation, and communicated to the world by the Director of the Department. The suspension was supported (either tacitly or expressly) by the Department's Board, which took no action to lift the suspension or halt the lawsuit brought by the Department seeking affirmation from the Supreme Court of its decision.

Because the Department is the sole agency designated to administer the CON program, from an apparent authority standpoint, every member of the regulated community had a right to rely on the Department's directive regarding administration of the CON program and the effect of the suspension. Furthermore, every member of the regulated community was on actual or constructive notice as of July 1, 2013, that projects would move forward without going through the CON review or exemption process.

In Director Templeton's memorandum advising of the suspension of the CON program, the Department affirmatively stated that it would not review any new or existing CON applications, but that its inspection and licensing activities would continue uninterrupted. The publicly posted memorandum notified providers that the suspension of the CON program would have "the practical effect of allowing new and expanding health care facilities to move forward without the Certificate of Need Process." (**Exhibit A**).

Because of the Department's suspension of the CON program and its refusal to review CON applications, LMC was not able to apply for or receive a CON for the 3rd Cath Lab or the 2nd Open Heart Suite despite its need for the facilities. Therefore, LMC proceeded with its plans to upfit and utilize already existing, licensed space as a 2nd Open Heart Suite and a 3rd Cath Lab. Although no new license application or issuance of an amended license was required by law for

the expansion, LMC notified the Department's Bureau of Health Licensing of its plans. Further, LMC advised the Division of Health Facilities Construction of the intended upfitting of space for the 3rd Cath Lab because of the minor construction involved.

On October 11, 2013, the Department performed an inspection and issued a "Report of Visit" accepting LMC's intended use of its already-licensed operating room #22 as a 2nd Open Heart Suite.[3] (**Exhibit B**). On February 21, 2014, the Department approved the Shielding Plan developed by LMC for use of imaging modalities in the 3rd Cath Lab. (**Exhibit C**). On February 25, 2014, the Department issued a Plan Approval approving the construction documents submitted by LMC with regard to upfitting existing space in the hospital to configure a 3rd Cath Lab. (**Exhibit D**). On March 20, 2014, the Department generated a Notice of Completion indicating that construction activity in the 3rd Cath Lab had been completed. (**Exhibit E**). Finally, on April 10, 2014, the Department made a scheduled visit to the 3rd Cath Lab and generated a Report of Visit finding no deficiencies in the construction and concurring in LMC's intent to begin utilization of the 3rd Cath Lab. (**Exhibit F**). Thus, having met every requirement possible, given the Department's announced policies and procedures, as of October 11, 2013 and April 10, 2014, respectively, LMC has been serving the critical and emergent needs of its cardiac patients by utilizing the 2nd Open Heart Suite and the 3rd Cath Lab on a continuing and ongoing basis.

On May 14, 2014[4], Providence filed its Request for Final Review under S.C.Code Ann. § 44-1-60 seeking Board review of the Department's reports and approvals regarding LMC's

[3] A "Report of Visit" is, as its name indicates, a report issued at the end of an inspection visit pursuant to which the Department notifies the inspected facility of any observed inconsistencies with applicable licensing standards set forth in Reg. 61-16.

[4] On April 14, 2014, the South Carolina Supreme Court, in a thirteen page opinion, determined that the Governor's veto of funding for the CON program did not act to suspend the CON law and that the Department was required to fund the program from other sources. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, __ S.C. __, 407 S.C. 583 (2014). While overturning the Department's position, the Supreme Court did not indicate that the Department's reasons for its position were frivolous, and the Court did not impose any sanctions therefore.

utilization of a 2nd Open Heart Suite and a 3rd Cath Lab in its previously approved comprehensive cardiac services program. On June 25, 2014, the Board declined to conduct a Final Review Conference on Providence's Request for Review. On July 9, 2014, Providence filed its Request for Contested Case Hearing with the Administrative Law Court ("ALC" or "Court").

LMC files this Motion to Dismiss Providence's Request for Contested Case Hearing on the grounds that (a) the Court lacks contested case subject matter jurisdiction over this matter and that (b) even if subject matter jurisdiction exists, Providence is foreclosed from invoking the jurisdiction of the Court because of the untimely filing of its Request for Final Review Conference before the Board.

II. ARGUMENT

A. Lack of Subject Matter Jurisdiction

The Court lacks subject matter jurisdiction in this case because none of the reports and approvals generated by the Department are decisions or actions of the Department for which a contested case hearing is permitted by the South Carolina Constitution or the law. "The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers." *Amisub of S.C. Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 585; 743 S.E.2d 786, 709 (2013). In S.C. Code Ann. § 1-23-600A, the General Assembly sets forth the relevant parameters of the ALC's jurisdictional powers as follows:

> An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases. . . ."

The Department of Health and Environmental Control is listed in Section 1-30-10 and is, therefore, a department of the executive branch whose decisions are subject to contested case review by the ALC. *Cf. Int'l Paper Co. v. S.C. Energy Office*, 2012 WL 7803774, at *3 (S.C. Admin. Law Judge Div.) (State Energy Office is not listed in Section 1-30-10 as a state agency for purposes of ALC contested case jurisdiction.).[5] Thus, the question before the Court is whether the Department decisions complained of by Providence give rise to a "contested case" as defined by the applicable law or by Article I, Section 22 of the South Carolina Constitution.

"Contested case" is defined in Section 1-23-505(3) as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing." In the present matter, Providence appeals several decisions of the Department, none of which involve ratemaking, price fixing, licensing or other proceedings in which Providence has any legal rights which are required to be determined after opportunity for hearing.

Section 44-7-300 of the South Carolina Code states that "[p]rior to commencing the construction or alteration of facilities required to be licensed by this department, plans and specifications must be submitted to the department for review and approval in accordance with regulations of the department." In its regulations, the Department establishes a construction plan submission scheme, with different requirements depending on the level of construction activity. *See* 3 S.C. Code Ann. Reg. 61-16, §§ 2003.1 and 2003.2.

[5] In *International Paper*, the Court also found that it would have had appellate jurisdiction over the State Energy Office decision if the petitioner had timely filed for appellate review. In the case at bar, the Court has no appellate jurisdiction over the Department. Therefore, the only relevant inquiry is whether the Court has contested case jurisdiction. *Id.*, 2012 WL 7803774, at *5.

LMC's 3rd Cath Lab involved upfitting and renovation of existing space within the hospital. LMC requested and received plan approval from the Department prior to undertaking the upfitting project as required by all of the applicable statutes and regulations. Further, the Department conducted an inspection of the final construction for the project and determined that there were no evident deficiencies. Nothing in the law or the Department's regulations requires the Department to notify third parties, such as Providence, of construction plan approvals, and no law gives third parties such as Providence the right to have a contested case hearing on decisions to approve or deny construction plans, even if they receive such notice.

Further, there is no requirement for a previously licensed hospital to apply for a new license or for issuance of an amended license when expanding an existing service such as a new open heart surgery suite or a new cath lab.[6] Rather, the Department is authorized to conduct inspections of licensed hospitals to ensure continued compliance with applicable licensing standards. *See* S.C. Code Ann. §§ 44-7-150(1) and 44-7-295.

Upon notification of LMC that it would be utilizing existing space within its hospital for new purposes, the Department in this case visited LMC to conduct inspections of the spaces to which changes were being made. No deviations from licensing standards were found, as indicated by the Reports of Visit generated by Department staff. Although these inspection activities of the Department are subject to appeal by the *licensee* (*See* S.C. Code Ann. §§ 44-7-320(A)(3) and (B)), nothing in the licensing inspection procedures affords a contested case remedy to a third party, particularly when, as here, the inspections and Reports of Visits indicated no violations.

[6] The absence of a requirement for a new or amended license is a significant difference between the case at bar and *Trident Neurosciences Ctr, LLC d/b/a HealthSouth Rehab. Hosp. of Charleston v. S.C. Dep't of Health & Envtl. Control and Trident Med. Ctr.*, 2014 WL 2708801 (S.C.Admin. Law Judge Div.). In the *HealthSouth* case, Trident Medical Center had actually applied for an amended license to operate its new rehabilitation unit. The plan approvals at issue in that case were part of the licensing process.

Section 44-1-60 provides that "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." A "license" is defined in the Administrative Procedures Act as "the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission required by law ...." S.C. Code Ann. § 1-23-310(4) (Emphasis added).

No statute or regulation requires issuance of any Reports of Visit by Department staff. Further, no statute or regulation affords a third party, such as Providence, the opportunity for a hearing as a result of the issuance of construction plan approvals or reports of visit detailing inspection activities. Because neither S.C. Code Ann. § 44-1-60 nor any other provision of the CON Act creates an opportunity for a third party to have a hearing to determine its legal rights, duties, or privileges with respect to the issuance of plan approvals or reports of visits, these decisions or actions of the Department do not give rise to a "contested case."[7]

Similarly, none of the decisions of the Department in this case form the basis of a contested case under Article I, Section 22 of the South Carolina Constitution, which provides.

> 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.

No judicial or quasi-judicial decision affecting a private right of Providence has been made by the Department with regard to issuance of the Reports of Visit for the 2nd Open Heart Suite or with regard to the plan approval and Reports of Visit for the 3rd Cath Lab.

---

[7] To the extent that Providence characterizes its Request for Contested Case Hearing as based on the decision by the Board to decline review of this matter, the Board's decision by itself cannot support contested case review. *Amisub of S.C. Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 594-595, 743 S.E.2d 796, 709 (2013).

In *South Carolina Ambulatory Surgery Centers Association v. South Carolina Worker's Compensation Commission*, 389 S.C. 380, 699 S.E.2d 146 (2010), the South Carolina Supreme Court reiterated and clarified its prior cases with regard to Article I, Section 22 as requiring "a traditional due process analysis" of whether the actions of a state agency have deprived the petitioner of its constitutionally protected interests. Specifically, *Surgery Center Association* articulates the threshold issue of an Article I, Section 22 analysis to be whether the petitioner has the requisite liberty or property interest to invoke the due process protections of that section. In other words, the Supreme Court has determined that the "private rights" protected by Article I, Section 22 are the same liberty and property rights necessary to invoke due process protections. *Id.*, 389 S.C. at 391, 699 S.E.2d at 152.

In *Surgery Center Association*, the Supreme Court found that the plaintiff surgery centers had failed to establish the requisite liberty and property interests to invoke the Article I, § 22 requirements for a contested case hearing with regard to the Workers Compensation Commission's approval of a maximum fee schedule for workers' compensation patients. The Surgery Association argued that its due process property rights were implicated by passage of the fee schedule because the Association's providers would be providing medical services to patients pursuant to the schedule. In rejecting this argument, the Court determined that the Association's interests amounted to the "mere desire for future work", which interests it determined were not sufficient to constitute property rights protected by due process. *Id.*, 389 S.C. at 392, 699 S.E.2d at 153.

Providence does not articulate in its Request for Contested Case Hearing what private rights it seeks to protect through its challenge to the Department's issuance of a construction plan approval and various reports of visit to LMC. The gist of its complaint appears to be that Providence's own cardiac program will be negatively impacted in the future because of the

Department's decision on July 1, 2014 not to enforce the CON program and its subsequent decisions with regard to LMC's 2nd Open Heart Suite and 3rd Cath Lab. Thus, Providence's interest in keeping or expanding its future business in this matter is indistinguishable from the interests of the providers in *Surgery Center Association.* For purposes of Article I, Section 22, Providence has no liberty or property interests sufficient to require a contested case hearing.

B. Providence's Request for Review was not timely filed under § 44-1-60

Even assuming (without conceding) that the Court has jurisdiction over the subject matter of this case, Providence's remedy to seek contested case review is foreclosed and the Court cannot exercise its jurisdiction because Providence failed to timely file its Request for Final Review to the Board.[8] Specifically, Providence's Request for Final Review was filed on May 14, 2014, more than fifteen days after the plan approval and Reports of Visit of the Department concerning the use of the 3rd Cath Lab and the 2nd Open Heart Suite were delivered to the applicant, LMC.[9]

Section 44-1-60(A) provides that "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." Thus, a contested case arising from the Department's action in this case must proceed as set forth in Section 44-1-60, unless some other statute applies to vary the procedure.[10]

[8] Because Providence failed to timely file with the Board, the decisions of the Department staff at issue became final and are no longer subject to review by the Board or by the ALC. See S.C. Code Ann. Section 44-1-60 (E)(2).

[9] Despite its knowledge of the suspension of the CON program and Director Templeton's memorandum indicating that new projects would be moving forward without CONs, Providence did not request to be notified of any licensing or construction decisions regarding LMC projects until April 9, 2014, when it served a letter indicating affected person status on the Department. Thus, Providence was not entitled to notice from the Department when those decisions were issued and delivered to the LMC.

[10] As discussed in Argument (A) above, there is no specific law which permits a hearing with regard to the Reports of Visit or plan approvals complained of by Providence in this case.

Section 44-1-60(E)(1) provides that:

> Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified. Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail. Notice of staff decisions for which a department decision is not required pursuant to subsection (D) must be provided by mail, delivery, or other appropriate means to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified.

Section 44-1-60 (E)(2) provides that:

> The 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 applicant, permittee, licensee, or affected person. [11]

On the face of its Request for Contested Case Review, including the exhibits thereto, Providence acknowledges the following timeline for the decisions it seeks to challenge:

> (A) On October 11, 2013, the Department performed an inspection and delivered a Report of Visit to LMC accepting LMC's intended use of its already-licensed operating room #22 as a 2nd Open Heart Suite.
>
> (B) On February 25, 2014, the Department issued a Plan Approval to LMC signing off on the construction documents submitted by LMC with regard to upfitting existing space in the hospital to configure a 3rd Cath Lab.
>
> (C) On February 21, 2014, the Department notified LMC of its approval of the Shielding Plan developed by LMC's for use of imaging modalities in the 3rd Cath Lab.
>
> (D) On March 20, 2014, the Department made an inspection and generated and delivered a Notice of Completion indicating that construction activity in the 3rd Cath Lab was complete.
>
> (E) On April 10, 2014, the Department visited the 3rd Cath Lab and generated and delivered to LMC a Report of Visit concurring in LMC's intent to begin utilization of the 3rd Cath Lab.

[11] Unlike prior versions of the Department's review procedures (*i.e.*, Regulation 61-72), Section 44-1-60(E)(2) does not contain any "knew or should have known" or actual or constructive notice requirements on the part of the party requesting review. The deadline for review is fixed as fifteen days after notice of a decision is mailed or delivered to the applicant. Rule 11(C) of the ALC Rules of Procedure does not apply to extend Providence's deadline because Rule 11 applies only to the filing of contested cases with the ALC and not to any underlying deadlines (statutes of limitation) governed by law. Further, any attempt to apply a court rule in derogation of a statutory deadline would be contrary to law. (*See, e.g., Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985) (Time for filing notice of appeal is jurisdictional and the court has no authority to extend or expand it.)

Each of the above reports and plan approvals was delivered to the applicant, LMC, on the date of issue. Providence filed its Request for Review of the above decisions with the Board on May 14, 2014, well after the decisions had become final agency decisions under the law, *i.e.*, well after the fifteen-day time frame from delivery to the applicant required by § 44-1-60. Providence was not entitled to review under § 44-1-60 because it failed to file its request within the deadline required by law.[12] Therefore, Providence is not entitled to invoke the contested case jurisdiction of this Court.[13]

CONCLUSION

For the reasons stated above, Lexington Medical Center respectfully requests that the Court grant LMC's Motion to Dismiss Providence's Request for Contested Case Hearing for lack of subject matter jurisdiction, or in the alternative, as untimely filed.

Respectfully Submitted,

David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, SC 29202
(803) 255-8000; (803) 255-8017 (fax)
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com

Attorneys for Respondent
Lexington Medical Center

Columbia, South Carolina
July 25, 2014

[12] Another significant difference between the case at bar and *Trident Neurosciences Ctr, LLC d/b/a HealthSouth Rehab. Hosp. of Charleston*, 2014 WL 2708801 (S.C.Admin. Law Judge Div.) is that HealthSouth filed its request for final review conference within fifteen days of delivery of the plan approval to Trident Medical Center.

[13] Contested cases founded on due process (Article I, § 22) claims must be brought within the time periods prescribed by statute. *See S.C. Tax Comm'n v. S.C. Tax Bd. of Rev.*, 278 S.C. 556, 299 S.E.2d 489 (1983). By its terms, Section 44-1-60 applies to all Department decisions giving rise to a contested case. Therefore, the 15-day time frame for filing applies whether jurisdiction over Providence's appeal is through statute or through Article I, Section 22.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 25, 2014, s/he caused the foregoing **MOTION TO DISMISS** to be served on all parties of record by hand delivery addressed as follows:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202

Columbia, South Carolina

Exhibit A

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director
Promoting and protecting the health of the public and the environment

June 28, 2013

Re: Certificate of Need Program

Members of the Regulated Community,

As you may know, the House of Representatives sustained Governor Haley's veto of the Certificate of Need program in the state budget. The sustained veto shows the intention of both the Executive and Legislative branches to suspend the operation of the Certificate of Need program for the fiscal year beginning July 1, 2013.

DHEC has no independent authority to expend state funds for Certificate of Need, and therefore, the veto completely suspends the program for the upcoming fiscal year. Accordingly, the Department cannot review new or existing applications for Certificate of Need as of July 1. Moreover, the Department cannot take any Certificate of Need enforcement action. Should the General Assembly restore the program in the future, the Department will not be inclined to take enforcement actions under Certificate of Need for activity that occurs during the program's suspension, unless instructed otherwise by the General Assembly. Suspending the program has the practical effect of allowing new and expanding health care facilities to move forward without the Certificate of Need process.

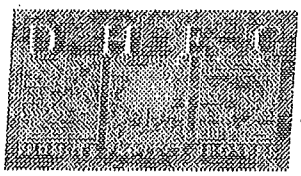
Health and safety concerns will still be addressed by DHEC's construction and licensing programs, which were not affected by the veto. The Department will continue to license and inspect health care facilities. Health care practitioners, like doctors and nurses, will continue to be licensed and regulated by their respective boards. With these protections in place, we do not believe the suspension of the Certificate of Need program presents any threat to the health, safety, and welfare of the public.

Sincerely,

Catherine Templeton

Catherine Templeton

Exhibit B



Facility Information		Audit Information	
Permit Number:	HTL-0500	Audit:	HTL ROV 20130911
Permit Type:	HL- Hospital or Institutional General Infirmary	Type:	L15 Initial Audit
Location Name:	LEXINGTON MEDICAL CENTER	Date:	10/11/2013
Address:	2720 SUNSET BLVD	Stop Date:	12/31/9999
City/State/Zip:	WEST COLUMBIA , SC , 29169-4810 , Lexington	Auditor:	Kristen Juarez
Phone:	803-791-2115	Contact Name:	MICHAEL J BIEDIGER
E-Mail:		Contact Email:	

Bureau of Health Facilities Licensing
2600 Bull St
Columbia SC 29201-1708

REPORT NOTICE: If applicable, this Report of Visit includes a detailed description of the conditions, conduct or practices that were found to be in violation of requirements. This inspection or investigation is not to be construed as a check of every condition that may exist, nor does it relieve the licensee (owner) from the need to meet all applicable standards, regulations and laws. The South Carolina Code of Laws requires this Department to establish and enforce basic standards for the licensure (permitting), maintenance, and operation of health facilities and services to ensure the safe and adequate treatment of persons served in this State. It also empowers the Department to require reports and make inspections and investigations as considered necessary. Furthermore, the Code authorizes the Department to deny, suspend, or revoke licenses (permits) or to assess a monetary penalty against a person or facility for (among other reasons), violating a provision of law or departmental regulations or conduct or practices detrimental to the health or safety of patients, residents, clients, or employees of a facility or service. If applicable to the type of report being made, the signature of the activity representative indicates that all of the items cited were reviewed during the exit discussion. If this Report of Visit is required by regulation to be made available in a conspicuous place in a public area within the facility, redaction of the names of those individuals in the report is required as provided by Sections 44-7-310 and 44-7-315 of the S.C. Code of Laws, 1976, as amended.

Report Notice

INSPECTION INFORMATION

Permission is hereby given to occupy Operating Room #22 to be utilized/designated for Open Heart Surgery.

The Department filed a petition on July 1, 2013, with the SC Supreme Court seeking a declaratory ruling as to the effect of the General Assembly's failure to appropriate funds to the Department for the administration of the CON program. Should the General Assembly restore the CON program in the future, or should the court determine the program is not suspended, the Department will not take action to revoke any license issued during the suspension period for a facility or service for which the Act requires CON review, unless otherwise instructed by the General Assembly or Judiciary. Please 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.

Is this an On-Site Visit?	YES
Select the Type of Inspection to be Performed:	HTL General Inspection
What Date Did the Auditor Arrive at the Facility?	10/11/2013
What Time Did the Auditor Arrive at the Facility?	9:00:31 AM
Licensed Capacity:	384
Current Census:	295
Facility Administrator:	Michael Biediger
Enter the name and title of the Facility/Activity Representative for this Report of Visit.	Michael Biediger
	YES

RECORD 000211

Is the Current Facility/Activity Administrator the same as the Administrator of Record?	
Are there any other individuals accompanying the auditor for this visit? • Sonya Turner and Lavonne Martin	YES
DHEC 0282 (05/2010) AUDIT - [Records Retention Schedule #SBH-F&S-17]	Retention
PROTECTED INFORMATION	
Is this information CONFIDENTIAL? This section names or identifies certain individuals related to cited violations. If you identify by name any patient, client, resident, or participant, you must check 'YES' by CONFIDENTIAL. Otherwise, check 'NO.' (The names of facility/activity staff members are NOT considered CONFIDENTIAL. If required for the audit, list the names of staff members in the citation.)	NO

Exhibit C

Dale Thompson

From: Brooks Williams
Sent: Friday, February 21, 2014 12:33 PM
To: Dale Thompson; Jason Jones; Cynthia Greene
Cc: Yu, Kevin (GE Healthcare)
Subject: FW:

SC DHEC has approved the Shielding Plan for Cath. Lab 3. See below.

Brooks Williams, LEED AP
Construction Project Manager
Lexington Medical Center
2720 Sunset Blvd.
West Columbia, SC 29169
Phone: (803) 791-2217
Cell: (803)-518-3112

From: Tracy Schening [mailto:sdpc98@hotmail.com]
Sent: Friday, February 21, 2014 12:29 PM
To: Brooks Williams
Subject:

The shielding has been approved.

Lexington Medical Center Cath Lab 3: Log # 1081690

Exhibit D

February 25, 2014

Plan Approval - DHFC

Facility Information		Audit Information	
Facility License Number:	HTL-0500	Audit Name:	DHFC Project Plan Approval 20131114
Facility Name:	LEXINGTON MEDICAL CENTER	Type:	L20 Construction Project
Facility Address 1:	2720 SUNSET BLVD	End Date:	2/25/2014
Permit Type:	HL- Hospital or Institutional General Infirmary	DHFC Staff Name:	Walter Stellpflug
		DHEC Project Number:	361500
Facility City/State/Zip:	WEST COLUMBIA, SC 29169-4810 Lexington		
Phone 1:	803-791-2115		
Contact Name:	MICHAEL J BIEDIGER		
Contact Phone:	803-791-2000		

Health Regulation Memorandum

This office has completed a final check of the above referenced project; based on the applicable codes and minimum standards, the construction documents are approved. Walter Stellpflug, DHEC, Division of Health Facilities Construction (DHFC).

Notice PPA

Plan Approval Information	Plan Approval Data
	Report Notice

Division of Health Facilities Construction
2600 Bull St
Columbia SC 29201-1708

PROJECT PLAN APPROVAL: This office has completed a final check of the below referenced project; based on the applicable codes and minimum standards, the construction documents are approved.

The examination of the submitted documents does not relieve the Owner, Architect/Engineer, and Contractor, or their representatives from individual or collective responsibility to comply with the applicable codes and regulations. This review is not to be construed as a check of every item in the submitted documents and does not prevent authorities from hereafter requiring corrections of errors in plans or construction.

Please keep this office informed in writing of the start of construction , progress of construction (at each 10% completion point), and to any developments (e.g. addendums, change orders, etc.). Inspections are required for this project.

Please post the Construction Project Information Form(s) in a conspicuous location. If you have any questions concerning construction of your facility, please do not hesitate to contact me at (803) 545-4215.

Project Plan Approval

Plan Approval Information	Plan Approval Data
Design Professional (Name, Firm, Address, Contact Info):	Design

Comments

- *Perkins + Will*
  330 S. Tryon Street
  Charlotte, NC
  Architect Contact: Ms. Julie Mullen/ Mr. David Harrison
  Tel: 704-972-5655/ 704-972-5632
  Email: julie.mullen@perkinswill.com
  Email: david.harrison@perkinswill.com

  Owner Contact: Mr. Brooks Williams
  Tel: 803-791-2217

Professionals Information

Project Information:
Comments

- *Lexington Medical Center- Cath Lab 3*
  Drawings dated 02/12/14

  Project Description: Project scope shall includes but not limited to Cath Lab Upfit existing space including equipment room and minor renovation of control room and nearby shower room, corridor, nurse area and alcove.

Project Info:

Square Footage of Project:
Comments

- *1,669 SF*

Project Size:

Cost of Project:
Comments

- *$200,000*

Project Cost:

Additional Observations

Plan Approval Information	Plan Approval Data
Additional Observations:	N/A

Record Retention

Plan Approval Information	Plan Approval Data
DHEC 0282 (05/2010) AUDIT - [Records Retention Schedule #SBH-F&S-17]	Retention

Exhibit E

Assessment Corrections: All

Facility Information		Contact Information		Audit Information	
Permit Number:	HTL-0600			Audit Name:	DHFC Notice of Completion 20131114
Facility Name:	LEXINGTON MEDICAL CENTER			Type:	L20 Construction Project
Address:	2720 SUNSET BLVD			Start Date:	3/20/2014 1:36:05 PM
City/State/Zip:	WEST COLUMBIA, SC 29169-4810			End Date:	3/20/2014 1:36:57 PM
	Lexington			Inspector:	Mark Bishop
Phone 1:	803-791-2115			Application Version:	WebAuditor version 2.5
Contact Name:	MICHAEL J BIEDIGER				
Contact Phone:	803-791-2000				
Contact Email:					

Audit Level Notes:

1 - 7 / 7 All

NOTICE NOC

	Answer
Division of Health Facilities Construction 2600 Bull St Columbia SC 29201-1708	Report Notice

NOTICE OF COMPLETION: THE BELOW REFERENCED PROJECT/FACILITY WAS INSPECTED FOR FINAL CONSTRUCTION INSPECTION AND DETERMINED THAT THERE ARE NO KNOWN DEFICIENCIES THAT WOULD PRECLUDE THE PROJECT/FACILITY FROM LICENSURE.

Owner/Architect - Licensing will be coordinating with you to schedule a visit to license the area under the NOC scope of work.

If you have not been contacted within a week of receiving this notification, please contact the Bureau of Health Facilities Licensing: (803) 545-4370.

NOTICE OF COMPLETION

	Answer
DHFC Project Number Comments *DHEC Project # - 361500*	DHFC Project Number
CON Number(s) Comments *N/A*	CON Number(s)
Type of NOC (Phased or Completed) Comments *Completed Project*	Completed Project NOC

Notice of Completion Narrative: Comments • *Cath Lab Upfit*	Notice of Completion Information

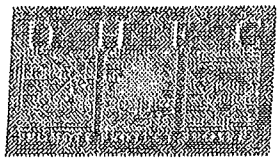
ADDITIONAL OBSERVATIONS

	Answer
Additional Observations:	N/A

RECORD RETENTION

	Answer
DHEC 0282 (05/2010) AUDIT - [Records Retention Schedule #SBH-F&S-17]	Retention

Exhibit F



Facility Information		Audit Information	
Permit Number:	HTL-0500	Audit:	HTL ROV 20131001
Permit Type:	HL- Hospital or Institutional General Infirmary	Type:	L15a Initial - Unit Increase
		Date:	04/10/2014
Location Name:	LEXINGTON MEDICAL CENTER	Stop Date:	04/10/2014
Address:	2720 SUNSET BLVD	Auditor:	Michell Hatcher
City/State/Zip:	WEST COLUMBIA , SC , 29169-4810, Lexington	Contact Name:	MICHAEL J BIEDIGER
		Contact Email:	
Phone:	803-791-2115		
E-Mail:			

Bureau of Health Facilities Licensing
2600 Bull St
Columbia SC 29201-1708

REPORT NOTICE: If applicable, this Report of Visit includes a detailed description of the conditions, conduct or practices that were found to be in violation of requirements. This inspection or investigation is not to be construed as a check of every condition that may exist, nor does it relieve the licensee (owner) from the need to meet all applicable standards, regulations and laws. The South Carolina Code of Laws requires this Department to establish and enforce basic standards for the licensure (permitting), maintenance, and operation of health facilities and services to ensure the safe and adequate treatment of persons served in this State. It also empowers the Department to require reports and make inspections and investigations as considered necessary. Furthermore, the Code authorizes the Department to deny, suspend, or revoke licenses (permits) or to assess a monetary penalty against a person or facility for (among other reasons), violating a provision of law or departmental regulations or conduct or practices detrimental to the health or safety of patients, residents, clients, or employees of a facility or service. If applicable to the type of report being made, the signature of the activity representative indicates that all of the items cited were reviewed during the exit discussion. If this Report of Visit is required by regulation to be made available in a conspicuous place in a public area within the facility, redaction of the names of those individuals in the report is required as provided by Sections 44-7-310 and 44-7-315 of the S.C. Code of Laws, 1976, as amended.

Report Notice

INSPECTION INFORMATION

A scheduled visit was made for the purpose of an initial Health Licensing inspection for a Cardiac Diagnostic and Interventional Cath Lab. A Notice of Completion dated March 20, 2014, from Health Facility Construction was recieved in Health Licensing for a Cath Lab Upfit. A walk through inspection of Cath Lab #3 was completed. All necessary equipment and supplies are present. A crash cart is present with required supplies. The oxygen, air, and suction outlets were tested and found to be functioning properly. Staff will be present in the room at all times a patient is present. Permission is granted for occupancy of Cath Lab #3.

Is this an On-Site Visit?	YES
Select the Type of Inspection to be Performed:	HTL General Inspection
What Date Did the Auditor Arrive at the Facility?	4/10/2014
What Time Did the Auditor Arrive at the Facility?	9:15:00 AM
Licensed Capacity:	414
Current Census:	378
Facility Administrator:	Michael Biedlger
Enter the name and title of the Facility/Activity Representative for this Report of Visit.	Dale Thompson, Cynthia Greene
Is the Current Facility/Activity Administrator the same as the Administrator of Record?	YES

Are there any other individuals accompanying the auditor for this visit?	NO
DHEC 0282 (03/2010) AUDIT - (Records Retention Schedule #SDH-F&S-17)	Retention
PROTECTED INFORMATION	
Is this information CONFIDENTIAL? This section names or identifies certain individuals related to cited violations. If you identify by name any patient, client, resident, or participant, you must check 'YES' by CONFIDENTIAL. Otherwise, check 'NO.' (The names of facility/activity staff members are NOT considered CONFIDENTIAL. If required for the audit, list the names of staff members in the citation.)	NO

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **LMC'S RESPONSE TO MOTION TO ENFORCE AUTOMATIC STAY**

The Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC") hereby responds to the Motion to Enforce Automatic Stay filed by the Petitioner Sisters of Charity Providence Hospitals ("Providence") and requests its denial on all of the grounds set forth below.

I. The Court lacks jurisdiction to consider Petitioner's Motion to Enforce Automatic Stay.

As more fully set forth in LMC's Motion to Dismiss pending before the Court, this Court lacks subject matter jurisdiction over this case because none of the reports of visits nor the plan approval complained of gives rise to a contested case under S.C. Code Ann. § 44-1-60 or S.C. Const. Art. I, Section 22. Under S.C. Code Ann. § 1-23-600(A), the Court's jurisdiction over the decisions of the Department of Health and Environmental Control ("Department") is limited to hearing of contested cases. Because no "contested case" exists in this matter, the Court cannot consider or address Providence's Motion to Enforce the Automatic Stay.

Further, to the extent that the Court may have subject matter jurisdiction, Providence's untimely filing of its Request for Review before the Board forecloses Providence from being able to invoke such jurisdiction in this matter. Because Providence failed to comply with the

time requirements of Section 44-1-60, Providence is foreclosed from invoking the jurisdiction of the Court over this matter, and the Court, therefore, cannot consider Providence's Motion to Enforce Automatic Stay.[1]

II. The Automatic Stay is moot and would serve no purpose in this case.

Providence seeks to "enforce" and apply the automatic stay to the Department's October 11, 2013 "Report of Visit" accepting LMC's intended use of its already-licensed operating room #22 as a 2nd Open Heart Suite and the February 25, 2014 approval of the construction documents submitted by LMC with regard to upfitting existing space in the hospital to configure a 3rd Cath Lab.[2] Under the law, neither of these documents was required by law as a prerequisite to LMC's use of the rooms in question. In the case of the approval of LMC's construction plans, that approval applied only to confirm that LMC could proceed with making certain alterations to existing space to accommodate a 3rd Cath Lab. Those alterations were completed on March 20, 2014.

The purpose of the automatic stay is to preserve the *status quo* until a decision is rendered in a contested case. Thus, it is clearly contemplated that a request for contested case hearing of a Department decision will be filed within the relatively short time requirements of the CON Act. When a party acts timely to preserve its rights, the purpose of the automatic stay is fulfilled as the relative positions of the parties remains as though no decision were rendered. In this case, the decisions of the Department have already been fully implemented and facility is utilizing the

[1] Obviously, and further, because this matter does not concern a "contested case" proceeding the automatic stay does not apply by its terms.

[2] Providence does not raise any issue with regard to the substance of the actual reports of visit or the construction plan approval generated by the Department in this case. Providence does not allege that the plans were inadequate or called for unsafe construction or that the rooms or equipment observed during the visits were not in compliance with the licensing standards set forth in Regulation 61-16. Providence's real complaint is with decision of the Department, announced on June 28, 2013, that it would not require or issue CONs for any project going forward, that it would continue licensing and inspecting such projects, and that it would not take enforcement action against any provider for its failure to possess a CON prior to implementing a project.

supplemental space on a daily basis. Therefore, any request to enforce the stay of the decisions at this point is moot.

Further, in this case, the *status quo* is that LMC has been utilizing its 2nd OR and its 3rd Cath Lab for many months and has patients scheduled for procedures in those rooms every day. Providence seeks to enforce the stay in a manner that, far from preserving the *status quo*, actually drastically alters it. The Court should decline to enforce the automatic stay in a manner contrary to its purpose, as urged by Providence. Instead, the Court should leave the *status quo* as is unless and until such time as Providence can satisfy the elements required for a temporary injunction, (including irreparable harm, no adequate remedy at law, and likelihood of success on the merit) to justify enjoining LMC's ongoing provision of cardiac services to its patients in the 2nd OR and the 3rd Cath Lab before any decision on the merits has been reached.

CONCLUSION

For the reasons stated above, Lexington Medical Center respectfully requests that the Court dismiss Providence's Motion to Enforce Automatic Stay.

Respectfully Submitted,

David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, SC 29202
(803) 255-8000; (803) 255-8017 (fax)
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com

Attorneys for Respondent
Lexington Medical Center

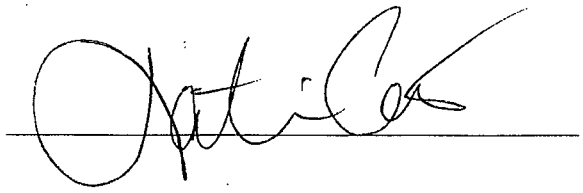
Columbia, South Carolina
August11, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 11, 2014, s/he caused the foregoing **RESPONSE TO MOTION TO ENFORCE AUTOMATIC STAY** to be served on all parties of record by hand delivery addressed as follows:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202



Columbia, South Carolina

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **LMC'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

The Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC") hereby responds to the Motion for Summary Judgment filed by the Petitioner Sisters of Charity Providence Hospitals ("Providence") and requests its denial and dismissal on all of the grounds set forth below.

I. The Court lacks jurisdiction to consider Petitioner's Motion for Summary Judgment.

As more fully set forth in LMC's Motion to Dismiss pending before the Court, this Court lacks subject matter jurisdiction over this case because none of the reports of visits nor the plan approval complained of gives rise to a contested case under S.C.Code Ann. § 44-1-60 or S.C. Const. art. I, § 22. Under S.C. Code Ann. § 1-23-600(A), the Court's jurisdiction over the decisions of the Department of Health and Environmental Control ("Department") is limited to the hearing of contested cases. Because no "contested case" exists in this matter, the Court cannot consider or address Providence's Motion for Summary Judgment.

Further, to the extent that the Court may have subject matter jurisdiction, Providence's untimely filing of its Request for Review before the Board forecloses Providence from being

able to invoke such jurisdiction in this matter.[1] Because Providence failed to comply with the time requirements of Section 44-1-60, Providence is foreclosed from invoking the jurisdiction of the Court over this matter, and, therefore, the Court cannot consider Providence's Motion for Summary Judgment.[2]

II. Summary judgment is not appropriate.

Providence filed its request for contested case hearing on July 9, 2014. On July 11, 2014, the Court issued its Notice of Assignment of this matter, triggering the beginning of the discovery process under Rule 21, RPALC. On July 24, 2014[3], prior to the commencement of any discovery activities, Providence filed its Motion for Summary Judgment seeking an order from the Court declaring that LMC was required to have a Certificate of Need prior to utilizing existing space as a second open heart surgery room ("2nd OR") and a third catheterization laboratory ("3rd Cath Lab") to provide services in its existing comprehensive cardiac services program. Neither LMC nor the Department has had the opportunity to respond to Providence's allegations raised in its Request for Contested Hearing[4], and no discovery has been commenced

[1] LMC filed its Motion to Dismiss based on (1) the timeline of events set forth in Providence's Request for Contested Case Hearing and (2) the plain requirement of Section 40-1-60 that requests for review by the Board must be filed within fifteen days of delivery of the decision to the applicant. If, over LMC's objections, the Court chooses to conduct an "actual or constructive" notice analysis, rather than following the plain and unambiguous time limitations set forth in Section 44-1-60, the jurisdictional issue will require development of the facts regarding when Providence knew or should have known of LMC's projects and whether Providence acted with due diligence to protect its alleged interests, given that notice of the suspension of the CON program was provided to Providence (and all providers) on June 28, 2013. LMC has not had the opportunity to discover what Providence knew, when it knew it, and what prompted it to finally act on April 9, 2014 (many months after it should have been aware of the suspension of the CON program). *See Snell v. Columbia Gun Exchange*, 276 S.c. 301, 303, 278 s.e.2d 333, 334 (1981)(The law requires that plaintiff act promptly and exercise due diligence to determine whether a claim exists once facts and circumstances put him on notice of a potential claim). All of these outstanding and disputed facts with regard to the threshold issue of jurisdiction would make summary judgment on the merits premature.

[2] Further, because the Certificate of Need program does not apply to this matter, Providence cannot be an "affected person" with standing under Section 44-7-130(1).

[3] Under Rule 56(a), SCRCP, a Motion for Summary Judgment cannot be filed by the petitioner until thirty (30) days after commencement of an action. Providence filed its motion within fifteen days of filing its Request for Contested Case Hearing, and, for that reason, alone, the motion is premature.

[4] On August 8, 2014, the Court issued its order for prehearing statements to be filed within fifteen days of the date of the order.

in the matter because of its recent commencement date and the pending threshold issue of jurisdiction.

Under Rule 56(c), SCRCP[5], summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In determining whether summary judgment is appropriate, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E. 2d 537, 543 (1991). Where further inquiry into the facts of the case is desirable to clarify the application of the law, summary judgment is not appropriate. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000). Moreover, summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *Id.* In cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543. "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.*

In this case, Providence moves for summary judgment by reciting numerous allegedly "undisputed" facts and by relying on *Trident Neurosciences Ctr., LLC d/b/a HealthSouth Rehab. Hosp. of Charleston v. S.C. Dep't of Health & Envtl. Control and Trident Med. Ctr.*, 2014 WL

[5] Rule 68 of the Rules of Procedure for the Administrative Law Court allows the Rules of Civil Procedure to be applied, in the Court's discretion, to matters before the Court.

2708801 (S.C.Admin. Law Judge Div.). LMC disputes both factually and legally Providence's arguments and conclusions.

