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**Feb 19 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III  
Chief Administrative Law Judge

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APPELLATE CASE NO. 2020-001610  
ADMINISTRATIVE LAW COURT CASE NO: 20-ALJ-07-0108-CC

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Lexington County Health Services  
District Inc., d/b/a Lexington Medical Center..... Petitioner/Respondent,

v.

South Carolina Department of Health and  
Environmental Control, Prisma Health-Midlands,  
Providence Hospital, LLC d/b/a Providence Health,  
Providence Health Northeast, Providence Health  
Fairfield, and Kershaw Hospital, LLC d/b/a  
Kershaw Health Medical Center .....Respondents,

OF WHICH

Prisma Health - Midlands is the Appellant-Respondent and  
Providence Hospital, LLC d/b/a Providence Health, Providence  
Health Northeast, Providence Health Fairfield, and Kershaw  
Hospital, LLC d/b/a Kershaw Health Medical Center are the  
Respondents-Appellants.

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**RETURN TO APPELLANT-RESPONDENT PRISMA HEALTH-MIDLAND'S  
MOTION TO EXPEDITE**

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The Respondents-Appellants Providence Hospital, LLC d/b/a Providence Health,  
Providence Health Northeast, Providence Health Fairfield ( collectively, "Providence") and  
Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center ("Kershaw") offer this Return in  
support of the Appellant-Respondent Prisma Health – Midlands' ("Prisma") Motion to Expedite

the proceedings (“Prisma Motion”). Providence and Kershaw support the Prisma Motion, and urge this Court to grant it, because this case involves issues of significant public interest and legal principles of major importance and because time is of the essence in preserving the appellants’ rights in this matter. In addition to adopting and incorporating Prisma’s arguments set forth in the Prisma Motion, Providence and Kershaw offer the following as additional support for the granting of the Prisma Motion.

### **ARGUMENT**

This case began as a challenge by Lexington County Health Services District, Inc. d/b/a Lexington Medical Center (“LMC”) under the Health Care Cooperation Act, S.C. Code Ann. §§ 44-7-500 *et seq.* (the “COPA Act”) and 3 S.C. Code Ann. Regs. 61-31 (the “COPA Regulations”)(collectively the “COPA Law”) to the Respondent South Carolina Department of Health and Environmental Control’s (“Department”) decision that Prisma’s intended purchase of the assets of Providence and Kershaw would not violate Prisma’s existing Certificate of Public Advantage (“COPA”) and could be covered thereby, provided certain conditions were met. (*See* February 28, 2020 DHEC Decision attached hereto as Exhibit A).

Because the issues raised by LMC in its request for contested case review of the Department Decision were legal in nature, Prisma moved the Administrative Law Court (“ALC”) for summary judgment. Prisma’s motion for summary judgment prompted LMC to assert a cross motion for summary judgment on the issues presented. In its Order Denying Cross Motions for Summary Judgment (“Order”), the ALC reduced the arguments of the parties to a single two-part question: (a) does Prisma’s acquisition of the Providence and Kershaw assets requires a new COPA application or an amendment to Prisma’s existing COPA?; and (b) if an amendment is sufficient, what kind of review is the Department required to undertake when

approving an amendment?<sup>1</sup> (Order, p. 6). In providing its answer to the questions posed, the ALC discounted and rejected the arguments of all of the parties in favor of restating the issues and making its own arguments and conclusions. In doing so, the ALC made two dispositive legal conclusions in support of its denial of the parties' cross-motions for summary judgment.

First, the Court concluded, as a matter of law, that the Asset Purchase Agreement, which governs the purchase of the assets in this case, is not a "cooperative agreement" under the COPA Law and, therefore, the acquisition of such assets does not qualify as the kind of transaction that is regulated by the COPA Law. (Order, p. 7). As a result of this finding, the Court concluded that "because this transaction cannot qualify as a cooperative agreement, it does not qualify for a COPA [and] does not require a new application for a COPA." (Order, p. 10). Prisma, the Department, Providence and Kershaw all agree with the ALC's ultimate conclusion that no new COPA application is required for Prisma's purchase of assets in this case.

The second dispositive legal conclusion made by the ALC in its Order was that the acquisition of the assets by Prisma is outside the scope of its original COPA and cannot be brought within the scope of the COPA "by amendment or additional conditions, or otherwise subsumed under the existing COPA." (Order, p. 12). This conclusion of the ALC is contrary to

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<sup>1</sup> Under § 508 of the COPA Regulations, "if an applicant amends, alters, or otherwise changes the agreement after receipt of a Certificate of Public Advantage, the Department will decide whether or not the amendment is substantial and thereby requires *another review*" to determine whether likely benefits from the proposed amendment to the COPA Conditions outweigh the likely disadvantages from the amendment and whether any reduction in competition from the amendment is reasonably necessary to achieve the benefits from the amendment. LMC contended that the phrase "another review" applicable to amendments to an existing COPA requires the Department to utilize the review process outlined in COPA Regulations §§ 303, 304 and 305, which apply only to new COPA applications. Prisma, Providence and Kershaw, and the Department contend that the phrase "another review" simply authorizes the Department to determine what type of review of the existing COPA it should conduct, based on the circumstances of matter before it. As discussed herein at n. 3 below, the February 25, 2020 Opinion of the South Carolina Attorney General agrees with such interpretation. (See Exhibit B).

the plain language and purpose of the COPA Law and the Department’s interpretation of its own regulations.

Because the ALC believed that neither parties’ interpretation of the law was correct, the ALC denied both Prisma and LMC’s motions for summary judgment. (Order, p. 12). The ALC found that, in light of its own analysis and conclusions, it did not need to determine the central issue presented to it by the parties’ motions and their arguments at the hearing thereon, which was “whether the Department’s interpretation and application of “another review” under Reg. 61-31, § 508 is correct as a matter of law.”<sup>2</sup> (Order pp. 12-13).

