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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Court Judge

Case No. 2021-000617

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair Appellant,

v.

South Carolina Department of Health
and Environment Control and
Beaufort Memorial Hospital Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
Petitioner,	)	SCHEDULING ORDER
	)	
v.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	
	)	
Respondents.	)	

The Court, having conferred with counsel of record, believes it is appropriate to set forth the following schedule for the conduct of this matter. Therefore, it is hereby ORDERED that:

1. Each party is permitted to serve up to thirty (30) requests for production and ten (10) interrogatories, including all subparts, on any other party.
2. Petitioner shall name all expert witnesses no later than **January 15, 2021**.
3. Respondents shall name all expert witnesses no later than **January 29, 2021**.
4. All discovery in this matter shall be served in sufficient time to allow for all responses to discovery to be received and all fact witness depositions to be concluded no later than **March 15, 2021**, subject to each party's right subsequently to move the Court for an extension if circumstances warrant.
5. Unless the parties agree otherwise, expert witness depositions shall commence after the completion of fact discovery, **March 15, 2021**, and shall conclude no later than **April 16, 2021**.
6. Parties shall file any dispositive motions and motions challenging the qualifications of experts no later than **May 14, 2021**.

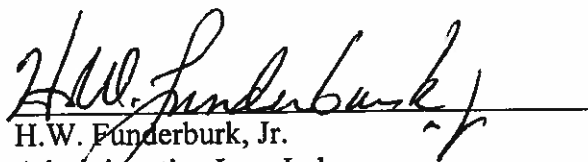
7. The parties shall exchange exhibits (all but demonstrative) and final witness lists no later than **May 21, 2021**.

8. Any pre-hearing motions and objections to exhibits must be filed no later than **May 28, 2021**, and responses filed not later than **June 4, 2021**. The Court will hold a hearing to address pre-hearing motions and objections on **June 7, 2021**.

9. It is expected that the case can be tried in three (3) days. Trial shall commence on **June 8, 2021**, at **10:00 a.m.** and conclude on **June 10, 2021**, or until completed, subject to the Court's schedule.

10. The foregoing discovery schedule and framework is subject to the right of any party to seek a protective order on any grounds available under Rule 21, RPLAC and under Rules 26-37, SCRCP.

AND IT IS SO ORDERED


H.W. Funderburk, Jr.
Administrative Law Judge

November 5, 2020
Columbia, South Carolina

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Docket No.: 20-ALJ-07-0235-CC

CERTIFICATE OF SERVICE

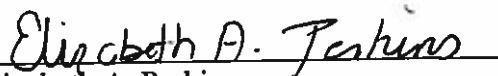
I, Elizabeth A. Perkins, hereby certify that I have this date served this **Scheduling Order** upon all parties to this case by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the parties and/or their attorneys.

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November 5, 2020
Columbia, South Carolina


Elizabeth A. Perkins
Judicial Law Clerk

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	AMENDING SCHEDULING ORDER
	)	
	)	
Respondents.	)	
	)	

The Court, having conferred with counsel of record, believes it is appropriate to set forth the following amended schedule for the conduct of this matter. Therefore, it is hereby ORDERED that:

1. Each party is permitted to serve up to thirty (30) requests for production and ten (10) interrogatories, including all subparts, on any other party.
2. Petitioner shall name all expert witnesses no later than January 15, 2021.
3. Respondents shall name all expert witnesses no later than January 29, 2021.
4. Respondent Beaufort Memorial Hospital filed on January 8, 2021 a Motion to Dismiss and to Stay Discovery in this matter. With all parties fully reserving their respective positions with respect to the Motion to Dismiss, the parties have agreed to a stay of discovery pending a ruling on the Motion to Dismiss as follows:
 - a. Within fifteen (15) days of receipt of a ruling from this Court on the Motion to Dismiss, should any claim remain and not be dismissed, the parties will serve any written discovery requests on any other party, including requests for production and interrogatories, as

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SC ADMIN. LAW COURT

permitted under paragraph 1 above. The parties will have thirty (30) days after service of any written discovery to respond to said written discovery. The parties will also have thirty (30) days after receipt of the Court's ruling to respond to any pending, outstanding discovery requests served prior to the stay period.

b. Within ninety (90) days of receipt of the Court's ruling on the Motion to Dismiss, the parties shall conclude all fact witness depositions, subject to each party's right subsequently to move the Court for an extension if circumstances warrant.

5. Unless the parties agree otherwise, expert witness depositions shall commence after the completion of fact discovery and shall conclude no later than thirty (30) days after the deadline in paragraph 4.b. above.

6. Parties shall file any dispositive motions and motions challenging the qualifications of experts no later than thirty (30) days after the conclusion of the deadline in paragraph 5 above.

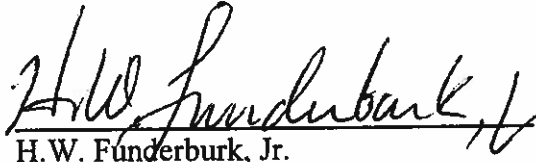
7. The parties shall exchange exhibits (all but demonstrative) and final witness lists no later than fourteen (14) days after the conclusion of the deadline in paragraph 6 above.

8. Any pre-hearing motions and objections to exhibits must be filed no later than seven (7) days after the deadline in paragraph 7 above, and responses filed no later than seven (7) days thereafter. The Court will hold a hearing to address pre-hearing motions and objections thereafter on a date to be determined (within approximately seven (7) days after the filing of the motion responses).

9. It is expected that the case can be tried in three (3) days. Trial shall commence within a week after the pre-hearing motion hearing date and continue for three (3) days or until completed, subject to the Court's schedule.

10. The foregoing discovery schedule and framework is subject to the right of any party to seek a protective order on any grounds available under Rule 21, RPLAC and under Rules 26-37, SCRCF.

AND IT IS SO ORDERED.


H.W. Funderburk, Jr.
Administrative Law Judge

February 2, 2021

Columbia, South Carolina

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FEB 02 2021

SC ADMIN. LAW COURT

MRI at Belfair, LLC, v. SCDHEC and Beaufort Memorial Hospital
(Docket No.: 20-ALJ-07-0235-CC)

CERTIFICATE OF SERVICE

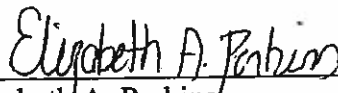
I, Elizabeth A. Perkins, hereby certify that I have this date served this **Amended Scheduling Order** upon all parties to this case by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the parties and/or their attorneys.

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February 2, 2021
Columbia, South Carolina



Elizabeth A. Perkins
Judicial Law Clerk

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FEB 02 2021

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI)
 at Belfair,)
)
 Petitioner,)
)
 v.)
)
 South Carolina Department of Health and)
 Environmental Control and Beaufort)
 Memorial Hospital,)
)
 Respondents.)
 _____)

Docket No.: 20-ALJ-07-0235-CC

**ORDER GRANTING
 MOTION TO DISMISS**

This matter came before the South Carolina Administrative Law Court (ALC or Court) as a request for a contested case hearing filed on September 9, 2020, by MRI at Belfair, LLC, d/b/a 3T MRI at Belfair (Petitioner or Belfair).¹ Petitioner sought review of a determination by the South Carolina Department of Health and Environmental Control (Department or DHEC) that the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110 through -394 (2018 and Supp. 2019) (CON or Act) did not apply to a relocation of a 1.5 Tesla Magnetic Resonance Imaging scanner (MRI) from a Beaufort Memorial Hospital (BMH) physician's office at 300 Midtown Drive, Port Royal, South Carolina, to a physician's office at 122 Okatie Center Boulevard North, Okatie, South Carolina. Both locations are in Beaufort County. Respondent BMH filed a Motion to Dismiss on January 8, 2021.