Providence argues that the plain and unambiguous language of the Certificate of Need Act requires that LMC have a Certificate of Need prior to utilizing the 2nd OR to perform cardiac surgery procedures or the 3rd Cath Lab to perform diagnostic and therapeutic heart catheterizations. In support of its contention, Providence cites Section 44-7-160 (5), which provides:

> 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:
>
> * * *
>
> (5) the offering of a health service by or on behalf of a health care facility which has not been offered by the facility in the preceding twelve months and for which specific standards or criteria are prescribed in the South Carolina Health Plan....

The undisputed facts are that LMC is a "health care facility" as defined in the CON Act, which was awarded a CON and approved to provide comprehensive cardiac services, including open heart surgery and therapeutic catheterizations on June 18, 2010. LMC began offering such services in March, 2012 and has continued to offer those services through today. Further, prior to opening its comprehensive cardiac program, LMC was approved to provide diagnostic catheterization procedures in February, 2002 and has been providing those services continuously through today. (*See* Affidavit of Tod Augsburger, attached as **Exhibit "A"**).

The requirement of Section 44-7-160(5) that a healthcare facility must obtain a CON to offer "a health service . . . which has not been offered by the facility in the preceding twelve months and for which specific standards or criteria are prescribed in the South Carolina Health Plan" plainly and unambiguously **does not apply** to LMC's utilization of existing space in its facility to continue to offer the services it has offered for the preceding twelve months (and

longer).[6] Therefore, Providence's argument that Section 44-7-160(5) justifies summary judgment in its favor is not supported by the plain language of the statute itself. *See Shea v. State Dep't of Mental Retardation*, 279 S.C. 604, 611, 310 S.E.2d 819, 822 (Ct.App. 1983), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (If a statute's application is not absolutely clear as a matter of law, this question should not be decided without fully developing the facts by means of trial.)

Providence also makes further allegations in support of its request for summary judgment, all of which involve disputed facts or disputed inferences or conclusions to be drawn from the facts. For example, Providence contends that neither the Department nor LMC gave the public notice of LMC's utilization of existing space in its facility for its comprehensive cardiac services. LMC contends that no such notice was required by law.

Further, even if the CON Act applied and would have required such notice, Providence and the rest of the public were in fact given notice on June 28, 2013 that the Department was suspending the CON program and would not be publishing notices to "affected persons" regarding projects as was its practice under the CON program. Providence and the public were advised by the Director of the Department at the time that suspension of the CON program as of July 1, 2013, would have "the practical effect of allowing new and expanding health care facilities to move forward without the Certificate of Need Process." LMC and the Department were as much subject to the Freedom of Information Act on July 1, 2013, as on April 9, 2014, when Providence made the requests it claims provided it with "notice" in this case.

Providence also seeks to support its motion by referencing an eight year old proceeding before the Administrative Law Court involving LMC's original quest for a comprehensive

[6] To the extent that Providence claims that the *State Health Plan* requires that LMC obtain a Certificate of Need for the use of its existing space, LMC argues and intends to show that any such *Plan* requirements are clearly erroneous, arbitrary, capricious, and contrary to the CON Act itself. These issues will involve factual inquiry which further makes summary judgment inappropriate.

cardiac services program. In that 2006 case[7], the Court denied LMC's first CON application to provide comprehensive cardiac services.[8] As part of this argument, Providence further cites three year old "statistics" from the *State Health Plan,* which Providence claims validate the court's alleged predictions in the 2006 case that open heart surgery volumes would decline statewide resulting in a decrease in the quality of care among cardiac services programs.

Even if any of these citations had any relevance to the current case, which LMC denies, the facts and inferences raised by Providence's arguments are disputed by LMC. For example, even if *statewide* open heart surgery volumes were in a decline as of 2011, as cited by Providence, open heart surgery volumes at LMC have steadily risen. (Affidavit of Dr. Jeffrey A. Travis, attached as **Exhibit B**, and Affidavit of Tod Augsburger, **Exhibit "A"**). Further, although Providence claims that LMC's utilization of existing space to serve its existing patients will hasten the decline of quality care in all of the Midlands' heart programs, Providence and Palmetto Heart Hospital's own websites indicate that those programs continue to be recognized for their quality services.[9] LMC's program, only in its third year, also has been recognized for its quality care, having earned a "3 star" rating from the Society of Thoracic Surgeons, putting it in the top fifteen percent of hospitals nationwide in 2013. (*See* **Ex. B**). Finally, other than arguments of counsel, Providence has presented no undisputed evidence that LMC's conduct of its "3-star" rated program is irreparably harming either Providence or the public. Such assertions of fact could only be proven with qualified expert testimony.

---

[7] *Lexington Co. Health Svcs. Dist., Inc. v. S.C. Dep't of Health & Envtl. Control*, 2006 WL 2899943 (S.C.Admin. Law Judge Div.).

[8] LMC's second CON application was granted by the Department in 2010 without objection or intervention from any of its competitors.

[9] Providence's website indicates that its heart program has earned the "3 star" rating from the Society of Thoracic Surgeons for the past 13 years and is designated a "Blue Distinction Center" by BlueCross BlueShield. (*See* https://www.providencehospitals.com/health-care-services/cardiac-care/our-record/). Palmetto Heart Hospital's website indicates that it has also been designated a Blue Distinction Center for Cardiac Care® by Blue Cross Blue Shield of South Carolina. (*See* http://www.palmettohealth.org/heartbody_links.cfm?id=3834).

As part of its request for summary judgment, Providence also alleges that, because the Department lacked the authority to suspend the CON Act, as a matter of law, LMC was required to obtain a CON prior to utilizing existing space in its facility to provide already-approved services to its existing patients. As noted, whether or not the CON was "suspended," LMC disputes the contention that the CON Act required it to obtain a CON in this case.

Furthermore, to the extent that it is determined in the first instance that LMC would have been required to have a CON prior to utilizing the existing space, LMC asserts estoppel against the Department for its representations otherwise. In its motion, Providence quotes *Morgan v. S.C. Budget & Control Bd.* to support its contention that LMC could not justifiably rely on the Department's representations as follows:

> Misrepresentations by government officials acting within the proper scope of their authority may subject the government to estoppel. However, estoppel is not appropriate where a government official or employee *with limited authority erroneously provides advice beyond the scope of his authority. Estoppel will not lie against a governmental entity where a government employee gives erroneous information in contravention of statute.* Simply stated equity follows the law.

377 S.C. 313, 319, 659 S.E.2d 263, 267 (Ct.App. 2008) (Emphasis added). To the contrary, *Morgan* supports LMC's position.

The Department is by law the sole agency designated to control and administer the granting of Certificates of Need.[10] The Department's decision to interpret the failure of the General Assembly to override the Governor's veto of funding for the CON program as a legal "suspension" of the program was made and communicated to LMC by the Director of the Department. The Director of the Department clearly is authorized to speak for the Department and clearly was acting within the scope of her authority when she did so. Further, the determination not to grant Certificates of Need in light of the Governor's veto was, at the least,

[10] Pursuant to Section 44-7-140, the Department is designated the "sole state agency for control and administration of the granting of Certificates of Need and licensure of health facilities and other activities necessary to be carried out under this article."

acquiesced in by the Board through silence. The Board of the Department is a body which also speaks and acts within the scope of its authority when making representations regarding the CON program. *See County of Charleston v. Nat'l Advert. Co.*, 292 S.C. 416, 418, 357 S.E.2d 9, 10 (1987), applying estoppel against the County to prevent it from revoking permits issued in contravention of the zoning ordinance ("The interpretation given by Simmons was clearly within the scope of his authority since he is the Building Inspector and is designated in the ordinance as the official charged with its enforcement.").

"To prove estoppel against the government, the claiming party must show (1) a lack of knowledge about the truth of the matter in question, (2) justifiable reliance on the government's conduct, and (3) a prejudicial change in position." *Midlands Util., Inc. v. S.C. Dep't of Health and Envtl. Control*, 298 S.C. 66, 71, 378 S.E.2d 256, 259 (1989). In *Abbeville Arms v. City of Abbeville*, 273 S.C. 491, 494-495, 257 S.E.2d 716, 718 (1979), the Supreme Court determined that the plaintiff had met all of the required elements to estop the defendant City from enforcing the City's zoning ordinance as written because the plaintiff had checked the official zoning map, had received confirmation of his understanding of the map from the City Zoning Administrator, and had acted to his monetary detriment in reliance on the official map and the confirmation he received.

In the present case, LMC was aware of the directive regarding suspension of the CON program, but also took the further steps of meeting with the Director to receive direct assurances regarding the lack of a requirement for a CON, and working extensively with the Department's legal, construction inspection, and licensing staffs to assure compliance with all Department requirements prior to implementing its projects. These and other facts to be developed indicate that LMC's reliance of the Department's suspension of the CON program was justified.

Furthermore, unlike in the cases cited by Providence, the "incorrectness" of the Department's interpretation of the status of the Certificate of Need program in light of the veto by the Governor and the House of Representative's failure to override the veto was not *obviously* contrary to the law[11] and, therefore, could not be determined by a simple reading of the statute. When LMC acted in reliance on the authorized statements of the Director of the agency charged with issuing Certificates of Need, the Supreme Court had not yet issued its decision in *Amisub*.[12] Therefore, LMC was not on "notice" that the Department's interpretation of the state of the CON program was incorrect.

Finally, Providence attempts to support its request for a cease and desist order[13], which it argues as part of its Summary Judgment Motion, by portraying the Court's decision in the *HealthSouth* case[14] as dispositive of the issue in this case. There are a number of significant differences between these cases. Not the least of these differences is that HealthSouth timely filed its request for review by the Board, thus, allowing it to invoke the jurisdiction of the Court.

Other notable differences are that, in the *HealthSouth* case, Trident was providing a *new* service and admitted that a CON would have been required but for the Department's suspension of the program. Also, the approval of Trident's construction plans, which was the decision

---

[11] *See Jackson v. Sanford*, 398 S.C. 580, 731 S.E.2d 722 (2011).

[12] *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, __ S.C. __, 407 S.E.2d. 583 (2014).

[13] Providence has also filed a Motion to Enforce the Automatic Stay provided for in S.C. Code Ann. § 1-23-600 (H)(2), which motion seeks temporary injunctive relief pending resolution on the merits of the issues pending before the Court. LMC has filed concurrent with this memorandum, a memorandum in opposition to the Motion to Enforce the Automatic Stay. If the Court grants LMC's Motion to Dismiss or Providence's Motion for Summary Judgment, the automatic stay will be moot.

[14] *Trident Neurosciences Ctr, LLC d/b/a HealthSouth Rehab. Hosp. of Charleston*, 2014 WL 2708801.

actually challenged by HealthSouth, was a prerequisite to licensure, unlike in this case where no new or amended license was required.[15]

Finally, Trident's rehabilitation unit was not operational and serving patients when the Court enjoined its use by Trident. In this case, the Court must weigh the equities and potential harm to patients associated with enjoining the ongoing operation of LMC's cardiac services program. Thus, whether a cease and desist order is appropriate in this matter depends on the facts of this case and cannot be decided by the mere application of the *HealthSouth* holding.

CONCLUSION

Because the Court lacks jurisdiction or, in the alternative, because there are material facts and factual inferences and conclusions in dispute in this matter, and for all of the other reasons stated above, Lexington Medical Center respectfully requests that the Court deny and dismiss Providence's Motion for Summary Judgment.

Respectfully Submitted,

David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, SC 29202
(803) 255-8000; (803) 255-8017 (fax)
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com

Attorneys for Respondent
Lexington Medical Center

Columbia, South Carolina
August 11, 2014

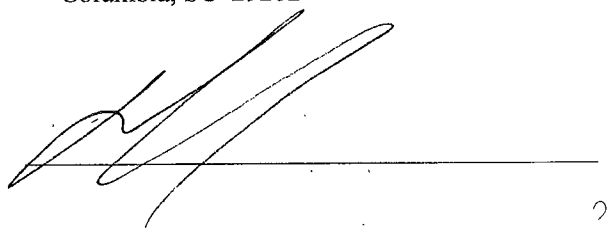
[15] In its Memorandum, Providence makes the repugnant and dangerous suggestion that, because LMC's attorneys represented Trident in the *HealthSouth* case, LMC somehow had some special duty to immediately cease and desist providing services upon the Court's issuance of the injunction in *HealthSouth*. Providence cites no authority for this proposition that a client is bound by the knowledge gained, or the positions taken, by its attorneys in the representation of unrelated third parties.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 11, 2014, s/he caused the foregoing **LMC'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT** to be served on all parties of record by hand delivery addressed as follows:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202



Columbia, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **AFFIDAVIT OF TOD AUGSBURGER**

PERSONALLY APPEARED BEFORE ME, TOD AUGSBURGER, who being duly sworn deposes and says that:

1. He is the Senior Vice President and Chief Operating Officer of the Respondent Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("LMC").

2. As part of his duties at LMC, Affiant has overseen the development, implementation, and operation of the comprehensive cardiac services program ("Program") at LMC. The Program was issued a Certificate of Need by the Department of Health and Environmental Control on June 18, 2010. LMC had previously been awarded a Certificate of Need to provide diagnostic catheterization services in February 2002. For the previous twelve months and longer, LMC has continuously provided open heart surgery services and diagnostic and therapeutic catheterization services to its patients at its main hospital facility located at 2720 Sunset Blvd., West Columbia, SC 29169.

3. Since performing its first open heart surgery procedure in March of 2012, the Program has experienced significant and consistent growth in total number of procedures each year.

4. In the fiscal year ending September 30, 2013, the Program had performed two hundred and twelve (212) open heart surgery procedures. As of the date of this Affidavit, the Program has performed 264 open heart surgery procedures for this fiscal year. Affiant expects that the Program will perform approximately three hundred (300) open heart surgery cases by the end of the current fiscal year, September 30, 2014.

5. As a result of the success and growth of the Program, physicians and administration determined that it was essential to have a second open heart surgery suite in which to perform cases. The lack of a second open heart surgery suite at LMC was beginning to create delays in the provision of timely care to LMC's patients.. Timely care is essential to the successful performance of open heart surgery and treatment of patients, especially those patients who present in an emergent state.

6. On September 25, 2013, he and the Chief Executive Officer for LMC met with Ms. Catherine Templeton, Director of the South Carolina Department of Health and Environmental Control, and others at DHEC's offices on Bull Street for the purpose of discussing LMC's need to utilize an existing operating room for open heart surgery procedures.

7. Before the meeting, LMC was aware of the Director's memorandum regarding the Department's suspension of the issuance of Certificates of Need due to the failure of the House of Representatives to override the Governor's veto of funding for the CON Program. Nevertheless, at that meeting, Affiant sought, and the Director gave, confirmation that a Certificate of Need was not necessary to utilize the existing operating room for open heart surgery procedures.

8. Therefore, Affiant, and other LMC personnel at Affiant's direction, contacted and worked with the Department's legal, construction inspection and facilities licensing staffs to

make sure that all Department requirements were met with regard to LMC's utilization of the existing operating room to perform open heart surgical procedures.

9. Similarly, several months later, Affiant, and other LMC personnel at Affiant's direction, contacted and worked with the Department's legal, construction inspection and facilities licensing staffs in the upfitting of existing space to configure a third catheterization laboratory to accommodate LMC's increasing volume of heart catheterization procedures.

FURTHER THE AFFIANT SAYETH NOT.

Tod Augsburger

Sworn to Before Me this
11th day of August, 2014

Notary Public for South Carolina
My Commission expires: 3/12/2023

Exhibit B

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc. d/b/a Lexington Medical Center, Respondents.	Docket No.: 14-ALJ-07-0332-CC **AFFIDAVIT OF JEFFREY A. TRAVIS, M.D.**

PERSONALLY APPEARED BEFORE ME, Jeffrey A. Travis, M.D., who being duly sworn, deposes and says that:

1. He is currently employed as a cardiovascular surgeon at Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC"), and in that capacity, has personal knowledge of all the matters stated in this Affidavit.

2. He is licensed to practice medicine in South Carolina. His additional credentials, certifications, and licensures are presented in the curriculum vitae, which is attached to this Affidavit as **Exhibit 1**.

3. He and Steven W. Marra, M.D., are the two cardiovascular surgeons employed by LMC to perform cardiovascular surgeries for LMC's comprehensive cardiac services program (the "Program").

4. During the fiscal year ending on September 30, 2013, he and Dr. Marra performed 212 open heart surgery procedures at LMC.

5. In his experience, approximately sixty percent of patients who ultimately require open heart surgery are presented through the Emergency Department. Approximately ninety-five percent of patients receiving cardiac surgery at LMC are diagnosed in LMC's cardiac

catheterization laboratories. Once appropriately diagnosed, patients are scheduled for surgery at LMC as soon as practical, usually within twenty-four to forty-eight hours.

6. Approximately thirty percent of open heart surgery patients require surgical procedures to be performed on an urgent or emergent basis.

7. Timely care, including surgery when needed, is critical for the safety and health of patients.

8. As the volume of patients in LMC's Program grew, he and LMC began to experience delays in scheduling surgeries because LMC had only one cardiovascular surgical suite. Such delays created the potential to prevent Program patients from receiving timely care.

9. In order to address temporarily the potential for delay in care caused by the use of only one cardiovascular surgical suite, he, the other cardiovascular surgeon, and clinical staff were required to perform surgeries later into the night and on weekends. This situation imposed a significant inconvenience on patients, their families, and on the surgeons, clinical staff and their families.

10. Because of the significant health risks and stresses associated with transfer and patient preferences, patients awaiting open heart surgery generally are not transferred to other facilities.

11. In his experience, Affiant is not aware of any other cardiovascular program that has access to only one cardiovascular surgical suite.

12. The use of the second surgical suite alleviates or prevent delays in treatment and surgery and reduces the significant inconveniences to patients, surgeons, staff and their families from night and weekend surgeries.

13. Because so few patients are transferred given the risks and given patient preferences, use of the second surgical suite is critical to operation of the Program and would likely have no significant effect on the number of open heart surgeries at other area hospitals.

14. From a quality standpoint, LMC's cardiovascular program recently earned a "3-star" rating from the Society of Thoracic Surgeons. In 2013, only fifteen percent of hospitals nationwide earned this highest distinction.

FURTHER AFFIANT SAYETH NOT.

JEFFREY A. TRAVIS, M.D.

SWORN to and subscribed before me
this 14th day of August, 2014.

Notary Public for South Carolina

My Commission expires: 3/12/2023

Exhibit 1

JEFFREY ALLEN TRAVIS, MD

Work:
Lexington Cardiovascular Surgery
2728 Sunset Blvd.
West Columbia, SC 29169

Home:
390 Yachting Rd
Lexington SC 29072

Internet: jatravis@lexhealth.org

Personal: Married – 19 years
Three children – Gracie 14
Allen 13
Sara Jane 4

Licensure: Georgia
South Carolina

Certification: National Board of Medical Examiners
American Board of Surgery
American Board of Thoracic Surgery

Hobbies: Snow skiing, Running, Soccer

WORK: Lexington Cardiovascular Surgery
2012 – Current

Columbus Cardiovascular Surgery
2005 – 2011
Interests: Valve Repair, Aortic Root Replacement, TAVR

EDUCATION:

1993 – 1997 **University of South Carolina School of Medicine**, Columbia, SC
MD – Cum laude awarded June 1997.

1989 – 1993 **Clemson University**, Clemson, SC
BS – Mathematical Sciences awarded June 1993

POST- GRADUATE:

2003 – 2005 **Wake Forest University Baptist Medical Center, Cardiothoracic Surgery**
Winston-Salem, NC
Cardiothoracic Surgery Resident

1997 – 2003 **Wake Forest University Baptist Medical Center, Department of Surgery**
Winston-Salem, NC
General Surgery Resident

1999 – 2000 **Wake Forest University Baptist Medical Center, Department of Surgery**
Winston-Salem, NC
Bradshaw Research Fellow
Directors: Randolph Geary, MD and Kimberley J. Hansen, MD

HONORS and AWARDS:

Alpha Omega Alpha Honor Medical Society, University of South Carolina School of Medicine, 1993
Bradshaw Research Fellowship, 1999 - 2000
2nd Place Resident Paper Competition, NC Chapter of ACS 2000
Resident Member of Graduate Medical Education Committee, Peer Selected
2nd Place Resident Research Day, WFUBMC – 2003
1st Place Resident Research Day, WFUBMC - 2004

RESEARCH INTERESTS AND ACTIVITIES:

Vascular wall biology, Restenosis and remodeling, Diastolic cardiac dysfunction and renovascular hypertension, Paradoxical embolus, Extracorporeal rewarming

1999 – 2000 **Wake Forest University Baptist Medical Center, Department of Surgery**
Bradshaw Research Fellow
Directors: Randolph Geary, MD; Kimberley Hansen, MD

INVITED PRESENTATIONS:

Nov 2004 Wake Forest University, Resident Research Day
"Prospective Evaluation of Plavix Administration and Bleeding After Coronary BypassSurger

Nov 2003 Wake Forest University, Resident Research Day
"Extracorporeal Rewarming in Trauma Patients"

Nov 2002 Wake Forest University, Resident Research Day
"Video-Assisted Thoracoscopic Ligation of Patent Ductus Arteriosus in 250 Consecutive Patients"

Oct 2002 Wake Forest University, General Surgery Grand Rounds
"Coronary Artery Bypass Surgery"

Sept 2002	Extracorporeal Life Support Organization, 13th Annual, Scottsdale, Az "Extracorporeal Rewarming in Trauma Patients"
Feb 2002	Southeastern Surgical Congress, Nashville, TN "Gastric Duplication Cyst Presenting In An Adult"
April 2001	Society for Clinical Vascular Surgery, 29th Annual, Boca Raton, FL "Diagnosis and Treatment of Paradoxical Embolus"
July 2000	North Carolina Chapter of American College of Surgeons, Myrtle Beach, SC "Diagnosis and Treatment of Paradoxical Embolus"
Feb 2000	Southeastern Surgical Congress, Orlando, FL "Renal Vein Thrombosis: Case Report and Brief Review"
Jan 2000	Southern Association for Vascular Surgery, 24th Annual Meeting, Tucson, AZ "Aneurysmal Degeneration and Rupture of an Aortorenal Vein Graft"
Oct 1999	Wake Forest University, Resident Research Day " Hyaluronan enhances contraction of vascular smooth muscle cells: Role of CD44"

MANUSCRIPTS AND BOOK CHAPTERS:

1. **Travis JA**, Hughes MG, Wong JM, Wagner WD, Geary RL. Hyaluronan Enhances Contraction of Collagen by Smooth Muscle Cells and Adventitial Fibroblasts : Role of CD44 and Implications for Constrictive Remodeling. *Circ Res* 2001 Jan; 88(1): 77-83.

2. **Travis JA,** Fuller S, Plonk G, Ligush J Jr., Geary RL, Hansen KJ. Diagnosis and Treatment of Paradoxical Embolus. *J Vasc Surg* 2001 Nov; 34(5): 860 – 865.

3. **Travis JA**, Hansen KJ, Miller PR, Dean RH, Geary RL. Aneurysmal degeneration and late rupture of an aortorenal vein graft: case report, review of the literature, and implications for conduit selection. *J Vasc Surg* 2000 Sept;32(3): 612-615.

4. Hansen KJ, Cherr GS, Craven TE, Motew SJ, **Travis JA**, Wong JM, Levy PJ, Freedman BI, Ligush J Jr, Dean RH; Management of ischemic nephropathy: dialysis-free survival after surgical repair. *J Vasc Surg* 2000 Sept;32(3): 472-81.

5. Motew SJ, Cherr GS, Craven TE, **Travis JA**, Wong JM, Reavis SW, Hansen KJ. Renal duplex sonography: main renal artery versus hilar analysis. *J Vasc Surg* 2000 Sept;32(3): 462-69.

6. **Travis JA**, Greene FL. Laparoscopic management of lymphomas: In: Eubanks S, Cohen RV, Younes RN, Brody F, eds. *Endosurgery for Cancer*. Austin: Landes Bioscience, 1999: 44 – 56.

7. **Travis JA**, Motew SJ, Wong J, Geary RL. Visceral embolization in an adult from a retained umbilica artery catheter. *J Vasc Surg*. Submitted.

8. Cherr GS, Motew SJ, **Travis JA**, Fingerle J, Fisher L, Brandl M, Williams JK, Geary RL. Metalloproteinase inhibition and the response to angioplasty and stenting in atherosclerotic primates. *Athero Thromb Vasc Biol* 2002 Jan; 22(1): 161-166.

9. Cherr GS, **Travis JA**, Ligush J, Plonk G, Hansen KJ, Braden G, Geary RL. Infection is an unusual but serious complication of a femoral artery catheterization site closure device. *Ann Vasc Surg* 2001 Sept; 15(5): 567 – 570.

10. Pranikoff T, Campbell BT, **Travis JA**, Hirschl RB. Differences in outcome with subspecialty care: Pyloromyotomy in North Carolina. *J Pediatr Surg* 2002 March; 37 (3) : 352-6.

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 **MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**

Petitioner Sisters of Charity Providence Hospitals ("Providence") hereby files this Memorandum in Opposition to the Motion to Dismiss filed by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center ("LMC"). For the reasons set forth herein, Providence respectfully requests that this Court deny the Motion:

BACKGROUND

The Court has before it competing dispositive motions setting forth the pertinent undisputed facts underlying these proceedings. Providence properly filed this contested case challenging the actions of LMC and the decisions of the Respondent South Carolina Department of Environmental Control ("DHEC" or "Department") to act in violation of the law. Specifically, LMC and DHEC have failed to comply with the State Certification of Need and Health Facility Licensure Act ("CON Act"), codified at S.C. Code Ann. § 44-7-110, et seq., by not requiring LMC to obtain CON approval and issuing written approvals for projects in violation of the law. In its Motion to Dismiss filed July 25, 2014, LMC presents two arguments in support of its Motion. As shown below, neither argument has merit and as a result, LMC's Motion to Dismiss should be denied.

UNDISPUTED FACTS

The grounds for Providence's entitlement to judgment as a matter of law are plainly set forth in the Motion for Summary Judgment filed on July 24, 2014. To avoid duplication, Providence will not restate the entire background set forth in the Request for a Contested Case or the Motion for Summary Judgment but will concentrate on the facts most relative to this Motion.

LMC admits in its Memorandum that it continues to illegally operate a Second Open Heart Surgery Unit and a Third Cardiac Cath Lab (collectively referred to as "CV Projects") "on a continuous and ongoing basis" despite the Supreme Court's ruling that the CON Act was never suspended. (LMC Motion to Dismiss, 4 (July 25, 2014)) Both the Surgery Unit and the Cath Lab require a Certificate of Need ("CON"), which LMC has not obtained. Prior to implementing the CV Projects, LMC officials contacted DHEC, sought approval (without an application or notice) to move forward with the projects, and obtained written permission from the Department on at least six separate occasions (all of which are attached to Providence's Motion for Summary Judgment):

- September 26, 2013: After meeting with the Department, Counsel for the Department stated in an email to LMC hospital officials the following "A licensed hospital seeking to convert a general surgery room to an open heart surgery room need not apply for an amended license. Should any new construction, additions, or major alterations to the existing hospital be involved, Section 2003 of Regulation 61-15 would require submission of plans and specifications to the Department for **review and approval**. (emphasis added) (DHEC later corrected the email to reflect Regulation 61-16)
- October 11, 2013: DHEC document states "Permission is hereby given to occupy Operating Room #22 to be utilized/designated for Open Heart Surgery."
- February 21, 2014: Internal LMC email states "SC DHEC has approved the Shielding Plan for Cath Lab 3."
- February 25, 2014: DHEC Plan Approval Document states "the construction documents are approved."
- March 20, 2014: DHEC Construction Approval.

- April 10, 2014: DHEC document states "Permission is granted for occupancy of Cath Lab #3."

Based on the documentation attached to the Motion for Summary Judgment, it cannot be disputed that LMC sought and received permission from the Department to convert an operating room to a Second Open Heart Surgery Unit and sought and received permission to construct and operate a Third Cardiac Cath Lab.

None of the actions taken by the Department in relation to the LMC CV Projects were publicized in any manner. On April 9, 2014, Providence's counsel sent a Freedom of Information Act Request ("FOIA") to LMC seeking information about the development of a third catheterization laboratory and new or renovation of existing operating rooms. On April 29, 2014, LMC delivered documents to Providence's counsel showing the actions of LMC and DHEC in developing both the Third Cardiac Cath Lab and Second Open Heart Surgery Unit. Fifteen days after receiving the information from LMC, Providence filed a Request for Final Review with the DHEC Board. On April 9, 2014, Providence sent a Notice of Affected persons letter to DHEC regarding a Third Cardiac Cath Lab and new or renovated operating rooms at LMC. DHEC never responded to the Notice of Affected Persons. The correspondence related to the FOIA and notice of affected person are attached as **Exhibit A** (excluding the documents produced by LMC through FOIA).

STANDARD OF REVIEW

LMC asserts Rule 12(b)(6), South Carolina Rules of Civil Procedure, as the basis for its right to dismissal. "A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and [the Court] must presume all well-pled facts to be true." *Gressette v. S.C. Elec. and Gas Co.*, 370 S.C. 377, 378-79, 635 S.E.2d 538, 538-39 (2006). This standard requires that every doubt be resolved in favor of Providence in order to determine

whether any valid claim for relief exists. *Dye v. Gainey*, 320 S.C. 65, 68, 463 S.E.2d 97, 99 (Ct. App. 1995) ("The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.)

ARGUMENTS

I. The Supreme Court's Decision that the CON Act was Never Suspended Affords Jurisdiction to Affected Persons to Require Compliance with the Law.

The parties and this Court must not forget that LMC's and the Department's contention that the CON Act was suspended was flatly rejected by the Supreme Court. At all times South Carolina law required compliance by the regulated community with its terms. "Under the CON Act, DHEC's responsibility to administer the CON Act is not discretionary, and thus, DHEC must comply with the CON Act . . . ." *Amisub of S.C. Inc. v. S.C. Dept. of Health and Envtl. Control*, 407 S.C. 583, 601, 757 S.E.2d 408, 418 (2014). As this Court so recently explained, "because the CON program was still in effect, and DHEC could not suspend the CON program but instead was required to fund its operation, a CON was therefore always required for licensing those projects requiring one pursuant to statute." *Trident Neurosciences Ctr., LLC v. S.C. Dept. of Health and Envtl. Control*, Docket No. 14-ALJ-17-0103-CC at 7 (S.C. Admin. Law J. Div. June 10, 2014). LMC was plainly advised by DHEC 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." (Oct. 11, 2013 DHEC Notice to LMC re: OR #22, Exhibit A to Providence's Motion for Summary Judgment.) Similarly, LMC's actions in violation of the CON Act are not outside the jurisdiction of this Court in a contested case proceeding by affected persons such as Providence. To ignore the current circumstances by foreclosing the ability of affected persons like Providence to require compliance with the law would vitiate the exact ruling of the Supreme Court on this very issue and provide the Department with the unfettered power to ignore

the law as it sees fit. Clearly such a result is contrary to the Supreme Court's recent ruling and other decisions affirming the constitutional protection to safeguard the citizens of South Carolina from unchecked agency power guaranteed by the State Constitution as explained below.

II. This Court has Subject Matter Jurisdiction over the Contested Case.

LMC's entire argument requires this court to narrowly construe the Department's actions and omissions, ignore LMC's illegal actions, and most importantly, significantly limit the right of an affected person to bring a contested case that is guaranteed by our State Constitution. "DHEC's 'Contested Case Procedures' apply *to all DHEC proceedings* in which the right to a hearing '(a) is provided by the Administrative Procedures Act; (b) is specifically required by other statutes or regulations; or (c) is required by due process under the South Carolina or United States Constitution.'" *Aiken Reg'l Med. Ctr. V. S.C. Dept. of Health and Envtl. Control*, Docket No. 99-ALJ-07-0655-CC at 3 (S.C. Admin. Law. J. Div. May 9, 2000) (emphasis in original) (quoting 25 S.C. Code Ann. Regs. 61-72 § 102 (Supp. 1999)); *see also* S.C. Code Ann. § 44-1-60(A). That DHEC and LMC failed to adhere to the requirements of the law does not deprive Providence of its right to a contested case proceeding.

(1) Subject Matter Jurisdiction Exists Under the CON Act and the APA.

LMC's first argument in support of dismissal ignores that the CON Act was never suspended and that CON cases are routinely litigated in the Administrative Law Court as a contested case under the APA and the CON Act. It is undisputed that LMC's expanded health care services required a valid CON before undertaking the covered services under the CON Act. S.C. Code Ann. § 44-7-160(4). The Department was required to ensure LMC's compliance with the law (which includes the CON Act and regulations) prior to approving the operation of the covered services. *Id.* § 44-7-290. An affected person is entitled to judicial review in a contested case proceeding in accordance with the APA. *Id.* § 44-1-60(F)(2) & (G). And that Providence is

an affected person for this project. *Id.* § 44-7-130(1). As a result, Providence contends that when the Department incorrectly advises a party in writing it can ignore a valid and enforceable statute (the CON Act), and then the party undertakes providing the covered service in violation of the law, it constitutes a decision whereby an affected person such as Providence may initiate a contested case. If this Court agrees that the Department and LMC's actions give rise to a contested case, the analysis need go no further as this Court has subject matter jurisdiction over this contested case.

(2) DHEC's Written Construction Approvals Give Rise to a Contested Case.

The licensing regulations require that construction plans and specifications by hospitals must be submitted to the Department and construction cannot commence until either approval of final construction documents or written permission is obtained from the Department. S.C. Code Ann. Regs. 61-16 § 2003(1). In the case of *Amisub of S.C., Inc. vs. S.C. Dept. of Health and Envtl. Control*, 403 S.C 576, 743 S.E.2d 786 (2013) ("*Amisub/CPN*"), the Supreme Court gave clear instructions as to the trigger when a decision by the Department gives rise to a Contested Case. The Court drew the line at whether the Department has a legal duty to issue a decision or approval. If the Department is so obligated to issue a decision or approval, jurisdiction by a contested case arises. If there is no duty, there is no jurisdiction for a contested case. In *Amisub/CPN*, the project at issue was the construction of a medical office building. As explained by the Supreme Court, certain exemptions and non-applicability determinations require a written authorization from the Department that the project in question is exempt from the CON Act. Other providers and projects do not require any Department approval or permission. Because the project in the *Amisub/CPN* case did not require any Department approval or decision and none was sought, Piedmont attempted to manufacture a decision by the Department by calling the Director of the CON program and asking her about the project. The Supreme Court rejected the

manufactured decision and drew the line at whether DHEC is obligated to make an approval or decision. Specifically, the Court stated "in each of the forgoing circumstances, *i.e.*, where there is a CON, NAD, or an exemption for which written approval is required, a formal decision emanates from DHEC for which a contested case proceeding is provided by law." (emphasis added). *Amisub,* 403 S.C at 596, 743 S.E. 2d at 797. In other words, if the Department is required to issue written approval, it is a decision giving rise to a contested case. Regulation 61-16 § 2003(1) required written permission from the Department for the LMC CV Projects.

In addition to DHEC's decision to not require a CON in violation of the law, DHEC issued six written decisions dated September 26, 2013, October 11, 2013, February 21, 2014, February 25, 2014, March 20, 2014, and April 10, 2014. Any or all of these written decisions give rise to a contested case by an affected person such as Providence. In its Memorandum, LMC concedes that LMC could have appealed DHEC's decisions regarding these licensing and construction approvals. Specifically, LMC states "these inspection activities of the Department are subject to appeal by the licensee." (LMC Motion to Dismiss, 7 (July 25, 2014)) Such an appeal would be through the contested case process. This concession recognizes that DHEC has made a written decision to which a contested case may be brought. If LMC has a right to appeal the decision, likewise, an affected person would share that same right. To limit the contested case process to only the applicant or licensee directly violates the constitutional safeguards and Section 44-1-60(F)(2), which provides that "Within thirty calendar days after the receipt of the decision an applicant, permitee, licensee, **or affected person** desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act." S.C. Code Ann. § 44-7-60(F)(2) (emphasis added).

(3) Due Process Mandates Subject Matter Jurisdiction.

Article I Section 22 of the South Carolina Constitution states

> 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 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.

S.C. Const. art. I, § 22.

The definition of contested case under the Administrative Procedures Act is as follows:

> a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges, of a party are required by law to be determined by an agency after an opportunity for hearing.

S.C. Code Ann. § 1-23-310(3). In the recent case of *Engaging and Guarding Laurens County's Env't "Eagle" vs. S.C. Dept. of Health & Envtl. Control*, 407 S.C. 334, 755 S.E.2d 444 (2014), the Supreme Court reaffirmed that a contested case in the Administrative Law Court is a mechanism to satisfy this constitutional obligation of notice and opportunity to be heard.

Providence submits that, in addition to the contested case proceedings authorized by the CON Act and the APA, due process requires this matter to fall squarely within the subject matter jurisdiction of this Court. "Administrative agencies are required to meet minimum standards of due process." *Smith v. S.C. Dept. of Mental Health*, 329 S.C. 485, 500, 494 S.E.2d 630, 638 (Ct. App. 1997). In *Stono River Envtl. Prot. Ass'n v. S.C. Dept. of Health and Envtl. Control*, 305 S.C. 90, 406 S.E.2d 340 (1991), the Supreme Court explained that "constitutional due process provisions, apart from the APA, are sufficient to confer the rights to notice and for an opportunity to be heard." *Id.* at 94, 406 S.E.2d at 342. Providence is clearly an affected person under the CON Act and regulations with a right to challenge the misconduct of LMC and the Department.

LMC and DHEC have failed to comply with the law and now seek to avoid judicial review on the basis of a lack of subject matter jurisdiction. Such an argument should clearly be denied outright. As in *Stono River*, Providence is entitled to notice and the opportunity to be heard as to the action of LMC and the Department as guaranteed by our State Constitution.

The *Surgery Center Association* case relied upon by LMC is entirely inapposite to these factual circumstances and was clearly limited in its holding. In the *Surgery Center Association* case, a trade association challenged conduct by the Workers' Compensation Commission in enacting revised payment schedules for ambulatory care centers. *S.C. Ambulatory Surgery Center Ass'n v. S.C. Workers' Comp. C'mmn*, 389 S.C. 380, 382-83, 699 S.E.2d 146, 148 (2010). As a threshold matter, to argue the *Surgery Center Association* case could have any relevance to this CON dispute between two existing health care providers and DHEC is foreclosed by the holding of the Supreme Court in *Surgery Center Association* when the Court states: "we emphasize our decision is controlled by specific statutory and regulatory provisions at issue in the instant case." *Id.* at 393, 699 S.E.2d at 153 It goes without saying that the statutory and regulatory provisions and the parties at issue in this case are very different from the workers' compensation payment concerns in *Surgery Center Association.* Moreover, the Supreme Court clearly stated: "our holding should not be construed as advocating for state agencies to exceed the authority granted to them by the General Assembly."[1] *Id.* Unlike the properly authorized conduct of the Workers' Compensation Commission in *Surgery Center Association*, DHEC had no legal authority to issue

[1] As an aside, it is offensive for LMC to compare the protected interests Providence seeks to defend with the payment challenge made in *Ambulatory Surgery Center*, and to quote the language as applicable that "mere desire for future work, however, is not sufficient to constitute a private right." *Id.* at 392, 699 S.E.2d at 153. The State of South Carolina has recognized the importance of ensuring quality health care services in this State, and specifically enacted the CON Act to, in part, prevent the unnecessary duplication of services and ensure that high quality services are provided to the citizens of South Carolina. S.C. Code Ann. § 44-7-120. The very provisions of the State Health Plan violated by LMC's conduct explains that "[u]nderutilized programs may reflect unnecessary duplication of services in an area, which may seriously compromise quality and safety of procedures and increase cost of care." *2012-2013 South Carolina Health Plan* at VIII-2 (attached as Exhibit C to Motion for Summary Judgment.) Providence is not simply seeking to protect a "mere desire for future work."

any licenses or approvals for LMC to undertake the CV Projects without first requiring LMC to obtain valid CONs. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Stono River*, at 94, 406 S.E.2d at 342. This contested case is the proper way to protect Providence's constitutional guarantee of notice and an opportunity to be heard.

III. Providence's Appeal is Timely.

LMC's remaining argument for dismissal challenges the timeliness of Providence's request for final review. It is important to note that LMC does not challenge the timeliness of Providence's request for final review upon receipt of the FOIA response from LMC's counsel on April 29, 2014. It is undisputed that Providence filed its Request for Review with the DHEC Board within 15 days after receipt of the documents in response to the FOIA request. Prior to April 29, 2014, Providence had not received any notice about LMC's Second Open Heart Surgery Unit and Third Cardiac Cath Lab. LMC's position appears to be that Providence had an obligation to ferret out the unlawful conduct of DHEC and LMC immediately upon the hidden actions occurring, and that by failing to discover the unlawful conduct in time, Providence has now lost the ability to challenge the misdeeds. LMC's argument is unavailing.