The consistent and correct interpretation and application of the COPA Law is vital to the ability of healthcare providers, such as Prisma and Providence and Kershaw, to operate in a heavily regulated environment. In this case, Providence and Kershaw became obligated to sell their assets to Prisma after the parties received the Department’s Decision that the sale could be consummated without affecting Prisma’s existing COPA. The decision of the Department was based on its interpretation of its own regulations, which interpretation is entitled to deference under *Kiawah Development Partners, II*<sup>3</sup> and was supported by an opinion of the Attorney General. Prisma, Providence and Kershaw were entitled to rely on the Department’s Decision in

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<sup>2</sup> On February 25, 2020, the South Carolina Attorney General issued an opinion in response to DHEC’s request whether its interpretation of “another review” found in § 508 of the COPA Regulations was correct. That opinion concluded, “[T]here are substantial reasons, discussed above, as to why a court would likely give great respect to DHEC’s interpretation. Thus, we advise that DHEC’s interpretation of § 508 would likely be upheld by a court.” 2020 WL 1068931 \*7 (S.C.A.G.);(See Exhibit B, attached).

<sup>3</sup> See *Kiawah Development Partners, II v. South Carolina Department*, 411 S.C. 16, 766 S.E.2d 707 (2014) (“Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency’s interpretation absent compelling reasons. We defer to an agency interpretation unless it is ‘arbitrary, capricious, or manifestly contrary to the statute.’”).

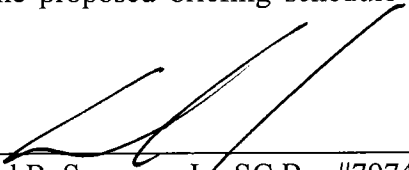
this case in the absence of a finding that the Department acted in an arbitrary or capricious manner. The issues raised in this case implicate matters of significant public importance and concern, *i.e.*, whether the COPA Law is interpreted and applied properly to effectuate the General Assembly's intent that the protection of the State be extended to the beneficial activities of the State's healthcare providers. This proceeding should be expedited so as to remove the uncertainty caused by protracted litigation and to allow the healthcare providers who are parties in this case to move forward.

In addition to the affidavits and arguments offered by Prisma in its Motions in support of expediting this matter, Providence and Kershaw offer for the Court's consideration the further affidavits of Ms. Sue Shugart, the Chief Executive Officer for Kershaw (Exhibit C, attached) and Mr. Joe Bernard, Market Chief Operating Officer for Providence Health (Exhibit D, attached). As demonstrated by these affidavits, the continued delay in resolution of the status of the sale of assets to Prisma is having a significant negative impact on the operation of all of the hospitals covered by the sale and on the ability of those hospitals to provide essential healthcare services to the public. For the good of the parties and the public relying on the appellant healthcare providers, this matter needs to be resolved as quickly as possible.

***[SIGNATURE PAGE FOLLOWS]***

## CONCLUSION

For the reasons stated above, Providence and Kershaw support the granting of Prisma's Motion to Expedite, including granting of the proposed briefing schedule and expediting the hearing in this case.



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*Attorneys for Respondents-Appellants*

Columbia, South Carolina  
February 19, 2021

# EXHIBIT A

TO

**RETURN TO APPELLANT-RESPONDENT  
PRISMA HEALTH-MIDLAND'S  
MOTION TO EXPEDITE**

Appellate Case No. 2020-001610



February 28, 2020

**VIA CERTIFIED MAIL**

Mr. Mark S. O'Halla  
President and Chief Executive Officer  
Prisma Health  
300 East McBee Avenue  
Suite 300  
Greenville, SC 29601

Re: Review of the Certificate of Public Advantage ("COPA") held by Prisma Health – Midlands (Formerly the Palmetto Health Alliance) and update to the conditions as set forth therein.

Dear Mr. O'Halla:

In December 2019, your organization submitted to the South Carolina Department of Health and Environmental Control ("Department") notice of a proposed transaction wherein Prisma Health – Midlands ("PHM") would acquire certain assets currently owned by LifePoint Health ("LPNT")<sup>1</sup> in the Richland County, Fairfield County, and Kershaw County market area. The Department received additional documentation from PHM in support of this transaction in February 2020. Pursuant to S.C. Code Regs. 61-31,§ 508, the Department determined that the proposed changes resulting from the transaction might materially impact the benefits or disadvantages to the community to be served. The Department therefore undertook another review of the COPA.

As a result of that review, and having given substantial consideration to all information provided by PHM to the Department regarding the proposed transaction, the Department has determined that the ongoing conditions of the COPA shall be amended as follows to provide for the addition of the LPNT assets:

1. PHM will provide a full report to the Department every other year which will include, at a minimum, responses to the questions in Regulation 61-31, Health Care Cooperative Agreements, Section 502 (B); the previous fiscal year's independent audited financial

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<sup>1</sup> To include Providence Health (HTL-0928), Providence Health – Northeast (HTL-0929), KershawHealth (HTL-0101), and a freestanding emergency department in Fairfield County operating under HTL-0929.

statements; and information which will enable the Department to evaluate each of the conditions listed below. In years when a full report is not required, PHM will provide the Department an abbreviated report which will include, at a minimum, an annual audited financial statement plus a description of the programs and services PHM provides through its Community Outreach Programs as described in Condition 2, as well as the required reporting as described in Conditions 17 and 19. All reports, full and abbreviated, may require additional information the Department feels is necessary to adequately evaluate PHM's compliance with the COPA and the COPA conditions. These annual reports are due to the Department no later than 120 days after the end of each fiscal year. In addition, PHM will provide a revised three (3) year forecasted financial statement, which may be based upon its most recently Board approved budget and Board accepted audited financial report, and which projects three (3) years forward from the end of the most recent fiscal year. PHM will also make available to the Department all of its managed care contracts for inspection, if necessary, which will be considered proprietary and not subject to disclosure.