Background and Procedural History

BMH replaced an MRI scanner with another scanner with similar capabilities as defined in S.C. Regs. 61-15, § 103.16.² On April 4, 2019, DHEC issued a Non-Applicability Determination (NA-

¹ Named for the physicist and inventor Nikola Tesla, a tesla is a measure of magnetic flux density. Belfair's device is a 3 Tesla magnetic resonance imaging scanner in contrast to Beaufort Memorial Hospital's 1.5 Tesla scanner.

² Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

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19-03) allowing the replacement. BMH completed the installation of the 1.5 Tesla MRI as permitted in early 2020.³ There was no opposition to or appeal from the NAD (NA-19-03). This determination is final and is not subject to review by the ALC (*See* discussion *infra*, pp. 7-8).

On May 20, 2020, BMH asked DHEC to confirm that the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110-394 (2018, Supp. 2019) did not apply to the relocation of the 1.5 Tesla MRI scanner to Okatie. On July 1, 2020, DHEC issued a determination, NA-20-04, agreeing that the Act did not apply to the project.

On July 6, 2020, Belfair identified itself as an affected party and, on July 7, 2020, requested final review by the Department's Board. The Board declined to hold a final review conference on August 12, 2020. On September 9, 2020, Belfair filed a request for a contested case hearing before the ALC.

BMH filed a Motion to Dismiss the contested case on January 8, 2021, in which it contended that the relocation cost of \$125,000.00 did not require a Certificate of Need (CON) pursuant to S.C. Code Ann. § 44-7-160 (2018) and S.C. Regs. 61-15, § 102(1) (Supp. 2019).⁴

Petitioner filed a Response in Opposition to the Motion on January 22, 2021, accompanied by eight exhibits (A-H), which, in turn, included other documents.

On January 25, 2021, the Department filed a response in support of BMH's motion, which included eight exhibits with other documents. The Department concluded that "the relocation within a

³ NA-19-03 is the correct designation although some documents in the file identify the first NAD as NA-19-09.

⁴ A person or health care facility as defined in this Regulation is required to obtain a Certificate of Need from the Department of Health and Environmental Control before undertaking any of the following:

a. The construction or other establishment of a new health care facility;

* * *

c. An expenditure by or on behalf of a health care facility in excess of two million dollars (\$2,000,000) which, under generally acceptable accounting principles consistently applied, is considered a capital expenditure except those expenditures exempted in Section 104. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the development, acquisition, improvement, expansion, or replacement of any plant or equipment must be included in determining if the expenditure exceeds the prescribed amount;

d. 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;

* * *

f. The acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of six hundred thousand dollars (\$600,000).

service area of a replacement MRI obtained through a non-applicability determination” did not require “written approval by DHEC.”

On February 8, 2021, BMH filed a reply to Belfair’s response.

On February 10, 2021, the Court notified the parties of a hearing on the Motion to Dismiss. The hearing, at which all parties were represented, was held on March 16, 2021.⁵

Jurisdiction

The third argument in BMH’s motion, made pursuant to Rule 12(b)(1), SCRCP, contends that DHEC had no legal duty to issue a decision and that, therefore, the ALC lacked subject matter jurisdiction and was without legal authority to conduct a contested case hearing. In this argument, BMH relied on *Amisub of S.C., Inc. v. S.C. Dep’t of Health and Env’tl. Control*, 403 S.C. 576, 743 S.E.2d 786, (2013). BMH cites the South Carolina Supreme Court for the following proposition:

. . . [when] 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 [Petitioner] be afforded a contested case hearing before the ALC. Accordingly, we hold [Petitioner] may not utilize the contested case review process where it has not been authorized by the General Assembly.

Id. at 596, 743 S.E.2d at 797. In *Amisub*, no decision was issued by DHEC. Therefore, there was no decision that could become final. A ministerial decision exempting a health care facility’s competitor from the process of obtaining a CON or an NAD may not require a formal written determination. Indeed, there are circumstances that do not require a contested case under the Administrative Procedures Act.

Nevertheless, there are constitutional provisions that “confer the rights to notice and for an opportunity to be heard. ‘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 . . . and he shall in all such instances the right to judicial review.’” *Stono River Env’tl. Protection Ass’n v. S.C. Dep’t of Health and Env’tl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991) (quoting S.C. Const., Art.I, Section 22.)

⁵ In its motion, BMH requested a stay of discovery. On February 2, 2021, the Court issued an Amended Scheduling Order suspending discovery until after its decision on the Motion to Dismiss, effectively granting the Motion to Stay Discovery.

However, a quasi-judicial determination requires a formal, written decision subject to judicial review. *Redmond v. Lexington Cty Sch. Dist. No. Four*, 314 S.C. 431, 437-38, 445 S.E.2d 441, 445 (1994); and *See Amisub of S.C., Inc. v. S.C. Dep't of Health and Envtl. Control*, 403 S.C. 576, 588-89, 743 S.E.2d 786, 793 (2013).

Although BMH did not request a formal NAD, it submitted an equipment replacement form without checking boxes either for exemption or non-applicability. BMH included construction, installation, and freight costs. The Department interpreted the correspondence as a request for a non-applicability determination and issued an NAD (NA-20-04) on July 1, 2020.

In the circumstances of this case, the Court concludes that the NAD was issued after the staff analyzed the situation, the costs, and exercised its discretion in determining that the Act did not apply to the relocation. Therefore, DHEC made a quasi-judicial determination, and Belfair has properly invoked the jurisdiction of the ALC.

Discussion and Conclusions of Law

BMH's Motion to Dismiss as a Matter of Law

BMH filed a Motion to Dismiss citing Rules 12(b)(1) and (6), SCRPC. SCALC Rule 68 provides that a presiding judge may apply the South Carolina Rules of Civil Procedure "to resolve questions not addressed by [the SCALC] rules." The Court does not find it necessary to apply Rules 12(b)(1) and (6), SCRPC, to resolve any issues in this case.

SCALC Rule 19(A) provides that a pre-hearing motion shall "state the grounds for relief and the relief sought." BMH also cited SCALC Rule 19 in its Motion to Dismiss and stated the grounds it believed would justify the relief sought. While Petitioner is correct that Rules 12(b)(1) and (6) are inappropriate, rejecting reliance on these rules does not defeat the motion.

Respondent BMH, relying on SCALC Rule 19, has also properly moved for dismissal as a matter of law. Although the Court finds this motion pursuant to SCALC Rule 19 adequately identifies the relief sought and the grounds for granting that relief, the Court also notes that Rule 56, SCRPC, provides that any party in a case may seek summary judgment as a matter of law.

Standard of Review for Summary Judgment

Rule 56(c), SCRPC 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). “[I]n cases applying the preponderance of the 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-S. Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). 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).

Circumstances Requiring a CON

S.C. Code Ann. § 44-7-160 (2018) and 3 S.C. Code Ann. Regs. 61-15 § 102.1 (Supp. 2020) identify circumstances requiring a CON. The regulation provides specifics as required by the statute and states as follows:

1. A person or health care facility as defined in this Regulation is required to obtain a Certificate of Need from the Department of Health and Environmental Control before undertaking any of the following:

- a. The construction or other establishment of a new health care facility;
- b. 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;
- c. An expenditure by or on behalf of a health care facility in excess of two million dollars (\$2,000,000) which, under generally acceptable accounting principles consistently applied, is considered a capital expenditure except those expenditures exempted in Section 104. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the development, acquisition, improvement, expansion, or replacement of any plant or equipment must be included in determining if the expenditure exceeds the prescribed amount;

d. 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;

e. If no capital expenditure is made, the offering of any 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. For purposes of this section, operating costs include expenditures incurred by the health care facility and any person or other entity on behalf of the health care facility to establish a new service. A person or other entity shall not be allowed to incur costs thereby attempting to enable a health care facility to avoid Certificate of Need review and establish a new service as described above;

f. The acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of six hundred thousand dollars (\$600,000)[.]

S.C. Code Regs. 61-15 § 102.1.