"DHEC has a duty to administer the CON program, as contemplated by the CON Act, for Fiscal Year 2013-2014." *Amisub*, 407 S.C. at 600, 757 S.E.2d at 417. Pursuant to the CON Act, LMC was required to obtain a CON prior to undertaking new cardiac services for which standards and criteria are prescribed in the South Carolina Health Plan. S.C. Code Ann. § 44-7-160(5). DHEC was required to publish notice in the State Register of an application submission, in order to allow affected persons such as Providence to participate in the review process. *Id.* § 44-7-200(D). Both LMC and DHEC failed to follow the law, in these and several other particulars and, therefore, notice was not given to Providence until April 29, 2014. This failure certainly explains

why Providence did not learn of LMC's conduct and why Providence's filing is timely. "[A]bsent a review process . . ., there is the potential for injustice where by mistake, inadvertence, surprise, neglect, fraud, or misrepresentation, DHEC makes an erroneous and/or inequitable determination." *Aiken Reg'l Med. Ctr.* 2000 WL 682164 at *5 (denying motion to dismiss challenge of affected person to non-applicability determination).

While Providence acknowledges that Section 44-1-60(E)(2) states that a decision becomes final "fifteen calendar days after notice of the staff decision has been mailed to the applicant," the Supreme Court has held the statute limiting an action runs from the date of notice. Therefore, the 15 day deadline does not run for Providence until Providence receives notice. As our Supreme Court has stated, "If time to appeal ran from the date a decision was actually made, an agency could preclude judicial review in all cases simply by concealing its decision until the [applicable time] had run." *Hamm v. S.C. Public Svc. C'mmn*, 287 S.C. 180, 336, S.E.2d 470 (1985) (finding that a literal interpretation of the deadline leads to an absurd result not intended by the legislature). LMC and DHEC chose to ignore the statutory mandates and elected not to provide notice to the public of their collusive conduct, and LMC now asks this Court to dismiss Providence's contested case on the grounds that that the scheme worked to avoid judicial review. Such a finding would be an absurd result. As in *Hamm*, Providence filed a request for review within the statutory timeline after receipt of written notice of the agency decisions. Therefore, LMC's Motion to Dismiss claiming the request for review was not timely filed should be denied.

In the event the Court is not persuaded that the timeliness of Providence's requests for review based on the arguments here, Providence submits that the Motion to Dismiss on that ground should nonetheless be denied because the "determination involves factual issues outside the scope of the pleadings and may not be resolved on a Motion to Dismiss at this time." *Id.* at 2000 WL 682164 *8.

CONCLUSION

For the reasons set forth herein, Providence respectfully requests that this Court deny the Motion to Dismiss and grant judgment in favor of Providence for the reasons set forth in the Motion for Summary Judgment.

James G. Long, III
Jennifer Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Petitioner,
Sisters of Charity Providence Hospitals

August 11, 2014
Columbia, South Carolina

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 **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Memorandum in Opposition to Motion to Dismiss** has been served on counsel of record via hand-delivery, addressed as shown below, this 11th day of August, 2014:

Ashley C. Biggers, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Attorney for Lexington County Medical Center
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

Sharon A. Wendenie

NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

EXHIBIT A

D H E C
PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director
Promoting and protecting the health of the public and the environment

South Carolina Board of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201
Telephone: (803) 898-3309 Facsimile: (803) 898-3393 Email: Lisa.Longshore@dhec.sc.gov

ACKNOWLEDGMENT OF REQUEST FOR FINAL REVIEW

TO: *Sisters of Charity Providence Hospitals, Requestors*
Ralph W. Barbier, Attorney for Requestors

Lexington Medical Center, Applicant
David B. Summer, Jr., Attorney for Applicant

Rupinderjit Grewal and Ashley C. Biggers, Attorneys for Department

FROM: *Lisa Lucas Longshore, Clerk*

RE: *Docket No. 14-RFR-18 - Construction Plan Approval for LMC to open and operate an additional Cardiac Catherization Lab and additional Open Heart Surgery Unit.*

DATE: *May 19, 2014*

A Request for Final Review of the above-referenced decision was filed on May 14, 2014. A copy of the request is attached. The Board of Health and Environmental Control will notify you by mail as to whether it will conduct a final review conference in this matter.

The Board has 60 days from the date of receipt of a Request for Final Review to conduct a final review conference. If a final review conference is scheduled, all parties will be given at least 10 calendar days' written notice of the conference.

Procedures for final review conferences and requesting further review are provided in S.C. Code Section 44-1-60. Additional information on procedures will be provided to you after the Board decides whether to conduct a final review conference in this matter.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

Parker Poe

David B. Summer, Jr.
Partner
Telephone: 803.253.8910
Direct Fax: 803.255.8017
davidsummer@parkerpoe.com

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

April 29, 2014

VIA HAND DELIVERY

Ralph W. Barbier, Esquire
Nexsen Pruet, LLC
1230 Main street, Suite 700
PO Box 2426
Columbia, SC 29202

Re: FOIA Request

Dear Ralph:

I am writing on behalf of our client, Lexington Health Services District, Inc., in response to your letter of April 9, 2014 in which you requested certain documents pursuant to the South Carolina Freedom of Information Act. I am informed by my client that the enclosed documents labeled LMC-00001 – LMC-000120 are documents that are responsive to your request.

Please feel free to contact me if you have any questions.

With best regards, I am

Sincerely,

David B. Summer, Jr.

DBSjr/ccq
Enclosures

NEXSEN|PRUET

Ralph W. Barbier
Member
Admitted In SC

April 9, 2014

VIA CERTIFIED MAIL –
RETURN RECEIPT REQUESTED

Mr. Mike Biediger, CEO
Lexington Medical Center
2720 Sunset Boulevard
West Columbia, South Carolina 29169

Re: Freedom of Information Act Request

Dear Mr. Biediger:

On behalf of our client, Sisters of Charity Providence Hospitals, we request Lexington Medical Center produce the following information pursuant to the South Carolina Freedom of Information Act:

1. A copy of all executed contracts entered into during the period January 1, 2012 to the present relating to the development of a 3rd cardiac catheterization lab, development of new operating rooms or renovation of existing operating rooms;

2. A copy of all purchase orders and/or invoices dated between January 1, 2012 to the present relating to the purchase of equipment for use in a 3rd cardiac catheterization lab, new operating rooms or existing operating rooms;

3. A copy of all correspondence with the South Carolina Department of Health and Environmental Control during the period January 1, 2012 to the present relating to the development of a 3rd cardiac catheterization lab, the development of new operating rooms or the renovation to existing operating rooms.

Very truly yours,

Ralph W. Barbier

cc: Michael French, CEO
Sisters of Charity Providence Hospitals

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

1230 Main Street
Suite 700 (29201)
PO BOX 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2004
F 803.727.1404
E RBarbier@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

NEXSEN|PRUET

Ralph W. Barbier
Member
Admitted in SC

April 9, 2014

VIA EMAIL & U.S. MAIL

thompsgw@dhec.sc.gov

Gwendolyn Thompson, Division Director
Division of Health Licensing
South Carolina Department of Health and Environmental Control
301 Gervais Street
Columbia, SC 29201

englishtl@dhec.sc.gov

Terry L. English, Manager
Health Facilities Oversight Section
South Carolina Department of Health and Environmental Control
Division of Health Licensing
301 Gervais Street
Columbia, SC 29201

shawn.stickle@dhec.sc.gov

Shawn Stickle, Division Director
Health Facilities Construction
Department of Health and Environmental Control
301 Gervais Street
Columbia, SC 29201

Re: (1) Lexington Medical Center's Development of a 3rd Cardiac Catheterization Lab;
(2) Lexington Medical Center's Development of New Operating Rooms during the Period January 1, 2012 to the Present; and
(3) Lexington Medical Center's Renovation of Existing Operating Rooms during the Period January 1, 2012 to the Present

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2004
F 803.727.1404
E RBarbier@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

Dear Ms. Thompson, Mr. English and Mr. Stickle:

As legal counsel to Sisters of Charity Providence Hospitals ("Providence"), we respectfully request that Providence be considered and notified as an "affected person" on the above referenced projects. This request is made pursuant to S.C. Code Ann. § 44-1-60. We further request that all notices be sent to me at the address provided below and to Michael French, CEO, Sisters of Charity Providence Hospitals, 2435 Forest Drive, Columbia, SC 29204. This request includes, but is not limited to, notice of all DHEC Staff decisions regarding construction plan approvals and licensure.

Very truly yours,

Ralph W. Barbier

cc: Ashley Biggers (via email) biggerac@dhec.sc.gov

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.	)	**DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S MEMORANDUM IN RESPONSE TO MOTION TO DISMISS** DOCKET NO. 14-ALJ-07-0332-CC

The Department of Health and Environmental Control ("DHEC" or "Department") submits this memorandum in response to the Lexington Medical Center's Motion to Dismiss. For the following reasons, the Motion to Dismiss should be granted.

BACKGROUND

Lexington Medical Center is a licensed hospital and provider of cardiac catheterization services and open heart surgery services in Lexington, South Carolina. As of July 1, 2013, LMC had two cardiac catheterization laboratories ("cath labs") and one open heart surgery suite, all of which were established pursuant to separate CONs issued by the Department.

On July 1, 2013, the 2013-14 Appropriations Act took effect. Following Governor Haley's veto of the line item for the CON budget, which was sustained by the SC House of Representatives, the Appropriations Act contained no funds for CON. The Department informed the regulated community in a letter dated June 28, 2013, of its belief that the lack of funding in the Appropriations Act for CON had the effect of suspending the CON program for the fiscal year. The Department filed a petition with the South Carolina Supreme Court seeking a declaratory ruling on the effect of the lack of funding for CON in the Appropriations Act, as did

a group of interested health care facilities and associations. The Supreme Court granted one of the petitions and, following a period of briefing and an oral argument, issued an opinion on April 14, 2014, finding that the Department is obligated to operate the CON program despite the lack of funding for the program in the Appropriations Act. The Supreme Court's opinion became final when it denied the Department's petition for rehearing on May 22, 2014.

LMC chose to pursue a third cath lab and a second open heart surgery unit during the period of time between issuance of the Department's June 28, 2013, letter to the regulated community and the issuance of the Supreme Court's April 14, 2014, opinion. Although neither the addition of a third cath lab nor the addition of a second open heart surgery unit required submittal of a new licensing application or issuance of an amended license, LMC notified the Department's Bureau of Health Facilities Licensing ("Licensing") of both projects. Further, since the cath lab project involved some construction, LMC notified the Department's Division of Health Facilities Construction ("DHFC") of the cath lab project.

Licensing conducted an on-site inspection of the physical area identified by LMC to be used as its second open heart surgery operating room. Licensing issued a report of visit ("ROV") on October 11, 2013, finding no violations and stating "Permission is hereby given to occupy Operating Room #22 to be utilized/designated for Open Heart Surgery." Attachment A.

DHFC reviewed construction plans and conducted an on-site inspection of the physical area identified by LMC to be used as its third cath lab. On February 25, 2014, DHFC provided LMC with a project plan approval for the up-fitting of existing space and minor renovation for a cath lab. Attachment B. DHFC issued a notice of construction completion for the project on March 20, 2014. Attachment C. On April 10, 2014, Licensing issued an ROV providing LMC with permission to occupy the space for utilization of a cath lab. Attachment D.

Providence submitted a letter to the Department dated April 10, 2014, claiming "affected person" status pursuant to Section 44-1-60 with respect to the development of new operating rooms, the renovation of existing operating rooms, and the development of a third cardiac cath lab at LMC, and requesting to be provided with notice of any staff decisions regarding construction or licensing for these projects. Providence submitted an RFR to the Board of Health and Environmental Control ("Board") challenging the projects on May 14, 2014. On June 25, 2014, the Board declined to conduct a final review conference. Providence filed a request for a contested case hearing with the ALC on July 9, 2014.

ARGUMENT

Subject matter jurisdiction is fundamental; it is the power to hear and determine cases of the general class to which the proceedings in question belong, and is determined by the Constitution and the laws of the state. *Ex parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009). The ALC is authorized by law to preside over hearings of contested cases as defined in S.C. Code Ann. § 1-23-505 or Article I, Section 22 of the South Carolina Constitution involving state agencies in which an administrative law judge is authorized by law to hear and decide cases. S.C. Code Ann. § 1-23-600(A).

The procedures for DHEC decisions "involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case" are set forth in Section 44-1-60. S.C. Code Ann. § 44-1-60(A). The procedures include an opportunity to request a final review conference before the Board and an opportunity to file a contested case hearing at the ALC.

"'Contested case' means a proceeding including, but not restricted to, rate making, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law

or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing." S.C. Code Ann. § 1-23-505(3) (Supp. 2008). A "license" is defined in the Administrative Procedures Act as "the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission required by law ...." S.C. Code Ann. § 1-23-310(4); *see also* § 1-23-505(4).

The ROVs issued by Licensing do not involve the issuance, denial, renewal, suspension, or revocation of a permit or license, nor do they involve any other action which may give rise to a contested case. No statute or regulation required issuance of the ROV by Department staff. The Department routinely conducts inspections of licensed facilities to determine compliance with applicable licensing standards, as authorized pursuant to Sections 44-7-150(1) and 44-7-295. Had the Department found violations of the licensing regulation at the time of inspection, the Department could have taken one of the actions authorized by Section 44-7-320(A)(1); that section authorizes the Department to "deny, suspend, or revoke licenses or assess a monetary penalty, or both, against a person or facility for: (a) violating a provision of this article or department regulations." Any of the actions taken pursuant to Section 44-7-320(A)(1) would constitute a department decision giving rise to a contested case. No such action was taken against LMC.

Construction plan approvals are required by law in certain circumstances. Section 44-7-300 states: "Prior to commencing the construction or alteration of facilities required to be licensed by this department, plans and specifications must be submitted to the department for review and approval in accordance with regulations of the department." Regulation 61-16, the

standards for licensing hospitals, requires submission of plans to the Department in certain circumstances. Section 2003.2[1] provides in part as follows:

> Alterations in Licensed Facilities: When alterations are contemplated that may affect life safety, preliminary drawings and specifications, accompanied by a narrative completely describing the proposed work, shall be submitted to the Department for review and approval to insure the proposed alterations comply with current safety and building standards. All alterations or renovations of a part of an existing licensed building, other than cosmetic (i.e., painting, wallpapering or carpeting) shall be made to conform with the requirements of the current editions of the building codes for construction of new facilities.

In this case, LMC received construction plan approval for the upfitting of existing space in the hospital, as it was required to do pursuant to Section 44-7-300 and Reg. 61-16. The construction plan approval signifies that the construction work performed in the area where LMC is now operating the third cardiac cath lab is in compliance with applicable construction requirements. It does not constitute a license or other form of permission required by law to operate a third cardiac cath lab. Therefore, the construction plan approval cannot form the basis for a contested case to challenge the operation of the third cardiac cath lab.

CONCLUSION

For the foregoing reasons, the ALC lacks subject matter jurisdiction, and LMC's motion to dismiss should be granted.

[Signature on following page]

[1] Reg. 61-16 was revised effective June 27, 2014. The section addressing submission of plans and specifications has been revised and re-numbered, and may now be found at Section 1903. Because the construction approvals in this case were issued prior to the date of the revision, the Department cites to Section 2003.2 in this memorandum.

Respectfully submitted,

Ashley C. Biggers, Esquire (SC Bar No.: 17225)
Vito M. Wicevic, Esquire (SC Bar No.: 100265)
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29078
P: (803) 898-3350
F: (803) 898-3367
E-mail: biggerac@dhec.sc.gov
E-mail: wicevivm@dhec.sc.gov
E-mail: presleja@dhec.sc.gov

August 11, 2014

ATTACHMENT A

Assessment Corrections: **Non-Compliant**

Facility Information / Contact Information

Permit Number: HTL-0500
Facility Name: LEXINGTON MEDICAL CENTER
Address: 2720 SUNSET BLVD
City/State/Zip: WEST COLUMBIA, SC 29169-4810
Lexington
Phone 1: 803-791-2116

Contact Name: MICHAEL J BIEDIGER
Contact Phone: 803-791-2000
Contact Email:

Audit Information

Audit Name: HTL ROV 20130911
Type: L15 Initial Audit
Start Date: 11 Oct 2013 09:00 AM
End Date: 11 Oct 2013 03:35 PM
Inspector: Kristen Juarez
Location Rep Name: Harriet Horton, VP
Application Version: MAPC 9.0.4051.21749

Audit Level Notes:

1 - 4 / 4 All

REPORT NOTICE

Bureau of Health Facilities Licensing
2600 Bull St
Columbia SC 29201-1708

	Answer	Points
Report Notice		0

REPORT NOTICE: If applicable, this Report of Visit includes a detailed description of the conditions, conduct or practices that were found to be in violation of requirements. This inspection or investigation is not to be construed as a check of every condition that may exist, nor does it relieve the licensee (owner) from the need to meet all applicable standards, regulations and laws. The South Carolina Code of Laws requires this Department to establish and enforce basic standards for the licensure (permitting), maintenance, and operation of health facilities and services to ensure the safe and adequate treatment of persons served in this State. It also empowers the Department to require reports and make inspections and investigations as considered necessary. Furthermore, the Code authorizes the Department to deny, suspend, or revoke licenses (permits) or to assess a monetary penalty against a person or facility for (among other reasons), violating a provision of law or departmental regulations or conduct or practices detrimental to the health or safety of patients, residents, clients, or employees of a facility or service. If applicable to the type of report being made, the signature of the activity representative indicates that all of the items cited were reviewed during the exit discussion. If this Report of Visit is required by regulation to be made available in a conspicuous place in a public area within the facility, redaction of the names of those individuals in the report is required as provided by Sections 44-7-310 and 44-7-315 of the S.C. Code of Laws, 1976, as amended.

INSPECTION INFORMATION

Comments: *Permission is hereby given to occupy Operating Room #22 to be utilized/designated for Open Heart Surgery.*

The Department filed a petition on July 1, 2013, with the SC Supreme Court seeking a declaratory ruling as to the effect of the General Assembly's failure to appropriate funds to the Department for the administration of the CON program. Should the General Assembly restore the CON program in the future, or should the court determine the program is not suspended, the Department will not take action to revoke any license issued during the suspension period for a facility or service for which the Act requires CON review, unless otherwise instructed by the General Assembly or Judiciary. Please 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.

	Answer	Points
Is this an On-Site Visit?	YES	0

Are there any other individuals accompanying the auditor for this visit? YES 0

Comments

- *Sonya Turner and Lavonne Martin*

RECORD RETENTION

DHEC 0282 (05/2010) AUDIT - [Records Retention Schedule #SBH-F&S-17]	Answer	Points
	Retention	0

ATTACHMENT B

February 25, 2014

Plan Approval - DHFC

Facility Information		Audit Information	
Facility License Number:	HTL-0500	**Audit Name:**	DHFC Project Plan Approval 20131114
Facility Name:	LEXINGTON MEDICAL CENTER	**Type:**	L20 Construction Project
Facility Address 1:	2720 SUNSET BLVD	**End Date:**	2/25/2014
Permit Type:	HL- Hospital or Institutional General Infirmary	**DHFC Staff Name:**	Walter Stellpflug
		DHEC Project Number:	361500
Facility City/State/Zip:	WEST COLUMBIA, SC 29169-4810 Lexington		
Phone 1:	803-791-2115		
Contact Name:	MICHAEL J BIEDIGER		
Contact Phone:	803-791-2000		

Health Regulation Memorandum

This office has completed a final check of the above referenced project; based on the applicable codes and minimum standards, the construction documents are approved. Walter Stellpflug, DHEC, Division of Health Facilities Construction (DHFC).

Notice PPA

Plan Approval Information — Plan Approval Date

Division of Health Facilities Construction
2600 Bull St
Columbia SC 29201-1708

Report Notice

PROJECT PLAN APPROVAL: This office has completed a final check of the below referenced project; based on the applicable codes and minimum standards, the construction documents are approved.

The examination of the submitted documents does not relieve the Owner, Architect/Engineer, and Contractor, or their representatives from individual or collective responsibility to comply with the applicable codes and regulations. This review is not to be construed as a check of every item in the submitted documents and does not prevent authorities from hereafter requiring corrections of errors in plans or construction.

Please keep this office informed in writing of the start of construction , progress of construction (at each 10% completion point), and to any developments (e.g. addendums, change orders, etc.). Inspections are required for this project.

Please post the Construction Project Information Form(s) in a conspicuous location. If you have any questions concerning construction of your facility, please do not hesitate to contact me at (803) 545-4215.

Project Plan Approval

Plan Approval Information — Plan Approval Date

Design Professional (Name, Firm, Address, Contact Info): Design

Professionals Information

Comments

- *Perkins + Will*
  330 S. Tryon Street
  Charlotte, NC
  Architect Contact: Ms. Julie Mullen/ Mr. David Harrison
  Tel: 704-972-5655/ 704-972-5632
  Email: julie.mullen@perkinswill.com
  Email: david.harrison@perkinswill.com

  Owner Contact: Mr. Brooks Williams
  Tel: 803-791-2217

Project Info:

Project Information:

Comments

- *Lexington Medical Center- Cath Lab 3*
  Drawings dated 02/12/14

  Project Description: Project scope shall includes but not limited to Cath Lab Upfit existing space including equipment room and minor renovation of control room and nearby shower room, corridor, nurse area and alcove.

Project Size:

Square Footage of Project:

Comments

- *1,669 SF*

Project Cost:

Cost of Project:

Comments

- *$200,000*

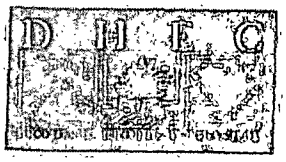
Additional Observations

Plan Approval Information	Plan Approval Date
Additional Observations:	N/A

Record Retention

Plan Approval Information	Plan Approval Date
	Retention

ATTACHMENT C



April 14, 2014

Notice of Construction Completion (NOC) - DHFC Project

Facility Information

Facility License Number:	HTL-0500
Facility Name:	LEXINGTON MEDICAL CENTER
Facility Address 1:	2720 SUNSET BLVD
Permit Type:	HL- Hospital or Institutional General Infirmary
Facility City/State/Zip:	WEST COLUMBIA, SC 29169-4810 Lexington
Phone 1:	803-791-2115
Contact Name:	MICHAEL J BIEDIGER
Contact Phone:	803-791-2000

Audit Information

Audit Name:	DHFC Notice of Completion 20131114
Type:	L20 Construction Project
End Date:	20 Mar 2014
DHFC Staff Name:	Mark Bishop

Health Regulation Memorandum

CONSTRUCTION PROJECT Accepted by Mark Bishop, DHEC, Division of Health Facilities Construction (DHFC).

Notice NOC

NOC Information

Division of Health Facilities Construction
2600 Bull St
Columbia SC 29201-1708

NOC Date
Report Notice

NOTICE OF COMPLETION: THE BELOW REFERENCED PROJECT/FACILITY WAS INSPECTED FOR FINAL CONSTRUCTION INSPECTION AND DETERMINED THAT THERE ARE NO KNOWN DEFICIENCIES THAT WOULD PRECLUDE THE PROJECT/FACILITY FROM LICENSURE.

***Owner/Architect**–Licensing will be coordinating with you to schedule a visit to license the area under the NOC scope of work.

If you have not been contacted within a week of receiving this notification, please contact the Bureau of Health Facilities Licensing, (803) 545-4370.

Notice of Completion

NOC Information

DHFC Project Number:
Comments
- *DHEC Project # - 361500*

NOC Date
DHFC Project Number

CON Number(s):
Comments
- *N/A*

CON Number(s):

Type of NOC (Phased or Completed):
Comments
- *Completed Project*

Completed Project NOC

Notice of Completion Narrative:
Comments

- *Cath Lab Upfit*

Notice of Completion Information

Additional Observations

NOC Information

Additional Observations:

NOC Data

N/A

Record Retention

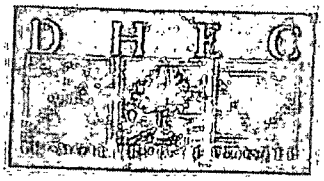
NOC Information

DHEC 0252 (05/2010) AUDIT - [Records Retention Schedule #SBH-F&S-17]

NOC Data

Retention

ATTACHMENT D



Facility Information		Audit Information	
Permit Number:	HTL-0500	**Audit:**	HTL ROV 20131001
Permit Type:	HL- Hospital or Institutional General Infirmary	**Type:**	L15a Initial - Unit Increase
Location Name:	LEXINGTON MEDICAL CENTER	**Date:**	04/10/2014
Address:	2720 SUNSET BLVD	**Stop Date:**	04/10/2014
City/State/Zip:	WEST COLUMBIA , SC , 29169-4810 , Lexington	**Auditor:**	Michell Hatcher
Phone:	803-791-2115	**Contact Name:**	MICHAEL J BIEDIGER
E-Mail:		**Contact Email:**	

Bureau of Health Facilities Licensing
2600 Bull St
Columbia SC 29201-1708

REPORT NOTICE: If applicable, this Report of Visit includes a detailed description of the conditions, conduct or practices that were found to be in violation of requirements. This inspection or investigation is not to be construed as a check of every condition that may exist, nor does it relieve the licensee (owner) from the need to meet all applicable standards, regulations and laws. The South Carolina Code of Laws requires this Department to establish and enforce basic standards for the licensure (permitting), maintenance, and operation of health facilities and services to ensure the safe and adequate treatment of persons served in this State. It also empowers the Department to require reports and make inspections and investigations as considered necessary. Furthermore, the Code authorizes the Department to deny, suspend, or revoke licenses (permits) or to assess a monetary penalty against a person or facility for (among other reasons), violating a provision of law or departmental regulations or conduct or practices detrimental to the health or safety of patients, residents, clients, or employees of a facility or service. If applicable to the type of report being made, the signature of the activity representative indicates that all of the items cited were reviewed during the exit discussion. If this Report of Visit is required by regulation to be made available in a conspicuous place in a public area within the facility, redaction of the names of those individuals in the report is required as provided by Sections 44-7-310 and 44-7-315 of the S.C. Code of Laws, 1976, as amended.

Report Notice

INSPECTION INFORMATION

A scheduled visit was made for the purpose of an initial Health Licensing inspection for a Cardiac Diagnostic and Interventional Cath Lab. A Notice of Completion dated March 20, 2014, from Health Facility Construction was recieved in Health Licensing for a Cath Lab Upfit. A walk through inspection of Cath Lab #3 was completed. All necessary equipment and supplies are present. A crash cart is present with required supplies. The oxygen, air, and suction outlets were tested and found to be functioning properly. Staff will be present in the room at all times a patient is present. Permission is granted for occupancy of Cath Lab #3.

Is this an On-Site Visit?	YES
Select the Type of Inspection to be Performed:	HTL General Inspection
What Date Did the Auditor Arrive at the Facility?	4/10/2014
What Time Did the Auditor Arrive at the Facility?	9:15:00 AM
Licensed Capacity:	414
Current Census:	378
Facility Administrator:	Michael Biediger
Enter the name and title of the Facility/Activity Representative for this Report of Visit.	Dale Thompson, Cynthia Greene
Is the Current Facility/Activity Administrator the same as the Administrator of Record?	YES

Are there any other individuals accompanying the auditor for this visit?	NO
DHEC 0282 (05/2010) AUDIT - [Records Retention Schedule #SBH-F&S-17]	Retention
PROTECTED INFORMATION	
Is this information CONFIDENTIAL? This section names or identifies certain individuals related to cited violations. If you identify by name any patient, client, resident, or participant, you must check 'YES' by CONFIDENTIAL. Otherwise, check 'NO.' (The names of facility/activity staff members are NOT considered CONFIDENTIAL. If required for the audit, list the names of staff members in the citation.)	NO

Auditor Signature: Michell Hatcher	**Account Signature:** Mike Greeley, VP Operations
Michell Hatcher M.S. BSN	Michael D Greeley

STATE OF SOUTH CAROLINA
ADMINSTRATIVE 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** **CERTIFICATE OF SERVICE**

I, Jaimie Presley Jones, with the South Carolina Department of Health and Environmental Control, do hereby certify that I have on this **11th day of August, 2014**, served a copy of ***DHEC's Memorandum in Response to Motion to Dismiss*** upon all parties and counsel of record in the above-captioned case, via Electronic Mail and United States Mail, First Class, postage prepaid, addressed as follows:

Parties of Record

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet
Post Office Drawer 2426
Columbia, SC 29201

Email: jlong@nexsenpruet.com
Email: JHollingsworth@nexsenpruet.com

Attorneys for Sisters of Charity Providence Hospitals

David B. Summer, Esquire
Parker Poe
Post Office Box 1509
Columbia, SC 29202

E-mail: davidsummer@parkerpoe.com

Attorney for Lexington Medical Center

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

By: Jaimie Presley Jones
Jaimie Presley Jones

Date: August 11, 2014

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **LMC'S REPLY TO PROVIDENCE'S RESPONSE TO MOTION TO DISMISS**

The Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC") replies to the Petitioner Sisters of Charity Providence Hospitals' ("Providence") Response to LMC's Motion to Dismiss ("Response") this matter for lack of jurisdiction as follows.

1. In its Response, Providence alleges that LMC admits in its Motion to Dismiss that LMC "continues to illegally operate a Second Open Heart Surgery Unit and a Third Cardiac Cath Lab." LMC makes no such admission and, in fact, specifically denies this allegation. As set forth in its Response to Providence's Motion for Summary Judgment, LMC disputes the applicability of the Certificate of Need statute (S.C.Code Ann. § 44-7-160(5)) to LMC's recent projects without regard to whether or not the program was "suspended" by DHEC.

2. Providence characterizes the reports of visit and the construction plan approval generated by the Department for LMC's projects as LMC's seeking and obtaining written "permission" for the Department on "at least six separate occasions." LMC denies Providence's characterization of the reports of visit and plan approval as permission. Further, LMC notes that the six occasions in question ran from September 26, 2013 to April 10, 2014, during which time

Providence, with the exercise of even the slightest due diligence, could have discovered the existence of the allegedly illegal projects.

3. Providence also alleges that neither the Department nor LMC "publicized" the projects in any manner, forcing Providence to ultimately learn of them through an apparently randomly timed Freedom of Information Act request. First, the Department, on June 28, 2013, published, through posting and other dissemination, a memorandum from Director Templeton notifying the regulated community (and the public) that, beginning July 1, 2013, the Department was not going to be processing or reviewing CON applications or issuing Certificates of Need for new or pending projects but would be continuing to inspect and license such projects. The notice specifically indicated that the Department's new policy would have "the practical effect of allowing new and expanding health care facilities to move forward without the Certificate of Need Process." (*See* **Exhibit "A"** to the Motion to Dismiss)

Thus, Providence and every other would-be "affected person" was on notice that, as of July 1, 2013, the Department would not be accepting CON applications and, hence, would not be publishing notices of projects in the *State Register* but that such projects would continue to be developed and inspected and licensed (where required) by the Department. For some reason currently known only to Providence, on April 9, 2014, Providence made a Freedom of Information Act request of LMC for information concerning any cardiac projects undertaken during the period the Department claimed the CON Program was suspended. Providence also wrote the Department and attempted to assert "affected person" status as to any cardiac projects that LMC may have undertaken. It is undisputed that both the Department and LMC are governmental entities subject to the state's Freedom of Information Act laws.

Providence offers no explanation in its Response why these actions to protect its rights as an "affected person" could not have been undertaken within a reasonable time after Providence

(and all other providers) were put on notice that contested projects would be going forward without the usual notification. Such basic and reasonable diligence would have required Providence to inquire and discover what competitive projects were going forward, as it ultimately decided to do on April 9, 2014. *See, e.g., Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct.App. 1989) ("A party cannot escape application of this [discovery] rule by claiming ignorance of the facts and circumstances, because the law also provides that if such facts and circumstances *could have been* known to the party through the exercise of ordinary care and reasonable diligence, the same result follows.") *See also, e.g., Gibson v. Bank of America, N.A.*, 383 S.C. 399, 407, 680 S.E.2d 778, 782-783 (Ct.App. 2009) ("Moreover, a simple inquiry of the co-owner of these accounts . . . would have eliminated any doubt over whether she was responsible for any of the withdrawals in question.").

4. In its Response, Providence claims that LMC contends that the CON Program was suspended during the period between July 1, 2013 and the date of the South Carolina Supreme Court decision in *Amisub*[1] LMC does not make this contention. LMC recognizes the holding in *Amisub* and acknowledges that the CON Act legally was in effect during the period mentioned. LMC does contend that the CON statute on its face does not require a Certificate of Need for the LMC projects in question and that, even if it did, the Department can be estopped from enforcing the law as to the LMC projects at this time.

5. On the face of its Request for Contested Case Hearing and in its Response to LMC's Motion to Dismiss, Providence continues to argue that the reports of visit and construction plan approval generated by the Department with respect to LMC's projects form the basis of Providence's contested case request. Yet, other than the February 25, 2014 approval of the drawing and schematics for the construction of the 3rd Cath Lab, Providence points to no law

[1] *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, __ S.C. __, 407 S.C. 583 (2014).

or regulation which requires the Department to issue any of the other written decisions allegedly complained of.[2] *See Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 743 S.E.2d 786 (2013) ("Since there was no legal duty owed by DHEC to issue a staff decision in this matter, which is the trigger giving rise to a contested case, there was no corresponding obligation that Piedmont be afforded a contested case hearing before the ALC. Accordingly, we hold Piedmont may not utilize the contested case review process where it has not been authorized by the General Assembly.").

6. Providence further mischaracterizes LMC's assertions with regard to whether any of the decisions in this matter are "appealable" by law, in other words, whether the law permits a contested case hearing on the decision. Providence claims that LMC admits that LMC could have appealed all of the decisions in this case, and, therefore, Providence, as an "affected person", must also have such appeal rights. In fact, LMC maintains that none of the decisions made by the Department are subject to appeal by third parties such as Providence. As an example, LMC references Section 44-7-320(C) for the proposition that the law specifically limits appeals of *adverse* inspection and licensing decisions to the *person or facility holding the license*. Nothing in the law allows an appeal of a decision finding no violations, and nothing in the law creates "affected person" status for third parties to contest such a decision by the Department[3]

---

[2] Reg. 61-16, Section 2003(2) requires that preliminary drawings and specifications for any contemplated alterations to a facility that may affect life safety must be submitted to the Department for review and approval to insure the proposed alterations comply with current safety and building standards. Providence admits, or at least does not challenge, that LMC submitted its preliminary drawings and specifications, was approved for construction, and subsequently completed construction in accordance with the plans. Providence's actual complaint in this case is with the decision of the Department to dispense with consideration of Certificate of Need when addressing requests for construction plan approval. As noted, Providence was aware of this Department decision on June 28, 2013.

[3] That section provides, "Should the department *determine to assess a penalty, deny, suspend, or revoke a license*, it shall send to the appropriate person or facility, by certified mail, a notice setting forth the particular reasons for the determination. The determination becomes final thirty days after the mailing of the notice, unless the person or facility, within such thirty-day period, requests in writing a contested case hearing before the board, or its designee, pursuant to the Administrative Procedures Act." (Emphasis added).

7. Finally, Providence argues that its appeal is timely in this case because it filed its Request for Review by the Board within fifteen days of receiving copies of the decisions from LMC in response to its Freedom of Information Act request. Providence acknowledges that the plain language of the law it relies on for jurisdiction establishes the deadline for appeal based on the delivery of a Department decision to the *applicant* rather than an opposing party's actual knowledge or receipt of the decision. Providence, however, cites the *Hamm*[4] case for the proposition that due process requires this Court to set aside the plain language of Section 44-1-60[5] and grant it a contested case hearing despite its failure to comply with the statute's time requirements.

In *S.C. Coastal Conserv. League v. S.C. Dep't of Health and Envtl. Control*, 390 S.C. 418, 426, 702 S.E.2d 246, 250-251 (2010), the Supreme Court rejected the applicability of *Hamm* to Section 40-1-60(E):

> The League and DHEC argue the fifteen day time period begins when a party receives notice, not when notice is deposited in the mail. Like the court of appeals, we cannot accept such an interpretation. The clear and unambiguous language in the statute provides that the staff decision becomes final "fifteen days after notice of the department decision *has been mailed* ..." Had the legislature intended for the time period to begin running from the date a party receives notice of the decision, the statute would have been drafted accordingly.

(Emphasis in original). The Court in *Coastal Conservation League* went on to find that "under the facts of this case, it is clear that the League asked to be notified of the DHEC staff decision . .

---

[4] *Hamm v. S.C. Pub. Serv. Com'n*, 287 S.C. 180, 182, 336 S.E.2d 470, 471 (1985) ("Statute controlling review of Public Service Commission decisions . . . had to be read to allow party 30 days after receiving written notice of agency decision to bring an appeal, rather than 30 days from time decision was made.").

[5] Section 44-1-60 (E)(1) and (2) provide that "Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified. Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail. Notice of staff decisions for which a department decision is not required pursuant to subsection (D) must be provided by mail, delivery, or other appropriate means to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified" and "The 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 applicant, permittee, licensee, or affected person."

. and DHEC believed the League asked to be notified." *Id.*, 390 S.C. at 428-429, 702 S.E.2d at 252. Based on this finding, that the League had asked to be notified but, in fact, was not given such notice for some length of time after the applicant's notice was mailed, the Court interpreted Section 40-1-60(E) to require simultaneous notice for the applicant and affected persons asking to be notified and, failing that, the Court interpreted the law to require the time limit to run from the last giving of notice to an affected person who had asked to be notified. *Id.*

In this case, it is undisputed that Providence did not ask to be notified of any decisions of the Department involving LMC's cardiac program until April 9, 2014, long after the decisions complained of were delivered to, and acted on by, LMC. Assuming that Section 40-1-60 applies to the decisions at issue in this case, which LMC denies, Providence did not act with due diligence and within the requirements of that law to preserve its alleged rights as an affected person in this case. Therefore, under Coastal Conservation League, cited above, Providence's attempted appeal must be dismissed as untimely.

CONCLUSION

For the reasons stated above, Lexington Medical Center respectfully requests that the Court grant its Motion to Dismiss Providence's Request for Contested Case Hearing.

Respectfully Submitted,

David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, SC 29202
(803) 255-8000; (803) 255-8017 (fax)
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com
Attorneys for Respondent
Lexington Medical Center

Columbia, South Carolina
August18, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 18, 2014, s/he caused the foregoing **Reply to Providence's Response to Motion to Dismiss** to be served on all parties of record by hand delivery addressed as follows:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202

Columbia, South Carolina

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 **REPLY IN FURTHER SUPPORT OF SUMMARY JUDGMENT**

Petitioner Sisters of Charity Providence Hospitals ("Providence") hereby files this Reply in further support of the Motion for Summary Judgment and to address issues raised by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center ("LMC") in its Response to Motion for Summary Judgment.

RESPONSE

Providence seeks only to address matters raised by LMC in its opposition to summary judgment.

A. Subject Matter Jurisdiction Exists.

LMC raises no new arguments in support of its position that subject matter jurisdiction does not exist in this Court. Though Providence fully briefed the fallacy of this position in response to LMC's Motion to Dismiss, Providence reminds the Court that LMC's position requires the Court to wholly ignore the Supreme Court's Decision in *Amisub of S.C. Inc. v. S.C. Dept. of Health and Envtl. Ctrl.*, 407 S.C. 583, 757 S.E.2d 408 (2014), *reh'g denied* (May 22, 2014), as well as this Court's application of the Supreme Court's ruling to projects pursued during the Department's purported suspension without prior CON approval in *Trident Neurosciences*

Ctr., LLC d/b/a HealthSouth Rehab. Hosp. of Charleston v. S.C. Dept. of Health and Envtl. Control, Docket No. 14-ALJ-17-0103-CC (June 10, 2014). Providence submits that LMC's position is simply without merit and the existence of subject matter jurisdiction is clear on its face. Providence further submits that the argument that the Request for Review was not timely is squarely addressed by *Hamm v. S.C. Public Svc. C'mmn*, 287 S.C. 180, 336, S.E.2d 470 (1985), where the Supreme Court refused to find a matter barred in light of the inability of the petitioner to obtain prior written notice of the decision for review. LMC does not claim that any written notice was provided by the Department or LMC, thus the deadline was May 14, 2014, fifteen days after receipt of written notice by Providence, which deadline was undisputedly complied with.