2. PHM will provide fifteen percent (15%) of its "excess revenues over expenses" to fund public health initiatives and community outreach programs. Efforts funded with this money, as a community benefit, will be evaluated each year as a part of the information required in Condition Number 1. The evaluation will be based on the benefits, changes, and/or accomplishments that occur because of the activities and services provided by the programs and for which the program is held accountable. The evaluation will consider whether these programs are reaching populations that might otherwise not receive such services without the Certificate of Public Advantage.
3. For twenty-four (24) months following the date of closing of the transaction, PHM will report major operational savings that can be documented as they relate to the acquisition of the LPNT assets. Costs used to document the above savings must be specific to the acquisition, that is, savings that occurred because of the acquisition and not savings that would have been realized even if the acquisition had not occurred.
4. PHM will provide access to competing licensed facilities for those services not offered by such facility in the core service area upon non-discriminatory terms and conditions to any competing licensed facility that requests such access. For services not offered by competing licensed facilities in the core service area, PHM will give them terms and conditions equal to the average of the amount which would be received from patients insured by any of PHM's commercial payers. That PHM will continue this access for which it is the sole provider until such time as a competing licensed facility offers the service, and will terminate only in the event that South Carolina repeals its Certificate of Need laws or that such laws otherwise cease to be applicable. Additionally, PHM must make available to the Department, upon

request, names of any facilities, to include terms and conditions, to which services have been offered.

5. PHM will continue a relationship substantially similar to the relationship set forth in the affiliation agreement between Prisma Richland Hospital and the University of South Carolina School of Medicine and continue to support medical education. If a clinical service is determined to be located at only one PHM facility, the medical, graduate medical, and allied health education programs will have access to that clinical service at the facility in which the service is to be located, to the extent that is necessary to complete the education and training as required by the program.
6. Should PHM change controlling interest by purchase, lease, assignment, management contract, transfer or comparable arrangement, the new operating entity as a condition of the change will adhere to all the conditions of this approval and all representations put forth in the Certificate of Public Advantage application and subsequent submissions.
7. As part of the information required in Condition Number 1, "generally accepted accounting principles" consistently applied, but excluding extraordinary revenue and expenses, losses on extinguishments of debt and the impact of any mark to market adjustments on derivative instruments, will be used to calculate net of revenues over expenses in the annual report for determining the 15% public health commitment and that such financial statements will be certified by an independent auditor. However, should any of these other items result in cash gains or losses, they may be included in net revenues over expenses.
8. Neither PHM, nor any of their affiliates, may enter into a contract that by its terms precludes third party payers from contracting with other hospitals in the core service area identified by the Sponsoring Organizations. This does not prevent third party payers from unilaterally choosing not to contract with a hospital that is competitive.

However, it must be the decision of the payer and not be required as a condition of a contract with PHM or its affiliate. This does not include exclusive contracts with third party payers that may be in effect on this date or their renewals as provided for in the existing contract.

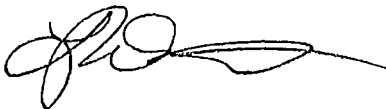
In addition, PHM will negotiate with managed care payers in good faith and in a fair and equitable manner. This does not require PHM to contract with every payer regardless of terms, or that contracted prices must be the same for all payers. The Department will, as a part of its ongoing monitoring process, investigate consistent complaints from employers and managed care payers to ensure compliance with this condition and will take appropriate regulatory action when necessary.

9. Except to the extent required by vendors, suppliers or Group Purchasing Organizations ("GPOs"), neither PHM, nor its subsidiaries, shall condition any contracts with suppliers, vendors, or GPOs that preclude or limit such suppliers, vendors, or group purchasing organizations to contract with other providers in the core service area identified by the PHM.
10. The Department may amend these conditions to include, but not be limited to, the lowering of prices should unexpected events lead to abnormally high margins from operations.
11. PHM will adhere to the commitments it has outlined in its "Summary of System Commitments and Proposed DHEC Monitoring" in its application and all other representations made in the Certificate of Public Advantage application and all of its subsequent submissions, to the extent that they are consistent with the conditions of this approval, and that may not be specifically described in these conditions.
12. PHM will pay to the Department an annual monitoring fee to cover the actual cost of audits and monitoring. This fee will be used by the Department in whatever manner solely for the purpose of monitoring these conditions.
13. Prior to the final execution of the Asset Purchase Agreement ("APA") by and between PHM and LPNT regarding those assets outlined the December 2019 and February 2020 submissions to the Department by PHM, PHM shall submit to the Department evidence that the Board of PHM is aware of the transaction.
14. PHM will conduct a comprehensive study of access to emergency, urgent, and/or extended primary care services within the northern City of Columbia or other disadvantaged area of Richland County. Based upon this study, PHM will develop a plan to address those issues identified in the study for presentation to, and input from, the Department. Such a study will be completed within eighteen (18) months of the closing date of the transaction.
15. Within twenty-four (24) months of the closing date of the transaction, PHM will begin provision of primary care, and/or extended-hours primary care, and/or urgent care services to the Lower Richland community.
16. Prior to closing or permanently reducing the number of licensed facilities or beds held by PHM, PHM shall submit to the Department a specific plan for the transfer of those services, beds, patients, medical professionals, and/or other staff affected by such a change. This requirement shall be in addition to those requirements set forth in S.C. Code 44-7-110 *et seq.*, and the *South Carolina Health Plan*.