Circumstances Not Requiring a CON

BMH is not constructing or establishing a new health care facility, nor is it changing bed complements. In fact, neither the current nor the proposed location is a “health care facility” as defined in S.C. Code Ann. § 44-7-130(10) and S.C. Code Regs. 61-15 § 103(12). There is no capital expenditure associated with additions to or an expansion of a health service with standards or criteria prescribed in the applicable State Health Plan.⁶ Lastly, there is no acquisition at a cost in excess of \$600,000.00 for medical equipment to be used for diagnosis or treatment. Acquisition is “the gaining of possession or control over something.” *Black’s Law Dictionary* (11th ed. 2019). Since BMH previously obtained the MRI scanner in question as replacement equipment pursuant to NA-19-03, no acquisition is involved in the current matter. Under the regulation discussed above, BMH is not required to have a CON in order to relocate within a service area a replacement MRI scanner obtained through a non-applicability determination.

Exemptions from CON

S.C. Code Ann. § 44-7-170(A) and 3 S.C. Code Ann. Regs. 61-15 § 104 provide for exemptions from CON requirements for certain transactions. These fall into two categories: exempt

⁶ The parties admitted that there are no standards or criteria for acquiring or installing MRI equipment in the applicable State Health Plan. In addition, the project does not involve offering a health service that has prescribed standards or criteria in an applicable Plan.

transactions that require written determinations and exempt transactions that do not. Projects that require written determinations include the following:

- a. The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.
- b. The acquisition by a health care facility of medical equipment to be used solely for research, the offering of an institutional health service by a health care facility solely for research, or the obligation of a capital expenditure by a health care facility to be made solely for research if it does not: (a) affect the charges of the facility for the provision of medical or other patient care services other than the services which are included in the research; (b) change the bed capacity of the facility; or (c) substantially change the medical or other patient care service of the facility. FDA research protocol and any applicable Investigational Device Exemption (IDE) policies and regulations must be followed by the facility. A written description of the proposed research project must be submitted to the department in order for the department to determine if the above conditions are met. A Certificate of Need is required to continue use of the equipment or service after the equipment or service is no longer being used solely for research;
- c. The permanent reduction in bed capacity, including the permanent closure of a health care facility.

3 S.C. Code Ann. Regs. 61-15 § 104.1.a to -c. Projects that do not require a written determination include “offices of a licensed private practitioner whether for individual or group practice.” *Id.* § 104.4.

Under this regulation, BMH was not required to obtain an exemption in writing from the Department.

Projects Requiring Non-Applicability Determinations

Certain facilities and expenditures are not governed by the Act. *See* S.C. Code Ann. § 44-7-170(B). Similarly, in the exemptions discussed above, 3 S.C. Code Ann. Regs. 61-15 § 105 (Supp. 2020) describes projects to which CON review is not applicable but which require a written determination of non-applicability and projects to which CON review is not applicable but which do not require a written determination of non-applicability. For these projects, a written determination of non-applicability is required for the following:

- a. Replacement of like equipment with similar capabilities as defined by the Department in Section 103.16.

b. Acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is not in excess of six hundred thousand dollars (\$600,000). A written determination of non-applicability is only required when any question exists as to whether or not the total project cost is below the six hundred thousand dollars (\$600,000) threshold.

S.C. Code Ann. Regs. 61-15 § 105.1a-b. Subsection 1.a governs replacement of like equipment. The NAD approving replacement, NA-19-03, was not challenged, and the appeal period has expired. Therefore, neither DHEC nor the ALC has jurisdiction to entertain a challenge to that determination. *Triska v. Dep't of Health and Envtl. Control*, 292 S.C. 190, 195, 355 S.E.2d 531, 533-34 (1987) (“DHEC does not have statutory, regulatory or federal authority to suspend or revoke a 401 Certification after it has been granted by the agency and the appeals process expired.”) The State Supreme Court clearly viewed the delay and expiration of the appeal period as a jurisdictional barrier to subsequent review:

The final decision by DHEC was made in November 1979. A delay of two and one-half years before the [Murrells Inlet Concerned Citizens] Association challenged the certification was not proper, and an adjudicatory hearing should not have been granted. See, e.g., *Wingate v. S.C. State Highway Dept.*, 276 S.C. 39, 274 S.E.2d 917 (1981).

Id. at 197-98, 355 S.E.2d at 535.

Projects Requiring Prior Notification When CON Review is Not Applicable

There are two types of projects to which CON review is not applicable and for which a written non-applicability determination is not required although written notification to the DHEC Division of Health Facilities Construction is required.⁷ Notification must be made prior to undertaking the following:

a. An expenditure by or on behalf of a health care facility for non-medical projects, such as refinancing existing debt, parking garages, laundries, roof replacement, computer systems, telephone systems, and heating and air conditioning systems;

b. The upgrading of medical facilities, which do not involve additional square feet to the facility or additional health services[.]

⁷ The first category set out in S.C. Code Ann. Regs. § 105.4 (Supp. 2020) deals with federal-owned and state-owned health facilities and does not apply to this case.

Id. § 105.5. If an MRI is included in health services and a professional office complex is included in the class of medical facilities (*Id.* § 103.13), then BMH satisfied this regulation by notifying DHEC of its relocation of its MRI scanner to the Okatie office.

Material Facts Not in Dispute

The only factual question that might be at issue in this case is the cost associated with the relocation under Regulation 61-15 § 105.1.b. If “acquisition” were an issue, it would have been addressed in NA-19-03. In that matter, the Department found that acquisition, as reflected in a replacement cost of less than \$2,000,000.00, was a project to which the Act did not apply. Since that determination was not appealed, it cannot be considered in the present case.

The only remaining issue of a factual nature would be the cost of moving the MRI scanner to the proposed location. BMH has asserted that the cost of moving the scanner and upgrading the chiller at the Okatie offices will be \$125,000.00.

In its response to BMH’s Motion to Dismiss, Belfair includes relocation cost invoices and estimates as follows:

Document Identification	Document Title	Project Cost
Exhibit A	DHEC Staff Response to Request for Final Review	\$125,000.00
Exhibits A.1, E, F.A	DHEC NA-20-04	\$125,000.00
Exhibit C	CON Update Non-Applicable List	\$125,000.00
Exhibit D	Affidavit of Kathryn Platt (Belfair’s Expert)	Asserts that relocation costs should include value of equipment [to be moved] (no other basis for cost stated)
Exhibit D.1	Letter from BMH to DHEC (5/20/2020)	Move: \$80,000.00 Chiller: 45,000.00
Exhibit D.1	Canon Chiller Invoice Canon Relocation Cost De-Install/ Re-Install Cost	\$31,216.00 75,000.00 5,000.00
Exhibit G	Denying Final Review	\$125,000.00

Although Belfair and its expert believe that moving is an “acquisition” cost that could exceed \$600,000, Belfair’s assertion depends on including the original purchase value in the relocation costs. Otherwise, none of Belfair’s submissions exceed \$125,000.00 or provide a factual a basis for a larger estimate.

Since neither DHEC nor the ALC can reconsider NA-19-03 or the MRI’s purchase value in this appeal, the only remaining costs that can be considered are those associated with the physical relocation itself and the chiller upgrade for the relocated MRI scanner. The only evidence is that these costs will be at or below \$125,000.00. However, I conclude that they are not “acquisition” costs, which would be expenses associated with the original purchase and the previous NAD. Since there is no evidence that any costs the Court could consider would reach or exceed \$600,000.00, there are no material facts in dispute.

Conclusion

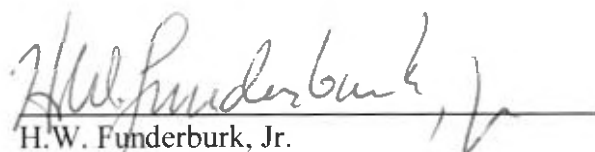
As a matter of law, the relocation of the 1.5 Tesla MRI scanner from the physician’s office or the office of a group of physicians in Port Royal to a similar office in Okatie is not subject to CON review under the Act as stated in DHEC Determination NA-20-04. The Department has properly determined that the Act does not apply to the relocation of this 1.5 Tesla MRI scanner.