B. The CON Act Applies to LMC's Projects.

LMC baldly asserts the CON Act is not applicable to its Cardiovascular Care Projects – the opening of a second open heart surgery suite and a third cardiac catheterization laboratory – both of which have specific and comprehensive criteria and standards set forth in the South Carolina Health Plan. LMC points out an error in the briefing of Providence's Motion for Summary Judgment, for which Counsel apologizes to the Court – the proper subsection of the CON Act applicable to LMC is subsection (4) of South Carolina Code Section 44-7-160, not subsection (5).[1] Counsel does submit that the error in description has no substantive effect on the matter before the Court because it is clear that LMC's project requires a CON and a CON was required before undertaking the services and, as such, summary judgment remains appropriate.

The CON Act at Section 44-7-160(4) requires LMC to obtain a CON before undertaking "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

[1] Providence properly informed the Court and the Respondents in its Request for Contested Case Proceeding filed July 9, 2014, that the applicable provisions of the CON Act requiring LMC to first obtain a CON prior to undertaking the projects were Code Sections 44-7-160(2) and (4). *See* Req. for Contested Case Hr'g ¶ 14.

in the South Carolina Health Plan." A capital expenditure is identified in the "Plan Approval" issued by DHEC to LMC on February 25, 2014, evidencing a "Cost of Project" of $200,000. (Exhibit "B" to Providence's Motion for Summary Judgment) The applicable standards and criteria are properly briefed in the Motion for Summary Judgment, and of particular importance to the Court should be Standard 10 as to the expansion of LMC's cardiac catheterization services and Standard 7 as to the expansion of LMC's open heart surgery program, both found within Chapter VIII of the *2012-2013 South Carolina Health Plan* at pages VIII-12 and VIII-20, included as Exhibit "C" to Providence's Motion for Summary Judgment. The South Carolina Health Plan clearly states "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." *Id.* at VIII-18.

While understandably LMC grasps as straws to claim the long-standing and permanent CON laws did not apply to its covert and improper activities in substantially expanding its cardiovascular care program without any notice to affected third parties, the arguments are without merit on their face. Taking LMC's arguments to their (il)logical conclusion would entirely gut the CON Act, Regulations and the South Carolina Health Plan all promulgated thereunder, if health care providers were allowed to secretly expand services without application of the clear law to their conduct.

C. LMC Cannot Assert Estoppel Against the Department.

LMC claims in its Response that it is entitled to claim estoppel against the Department in the event it is determined the CON Act applies (as it does). LMC's argument is unavailing. In addition to significant case law on this issue, there is this Court's clear ruling in the *Trident Neurosciences* case, that estoppel is not available to health care providers who took the calculated risk to proceed with projects without prior CON approval despite the existing and applicable laws. As this Court explained, "because the CON program was still in effect, and DHEC could not

suspend the CON program but instead was required to fund its operation, a CON was therefore always required for licensing those projects requiring one pursuant to statute." *Trident Neurosciences Ctr., LLC*, at 7. LMC claims that *Morgan v. S.C. Budget & Control Bd.* is supportive of its position – it is not. While Director Templeton was authorized to speak for DHEC, she, as well as the Governor, was not and could not do what she lacked authority to do. "The authority to enact, modify, or repeal legislation lies solely within the General Assembly's broader authority." *Amisub*, 407 S.C. at 595, 757 S.E.2d at 415. As was the purported act of the Governor in seeing to repeal CON through the line item veto, the Director's attempt to suspend the program was without authority. *See id.* ("To permit the Governor to exercise her line item veto power to abolish the CON program – a program mandated by permanent law – would certainly alter and amend legislative intent.")

Director Templeton's statements claiming suspension of the CON program were clearly outside the scope of her authority. *See S.C. Dept. of Nat. Resources v. McDonald*, 367 S.C. 531, 534, 626 S.E.2d 816, 818 (Ct. App. 2006) ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.") As such, any reliance by LMC on those statements was patently unreasonable. "The public cannot be estopped . . . by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment." *DeStefano v. City of Charleston*, 304 S.C. 250, 258, 403 S.E.2d 648, 653 (1991) (quoting *S.C. Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987)).

Moreover, DHEC itself *warned* LMC *numerous times* that it made no representations as to the outcome of the already pending Petition before the Supreme Court wherein the Department sought clarification regarding the Governor's veto of program funding. In fact, and quoted, DHEC regularly advised LMC: "Please be on notice that any action by the General Assembly, the

Judiciary, or third parties challenging the validity of a project undertaken without CON approval during the program's suspension is outside the control of the Department." *See* E-Mail DHEC Counsel to Mr. Augsburger (SVP/COO LMC), Mr. Biediger, Ms. Shuster dated 9/26/13 (Exhibit "C" to Providence's Req. for Contested Case H'rg); *see also* DHEC Permission Form as to Second Open Heart Surgery Suite dated 10/11/13 (Exhibit "A" to Providence's Mem. in Supp. S.J.). Therefore, as in the matter of *Trident Neurosciences*, LMC "knowingly took a risk of receiving an adverse decision from the Supreme Court when it began construction of its [projects] without obtaining a CON." *Trident Neurosciences* at 6. This Court should reject outright any alleged defense of estoppel asserted by LMC and grant summary judgment based on the undisputed facts evidencing the requiring the LMC obtain a CON prior to undertaking the expansion of its cardiac care services as identified herein.

D. Summary Judgment is Appropriate.

"The purpose of summary judgment is to expedite disposition of case which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Bayle v. S.C. Dept. of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001). LMC claims to dispute the facts or inferences asserted in Providence's Motion for Summary Judgment. That LMC disagrees with Providence can be assumed; the question for the Court, however, is whether any "triable issues of fact exist," which Providence submits there are not. *Id.* 344 S.C. at 119, 542 S.E.2d at 738.

The undisputed material facts are these:

(1) The CON Act was never suspended and DHEC was required by law to operate the program for fiscal year 2013-2014. *Amisub.*, 407 S.C. at 603, 757 S.E.2d at 419.

(2) LMC did not obtain a CON prior to undertaking a Second Open Heart Surgery Suite or a Third Cardiac Catheterization Laboratory. (LMC's Motion. to Dismiss at 3, explaining LMC proceeded with its plans without applying for or receiving a CON)

(3) LMC expended no less than $200,000 on the construction of the projects. (Exhibit "B" to Providence's Motion for Summary Judgment)

(4) Cardiac catheterizations and open heart surgery suites are health services for which standards and criteria are prescribed in the South Carolina Health Plan. (Exhibit "C" to Providence's Motion for Summary Judgment)

(5) Neither LMC nor DHEC notified the public of the applications for licensing and/or construction submitted by LMC to DHEC. (LMC's Response to Motion for Summary Judgment ("LMC contends that no such notice was required by law."))

(6) Providence received written notice of the DHEC approvals on April 29, 2014, by FOIA response letter from counsel for LMC. (Exhibit "A" to Providence's Opposition to LMC's Motion to Dismiss)

(7) Providence filed its Request for Review with the DHEC Board on May 14, 2014. (Exhibit "A" to Providence's Opposition to LMC's Motion to Dismiss)

The Affidavits submitted by LMC in response to summary judgment do no more than lay out the analysis LMC should have undertaken in applying for a CON for the projects. Whether the alleged "success and growth" of LMC's cardiac services program warrants expansion is information for the Department to consider on review of a proper CON application – the Affidavits in no way create issues of material fact for review and decision by this Court. If LMC has a successful heart program is irrelevant to the analysis and conclusion that the program was illegally expanded and continues to operate in violation of the law. LMC should be required to

comply with the law and obtain a CON for the Second Open Heart Surgery Suite and Third Cardiac Catheterization Laboratory prior to undertaking an expansion of those services.

CONCLUSION

For the reasons set forth herein, Providence respectfully requests that this Court grant judgment in favor of Providence for the reasons set forth in the Motion for Summary Judgment and as clarified herein.

James G. Long, III
Jennifer Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Petitioner,
Sisters of Charity Providence Hospitals

August 18, 2014
Columbia, South Carolina

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 **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Reply in Further Support of Motion for Summary Judgment** has been served on counsel of record via electronic mail and hand delivery, addressed as shown below, this 18 day of August, 2014:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Faye A. Flowers, Esquire
Attorney for Lexington County Medical Center
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

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 **AMENDED CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Reply in Further Support of Motion for Summary Judgment** has been served on counsel of record via hand delivery, addressed as shown below, this 19 day of August, 2014:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Faye A. Flowers, Esquire
Attorney for Lexington County Medical Center
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

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 **PREHEARING STATEMENT FOR SISTERS OF CHARITY PROVIDENCE HOSPITALS**

Pursuant to the Order for Prehearing Statements dated August 8, 2014, Respondent, Sisters of Charity Providence Hospitals ("Providence Hospitals") submits the following:

1. The nature of this proceeding;

Sister of Charity Providence Hospitals ("Providence") brings this contested case proceeding to challenge the actions and conduct of the South Carolina Department of Health and Environmental Control ("Department" or "DHEC") and Lexington Health Services District, Inc. d/b/a Lexington Medical Center ("LMC") in the substantial expansion of LMC's cardiac care program without first applying for and obtaining the necessary and required Certificates of Need ("CON").

Specifically, LMC failed to apply for and obtain a CON to expand its cardiac catheterization program and its open heart surgery program and is now operating in violation of the law a third cardiac catheterization laboratory and a second open heart surgery suite. Pursuant to the State Certification of Need and Health Facility Licensure Act ("CON Act"), codified at South Carolina Code Section 44-7-110, *et seq.*, LMC is required to obtain a CON before

undertaking "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," and both cardiac catheterization laboratories and open heart surgery suites are clearly and specifically covered services in the South Carolina Health Plan for which specific standards and criteria are set forth. S.C. Code Ann. § 44-7-160(4); *see also* 2012-2013 South Carolina Health Plan at Chapter VIII.

As an "affected person" under the CON Act, Providence is entitled to challenge the failure of DHEC to require LMC to first obtain valid CONs before implementing the projects, as well as LMC's actions in undertaking the projects in violation of the CON Act. S.C. Code Ann. §§ 44-7-130(1); -220.

2. Statutory provision(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations;

The Court has jurisdiction over this matter under the South Carolina Administrative Procedures Act, S.C. Code Ann. § 1-23-310, *et seq.*; the State Certificate of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110, *et seq.*; the Certificate of Need for Health Facilities and Services Regulations, 24A S.C. Code Ann. Regs. 61-15, *et seq.*; and the Rules of Procedure for the Administrative Law Court.

3. The issues presented for determination, including any claims or defenses expected to be raised;

The issues for this Court include whether DHEC and LMC violated the CON Act and related laws and regulations in allowing LMC to undertake a substantial expansion of its cardiovascular care program before first applying for and obtaining valid CONs. The Record before the Court will establish beyond a preponderance of the evidence that LMC was required

to first apply for and obtain two CONs before undertaking the substantial expansion of its cardiovascular care program, to include the establishment of a third cardiac catheterization laboratory and a second open heart surgery suite. S.C. Code Ann. § 44-7-160(4). Moreover, the Department was required fund and operate the CON program pursuant to the Supreme Court's ruling in *Amisub of S.C. Inc. v. S.C. Dept. of Health and Envtl. Control*, 407 S.C. 583, 757 S.C.2d 408 (2014), *reh'g denied* (May 22, 2014). Any conduct by the Department outside the scope of its authority allowing providers like LMC to act with impunity of the CON Act does not render LMC's conduct immune to the requirements of the CON Act. *See Trident Neurosciences Ctr., LLC v. S.C. Dept. of Health and Envtl. Control*, Docket No. 14-ALJ-17-01013-CC (S.C. Admin. Law J. Div. June 10, 2014).

Providence expects LMC to proffer certain defenses, none of which overcome the *prima facie* case to be put forth by Providence. Specifically, LMC asserts that Providence "should have known" to inquire as to illegal activities undertaken by health care providers following DHEC's announced suspension of the CON program in late June 2013 – that an obligation was somehow imposed on all health care providers to continuously ask of all other health care providers if any illegal conduct was taking place in violation of the law. Such an argument is absurd. Providence properly issued a Freedom of Information Act request to LMC and obtained written notice of the Department's and LMC's collusive conduct, which Providence timely appealed.

Providence also expects LMC to argue the CON Act is not applicable to its projects, but these arguments similarly fail in light of the clear language of the CON Act and the explicit holdings of the Supreme Court of South Carolina and the Administrative Law Court. Finally, LMC may raise the defense of estoppel against the Department, but the Record and case law will

reflect that the defense is not applicable to the facts of the case, and regardless, estoppel as to DHEC has no bearing on Providence's right to challenge LMC's conduct in violation of the law.

4. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations;

Providence asks this Court to enforce the automatic stay of S.C. Code Ann. § 1-23-600(H) and direct LMC to cease and desist all activities in the unlicensed third cardiac catheterization laboratory and second open heart surgery suite pending application and approval for a valid CON for each project, as mandated by S.C. Code Ann. § 44-7-160(4). The action requested of the Court is analogous to the recently issued decision in *Trident Neurosciences Ctr., LLC v. S.C. Dept. of Health and Envtl. Control*, Docket No. 14-ALJ-17-01013-CC (S.C. Admin. Law J. Div. June 10, 2014).

5. A brief summary of the facts to be presented at the hearing;

The material facts in this case are undisputed and the matter should be resolved by motion. On April 29, 2014, LMC responded to a FOIA request from Providence seeking information regarding the expansion or development of additional cardiac catheterization space and/or new or renovated operating rooms. For the first time by way of this response, LMC provided written notice to Providence that LMC had undertaken, in collusion with DHEC, a third cardiac catheterization laboratory and a second open heart surgery suite, both of which are required to have a CON prior to implementing pursuant to the CON Act.

Providence timely filed a Request for Final Review with the DHEC Board challenging the actions of DHEC and LMC, but the Board elected not to hold a final review conference on the matter. Providence therefore timely petitioned this Court by way of a Request for Contested Case Hearing. Providence will establish for this Court that LMC was required to obtain a valid

CON prior to implementing either cardiac care project and that the failure to do so requires this Court to direct LMC to cease all activities in the unlicensed third cardiac catheterization laboratory and the unlicensed second open heart surgery suite.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion;

The Court has pending dispositive motions filed by both Providence and LMC. Providence asks this Court to grant judgment in its favor as a matter of law under Rule 56, SCRCP, and LMC has moved for dismissal pursuant to Rule 12(b)(6), SCRCP. There are simply no material factual issues in dispute. If the Court does not grant a final disposition at this time, however, Providence expects a subsequent summary judgment motion will be filed after development of a limited factual record, if necessary. If so, Providence would request a Scheduling Order and Confidentiality Order.

7. A list of proposed witnesses and exhibits;

No witnesses are necessary at this time. If the Court determines that the case is not resolved with the pending dispositive motions, Providence will amend their Prehearing Statement and provide a list of witnesses and exhibits.

8. A statement regarding the necessity for discovery, if any;

In the event the Court does not grant judgment as a matter of law in favor of Providence, Providence expects the parties will undertake reasonable and limited discovery as provided in S.C. Code Ann. § 44-7-210(F) in order to develop the Record and narrow the issues for presentation to the Court.

9. The estimated length of the hearing;

Providence expects the hearing would last two to four days.

10. Any dates in the next one hundred twenty (120) days when you will not be available for a hearing; and

Counsel for Providence is scheduled for trial in the ALC on the following dates:

September 22 – 26, 2014; and

December 8 – 19, 2014.

11. An email address where you can be reached.

jlong@nexsenpruet.com

jhollingsworth@nexsenpruet.com

RESPECTFULLY SUBMITTED,

James G. Long, III
Jennifer J. Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.771.8900

August 22 2014
Columbia, South Carolina

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 **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Prehearing Statement for Sisters of Charity Providence Hospitals** has been served on counsel of record via Hand Delivery addressed as shown below this 22nd day of August, 2014.

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
South Carolina Department of Health & Environmental Control
2600 Bull Street
Columbia, SC 29201

David B. Summer, Jr., Esquire
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

Sharon A. Werdenie

Sharon A. Werdenie
Legal Assistant for James G. Long III and Jennifer J. Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
(803) 771-8900

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	Docket No: 14-ALJ-07-0332-CC **LEXINGTON MEDICAL CENTER'S PREHEARING STATEMENT**

Pursuant to the August 8, 2014, Order for Prehearing Statement, Respondent Lexington Health Services District, Inc., d/b/a Lexington Medical Center ("LMC") states as follows:

1. **The nature of this proceeding.**

This action arises from the Request for Contested Case Hearing filed by the Petitioner Sisters of Charity Providence Hospitals ("Providence") challenging the alleged approval by the Department of Health and Environmental Control ("DHEC") of LMC's utilization of an existing operating room within its hospital facility as a 2nd operating room for open heart surgery procedures and of the establishment of a 3rd cardiac catheterization laboratory. Although Providence asserts contested case jurisdiction in this matter, LMC denies that such jurisdiction exists.

2. **Statutory provision(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations.**

There are no statutory or constitutional provisions conferring jurisdiction on the Administrative Law Court over the subject matter. Even assuming (without conceding), however, that the Court has jurisdiction over the subject matter of this case, Providence's remedy to seek contested case review is foreclosed and the Court cannot exercise its jurisdiction because

Providence failed to timely file its Request for Final Review to the Board of Health and Environmental Control ("Board").

3. **The issue(s) presented for determination, including any claims or defenses expected to be raised.**

The threshold issues for determination are whether the Court has subject matter jurisdiction over this matter, or, in the alternative, if such subject matter jurisdiction exists, whether Providence timely filed its Request for Review before the Board in order to invoke such jurisdiction. These issues have been presented to the Court in the form of LMC's Motion to Dismiss Providence's Request for Contested Case Hearing.

If the Court determines that it may exercise subject matter jurisdiction in this case, the following issues will be presented for determination on the merits:

1. *Was a Certificate of Need required prior to LMC's utilization of an existing operating room as a 2nd open heart surgery suite and/or prior to LMC's upfitting and utilization of existing space for a 3rd cardiac catheterization laboratory (collectively, the "Projects")?* As explained in detail below, LMC contends that the plain and unambiguous language of the CON Act indicates that no Certificate of Need was required for either of the Projects, and to the extent that the *State Health Plan* can be interpreted to require a CON for either or both Projects, those *Plan* requirements are arbitrary, capricious and contrary to law.

2. *If a Certificate of Need was required for either or both Projects, does governmental estoppel lie against the Department in this case to prevent enforcement of the CON requirements?* LMC contends that, under the law, the Department is estopped from asserting that a Certificate of Need was required to implement the Projects.

4. **The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations.**

Reserving its right to amend this Prehearing Statement to address additional issues and defenses raised during discovery, LMC offers the following in support of its request for dismissal of Providence's Request for Contested Case Hearing.

a. LMC requests that the Court find that it lacks subject matter jurisdiction over this matter.

"The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers." *Amisub of S.C. Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 585; 743 S.E.2d 786, 709 (2013). S.C. Code Ann. § 1-23-600A provides "An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases. . . ."

"Contested case" is defined in Section 1-23-505(3) as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing." LMC contends that, in the present case, Providence appeals decisions of the Department, none of which involve ratemaking, price fixing, licensing or other proceedings in which Providence has any legal rights which are required to be determined after opportunity for hearing.

Section 44-1-60 provides that "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." A "license" is defined in the Administrative Procedures Act as "the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission required by law ...." S.C. Code Ann. § 1-23-310(4) (Emphasis added). No statute or regulation requires issuance of any Reports of Visit by Department staff. Further, no statute or regulation affords a third party, such as Providence, the opportunity for a hearing as a result of the issuance of construction plan approvals or reports of visit detailing inspection activities. Because neither S.C. Code Ann. § 44-1-60 nor any other provision of the CON Act creates an opportunity for a third party to have a hearing to determine its legal rights, duties, or privileges with respect to the issuance of plan approvals or reports of visits, these decisions or actions of the Department do not give rise to a "contested case."

Similarly, none of the decisions of the Department form the basis of a contested case under Article I, Section 22 of the South Carolina Constitution, which provides:

> 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.

No judicial or quasi-judicial decision affecting a private right of Providence has been made by the Department with regard to issuance of the Reports of Visit for the 2nd Open Heart Suite or with regard to the plan approval and Reports of Visit for the 3rd Cath Lab. *See South Carolina Ambulatory Surgery Centers Association v. South Carolina Worker's Compensation Commission*, 389 S.C. 380, 699 S.E.2d 146 (2010).

b. In the alternative, LMC requests that the Court find that Providence cannot avail itself of the Court's jurisdiction because it failed to timely file its Request for Review before the Board.

Section 44-1-60(A) provides that "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." Section 44-1-60(E)(1) provides that:

> Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified. Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail. Notice of staff decisions for which a department decision is not required pursuant to subsection (D) must be provided by mail, delivery, or other appropriate means to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified.

Section 44-1-60 (E)(2) provides that:

> The 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 applicant, permittee, licensee, or affected person.[1]

All of the reports of visit and the plan approval appealed from were delivered to the applicant, LMC, on the date of issue. Providence filed its Request for Review of these decisions with the Board on May 14, 2014, well after the decisions had become final agency decisions under the law, *i.e.*, well after the fifteen-day time frame from delivery to the applicant required by § 44-1-60.

[1] Unlike prior versions of the Department's review procedures (*i.e.*, Regulation 61-72), Section 44-1-60(E)(2) does not contain any "knew or should have known" or actual or constructive notice requirements on the part of the party requesting review. The deadline for review is fixed as fifteen days after notice of a decision is mailed or delivered to the applicant. Rule 11(C) of the ALC Rules of Procedure does not apply to extend Providence's deadline because Rule 11 applies only to the filing of contested cases with the ALC and not to any underlying deadlines (statutes of limitation) governed by law. Further, any attempt to apply a court rule in derogation of a statutory deadline would be contrary to law. (*See, e.g., Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985) (Time for filing notice of appeal is jurisdictional and the court has no authority to extend or expand it.)

To the extent that Providence contends that the time for appeal runs from actual notice rather than from the plain statutory deadline of delivery to the applicant, LMC asserts that basic and reasonable due diligence would have required Providence to inquire and discover what competitive projects were going forward without Certificate of Need well prior to the time Providence ultimately decided to make such inquiries. *See, e.g., Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct.App. 1989) ("A party cannot escape application of this [discovery] rule by claiming ignorance of the facts and circumstances, because the law also provides that if such facts and circumstances *could have been* known to the party through the exercise of ordinary care and reasonable diligence, the same result follows.") *See also, e.g., Gibson v. Bank of America, N.A.*, 383 S.C. 399, 407, 680 S.E.2d 778, 782-783 (Ct.App. 2009) ("Moreover, a simple inquiry of the co-owner of these accounts . . . would have eliminated any doubt over whether she was responsible for any of the withdrawals in question.").

Furthermore, in *S.C. Coastal Conserv. League v. S.C. Dep't of Health and Envtl. Control*, 390 S.C. 418, 426, 702 S.E.2d 246, 250-251 (2010), the Supreme Court rejected the proposition that Section 40-1-60(E) can be interpreted to allow the time period to run from actual notice rather than delivery. LMC contends that, because Providence did not ask to be notified of any decisions of the Department involving LMC's cardiac program until April 9, 2014, long after the decisions complained of were delivered to, and acted on by, LMC, Providence did not act with due diligence and within the requirements of that law to preserve its alleged rights as an affected person in this case. Therefore, under *Coastal Conservation League*, cited above, Providence's attempted appeal must be dismissed as untimely.

c. In the alternative, LMC requests that the Court find on the merits that no prior Certificates of Need were required for the Projects under the law and/or that to the extent that the *State Health Plan* appears to require otherwise, the Plan is clearly erroneous, arbitrary, capricious and contrary to law.

S.C. Code Ann. Section 44-7-160 (5) provides:

> 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:
> * * *
> (5) the offering of a health service by or on behalf of a health care facility which has not been offered by the facility in the preceding twelve months and for which specific standards or criteria are prescribed in the South Carolina Health Plan....

Although Providence cites this law to support its contention that a CON was required prior to implementation of LMC's projects, the undisputed facts are that (a) LMC is a "health care facility" as defined in the CON Act; (b) LMC was awarded a CON and approved to provide comprehensive cardiac services, including open heart surgery and therapeutic catheterizations on June 18, 2010; and (c) LMC began offering such services in March, 2012 and has continued to offer those services through today.

The requirement of Section 44-7-160(5) that a healthcare facility must obtain a CON to offer "a health service . . . which has not been offered by the facility in the preceding twelve months and for which specific standards or criteria are prescribed in the South Carolina Health Plan" plainly and unambiguously **does not apply** to LMC's utilization of existing space in its facility to continue to offer the services it has offered for the preceding twelve months (and longer).

Furthermore, to the extent that the *State Health Plan* is interpreted to provide otherwise, LMC contends that it is clearly erroneous, arbitrary, capricious, and contrary to law. ("An administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation." *McNickel's Inc. v. S.C. Dept. of Revenue*, 331 S.C. 629, 634, 503 S.E.2d 723, 725

(1998). "Although a regulation has the force of law, it must fall when it alters or adds to a statute." *Id.*).

d. Further, in the alternative, LMC requests that the Court find that, even if a Certificate of Need was required for one or both Projects, the Department is estopped from enforcing such requirement.

If it is determined that LMC would have been required to have a CON prior to utilizing the existing space, LMC asserts estoppel against the Department for its representations otherwise. *See Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 319, 659 S.E.2d 263, 267 (Ct.App. 2008)("Misrepresentations by government officials acting within the proper scope of their authority may subject the government to estoppel. However, estoppel is not appropriate where a government official or employee with limited authority erroneously provides advice beyond the scope of his authority. Estoppel will not lie against a governmental entity where a government employee gives erroneous information in contravention of statute.")

The Department is by law the sole agency designated to control and administer the granting of Certificates of Need. The Department's decision to interpret the failure of the General Assembly to override the Governor's veto of funding for the CON program as a legal "suspension" of the program was made and communicated to LMC by the Director of the Department. The Director of the Department clearly is authorized to speak for the Department and clearly was acting within the scope of her authority when she did so. Furthermore, the determination not to grant Certificates of Need in light of the Governor's veto was, at the least, acquiesced in by the Board through silence. The Board of the Department is a body which also speaks and acts within the scope of its authority when making representations regarding the CON program. *See County of Charleston v. Nat'l Advert. Co.*, 292 S.C. 416, 418, 357 S.E.2d 9, 10 (1987), applying estoppel against the County to prevent it from revoking permits that were

issued in contravention of the zoning ordinance ("The interpretation given by Simmons was clearly within the scope of his authority since he is the Building Inspector and is designated in the ordinance as the official charged with its enforcement.").

"To prove estoppel against the government, the claiming party must show (1) a lack of knowledge about the truth of the matter in question, (2) justifiable reliance on the government's conduct, and (3) a prejudicial change in position." *Midlands Util., Inc. v. S.C. Dep't of Health and Envtl. Control*, 298 S.C. 66, 71, 378 S.E.2d 256, 259 (1989). In *Abbeville Arms v. City of Abbeville*, 273 S.C. 491, 494-495, 257 S.E.2d 716, 718 (1979), the Supreme Court determined that the plaintiff had met all of the required elements to estop the defendant City from enforcing the City's zoning ordinance as written because the plaintiff had checked the official zoning map, had received confirmation of his understanding of the map from the City Zoning Administrator, and had acted to his monetary detriment in reliance on the official map and the confirmation he received.

In the present case, LMC was aware of the Department directive regarding suspension of the CON program, but also took the further steps of meeting with the Director to receive direct assurances regarding the lack of a requirement for a CON (under the law and under the *State Health Plan* as interpreted by the Department), and working extensively with the Department's legal, construction inspection, and licensing staffs to assure compliance with all Department requirements prior to implementing the Projects. At present, LMC is utilizing both of these Projects daily to treat patients in need of critical cardiac care. These and other facts to be developed indicate that LMC's reliance of the Department's suspension of the CON program was justified and that estoppel is warranted.

For each of LMC's issues set forth above, LMC requests that the Court dismiss Providence's Request for Contested Case Hearing.

5. **A brief summary of the facts to be presented at hearing.**

Reserving its right to present detailed factual and expert evidence to the Court at the hearing, LMC offers the following summary of facts for purposes of this prehearing statement:

On June 18, 2010, with no opposition from any competitor of LMC, the Department approved the establishment of a comprehensive cardiac services program at LMC. The approval of LMC's program came about as a result of an agreement between Providence and LMC that Providence would de-license one of its open heart surgery suites with the understanding that LMC would apply for a CON to provide comprehensive cardiac services to fill the need generated by the closure of Providence's surgery suite. As part of its comprehensive cardiac services program, LMC had received prior Department approval to provide diagnostic catheterization services in February, 2002.

At the opening of its comprehensive cardiac services program, LMC utilized one surgery suite for the performance of open heart surgery and other cardiac surgery procedures and two catheterization laboratories for the performance of diagnostic and therapeutic catheterization procedures. Due to the overwhelming success of its program, LMC began to plan for the utilization of additional existing space to accommodate its comprehensive cardiac services program in order to meet the critical needs of its patients. These plans included utilizing an existing operating room as a 2nd open heart surgery suite and upfitting existing space to accommodate a third cardiac catheterization laboratory.

Effective July 1, 2013, before LMC could begin implementing the Projects, the Department announced to the public and all members of the regulated community that the CON Program was suspended as a result of the failure of the House of Representatives to override Governor Haley's line-item veto of funding for the CON Program. The *de facto* suspension of the CON program was not some mistaken pronouncement of the law by a low level government

employee but rather was an action of the Department, clearly taken after due deliberation, and communicated to the world by the Director of the Department on June 28, 2013 via a memorandum to the regulated community ("Director's Memo"). The suspension was supported (either tacitly or expressly) by the Department's Board, which took no action to lift the suspension or halt the lawsuit brought by the Department seeking affirmation from the Supreme Court of its decision.

Because the Department is the sole agency designated to administer the CON program, from an apparent authority standpoint, every member of the regulated community had a right to rely on the Director's Memo regarding administration of the CON program and the effect of the suspension. Furthermore, every member of the regulated community was on actual or constructive notice as of the Director's Memo that projects would move forward without going through the CON review or exemption process.

In the Director's Memo, the Department affirmatively stated that it would not review any new or existing CON applications, but that its inspection and licensing activities would continue uninterrupted. The Memo further notified providers that the suspension of the CON program would have "the practical effect of allowing new and expanding health care facilities to move forward without the Certificate of Need Process."

Because of the Department's *de facto* suspension of the CON program and its refusal to review CON applications, LMC was not able to apply for or receive a CON for the 3rd Cath Lab or the 2nd Open Heart Suite despite its need for the facilities, assuming that Certificates of Need were required for either or both Projects. Prior to implementing the Projects, LMC met with Director Templeton and other Department staff in order to confirm that no Certificate of Need was required and to determine what further Department involvement was advised.

In reliance on the Director's Memo and the meeting, LMC proceeded with its plans to utilize already existing space in order to implement its Projects. Although no new license application or issuance of an amended license was required by law, LMC notified the Department's Bureau of Health Licensing of its plans. Further, LMC advised the Division of Health Facilities Construction of the intended upfitting of existing space for the 3rd Cath Lab because of the minor construction involved.

On October 11, 2013, the Department performed an inspection and issued a "Report of Visit" accepting LMC's intended use of its already-licensed operating room #22 as a 2nd Open Heart Suite. On February 21, 2014, the Department approved the Shielding Plan developed by LMC for use of imaging modalities in the 3rd Cath Lab. On February 25, 2014, the Department issued a Plan Approval approving the construction documents submitted by LMC with regard to upfitting existing space in the hospital to configure a 3rd Cath Lab. On March 20, 2014, the Department generated a Notice of Completion indicating that construction activity in the 3rd Cath Lab had been completed. Finally, on April 10, 2014, the Department made a scheduled visit to the 3rd Cath Lab and generated a Report of Visit finding no deficiencies in the construction and concurring in LMC's intent to begin utilization of the 3rd Cath Lab. Thus, having met every requirement possible, given the Department's announced policies and procedures, as of October 11, 2013 and April 10, 2014, respectively, LMC has fully implemented the Projects and has been serving the critical and emergent needs of its cardiac patients by utilizing them.

On May 14, 2014, Providence filed its Request for Final Review under S.C.Code Ann. § 44-1-60 seeking Board review of the Department's reports of visit and plan approval regarding the Projects. On June 25, 2014, the Board declined to conduct a Final Review Conference on Providence's Request for Review. On July 9, 2014, Providence filed its Request for Contested Case Hearing with this Court.

6. **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.**

There are currently pending before the Court LMC's Motion to Dismiss and Providence's Motion to Enforce Automatic Stay and Motion for Summary Judgment. These motions have been thoroughly briefed and LMC relies on its various memoranda filed with the Court for its statement of authorities in support of its motion and in opposition to Providence's motions.

As for further motions related to the merits, LMC intends to evaluate the necessity for motions at the completion of discovery and reserves the right to raise any motions necessary prior to or at the hearing in this matter.

7. **A list of proposed witnesses and exhibits.**

Reserving its right to call any witnesses listed by any party to the proceeding, as well as any witnesses that may become known to the parties during the discovery process or as the case develops, LMC identifies the following persons as potential witnesses at trial of this matter:

1. Tod Augsburger
   Senior Vice President & Chief Operating Officer
   Lexington Medical Center
   2720 Sunset Boulevard
   West Columbia, SC 29169

2. Jeffrey A. Travis, M.D.
   Lexington Cardiovascular Surgery
   Lexington Medical Park 1
   2728 Sunset Blvd., Suite 101
   West Columbia, SC 29169

3. Mark A. Richardson
   Richardson/Knapp & Associates, Inc.
   1105 Lakewood Parkway Suite 155
   Alpharetta, GA 30004

Reserving its right to utilize and introduce as evidence any documents identified by any party to the proceeding and to introduce documents gathered during the discovery period, LMC identifies the following as potential exhibits at trial of this matter:

a. October 11, 2013 Report of Visit to LMC accepting LMC's intended use of its already-licensed operating room #22 as a 2nd Open Heart Suite.
b. February 25, 2014, Plan Approval of the construction documents submitted by LMC with regard to upfitting existing space in the hospital to configure a 3rd Cath Lab.
c. February 21, 2014 approval by the Department of the Shielding Plan developed by LMC's for use of imaging modalities in the 3rd Cath Lab.
d. March 20, 2014, Department Notice of Completion indicating that construction activity in the 3rd Cath Lab was complete.
e. April 10, 2014, Department Report of Visit concurring in LMC's intent to begin utilization of the 3rd Cath Lab.
f. All other documents produced by LMC in response to Providence's April 9, 2014 Freedom of Information Act request to LMC.
g. All documents contained in any Department files relevant to this matter.
h. All documents produced by any party during discovery in this matter.
i. *2012-2013 State Health Plan;*

8. **A statement regarding the necessity for discovery, if any.**

LMC's anticipates that the discovery provided for under the law will be more than adequate for this matter. In that regard, LMC respectfully requests that the Court conduct a scheduling conference to address the appropriate parameters for discovery in this case.

9. **The estimated length of the hearing.**

LMC anticipates that the hearing in this matter will take one week.

10. **Any dates in the next one hundred twenty (120) days when you will not be available for a hearing.**

Counsel will be unavailable for trial from November 7 – November 16, 2014 and requests protection for that time period.

11. **An email address where you can be reached.**

davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com

Respectfully Submitted,

David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, SC 29202
Telephone: (803) 255-8000
Facsimile: (803) 255-8017 (fax)
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com

Attorneys for Respondent
Lexington County Health Services District, d/b/a Lexington Medical Center

Columbia, South Carolina
August 22, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 22, 2014, s/he caused a copy of the foregoing ***Lexington Medical Center's Prehearing Statement*** to be served upon the following counsel of record by hand delivering a copy of the same addressed as follows:

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, South Carolina29201

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

Columbia, South Carolina

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.	)	**DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S PREHEARING STATEMENT** DOCKET NO. 14-ALJ-07-0332-CC

In response to the Order for Prehearing Statements issued by the Honorable Ralph King Anderson, III, Chief Administrative Law Judge, the Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") responds as follows:

1. The nature of this proceeding;

This action arises from a request for contested case hearing before the Administrative Law Court ("ALC") by Sisters of Charity Providence Hospitals ("Providence"). Providence appeals the Department's construction plan approval, notice of construction completion, and licensing inspection report of visit for Lexington Medical Center's ("LMC") third cardiac catheterization laboratory ("cath lab") and the Department's licensing inspection report of visit for LMC's second open heart surgery unit.

2. Statutory provision(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations;

Applicable statutes and regulations include the *State Certification of Need and Health Facility Licensure Act* ("the Act"), S.C. Code Ann. §§ 44-7-110, *et seq.* (2002 and Supp. 2013), and *Minimum Standards for Licensing Hospitals and Institutional General Infirmaries* ("the

Regulation"), 3 S.C. Code Ann. Regs. 61-16 (2012)[1]. For the reasons stated in the Department's Memorandum in Response to LMC's Motion to Dismiss, the Department asserts that the ALC lacks subject matter jurisdiction.

3. The issues presented for determination, including any claims or defenses expected to be raised;

The first issue for determination is whether the ALC has subject matter jurisdiction over this matter. Should the ALC find that it does have subject matter jurisdiction, the issue raised by Providence is whether the Department's construction plan approval, notice of construction completion, and licensing inspection report for LMC's third cardiac cath lab and licensing inspection report for LMC's second open heart surgery unit complied with the Act and Regulation.

4. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations;

For the reasons stated in the Department's Memorandum in Response to LMC's Motion to Dismiss, the Department respectfully requests the Court dismiss this matter because the ALC lacks subject matter jurisdiction.

5. A brief summary of the facts to be presented at the hearing;

LMC is a licensed hospital and provider of cardiac catheterization services and open heart surgery services in Lexington, South Carolina. As of July 1, 2013, LMC had two cardiac cath labs and one open heart surgery suite, all of which were established pursuant to separate certificates of need ("CONs") issued by the Department.

On July 1, 2013, the 2013-14 Appropriations Act took effect. Following Governor Haley's veto of the line item for the CON budget, which was sustained by the SC House of

[1] Subsequent to the Department's issuance of the above-mentioned reports of visit, construction plan approval, and notice of construction completion, the Department amended Regulation 61-16. The amendments to Regulation 61-16 became effective on June 27, 2014.

Representatives, the Appropriations Act contained no funds for CON. The Department informed the regulated community in a letter dated June 28, 2013, of its belief that the lack of funding in the Appropriations Act for CON had the effect of suspending the CON program for the fiscal year. The Department filed a petition with the South Carolina Supreme Court seeking a declaratory ruling on the effect of the lack of funding for CON in the Appropriations Act, as did a group of interested health care facilities and associations. The Supreme Court granted one of the petitions and, following a period of briefing and an oral argument, issued an opinion on April 14, 2014, finding that the Department is obligated to operate the CON program despite the lack of funding for the program in the Appropriations Act. The Supreme Court's opinion became final when it denied the Department's petition for rehearing on May 22, 2014.

LMC chose to pursue a third cath lab and a second open heart surgery unit during the period of time between issuance of the Department's June 28, 2013, letter to the regulated community and the issuance of the Supreme Court's April 14, 2014, opinion. Although neither the addition of a third cath lab nor the addition of a second open heart surgery unit required submittal of a new licensing application or issuance of an amended license, LMC notified the Department's Bureau of Health Facilities Licensing ("Licensing") of both projects. Further, since the cath lab project involved some construction, LMC notified the Department's Division of Health Facilities Construction ("DHFC") of the cath lab project.

Licensing conducted an on-site inspection of the physical area identified by LMC to be used as its second open heart surgery operating room. Licensing issued a report of visit ("ROV") on October 11, 2013, finding no violations and stating "Permission is hereby given to occupy Operating Room #22 to be utilized/designated for Open Heart Surgery."

DHFC reviewed construction plans and conducted an on-site inspection of the physical area identified by LMC to be used as its third cath lab. On February 25, 2014, DHFC provided LMC with a project plan approval for the up-fitting of existing space and minor renovation for a cath lab. DHFC issued a notice of construction completion for the project on March 20, 2014. On April 10, 2014, Licensing issued an ROV providing LMC with permission to occupy the space for utilization of a cath lab.