17. All acquired facilities will be subject to the charity care policy of PHM. The current charity care policy in force at the time of submission will be included in PHM's annual COPA report. In the event PHM determines to close a licensed general hospital, PHM will provide the Department with a plan that addresses how indigent care patients will be accommodated.
18. PHM will maintain Level 1 trauma services and serve as a Regional Perinatal Center for at least five (5) years following the date of closing of the transaction, subject to no material change in program requirements, state law or regulations, and federal law or regulations. Further, PHM will commit to operating no less than seven (7) emergency departments, unless otherwise approved to do so by the Department, for at least five (5) years following the date of closing of the transaction.
19. In addition to the requirements set forth in the *Health Care Cooperation Act*, S.C. Code Ann. Sections 44-7-500 through 44-7-590, the *Health Care Cooperative Agreements Regulation*, S.C. Code Ann. Regs. 61-31, and these Conditions, PHM shall notify the Department through its annual COPA report of any acquisitions or dispossessions related to physician practices, surgical centers, imaging centers, radiation therapy facilities, or substance use and treatment facilities.
20. These Conditions will be evaluated for necessity and compliance on an annual basis. Those Conditions that contain specified time periods will be evaluated at the end of that specified time period for compliance, and PHM and the Department may mutually agree to adjust the specified time period.

Your continued cooperation and compliance is greatly appreciated. Please do not hesitate to contact me with any questions you might have.

Very Respectfully,



Louis Eubank, Chief  
Bureau of Healthcare Planning & Construction

cc: Malcolm Isley (via email)  
Liz Crum, Esquire (via email)

# EXHIBIT B

TO

**RETURN TO APPELLANT-RESPONDENT  
PRISMA HEALTH-MIDLAND'S  
MOTION TO EXPEDITE**

Appellate Case No. 2020-001610

2020 WL 1068931 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 25, 2020

\*1 W. Marshall Taylor, Jr.  
General Counsel  
S.C. Department of Health and Environmental Control  
2600 Bull Street  
Columbia, SC 29201

Dear Mr. Taylor:

You have requested our opinion “regarding the scope of authority of the South Carolina Department of Health and Environment Control (Department or DHEC) to conduct certain reviews under regulations promulgated pursuant to the Health Care Cooperation Act, S.C. Code Ann. Sections 44-7-500 through 44-7-590 (the ‘Act.’)D’ Specifically, DHEC seeks our opinion with regard to the following question: “[w]hat review must be conducted prior to departmental approval of proposed modifications to a cooperative agreement after issuance of a Certificate of Public Advantage if DHEC determines the proposed modifications are substantial under Section 508 of S.C. Code Regulation 61-31, Health Care Cooperative Agreements?” You further advise that “DHEC’s interpretation is that ‘another review’ under Section 508 does not necessarily require the same type of review as occurs when an applicant applies for a Certificate of Public Advantage.” You note that “DHEC believes it is within its discretion to conduct the review it deems appropriate based on the facts and circumstances involved including, but not limited to, the significance of the proposed change, any relevant time constraints related to the proposed change, and any exigent circumstances as found by DHEC or as represented to DHEC by the parties to the cooperative agreement.”

As will be explained more fully below, we believe a court is likely to agree with DHEC’s analysis as reasonable. As the agency charged with approval, monitoring and enforcement of Certificates of Public Advantage, a court will likely conclude DHEC possesses broad discretion to interpret its Regulation. As you note, the language of the Regulation, using the phrase “another review,” does not necessarily require that DHEC conduct the same type of review as occurs when an applicant applies for a Certificate of Public Advantage. Thus, in our opinion, a court is likely to conclude that DHEC possesses the discretion to allow the agency to conduct “another review” pursuant to the Regulation, as it deems appropriate, based upon factors such as are specified in your letter.

By way of background, your letter further states:

I. The Health Care Cooperation Act and Regulation 61-31

The Act is predicated upon Legislative findings set forth at Section 44-7-505(1)-(4). The findings recognize “that cooperative agreements among hospitals, health care purchasers, and other health care providers would foster improvements in the quality of health care for South Carolinians, moderate cost increases, improve access to needed services in rural areas, and enhance the likelihood that rural hospitals can remain open,” and “that competition as currently mandated by federal and state antitrust laws should be supplanted by a regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers when the benefits outweigh the disadvantages caused by their potential adverse effects on competition.” Section 44-7-505(2), (4).

\*2 DHEC is the state agency authorized to enforce and implement the Act and is authorized to promulgate regulations pursuant to the Act Sections 44-7-510(4) and - 570(D). The purpose of the regulation is to “implement the legislative intent that there be a state regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other

health care providers which would otherwise violate federal or state anti-trust laws when the benefits outweigh disadvantages caused by their potential adverse effects on competition.” R.61-31, Section 101.

## II. Role of DHEC After Issuance of Certificate of Public Advantage

The Act relies upon DHEC's continuing involvement following the approval of an application for a Certificate of Public Advantage. For example, DHEC monitors and regulates agreements approved under the Act and may request information whenever necessary to ensure that the agreements remain in compliance with any conditions of approval. Section 44-7-570(A). While the Act provides a detailed process for review of initial applications and changes to applications prior to issuance of a Certificate of Public Advantage, the Act is silent regarding any process for reviewing proposed changes to a cooperative agreement after issuance of a certificate. However, Section 508 of the regulation addresses this scenario.

SECTION 508. Changes After Receipt of a Certificate of Public Advantage: If an applicant amends, alters, or otherwise changes the agreement after receipt of a Certificate of Public Advantage, the Department will decide whether or not the amendment is substantial and thereby requires another review. A change in the application will be considered substantial if the Department believes that the change materially changes the reasons for approval, might materially impact the benefits or disadvantages to the community to be served, or will change the service area of the original application. The addition or deletion of a party to the agreement does not necessarily constitute a substantial change unless the Department believes that the above mentioned criteria will occur.