It is, therefore,

ORDERED that the Motion is **GRANTED**, and the case is **DISMISSED**.

AND IT IS SO ORDERED.

March 30, 2021
Columbia, South Carolina


H.W. Funderburk, Jr.
Administrative Law Judge

FILED

MAR 30 2021

SC ADMIN. LAW COURT

MRI at Belfair, LLC, v. SCDHEC and Beaufort Memorial Hospital
(Docket No.: 20-ALJ-07-0235-CC)

CERTIFICATE OF SERVICE

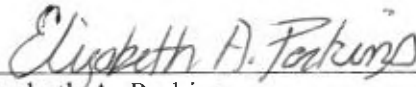
I, Elizabeth A. Perkins, hereby certify that I have this date served this **Order Granting Motion to Dismiss** upon all parties to this case by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the parties and/or their attorneys.

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March 30, 2021
Columbia, South Carolina


Elizabeth A. Perkins
Judicial Law Clerk

FILED

MAR 30 2021

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI)
 at Belfair,)
)
 Petitioner,)
)
 v.)
)
 South Carolina Department of Health and)
 Environmental Control and Beaufort)
 Memorial Hospital,)
)
 Respondents.)
)
 _____)

Docket No.: 20-ALJ-07-0235-CC

**ORDER GRANTING IN PART AND
 DENYING IN PART PETITIONER'S
 MOTION TO ALTER OR AMEND
 AND GRANTING RESPONDENT'S
 MOTION TO DISMISS**

This matter came before the South Carolina Administrative Law Court (ALC or Court) on a request for a contested case hearing filed on September 9, 2020, by MRI at Belfair, LLC, d/b/a 3T MRI at Belfair (Petitioner or Belfair). Petitioner sought review of a determination by the South Carolina Department of Health and Environmental Control (Department or DHEC) that the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110 through -394 (2018 and Supp. 2019) (CON Act) did not apply to a relocation of a 1.5 Tesla¹ Magnetic Resonance Imaging scanner (MRI) from a physicians' office building, owned by Beaufort Memorial Hospital (BMH), located at 300 Midtown Drive, Port Royal, South Carolina, to a physician's office building at 122 Okatie Center Boulevard North, Okatie, South Carolina. Both locations are in Beaufort County.

Respondent BMH filed a Motion to Dismiss on January 8, 2021. The Court granted this motion by order dated March 30, 2021. On April 9, 2021, Petitioner filed a Motion to Alter or Amend the Order Granting Judgment in Favor of Respondents. On April 19, 2021, both BMH and DHEC submitted memoranda in opposition to Belfair's motion.

On April 21, 2021, Belfair submitted a Motion for Leave to File a Reply to BMH's Memorandum in Opposition to Petitioner's Motion to Alter or Amend. The Reply challenged BMH's

¹ Named for the physicist and inventor Nikola Tesla, a tesla is a measure of magnetic flux density. Belfair's device is a 3 Tesla magnetic resonance imaging scanner in contrast to Beaufort Memorial Hospital's 1.5 Tesla scanner.

characterization of Belfair's agreement to stay discovery. BMH filed a memorandum opposing the Reply on April 22, 2021. The Motion for Leave to File a Reply is granted. The Court agrees that Petitioner's consent to stay discovery cannot be construed as a concession that discovery was not necessary.

This fact, however, does not preclude the Court from deciding this case as a matter of law. *See Amisub of S. C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 582-583, 743 S.E.2d 786, 790 (2013).

Background and Procedural History

BMH replaced an MRI scanner at its physician's office at Port Royal with a scanner with similar capabilities, as defined in S.C. Regs. 61-15, § 103.16.² On April 4, 2019, DHEC issued a Non-Applicability Determination (NAD) allowing the replacement. BMH completed the installation of the 1.5 Tesla MRI in early 2020 within the parameters of the NAD.³ There was no opposition to nor an appeal from the NAD (NA-19-03). This determination is final and is not subject to review by this Court. (*See, infra*, Circumstances Not Requiring a CON, p.8, and Projects Requiring Non-Applicability Determinations, pp. 9, 10.)

On May 20, 2020, BMH asked DHEC to confirm that the CON Act did not apply to the relocation of the 1.5 Tesla MRI scanner from Port Royal to Okatie. On July 1, 2020, DHEC issued a determination, NA-20-04, agreeing that the Act did not apply to the project.

On July 6, 2020, Belfair identified itself as an affected party and, on July 7, 2020, requested final review of NA-20-04 by the Department's Board. The Board declined to hold a final review conference by letter issued August 12, 2020. On September 9, 2020, Belfair filed a request for a contested case hearing before the ALC.

BMH filed a Motion to Dismiss the contested case on January 8, 2021, in which it contended that the CON Act did not apply and that the relocation was not an acquisition and did not require a Certificate of Need (CON) pursuant to S.C. Code Ann. § 44-7-160 (2018) and 3 S.C. Ann. Regs.

² "Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as [the equipment] currently in use; and does not constitute a material change in service or a new service."

³ NA-19-03 is the correct designation although some documents in the file identify this NAD as NA-19-09.

61-15, § 102(1) (Supp. 2019).⁴ BMH also contended that the relocation cost of \$125,000.00, less than \$600,000.00, excused the relocation from the regulation even if it were an acquisition.

Petitioner filed a Response in Opposition to the Motion on January 22, 2021, accompanied by eight exhibits (A-H), which, in turn, included other documents.

On January 25, 2021, the Department filed a response in support of BMH's motion, which included eight exhibits with other documents. The Department concluded that "the relocation within a service area of a replacement MRI obtained through a non-applicability determination" did not require "written approval by DHEC."

On February 8, 2021, BMH replied to Belfair's response.

On February 10, 2021, the Court notified the parties of a hearing on the Motion to Dismiss. The hearing, with all parties represented, was held on March 16, 2021.⁵

To address more clearly the issues raised by Petitioner, the order of March 30, 2021, is withdrawn and is replaced by this order.

Discussion of Petitioner's Motion to Alter or Amend

BMH's motion identified three grounds for dismissal. Two raised jurisdictional issues based on SCRCF pleading rules, Rule 12(b) (1) and (6), SCRCF. SCALC Rule 68 provides that a presiding judge may apply the South Carolina Rules of Civil Procedure "to resolve questions not addressed

⁴ A person or health care facility as defined in this Regulation is required to obtain a Certificate of Need from the Department of Health and Environmental Control before undertaking any of the following:

a. The construction or other establishment of a new health care facility;

* * *

c. An expenditure by or on behalf of a health care facility in excess of two million dollars (\$2,000,000) which, under generally acceptable accounting principles consistently applied, is considered a capital expenditure except those expenditures exempted in Section 104. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the development, acquisition, improvement, expansion, or replacement of any plant or equipment must be included in determining if the expenditure exceeds the prescribed amount;

d. 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;

* * *

f. The acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of six hundred thousand dollars (\$600,000).

⁵ In its motion, BMH requested a stay of discovery. On February 2, 2021, the Court issued an Amended Scheduling Order suspending discovery until after its decision on the Motion to Dismiss, effectively granting the Motion to Stay Discovery. See also the Court's discussion of Belfair's Motion for Leave to Reply, *supra*.

by [the SCALC] rules.” The Court does not find it necessary to apply Rules 12(b)(1) and (6), SCRCF, to resolve any issues in this case. While Petitioner is correct that Rules 12(b)(1) and (6) are inappropriate, rejecting the argument based on these rules does not defeat the motion.

BMH also relied on SCALC Rule 19 and moved for dismissal as a matter of law. Pursuant to SCALC Rule 19, this motion identified the relief sought and the legal grounds for granting that relief.

Petitioner’s first argument in its reconsideration motion is that the Court, without notice, converted BMH’s Motion to Dismiss to one for summary judgment. This contention is in error.