Providence submitted a letter to the Department dated April 10, 2014, claiming "affected person" status pursuant to Section 44-1-60 with respect to the development of new operating rooms, the renovation of existing operating rooms, and the development of a third cardiac cath lab at LMC, and requesting to be provided with notice of any staff decisions regarding construction or licensing for these projects. Providence submitted an RFR to the Board of Health and Environmental Control ("Board") challenging the projects on May 14, 2014. On June 25, 2014, the Board declined to conduct a final review conference. Providence filed a request for a contested case hearing with the ALC on July 9, 2014.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion;

The Department supports LMC's motion to dismiss for lack of subject matter jurisdiction.

7. A list of proposed witnesses and exhibits;

WITNESSES:

Kristen Juarez, Licensing
Walter Stellpflug, DHFC
Mark Bishop, DHFC
Michell Hatcher, Licensing

EXHIBITS:

DHEC's licensing and construction files for LMC

The Department reserves its right to supplement its witness and exhibit list as may prove necessary.

8. A statement regarding the necessity for discovery, if any;

The Department believes the standard discovery provided for by the Rules of Procedure for the ALC and by S.C. Code Ann. § 44-7-210(F) will be sufficient, should this matter not be dismissed.

9. The estimated length of the hearing;

The Department anticipates a contested case hearing in this matter would last approximately one (1) to two (2) days.

10. Any dates in the next one hundred twenty (120) days when you will not be available for a hearing; and

The Department is not available: September 4, 5, 8-10, and 22-25; October 6-16; November 27-28 (Thanksgiving); December 19-January 9 (Christmas and New Years).

11. An email address where you can be reached.

biggerac@dhec.sc.gov
wicevivm@dhec.scogv
presleja@dhec.sc.gov

Respectfully submitted,

Ashley C. Biggers, Esquire (SC Bar No.: 17225)
Vito M. Wicevic, Esquire (SC Bar No.: 100265)
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29078
P: (803) 898-3350
F: (803) 898-3367
E-mail: biggerac@dhec.sc.gov
E-mail: wicevivm@dhec.sc.gov
E-mail: presleja@dhec.sc.gov

August 25, 2014

STATE OF SOUTH CAROLINA
ADMINSTRATIVE 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** **CERTIFICATE OF SERVICE**

I, Jaimie Presley Jones, with the South Carolina Department of Health and Environmental Control, do hereby certify that I have on this **25th day of August, 2014**, served a copy of ***DHEC's Prehearing Statement*** upon all parties and counsel of record in the above-captioned case, via Electronic Mail and United States Mail, First Class, postage prepaid, addressed as follows:

Parties of Record

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet
Post Office Drawer 2426
Columbia, SC 29201

Email: jlong@nexsenpruet.com
Email: JHollingsworth@nexsenpruet.com

Attorneys for Sisters of Charity Providence Hospitals

David B. Summer, Esquire
Parker Poe
Post Office Box 1509
Columbia, SC 29202

E-mail: davidsummer@parkerpoe.com

Attorney for Lexington Medical Center

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

By: _____
Jaimie Presley Jones

Date: August 25, 2014

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **MOTION TO LIFT AUTOMATIC STAY**

Pursuant to Section 1-23-600(H)(4) of the South Carolina Code, the Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC") hereby moves the Court for an order lifting the automatic stay for the reasons set forth below.

FACTUAL BACKGROUND

In this case, LMC (and the entire regulated community) was advised by the Department on June 28, 2013, that, beginning on July 1, 2013, health care projects would be addressed by the Department's health licensing and inspection divisions without consideration of whether the Department's certificate of need staff had evaluated and approved those projects. In accordance with the procedure specified by the Department and with the Department's involvement, LMC expanded its approved comprehensive cardiac services program by utilizing an additional existing operating room and an additional catheterization laboratory. Implementation of these projects began in October 2013 and ended on April 10, 2014. By July 9, 2014, the date Providence filed its request for contested case review and the date the automatic stay took

effect[1], LMC had been utilizing the second operating room for approximately nine months. As of the date of this writing, LMC has patients scheduled for procedures in this room. (*See* Affidavits of Tod Augsburger and Dr. Jeffrey Travis, attached hereto as **Exhibits "A"** and **"B"** respectively.[2])

DISCUSSION

Section 1-23-600(H)(4) provides that, "[u]pon motion by any party, the court ***shall*** lift the stay for good cause shown ***or*** if no irreparable harm will occur, then the stay ***shall*** be lifted." (emphasis added). Section 1-23-600(H) does not define "good cause" or "irreparable harm." However, in *Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center v. South Carolina of Health and Environmental Control,*[3] this Court extensively addressed both of these issues, stating that while the analyses are related, they are distinct, and the Court need only find the existence of one to lift an automatic stay.

A. Good Cause.

Good cause exists to lift the automatic stay in this case because the stay does not serve the purpose of an automatic stay and the facts of the case weigh in favor of lifting the stay. Accordingly, this Court should grant LMC's Motion to Lift Automatic Stay.

This Court articulated that the purpose of enforcing an automatic stay is to preserve the status quo. Accordingly, this Court found:

> [A] a stay should not be lifted unless there is good cause to depart from the purposes of having an automatic stay in the first place. However, contrary to [the petitioner]'s assertion, lifting a stay is not, by its very nature, an action that is at odds with the purpose of the automatic stay. Rather, it is the General Assembly's recognition that not every case must be stayed pending its outcome.

---

[1] Although LMC believes and argued to the contrary, in its September 22 Order to Enforce Automatic Stay, this Court found the automatic stay took effect on July 9, 2014.

[2] The original Affidavits of Tod Augsburger and Dr. Travis are attached as exhibits to LMC's Response to Providence's Motion for Summary Judgment.

[3] Docket No. 08-ALJ-07-0063-CC (July 23, 2008) (attached hereto as **Exhibit "C"**).

(**Exhibit "C"**, pp. 2–3.) Thus, the party seeking to lift the stay must "demonstrate that the circumstances of this case raise sufficient reasons to depart from the sound reasons for the existence of the automatic stay." (**Exhibit "C"**, p. 4.) The demonstration of good cause does not require proof of extraordinary circumstances or the application of a strict "balancing of the harms" test. (**Exhibit "C"**, p. 3.) Instead, the decision as to whether good cause exists to lift an automatic stay is fact-specific and should "be made by weighing or considering all relevant factors that reflect upon whether the stay should or should not be lifted." (**Exhibit "C"**, p. 3.)

1. **Purpose of Automatic Stay.**

Under the contemplated time frame for initiating contested case review set forth in Section 44-1-60 of the South Carolina Code, the automatic stay prevents changes in the status of the parties until such time as the Court can determine whether or not the Department's decision is correct. If the decision is determined to be correct on the merits, then the decision can be implemented. If the decision is determined not to be correct, there is "no harm, no foul" because the stay prevented any change in the status of the parties pending court review.

In this case, enforcing the automatic stay serves none of the purposes behind the stay, therefore, good cause exists to lift the stay. Providence filed its request for contested case review of the Department's decision concerning the open heart operating room many months after the decisions were issued to LMC and many months after LMC actually implemented and began utilization of the room. Thus, on the date that Providence filed its request for contested case review, the *status quo* was that LMC's project had been implemented with the Department's input and acquiescence and the surgery suite was being utilized on a daily basis for the treatment of LMC's cardiac patients.

The automatic stay in this case does not preserve the *status quo* as it existed on the date the automatic stay went into effect. Rather, the stay turns back the clock, requiring LMC to

return to a state of operations that only existed many months prior to the filing for contested case review. Because the automatic stay in this case does not serve the fundamental purpose of having an automatic stay, good cause exists to lift the automatic stay in this case.

2. Timing of the Stay and Resulting Impairment.

This Court in *Piedmont* held that consideration of whether to lift the stay includes a consideration of the timing of the stay and the impairment that will result from its imposition. The Court found the fact that the respondents spent a large sum of money to substantially complete the project weighed in favor of lifting the stay and allowing the respondents to proceed with construction. Here, LMC has completed and opened its surgery suite and has been serving patients in its operating room for ten months. Patients currently are scheduled for procedures in this room. Because of the urgent nature of the procedures performed in the surgery suite, requiring LMC to discontinue its existing business operations will adversely impact LMC's patients because they will have to be rescheduled and their care delayed. These facts should weigh strongly in favor of lifting the stay and allowing LMC to continue to serve its patients in a timely and efficient manner during the pendency of this action.

B. Irreparable Harm.

There is no irreparable harm in this case because any injury is purely speculative and immaterial. Thus, this Court should grant LMC's Motion to Lift Automatic Stay.

In *Piedmont*, this Court found that the determination of what constitutes irreparable harm is a fact-specific determination dependent upon the particular circumstances of the case. (**Exhibit "C"**, p. 5.) The injury must be "neither remote nor speculative, but actual and imminent." (**Exhibit "C"**, p. 5.) This Court noted the irreparable harm analysis considers many of the same factors as does the good cause analysis, but particularly from the perspective of whether any resulting harm is irreparable. (**Exhibit "C"**, p. 5–6.) The Court identified the

purposes of the CON Act as the types of harm that are at issue in CON contested cases. Those purposes are to:

> promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State.

(**Exhibit "C"**, p. 6.)

There is no irreparable harm in allowing LMC to continue its existing operations during the pendency of this action. LMC's project was not wasteful of healthcare dollars as it was instituted by utilizing existing space and equipment. The surgery suite provides high quality, necessary services that serve the public needs by allowing LMC to more efficiently provide care to its patients and avoid inconvenient scheduling of procedures. (*See* **Exhibit "A"**, ¶5; **Exhibit "B"**, ¶¶5–8.)

Additionally, Providence is not harmed by LMC's surgery suite and will not be harmed by lifting the automatic stay. Providence admitted that it was unaware of LMC's second surgery suite for many months after it was being utilized and, then, Providence only learned of the project by way of rumor. If Providence were suffering irreparable harm from the operation of the surgery suite, it would certainly have realized this sooner. As stated in Dr. Travis' Affidavit, the surgery suite serves LMC's patients, who, because of health risks and stresses, would not be transferred to other providers, such as Providence. (**Exhibit "B"**, ¶9.) Any harm Providence alleges is purely speculative. Therefore, Providence suffers no loss of patients or any other harms from the operation of the surgery suite during the pendency of this action. Failure to lift the stay will serve only to delay important treatment to these high-risk patients who currently are scheduled for surgery or who are awaiting such scheduling. (*See* **Exhibit "B"**, ¶10.)

Because of the health risks of the patients affected by the stay and the urgency of their continuing to receive timely, convenient care, LMC requests this Motion be heard via telephone

conference before the expiration of the five day period set forth in this Court's September 22 Order to Enforce Automatic Stay or as soon as possible thereafter.

CONCLUSION

For the reasons stated above, the automatic stay in this case does not serve the purpose of having an automatic stay and good cause exists for lifting the stay. Additionally, Providence will suffer no irreparable harm from lifting the automatic stay. Lexington Medical Center respectfully requests that the Court grant LMC's Motion to Lift the Automatic Stay as to Lexington Medical Center's second open heart surgery suite.

Respectfully Submitted,

David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
Post Office Box 1509
Columbia, SC 29202
(803) 255-8000; (803) 255-8017 (fax)
davidsummer@parkerpoe.com;
fayeflowers@parkerpoe.com
Attorneys for Lexington Medical Center

Columbia, South Carolina
September 23, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 23, 2014, s/he caused the foregoing **Motion to Lift Automatic Stay** to be served on all parties of record by hand delivery addressed as follows:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202

Columbia, South Carolina

EXHIBIT "A"

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **AFFIDAVIT OF TOD AUGSBURGER**

PERSONALLY APPEARED BEFORE ME, TOD AUGSBURGER, who being duly sworn deposes and says that:

1. He is the Senior Vice President and Chief Operating Officer of the Respondent Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("LMC").

2. As part of his duties at LMC, Affiant has overseen the development, implementation, and operation of the comprehensive cardiac services program ("Program") at LMC. The Program was issued a Certificate of Need by the Department of Health and Environmental Control on June 18, 2010. LMC had previously been awarded a Certificate of Need to provide diagnostic catheterization services in February 2002. For the previous twelve months and longer, LMC has continuously provided open heart surgery services and diagnostic and therapeutic catheterization services to its patients at its main hospital facility located at 2720 Sunset Blvd., West Columbia, SC 29169.

3. Since performing its first open heart surgery procedure in March of 2012, the Program has experienced significant and consistent growth in total number of procedures each year.

4. In the fiscal year ending September 30, 2013, the Program had performed two hundred and twelve (212) open heart surgery procedures. As of the date of this Affidavit, the Program has performed 264 open heart surgery procedures for this fiscal year. Affiant expects that the Program will perform approximately three hundred (300) open heart surgery cases by the end of the current fiscal year, September 30, 2014.

5. As a result of the success and growth of the Program, physicians and administration determined that it was essential to have a second open heart surgery suite in which to perform cases. The lack of a second open heart surgery suite at LMC was beginning to create delays in the provision of timely care to LMC's patients.. Timely care is essential to the successful performance of open heart surgery and treatment of patients, especially those patients who present in an emergent state.

6. On September 25, 2013, he and the Chief Executive Officer for LMC met with Ms. Catherine Templeton, Director of the South Carolina Department of Health and Environmental Control, and others at DHEC's offices on Bull Street for the purpose of discussing LMC's need to utilize an existing operating room for open heart surgery procedures.

7. Before the meeting, LMC was aware of the Director's memorandum regarding the Department's suspension of the issuance of Certificates of Need due to the failure of the House of Representatives to override the Governor's veto of funding for the CON Program. Nevertheless, at that meeting, Affiant sought, and the Director gave, confirmation that a Certificate of Need was not necessary to utilize the existing operating room for open heart surgery procedures.

8. Therefore, Affiant, and other LMC personnel at Affiant's direction, contacted and worked with the Department's legal, construction inspection and facilities licensing staffs to

make sure that all Department requirements were met with regard to LMC's utilization of the existing operating room to perform open heart surgical procedures.

9. Similarly, several months later, Affiant, and other LMC personnel at Affiant's direction, contacted and worked with the Department's legal, construction inspection and facilities licensing staffs in the upfitting of existing space to configure a third catheterization laboratory to accommodate LMC's increasing volume of heart catheterization procedures.

FURTHER THE AFFIANT SAYETH NOT.

Tod Augsburger

Sworn to Before Me this
11th day of August, 2014

Notary Public for South Carolina
My Commission expires: 3/12/2023

EXHIBIT "B"

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc. d/b/a Lexington Medical Center, Respondents.	)	Docket No.: 14-ALJ-07-0332-CC **AFFIDAVIT OF JEFFREY A. TRAVIS, M.D.**

PERSONALLY APPEARED BEFORE ME, Jeffrey A. Travis, M.D., who being duly sworn, deposes and says that:

1. He is currently employed as a cardiovascular surgeon at Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC"), and in that capacity, has personal knowledge of all the matters stated in this Affidavit.

2. He is licensed to practice medicine in South Carolina. His additional credentials, certifications, and licensures are presented in the curriculum vitae, which is attached to this Affidavit as **Exhibit 1**.

3. He and Steven W. Marra, M.D., are the two cardiovascular surgeons employed by LMC to perform cardiovascular surgeries for LMC's comprehensive cardiac services program (the "Program").

4. During the fiscal year ending on September 30, 2013, he and Dr. Marra performed 212 open heart surgery procedures at LMC.

5. In his experience, approximately sixty percent of patients who ultimately require open heart surgery are presented through the Emergency Department. Approximately ninety-five percent of patients receiving cardiac surgery at LMC are diagnosed in LMC's cardiac

catheterization laboratories. Once appropriately diagnosed, patients are scheduled for surgery at LMC as soon as practical, usually within twenty-four to forty-eight hours.

6. Approximately thirty percent of open heart surgery patients require surgical procedures to be performed on an urgent or emergent basis.

7. Timely care, including surgery when needed, is critical for the safety and health of patients.

8. As the volume of patients in LMC's Program grew, he and LMC began to experience delays in scheduling surgeries because LMC had only one cardiovascular surgical suite. Such delays created the potential to prevent Program patients from receiving timely care.

9. In order to address temporarily the potential for delay in care caused by the use of only one cardiovascular surgical suite, he, the other cardiovascular surgeon, and clinical staff were required to perform surgeries later into the night and on weekends. This situation imposed a significant inconvenience on patients, their families, and on the surgeons, clinical staff and their families.

10. Because of the significant health risks and stresses associated with transfer and patient preferences, patients awaiting open heart surgery generally are not transferred to other facilities.

11. In his experience, Affiant is not aware of any other cardiovascular program that has access to only one cardiovascular surgical suite.

12. The use of the second surgical suite alleviates or prevent delays in treatment and surgery and reduces the significant inconveniences to patients, surgeons, staff and their families from night and weekend surgeries.

13. Because so few patients are transferred given the risks and given patient preferences, use of the second surgical suite is critical to operation of the Program and would likely have no significant effect on the number of open heart surgeries at other area hospitals.

14. From a quality standpoint, LMC's cardiovascular program recently earned a "3-star" rating from the Society of Thoracic Surgeons. In 2013, only fifteen percent of hospitals nationwide earned this highest distinction.

FURTHER AFFIANT SAYETH NOT.

JEFFREY A. TRAVIS, M.D.

SWORN to and subscribed before me
this 14 day of August, 2014.

Notary Public for South Carolina
My Commission expires: 3/12/2023

EXHIBIT "C"

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, Petitioner, vs, South Carolina Department of Health and Environmental Control and Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System, Respondents.	Docket No. 08-ALJ-07-0063-CC **ORDER LIFTING STAY**

This matter comes before the Administrative Law Court (ALC or Court) pursuant to a request for a Contested Case Hearing. After a previous hearing in this matter, the Court issued an Order on June 16, 2008, enforcing the automatic stay provisions of S.C. Code Ann. § 1-23-600(G) (Supp. 2007). Consequently, Respondent Carolinas Healthcare System (CHS) was prohibited from continuing its construction of the medical office building (MOB) during the pendency of this contested case. On June 20, 2008, CHS moved to lift the automatic stay imposed by this Court. On June 27, 2008, a hearing was held on the motion to lift the stay. At that hearing, the Court asked the parties to submit briefs and allowed the record to remain open for the submission of further evidence, considering the recently-created standard for lifting stays set forth in S.C. Code Ann. § 1-23-600(H)(4) (as amended by 2008 S.C. Act No. 334).

STANDARD APPLICABLE TO MOTION TO LIFT STAY

On June 5, 2008, the South Carolina General Assembly passed Act 334, which, *inter alia*, amended the South Carolina Administrative Procedures Act (APA). The Act, which took effect on June 16, 2008, amended the automatic stay provisions contained in S.C. Code Ann. § 1-23-600 by providing a more detailed standard for lifting an automatic stay. The newly-amended statute provides:

> After a contested case is initiated before the Administrative Law Court, a party may move before the presiding administrative law judge to lift the stay imposed pursuant to this subsection. Upon motion by any party, the court shall lift the stay

FILED
JUL 23 2008
SC ADMIN. LAW COURT

for good cause shown *or* if no irreparable harm will occur, then the stay shall be lifted. (emphasis added).

S.C. Code Ann. § 1-23-600 (H)(4) (as amended by 2008 S.C. Act No. 334).[1] Thus, Section 1-23-600 now provides that a stay shall be lifted if the court finds good cause to lift the stay or if no irreparable harm will occur as the result of lifting the stay. In other words, good cause quintessentially exists if there would be no irreparable harm as a result of lifting the stay. However, despite the fact that they are related, analysis of the two prongs is distinct. Here, the parties contest the existence of both good cause and irreparable harm.

Good Cause Standard

CHS argues that the determination of whether to lift a stay should be made following a "balancing of the harms test" which is applied in equitable stay or injunction cases. See Merritt Bros., Inc. v. Marine Midlands Realty Credit Corp., 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992). In other words, the lifting of a stay would be appropriate only if "justified by circumstances which outweigh any potential harm to the party against whom it is operative." Id., 414 S.E.2d at 169. On the other hand, Piedmont Medical Center (Piedmont) argues that since the purpose of the stay is to preserve the *status quo*, construing Section 1-23-600(H)(4) to require anything less than extraordinary circumstances would allow Section 600(H)(4) to be an exception that swallows the general rule of an automatic stay. Piedmont further argues that, because lifting the stay imposed against CHS is antithetical to the general requirement that the ALC must first determine *de novo* whether the project is exempt before the licensee may proceed with the project, a stay should be lifted only upon a showing of extraordinary circumstances.

It appears that the purpose of the stay is to maintain the *status quo* until a decision is made in the case. Accordingly, a stay should not be lifted unless there is good cause to depart from the purposes of having an automatic stay in the first place. However, contrary to Piedmont's assertion, lifting a stay is not, by its very nature, an action that is at odds with the

[1] Section 1-23-600 was amended after this case was filed with the ALC. I nevertheless find that the amended provision is applicable to this case because it is procedural in nature. In Smith v. S.C. Ret. Sys., 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999), the Court held that, 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. However, statutes that are remedial or procedural in nature are generally held to operate retrospectively. Furthermore, even if the provision was not viewed retroactively because it is procedural, the enacting of this express standard to consider in determining whether to lift a stay could certainly be interpreted as clarifying original legislative intent. Bulst v. Huggins, 367 S.C. 268, 625 S.E.2d 636 (2006) (a subsequent statutory amendment may be interpreted as clarifying original legislative intent).

purpose of the automatic stay. Rather, it is the General Assembly's recognition that not every case must be stayed pending its outcome.

Nevertheless, though not contrary to the purpose of the automatic stay, it equally appears that if the only harm suffered by the movant is that which is analogous to any licensee then one would fail to establish "good cause." See MRI at Belfair v. Southern MRI, 07-ALJ-07-0538-CC (May 22, 2008). Logically, if harm that is analogous to any applicant would meet good cause, then the purposes of the automatic stay would be vitiated. Mun. Ass'n of S.C. v. AT&T Comm'ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (statutory language must be read "in a sense 'which harmonizes with its subject matter and accords with its [statute's] general purpose'"). Obviously, there must be a distinction. The fact that such a distinction must be made, however, does not necessitate the addition of a requirement to prove extraordinary circumstances.[2] Rather, it simply requires courts to recognize that factors that are common to all would-be licensees are not sufficient by themselves to demonstrate good cause.

Additionally, I do not find that the determination of whether to lift a stay should be made following a strict "balancing of the harms test." Nevertheless, I do not find the standard used in determining whether to grant an equitable stay to be off base in these determinations. In Merritt Bros., the court held that in determining whether to issue an equitable stay, the court "must weigh competing interests and maintain an even balance." 414 S.E.2d at 169 (quoting U.S. Central Bldg. Supply, Inc. v. Wilke, 685 F.Supp. 936, 938 (D.C. Md.1988)) (emphasis added). Here, the decision should likewise be made by weighing or considering all relevant factors that reflect upon whether the stay should or should not be lifted.

Finally, though there does not appear to be any case law or statute in South Carolina that sets forth a good cause standard for lifting a stay or that explains generally what constitutes good

---

[2] Proof of extraordinary circumstances is not necessarily the appropriate standard that should be applied in all cases and this Court therefore declines to adopt that standard as a bright line test. In other words, if the term "extraordinary circumstances" is used in the sense of circumstances "going beyond what is usual, regular, or customary," then such proof would be necessary to establish "good cause" in these cases: Merriam-Webster's Online Dictionary, www.m-w.com (defining "extraordinary"). However, if used in the sense of "[a] highly unusual set of facts that are not commonly associated with a particular thing or event," requiring proof of extraordinary circumstances would lead to a standard that simply may not be appropriate in all cases. Black's Law Dictionary 236 (7th ed. 1999) (emphasis added). For instance, a party may potentially demonstrate good cause by showing that a harm that is common to all applicants would have a greater impact upon him. The circumstances thus may not be highly unusual but the harm may be.

cause, the treatment of the issue by other jurisdictions does add clarity.[3] Other jurisdictions which have addressed the issue have pointedly avoided providing precise definitions of "good cause." Rather, those courts have found that the determination of whether there is good cause involves an evaluation of the facts of the specific case. See Shapiro v. Massengill, 661 A.2d 202, 211 (Md. Ct. Spec. App. 1995) ("The concept of 'just cause' does not lend itself to a mathematically precise definition. Indeed, '[t]here is no single definition of what constitutes good cause . . .'") (quoting Stanley Mazeroff, Maryland Employment Law § 3.3(A), at 189 (1990)); Peebles v. Moore, 269 S.E.2d 694, 698 (N.C. Ct. App. 1980) ("What constitutes 'good cause' depends on the circumstances in a particular case. . . ."). Therefore, following those precedents here, CHS must demonstrate that the circumstances of this case raise sufficient reasons to depart from the sound reasons for the existence of an automatic stay. See Leventis v. Dep't of Health and Envtl. Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000) (the burden of proof is upon the party asserting the affirmative of an issue).

Irreparable Harm Standard

Like the term "good cause," the term "irreparable harm" is not defined in Section 1-23-600. Where a term is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning. Lee v. Thermal Eng'g Corp., 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002). According to Black's Law Dictionary, an irreparable injury is "[a]n injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction." Black's Law Dictionary 789-90 (7th ed. 1999). The term irreparable injury "is not to be taken in its strict legal sense;" in other words, it "does not require that the threatened injury should be one not physically capable of being repaired." Id. at 790 (quoting Elias Merwin, Principles of Equity and Equity Pleading 426-27 (H.C. Merwin ed., 1896)).

[3] There are certainly instances in which our appellate courts have reviewed good cause determinations. See, e.g., Falle v. S.C. Employment Sec. Comm'n, 267 S.C. 536, 541-542 (1976) (finding that the employee's departure from his job was not "voluntarily without good cause" within the provisions of S.C. Unemployment Compensation Law); Doe v. Ward Law Firm, 353 S.C. 509, 579 S.E.2d 303 (2003) (finding good cause under S.C. Code Ann. § 20-7-1780 (Supp. 2001) to allow a child to review his adoption records); Chester County Dep't of Social Servs. v. Coleman, 303 S.C. 226, 399 S.E.2d 773 (1990) (finding that good cause existed under Indian Child Welfare Act to deny transfer of child placement proceeding to tribal court). However, though the treatment in those cases reflects a view that courts determine good cause, or lack thereof, on a case by case basis, the appellate cases of our State have not set forth general, non-case-specific, criteria for determining good cause.

"What constitutes irreparable harm is generally a factual determination made after considering the particular circumstances of a case." School Comm. of City of Pawtucket v. Pawtucket Teachers' Alliance Local No. 930, 365 A.2d 499, 502 (R.I. 1976). Whether a wrong is irreparable is a question that is "not decided by narrow and artificial rules." Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 455, 626 S.E.2d 34, 36 (Ct. App. 2005) (quoting Kirk v. Clark, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939)). Nevertheless, it has been held that, to be irreparable, the harm must be "neither remote nor speculative, but actual and imminent." Gracepointe Church v. Jenkins, No. 2:06-CV-1463-DCN, 2006 WL 1663798 (D.S.C. June 8, 2006) (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812 (4th Cir. 1991)); accord Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144 (2d Cir. 1999). Moreover, while some courts have held that the injury must be "great" and not "merely serious or substantial,"[4] others have held that "when the threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts."[5]

Although it sometimes held that mere economic loss does not constitute irreparable harm,[6] the absence of an available remedy by which the economic loss can be recovered may transform the economic loss into irreparable harm.[7] In other words, harm that a court cannot remedy following a final determination on the merits may constitute irreparable harm. See Am. Hosp. Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980).

In this case, consideration of whether there would be no irreparable harm if the stay is lifted involves analysis of many of the same factors as the broad consideration of good cause, but from the narrow perspective of whether the harm which may ensue from lifting the stay would be

---

[4] Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 356 F.3d 1256, 1262 (10th Cir. 2004) (quoting Prairie Band of Potawatomi Indians, 253 F.3d at 1250).

[5] Enterprise Intern., Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 472 (5th Cir. 1985) (quoting Canal Authority v. Callaway, 489 F.2d 567, 575 (5th Cir.1974)).

[6] See, e.g., Rogers v. Comprehensive Rehabilitation Associates, Inc., 808 F.Supp. 493,498 (D.S.C. 1992) (economic loss, standing alone, normally cannot constitute irreparable harm); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C.Cir.1985) ("It is ... well settled that economic loss does not, in and of itself, constitute irreparable harm."); Morton v. Beyer, 822 F.2d 364, 372 (3d Cir.1987) (loss of income alone does not constitute irreparable harm).

[7] See Enterprise Intern., Inc., 762 F.2d at 473 ("The absence of an available remedy by which the movant can later recover monetary damages, however, may also be sufficient to show irreparable injury"); see also Arlington School Dist. No. 3 v. Arlington Educ. Ass'n, 55 P.3d 546, 548 (Or. Ct. App. 2002) (holding that "[w]hether or not an injury is irreparable depends not upon the magnitude of the injury, but upon the completeness of a remedy in law") (citations omitted).

irreparable. The statute does not specify what harm the court should consider or what is indeed considered irreparable in order to prevent the lifting of a stay. Rather, this consideration must emanate from the legal and factual considerations before the court. Accordingly, the court must first look to the purpose of the statutes or regulations governing the conduct to determine what types of harm are at issue. In this case, that determination is relatively simple in that S.C. Code Ann. § 44-7-120 (2008) specifically sets forth that the purpose of the CON Act is to:

> promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State.

The harm that is relevant to this case is the need to "promote cost containment." In other words, succinctly stated, the issue here is the potential harm to the public that could result from the wasting of health care dollars on a project that requires CON approval before the project is approved for a CON.

Additionally, consideration of whether the harm is irreparable under this second prong of Section 1-23-600 (H)(4) does not involve a balancing of the effect of granting the stay. Rather, the analysis is expressly whether the harm resulting from lifting the stay is irreparable.

GOOD CAUSE

Evaluation of whether good cause exists to allow CHS to complete its construction of the MOB involves consideration of the timing of the stay and the impairment that will result from the stay.[8] A timeline of the progression of this case is important for an understanding of those issues. On October 26, 2007, CHS received notice from the South Carolina Department of Health and Environmental Control (Department or DHEC) that the MOB project was exempt from CON review. More importantly, CHS was informed by the Department that CHS could proceed with its construction of the MOB once it determined that the project was exempt from CON review.[9] Piedmont later requested administrative review of DHEC's determination on

[8] In this vein, CHS has argued that the Court should consider the harm to individuals such as the contractors hired to construct the MOB if the stay is not lifted. I do not find that type of harm is at issue in this proceeding. While Section 44-7-120 sets forth that two of its purposes are to "guide the establishment of health facilities and services which will best serve public needs" and to "ensure that high quality services are provided in health facilities in this State," those considerations are not so expansive as to require an examination of the harm to the individuals hired to construct the MOB.

[9] The Department's staff did not view the automatic stay provision under the then-current version of Section 1-23-600 to apply to CON exemption determinations. Obviously, this Court disagrees with that interpretation of the law.

December 20, 2007. A contested case was subsequently filed with the ALC on February 14, 2008.

However, once Piedmont filed its contested case, CHS continued construction under the belief that the automatic stay provision did not apply to CON exemptions. The Department also shared this interpretation. Furthermore, Piedmont did not seek to halt the ongoing construction of the MOB until it filed a motion seeking to enforce the stay on April 11, 2008 - nearly two months after it filed the contested case. By the time Piedmont filed its motion, a substantial portion of the construction had been completed. This Court's Order on June 16, 2008, enforcing the automatic stay was therefore the first formal notification CHS received that it could not proceed with the building of the MOB.

Moreover, from the time Piedmont filed its contested case to the day that this Court enforced the stay (over four months), CHS completed a significant portion of the MOB. To date, CHS has spent $6,739,129 on the construction of its MOB. It is reasonable to assume that a large portion of the money that CHS has spent upon the construction occurred during the four month period since the filing of the contested case. I find that the unabated substantial progress that was made in constructing the MOB after this case was filed with the ALC is a factor that weighs in favor of allowing CHS to complete the construction of the building.

It is also significant that CHS did not simply choose to expend the money to construct the MOB solely under a wrongful interpretation of the automatic stay provisions. Rather, as noted above, the Department informed CHS that it could proceed with the construction of the MOB once it determined that the project was exempt from CON review, and it further took the position that construction was not stayed by Piedmont's filing for contested case review with the ALC. CHS's actions in proceeding to construct the building without obtaining legal authorization from the ALC does not appear to be based upon a disregard for the law or a cavalier attitude to proceed at its own risk. Therefore, CHS's continued construction during this period, though based upon an erroneous understanding of the automatic stay provisions, is not a factor that I find weighs against lifting the stay under the circumstances.

Nevertheless, at the time the Department's staff made its determination, there was no existing decision setting forth the ALC's interpretation of whether the automatic stay provision applies to the filing of a request for this Court's review of DHEC's decision to issue a "nonmedical project" exemption under 24A Regulation 61-15 § 104(2)(f) (Supp. 2007).

Additionally, a crucial determination as to whether to lift the stay is whether it would be a waste of health care dollars to allow the building to simply remain as it is until the completion of this case.[10] At this point, CHS's building is essentially a shell, with several potential uses: an MOB, commercial office space, or perhaps another type of non-medical use. However, if the stay is lifted, CHS will proceed to upfit individual offices in the building for use as an MOB. Piedmont argues that if CHS proceeds to upfit the building solely as an MOB, those upfitting costs could be wasted, because CHS may find it difficult to lease the space to physicians who are not employed by CHS. Therefore, Piedmont thus asserts that during the litigation of this issue the building should remain a shell, leaving open the possibility of other potential uses of the building.

Clearly, it would be an egregious waste of health care dollars to require that the building remain a shell. Therefore, no matter what the outcome of the case, the building should either be completed or sold to another party presumably to be completed. Consideration of the proper approach in this case involves a balancing of the benefits versus the costs of allowing the completion of the building as an MOB. More specifically, the Court must consider the amount of health care dollars needed to upfit the building and the benefit that would result from the completion of the building as an MOB versus the advantage that would be gained by waiting until this case is resolved by the ALC to complete the building.

To begin with, CHS estimates the cost of upfitting this building as an MOB to be $2.6 million. If the building is completed as an MOB, the building will have multiple uses in addition to CHS's desired purpose. Warren Norman, a Rock Hill, South Carolina based commercial real estate developer, stated that the building "has tremendous commercial potential and would undoubtedly attract a variety of tenants." It is located in the thriving Fort Mill, South Carolina area in close proximity to Interstate 77, thus making it a prime candidate to attract the influx of businesses relocating from Charlotte to this area. In fact, if CHS is not able to use its building in the manner that it desires, Mr. Norman's company has an interest in purchasing it.[11] Other

[10] See S.C. Code Ann. § 44-7-120 (2008) (as more fully explained above) which provides, in part, that the purpose of the CON Act is to promote cost containment and guide the establishment of health facilities and services which will best serve public needs. In contrast, Piedmont faces little to no harm if the stay is lifted and CHS is allowed to finish the MOB project.

[11] The probative value of this evidence is limited by the fact that no evidence was offered as to what would be the value of the building if completed. The evidence nevertheless does reflect that upfitting the building as an MOB would not prevent it from being leased or sold.

physicians who are not employed by CHS have also expressed an interest in leasing space in the building. Accordingly, I find little support for the argument that the building would remain vacant if CHS cannot use it as an MOB for CHS-employed physicians. However, if the stay remains in effect, this factor could be diminished. Some of the non-employee physician tenants planning to occupy the MOB are relocating from other office buildings or other areas. Since the physicians are relocating, they will have to either cancel or let their current leases expire. If this stay is not lifted, the delay could result in those physicians simply renewing their old leases or finding other locations to house their practice.

Furthermore, CHS has spent $6,739,129 to purchase the land for the building and construct the base building shell, including parking and site work. The remaining cost to upfit the building would include $2,601,751 for the general contractor and $205,203 for architectural services and unspecified equipment to be purchased. However, if the stay is not lifted, CHS will incur a cost of approximately $186,870 to pay work stoppage damages.[12] In addition to the quantifiable financial obligations arising from its contract as a result of this work stoppage, CHS also faces untold financial penalties due to the inflationary nature of construction.[13]

On the other hand, should CHS be allowed to upfit the building as an MOB, Piedmont offered uncontested evidence that its use will be only as an MOB, unless demolition and renovation is made to the interior of the MOB to make the facility suitable for commercial office space. The cost of the demolition and renovation work to the MOB upfitting would range from $376,000 to $524,000. Upon completion of that work, the cost of retrofitting the MOB for commercial office space would range from $1.5 - $1.8 million. The total costs, therefore, of converting the MOB upfitting to commercial office space would range from nearly $1.9 million to over $2.3 million.

In conclusion, although CHS curiously offered no evidence regarding the cost of modifying the building if it is not approved as an MOB, I nevertheless find that the stay should be lifted. I base this finding upon a determination that the construction of the MOB reached its current stage without a timely objection by Piedmont and under a rational belief by CHS that it

[12] This figure was derived from subtracting $62,845 (the costs that have already been incurred as the result of ordering that construction be halted pursuant to the automatic stay) from the overall cost of $249,718.

[13] Piedmont argues that the possibility of inflation should not be considered as a factor in this case because CHS provides no evidence that construction costs are in fact on the rise or to what extent. However, I take notice of the fact that inflationary costs are not quantifiable but occur based upon many unforeseen circumstances. I therefore find that this issue is appropriate for consideration but only to the extent that CHS established its likelihood.

was entitled to proceed with constructing the building. Furthermore, though the evidence indicates that modifying the building for commercial use will result in substantial costs, the evidence also indicates a substantial likelihood that a significant portion of the building would nevertheless be viable for use as medical offices. Thus, I find that the modification cost propounded by Piedmont is substantially higher than what would most likely occur if CHS-employed physicians are not permitted to occupy the space. Finally, I recognize that even if CHS is denied the exemption it seeks in this case, the building may still be ultimately used by CHS-employed physicians if CHS obtains a CON for that use. Therefore, I find good cause to the lift the stay.

IRREPARABLE HARM

Piedmont argues that lifting the stay in this case would result in the irreparable loss of health care dollars. More specifically, as noted above, Piedmont offered uncontested evidence that should CHS be allowed to upfit the building as an MOB, the only use of the building would be as an MOB, unless costly demolition and renovations were made to the interior of the building to make the facility suitable for commercial office space. As discussed above, the total costs of converting the MOB to commercial office space would range from nearly $1.9 million to over $2.3 million. Piedmont argues that those costs would result in the irreparable loss of health care dollars. Additionally, though CHS presented evidence that the building could be sold, it offered no evidence as to what the value of the building would be if completed. Therefore, the Court is left to speculate as to whether the sale of the building would offset the dollars spent in upfitting the building.

On the other hand, though those costs would be irreparably lost if expended, I do not find that the evidence established that the demolition and renovations would necessarily have to be made. The evidence established that there is a substantial likelihood that a significant portion of the building could be leased to non CHS-employed physicians for use as medical offices if CHS is denied the exemption that it seeks in this case. Moreover, even if CHS is denied the exemption it seeks in this case, the building may still be ultimately used by CHS-employed physicians if CHS obtains a CON for that use. Nevertheless, in light of the limited evidence that CHS presented upon this issue, I do not find that CHS established that no irreparable loss of health care dollars will occur as a result of lifting the stay. See Leventis, 340 S.C. 118, 530 S.E.2d 643 (the burden of proof is upon the party asserting the affirmative of an issue).

CONCLUSION

I recognize the potential perception as to the dichotomy of this decision – that good cause exists to lift the stay based, in part, on an analysis of whether an irreparable loss of health care dollars will occur, but also finding that CHS failed to establish that no irreparable loss of health care dollars will occur as a result of lifting the stay. Nevertheless, each issue is subject to separate analysis under the factors relevant to that issue. Moreover, the determination of whether good cause existed in this case involved consideration of several additional facts that weighed in favor of lifting the stay. Therefore, I find that the stay should be lifted.[14]

Furthermore, though I find that the automatic stay in this case should be lifted to allow the construction and upfitting of the building to continue, I do not lift the stay restraining the use of the building as an MOB for CHS-employed physicians until the completion of this case. This decision, however, does not restrict, upon completion of the building's construction, the occupation of the building by non-physician employees of CHS as an MOB or other commercial uses of the building that are exempt from CON requirements. It is therefore

ORDERED that the CHS's motion to lift the automatic stay pursuant to § 1-23-600(G) in keeping with the above conclusions is GRANTED.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Administrative Law Judge

July 23, 2008
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above captioned action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Intragency Mail Service addressed to the party(ies) or their attorney(s).
This 23rd day of July, 2008
By: Amanda M. Scott
Judicial Law Clerk

[14] Obviously, CHS constructs the MOB at the risk that its employed physicians will not be allowed to use this building unless CHS obtains a CON for that use.