R.61-31, Section 508 (Emphasis added). Therefore, if the Department finds proposed changes to a cooperative agreement after issuance of a certificate are substantial, another review must be performed. Neither the Act nor the regulations provide definitions for “review” or “another review.” Because it is not clear from the text of Section 508 what the clear meaning of “another review” is, interpretation of the term is warranted. See Kiawah Dev. Partners. II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 333, 766 S.E.2d 707, 717(2014). [ ]

DHEC interprets “another review” in Section 508 to allow it the discretion to conduct the review that may be required, in the event it deems the change to be “substantial.” This review will depend on the facts and circumstances involved, such as the significance of the proposed change, any relevant time constraints related to the proposed change, and any exigent circumstances as found by DHEC or as represented to DHEC by the parties to the cooperative agreement. This interpretation is reasonable and consistent with DHEC's statutory authority.

\*3 Evidence of the reasonableness of DHEC's interpretation is found in the contrary treatment in Section 308. That section addresses changes made by an applicant prior to the issuance of a certificate. Section 308 necessitates recommencement of the public notice and other steps if DHEC determines that the changes constitute a new application. In such cases, “the requirements of Section 301, 302, and 303” must be complied with. Those sections require submission of an application to DHEC, payment of filing fees, evaluation by DHEC for completeness, and notice of opportunity for public hearings. Section 308 also expressly requires that the time periods, deadlines and waiting periods, be complied with for revisions at the pre-issuance stage.

There is no parallel requirement in Section 508 (post-issuance of a Certificate) to recommence the extensive review process required in Section 308 (pre-issuance of a Certificate). Instead, Section 508 refers simply to “another review.” The absence of express requirements like those in Section 308 is a strong indicator that DHEC can conduct the review it deems appropriate at the post-issuance stage.

Separately, further evidence of the Legislature's design to entrust DHEC with broad discretion and authority to conduct appropriate post-issuance reviews is found in the Act. The Legislature recognized the inability to exhaustively articulate criteria that may be material for the analysis to be undertaken by DHEC. Following the list of criteria for advantages and disadvantages

in its evaluation of an application (Section 44-7-560(A)), the Act entrusts DHEC to use its discretion to execute the purpose of the effort:

The department also may establish conditions for approval that are reasonably necessary to ensure that the cooperative agreement and the activities engaged under it are consistent with this article and its purpose to promote cooperation and limit health care costs, protect against abuse of private economic power, and to ensure that the activity is appropriately supervised by the State.

Section 44-7-560(B).

Additionally, the regulations provide that the Certificate of Public Advantage may be revoked by DHEC if, in its discretionary assessment, the parties are not complying, or the benefits of the certified cooperative agreement no longer outweigh the disadvantages, or that the certificate was issued in reliance upon a misrepresentation or other improper basis. Section 503(A)-(C). The Certificate may also be revoked by a single, non-discretionary basis, failure to pay the annual monitoring fee. Section 503(D). The discretionary bases for revocation demonstrate that DHEC is uniquely relied upon in the Health Care Cooperation Act to be the State agent to conduct this activity. This reliance by the Legislature in statute and by approval of DHEC's regulations confirms the reasonableness of DHEC's interpretation regarding the inherent flexibility to determine the appropriate review of modifications pursuant to Section 508.

\*4 DHEC requests confirmation of its interpretation of S.C. Code Regulations 61-31, Section 508, to allow the review DHEC deems appropriate to give effect to the Health Care Cooperation Act.

#### LAW/ANALYSIS

In interpreting statutes or regulations, the cardinal rule of construction is to rely upon legislative intent. As was stated by our Supreme Court in Protection and Advocacy for People with Disabilities, Inc. v. Buscemi, 417 S.C. 267, 273-274, 789 S.E.2d 756, 760 (2016),

“[t]he cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible.” Perry v. Bullock, 409 S.C. 137, 140, 761 S.E.2d 251, 253 (2014) (quoting State v. Bauer, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000)). “All rules of statutory construction are subservient to the one that legislative intent must be construed in light of the intended purpose of the statute.” S.C. Prop. & Cas Ins. Co. Guar. Assn. v. Brock, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (2014) (quoting McClanahan v. Richland Cty. Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)). “The plain language of a statute is considered the best evidence of the legislature's intent.” Perry, 409 S.C. at 140, 761 S.E.2d at 253. “When interpreting an undefined statutory term, the Court must look to its usual and customary meaning.” Id. at 140-41, 761 S.E.2d at 253.

In Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, 411 S.C. 16, 32-33, 766 S.E.2d 7070, 717-718 (2014), the South Carolina Supreme Court set forth the rule for an agency's interpretation of the statute's regulations which it is charged to enforce. According to the Court,

[i]n reaching this conclusion, the ALC erred by failing to give deference to DHEC's interpretation of its regulation. Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of the statute or regulations speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation.... [cases cited]. If the statute or regulation “is silent or ambiguous with respect to the specific issue,” the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference....

Advancing to the second step, we must first consider the scope of South Carolina's deference doctrine.

.... [cases cited] ...

As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations "unless there is a compelling reason to differ." ... Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to the agency's interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute." ... (quoting Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 437 U.S. 837, at 844 (1984).

\*5 Our opinions are in accord. See e.g. Op. S.C. Att'y Gen., 2019 WL 4729535 (September 13, 2019) ["it is this Office's long standing policy, like that of our state courts, to defer to an administrative agency's reasonable interpretation of the statutes and regulations that it administers."] (citing numerous opinions).

Moreover, our Supreme Court stated in City of Cola. v. Bd. of Health and Environmental Control, 262 S.C. 199, 2020, 355 S.E.2d 536, 538 (1987),

[While] as creatures of statute, regulatory bodies are possessed only of those powers which are specifically delineated [,]... [t]he delegation of authority to an administrative agency is construed liberally when the agency [here DHEC] is concerned with the protection of the health and welfare of the public.