Petitioner is correct in that the motion to dismiss was not identified by the parties as a motion for summary judgment pursuant to Rule 56, SCRCF. However, a motion to dismiss under SCALC Rule 19 as a matter of law invokes principles analogous to a motion for summary judgment. Consequently, the Court examines the statutory and regulatory basis for the relief sought.

Petitioner’s second argument, relying on Rule 56, SCRCF, argues that a motion for summary judgment should be denied or delayed so that Belfair could complete discovery. In this case, the only facts to be developed in discovery would explore the “acquisition” costs associated with the project. However, this discovery would be appropriate only if the relocation of the previously purchased MRI scanner can be characterized, at this point in its history, as an acquisition. The Court concludes that the project in question is not an acquisition in the sense intended by statute and regulation.

Petitioner’s third argument in its reconsideration motion asserts, without citation to statute, regulation, or case law, that the Court erred in determining that the offices of a physician or a group of physicians “are not ‘health care facilities’ under the applicable code and regulation.” The Court disagrees with this argument.

A health care facility is defined as follows:

Health care facility for the purposes of Certificate of Need means acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, nursing homes, ambulatory surgical facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, intermediate care for the persons with intellectual disability, inpatient hospice facilities, radiation therapy facilities and any other facility for which Certificate of Need review is required by state law.

3 S.C. Code Ann. Regs. 61-15 § 103(12) (Supp. 2020); *See also* S.C. Code Ann. § 44-7-130(10) (2018).

Further, “hospital” is defined in like manner as:

... a facility organized and administered to provide services to accommodate two or more non-related persons for the diagnosis, treatment and care of such persons over a period exceeding 24 hours and provides medical or surgical care or nursing care of illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care is administered by or under the direction of persons currently licensed to practice medicine, surgery, or osteopathy.

Id. § 103(14); *See also* S.C. Code Ann. § 44-7-130(12) (2018).

A physicians’ office, for which a CON is not required and which does not provide overnight care, is neither a health care facility nor a hospital as defined in regulation and statute.

In addition, as the South Carolina Supreme Court has held, a private physician’s office is exempt from CON review. *Amisub*, 403 S.C. at 595-96, 743 S.E.2d 786, 797 (referring to “an exemption from the CON process” for “the office of a licensed private practitioner.” The Court held that “[u]nder the CON Act and the regulation, this exemption does not require a formal, written determination or approval from DHEC.”).

Jurisdiction

BMH’s argument, made pursuant to Rule 12(b)(1) and (6), SCRCP, contends that DHEC had no legal duty to issue a decision and that, therefore, the ALC lacked subject matter jurisdiction and was without legal authority to conduct a contested case hearing. In this argument, BMH relied on a proposition from *Amisub*:

... [when] 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 [Petitioner] be afforded a contested case hearing before the ALC. Accordingly, we hold [Petitioner] may not utilize the contested case review process where it has not been authorized by the General Assembly.

Id. at 596, 743 S.E.2d at 797. In *Amisub*, in which no decision was issued by DHEC, there was no decision that could become final. A ministerial decision exempting a health care facility’s competitor from the process of obtaining a CON or an NAD need not require a formal written determination. In this case, as in *Amisub*, the circumstances do not give rise to a contested case under the Administrative Procedures Act.

However, the Court must determine whether DHEC's decision was ministerial or judicial in nature. Constitutional provisions "confer the rights to notice and for an opportunity to be heard. '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 . . . and he shall in all such instances the right to judicial review.'" *Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991) (quoting S.C. Const., Art.I, Section 22.).

A quasi-judicial determination issued in a formal, written decision is subject to judicial review. *Redmond v. Lexington Cty Sch. Dist. No. Four*, 314 S.C. 431, 437-38, 445 S.E.2d 441, 445 (1994); *see also Amisub*, 403 S.C. at 588-89, 743 S.E.2d 786, 793.

Without requesting a formal NAD, BMH submitted an equipment replacement form for the MRI relocation without checking boxes either for exemption or for non-applicability.⁶ BMH included modification, installation, and transportation (freight) costs. The Department interpreted the form and correspondence as a request for a non-applicability determination and issued NA-20-04 on July 1, 2020.

In the circumstances of this case, the Court concludes that the NAD was issued after the staff analyzed the situation, the costs, and exercised its discretion in determining that the Act did not apply to the relocation. Therefore, DHEC issued a quasi-judicial determination, and Belfair properly invoked the jurisdiction of the ALC although the Court ultimately decided that a contested case hearing was not necessary.

Discussion and Conclusions of Law

BMH's Motion to Dismiss as a Matter of Law

SCALC Rule 19(A) provides that a pre-hearing motion shall "state the grounds for relief and the relief sought." BMH cited SCALC Rule 19 in its Motion to Dismiss and stated the grounds it believed would justify the relief sought. Although the motion is not identified by the parties as a motion for summary judgment pursuant to Rule 56, SCRPC, a motion to dismiss as a matter of law invokes principles analogous to a motion for summary judgment and requires the Court to

⁶ In the Staff Response to Belfair's Request for Final Review, DHEC pointed out that the form BMH submitted in asking for a written non-applicability determination was a Replacement of Equipment form that did not apply to the project involving moving rather than replacing equipment. DHEC previously issued the requested determination.

determine whether the conflict should be resolved solely under the governing statutory and regulatory law.

For this purpose, the Court will examine the following: Circumstances Requiring a CON, Circumstances not Requiring a CON, Exemptions from CON, Projects Requiring Non-Applicability Determinations, and Projects Requiring Prior Notification When CON Review is not Applicable.

A. Circumstances Requiring a CON

S.C. Code Ann. § 44-7-160 (2018) and 3 S.C. Code Ann. Regs. 61-15 § 102.1 (Supp. 2020) identify circumstances requiring a CON. The regulation provides specifics required by the statute and states as follows:

1. A person or **health care facility** as defined in this Regulation is required to obtain a Certificate of Need from the Department of Health and Environmental Control before undertaking any of the following:

- a. The construction or other establishment of a new health care facility;
- b. 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;
- c. An expenditure by or on behalf of a health care facility in excess of two million dollars (\$2,000,000) which, under generally acceptable accounting principles consistently applied, is considered a capital expenditure except those expenditures exempted in Section 104. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the development, acquisition, improvement, expansion, or replacement of any plant or equipment must be included in determining if the expenditure exceeds the prescribed amount;
- d. 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;
- e. If no capital expenditure is made, the offering of any 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. For purposes of this section, operating costs include expenditures incurred by the health care facility and any person or other entity on behalf of the health care facility to establish a new service. A person or other entity shall not be allowed to incur costs thereby attempting to enable a health care facility to avoid Certificate of Need review and establish a new service as described above;

f. The **acquisition** of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of six hundred thousand dollars (\$600,000)[.]

3 S.C. Code Ann. Regs. 61-15 § 102.1 (Emphasis added.).

Accordingly, physician offices are not included in the definition of a health care facility. Therefore, there is no construction of a new health care facility or an expansion of the capacity of a health care facility. Moreover, there is no capital “expenditure by or on behalf of a health care facility in excess of two million dollars (\$2,000,000)” or an expenditure “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.” In fact, as the parties concede, the State Health Plan imposes no standards or criteria for MRI scanners.⁷

B. Circumstances Not Requiring a CON

As discussed above, BMH is not constructing or establishing a new health care facility, nor is it changing bed complements. In fact, neither the current nor the proposed location is a “health care facility” as defined in S.C. Code Ann. § 44-7-130(10) and 3 S.C. Code Ann. Regs. 61-15 § 103(12). There is no capital expenditure associated with additions to or an expansion of a health service with standards or criteria prescribed in the applicable State Health Plan.

Lastly, there is no acquisition at a cost in excess of \$600,000.00 for medical equipment to be used for diagnosis or treatment. Acquisition is “the gaining of possession or control over something.” *Black’s Law Dictionary* (11th ed. 2019). Since BMH previously obtained the MRI scanner in question as replacement equipment pursuant to NA-19-03, no acquisition is involved in the current matter. Under the regulation discussed above, BMH is not required to have a CON in order to relocate within the same service area an MRI scanner previously obtained pursuant to a non-applicability determination, which was not appealed.