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **MOTION TO ALTER OR AMEND** (Reconsider)

Pursuant to Rules 29(D) and 68 of the Rules of Procedure for the Administrative Law Court and Rule 59(e), SCRCP, and reserving all of its rights and issues for appeal whether or not addressed herein[1], the Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC") hereby moves the Court to reconsider its Order Denying Motion to Dismiss, Order Granting Partial Summary Judgment, and Order to Enforce Automatic Stay, all issued by the Court on September 22, 2014. LMC moves the Court to vacate or, in the alternative, to modify, these Orders on the following grounds.

I. Order Denying Motion to Dismiss

In denying LMC's Motion to Dismiss this matter for lack of subject matter jurisdiction or, in the alternative, for Providence's failure to properly avail itself of the Court's jurisdiction by timely filing its Request for Review before the DHEC Board, the Court misapprehends or overlooks the following.

[1] In moving for reconsideration, LMC addresses those issues and matters which the Court failed to consider or address adequately in its Order. LMC reserves its right to appeal, without explicitly raising them herein, those issues which the Court actually considered or addressed but decided incorrectly. Further, LMC incorporates by reference herein all of its arguments and issues raised in its Prehearing Statement, its Motion to Dismiss, its Responses and Replies with regard to the Motion to Dismiss, the Motion for Summary Judgment and the Motion to Enforce Automatic Stay.

1. At page 2, the Court makes the factual finding that Providence did not have notice of LMC's projects until April 29, 2014, when Providence received LMC's response to Providence's Freedom of Information Act request. There is no evidence before the Court to support this finding as Providence submitted no affidavits or other sworn testimony regarding this issue, and the argument of counsel is not evidence. (*Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 645-646 (2012)).

Furthermore, the Order's factual finding with regard to when Providence first received notice of LMC's projects is not supported by the pleadings that were before the Court on LMC's Motion to Dismiss.[2] In its Request for Contested Case Hearing, Providence does not allege any facts from which the Court could conclude when Providence had notice of LMC's projects. Indeed, on the face of Providence's Request for Contested Case Hearing, the only conclusion to be drawn is that Providence filed its Request for Review with the DHEC Board well after 15 days from the dates of the alleged DHEC "approvals."

Finally, at the hearing before the Court, LMC submitted, without objection, Providence's April 9, 2014 Letter to DHEC notifying the Department of Providence's alleged status as an "affected person" as to an additional OR and/or Cath Lab at LMC. At the least, this April 9 letter indicates that a significant and material question of fact exists whether Providence had knowledge of these projects prior to April 29, 2014.[3]

Therefore, to the extent that the Order's ultimate legal conclusions with regard to Providence's timely filing of its Request for Review are based on the Court's erroneous and

---

[2] *See Doe v. Greenville County School Dist.*, 375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007)("Generally, in considering a Rule 12(b)(6), SCRCP, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the **face** of the complaint.")

[3] Even Providence, in its response to LMC's Motion to Dismiss, recognized the need for further factual inquiry if the Court intended to look beyond the plain language of Section 44-1-60 and the pleadings. (See Providence's Memorandum in Opposition to Motion to Dismiss, p. 11).

unsupported finding of fact as to when Providence had knowledge of LMC's projects and the Department's actions, the Order's legal conclusion that procedural jurisdiction exists is arbitrary, capricious, clearly erroneous, contrary to law and not based on any evidence in the record.

2. The Order's conclusion on page 3 that "the question here is not a matter of subject matter jurisdiction but rather one of procedural jurisdiction" is contrary to law and misapprehends or overlooks LMC's arguments that the Court lacks subject matter jurisdiction because none of the written decisions complained of by Providence give rise to a contested case under the law or under Article I, Section 22 of the South Carolina Constitution. If the decisions challenged do not give rise to a contested case, no *subject matter jurisdiction* exists. *See Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 743 S.E.2d 786 (2013). Therefore, the Order's conclusion that the question of subject matter jurisdiction is not before the Court is clearly erroneous.[4]

3. The Order's conclusion on pages 3-4 that the Department decisions challenged by Providence can give rise to a contested case proceeding is erroneous and contrary to the law in that, other than the February 25, 2014 approval of the drawing and schematics for the construction of the 3rd Cath Lab, there is no law or regulation which requires the Department to issue any of the other written decisions complained of. (*See Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 743 S.E.2d 786 (2013)).

4. The Order's conclusion on page 4, that "decisions involving CONs" are "other actions" giving rise to a contested case under Section 44-1-60(A) is overly broad, erroneous and contrary to the law in that there are many decisions "involving" CONs that do not give rise to

[4] LMC acknowledges that its alternative arguments as to Providence's failure to timely appeal implicate the Court's procedural jurisdiction.

contested case proceedings. (*See Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 743 S.E.2d 786 (2013)).

5. The Order's conclusion on page 4, footnote 4, that LMC's argument that the decisions challenged by Providence do not give rise to a contested case is an attempt "to divert the issue away from CON requirements" is erroneous and overlooks or misapprehends that the question whether the appealed decisions give rise to a contested case is the crux of the analysis of whether the Court has subject matter jurisdiction. As argued by LMC and the Department, there is no requirement that the Department issue the decisions appealed from, except for the February 25, 2014 approval of the Cath Lab construction plans and, therefore, there is no subject matter jurisdiction over Providence's challenge to the decisions.[5]

6. Further, if, as the Court concludes, at page 4, footnote 4, Providence is in fact appealing DHEC's decision not to require Certificates of Need for LMC's projects, that decision was made by DHEC and communicated to Providence and the public at large on June 28, 2014. It is error for the Court to characterize Providence's appeal as involving decisions on Certificates of Need without also considering and finding that Providence was on notice of the Department's decision regarding CON on June 28, 2013 and that it filed to timely appeal or act on this decision.

7. The Order's conclusion in footnote 4 that LMC's failure to file a CON application to include construction plans for the Cath Lab gives the Court jurisdiction over this matter is erroneous for the reasons stated above and because such alleged failure does not confer jurisdiction over this matter as it pertains to the 2nd Operating Room.

[5] As to that decision, which was delivered to the applicant on February 25, 2014, Providence did not timely file its Request for Review.

8. The Order's conclusion at page 5 that the *State Health Plan* unambiguously and unequivocally requires a CON for the services LMC sought to expand is erroneous and contrary to law and prematurely determined because, as raised by LMC in its pleadings before the Court, 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.

9. The Order's conclusions at page 5, footnote 6, that Providence's interests in this matter are "distinguishable" from the interests of the providers in *South Carolina Ambulatory Surgery Centers Association v. South Carolina Worker's Compensation Commission*, 389 S.C. 380, 699 S.E.2d 146 (2010) are erroneous and contrary to law in that there is no evidence before the Court regarding the interests claimed by Providence in this case and the argument of counsel is not evidence. (*Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 645-646 (2012)). Furthermore, this conclusion overlooks and is contrary to the Court's prior holding that a regulated provider's interest in assuring that the Department complies with its responsibilities under the Certificate of Need program is comparable to the "desire for future business" interests rejected by the Court in *Surgery Centers*. *See, Trident Medical Ctr., LLC v. S.C. Dep't of Health & Envtl. Control*, Docket No. 12-ALJ-07-0524-C, Second Amended Order dated June 19, 2013 (attached hereto as **Exhibit "A"**).

10. The Court's findings at page 6 that "LMC does not dispute that Providence meets the criterion of an 'affected person' under Section 44-7-120(1)(2002) and other applicable statutes" is clearly erroneous in that LMC does in fact dispute Providence's claim to be an affected person. (*See, e.g.*, LMC's Response to Motion for Summary Judgment, page 1, footnote 2.)

11. The Court's finding at page 6, and the accompanying footnote 7, that Providence filed a Freedom of Information Act request with the Department on April 9, 2014 and that, in a

noteworthy moment, DHEC failed to respond, is clearly erroneous because there is no evidence in the record to support the finding that Providence filed such a FOIA request and/or that the Department failed to answer it.[6] At the hearing before the Court, LMC submitted, without objection, Providence's April 9, 2014 letter to DHEC notifying the Department of Providence's alleged status as an "affected person" as to an additional OR and/or Cath Lab at LMC. This notification to the Department was not a FOIA request but does indicate that Providence had notice of these projects before April 29.

12. On page 7 of its Order, the Court makes the finding that "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." This finding is clearly erroneous in that, it is undisputed that, on June 28, 2014, the Department made the written decision that all providers, including LMC, could proceed with projects without a Certificate of Need and published that decision to the regulated community and the public. To the extent that the Court is correct in its determination that the decision to allow LMC to proceed without a CON and the decision not to publish notice of LMC's projects are not in writing, then the Court's determination that these unwritten, amorphous decisions can give rise to contested case proceedings is clearly erroneous and contrary to law. (*See Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 743 S.E.2d 786 (2013)).

13. On page 8 of the Order, the Court erroneously notes that LMC's arguments ignore the consideration that provisions of the CON Act other than the 15-day time limit would have

[6] Likewise, the Court erroneously determines that the Department never responded to Providence's FOIA request on p. 12, footnote 10 of its Order.

given Providence the opportunity to notify the Department of its status as an affected person.[7] This conclusion overlooks or misapprehends LMC's argument that Providence in fact received notice that the Department would be allowing all projects to go forward without Certificates of Need and that the Department would continue to participate inspecting and licensing such projects, without consideration of Certificate of Need requirements. Further, the Court's conclusion overlooks that Providence did in fact notify the Department of its [claimed] status as an affected person on April 9, 2014, well after all the projects in question were approved and before its receipt of LMC's FOIA response. The record is devoid of any evidence that would support Providence's contention or the Court's conclusions that Providence could not have acted sooner than April 29, 2014, and in a timely manner, to protect its interests. (*See S.C. Coastal Conserv. League v. S.C. Dep't of Health and Envtl. Control*, 390 S.C. 418, 426, 702 S.E.2d 246, 250-251 (2010))

14. At page 8, the Court concludes that "Thus, though Providence is now challenging actions involving the implementation of a CON, the challenge to the current acts emanates from DHEC's decision not to follow its own CON laws and give notice of its initial decision." This conclusion is contrary to the Court's ultimate holding that Providence timely filed its Request for Review inasmuch as the Department's decision not to follow its own CON laws was made and announced to Providence, the provider community and the public on June 28, 2013, months before Providence's challenge to the decision filed on May 14, 2014.

15. The Court's application of *Hamm v. S.C. Pub. Serv. Comm'n* to this matter is clearly erroneous in light of *S.C. Coastal Conserv. League v. S.C. Dep't of Health and Envtl.*

[7] The Court's similar finding at page 11 that LMC's allegedly relies on the fifteen day timeframe of Section 44-1-60 while allegedly ignoring the requirements regarding notice is also erroneous and misapprehend and overlooks that LMC does not rely on Section 44-1-60, Providence does. LMC contends that Section 44-1-60 does not apply to this matter because none of the decisions of the Department in this case give rise to a contested case proceeding.

Control, 390 S.C. 418, 426, 702 S.E.2d 246, 250-251 (2010)) and the Court's discussion of this issue misapprehends or overlooks the Supreme Court's holding in that case. In *Coastal*, the Supreme Court holds that the time for appeal under Section 44-1-60 runs fifteen days from receipt of the decision by the applicant unless (a) the affected person has requested notice from the Department and (b) the requested notice is not provided simultaneously with the transmittal of the decision to the applicant. In this case, Providence has not met the first condition that persuaded the Court in *Coastal Conservation League* to extend the fifteen day time frame to appeal. Providence was on notice as of June 28, 2013 that all of its competitors' projects (and its own) would be proceeding without consideration of Certificate of Need requirements and without the usual published notice. It was incumbent on Providence to protect its rights by timely notifying the Department that it desired notice of any projects approved for its competitors, including LMC. There is no evidence in the record why Providence waited until April 9, 2014, long after the Department's June 28, 2013 decision, to do so.

16. The Court's finding at page 10 that Providence acted reasonably and promptly by filing its Request for Review within fifteen days of its receipt of LMC's response to Providence's FOIA request is erroneous and contrary to law for the reasons stated above.

17. The Court's discussion and holding regarding "Constructive Notice" at pages 10, 11, and 12 of the Order misapprehend and overlook the Department's published notice to Providence and the public that all projects would be allowed to proceed without consideration of Certificate of Need requirements and the duty of all providers, including Providence, upon receipt of such notice to protect their rights by notifying the Department of their interest in such projects as affected persons.

18. On page 12, the Court finds that "Providence has no reason to make earlier inquiries." This finding is not supported by any evidence in the record as Providence presented

no affidavits or testimony concerning what it knew and when it knew it and the argument of counsel is not evidence. (*Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 645-646 (2012)).

19. The Court's Order finding that jurisdiction exists as to the Cath Lab and the 2nd OR because these projects required a Certificate of Need prior to implementation is erroneous and contrary to law and in contradiction to the Court's holding in its Order granting partial summary judgment that the question whether LMC made a capital expenditure in connection with the 2nd OR requires factual inquiry before the matter can be determined. If no capital expenditure was made, no Certificate of Need was required as to the 2nd OR.

II. Order Granting Partial Summary Judgment

In granting partial summary judgment to Providence on the grounds that LMC was required to obtain a Certificate of Need prior to implementing its 3rd Cath Lab project, the Court misapprehended or overlooked the following[8]:

1. At page 2 of the Order Granting Partial Summary Judgment, the Court makes the factual finding that Providence did not have notice of LMC's projects until April 29, 2014, when Providence received LMC's response to Providence's Freedom of Information Act request. There is no evidence before the Court to support this finding as Providence submitted no affidavits or other sworn testimony regarding this issue, and the argument of counsel is not evidence. (*Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 645-646 (2012)).

2. The Court's conclusion on page 4 that the Court has subject matter and procedural jurisdiction to hear this matter is erroneous and contrary to the law for the reasons stated in Section I above.

[8] LMC incorporates its arguments with regard to the Order Denying Motion to Dismiss into its arguments regarding the Order Granting Partial Summary Judgment.

3. The Court's recitation of the "undisputed" material facts at page 4 is clearly erroneous and contrary to the law in that LMC disputed before the Court (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. Further no evidence was presented to the Court on these "facts" and the argument of counsel is not evidence. (*Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 645-646 (2012)).

4. The Court's conclusions at page 4, Footnote 2, that Director Templeton's letter was neither actual nor constructive notice in this case is clearly erroneous and contrary to the law for the reasons discussion in Section I above.

5. Further, the Court's conclusions in Footnote 2 that "it is noteworthy" that LMC did not raise the issue whether Providence should have inquired earlier about LMC's projects in its Response to Motion for Summary Judgment is clearly erroneous in that LMC's Response references and incorporates its arguments stated in the Motion to Dismiss and in Footnote 1 of its Response, LMC discusses at length Providence's failure to act with due diligence with regard to its alleged "affected person" rights.

6. The Court's conclusions, beginning at page 6, that LMC is not entitled to assert estoppel against DHEC is clearly erroneous and contrary to law in that the issue of estoppel in this case is factual and, therefore, such findings on summary judgment are not appropriate. Furthermore, the conclusion that Director Templeton was authorized to speak for the Department but was not authorized to "contravene the CON statute" overlooks and misapprehends the Supreme Court's decision in *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, __ S.C. __, 407 S.E.2d. 583 (2014), which does not address whether a third party was entitled to rely on the Department's representations and actions prior to the Court's decision.

7. The Court's determination that the validity of the CON program could have been determined by a simple reading of the CON statute and that, therefore, LMC should have known it could not rely on the actions and representation of the Director of the Department misapprehend and overlooks the Supreme Court's decision in *Amisub*, cite above. The issue presented to the Supreme Court in Amisub involved a constitutional determination whether the Governor and the House of Representatives could "defund" program with the result that the program is suspended. No "simple reading of the CON statute" would have illuminated LMC's ability to determine what the answer to this constitutional question was. LMC, as a regulated provider, had the right to rely on the Director of the sole agency charged with administering the CON program when it sought the Department's input and advice in implemented needed projects. LMC further incorporates its arguments set forth in its Response to Motion for Summary Judgment regarding the applicability of estoppel to this matter.

III. Order Enforcing Automatic Stay

1. The Order Enforcing Automatic Stay as to the 2nd OR misapprehends or overlooks that the Certificate of Need Act requirements are not applicable to this matter and no contested case exists.

CONCLUSION

For the reasons stated above, Lexington Medical Center respectfully requests that the Court alter or amend and vacate its Orders as indicated above.

Respectfully Submitted,

David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, SC 29202
(803) 255-8000; (803) 255-8017 (fax)
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com
Attorneys for Respondent
Lexington Medical Center

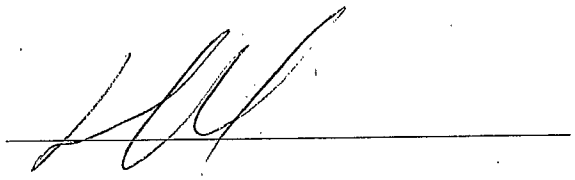
Columbia, South Carolina
October 2, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 2, 2014, s/he caused the foregoing **Motion to Alter or Amend (Reconsider)** to be served on all parties of record via U.S. Mail, first class postage prepaid, addressed as follows:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202



Columbia, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Trident Medical Center, LLC d/b/a, Summerville Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 12-ALJ-07-0524-CC **SECOND AMENDED ORDER**

APPEARANCES: For the Petitioner: David B. Summer, Esq.
For the Respondent: Ashley C. Biggers, Esq.

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) upon the request of Petitioner Trident Medical Center, LLC, d/b/a Summerville Medical Center (Summerville) for contested case review of the Department of Health and Environmental Control's (Department) approval of the 2012-2013 South Carolina Health Plan (State Health Plan or Plan). Summerville asserts that the Plan fails to comply with the mandate of S.C. Code Ann. § 44-7-180 (Supp. 2012) that it contain projections of need and standards of distribution for general acute care hospital facilities. The Department asserts that this matter does not constitute a contested case as defined by S.C. Code Ann. § 1-23-505 (Supp. 2012) or S.C. Const. art. I, § 22 and, therefore, the ALC lacks subject matter jurisdiction. A hearing on this matter was held before this Court on April 3, 2013.

This Court issued its Final Order and Decision on April 26, 2013, and then modified that decision in an Amended Order and Decision on April 29, 2013 dismissing this matter as a contested case. Summerville then filed its Motion to Alter or Amend (Reconsider) on May 6, 2013. After careful consideration of the arguments made by Summerville, the Court has amended its April 29, 2013 Amended Order and Decision accordingly below.[1]

[1] This Order vacates this Court's orders issued on April 26, 2013 and April 29, 2013 in this matter. Furthermore, the determinations made in the Reconsideration Order issued today are incorporated into this Order.

BACKGROUND

S.C. Code Ann. § 44-7-180(B) (Supp. 2012) provides that "[w]ith the advice of the State health planning committee, the department shall prepare a South Carolina Health Plan for use in the administration of the Certificate of Need program." The Plan includes an inventory of existing health care facilities, beds, specified services, and equipment, as well as projections of need, standards for distribution, and a list of those project review criteria most important to review of certificate of need (CON) applications for items contained in the Plan. The State Health Plan must first be approved by the State Health Planning Committee (Committee) after "public review and comment, including regional public hearings." Then, upon the Committee's approval, the Plan is submitted to the Department's Board for its approval. Id. § 44-7-180 (B) & (C).

In this instance, the 2012-2013 State Health Plan was prepared through a lengthy process involving meetings of the Committee, receipt and review of public comments, staff responses to public comments, and regional public hearings. Following that process, a draft Plan was submitted to the Board for consideration on September 18, 2012. The Board adopted the 2012-2013 State Health Plan at its November 8, 2012 meeting.

DISCUSSION

In its Motion to Dismiss, the Department argues that the ALC lacks subject matter jurisdiction over this matter because there is no constitutional or statutory provision providing a right to a hearing to contest the Board's adoption of the Plan. Contrarily, Summerville contends that as a health care facility licensed by the Department and bound by the Plan as conditions for conducting its business, it is entitled to contested case review of the Department's adoption of the Plan pursuant to S.C. Code Ann. §§ 44-7-110 et seq. (2002) (CON/Health Facility Licensure Act or CON Act), § 1-23-505, and Article I, § 22 of the South Carolina Constitution.

"Subject matter jurisdiction of a court depends upon the authority granted to the court by the constitution and laws of the state." Paschal v. Causey, 309 S.C. 206, 209, 420 S.E.2d 863, 865 (Ct. App. 1992). It refers to the "power to hear and determine cases of the general class to which the proceedings in question belong." Slezak v. S.C. Dep't of Corr., 361 S.C. 327, 331, 605 S.E.2d 506, 507 (2004), cert. denied, 544 U.S. 1033 (2005) (quoting Dove v. Gold Kist, Inc.,

314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994)). The lack of subject matter jurisdiction may not be waived even with consent of the parties. Tatnall v. Gardner, 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002). In fact, it "may be raised at any time and can be raised *sua sponte* by the court. State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (Ct.App.2002).

The ALC is a creature of statute and its jurisdiction to preside over legal matters is strictly limited to those matters permitted by law. Howard v. S.C. Dep't of Corr., 399 S.C. 618, 733 S.E.2d 211 (2012); see also Black v. Town of Springfield, 217 S.C. 413, 415, 60 S.E.2d 854, 855 (1950) ("The jurisdiction of a Court of the subject matter of an action depends upon the authority granted to it by the Constitution and laws of the State and is fundamental."). The contested case jurisdiction of the ALC is set forth in S.C. Code Ann. § 1-23-600 (A) (Supp. 2012), which empowers the Court to:

> preside over all hearings of **contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895,** involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases . . . ."

(Emphasis added).[2]

Therefore, the threshold issue before the Court is whether the Department's decision to approve the Plan is a decision that gives rise to a contested case under the law or under S.C. Const., art. I, § 22.

Contested Case

"Contested case" is defined in § 1-23-505(3) as "a proceeding including, but not restricted to, ratemaking, price fixing,[3] and licensing, in which the legal rights, duties, or privileges of a party **are required by law** or by Article I, Section 22, Constitution of the State of

---

[2] There is no dispute that the Department of Health and Environmental Control is listed in § 1-30-10 and is a department of the executive branch whose decisions are subject to contested case review by the ALC. (Cf. Int'l Paper Co. v. S.C. Energy Office, ALC Docket No. 12-ALJ-30-0086-CC, Order dated December 19, 2012) (State Energy Office is a state agency but is not defined in § 1-30-10 as such for purposes of ALC contested case jurisdiction.). In Int'l Paper, this Court found that it would have had appellate jurisdiction over the State Energy Office decision if the petitioner had timely filed for appellate review. In the case at bar, the Court has no appellate jurisdiction over the Department.

[3] Clearly, this case does not involve ratemaking or price fixing. Therefore, those matters will not be addressed in this Order.

South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing."[4] (Emphasis added).

Clearly, Summerville is not seeking a typical contested case review. No license is at issue in this matter.[5] Therefore, it does not challenge another entity's CON application or proposed project, nor does it request Department approval for a project of its own. Nevertheless, as argued by Summerville, Section 1-23-505(3) is not limited solely to consideration of proceedings involving "ratemaking, price fixing, and licensing." The definition of "contested case" plainly states that it includes those activities but is not restricted to them. Summerville notes that Section 44-1-60(A) provides that: "All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, **or other actions of the department which may give rise to a contested case** shall be made using the procedures set forth in this section." Summerville contends the Department's own governing authority also recognizes that there are decisions of the Department, which, although they do not concern permits or licenses, nonetheless give rise to contested case review. However, even if a proceeding involves a matter other than "ratemaking, price fixing, and licensing," in order to constitute a contested case, the proceeding still must involve legal rights which are required by law to be determined after an opportunity for a hearing. S.C. Code Ann. § 1-23-505(3).

Furthermore, the Supreme Court analysis in S.C. Ambulatory Surgery Center Ass'n v. S.C. Workers' Comp. Comm'n, 389 S.C. 380, 388, 699 S.E.2d 146, 151 (2010) provides clear guidance to the resolution in the present case. In that case, Surgery Centers challenged the revised schedule for maximum allowable payments to outpatient medical providers approved by the Workers' Compensation Commission (Commission) pursuant to 25A S.C. Code Ann. Regs. 67–1304 (Supp.2009). Regulation 67-1304 (A) provided that: "The Commission shall develop a prospective payment system for outpatient hospital services and services rendered by ambulatory surgical centers." Pursuant to those regulations, the Commission convened its Hospital Advisory Committee to establish a new schedule of maximum allowable payments for hospital outpatient

---

[4] The Administrative Procedures Act contains another definition of "contested case" that does not include Article I, Section 22. See S.C. Code Ann. § 1-23-310 (2005). However, that definition does not apply to determine the jurisdiction of this Court.

[5] "License" is defined as "the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission required by law, but does not include a license required solely for revenue purposes." S.C. Code Ann. § 1-23-505(4) (Supp. 2012). Black's Law Dictionary (9th ed. 2009) defines "permit" as "[a] certificate evidencing permission; a license."

services and ambulatory surgical centers. The Hospital Advisory Committee submitted its report, together with recommendations, to the Commission, which adopted the recommended schedules in its business meeting. 389 S.C. at 383-85, 699 S.E.2d at 148-49.

Surgery Centers challenged the implementation of the Commission's revised payment schedule, arguing that the Commission's actions constituted a contested case under the APA.[6] The Supreme Court found that Surgery Centers failed to establish a right to a "contested case" because, aside from the fact that the Commission's actions did not involve "ratemaking, price fixing, [or licensing,]"[7] Surgery Centers did not identify the necessary South Carolina or federal law that would require an opportunity for a hearing. Id. at 388, 699 S.E.2d at 151.

As in S.C. Ambulatory Surgery Cntr. Ass'n, the present case is not a contested case because there is no authority, either in South Carolina or federal law, to require the opportunity for a hearing on the DHEC Board's approval of the State Health Plan. The statutory provision setting forth the procedure for the review of the Department's contested cases states that **all** decisions from the Department which "may give rise to a contested case shall be made using the procedures set forth in [Section 44-1-60]." S.C. Code Ann. § 44-1-60(A). Importantly, Section 44-1-60(C) provides that: "The initial decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department shall be a staff decision."[8] Therefore, there is no decision by the Department involving contested case review that does not first emanate from an initial staff decision.

In this case, there has been no "initial decision" by the Department's staff. Consequently, no notice of a staff decision was sent, pursuant to Section 44-1-60(E)(1), to an applicant,

---

[6] In Surgery Centers, the Court addressed whether the Association was entitled to a "contested case" pursuant to S.C. Code Ann. § 1-23-310(3). Thought the issue before the ALC is whether Summerville is entitled to a "contested case" pursuant to Section 1-23-505(3), the language regarding "contested cases" in those respective Sections is virtually identical.

[7] The Court did not mention "licensing" for some reason, but more importantly, did not address the "but not restricted to" language in the definition of "contested case" under S.C. Code Ann. § 1-23-310(3). But because Surgery Centers failed to show a requirement in South Carolina or federal law for an opportunity for a hearing, there was nevertheless no entitlement to a contested case hearing. The fact that Surgery Centers did not engage in "ratemaking" or "price fixing" was simply further grounds for concluding that there was no contested case. This Court recognizes "the but not restricted to" language, as indicated above, but reaches the same conclusion as the Court in S.C. Ambulatory Surgery Cntr. Ass'n for the same reason. Even if the proceeding in the present case included something other than ratemaking, price fixing, or licensing, there would still need to be South Carolina or federal law requiring the opportunity for a hearing in order for there to be a contested case.

[8] Notice of that initial decision must be sent by the Department to an applicant, permittee, licensee, or affected persons who have requested in writing to be notified. S.C. Code Ann. § 44-1-60(E)(1).

permittee, licensee, or affected person requesting to be notified in writing, including Summerville. Summerville's own actions attest to the fact that no staff decision was made, as it made no request for a final review conference as required by S.C. Code Ann. § 44-1-60(E)(2) (Supp. 2012), or a final review conference as provided for in Section 44-1-60(F). Summerville did not request that the Board review an initial staff decision regarding the Plan because there was no initial staff decision. And since there is no staff decision to challenge pursuant Section 44-1-60, there is no contested case review.

In addition, there is no statutory requirement granting an opportunity for a hearing following adoption of the Plan by the Board. In Bowaters Carolina Corp. v. Smith, the South Carolina Supreme Court quoted the following well-established rule:

> Where the words of a Statute, in their primary meaning, do not expressly embrace the case before the Court, and there is nothing in the context to attach a different meaning to them, capable of expressly embracing it; the Court cannot extend the Statute, by construction, to that case, unless it falls so clearly within the reasons of the enactment as to warrant the assumption that it was not specifically enumerated among those described by the Legislature, only because it may have been deemed unnecessary to do so.

257 S.C. 563, 570-71, 186 S.E.2d 761, 763 (1972). In this case, the process for developing the Plan is set forth at S.C. Code Ann. § 44-7-180 (Supp. 2012). It requires preparation of a Plan by the Department with the advice of the Committee, opportunity for public review and comment, including regional public hearings, followed by submission to the DHEC Board for final revision and adoption. Id. There is no requirement in Section 44-7-180 for the opportunity for a hearing following adoption by the Board. In S.C. Code Ann. § 44-1-60, the Legislature conferred jurisdiction on this Court to hear appeals from DHEC decisions giving rise to contested cases and was therefore perfectly capable of granting this Court jurisdiction in Section 44-7-180 to hear cases challenging the approval of the State Health Plan following its adoption by the Board. However, the Legislature chose not to include conferral of such jurisdiction to the ALC in Section 44-7-180, and there is simply no indication that this conferral was omitted because the Legislature deemed it unnecessary to include it. Rather, given the specificity and detail used in Section 44-7-180 to set forth the procedure involved in the planning, revision, and approval of the State Health Plan, it is much more likely that the Legislature would have included jurisdiction of the ALC to hear challenges to the approval of the State Health Plan upon its adoption by the Board had the Legislature intended to do confer it. However, there is no

indication that the Legislature intended to do so, and it is not for this Court to extend Section 44-7-180 beyond the bounds established by Legislature.

Moreover, Summerville has not cited any other statutory provisions that would require a hearing to review the Board's approval of the Committee's approval of standards, criteria, and projections of need applicable to many types of projects that require a CON. In fact, this Court has found no provision under the CON Act requiring an opportunity for a party to have a hearing to determine its legal rights, duties, or privileges with respect to the adoption of the Plan. In sum, neither the CON Act nor any other statutory provision affords an opportunity for a contested case hearing regarding the approval of the State Health Plan that would make this case a contested case.

Article I, Section 22

Summerville argues that even if there is no statutory law that provides for contested case review of the approval of the State Health Plan, Article I, Section 22 of the South Carolina Constitution provides Summerville the right to an adjudicatory hearing before it can be finally bound by the requirements of the Plan. Summerville asserts that it has the requisite property and liberty interest in this case by virtue of its status as a health care facility that is constructed, licensed, and operated pursuant to the standards and criteria of the CON Act, including those standards and criteria set forth in the State Health Plan.

Article I, Section 22 provides in relevant part that "[n]o 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 . . . ." S.C. Const. art. I, § 22.[9] Importantly, to claim a due process right under Article I, Section 22, a party must have a private right that is affected by an administrative agency's action. S.C. Ambulatory Surgery Cntr. Ass'n, 389 S.C. at 390-92, 699 S.E.2d at 152-53.

---

[9] As noted above, Section 1-23-600(A) vests the ALC with subject matter jurisdiction to review Article I, Section 22 hearings. That authority is further codified in the definition of ALC contested cases. § 1-23-505(3). A contested case is a proceeding in which the legal rights are required by law to be determined after an opportunity for hearing. Our constitutional law via Article I, Section 22 requires an opportunity to be heard concerning an administrative decision that affects "private rights." Moreover, the South Carolina Supreme Court in S.C. Ambulatory Surgery Cntr.Ass'n, 389 S.C. at 390-92, 699 S.E.2d at 152-53, found that a liberty or property interest, which the Court considered a "private right," is necessary to invoke the due process protections of Article I, Section 22, yet legal rights, duties, or privileges required by law is listed separately under the definition of "contested case." Thus, the distinction between a case that arises under the statutory law versus under Article I, Section 22 appears to have been blurred.

As with the determination of the contested case issue, the Supreme Court's intellection in S.C. Ambulatory Surgery Cntr. Ass'n, also provides guidance to the resolution of the Article I, Section 22 issue. In Surgery Centers, the Association argued that they had a substantive property interest in the payment schedule process, thus implicating their "private rights" under Article I, Section 22 of the South Carolina Constitution. Id. at 385, 387, 699 S.E.2d at 150, 189. The Court applied a traditional due process analysis and held that Surgery Centers failed to establish "the requisite liberty or property interest to invoke the due process protections of [S.C. Const. art. I, § 22]." The Court concluded that Surgery Centers did not establish any private right to warrant the protections in Article I, Section 22, but instead merely had an interest in receiving "future income based on desired future work," which the Court found "not sufficient to constitute a private right."[10]

Just as the Hospital Advisory Committee in S.C. Ambulatory Surgery Cntr. Ass'n formulated and submitted a revised schedule of maximum allowable payments for hospital outpatient services and ambulatory surgical centers to the Commission for its approval, the Committee in the present case formulated and approved the State Health Plan before submitting it to the DHEC Board for its approval. Summerville is an acute care hospital listed in the inventory of the 2012-2013 State Health Plan. (Plan, pp. III-16). As a health care facility, Summerville is subject to the standards and criteria of the CON/Health Licensing Act. Indeed, as a health care facility, Summerville could not exist as a physical entity unless and until it applied for, and was granted, a Certificate of Need by the Department. See § 44-7-160(1) ("A person or a health care facility as defined in this article is required to obtain a Certificate of Need from the Department before undertaking . . . (1) the construction or other establishment of a new health care facility."). Section 44-7-180(B), however, simply requires the Board, in its review of certificate of need (CON) applications, to determine whether the State Health Plan meets the statutory criteria used in addressing the "projections and standards for specified health services and equipment which have a potential to substantially impact health care cost and accessibility."

[10] The Supreme Court also stated the following basis for its decision: "Moreover, we emphasize that Surgery Centers' decision to provide medical care to workers' compensation claimants is entirely voluntary." The Court's statement cannot be read in isolation and was merely an additional reason, under the facts of that case, to hold that Surgery Centers had failed to establish a due process right. Hence, the Court used the term "Moreover" to preface its final grounds. In this case, Summerville's abilitiy to replace hospital facilities in the future, expand services, and transfer existing beds to other locations are all voluntary, becoming regulated only upon Summerville's decision to perform them. Summerville has nevertheless pointed to no current specific rights that have been abridged.

Thus, the DHEC Board, like the Workers' Compensation Commission with the revised schedule at issue in S.C. Ambulatory Surgery Cntr. Ass'n, considers approval of the submitted Plan.

Furthermore, Summerville did not present any argument that the approved 2012-2013 State Health Plan would diminish the filling of the medical need for which it has been licensed. Though Summerville could not add beds or new services; purchase new equipment; or make other material capital expenditures for its business without seeking a Certificate of Need (or an exemption or determination of non-applicability) from the Department,[11] such actions would be an expansion of the services offered by Summerville based upon a desire to service future medical needs. This is akin to the Surgery Centers' interest in future income based on desired future work, concerning which the Court in S.C. Ambulatory Surgery Cntr. Ass'n held that "the mere desire for future work . . . is not sufficient to constitute a private right." 389 S.C. at 392, 699 S.E.2d at 153.

Summerville nonetheless seeks to distinguish the prospective aspect of its concern by equating the amended Health Plan to the regulation of its current business. Summerville contends "the property interest of Summerville Medical Center in the ownership and continued operation of its business is dependent on the appropriate regulation of that business by the Department." Likewise, Summerville stated that as a regulated health care facility, once it obtains permission from the Department to establish or expand its facilities or services, Summerville must be surveyed, inspected, and licensed, both initially and periodically, by the Department to operate its business. See § 44-7-250 ("The department shall establish and enforce basic standards for the licensure, maintenance, and operation of health facilities and services to ensure the safe and adequate treatment of persons served in this State."); see also § 44-7-260 (providing that health care facilities must be licensed by the Department prior to operating or maintaining facilities in this State) and 3 S.C. Code Ann. Regs. 61-16 (2011) (setting forth the detailed requirements for obtaining and maintaining licensure as a hospital). However, these arguments do not distinguish Summerville's concerns from those of Surgery Centers in Ambulatory Surgery Ctr., which the Court considered a "desire for future work" and thus not a private right.

Nevertheless, Summerville was still able to, and in fact did, present its specific concern with the Plan for consideration by the Board. The Department staff followed the requirements of public notice and public hearings required by §44-7-180(C) and 3 S.C. Code Ann. Regs. 61-15,

[11] See S.C. Code Ann. §§ 44-7-160(2), (3), (4) (5) and (6).

§106(3) following approval of the Plan by the Committee. And Summerville participated in the proceedings by offering comments in response to the issuance of the draft Plan prior to its adoption by the Board. See § 44-7-180(C). Indeed, before the Board made the final agency decision on the contents of the Plan, Summerville raised and preserved in the form a letter the issue of the Plan's lack of compliance with § 44-7-180 and requested that the Board address the Plan's deficiencies in its final decision.[12]

CONCLUSION

Because I find that this case does not involve a contested case and that DHEC's decision did not affect any of Summerville's private rights, or liberty or property interests, invoking due process under Article I, Section 22 of the South Carolina Constitution, I conclude that this Court lacks subject matter jurisdiction to hear a contested case review of this matter.

ORDER

Based upon the foregoing Findings of Facts and Conclusions of Law, it is hereby:

ORDERED that the Department's Motion to Dismiss in this matter as a contested case is **GRANTED.**[13]

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

June 19, 2013
Columbia, South Carolina

---

[12] Because § 44-7-180 mandates that **only** the Board can approve the State Health Plan, the provisions of § 44-1-60(E) and (F), which allow a staff decision to become the final agency decision unless appealed, do not apply. In this case, the Board's consideration of the Plan as required by law supplants the final review conference process. See Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect."). In this case, Summerville Medical Center did not have to request that the Board review the initial staff decision regarding the Plan, because there was no initial staff decision and because the law required the Board to hear the matter whether or not Summerville requested it. Summerville did present its specific issue with the Plan for consideration by the Board in the form of its letter detailing the Plan's deficiencies and urging the Board not to approve any provisions not in compliance with § 44-7-180.

[13] The Court nevertheless recognizes that the issue regarding a Writ of Mandamus in this matter is still pending.

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).

E. Harvin Belser Fair
Judicial Law Clerk

June 19, 2013
Columbia, South Carolina

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 **MEMORANDUM IN OPPOSITION TO MOTION TO LIFT AUTOMATIC STAY**

Petitioner Sisters of Charity Providence Hospitals ("Providence") hereby files this Memorandum in Opposition to the Motion to Lift Automatic Stay filed by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center ("LMC").

BACKGROUND

The Court is well familiar with the factual background underlying this dispute, as the Court on September 22, 2014, issued numerous rulings addressing with finality almost all of the issues raised by the parties in their respective Motions to Dismiss, for Summary Judgment, and to Enforce the Automatic Stay. Following receipt of comprehensive briefing and hearing lengthy oral argument, the Court concluded that LMC was in fact operating a third cardiac catheterization laboratory in violation of the law and that, pending limited discovery on the issue of capital expenditure, may very well conclude that the second open heart surgery suite has been similarly operated (and patients treated) in violation of the law.

Despite the Court's conclusive ruling on Providence's Motion to Enforce Automatic Stay holding that both projects were subject to the stay of Section 1-23-600(H)(2) as of July 9, 2014, LMC nonetheless files a motion to lift that stay, despite having earlier had the opportunity to do so

and electing not to.[1] For the reasons set forth herein, Providence submits that LMC does not satisfy the burden necessary to lift the automatic stay and therefore the Motion should be denied.

THE AUTOMATIC STAY

As this Court explained, "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." Order on Automatic Stay at 3. The Court ordered that "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." *Id.* LMC was given five (5) calendar days. *Id.* As to the cardiac catheterization laboratory, given the Court's ruling that LMC was required to obtain a CON before undertaking the service, LMC's operation of the laboratory was in violation of the law and all activities were stayed pending receipt of a proper CON application, "should LMC choose to do so." *Id.* at n.1.

There is no justifiable reason to allow LMC to be allowed to continue to ignore the CON Act and, thereby, act in violation the law, as it seeks to do by a lifting of the automatic stay. The automatic stay should be lifted only upon a showing of good cause or that no irreparable harm will occur if the stay is lifted. S.C. Code Ann. § 1-23-600(H)(4). This Court has had occasion to hear arguments on similar motions and the directives of this Court's opinions is instructive.