In other words, "regulations governing public health should be liberally construed." Putnam Lake Comm, Council Bathing Beaches v. Dept'y Comm'r of State of N.Y., 456 N.Y.S.2d 100 (1982).

It should be noted that R. 61-31, § 308 provides for the process that DHEC must utilize when the applicant makes an amendment during the initial application process. Section 308 specifically requires DHEC to review the amendments and notify the applicant if the amendment constitutes a new application. The Regulation requires that in such instance, the review process provided for in § § 301-303 must be followed and the review is considered "as though the amendment were a new application." By comparison, § 508 is deemed "Changes After Receipt of a Certificate of Public Advantage." Such Section regulates amendment post-issuance of a COP A. In other words, § 508 applies to an amendment to the operational COPA. If DHEC deems these amendments substantial, the agency is required to conduct "another review."

Such a comparison is striking. As your letter notes, "[t]here is no parallel requirement in Section 508 (post-issuance of a Certificate) to recommence the extensive review process required in Section 308 (pre-issuance of a Certificate)." Instead, Section 508 refers simply to "another review."

You also note that § 44-7-560(B) affords broad discretion to DHEC to "establish conditions for approval that are reasonably necessary to ensure that the cooperative agreement and the activities engaged under it are consistent with this article and its purpose to promote cooperation and limit health care costs, protect against abuse of private economic power, and to ensure that the activity is appropriately supervised by the State." With this legislative intent in mind, we now turn to the phraseology "another review."

In this instance, as your letter indicates, the words "another review" are not defined in Section 508 of R. 61-31. Nor is there any suggestion, at least in the Regulation itself, either that "another review" must be a repeat of the original COPA process, or that something less may be undertaken. The Regulation simply states that if there is an amendment, alteration or change to the agreement by the applicant, the Department must determine if the amendment is "'substantial" and, if so, "requires another review." (emphasis added). Your question specifies that DHEC deems the amendment to be "substantial."

\*6 As we stated in Op. S.C. Att'y v Gen., 1996 WL 82894 (January 17, 1996), "[t]he term 'review' ordinarily means to 'look over, study, or examine again.'" Use of such a term "envisions discretion." And, as defined in Black's Law Dictionary (7<sup>th</sup>

ed.), the term “review” means a “consideration inspection or reexamination of a subject or thing.” As one court has explained, the term “‘review’ commonly denotes a ‘looking over or examination with a view to amendment or improvement.’” Kholi v. Wall, 582 F.3d 147, 153 (1<sup>st</sup> Cir. 2009).

Ordinarily, when the term “judicial review” is used, the reviewing court, of course, does not “start over” from what has already been determined, but examines the lower court's performance for errors. As Chief Justice Hughes famously summarized in St. Joseph Stockyards Co. v. U.S., 298 U.S. 38, 53 (1936), the “judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the ... [prior] determination.” In short, common sense and the economy of public resources typically does not require that “another review” entail the painstaking gathering of facts and analysis undertaken originally.

In Farm Management Co., LLC v. Rural Community Ins. Agency, 2015 WL 1809789 (E.D. Wash. 2015), the Court reached this very conclusion. There, the question was whether “the court may conduct a de novo review of the indemnity claims because the arbitrator's decision is not binding....” The Court concluded “on closer examination” that de novo review of the arbitrator's decision was not intended. The provision in question specified that the arbitrator's decision was binding unless “judicial review is sought.” Id. at \* 4. According to the Court,

[t]he term “review” means to “view, look at, or look over again” or “to look back upon; view retrospectively.” .... (citation). Accordingly, the Court is to “review” the arbitrator's decision - not begin anew with the analysis of the issues presented to the arbitrator.

Id. In short, use of the word “review” [“another review”] was deemed to be an analysis which did not “begin anew,” but one which “look[s] over again” what was originally done.

In addition, the point you make in your letter regarding the contrast in procedures specified in Section 308 with that of Section 508 is well taken, and we believe a court would give it considerable weight. As your letter notes, “Section 308 necessitates recommencement of the public notice and other steps if DHEC determines that the changes constitute a new application. In such cases, ‘the requirements of Section 301, 302 and 303’ must be complied with.” By comparison, § 508 simply requires “another review.” In Op. S.C. Att'y Gen., 2014 WL 2619140 (May 30, 2014), we advised that such a comparison may be used in the interpretation of an agency's Regulation, as follows:

\*7 [t]hus, because the canons of statutory construction explain that where, as here, a regulation provides multiple factors to evaluate within its text, the omission of others is considered intentional. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (“The canon of construction ‘ex oressio unius est exclusio alterius’ or ‘inclusio unius est exclusio alterius’ holds that ‘to express or include one thing implies the exclusion of another, or of the alternative.’”).

In summary, DHEC's interpretation of § 508 may be based upon comparison with other relevant provisions, as well as § 44-7-560(B), and particularly the flexibility and discretion implied by the use of the term “review” in § 508. The foregoing authorities all support DHEC's interpretation.

## CONCLUSION

The term “another review,” as employed in Section 508 of R. 61-31 is not defined and is open to interpretation. However, based upon the foregoing authorities, DHEC's construction of “another review” - i.e. that the same degree of review and analysis for application of a COPA is not necessarily required for amendment of an existing COPA - would likely withstand scrutiny by a court. DHEC's interpretation that it possesses the discretion to conduct the review it deems appropriate, based upon the relevant facts - such as the significance of the proposed change or exigent circumstances — would likely be given considerable deference by the courts as a reasonable interpretation. Moreover, comparison of the language of § 508 of the Regulation with § 308 thereof is striking, indicating that there is considerable difference in the review required pre-COPA approval and that required for a post-COPA amendment. Accordingly, we believe a court would likely conclude that DHEC's interpretation is

consistent with the language of § 508, and is consistent with the public health. As the agency charged by the General Assembly with approving, monitoring and enforcing a COPA, as well as protecting the public health, in our judgment, a court would likely afford wide berth to DHEC's interpretation of its own Regulation regarding the meaning of "another review."