C. Exemptions from CON

S.C. Code Ann. § 44-7-170(A) and 3 S.C. Code Ann. Regs. 61-15 § 104 provide for exemptions from CON requirements for certain transactions. These fall into two categories: exempt

⁷ The parties admitted that there are no standards or criteria for acquiring or installing MRI equipment in the applicable State Health Plan. Thus, the project does not involve offering a health service that has prescribed standards or criteria in an applicable Plan.

transactions that require written determinations and exempt transactions that do not. Projects that **require** written determinations include the following:

- a. The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.
- b. The acquisition by a health care facility of medical equipment to be used solely for research, the offering of an institutional health service by a health care facility solely for research, or the obligation of a capital expenditure by a health care facility to be made solely for research if it does not: (a) affect the charges of the facility for the provision of medical or other patient care services other than the services which are included in the research; (b) change the bed capacity of the facility; or (c) substantially change the medical or other patient care service of the facility. FDA research protocol and any applicable Investigational Device Exemption (IDE) policies and regulations must be followed by the facility. A written description of the proposed research project must be submitted to the department in order for the department to determine if the above conditions are met. A Certificate of Need is required to continue use of the equipment or service after the equipment or service is no longer being used solely for research;
- c. The permanent reduction in bed capacity, including the permanent closure of a health care facility.

3 S.C. Code Ann. Regs. 61-15 § 104.1.a to -c. Projects that **do not require** a written determination include “offices of a licensed private practitioner whether for individual or group practice.” *Id.* § 104.4.

Replacement and acquisition were approved by NA-19-03. Therefore, for the relocation challenged herein, BMH was not required to obtain an exemption in writing from the Department.

D. Projects Requiring Non-Applicability Determinations

Certain facilities and expenditures are not governed by the Act. *See* S.C. Code Ann. § 44-7-170(B). The regulation, 3 S.C. Code Ann. Regs. 61-15 § 105 (Supp. 2020), describes projects for which CON review is not applicable but which require a written determination of non-applicability and projects to which CON review is not applicable but which do not require a written determination of non-applicability. A written determination of non-applicability is required for the following:

- a. **Replacement** of like equipment with similar capabilities as defined by the Department in Section 103.16.
- b. **Acquisition** of medical equipment which is to be used for diagnosis or treatment if the total project cost is not **in excess of** six hundred thousand dollars (\$600,000). A written determination of non-applicability is only required when any

question exists as to whether or not the total project cost is below the six hundred thousand dollars (\$600,000) threshold.

3 S.C. Code Ann. Regs. 61-15 § 105.1a-b. Subsection 1.a governs replacement of like equipment. However, the NAD approving replacement, NA-19-03, was not challenged, and the appeal period has expired. Therefore, neither DHEC nor the ALC has jurisdiction to entertain a challenge to that determination. *Triska v. Dep't of Health and Env'tl. Control*, 292 S.C. 190, 195, 355 S.E.2d 531, 533-34 (1987) (“DHEC does not have statutory, regulatory or federal authority to suspend or revoke a 401 Certification after it has been granted by the agency and the appeals process expired.”). The South Carolina Supreme Court clearly viewed the delay and expiration of the appeal period as a jurisdictional barrier to subsequent review:

The final decision by DHEC was made in November 1979. A delay of two and one-half years before the [Murrells Inlet Concerned Citizens] Association challenged the certification was not proper, and an adjudicatory hearing should not have been granted. See, e.g., *Wingate v. S.C. State Highway Dept.*, 276 S.C. 39, 274 S.E.2d 917 (1981).

Id. at 197-98, 355 S.E.2d at 535. See also *A.O. Smith Corporation v. S.C. Dep't of Health & Env'tl. Control*, 428 S.C. 189, 205, 833 S.E.2d 451, 460 (2019) (“Because A.O. Smith did not file a request for a contested case hearing after the issuance of the permits in the time required, the ALC did not err in finding A.O. Smith’s motion for a contested hearing untimely.”).

Accordingly, the acquisition of the 1.5 Tesla MRI scanner, approved by NA-19-03, cannot be revisited by the ALC.

E. Projects Requiring Prior Notification When CON Review is Not Applicable

There are two types of projects to which CON review is not applicable and for which a written non-applicability determination is not required although written notification to the DHEC Division of Health Facilities Construction is required.⁸ Notification must be made prior to undertaking the following:

- a. An expenditure by or on behalf of a health care facility for non-medical projects, such as refinancing existing debt, parking garages, laundries, roof

⁸ The first category set out in S.C. Code Ann. Regs. § 105.4 (Supp. 2020) deals with federal-owned and state-owned health facilities and does not apply to this case.

replacement, computer systems, telephone systems, and heating and air conditioning systems;

b. The upgrading of medical facilities, which do not involve additional square feet to the facility or additional health services[.]

Id. § 105.5. If an MRI is included in health services and a professional office complex is included in the class of medical facilities (*Id.* § 103.13), then BMH satisfied this regulation by notifying DHEC of the relocation of its MRI scanner to the Okatie office.

Summary

If “acquisition” were an issue, it was addressed in NA-19-03. In that matter, the Department found that purchase or acquisition, as reflected in a replacement cost of less than \$2,000,000.00, was a project to which the Act did not apply. Since that determination was not appealed, it cannot be revisited in the present case.

Since neither DHEC nor the ALC can reconsider NA-19-03 or the MRI’s purchase value in this appeal, the only remaining costs that can be considered are those associated with the physical relocation itself and the chiller upgrade for the relocated MRI scanner. The only evidence is that these costs (in total) will be at or below \$125,000.00. However, the Court concludes that they are not “acquisition” costs, which were expenses associated with the original purchase and installation subject to NA-19-03. Hence, there are no material facts in dispute or subject to discovery in this case.

Additional Arguments

Belfair also argues that BMH is splitting costs of this project into parts that, separately, evade review under the CON Act. 3 S.C. Code Ann. Regs. 61-15 § 102(2) (Supp. 2020). However, since the project does not include “[a]n expenditure by or on behalf of a **health care facility**” (3 S.C. Code Ann. Regs. 61-15 § 105(1)(c) (emphasis added)), there can be no impermissible cost-splitting.

Belfair further contends that CONs, NADs, and written exemptions are location specific. For this principle, Belfair relies on 3 S.C. Code Ann. Regs. 61-15 § 802(2)(d),⁹ a section which establishes Criteria for Project Review, particularly Community Need Documentation, and states as follows:

⁹ In its reconsideration motion, Belfair cites this as S.C. Code Ann. Regs. 61-15 § 801(2)(d).

In the case of a reduction, relocation, or elimination of a facility or service, the applicant should address the need that the population presently has for the service, the extent to which that need will be met by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other underserved groups, to obtain needed health care.

Unfortunately for Belfair's argument, the review criteria depend on projects included in the State Health Plan. The State Health Plan does not include standards or criteria for MRI scanners. Moreover, "[t]he following projects are exempt from Certificate of Need review but do not require a written determination from the Department: the offices of a licensed private practitioner whether for individual or group practice." 3 S.C. Code Ann. Regs. 61-15 § 104(4). Moving equipment which is not covered by the CON Act from one exempt location to another in the same service area does not transform the relocation or the equipment into a project requiring CON review.

Conclusion

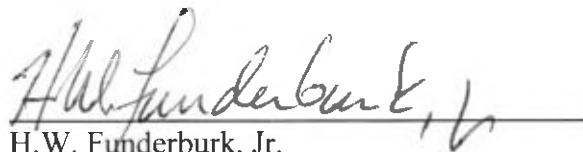
As a matter of law, the relocation of the 1.5 Tesla MRI scanner from the physician's office or the office of a group of physicians in Port Royal to a similar office in Okatie is not subject to CON review under the Act as stated in DHEC Determination NA-20-04. The Department Determination is proper.