> Lifting the stay based upon the normal, foreseeable delay, expense, and lost profits associated with an applicant's inability to continue with a project due to the operation of the automatic stay would contradict the legislative purpose of imposing one. Consequently, the court finds that a movant must show circumstances other than those generally suffered by prospective permittees or licensees to lift the stay. Moreover, the harm demonstrated by those circumstances must outweigh that which will be suffered by the other parties.

[1] If the circumstances were as emergent as claimed in the Motion and accompanying Affidavits, surely LMC should have requested this relief long before the adverse ruling of the Court.

MRI at Belfair, LLC, v. S.C. Dept. of Health and Envtl. Control, Docket No. 07-ALJ-07-0538-CC (S.C. Admin Law J. Div. May 22, 2008) (Order on Motion to Lift Stay attached as **Exhibit A**). LMC has not shown good cause to lift the stay, and it is apparent that irreparable harm will result if the stay is lifted pending a final decision.

Several undisputed facts are important to set forth for the Court. First, it cannot be disputed that LMC knew or should have known that a CON was required by the black letter law of the CON Act and the South Carolina Health Plan before undertaking the third cardiac catheterization lab or the second open heart surgery suite projects.[2] In fact, as the Court acknowledged in its Order on summary judgment, counsel for LMC acknowledged the risk undertaken by LMC to act during the purported suspension and before the Supreme Court could rule on the issue. Order Granting P. Summ. J. 7.

Second, LMC knew or should have known that the open heart surgery services it sought to expand without prior CON approval were not needed under the applicable South Carolina Health Plan and, therefore, intentionally took advantage of the Department's confusion over the CON program to implement services it otherwise would not be successful in obtaining. That existing providers, including Providence, will be irreparably harmed by the lifting of the automatic stay is without question. The South Carolina Health Plan measures utilization (volume) *by suite* and contains findings about the strong correlation between volume, proficiency and patient outcomes. 2012-2013 South Carolina Health Plan, VIII-21-23.

Finally, despite acting improperly in issuing the licensing approvals without first requiring LMC obtain valid CONs for the cardiovascular care projects, which conduct by DHEC was a violation of Section 44-7-290 of the CON Act, the Department did place LMC on notice that the

[2] At the hearing in this proceeding, the Department, through counsel, responded to a question by the Court and stated that the expansion to a second open heart surgery suite requires a CON. *See also*, 2012-2013 South Carolina Health Plan, VIII-20 (Exhibit "C" to Mot. for Summ. J.).

issuance of an approval, without the required CON, was subject to challenge and directive from the judiciary or others. *See* Order Denying Mot. to Dismiss, n.1.

1. Good cause does not exist to lift the automatic stay

"Good cause" is a "legally sufficient reason." Black's Law Dictionary 235 (8th ed. 2004). As the ALC has explained, LMC must show more than circumstances generally suffered by prospective licensees to lift the stay. For reasons known only to LMC, this Motion was only filed after receipt of adverse rulings from the Court on the cross motions for disposition. LMC had every opportunity to file and brief the issue of the stay at the time of the filing of the contested case proceeding, at the time of the filing of the dispositive motions and Providence's Motion to Enforce Automatic Stay, prior to the hearing on the dispositive motions, or even following the hearing and in the nearly three weeks between the hearing and the Court's rulings. That LMC faced a short (and gratuitous) grace period before an order confirming the imposition of the stay (that was effective as of July 9, 2014), is solely the doing of LMC and militates against a finding of good cause.

It is undisputed that this Court has recognized that the Supreme Court's decision in *Amisub* results in the conclusion that health care providers, as DHEC, are required to follow the law and the law applicable to this matter requires the acquisition of CONs prior to the institution of the services LMC was providing without authorization. *Trident Neurosciences Center, LLC, v. S.C. Dept. of Health and Envtl. Control*, Docket No. 14-ALJ-17-0103-CC at 7 (S.C. Admin. Law J. Div. June 10, 2014) (Order Granting Summ. J. attached as Exhibit "E" to Mot. for Summ. J.) LMC does not have a legally sufficient reason for lifting of the automatic stay. For example, there is no meritorious defense for LMC's violation of the law. "The CON Act is, and has been, in effect throughout the events at issue, and DHEC has all the while been responsible for enforcing it." Order Granting P. Summ. J., 7). LMC's contention that it can expand its open heart surgery

program by adding a second open heart surgery suite without a CON is, at best, a novel issue with no legal or factual support. In contrast to this new theory, there is a high likelihood that Providence will succeed in providing undisputable evidence of LMC's capital expenditure in support of its expansion of the open heart surgery program. With its October 2009 joint application with Providence establishing its open heart surgery program, LMC spent over the three million dollars to equip one room. The equipment identified for that single room is not enough equipment to operate two open heart surgery suites in the same program. Attached as **Exhibit B** is the Affidavit of Joanne Carelli, RN, CNOR, Director of Cardiovascular Surgery, who has worked at Providence Hospital for 36 years in cardiac surgical care, who has the knowledge and experience necessary to explain for the Court what LMC should have purchased since October 2009 to implement a second open heart surgery suite. Thus, for LMC to be currently providing open heart surgery services in two surgical suites, additional equipment had to have been purchased by LMC to outfit the second suite. In short order, Providence expects that the narrow scope of discovery directed by the Court will reveal the capital expenditure needed to satisfy summary judgment as to the second open heart surgery suite.

As to the argument regarding status quo, LMC argues that refusing to lift the automatic stay results in a need to "turn[] back the clock" and return LMC to a state of operations prior to LMC's knowing violation of the law. Mot. to Lift Auto. Stay, 3-4. Once again, LMC seeks to profit and proceed based on a "timing" issue of its own creation, as it was LMC that purposefully and intentionally hid its conduct from affected persons such as Providence, and now complains that the passage of time before Providence could properly bring LMC's bad conduct to light would cause disruption to LMC's illegal operations. LMC's reliance on *Amisub of S.C. Inc. d/b/a Piedmont Med. Ctr. v. S.C. Dept. of Health and Envtl. Control*, Docket No. 08-ALJ-07-0063-CC (July 23, 2008), is misplaced. The ALC clearly held that the lifting of the stay was solely with

regard to the completion of construction and upfitting of the MOB at issue, and was not a lifting of the stay to provide unauthorized services to patients. Moreover, the *Piedmont* Court noted that the challenged party's "actions in proceeding to construct the building without obtaining legal authorization from the ALC does not appear to be based upon a disregard for the law or a cavalier attitude to proceed at its own risk." *Id.* at 7. Providence submits that the same cannot be said of LMC in this instance. LMC's actions were certainly cavalier. As this Court noted, a simple reading of the CON Act was all LMC needed to do in order to understand the steps necessary to obtain authorization for its expanded services. Thus, the good cause available to the challenged party in *Piedmont* is wholly distinguishable from the matter before this Court.

The Court must evaluate the specific facts of this case to determine the existence of good cause. The provision of open heart surgery services in this State is highly and carefully regulated. The South Carolina Health Plan clearly explains the need for CON oversight of new and expanding open heart surgery services, given that "[u]nderutilized programs may reflect unnecessary duplication of services in an area, which may seriously compromise quality and safety of procedures and increase the cost of care." 2012-2013 South Carolina Health Plan, VIII-2. This concern regarding underutilization is consistent with the guiding posts of the CON Act – including preventing the unnecessary duplication of services and maintaining quality care. S.C. Code Ann. § 44-7-120. LMC has not and cannot show good cause exists to allow a second, unauthorized open heart surgery suite without first going through the CON approval process.

Very similar to the *Piedmont* matter, while the *Piedmont* Court lifted the stay, it was only to allow construction to be completed on the building rather than remain a shell. *Piedmont Med. Ctr.* at 8. The use of the building pending a final determination on the CON dispute before the court was not allowed, but instead the building could be completed and used for non-objectionable purposes. *Id.* at 10-11. As here, LMC is not prohibited from using its surgery suite to perform

surgical services that do not require a CON; it is only stayed from conducting open heart surgeries in violation of the law for which it did not obtain prior approval. LMC has not proven that good cause exists to lift the stay as to open heart surgical procedures in the unapproved second suite.

2 *Irreparable harm will result from a lifting of the stay.*

As addressed above, LMC's unjustified expansion of its open heart surgery program violates the very tenets of the CON Act. More than just a "competitive disadvantage" that existing providers would allege, the irreparable harm to affected persons such as Providence is recognized and protected by the South Carolina Health Plan. Each procedure improperly performed by LMC in the second open heart surgery suite is not only an unjust enrichment to LMC at the expense of existing open heart surgery providers in the Midlands, but also adversely effects the utilization of the nine other units in the Service Region (five of which are just a few miles away), which all suffer from the underutilization the Health Plan seeks to avoid. 2012-2013 South Carolina Health Plan at VIII-23; *see also Dema v. Tenet Phys. Svcs-Hilton Head, Inc.*, 383 S.C. 115, 124, 678 S.E.2d 430, 434-35 (2009) (finding provider of catheterization procedures without proper authorization was undoubtedly unjustly enriched in the form of revenue and profits from performing lucrative, yet unlawful, procedures). As was the unauthorized provider in *Dema*, LMC has acted "in direct derogation" of the CON Act's purpose of promoting quality healthcare to the citizens of South Carolina by performing unauthorized medical procedures. *Dema* at 124, 678 S.E.2d at 435. The irreparable harm to Providence, existing providers, and the citizens of South Carolina, is apparent and requires enforcement of the automatic stay.

In challenging stay by alleging irreparable harm, LMC resubmits the earlier filed Affidavits of Mr. Augsburger and Dr. Travis (notably, without bothering to update or expand the Affidavits), neither of which supports a findings that irreparable harm will not occur. As addressed at the hearing before this Court on September 12, 2014, these Affidavits do no more

than assert LMC's purported entitlement to the expanded service lines, which should properly be taken before the Department as part of the CON application process. It is also important to note that LMC applied for one suite and has operated in one suite for several years. If having an open heart program with one suite violates the standard of care, LMC should have never applied for the service.

LMC argues that the patients may be affected by the stay and that scheduling concerns warrant a lifting of the automatic stay. In fact, according to LMC's Dr. Travis, patients diagnosed as needing cardiac surgery "are scheduled for surgery at LMC as soon as practical, usually within twenty-four to forty-eight hours." Travis Aff. ¶5. Given that LMC had five days' notice of the effective date of the stay, clearly sufficient time existed to address scheduling of newly diagnosed patients. Moreover, LMC offers no reason that any or all of these patients requiring cardiac surgery cannot be treated at any other existing provider of cardiac surgery in the service area, including Providence. There is no prohibition on patient transfers and such transfers do not afford a basis to require a second open heart surgery suite in a market with underutilized existing programs. In fact, for several decades LMC did just that – transferred patients requiring open heart surgery to another provider in the service area.

Providence submits the Affidavit of Dr. Mac Leppard, a cardiovascular surgeon with Providence that has practiced cardiovascular care in South Carolina for 30 years. **Exhibit C**, Affidavit of M. Leppard. As Dr. Leppard avers, very few cardiac patients require open heart surgery on an emergent basis. *Id.* ¶2(b). In fact, transfer of patients for cardiac surgery is common and not prohibitive. *Id.* ¶2(c)-(d). LMC's assertion that patients would suffer without the second suite is simply without foundation. The South Carolina Health Plan clearly considers the utilization of all existing open heart surgery suites when considering applications for open heart surgery services. As of the data published in the 2012-2013 South Carolina Health Plan, the

existing providers located just miles away had significant excess capacity in their underutilized programs – Providence at 42% for three open heart surgery suites and Palmetto Health Richland at 36% for two open heart surgery suites. 2012-2013 South Carolina Health Plan, VIII-23. "With a capacity of 500 surgeries per suite, the statewide capacity was 17,000 surgeries. The state average utilization rate of 26.9% equated to 133.4 surgeries per suite. Unused capacity remains in all programs in the state." *Id.* at VIII-3 Clearly, irreparable harm exists for the existing open heart surgery providers who are already underutilized if LMC is allowed to conduct open heart surgeries in a second suite without having obtained CON approval and established the need for the program in the absence of adverse impact, among the other relevant criteria considered by the Department.

CONCLUSION

For the reasons set forth here, Providence respectfully requests that this Court deny the Motion to Lift Automatic Stay.

James G. Long, III
Jennifer Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Petitioner,
Sisters of Charity Providence Hospitals

October 3, 2014
Columbia, South Carolina

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 **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Memorandum in Opposition to Motion to Lift Automatic Stay** has been served on counsel of record via hand-delivery, addressed as shown below, this 3rd day of October, 2014:

Ashley C. Biggers, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Faye A. Flowers, Esquire
Attorney for Lexington County Medical Center
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

Sharon A. Wendice

NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

EXHIBIT A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC; Hilton Head Regional Medical Center; and Hilton Head Imaging, Inc., Petitioners, vs. South Carolina Department of Health and Environmental Control and Southern MRI, Respondents.	Docket No. 07-ALJ-07-0538-CC **ORDER ON MOTION TO LIFT STAY**

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC") on the motion of Respondent Southern MRI to lift the automatic stay imposed by S.C. Code Ann. § 1-23-600(G)(2).[1] Petitioners MRI at Belfair, LLC ("MRI at Belfair"); Hilton Head Regional Medical Center ("Hilton Head Regional"); and Hilton Head Imaging, Inc. ("Hilton Head Imaging") (collectively, "Petitioners") oppose the lifting of the stay. Respondent Department of Health and Environmental Control ("Department") does not object to the lifting of the stay. The court held an expedited hearing on this motion on May 12, 2008. Upon consideration of the parties' written memoranda and oral argument at the motions hearing, the court grants the Petitioners' motion.

On September 19, 2007, the Department granted Southern MRI's request for a non-applicability determination ("N/A Determination") regarding its proposal to purchase and operate a magnetic resonance imaging ("MRI") unit and computer tomography ("CT") unit in Beaufort County, South Carolina. Upon exhaustion of the administrative process with the Department, MRI at Belfair and Hilton Head Regional timely filed a request for a contested case hearing before the ALC challenging the Department's determination. Hilton Head Imaging later

[1] By order dated April 30, 2008, the court granted the Petitioners' motion to enforce the automatic stay of § 1-23-600(G)(2). Pursuant to § 1-23-600(G)(4), Respondent Southern MRI promptly filed a motion to lift the automatic stay.

PJG

intervened as a Petitioner. By way of the present motion, Southern MRI seeks to proceed with its planned operation of the MRI and CT units on Hilton Head Island.

Southern MRI has been providing imaging services on Hilton Head Island since the late 1990s. Most recently it was providing imaging services through a Siemens Impact Expert 1.0T MRI at its facility located at 460 William Hilton Parkway. This facility is down the road from the facility that will house the MRI and CT units that are the subject of this action. Further, an affiliated entity, Southern Open MRI located in Bluffton, South Carolina, provides imaging services to the Hilton Head area through a Hitachi Aris II .3T MRI.

After the Department granted Southern MRI's N/A Determination, Southern MRI began construction of its new facility and installation of a GE 1.5T Signa HiSpeed MRI and a GE 4 Slice CT, the MRI and CT units that are at issue in this matter. In March 2008, Southern MRI decommissioned its Siemens unit intending to utilize its newly installed GE unit on Hilton Head Island. Patients in the Hilton Head and Bluffton areas may obtain imaging services from a variety of providers, including, for example, Hilton Head Regional, Hilton Head Imaging, MRI at Belfair, Southern Open MRI, and, until recently, Southern MRI.

DISCUSSION

a. Standard to Lift Stay

The Administrative Procedures Act provides for an automatic stay of an agency decision to issue a new license when a contested case hearing is requested. § 1-23-600(G)(2) ("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."). After a contested case hearing is initiated before the ALC, any party may move for the presiding administrative law judge to lift the automatic stay. § 1-23-600(G)(4). The parties agree that subsection (G)(4) does not provide a standard as to the circumstances under which the automatic stay should be lifted. Their positions diverge somewhat as to the standard they urge this court to apply.

Generally, the decision to grant or refuse a stay is discretionary and should be exercised with caution after balancing competing interests. Carolina Water Serv., Inc. v. Lexington County Joint Mun. Water & Serv. Comm'n, 367 S.C. 141, 153 n.2, 625 S.E.2d 227, 233 n.2 (Ct. App. 2006), rev'd on other grounds, 373 S.C. 96, 644 S.E.2d 681 (2007). Southern MRI and Petitioner MRI at Belfair agree that, in exercising its discretion as to whether to lift the stay, the

PJG

court should employ a balancing test.[2] Merritt Bros., Inc. v. Marine Midlands Realty Credit Corp., 307 S.C. 213, 414 S.E.2d 167 (1992) ("An equitable stay may be invoked if justified by circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination, the court 'must weigh competing interests and maintain an even balance.'") (quoting, in part, United States Central Building Supply, Inc. v. Wilke, 685 F. Supp. 936, 938 (D. Md. 1988)); see also Carolina Water Serv., 367 S.C. at 153 n.2, 625 S.E.2d at 233 n.2. By contrast, Petitioners Hilton Head Regional and Hilton Head Imaging argue that the balancing test typically employed by courts when considering whether to issue an equitable stay is not appropriate here. They contend that because the automatic stay of § 1-23-600(G)(2) is statutory rather than equitable, the court must consider the statute as a whole in light of its intended purpose. Such an examination, they contend, shows that the General Assembly intended that the automatic stay of (G)(2) be lifted only in extraordinary circumstances, which, they argue, Southern MRI has not demonstrated here. Cf. Talley v. John-Mansville Sales Corp., 285 S.C. 117, 119 n.2, 328 S.E.2d 621, 623 n.2 (1985) (noting that remanding the case for entry of a stay could delay its resolution for years, and stressing that such a stay is proper only under the most exceptional circumstances).

The court agrees to some extent with both of these positions. In determining whether the stay should be lifted, the court must certainly consider and balance the respective harm to the parties. However, the court finds that the ordinary, garden variety "harm" that all permit or license applicants will undeniably but commonly suffer is alone insufficient to warrant lifting of the automatic stay. Lifting the stay based upon the normal, foreseeable delay, expense, and lost profits associated with an applicant's inability to continue with a project due to the operation of the automatic stay would contradict the legislative purpose of imposing one. Consequently, the court finds that a movant must show circumstances other than those generally suffered by prospective permittees or licensees to lift the stay. Moreover, the harm demonstrated by those circumstances must outweigh that which will be suffered by the other parties.

b. Application to Evidence Presented

Southern MRI asserts that it will suffer more harm from the stay than the Petitioners will suffer if it is lifted. In support of its motion, Southern MRI filed an affidavit of Chris Jenkins

[2] Naturally, these opposing parties disagree as to how the court should apply that balancing test based on the evidence presented.

PJG

averring that "[t]he prohibition against operating the MRI and CT modalities are causing significant harm to Southern MRI." (Jenkins Aff. ¶ 15.) Specifically, Southern MRI contends that if the stay is not lifted, "it will be forced to terminate its employees, as it will not be generating sufficient revenue to service its debt." (Id.) Additionally, it contends that "its referral relationships with the established referring physicians that have been cultivated since 1999 will be jeopardized or terminated." (Id. ¶ 16.) Moreover, "[i]t believes that there will be a significant detrimental impact on the patients that have been referred to Southern MRI in the past and will be referred to Southern MRI in the future." (Id.) Finally, Jenkins avers that "[t]he impact to Southern MRI, the referring physicians and the patients are significant and potentially non repairable if Southern MRI is not allowed to operate during the appeal." (Id. ¶ 17.) Attached to Jenkins's affidavit are letters from ten local physicians essentially stating that the inability to refer patients to Southern MRI during the pendency of this contested case will negatively impact their patients. The physician letters further state that, if the stay is not lifted, they will be "forced to look elsewhere for imaging services" and express concern that they "will not be able to find the timely and quality services that [Southern MRI is] prepare[d] to offer."

In further support of its motion, Southern MRI argues that, although it knowingly assumed the risk that the Department's decision to grant the N/A Determination could ultimately be determined to be erroneous, thus necessitating full certificate of need review for its project, Southern MRI could not have anticipated that the court would interpret the automatic stay provision of § 1-23-600(G)(2) to apply to N/A Determinations until the court's order of April 30, 2008. Because this novel issue had not yet been addressed by the ALC[3] when Southern MRI elected to proceed with implementing its project based upon the Department's N/A Determination, it argues that equity demands that the stay be lifted. Finally, it argues that, because Southern MRI will be unable to provide any MRI or CT services if the stay is not lifted, it may not be in a financial position to proceed with the project even if it ultimately prevails in the underlying contested case.

In response, the Petitioners make several points. First, they point out that Southern MRI's inability to provide MRI and CT services during the pendency of this matter is a result of

[3] The court notes that its April 30, 2008 decision has no precedential effect and is not binding on other administrative law judges. See Stephen P. Bates, *The Contested Case Before the ALJD, in* South Carolina Administrative Practice & Procedure 161, 211 (Randolph R. Lowell & Stephen P. Bates eds., 2004) ("The judges of the [ALC] are not bound by previous rulings of their peers.").

PJG

its own actions. Southern MRI had an operable Siemens unit on Hilton Head Island, which it decommissioned in March 2008 during the pendency of this case. Hilton Head Regional and Hilton Head Imaging further point out that Jenkins stated in his deposition just a few days before his affidavit was filed in connection with this motion that Southern MRI decommissioned its Siemens unit at the same time the GE unit was being delivered for economic reasons, which created a lapse in service. Further, Jenkins stated in his deposition that the two technicians employed by Southern MRI are currently working forty hours per week, although not exclusively by performing imaging services.

The Petitioners also argue that lifting the stay will result in harm to the Petitioners. MRI at Belfair submitted an affidavit by its sole member, Dr. Albert Joseph Borelli, averring that lifting the stay would "cause substantial financial harm to MRI at Belfair." (Pet'r MRI at Belfair's Ex. 1 ¶ 10.) The basis for Dr. Borrelli's position is that the referring physician that utilizes MRI at Belfair the most provided Southern MRI with a letter of support, and further, that Southern MRI's advertising, which he contends is misleading, may also cause MRI at Belfair to lose patients. Dr. Borelli also asserts that Southern MRI's potential patients could be served at the other existing providers, including MRI at Belfair.

Thus, the harm that will apparently be suffered by the Petitioners if the stay is lifted is largely the same as that alleged by Southern MRI if the stay is not lifted—competitive disadvantage. Southern MRI also alleges general economic harm by virtue of not being able to generate sufficient revenue to service the debt it has incurred on the project and meet its payroll. Moreover, although it attempts to establish additional harm to its referring physicians and their patients due to the interruption in Southern MRI's service, the evidence shows that the local area has several MRI providers that can meet the needs of these physicians and patients; no evidence was presented that the other facilities do not currently have capacity to absorb that need during the pendency of this case.

The court finds that the economic harm alleged by Southern MRI alone would be insufficient to establish the unusual circumstances required to lift the automatic stay. Southern MRI has additionally established, however, that the entire contested case may become moot if it is not permitted to operate the services at issue during the pendency of this matter. The court notes that, while not applicable to this contested case, Rule 225(c)(2) of the South Carolina Appellate Court Rules provides two examples of when it may be appropriate to lift the automatic

PJG

stay imposed by Rule 225(a), SCACR, which, like § 1-23-600(G)(2), generally stays orders of lower courts during the pendency of an appeal to the South Carolina Court of Appeals or Supreme Court. See ALC Rule 68 (allowing the ALC to apply the South Carolina Appellate Court Rules to resolve questions not addressed by the ALC Rules). Subsection (c)(2) provides, "In determining whether an order should issue pursuant to this Rule, the [court] should consider whether such an order is necessary to preserve jurisdiction of the appeal *or to prevent a contested issue from becoming moot.*" Id. Thus, our appellate court rules indicate that potential mootness of a contested issue may be sufficient to establish special harm warranting the lifting of the automatic stay.

The court observes that this situation of potential mootness results from Southern MRI's own decision to decommission its existing Siemens unit prior to the resolution of this controversy. However, it also notes that Southern MRI is not adding a new service to the marketplace; rather, it is replacing an existing service with better technology. The purpose of a stay is generally to preserve the status quo during the pendency of litigation. Melton v. Walker, 209 S.C. 330, 40 S.E.2d 161 (1946) ("The general rule is that the effect of a . . . stay is to suspend proceedings and preserve the status quo pending the determination of the appeal or proceeding in error.") (citing 4 C.J.S., Appeal and Error, §§ 626, 662). In this case, the status quo before litigation began was that Southern MRI was providing imaging services in Bluffton and on Hilton Head Island. Indisputably, the 1.5 MRI unit is superior to the 1.0 unit it was utilizing on the Island prior to the Siemens unit being decommissioned. Nonetheless, the situation that comes closest to preserving the status quo is for Southern MRI to continue to provide MRI services on the Island during the pendency of this case. The alternative is an effective prohibition on Southern MRI's providing such services on the Island, which does not reflect the status of the marketplace at the time of the filing of this contested case.

CONCLUSION

The court finds that due to the unique procedural posture of this case and because permitting Southern MRI to offer services during the pendency of this case more closely approximates the status quo ante, the stay should be lifted. The special harm demonstrated by Southern MRI of potentially being unable to go forward with its project if it is not permitted to

PJG

operate during the pendency of this matter outweighs the potential competitive disadvantage to the Petitioners.[4] It is therefore

ORDERED that the Petitioners' motion to lift the automatic stay of § 1-23-600(G)(2) is GRANTED.

IT IS SO ORDERED.

PAIGE J. GOSSETT
Administrative Law Judge

May 22, 2008
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 22nd day of May, 2008

By: Jennifer E. Wallace
Judicial Law Clerk

[4] The court further notes that the contested case hearing in this matter is currently scheduled to take place in approximately nine weeks. The court urges the parties to make every effort to ensure that the hearing is not delayed, as a continuance will be granted only for extreme circumstances.

EXHIBIT B

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 **AFFIDAVIT OF JOANNE CARELLI**

COMES NOW, Joanne Carelli, who first being duly sworn, deposes and states the following:

1. My name is Joanne Carelli and I am the Director of Cardiovascular Surgery at Providence Hospitals. I have a Bachelor's of Science in Nursing from the University of South Carolina, and have worked in cardiac surgery at Providence Hospital since my graduation in 1978. I have more than 35 years of experience in providing cardiac surgical care to patients in the Midlands and surrounding areas and am certified as a CNOR.

2. I have reviewed the equipment list submitted by Lexington Medical Center as part of the joint application with Providence Hospital that established the existing open heart surgery suite at LMC. The list, included at **Exhibit A** hereto, reflects only enough equipment to equip a single open heart surgery suite.

3. In order to allow for simultaneous scheduling of surgical patients in two open heart surgery suites, specialized cardiac equipment must be acquired and often installed before implementation of the services.

4. For example, in order to conduct simultaneous open heart surgeries in two surgical suites, LMC must have at least three heart/lung machines. To perform two open heart surgeries simultaneously with only two heart/lung machines without any backup machine would fall below the standard of care and be very dangerous to patients. LMC's original application had two heart/lung machines, recognizing the need for a backup machine.

5. Similarly, each open heart surgical suite would be expected to have a transesophageal echocardiogram or TEE machine available during the surgery. LMC purchased only one TEE machine with its application. A second machine would be needed to operate two suites. Further, a dedicated sternal saw with available sterilized backup and addition internal paddles would be needed in the event of an unexpected adverse event while a patient is on the table. As reflected on the equipment list from 2009, LMC did not purchase at that time enough specialized cardiac equipment to provide quality care in two open heart surgery suites.

FURTHER AFFIANT SAYETH NOT.

Joanne Carelli

Joanne Carelli

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 3rd DAY OF OCTOBER, 2014.

Pamela L. Johnson, L.S.
My Commission Expires: November 21, 2016

Lexington Medical Center
Your partner for health and wellness ®

2720 Sunset Boulevard
West Columbia, SC 29169
(803) 791-2000

July 29, 2009

Mrs. Shelley Pifer
Lexington Medical Center
2720 Sunset Boulevard
West Columbia, SC 29169

RE: Renovations to the Perioperative Department for an Open Heart Surgery OR.

Dear Mrs. Pifer:

The estimated construction costs for the above referenced project is $160,000. Additional fees associated with the project include $31,000 for architect/engineering fees, $3,107,940 for equipment/furnishings, $5,000 for zoning/permit fees, and a $50,000 contingency. This renovation will be completed by our in-house Engineering Department.

The projected completion date is August 2010.

If you have any questions about this estimate, please let me know.

Thank you.

Sincerely,

Kevin Stanley
Director of Engineering

A

LEXINGTON ...ICAL CENTER
OPEN HEART

ITEM QTY	ITEM DESCRIPTION	PRICE	TOTALS
1	CABINET, STORAGE, CATHETER	3,226.00	3,226.00
2	INTERNAL PADDLES (set of 3 sizes)	1,865.00	3,730.00
1	LASER, HOLMIUM-YAG	422,650.00	422,650.00
1	EXCIMER DIOD LASER	266,430.00	266,430.00
1	OMNI CELL TISSUE TRACKING CABINET FOR trackable implants	77,000.00	77,000.00
2	STERNAL SAW	9,813.00	19,626.00
1	CO/SV02 MONITOR	8,000.00	8,000.00
1	Hospira equipment to interface with Spacelabs SV02	2,000.00	2,000.00
1	TEE MACHINE W/PROBES (there are multiple probes, quote high)	300,000.00	300,000.00
1	TEE PROBE CLEANING UNIT	15,510.00	15,510.00
1	AF-RF ELECTROSURGICAL UNIT for cauterization	41,600.00	41,600.00
1	Cardiac Ablation system for epicardial ablation	51,039.00	51,039.00
2	IV PUMPS	4,703.00	9,406.00
1	ENDOSCOPIC VEIN HARVESTING UNIT	36,275.00	36,275.00
1	PAC/HEARTLAB INTERFACE	20,000.00	20,000.00
1	HEART LAB VIEWING STATION	19,560.00	19,560.00
2	WEDGE 45 DEGREE TRIANGLE 24"	35.00	70.00
1	ALLOWANCE, SURGICAL INSTRUMENTS	150,000.00	150,000.00
2	INSTRUMENT TRAYS: BASIC	20,006.00	40,012.00
1	INSTRUMENT TRAYS: PHYSICIAN	14,440.00	14,440.00
2	INSTRUMENT TRAYS: RADIAL ARTERY	2,640.00	5,280.00
2	INSTRUMENT TRAYS: FROGGER	1,600.00	3,200.00
1	INSTRUMENT TRAYS: RULTRACT RETRACTOR	7,000.00	7,000.00
1	SUNQUEST INTERFACE (lab interface)	5,000.00	5,000.00
3	INTERAORTIC BALLOON PUMP What brand does ED/ICU have?	46,775.00	140,325.00
3	EXTERNAL PACEMAKER	24,387.00	73,161.00
2	HEART LUNG MACHINE	128,125.10	256,250.20
1	MEDTRONIC ACT COAGULATION	2,800.00	2,800.00
1	ISTAT	14,056.00	14,056.00
1	HMS Plus (Heprin management)	27,820.00	27,820.00
1	VENTRICULAR ASSIST DEVICE, UNIWAD SINGULAR (left VAD)	150,000.00	150,000.00
1	VTI OXYGEN ANALYZER/MONITOR	981.00	981.00
1	Extracorporeal membrane oxygenation (ECMO) unit	52,318.00	52,318.00
1	cell saver	27,392.00	27,392.00
1	Waste can, 32-36 Gallon	500.00	500.00
		SUBTOTALS:	2,266,657.20
	7% tax is figured on each individual line item		
		freight	10,000.00
		total	2,276,657.20

RECORD 000409

LEXINGTON MEDICAL CENTER - C ...ber 23			
ITEM DESCRIPTION	**QTY**	**PRICE**	**EXT PRICE**
OPERATING ROOM # 23			
ALLOWANCE, AUDIO VISUAL SYSTEM, AIDA DVD AND MONITOR, VIDEO 19-20" (Radiance flat panel Storz) 4 OR, MONITOR, VIDEO 32"boom, 42 " plasma or LCD wall mounted	1	261,540.00	261,540.00
BOOM AND SURGICAL LIGHTS (LED lights) (need three) spotlights) LIGHT, SURGICAL, DUAL, ANESTHESIA BOOM, physiciological monitor	1	180,872.50	180,872.50
BRACKET, SUCTION CANISTER	1	15.00	15.00
BUCKET, KICK	3	151.50	454.50
CAMERA, SURVEILLANCE	1	2,850.00	2,850.00
CLOCK, ELAPSED TIME, WALL MOUNT & CLOCK, WALL MOUNT, CENTRALLY CONTROLLED	1	1,660.00	1,660.00
COMPUTER, PERSONAL/laser PRINTER	2	2,252.00	4,504.00
DEFIBRILLATOR	1	12,608.00	12,608.00
DISPENSER, GLOVE	4	175.94	175.94
DISPOSAL, SHARPS, LARGE	2	78.02	156.04
FLOWMETER, AIR	4	41.00	164.00
FLOWMETER, NITROUS OXIDE/OXYGEN	4	150.00	600.00
FLOWMETER, OXYGEN	4	32.00	128.00
HAMPER, LINEN	1	85.14	85.14
HAMPER, TRASH	1	85.14	85.14
HYPO-HYPERTHERMIA UNIT Bair Hugger	1	0.00	0.00
INTERNAL PADDLES	2	1,740.00	3,480.00
IV POLES	2	114.48	228.96
LIGHT SOURCE, XENON (& HEADLIGHT) Welch Allyn 300	1	10,000.00	10,000.00
DESK PHONES	4	490.00	1,960.00
REGULATOR, NITROGEN PRESSURE CONTROL	1	250.00	250.00
REGULATOR, SUCTION, INTERMITTENT/CONTINOUS (individual outlets)	5	350.00	1,750.00
ROLLER, PATIENT TRANSFER	1	300.00	300.00
STAND, BASIN, SINGLE	1	365.93	365.93
STAND, MAYO, LARGE	2	1,005.94	2,011.88
STAND, SUCTION CANISTER - quad	1	305.00	305.00
STEREO, SHELF SYSTEM , XM radio	1	285.00	285.00
STOOL W/BACK - ANESTHESIA-Black	3	400.78	1,202.34
STOOL, EXAM Nurses chair-Navy	1	400.00	400.00
STOOL, SURGEON-Black	2	325.95	651.90
TABLE, SURGICAL (up to 1000 pounds)	1	36,000.00	36,000.00
WARMER, BLOOD/I.V. FLUIDS, PORTABLE	4	0.00	0.00
WASTE CAN, 32-36 GALLON	2	510.00	1,020.00
WASTE CAN, BIO=HAZARDOUS	2	190.00	380.00

LEXINGTON MEDICAL CENTER - C . .mber 23			
ITEM DESCRIPTION	QTY	PRICE	EXT PRICE
GLUCOMETER	1	668.00	668.00
IV PUMPS, 3 CHANNEL	2	6,500.00	13,000.00
ANESTHESIA			
ANESTHESIA MACHINE	1	65,356.00	65,356.00
ANESTHESIA CART	1	2,730.00	2,730.00
SPACELABS MONITOR & TRANSPORT MONITOR	1	60,719.29	60,719.29
ANESTHESIA INSTRUMENTS-HANDLES	1	500.00	500.00
ANESTHESIA INSTRUMENTS -BLADES	1	2,090.00	2,090.00
BIS MONITOR	1	10,700.00	10,700.00
CART, OXYGEN	2	35.00	70.00
STIMULATOR, TRANSCUTANEOUS ELECTRICAL NERVE	1	125.00	125.00
SCRUB			
SINK, SCRUB, 2-BAY	1	11,000.00	11,000.00
Waste can, 32-36 Gallon	1	510.00	510.00
SHELF, STAINLESS STEEL W/ HOLES (OVERSHELF)	1	749.00	749.00
Subtotal			**694,706.56**
Tax - 7%			**55,576.52**
Total Equipment			**750,283.08**

EXHIBIT C

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 **AFFIDAVIT OF EDWARD M. LEPPARD, M.D.**

COMES NOW, Edward M. "Mac" Leppard, M.D., who first being duly sworn, deposes and states the following:

1. My name is Mac Leppard and I am a cardiothoracic surgeon at Sisters of Charity Providence Hospitals. I am a 1977 graduate of the Medical University of South Carolina and completed a residency in general surgery at Louisiana State University and a fellowship in thoracic and cardiovascular surgery at Emory University in Atlanta, Georgia. I have practiced medicine in South Carolina since 1984.

2. I have reviewed the Affidavit of Jeffrey A. Travis, M.D., and can offer the following to the Court:

(a) An urgent surgical case and an emergent surgical case are different. My definition of cardiovascular surgical procedures to be performed on an "urgent" basis means that the patient cannot go home prior to the procedure. Urgent cases are semi-elective with open heart surgery scheduled in advance. An "urgent" basis does not prevent the transfer of a patient.

(b) Cardiovascular surgical procedures to be performed on an "emergent" basis means that the procedure must be done without delay. A small percentage of open heart surgery is performed on an "emergent" basis. The most common emergent cardiac condition is an acute myocardial infarction, routinely referred to as a heart attack. It is rare in our practice to perform open heart surgery on a patient suffering from a heart attack. The standard of care is to open the

artery with a therapeutic catheterization performed by a cardiologist in a cath lab. As a result, open heart surgery has a very minor role in the treatment of heart attack patients.

(c) In my 30 years of practice at Providence Hospital, we routinely and regularly perform open heart surgery procedures on patients referred from within and outside of the metropolitan Columbia area, with as many as half of our open heart surgery patients residing outside Richland and Lexington counties. In my experience, transferring a patient for open heart surgery is common.

(d) Prior to Lexington Medical Center opening its open heart program, I regularly and routinely performed open heart surgery to patients transferred from Lexington Medical Center without incident. The transfer of patients is not prohibitive nor does it represent a health risk to patients. A transfer of a patient from Lexington Medical Center is no different from a transfer of a patient from hospitals in Sumter, Orangeburg or Camden except that Lexington is closer to Providence.

3. In order to conduct simultaneous open heart surgeries in two surgical suites, the hospital must have at least three heart/lung machines. To perform two open heart surgeries simultaneously with only two heart/lung machines, without any backup machine, would be contrary to the standard of care.

FURTHER AFFIANT SAYETH NOT.

Edward M. "Mac" Leppard, M.D.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 1st DAY OF OCTOBER, 2014.

Lawerne O. Cook, L.S.
My Commission Expires: 3/15/2019

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **LMC'S REPLY TO RESPONSE TO MOTION TO LIFT AUTOMATIC STAY**

The Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC") offers this Reply to Providence's Response to LMC's Motion to Lift Automatic Stay and urges the Court to grant LMC's Motion for the reasons stated below.

Discussion

LMC's motion is filed pursuant to S.C.Code Ann. § 1-23-600(H), which provides that:

> (1) This subsection applies to *timely* requests for a contested case hearing pursuant to this section of decisions by departments governed by a board or commission authorized to exercise the sovereignty of the State.
>
> * * *
>
> (4) After a contested case is initiated before the Administrative Law Court, a party may move before the presiding administrative law judge to lift the stay imposed pursuant to this subsection. Upon motion by any party, the court *shall* lift the stay for good cause shown *or* if no irreparable harm will occur, then the stay *shall* be lifted. A hearing must be held within thirty days after the motion is filed with the court and served upon the parties to lift the automatic stay or for a determination of the applicability of the automatic stay. The judge must issue an order no later than fifteen business days after the hearing is concluded.

(Emphasis added). Once a contested case proceeding is timely initiated, a motion to lift the automatic stay can be filed at any time, and, if a party demonstrates either good cause **or** no irreparable harm, the court "shall" lift the stay.

In its Reply, Providence attempts to impose time requirements on the filing of a motion to lift the automatic stay where none exists in the law. LMC has asserted (and continues to assert) that the Court lacks jurisdiction to hear this matter because the decisions being challenged do not give rise to a contested case and because Providence's Request for Review was not timely filed. In short, from the beginning of this matter, LMC has taken the position that the automatic stay provisions do not apply.

When the Court issued its September 22, 2014 orders rejecting LMC's position, LMC filed its Motion to Lift Automatic Stay.[1] The motion is timely filed and Providence's attempts to characterize it as otherwise are specious.