As we have consistently advised, "courts give great deference to an agency's interpretation of its own regulations even in circumstances where there may be more than one interpretation and even if such interpretation is not the one the court would adopt in the first instance." Op. S.C. Att'y Gen., 2010 WL 5578961 (December 6, 2010) (quoting other previous opinions). Moreover, as we have noted previously, the term "review" certainly "envisions exercise of discretion," Op. S.C. Att'y Gen., 1996 WL 82894 (January 17, 1996). Here, there are substantial reasons, discussed above, as to why a court would likely give great respect to DHEC's interpretation. Thus we advise that DHEC's interpretation of § 508 would likely be upheld by a court.

Sincerely,

\*8 Robert D. Cook  
Solicitor General

2020 WL 1068931 (S.C.A.G.)

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End of Document

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# EXHIBIT C

TO

**RETURN TO APPELLANT-RESPONDENT  
PRISMA HEALTH-MIDLAND'S  
MOTION TO EXPEDITE**

Appellate Case No. 2020-001610

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

Appellate Case No. 2020-001610

---

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III  
Chief Administrative Law Judge

Case No: 20-ALJ-07-0108-CC

---

Lexington County Health Services  
District Inc., d/b/a Lexington Medical Center, ..... Petitioner/Respondent,

v.

South Carolina Department of Health and  
Environmental Control, Prisma Health-  
Midlands, Providence Hospital, LLC  
d/b/a Providence Health, Providence Health  
Northeast, Providence Health Fairfield,  
and Kershaw Hospital, LLC d/b/a  
Kershaw Health Medical Center, ..... Respondents,

OF WHICH

Prisma Health-Midlands is the Appellant-Respondent and  
Providence Hospital, LLC d/b/a Providence Health, Providence  
Health Northeast, Providence Health Fairfield, and Kershaw  
Hospital, LLC d/b/a Kershaw Health Medical Center are the  
Respondents-Appellants.

---

AFFIDAVIT OF SUE SHUGART, FACHE

---

PERSONALLY APPEARED BEFORE ME, Sue Shugart, FACHE, who being duly sworn,  
deposes and says that:

1. She is the Chief Executive Officer for KershawHealth Medical Center (“Kershaw”) and in that capacity is knowledgeable about the matters contained herein.

2. She is generally aware of the proposed sale of Kershaw to Prisma Health - Midlands and of the above-captioned proceedings in which Lexington Medical Center challenges the decision of the South Carolina Department of Health and Environmental Control to modify the conditions of the Certificate of Public Advantage currently held by Prisma Health-Midlands.

3. Because of the delay caused by these proceedings, significant uncertainty exists as to when, and if, a closing may occur and ownership and operation of Kershaw will pass to Prisma Health-Midlands.

4. This delay and uncertainty has impaired and continues to impair Kershaw's ability to retain and to recruit physicians. In her capacity as Chief Executive Officer, she participates in physician recruitment for Kershaw. She is aware of physician candidates who have declined to be recruited to practice at Kershaw because of concerns regarding the uncertainty of the hospital's ownership in the future. The lack of ability to recruit physicians has placed undue pressure on the existing medical staff at the facility.

5. Further, the continued uncertainty over the hospital's ownership continues to effect Kershaw's ability to retain nursing staff, which negatively impacts operation of the hospital.

6. Additionally, the impairment of the operations of the facility, caused by the continued delay and uncertainty regarding the transaction, jeopardizes the ability of the facility to respond to the demands of the Covid-19 pandemic, at a time when infection rates are dramatically rising throughout the State of South Carolina.

7. Therefore, she believes that it is imperative for the sound operation of the hospital that the uncertainties caused by the legal proceedings be resolved as soon as possible.

FURTHER THE AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Sue Shugart, FACHE

SWORN and subscribed to before  
me this 8 day of January, 2021

Carol B. Vinson (L.S.)  
Notary Public for South Carolina  
My commission expires: 06/06/27.



# EXHIBIT D

TO

**RETURN TO APPELLANT-RESPONDENT  
PRISMA HEALTH-MIDLAND'S  
MOTION TO EXPEDITE**

Appellate Case No. 2020-001610

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

Appellate Case No. 2020-001610

---

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III  
Chief Administrative Law Judge

Case No: 20-ALJ-07-0108-CC

---

Lexington County Health Services  
District Inc., d/b/a Lexington Medical Center, .....Petitioner/Respondent,

v.

South Carolina Department of Health and  
Environmental Control, Prisma Health-  
Midlands, Providence Hospital, LLC  
d/b/a Providence Health, Providence Health  
Northeast, Providence Health Fairfield,  
and Kershaw Hospital, LLC d/b/a  
Kershaw Health Medical Center, ..... Respondents,

OF WHICH

Prisma Health-Midlands is the Appellant-Respondent and  
Providence Hospital, LLC d/b/a Providence Health, Providence  
Health Northeast, Providence Health Fairfield, and Kershaw  
Hospital, LLC d/b/a Kershaw Health Medical Center are the  
Respondents-Appellants.

---

AFFIDAVIT OF JOSEPH BERNARD

---

PERSONALLY APPEARED BEFORE ME, Joseph Bernard, who being duly sworn,  
deposes and says that:

1. He is the Market Chief Operating Officer and the Ethics and Compliance Officer  
of Providence Health (“Providence”) and in that capacity is knowledgeable about the matters  
contained herein.