It is, therefore,

ORDERED that BMH's Motion is **GRANTED**, and the case is **DISMISSED**.

AND IT IS SO ORDERED.

May 14, 2021
Columbia, South Carolina


H.W. Funderburk, Jr.
Administrative Law Judge

MRI at Belfair, LLC, v. SCDHEC and Beaufort Memorial Hospital
(Docket No.: 20-ALJ-07-0235-CC)

CERTIFICATE OF SERVICE

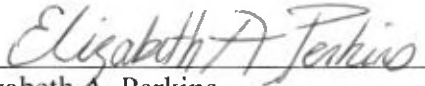
I, Elizabeth A. Perkins, hereby certify that I have this date served this **Order Granting In Part and Denying In Part Petitioner's Motion to Alter or Amend and Granting Respondent's Motion to Dismiss** upon all parties to this case by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the parties and/or their attorneys.

Henry W. Frampton, IV, Esquire
A. Victor Rawl, Jr., Esquire
Gordon & Rees
40 Calhoun Street, Suite 350
Charleston, SC 29401
Counsel for Petitioner

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
SC DHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29021
Counsel for Respondent South Carolina Department of Health and Environmental Control

Trudy H. Robertson, Esquire
Donald Bancroft Meyer, Esquire
Moore & Van Allen, PLLC
PO Box 22828
Charleston, SC 29413-2828
Counsel for Respondent Beaufort Memorial Hospital

May 14, 2021
Columbia, South Carolina


Elizabeth A. Perkins
Judicial Law Clerk

FILED

MAY 14 2021

South Carolina Administrative Law Court (SC ALC)
Request for Contested Case Hearing FORM
Mail to: 1205 Pendleton St., Suite 224, Columbia, SC 29201

Last Name: MRI at Belfair, LLC First: Middle: ☐ Mr. ☐ Miss ☐ Mrs. ☐ Ms. Docket No. (To Be Completed by ALC)

Mailing Address: 18 Clark Summit Dr. City: Bluffton State and Zip: SC 29910

Home Number: Work Number: 843-815-9700 Cell Number: *E-Mail Address: see atty info below

*By providing your e-mail address, you consent to receive court orders and notices via electronic transmission

REPRESENTATION

Are you representing yourself? ☐ Yes ☒ No

Are you represented by an Attorney? ☒ Yes ☐ No

Name of Attorney: A. Victor Rawl, Jr.

City, State and Zip:
Charleston, SC 29401

Attorney Mailing Address:
Gordon & Rees, LLP
40 Calhoun St., Suite 350

Attorney Work Number and Cell Number:
843-714-2501 (o); 803-463-4004 (c)

Attorney E-Mail Address:
vrawl@grsm.com

CASE INFORMATION

Name of Agency that Issued the Decision: DHEC
(Example - Dept. of Revenue, Dept. of Insurance, DHEC)

In order to have your case processed, you must attach the agency decision. Is it attached?
☒ Yes ☐ No If no, please explain:

Date the decision was issued: August 12, 2020

Date the decision was received: August 12, 2020

Please provide a brief statement regarding why the hearing is being requested and the relief sought:

Petitioner believes that the Department improperly issued a non-applicability determination to Beaufort Memorial on July 1, 2020. Petitioner believes that a Certificate of Need should have been required and craves reference to its submissions to the DHEC Board requesting final review.

Payment via ☒ Check ☐ Money Order ☐ Cash for \$ submitted today to the Administrative Law Court via

(applicable filing fee pursuant to ALC Rule 71) is being
☒ U.S. Postal Service ☐ Hand-delivery

September 9, 2020

X Your Signature or Signature of Attorney

Date

PROOF OF SERVICE (MUST BE COMPLETED)

Your Name: Kaillie D. Harris

Date: September 9, 2020

City: Charleston

State: SC

I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing on all other parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):

SCDHEC - Office of General Counsel, Meredith Sella, Esq., 2600 Bull Street, Columbia, SC 29201

Name and/or Agency Name

Address

City, State and Zip

Beaufort Memorial Hospital, ATTN: Daniel Mock, AVP Operations, 955 Ribaut Rd., Beaufort, SC 29902

Name and/or Agency Name

Address

City, State and Zip

X Your Signature or Signature of Attorney

Date

Attention: All cases filed in the Administrative Law Court are subject to the Rules of Procedure found at the Court's website www.scalc.net or from the Clerk of Court. Failure to follow these rules may result in dismissal of your case.



Article #: 92148969009997901539819481

July 1, 2020

Via Certified Mail

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
955 Ribaut Rd.
Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
Following Project:
Beaufort Memorial Hospital
Relocation of current 1.5 T MRI located at 300 Midtown Dr, Port Royal,
SC to 122 Oaklie Center Blvd North, Oaklie, SC at a total project cost of
\$125,000.00
Matter: NA-20-04
Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, §105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and Information.

This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803) 545-0530; Division of Health Facilities Construction, Mr. Elie Macaron, (803) 545-4449; Division of Health Licensing, Ms. Angie Smith, (803) 545-4252; and Bureau of Certification, Ms. MaryJo Roué, (803) 545-4293.

Letter to Daniel Mock
July 1, 2020
Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

Should you have any question regarding the above information, please contact the Department at (803) 545-0260.

Very truly yours,



Jennifer Hyman
Project Coordinator, Certificate of Need Program
South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief
Bureau of Healthcare Planning and Construction

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 7, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

We represent MRI at Belfair, LLC ("Belfair") in connection with the attached/enclosed request of May 20, 2020, from Beaufort Memorial Hospital for a non-applicability determination ("NAD") concerning relocation of 1.5T MRI equipment from their location in Port Royal, SC to their new location in Okatie, SC. We received a FOIA response from the Department yesterday containing the NAD request. The FOIA response did not contain a determination from the Department. When we received the documents, we immediately asked DHEC staff whether a determination has been issued but we have not received a response. Belfair has an interest in this matter because it operates an MRI facility in very close proximity to Beaufort Memorial's Okatie location.

Out of an abundance of caution, if an NAD has been granted, please accept this communication as Belfair's written request pursuant to S.C. Code Ann. § 44-1-60(E) for final review by the DHEC Board. We are sending a copy of this request along with a \$100 filing fee by overnight delivery. While it is difficult to argue against a determination that we have not seen, Belfair's basic position is that the CON Act does not provide for an exemption or non-applicability determination for the relocation of a capital project that would otherwise require a CON. Indeed, the NAD request in this case did not check the box of DHEC's form for a 104.1 exemption or a 105.1 NAD because neither apply.

On April 4, 2019, DHEC issued an NAD to Beaufort Memorial to replace their 1.0T MRI in Port Royal with a 1.5T MRI as a replacement of "like" equipment under Section 105.1.a, despite a project cost of over \$1.2 million. The *raison d'être* for DHEC's approval was that Beaufort Memorial was simply replacing equipment for which it had previously received a CON without

July 7, 2020
Page 2

materially changing the service provided. Now, however, Beaufort Memorial seeks to move this equipment to a new area, effectively transforming a \$1.2 million capital project from a mere "replacement" of service to a provision of *new* service in a *new* area. As anyone familiar with Beaufort County would know, Port Royal and Okatie are nearly 20 miles apart, and are very different communities with vastly different demographics and access to medical care, and moving a piece of imaging equipment from one community to the other is likely to affect access to services that should be evaluated under via the CON process.

Note, if Beaufort Memorial is correct that the NAD process permits the relocation of equipment that only eluded CON review upon installation because it replaced existing equipment, then nothing prevents a health care provider from obtaining a replacement NAD for costly equipment in Beaufort County, and then another NAD to move it to Greenville County, so long as the relocation itself stays under the \$600,000 threshold. This is not at all what was intended by the CON Act because it prevents DHEC from reviewing large projects to ensure that they adhere to the objectives of the CON Act, which include cost containment, avoidance of unnecessary duplication, service to the public, and provision of high quality services throughout the State.