In support of its arguments against good cause, Providence cites and attaches a decision authored by Judge Gossett as being instructive to the Court in this case. *See MRI at Belfair, LLC et al. v. S.C. Dep't of Health and Envtl. Control and Southern MRI,* Docket No. 07-ALJ-07-0538-CC (S.C. Admin. Law J. Div. May 22, 2008). In reliance on *Southern MRI,* Providence argues that the Court must find that "special circumstances" exist to lift the stay and that those circumstances must be balanced by the Court against the harms to be suffered if the automatic stay is lifted. However, *Southern MRI* was decided under a prior version of the current law, and the tests Providence seeks to apply as dispositive have been rejected by this Court. See *Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center v. South Carolina Dep't of Health and*

[1] LMC has moved for reconsideration of the Court's September 22, 2014 orders and preserves all of its arguments and objections to the Court's findings and conclusions therein, including those related to the jurisdiction of the Court to hear this matter and the timeliness of Providence's appeal.

Environmental Control, Docket No. 08-ALJ-07-0063-CC (S.C. Admin. Law J. Div. July 23, 2008), which LMC attached to its Motion to Lift Automatic Stay.[2]

The Court in *Amisub* determined that a showing of "good cause" requires the movant to demonstrate that the circumstances involved raise sufficient reasons to depart from the sound reasons for the existence of the automatic stay. *Id.*, p. 4. In *Amisub*, the Court determined that the reason for the existence of the automatic stay is to preserve the status quo until a decision is made in the case. *Id.*, p. 2.

In its Motion to Lift the Automatic Stay, LMC sets forth its detailed arguments demonstrating "good cause" or "no irreparable harm" in this case.[3] LMC refers the Court to those arguments and incorporates them herein. In this Reply, LMC responds explicitly only to the arguments of Providence against LMC's motion.

In support of its argument that no good cause exists to lift the stay, Providence contends that there is a high likelihood that it will be successful on the merits of the issue whether LMC made a capital expenditure in support of its utilization of a 2nd existing operating room to perform cardiac procedures and, therefore, the Court should not lift the stay only to have the case end shortly thereafter. This argument is based on two affidavits submitted by Providence with its Response. Neither of these affidavits provides any evidence concerning whether LMC made a capital expenditure in connection with utilizing an existing OR. Rather, the allegations made in

[2]In *Amisub*, the Court begins its analysis by noting that the change in the law, which became effective June 16, 2008, provided "a more detailed standard for lifting an automatic stay" than existed before the change. *Id.*, p. 1. The Court also noted that, "Proof of extraordinary circumstances is not necessarily the appropriate standard that should be applied in all cases and this Court therefore declines to adopt that standard as a bright line test." *Id.*, p. 3, fn. 2. Similarly, the Court stated "I do not find that the determination of whether to lift the stay should be made following a strict "balancing of the harms test." *Id.*, p. 3. Instead, the Court determined that a decision to lift the automatic stay should be made by "weighing or considering all relevant factors . . . ." *Id.*

[3] As noted in *Amisub*, the two reasons for lifting the stay are separate and distinct and a party only needs to demonstrate one to require lifting of the stay. *Id.*, p. 2.

the affidavits are purely speculative as neither of the affiants has any relationship with Lexington Medical Center or its heart program.[4]

In its response, Providence urges the Court to ignore LMC's contention that imposing the stay after the projects at issue have become operational does not advance the stated purpose of the automatic stay, which is to preserve the *status quo* pending a decision on the merits. Providence argues that LMC changed the *status quo* when it "intentionally hid" its projects from Providence and, therefore, the Court should apply the stay in derogation of its purpose. This argument by Providence requires assumptions not supported by the record.

First, LMC did not hide its projects. LMC advised, and worked with, the Department prior to either project being implemented. Further, Providence was on notice that the Department would be working with providers to implement projects without CON notification long before LMC began its projects. The Department explicitly announced that such actions would be ongoing after July 1, 2013. Finally, although both LMC and the Department were subject to Freedom of Information Act disclosure laws during the entire time period at issue, Providence, for reasons known only to Providence, waited until April 9, 2014 to make any inquiries concerning whether LMC had undertaken any new projects in reliance on the Department's published policies and procedures concerning CON.

Providence seeks to introduce some weighing of the equities test into the analysis of whether good cause exists to lift the automatic stay. No such test is warranted or relevant to the

[4] For example, in order to speculate regarding whether LMC has purchased any capital equipment to perform procedures in the 2nd OR, the affiants assume that LMC conducts simultaneous procedures in the two operating rooms. There is no evidence in the record regarding how LMC conducts its program. The Court has determined that no evidence exists to make a finding on the capital expenditure issue and has ordered that the case go forward on that issue for the purpose of gathering evidence. Providence's two affidavits do nothing to change this and are not relevant for purposes of defeating whether good cause exists to lift the stay pending a final decision on this issue.

issues before the Court and, even if an assignment of "blame" were relevant, there is not enough evidence in the record to allow an appropriate analysis of the issue.[5]

Providence's final argument against lifting the stay is that irreparable harm will allegedly result to other providers. Much of this argument is based on unsupported assertions by counsel which are not evidence.[6] Citation of dated utilization statistics is not proof that irreparable harm will exist if LMC is allowed to continue serving its own patients during pendency of this matter.

CONCLUSION

For the reasons stated above, Lexington Medical Center respectfully requests that the Court grant its Motion to Lift the Automatic Stay as to the 2nd OR pending a final decision on that matter.

Respectfully Submitted,

David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, SC 29202
(803) 255-8000; (803) 255-8017 (fax)
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com
Attorneys for Respondent
Lexington Medical Center

Columbia, South Carolina
October 8, 2014

[5] Providence argues in its Response that LMC admitted that it assumed the risk of having its ongoing patient care shut down when it chose to comply with the Department's published policies in existence when the projects were implemented because those policies were being challenged in court on constitutional grounds. LMC has made no such admission. The existence of the lawsuit was public knowledge and LMC, and Providence alike were presumably aware of it. This awareness of a pending lawsuit does not constitute an assumption of the risk and a waiver of LMC's legal arguments.

[6] Neither of the affidavits submitted by Providence address the irreparable harm issue as to Providence or other providers. Dr. Leppard does address his belief that patients can generally be transferred without risking their health. This assertion does not address Dr. Travis' affidavit (attached to LMC's Motion to Lift Automatic Stay) that individual LMC patients will not be transferred to Providence for a number of reasons, including that individual's particular risks and physician and family preferences. The patients in LMC's program are not chattel to be shuttled around among programs. LMC's patients were referred by their personal cardiologists to LMC in the first instance, not to Providence or Palmetto Richland, and they have the final choice of where to seek services.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 8, 2014, s/he caused the foregoing **LMC's Reply to Response to Motion to Lift Automatic Stay** to be served on all parties of record via hand delivery, addressed as follows:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202

Columbia, South Carolina

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 **MEMORANDUM IN OPPOSITION TO MOTION TO ALTER OR AMEND**

Petitioner Sisters of Charity Providence Hospitals ("Providence") hereby files this Memorandum in Opposition to the Motion to Alter or Amend filed by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center ("LMC"). Providence will respond to each Order appealed as addressed by LMC.

ORDER DENYING MOTION TO DISMISS

LMC's efforts to reargue its Motion to Dismiss in seeking this Court's reconsideration are insufficient to warrant a change in the Court's position. Most assuredly, where LMC asserts the Court misapprehends or overlooks LMC's arguments, rather the Court properly and fairly considered and then correctly rejected them. That this Court has subject matter jurisdiction over this contested case proceeding is apparent from the face of the Request for Contested Case Proceeding filed by Providence. "Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." *Great Games, Inc. v. S.C. Dept. of Revenue*, 339 S.C. 79, 83, 529 S.E.2d 6, 8 (2000). Providence's challenge to LMC's failure to obtain a Certificate of Need ("CON") and the Respondent South Carolina Department of Health and Environmental Control's ("DHEC's") decision to allow LMC

to proceed with substantially expanding covered services without first doing so, are clearly the "general class" of cases that fall within this Court's subject matter jurisdiction. Though LMC continues to demand this Court ignore the CON Act's application to its conduct, such a demand is contrary to the law.

LMC's challenge to the pleadings in this case misconstrues the papers before the Court on which dismissal should be based. Rule 11(d) of the Rules of Procedure for the ALC establishes the content required for a Request for Contested Case Hearing, which Providence complied with. Providence further filed, pursuant to the Court's Order, a Pre-Hearing Statement "describing the contested case," as required by Rule 14, RPALC. From the Request for Contested Case Hearing and the Pre-Hearing Statement, the Court properly acquired statements of fact supporting the Court's jurisdiction, and on which the Court was required to view as true and draw favorable inferences therefrom. *See e.g. Murphy v. S.C. Dept. of Health and Envtl. Control*, Docket No. 11-ALJ-07-0134-CC, 2011 WL 7119282 *3 (S.C. Admin. L. J. Div. Nov. 4, 2011). Moreover, as it was the jurisdiction of the Court challenged by LMC, the Court may consider evidence outside the pleadings on a motion to dismiss. *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

LMC asserts at page 4 of its Motion that the decision with regard to the requirement to obtain a CON for LMC's projects was made on June 28, 2013 (the Templeton letter) – this argument was properly rejected by the Court. Not only does the Templeton letter to the amorphous "regulated community" not provide the sort of detail that notice to affected persons requires, but LMC itself was not convinced that the Templeton letter authorized violation for the CON Act by LMC, 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 that neither party advised any affected persons of. *See* Exhibit "C" to Providence's Req. for Contested Case Proc'g.

LMC argues the Court erred in distinguishing the interests claimed by Providence from those at issue in *S.C. Ambulatory Surgery Center Association* and then asserts the conclusion is contrary to the Court's prior holding in a case involving Summerville Medical Center. (*See* Exhibit "A" to Motion to Alter/Amend). The law is clear that "decisions of the ALC cannot be considered binding precedents." *Greeneagle, Inc. v. S.C. Dept. of Health and Envtl. Control*, Docket No. 08-ALJ-07-0339-CC, 2010 WL 5781616 *9 (S.C. Admin. L. J. Div. Oct. 25, 2010). Moreover, it is apparent from the Order provided by LMC with its Motion that this matter is distinguishable from the arguments made by Summerville Medical Center. Rather than support dismissal, the Summerville Medical Center Order confirms the decision by this Court denying LMC's Motion to Dismiss. First, in the Summerville Medical Center case, no staff decision was issued nor was one required. In this case, LMC was required to obtain a CON to expand its cardiac program. Second, the approval of the South Carolina Health Plan provides no opportunity to be heard after approval of the Plan.[1] In contrast, the CON Act specifically provides for notice to affected persons and an opportunity for judicial review by affected persons. Third, unlike Summerville Medical Center and the interests claimed in *S.C. Ambulatory Surgery Center* amounting to a desire for future income, Providence has asserted that the conduct of LMC in substantially expanding its cardiac care services without first obtaining a CON to determine whether the services are needed and not adversely impacting existing providers is in fact "diminish[ing] the filling of the medical need for which [Providence] has been licensed." *Trident Med. Ctr. d/b/a Summerville Med. Ctr. v. S.C. Dept. of Health and Envtl. Control*, Docket No. 12-

[1] The opportunity to be heard is completed prior to approval of the South Carolina Health Plan during a comments phase.

ALJ-07-0524-CC at 9 (S.C. Admin. Law J. Div. June 19, 2013). The Summerville Medical Center need can be relied upon by this Court.

Finally, the Court properly analyzed the notice and notification issues in ruling on the Motion to Dismiss. LMC asserted *ad nauseam* at the hearing that Providence was required to "raise its hand" in order to be advised of the subterfuge engaged in by LMC and the Department. LMC never asserts that it provided notice to any affected person or the public of its projects – not surprising given the intentional decisions to act outside the law. LMC offers no law to support that an affected person is required to sniff out such subterfuge in the air and thus would have obtained more timely notification of LMC's acts and DHEC's decisions. To support the Motion to Dismiss, LMC had an obligation to assert facts evidencing an earlier opportunity for Providence to learn of the hidden conduct; LMC failed to do so. Viewing the evidence in the light most favorable to Providence, LMC's Motion to Dismiss was properly denied. *See Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012).

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

LMC challenges the Order of this Court granting partial summary judgment as to the illegal operation of the third cardiac catheterization laboratory without first obtaining a CON. The challenges made by LMC regarding the Court's findings again stem from a misunderstanding or misperception of the materials from which this Court may draw its conclusions. Included within the record before the Court is evidence establishing the date on which Providence learned of the implementation of the third cath lab and the second open heart surgery suite, both of which were being operated without having first obtained a CON. *See* Exhibit "A" to Mem. in Opp. to Motion to Dismiss. LMC's own FOIA production contains the evidence necessary to satisfy Providence's burden of proof that LMC made a capital expenditure to substantially expand services covered by the South Carolina Health Plan. *See* Exhibit "B" to Mot. for Summ. J. "Once the moving party

carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining []." *Sims v. Amisub of S.C., Inc.* 408 S.C. 209, 758 S.E.2d 187, 190-91.

As to LMC's continued assertion of estoppel, such arguments remain unavailing. Ms. Templeton, DHEC Director, did not have the authority to interpret the funding veto as a suspension of the permanent CON Act. LMC had no right to rely on Ms. Templeton's letter, as it clearly exceeded the scope of her authority as agency director. *See S.C. Dept. of Nat. Resources v. McDonald*, 367 S.C. 531, 534, 626 S.E.2d 816, 818 (Ct. App. 2006) ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.") "The public cannot be estopped . . . by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment." *DeStefano v. City of Charleston*, 304 S.C. 250, 258, 403 S.E.2d 648, 653 (1991) (quoting *S.C. Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987)).

With regard to the application of the *Amisub* decision to this matter, the Court properly explained the relevance of the Supreme Court's ruling to this proceeding. LMC misstates the impact of *Amisub* by generalizing the matter, when in fact much of the import of the opinion addresses 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. *Amisub of S.C., Inc. v. S.C. Dept. of Health and Envtl. Control*, 407 S.C. 583, 596, 757 S.E.2d 408, 415 (2014). 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)). The Court properly

granted partial summary judgment on the issue of the third cath lab and, pending evidence of a capital expenditure, should similarly rule as to the second open heart surgery suite.

ORDER ENFORCING AUTOMATIC STAY

LMC makes no substantive argument to support enforcement of the automatic stay other than the repeated bald assertion that the CON act does not apply to its conduct. LMC acknowledged at the hearing the risk it undertook acting before the Supreme Court's ruling on DHEC's conduct – this outcome was anticipated and LMC's gambled loss affords no reason to allow the operation of any expanded services for which a CON is first required.

CONCLUSION

For the reasons set forth here, Providence respectfully requests that this Court deny the Motion to Alter or Amend.

Respectfully submitted,

James G. Long, III
Jennifer Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Petitioner,
Sisters of Charity Providence Hospitals

October 13, 2014
Columbia, South Carolina

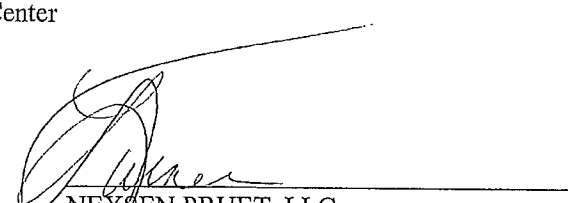
STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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 **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Memorandum in Opposition to Motion to Alter or Amend** has been served on counsel of record via hand-delivery, addressed as shown below, this 13 day of October, 2014:

Ashley C. Biggers, Esquire
Vito M. Wicevic
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Faye A. Flowers, Esquire
Attorney for Lexington County Medical Center
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201



NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

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 **SUR-RESPONSE IN OPPOSITION TO MOTION TO LIFT AUTOMATIC STAY**

Realizing the importance of brevity, Petitioner Sisters of Charity Providence Hospitals ("Providence") files this sur-response to the Motion to Lift Automatic Stay filed by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center ("LMC") solely to address the inaccuracy entered into the record through LMC's Reply filed on October 8, 2014. Specifically, in Footnote 4 of the Reply, LMC asserts "There is no evidence in the record regarding how LMC conducts its program." This reference is made as part of the argument seeking to diminish the importance of the affidavits provided by Providence to the Court.

Providence reminds LMC that the affidavit of Dr. Jeffrey A. Travis, included as support for its Motion to Lift Automatic Stay, provides more than sufficient evidence for the Court and Providence to conclude that LMC conducts open heart surgery procedures simultaneously in both surgical suites. Specifically, paragraphs 8, 9, 12 and 13 of Dr. Travis' Affidavit all lead to a reasonable inference that the second surgical suite is at times accommodating open heart procedures at the same time as the properly licensed open heart surgery suite. Similarly, the Affidavit of LMC's Chief Operating Officer, Tod Augsburger, at paragraph 5 indicates that the

second surgery suite was needed to perform procedures *in addition to* the procedures already occurring in the only licensed open heart surgery suite.[1]

Moreover, the open heart programs at Providence and LMC do not exist in a vacuum – in fact, the three largest area providers of open heart surgery all operate within less than ten miles from each other. To seek to discredit the affidavit of a highly qualified cardiac surgical nurse with more than three decades of experience and a well-known and respected cardiothoracic surgeon who has performed open heart surgeries on area patients (including LMC's) for thirty years simply because six miles of geography separates the two programs would be unreasonable and improper. The residents of LMC's service area obtained needed open heart care prior to the institution of a program at LMC in March 2012, and since then have fared with the single room without need to resort to a violation of the law based on what amounts to patient hoarding. There exists no good cause to lift the automatic stay imposed by these contested case proceedings and doing so would certainly result in irreparable harm.

[1] Notably, LMC has yet to deny that a capital expenditure was made with the expansion of the open heart surgery program to a second surgical suite, seeking instead to deflect the matter by arguing a lack of evidence in the record.

CONCLUSION

For these reasons and incorporating all arguments made in the Memorandum in Opposition to Motion to Lift Automatic Stay, Providence respectfully requests that this Court deny the relief requested by LMC.

James G. Long, III
Jennifer Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Petitioner,
Sisters of Charity Providence Hospitals

October 15, 2014
Columbia, South Carolina

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 **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Sur-Response in Opposition to Motion to Lift Automatic Stay** has been served on counsel of record via hand-delivery, addressed as shown below, this 10th day of October, 2014:

Ashley C. Biggers, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Faye A. Flowers, Esquire
Attorney for Lexington County Medical Center
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **MOTION TO ALTER OR AMEND** (Reconsider)

Pursuant to Rules 29(D) and 68 of the Rules of Procedure for the Administrative Law Court and Rule 59(e), SCRCP, and reserving all of its rights and issues for appeal whether or not addressed herein[1], the Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC") hereby moves the Court to reconsider its Amended Order Granting Partial Summary Judgment issued by the Court on October 23, 2014. LMC moves the Court to vacate or, in the alternative, to modify, the Amended Order on the following grounds.

In its Amended Order Granting Partial Summary Judgment, the Court raises for the first time in footnote 6 to the Order that "[i]n remanding this matter, the Court finds that the Department's pledge not take [sic] action against LMC was unlawful and void." The Respondent LMC believes that the Court has overlooked or misapprehended the facts and the law in making this finding in that the matter before the Court is not being remanded to the Department and in

[1] In moving for reconsideration, LMC addresses those issues and matters which the Court failed to consider or address adequately in its Order. LMC reserves its right to appeal, without explicitly raising them herein, those issues which the Court actually considered or addressed but decided incorrectly. Further, LMC incorporates by reference herein all of its arguments and issues raised in its Prehearing Statement, its Motion to Dismiss, its Responses and Replies with regard to the Motion to Dismiss, the Motion for Summary Judgment and the Motion to Enforce Automatic Stay.

that the issue of whether the Department can be held to this particular pledge[2], set forth in the Department's documentation regarding the 2nd Open Heart Suite, not to take action against LMC was not directly raised by the parties[3] and cannot be determined without further development of the facts.

CONCLUSION

For the reasons stated above, Lexington Medical Center respectfully requests that the Court alter or amend and vacate its Amended Order as indicated above.

Respectfully Submitted,

David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, SC 29202
(803) 255-8000; (803) 255-8017 (fax)
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com
Attorneys for Respondent
Lexington Medical Center

Columbia, South Carolina
November 3, 2014

[2] The specific "pledge" by the Department is "Should the General Assembly restore the CON program in the future, or should the court determine the program is not suspended, the Department will not take action to revoke any license issued during the suspension period for the facility or service for which the Act requires a CON review, unless otherwise instructed by the General Assembly or Judiciary."

[3] LMC does raise the issue of estoppel, which broadly encompasses the question of whether the Department may be estopped by its actions from requiring a Certificate of Need for the services already licensed by it. However, the issue of the enforceability of the language quoted by the Court in Footnote 6 in the Amended Order was not argued by either party and as LMC argues with regard to the entire estoppel issue, requires development of the facts for resolution. LMC acknowledges (but disagrees with) the Court's conclusion in its Order Granting in Part and Denying in Part Motion to Alter or Amend (Reconsider) that no further facts are needed with regard to the estoppel issue addressed in that and related orders.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 3, 2014, s/he caused the foregoing **Motion to Alter or Amend (Reconsider)** to be served on all parties of record via U.S. Mail, first class postage prepaid, addressed as follows:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202

Columbia, South Carolina

RECEIVED

NOV 13 2014

Parker, Poe, Adams & Bernstein, L.L.P.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospital,

Petitioner,

vs.

South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center,

Respondents.

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

RESPONSE IN OPPOSITION TO MOTION TO ALTER OR AMEND

Petitioner Sisters of Charity Providence Hospitals ("Providence") hereby files this Memorandum in Opposition to the Motion to Alter or Amend filed by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center ("LMC").

LMC files a successive Motion to Alter or Amend the Court's ruling on summary judgment to challenge a footnote contained in the Amended Order Granting Partial Summary Judgment. It appears LMC challenges the Court's statement of the procedural posture of this case (remand) and the reference to the statement of Department in communications and documents issued to LMC that DHEC "will not take action to revoke any license issued during the suspension period for the facility or service for which the Act requires a CON review, unless otherwise instructed by the General Assembly or Judiciary." *See* E-Mail DHEC Counsel to Mr. Augsburger (SVP/COO LMC), Mr. Biediger, Ms. Shuster dated 9/26/13 (Exhibit "C" to Providence's Req. for Contested Case H'rg); *see also* DHEC Permission Form as to Second Open Heart Surgery Suite dated 10/11/13 (Exhibit "A" to Providence's Mem. in Supp. S.J.). LMC incorrectly submits that the issue of DHEC's statement to LMC was not "directly raised by

the parties." Clearly, the foregoing citations evidence otherwise.

As to the matter of remand, Providence submits that there exists no basis to further amend the Court's Order Granting Partial Summary Judgment. To the extent LMC elects to properly license its third cardiac catheterization laboratory or its second open heart surgery suite, that expansion of services requires the determination of the Department to award of CON after the statutory and regulatory review process takes place. This results in a remand to the Department. Should LMC elect to abandon the cardiovascular project expansions, LMC may choose not to proceed with obtaining a valid CON. As the Court acknowledged, LMC's activities in the unapproved third cardiac catheterization laboratory were stayed "until LMC properly files the requisite CON application, *should LMC choose to do so*." Am. Order Granting P. S.J. at 8 (emphasis added).

With regard to the reference to DHEC's statements regarding its intended actions upon the Supreme Court's ruling in *Amisub of S.C. Inc. v. S.C. Dept. of Health and Envtl. Control*, 407 S.C. 583, 757 S.E.2d 408 (2014), *reh'g denied* (May 22, 2014), the Court properly addresses the statement of the Department and rejects any contention that DHEC can refuse to require LMC to undertake the CON review process required by the CON Act and Regulations. DHEC clearly anticipated such instruction of the Court in its statements to LMC, given the recognition that the Department may be required to comply with the law based on the outcome of the Supreme Court Petition. The Court's dicta in footnote 6 is consistent with the entirety of its decision that DHEC's assertion that the CON Act was suspended was in violation of the law and exceeded the scope of its statutory authority.

Providence respectfully requests the Court deny the successive Motion to Alter or Amend filed by LMC.

James G. Long III
Jennifer J. Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Box 2426
Columbia, SC 29202
803.771.8900

Attorneys for Petitioner
Sisters of Charity Providence Hospital

November 13 2014
Columbia, South Carolina

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 **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Petitioner's Response in Opposition of Lexington Medical Center's Motion to Alter or Amend** has been served on counsel of record via hand-delivery, addressed as shown below, this 13th day of November, 2014:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Faue A. Flowers, Esquire
Attorney for Lexington County Medical Center
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc., d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **MOTION TO ALTER OR AMEND** (Reconsider)

Pursuant to Rules 29(D) and 68 of the Rules of Procedure for the Administrative Law Court and Rule 59(e), SCRCP, and reserving all of its rights and issues for appeal whether or not addressed herein[1], the Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center ("LMC") hereby moves the Court to reconsider its Order Denying Motion to Lift Automatic Stay issued by the Court on November 5, 2014 ("Order") on the following grounds.

1. On page 2 of the Order, the Court, discussing "good cause", states that "an implicit *prerequisite to seeking a stay to continue an activity* requires that the activity have been initially determined to be valid."(Emphasis added.) This statement misapprehends the law and the nature of the case at issue in that LMC does not seek a stay to continue an activity. The law (which LMC contends is not applicable) imposes an automatic stay on each and every activity

[1] In moving for reconsideration, LMC addresses those issues and matters which the Court failed to consider or address adequately in its Order. LMC reserves its right to appeal, without explicitly raising them herein, those issues which the Court actually considered or addressed but decided incorrectly. Further, LMC incorporates by reference herein all of its arguments and issues raised in its Prehearing Statement, its Motion to Dismiss, its Responses and Replies with regard to the Motion to Dismiss, the Motion for Summary Judgment and the Motion to Enforce Automatic Stay.

covered, without regard to its nature. The stay prevents the activity from continuing, it does not allow it to continue as indicated in the Order.

Further, the conclusion (based on the faulty premise set forth above) that LMC cannot demonstrate good cause because "LMC has never received a lawful authorization to expand its Open Heart Suite" is not supported by evidence in the record and is directly contrary to the Court's holdings at pages 2, 3, and 9 in the Order and the holding in its October 23, 2014 Amended Order Granting Partial Summary Judgment that factual evidence is needed to determine whether LMC's use of an existing operating room as a second open heart suite required a Certificate of Need (*i.e.*, whether LMC made a capital expenditure in connection with such use).[2] The evidence in the record is that the Department was notified in advance of LMC's intent to use the second OR and the Department took all of the actions it deemed necessary with regard to acquiescing in such use. Whether further authorization is needed is still to be determined. Therefore, the Court's characterization of LMC's services as "unauthorized" are not supported by any evidence in the record or the law.

2. The Court misapprehends or overlooks the law in dismissing LMC's utilization of a second OR as not being entitled to "status quo" consideration. (Order, p. 3.) "Status quo" is a factual state of being, not an opinion. It is undisputed that LMC was utilizing the second OR (and had been for months) at the time Providence filed its Request for Review before the Board. Thus, as a fact, the "status quo" with regard to LMC's OR was that it was operational and LMC's patients were receiving cardiac surgeries there. Whether or not "good cause" exists to upset the "status quo" is a question for the Court. What the "status quo" was in this matter is not,

[2] The Order also finds that LMC's services/actions are "unauthorized" at pages 3, 4, 5, and 6 and to that extent LMC requests reconsideration of those findings on the grounds stated in paragraph 1 above.

given that no one disputes that the second OR was operational and in use at the time Providence filed its review request.

3. The Court's reliance on *MRI at Belfair, LLC, v. S.C. Dep't of Health and Envtl. Control*, Docket No. 07-ALJ-07-0538-CC, is misplaced and misapprehends or overlooks that this case was decided by application of the old standard for lifting the stay, which standard was later amended and is not applicable to LMC's request.

4. In making factual findings and conclusions of law regarding whether LMC could "qualify" for a Certificate of Need for its second open heart suite, the Court misapprehends the law and makes factual findings with no or incomplete evidence in the record. For example, at pages 5, 7 and 8 of the Order, the Court's finds that LMC would not qualify for a Certificate of Need because LMC would not meet the 500-procedure threshold for expansion. Under the *State Health Plan*, the threshold for expansion is not 500 procedures. Rather, the *Plan* provides that "expansion of an existing open heart surgery service shall only be approved if the service has operated at a minimum use rate of 70 percent of capacity for each of the past two years and can project a minimum of 200 procedures per year in the new open heart surgery unit." (*2012-2013 South Carolina Health Plan, page VIII-20*). Thus, the *Plan* (if it were applicable to this matter, which LMC contends it is not) sets an annual requirement of 350-procedures per existing room for the two year period prior to the filing of the Certificate of Need application. Further, the *Plan* requires only a projection of 200 procedures in the third year of use for the new room. The Court's gratuitous findings regarding LMC's ability to "qualify" for a CON based on no evidence other than *fiscal* year numbers and based on an erroneous interpretation of the requirements of the law are in error and should be vacated.

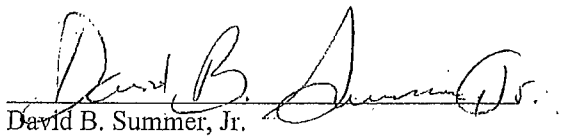
5. On page 7, the Court finds that "it is undisputed that the threshold exists to insure that providers are performing a sufficient number of procedures to maintain proficiency." Apart from the Court's misapprehension of the actual number of procedures that comprise the "threshold" (see above), this finding overlooks that LMC has and does dispute the relevance of this threshold to its purported goals. In its Prehearing Statement, LMC alleges that, to the extent that it is applicable to this matter, the State Health Plan is arbitrary, capricious and contrary to law. As a part of this argument, LMC intended to present expert evidence on, and assert that, a "per unit" (per room) standard, rather than a "per program" standard as is used by virtually all other jurisdictions, is arbitrary, capricious, and not rationally related to any safety or proficiency goal. In the alternative, to the extent that Criteria 5 (2012-2013 Plan, p. VIII-22) can be read to require only a 200 procedure threshold per "hospital" as a proficiency standard, the Court's finding of harm based on a 500 procedure threshold is erroneous. Finally, there is no evidence in the record to support any finding of harm based on the proficiency threshold because there is no evidence of the volumes of other provider's programs or of the effect LMC's utilization of a second OR would have on those volumes.

6. The Court's findings on pages 6, 7, and 8 of the Order that LMC's continued use of a second OR pending resolution of this case will cause harm to the other providers in the service area is not supported by any evidence in record and is based in part on the Court's misapprehension of the requirements of the *State Health Plan* and, therefore, the findings should be vacated.

CONCLUSION

For the reasons stated above, Lexington Medical Center respectfully requests that the Court alter or amend and vacate its Order as indicated above.

Respectfully Submitted,



David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, SC 29202
(803) 255-8000; (803) 255-8017 (fax)
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com

Attorneys for Respondent
Lexington Medical Center

Columbia, South Carolina
November 14, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 14, 2014, s/he caused the foregoing **Motion to Alter or Amend (Reconsider)** to be served on all parties of record via hand delivery, addressed as follows:

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202

Columbia, South Carolina

FILED
NOV 14 2014
SC ADMIN. LAW COURT

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 **MEMORANDUM IN OPPOSITION TO MOTION TO ALTER OR AMEND**

Petitioner Sisters of Charity Providence Hospitals ("Providence") hereby files this Memorandum in Opposition to the Motion to Alter or Amend (Reconsider) filed by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center ("LMC") challenging the Court's Order Denying Motion to Lift Automatic Stay.

RESPONSE

LMC asserts six numbered arguments in challenging the Court's denial of its Motion to Lift Automatic Stay. Providence addresses each argument in turn.

1. LMC's first argument makes word play with the Court's reasoned position on the legal matter presented by these proceedings. Although ruling on this Motion to Lift Automatic Stay, the Court was initially presented with a challenge by Providence to ongoing and unauthorized cardiac services taking place in a second unapproved open heart surgery suite by LMC. The Court enforced the automatic stay with the issuance of the Order Granting Partial Summary Judgment on September 22, 2014. Following briefing on LMC's Motion to Alter or Amend that Order (as well as others), LMC filed this Motion to Lift Automatic Stay. LMC argued it was entitled a lifting of the automatic stay to resume unlicensed activity in the second open heart

surgery suite. The Court, in denying the request, properly addressed the purpose of the automatic stay and the underlying logic that in order to be excepted from the application of a stay in licensing matters, a presumption is implicit that the affected conduct be valid in the first instance.

The reference in this argument that the Department was notified and acquiesced to LMC's misconduct evidences that LMC continues to unreasonably ignore the law applicable to its expansion of its open heart surgery program. In claiming "[w]hether further authorization is needed is still be to determined," LMC is patently wrong. The CON Act is and has at all times been the law and its mandates must be satisfied by LMC in expanding covered services in this State. It is at this point frivolous that LMC continues to assert legal arguments in direct derogation to the holding of *Amisub of S.C., Inc. v. S.C. Dept. of Health and Envtl. Control*, 407 S.C. 583, 757 S.E.2d 408 (2014), *reh'g denied* (May 22, 2014). The Court's characterization of LMC's conduct as "unauthorized" is not only accurate but well-supported by the evidence. The Court correctly found that "[t]hough LMC contends that its expansion of its Open Heart Suite was authorized by the Department, it has not established that it ever sought a CON, a non-applicability determination, or an exemption for these services." Order at 2. Nor has LMC submitted evidence to prove that it made no capital expenditure in the substantial expansion of its open heart surgery program. S.C. Code Ann. § 44-7-160(4).

2. LMC's second argument wholly ignores and disregards the Court's correct explanation that in order to be entitled to a lifting of the automatic stay while a licensing dispute is resolved, "the activity has [to have] been initially determined to be valid." Order at p.2. Having circumvented the CON Act entirely in engaging in its unauthorized conduct, LMC is not entitled to a lifting of the stay to allow the conduct to resume. That the unauthorized second open heart surgery suite was "operational" prior to the filing of this proceeding is insufficient to establish good cause to lift the stay.

3. LMC's attempt to dismiss *MRI at Belfair, LLC, v. S.C. Dept. of Health and Envtl. Control* in its entirety is improper. That the standard for lifting of the automatic stay was modified has no bearing on the propriety of any analysis or considerations under the prior standard. Moreover, to claim that the Court "relied" on *MRI at Belfair* is inaccurate and unsupported by the clear language of the Order.

4. While LMC correctly identifies the Standard applicable to the expansion of its open heart surgery program in the *2012-2013 South Carolina Health Plan* (which it indisputably failed to comply with), the Order nonetheless accurately posits that LMC's own evidence establishes that its volumes do not meet the necessary threshold under the *Plan*. The evidence submitted by LMC regarding its current and anticipated volumes establishes that LMC would not qualify to expand to a second open heart surgery suite under the *2012-2013 South Carolina Health Plan*.

5. LMC's fifth argument is a challenge directed to the *South Carolina Health Plan* and is of no consequence to the matters before the Court. That LMC disputes matters contained within the *Plan* has no bearing on the applicability of the *Plan* to its unauthorized conduct and its inability to satisfy the volume mandates contained therein. Moreover, LMC once again misstates the content of the Record in claiming "there is no evidence of the volumes of the other provider's programs," given that Providence submitted to the Court the inventory for open heart surgery programs contained in the *2012-2013 South Carolina Health Plan* as Exhibit "C" to the Motion for Summary Judgment.

6. LMC's sixth and final challenge complains about the finding of the Court that LMC's continued unauthorized use of a second open heart surgery suite "will cause harm to the other providers" not only overstates the Court's finding (which was that the use *could* or *may* cause harm), but also wholly disregards that the burden was on LMC to submit evidence otherwise. The Order properly concludes that LMC failed to prove that no irreparable harm would

result from the lifting of the automatic stay.

CONCLUSION

For the reasons set forth herein, Providence respectfully requests that this Court deny the Motion to Alter or Amend.

Respectfully submitted,

James G. Long, III
Jennifer Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Petitioner,
Sisters of Charity Providence Hospitals

November 24, 2014
Columbia, South Carolina

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 **CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Memorandum in Opposition to Motion to Alter or Amend (Reconsider)** has been served on counsel of record via hand-delivery, addressed as shown below, this 24th day of November, 2014:

Ashley C. Biggers, Esquire
Vito M. Wicevic
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

David B. Summer, Jr., Esquire
Faye A. Flowers, Esquire
Attorney for Lexington County Medical Center
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426 (29202)
Columbia, SC 29201
(803) 771-8900

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc. d/b/a Lexington Medical Center, Respondents.	DOCKET NO. 14-ALJ-07-0332-CC **LEXINGTON MEDICAL CENTER'S ANSWERS TO SISTERS OF CHARITY PROVIDENCE HOSPITALS' FIRST REQUEST FOR ADMISSION**

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure and Rule 21 of the Rules of Procedure for the Administrative Law Court, Respondent Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("LMC") by and through its undersigned attorneys, hereby submits the following answers to Petitioner's First Request for Admission:

1. ADMIT OR DENY: Exhibit A attached hereto represents the equipment purchased by LMC for the Approved Open Heart Suite.

ANSWER: Deny.

2. ADMIT OR DENY: Exhibit A attached hereto represents the capital expenditure made by LMC for the Approved Open Heart Suite.

ANSWER: Deny.

3. ADMIT OR DENY: Exhibit A attached hereto does not reflect a sufficient amount of equipment to equip both the Approved Open Heart Suite and the 2nd Open Heart Suite for open heart surgery.

ANSWER: Deny.

4. ADMIT OR DENY: LMC acquired additional equipment not reflected on Exhibit A attached hereto before performing open heart surgery in the 2nd Open Heart Suite.

ANSWER: LMC is unable to answer this Request as stated in the context of the issue involved in this proceeding. Because LMC has purchased all manner of equipment not reflected on Exhibit A for use in the hospital during the time period preceding its use of the second open heart suite to perform open heart surgery, the answer to this Request must literally be "Admit". If the Request is meant to state that LMC purchased equipment to use in the second OR to perform open heart surgery procedures and that such equipment was purchased prior to the performance of open heart surgery in that OR, then the answer to this request is "Deny".

5. ADMIT OR DENY: LMC performed renovations to the 2nd Open Heart Suite after April 1, 2012.

ANSWER: Deny.

6. ADMIT OR DENY: LMC made a capital expenditure for the 2nd Open Heart Suite after April 1, 2012.

ANSWER: Deny.

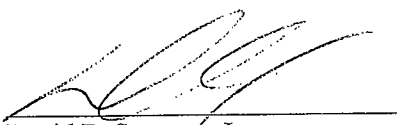
7. ADMIT OR DENY: LMC may not utilize the 2nd Open Heart Suite for open heart surgery unless LMC is awarded a Certificate of Need by the Department.

ANSWER: Deny.

8. ADMIT OR DENY: LMC made a capital expenditure in excess of three million dollars ($3,000,000) for the Approved Open Heart Suite.

ANSWER: Admit.

Respectfully Submitted,



David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, South Carolina 29202
Telephone: (803) 255-8000
Facsimile: (803) 255-8017
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com

Attorneys for Respondent
Lexington Medical Center

January 29, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 29, 2015, s/he caused to be served on all parties of record the foregoing **LEXINGTON MEDICAL CENTER'S ANSWERS TO SISTERS OF CHARITY PROVIDENCE HOSPITALS' FIRST REQUEST FOR ADMISSION** by hand delivering a copy of the same, addressed as follows:

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sisters of Charity Providence Hospitals, Petitioner, vs. South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc. d/b/a Lexington Medical Center, Respondents.	)	Docket No.: 14-ALJ-07-0332-CC **LEXINGTON MEDICAL CENTER'S STIPULATION OF FACT**

The Respondent, Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("LMC"), through its undersigned counsel, hereby makes the following stipulation of fact:

1. LMC made at least $1.00 in capital expenditures in connection with its utilization and designation of operating room #22 as a second open heart surgery suite, for which the South Carolina Department of Health and Environmental Control gave permission on October 11, 2013.

Respectfully submitted,

David B. Summer, Jr.
Faye A. Flowers
PARKER POE ADAMS & BERNSTEIN LLP
1201 Main Street, Suite 1450
Post Office Box 1509
Columbia, SC 29202
Tel.: (803) 255-8000;(803) 255-8017 (fax)
davidsummer@parkerpoe.com
fayeflowers@parkerpoe.com

Attorneys for Respondent
Lexington County Health Services District, d/b/a Lexington Medical Center

Columbia, South Carolina
March 16, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 16, 2015, s/he caused to be served on all parties of record the foregoing **LEXINGTON MEDICAL CENTER'S STIPULATION OF FACT** by hand delivering a copy of the same, addressed as follows:

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202

Ashley C. Biggers, Esquire
Vito Wicevic, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201

Columbia, South Carolina