2. He is generally aware of the proposed sale of the Providence hospitals and other Providence Health facilities to Prisma Health - Midlands and of the above-captioned proceedings in which Lexington Medical Center challenges the decision of the South Carolina Department of Health and Environmental Control to modify the conditions of the Certificate of Public Advantage currently held by Prisma Health-Midlands.

3. Because of the delay caused by these proceedings, significant uncertainty exists as to when, or if, a closing will occur and ownership and operation of the Providence facilities will pass to Prisma Health-Midlands.

4. This delay and uncertainty has impaired and continues to impair Providence's ability to retain and to recruit physicians. In his capacity as Market COO, he participates in physician recruitment for Providence. He is aware of physician candidates who have left employment or practice with Providence or who have declined to be recruited to practice at Providence because of concerns regarding the uncertainty of the hospital's ownership in the future. The lack of ability to retain and recruit physicians has placed undue pressure on the existing medical staff.

5. Similarly, the continued uncertainty over the hospital's ownership affects Providence's ability to recruit and to retain nursing staff, which also negatively impacts the operation of the hospital.

6. Furthermore, in his capacity as Market COO, the affiant is aware that the delay and uncertainty surrounding the sale of assets to Prisma Health – Midlands, has resulted in the loss of key management personnel, which further impairs operations of the system facilities.

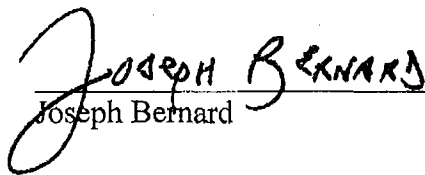
7. Additionally, the impairment of the operations of the facility, caused by the continued delay and uncertainty regarding the transaction, jeopardizes the ability of Providence to

respond to the demands of the Covid-19 pandemic, at a time when infection rates are dramatically rising throughout the State of South Carolina.

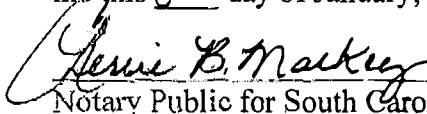
8. Finally, the continued delay of the transaction also wastes the excess capacity of Providence to treat patients because, while Prisma has the ability to utilize its more robust infrastructure and staff to make use of the excess capacity, Providence does not at this time because of the stalled transaction.

9. Based on the above and his knowledge of the circumstances that exist at Providence, he believes that it is imperative for the sound operation of the Providence's facilities that the uncertainties caused by the legal proceedings be resolved as soon as possible.

FURTHER THE AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Joseph Bernard

SWORN and subscribed to before  
me this 8<sup>th</sup> day of January, 2021

 (L.S.)  
Notary Public for South Carolina  
My commission expires: Jan. 4, 2028

**RECEIVED**

**Feb 19 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III  
Chief Administrative Law Judge

APPELLATE CASE NO. 2020-001610  
ADMINISTRATIVE LAW COURT CASE NO: 20-ALJ-07-0108-CC

Lexington County Health Services  
District Inc., d/b/a Lexington Medical Center..... Petitioner/Respondent,

v.

South Carolina Department of Health and  
Environmental Control, Prisma Health - Midlands,  
Providence Hospital, LLC d/b/a Providence Health,  
Providence Health Northeast, Providence Health  
Fairfield, and Kershaw Hospital, LLC d/b/a  
Kershaw Health Medical Center ..... Respondents,

OF WHICH

Prisma Health - Midlands is the Appellant-Respondent and  
Providence Hospital, LLC d/b/a Providence Health, Providence  
Health Northeast, Providence Health Fairfield, and Kershaw  
Hospital, LLC d/b/a Kershaw Health Medical Center are the  
Respondents-Appellants.

**PROOF OF SERVICE**

The undersigned hereby certifies that on February 19, 2021, s/he caused a copy of Respondents-Appellants' **RETURN TO APPELLANT-RESPONDENT PRISMA HEALTH-MIDLAND'S MOTION TO EXPEDITE**, with attachments, to be served upon all counsel of record via electronic mail to each counsel's individual AIS email address pursuant to SC Supreme Court COVID Order 2020-05-29-02 addressed as follows:

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Vito M. Wicevic, Esquire  
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Columbia, SC  
Greenville, SC  
Raleigh, NC  
Spartanburg, SC  
Washington, DC

February 19, 2021

VIA EMAIL ONLY CTAPPFILINGS@SCCOURTS.ORG  
The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

**RECEIVED**  
**Feb 19 2021**  
**SC Court of Appeals**

**Re: Appellate Case No: 2020-001610**  
*Lexington County Health Services District, Inc. d/b/a Lexington Medical Center v. SC DHEC, et al.*

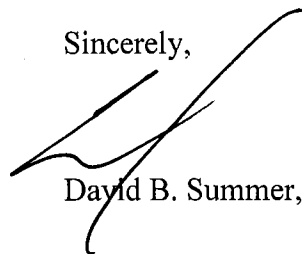
Dear Ms. Kitchings:

Enclosed for filing in connection with the above, please find Respondents-Appellants' *Return to Appellant-Respondent Prisma Health-Midland's Motion to Expedite.*

By copy of this letter and pursuant to the Court's standing Order, we are serving copies of same to all counsel of record via email.

With best regards, I am

Sincerely,



David B. Summer, Jr.

Enclosure

cc: Kelly M. Jolley, Esq. *(via email)*  
Ariail B. Kirk, Esq. *(via email)*  
Jennifer J. Hollingsworth, Esq. *(via email)*  
Shannon V. Lipham, Esq. *(via email)*  
Ashley C. Biggers, Esq. *(via email)*  
Vito W. Wicevic, Esq. *(via email)*  
M. Elizabeth Crum, Esq. *(via email)*  
Celeste T. Jones, Esq. *(via email)*  
Pamela A. Baker, Esq. *(via email)*