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**Feb 25 2021**

**SC Court of Appeals**

IN 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, Administrative Law Court Judge

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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 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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**PETITIONER/RESPONDENT’S MOTION FOR LEAVE TO FILE RESPONSE**

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Pursuant to Rule 240(a), SCACR, Petitioner/Respondent, Lexington County Health Services District, Inc., d/b/a Lexington Medical Center (LMC), respectfully requests leave of this Court to file a brief in response to Respondent South Carolina Department of Health and Environmental Control (DHEC). The basis for this request is that although DHEC is positioned as a “Respondent” in these appeals filed by Respondents/Appellants Prisma Health-Midlands (PHM) 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 (collectively LifePoint), DHEC’s position is aligned with the appealing parties and the Initial Brief filed on

February 19, 2021, does not seek affirmance of the ALC but instead asserts argument consistent with the Appellants' positions. Because DHEC's posture is akin to an appellant in this proceeding, LMC requests the opportunity to respond in the event the Court were inclined to consider DHEC's argument. *Cf. Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 170 (Ct. App. 1993) (stating procedural rule that an appellant cannot make new arguments for reversal in a reply brief); *see also* Rule 208(a)(4), SCACR; S.C. Jur. Appeal and Error § 83; and *Turner v. Santee Cement Carriers, Inc.*, 277 S.C. 91, 96, 282 S.E.2d 858, 860 (1981). A copy of LMC's proposed response is included at **Exhibit A**.

Respectfully submitted,

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Dated: February 25, 2021

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OF WHICH

Prisma Health-Midlands 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 25, 2021, she caused a copy of the  
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# **EXHIBIT “A”**

*(LMC’s PROPOSED Response to DHEC’s Initial Brief)*

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OF WHICH

Prisma Health-Midlands 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.

---

**PETITIONER/RESPONDENT LEXINGTON COUNTY HEALTH SERVICES  
DISTRICT, INC.'S RESPONSE TO INITIAL BRIEF OF RESPONDENT SOUTH  
CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL**

---

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**STATEMENT OF ISSUES ON APPEAL**

- I. THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL’S (DHEC) AUTHORITY TO AMEND OR MODIFY CERTIFICATES OF PUBLIC ADVANTAGE (COPA) IS UNDISPUTED AND NOT DETERMINATIVE OF ANY ISSUE ON APPEAL.
- II. DEFERENCE TO DHEC WAS NOT PRESERVED FOR APPEAL AND/OR NO DEFERENCE IS DUE AND REGULATION 61-31 § 508 IS UNCONSTITUTIONALLY VAGUE AS APPLIED.

**STATEMENT OF THE CASE**

Petitioner/Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center (LMC) incorporates the Statement of the Case set forth in its Initial Brief filed February 18, 2021, found at page 1 therein.

**STANDARD OF REVIEW**

LMC incorporates the Standard of Review set forth in its Initial Brief filed February 18, 2021, found at page 4 therein.

**STATEMENT OF THE FACTS**

LMC incorporates the Statement of the Facts set forth in its Initial Brief filed February 18, 2021, found at page 5 therein.

**ARGUMENT**

- I. THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL’S (DHEC) GENERAL AUTHORITY TO AMEND OR MODIFY CERTIFICATES OF PUBLIC ADVANTAGE IS NOT DETERMINATIVE OF ANY ISSUE ON APPEAL.

DHEC’s “Argument I” asserts that “DHEC has the authority to amend and make modifications to a COPA,” and concludes that “[t]he ALC did not rule that DHEC lacks authority under the Act and Regulation to amend or modify a COPA, including where a COPA holder adds assets to the COPA’s coverage.” DHEC Br., pp. 5-6. DHEC does not advocate affirmance or reversal of the ALC, but this argument is in fact consistent with the decisions appealed by Prisma

Health-Midlands (PHM) 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 (collectively LifePoint). The Order Denying Cross-Motions for Summary Judgment and the Order on Motions to Clarify and to Reconsider both specifically address DHEC's general authority to approve changes to an existing COPA, the first Order recognizing the issue was not subject to dispute. *See* Summ. J. Order, n. 5; Clarif. Order, p. 5 (R. pp. \_\_). The Clarification Order also explained that the ALC "never held that a cooperative agreement and/or COPA could not be amended to include additional assets." Clarif. Order, p. 5 (R. p. \_\_). This Court does "not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Byrd v. Irmo High School*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). Simply put, whether DHEC *generally* has authority to amend or modify conditions after issuance of a COPA does not resolve the conflict before the Court, which is a challenge to DHEC's approval of PHM's request to "amend" COPA-97-01 to allow for the proposed purchase of LifePoint's assets with only an internal, private review and no determination of public benefit. *See* DHEC Decision, p. 1; DHEC Staff Resp. to Req. for Rev., p. 5 (R. pp. \_\_).

LMC submits it would be error to conclude that the simple fact of DHEC's authority to approve changes to an existing cooperative agreement is sufficient to uphold *any* kind of amendment and *any* kind of review after issuance of a COPA, as it would mean DHEC's discretion to allow changes after the formal approval of the agreement is limitless. In *Bruning v. South Carolina Department of Health and Environmental Control*, 418 S.C. 537, 795 S.E.2d 290 (Ct. App. 2016), this Court dismissed the interpretation of a DHEC regulation that would have afforded unfettered discretion to DHEC in approval of "a method of stormwater treatment that does not otherwise meet the established criteria." *Bruning*, 418 S.C. at 546, 795 S.E.2d at 295. "When

interpreting a law, courts must presume a futile act was not intended and that the law intends to accomplish something.” *Id.* (citing *State v. Sweat*, 379 S.C. 367, 377, 795 S.E.2d 645, 651 (Ct. App. 2008)).

“As a creature of statute, [DHEC] has only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged.” *S.C. Coastal Conservation League v. S.C. Dept. of Health and Env'tl. Control*, 363 S.C. 67, 74, 610 S.E.2d 482, 485 (2005) (internal quotations omitted). Among the responsibilities held by DHEC in the monitoring of approved cooperative agreements is the requirement that DHEC must determine whether an amendment, alteration or other change to a cooperative agreement<sup>1</sup> made after issuance of a COPA “is substantial and thereby requires another review.” S.C. Code Ann. Regs. 61-31 § 508. To allow DHEC unrestrained discretion in the review and approval of substantial changes “is inconsistent with the statute requiring the agency to evaluate permit applications pursuant to regulation.” *S.C. Coastal Conservation League*, 363 S.C. at 74-75, 610 S.E.2d at 486.

The COPA Act is intended to afford certain immunities to health care providers who “negotiate, enter into, and conduct business pursuant to a cooperative agreement . . . .” S.C. Code Ann. § 44-7-520(A). There is no such “immunity for a person for conduct in negotiating or entering into a cooperative agreement *for which an application for a certificate of public advantage is not filed.*” *Id.* § 520(B) (emphasis added). PHM has negotiated and entered into a transaction to purchase a competitor’s assets *for which an application for a certificate of public advantage was*

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<sup>1</sup> Importantly, and significant to the ALC’s statutory construction analysis, Section 508 applies when “an applicant amends, alters, or otherwise changes **the agreement**” after a COPA is issued. S.C. Code Ann. Regs. 61-31 § 508 (emphasis added). In the contested case below, “the agreement” is that cooperative agreement between BHS and RMH that was approved by the issuance of COPA-97-01, and the ALC determined that PHM’s proposal to add new assets to be purchased from LifePoint, a different competing healthcare provider, is not a change to the agreement between BHS and RMH. *See* Summ. J. Order, pp. 10-11 (R. p. \_\_\_).

*not filed*, yet together with LifePoint demands immunity for the proposed transaction. While DHEC has the authority to approve changes to a cooperative agreement, that authority is not without limits and the underlying approval granted to PHM was in error.

II. DEFERENCE TO DHEC WAS NOT PRESERVED FOR APPEAL AND/OR NO DEFERENCE IS DUE AND REGULATION 61-31 § 508 IS UNCONSTITUTIONALLY VAGUE AS APPLIED.

A. DHEC’s interpretation of “another review” in Regulation 61-31 § 508

DHEC Brief includes a heading “II” that addresses its interpretation of and the vagueness challenge to Regulation 61-31 § 508. DHEC Br., p. 6. DHEC asserts that to the extent the Department’s interpretation of “another review” in Section 508 is an issue on appeal, “the Department’s interpretation is reasonable.” *Id.* LMC incorporates in response Arguments III and IV of its Initial Brief, found at pages 23-29 therein, for the arguments supported by evidence and citations to authority demonstrating that the issue of deference to DHEC’s interpretation was not preserved for appeal, or in the alternative, the Court need not defer because the COPA Act and Regulation 61-31 are clear and unambiguous, properly applied by the ALC, and DHEC’s interpretation of “another review” is contrary to the plain language of the COPA Act and as such a compelling reason exists to reject its interpretation. *See also, Langehans v. Smith*, 347 S.C. 348, 353, 554 S.E.2d 681, 684 (Ct. App. 2001) and *Brown v. S.C. Dept. of Health and Env’tl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 415 (2002).

B. Vagueness of Regulation 61-31 § 508

DHEC’s concluding assertion is that, “although the ALC did not make a finding that Section 508 is void for vagueness, to the extent that is an issue on appeal the Department adopts its arguments in its briefs below to the ALC.” DHEC Br., p. 6. DHEC does not otherwise state its position or identify where in the Record the information should be ascertained. As to this position, LMC incorporates the arguments and evidence offered to support that DHEC’s interpretation of

Regulation 61-31 § 508 is unconstitutionally vague, identified as Argument II and found at pages 20-23 of the Initial Brief filed on February 18, 2021.

**CONCLUSION**

Petitioner/Respondent LMC respectfully reiterates the request that this Court uphold the ALC's reversal of the DHEC Decision and dismiss these appeals.

Respectfully submitted,

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

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on February 25, 2021, she caused a copy of the  
foregoing *Petitioner/Respondent's Response to DHEC's Initial Brief* to be served upon all parties  
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***Appellate Case No.: 2020-001610***

- Charleston
- Charlotte
- Columbia**
- Greensboro
- Greenville
- Hilton Head
- Myrtle Beach
- Raleigh

Dear Ms. Kitchings:

Enclosed for filing, please find *Petitioner/Respondent's Motion for Leave to File Response* in the above referenced matter. Please file the originals and return the file-stamped copies to me. I am also placing our filing fee in the amount of \$50.00 in the U.S. Mail to you today.

By copy of this letter, we are hereby serving all counsel of record with a copy of the same.

With highest regards, I remain,

Very truly yours,

Laura L. Smith  
Legal Assistant to Jennifer J. Hollingsworth

/lls  
Enclosures

The Honorable Jenny Abbott Kitchings  
February 25, 2021  
Page 2

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