Thank you for your attention to this matter. Please advise us of the next steps, and please let us know if further information is required. If an NAD has not been granted, we provide the above information to DHEC staff for their use in evaluating the NAD request.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm
Enclosures

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)



Beaufort Memorial HOSPITAL

955 Ribaut Road | Beaufort, SC 29902
843-522-5200 | 877-532-6472
beaufortmemorial.org

May 20, 2020

Ms. Jennifer Hyman
SCDHEC Certificate of Need Division
2600 Bull Street.
Columbia, SC 29201-1708

Dear Ms. Hyman:

Beaufort Memorial Hospital is requesting a determination of the relocation of our current 1.5 Tesla MRI located at 300 Midtown Drive, Port Royal SC, to a new location: 122 Oaktie Center Blvd North, Oaktie, South Carolina 29909.

The new location is within Beaufort County and moving is an effort to consolidate our MRI and physician practice in a central location.

The cost to relocate the MRI is \$80,000.00 for the actual move and \$45,000.00 for a replacement chiller. I have attached quotes from the vendor, Cannon Medical, who would support the relocation.

For your review, the following attachments are included:

- #1. Valid vendor equipment quotes for relocation of the current MRI
- #2. Installation cost including removal
- #3. Total project cost summary
- #4. New location
- #5. Copy of initial CON/ NA letter approving current MRI
- #6. Side by side comparison of current and new equipment
- #7. Current patient volumes with proposed volumes at new location
- #8. Floor plan of affected area new location

Thank you for the review of this request. Please reach out if you have any questions or if further information is needed to make a determination on this project.

Regards,

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
Administration
955 Ribaut Rd.
Beaufort SC, 29902
dmock@bmhsc.org
843-522-5668

SCDHEC
Received:

JUN - 8 2020

Certificate of Need Program

NAI
move



Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ Replacement of Like Equipment Exemption
Note: There must be a previously existing CON

R.61-15 Section 104.1.a Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

- ☐ Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)

R.61-15 Section 105.1.a Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
 - ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
 - ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
 - ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
- ☒ 8. Floor plan of affected area(s). If construction is part of the proposal, please remit both "before" and "after" floor plans. The floor plans should contain enough detail to be a stand-alone plan outlining the specific area of the facility in which the unit is to be located

GORDON REES SCULLY MANSUKHANI, LLP
1111 BROADWAY SUITE 1700
OAKLAND, CA 94607

0041

229654

Wells Fargo Bank, N.A.

11-4288/1210

DATE

July 7, 2020

PAY

One Hundred & No.

DOLLARS \$ *100.00*

TO
THE
ORDER
OF

*Clerk, D.C. Board of Natural Resources
Environmental Control
2600 Bull Street
Columbia DC 20201*

AMOUNTS OVER \$5,500 REQUIRE 2 SIGNATURES

⑈ 229654 ⑈ ⑆ 121042882⑆ 7320714707 ⑈

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 14, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

This letter is intended to supplement the prior Request for Final Review (RFR) submitted by MRI at Belfair, LLC ("Belfair") on July 7, 2020, as Belfair is now in possession of the non-applicability determination (NAD) issued to Beaufort Memorial Hospital (BMH) on July 1, 2020 for relocation of a 1.5T MRI from Port Royal, SC to Okatie, SC. Pursuant to S.C. Code Ann. 44-1-60, Belfair requests final review by the DHEC Board of the staff decision to issue an NAD. The staff decision is attached hereto as Exhibit A.

Belfair operates an MRI imaging center in Bluffton, SC, approximately 6 miles down US 278 from the proposed site of the relocated MRI. Belfair is an affected person and has standing to challenge the issuance of the NAD. The request for final review was submitted within 15 days of the issuance of the staff decision, and a \$100 check was enclosed for the filing fee. This letter supplements the original request for final review and is itself submitted within 15 days of the issuance of the staff decision.

Belfair's basic position is that placing a 1.5T MRI in a brand-new location, more than 17 miles from its original location and in a completely different community, should have been treated as a new project requiring a Certificate of Need. The grounds for this position are as follows:

- The CON Act provides that a CON is required for "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). The CON Regulations provides that the cost threshold is \$600,000. S.C. Reg. 61-15, Sec. 102(1)(f).

July 14, 2020

Page 2

- The CON Act exempts providers from obtaining a (second) CON for “the replacement of like equipment for which a Certificate of Need has been issued which does not constitute a material change in service or a new service.” S.C. Code Ann. 44-7-170(A)(3). In other words, once a provider obtains a CON for a piece of equipment, it may replace that equipment without obtaining a second CON, so long as it does not materially change the health service provided or offer a new health service. This exemption makes sense in light of the purposes of the CON Act because the project has already been fully vetted by DHEC to ensure that it promotes cost containment, avoid unnecessary duplication, properly serves the public needs, and provides high quality services, and there is no need for further review.
- The CON Act further provides that it does not apply to “an expenditure by or on behalf of a health care facility for nonmedical projects such as . . . replacement of like equipment with similar capabilities” S.C. Code Ann. 44-7-170(B)(1). The CON Regulations require that providers obtain an NAD before undertaking the “[r]eplacement of like equipment with similar capabilities” S.C. Reg. 61-15, Sec. 105(a).
- Here, BMH obtained an NAD from the Department on April 4, 2019, permitting BMH to replace their existing 1.0T MRI at the their Port Royal, SC location with a 1.5T MRI, despite the project cost of more than \$1,200,000. Notably, the Department issued the NAD under Section 105 of the CON Regulations, which apply to non-applicability, rather than under Section 104 of the CON Regulation, which apply to exemptions. This means that the 1.0T MRI being replaced was not itself acquired with a CON. Now, the staff decision provides a second NAD allowing to move the \$1.2 million project to a new location in Okatie, SC.
- As an initial matter, it violates the CON Act for the Department to issue NADs under Section 105 of the CON Regulations / S.C. Code Ann. 44-7-170(B)(1) for the replacement of *medical* equipment. By its plain terms, S.C. Code Ann. 44-7-170(B)(1) applies only to “nonmedical projects for services.” Therefore, the NAD of April 4, 2019 was issued in error, and a CON was required for the project. Likewise, the project was not exempt under S.C. Code Ann. 44-7-170(A)(3) / S.C. Reg. 61-15, Section 104 because a CON was not issued for the piece of equipment being replaced.
- Even assuming the validity of the April 4, 2019 NAD (and it was not valid), that NAD was based on the representation by BMH that it would be replacing an MRI at its Port Royal, SC location. Indeed, the NAD itself states that it is not valid if the project changes.
- Because the project has now changed—and indeed changed barely a year from issuance of the April 4, 2019 NAD—the April 4, 2019 NAD does not apply, and the acquisition of the 1.5T MRI with a project cost in excess of \$1.2 million falls squarely within the CON requirements of S.C. Code Ann. 44-7-160(6) and its associated regulations. Thus, even if the April 4, 2019 NAD was properly issued (and it was not), the CON Act does not permit BMH to move its \$1.2 million acquisition to a new location without obtaining a CON.
- Any other conclusion would effectively create an exemption to the CON Act that the General Assembly did not create. The General Assembly exempted the replacement of

July 14, 2020
Page 3

equipment *for which a CON has already been issued*. It did not exempt the replacement of medical equipment for which no CON was issued, much less did it exempt the purchasing new equipment under the guise of replacement and then, barely 12 months later, moving the new equipment to a new location without any meaningful regulatory review.

- The location of diagnostic equipment is of critical importance in reviewing the need for a particular project. Indeed, the community need and distribution (accessibility) project review criteria—both of which are typically identified by DHEC as relative importance criteria in MRI projects—directly address the location of the proposed project its relationship to the target population. Further, they specifically provide for the review of relocations to “address the need that the population presently has for the service, the extent to which that need will be met by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other underserved groups, to obtain needed health care.” S.C. Reg. 61-15, Sec. 802(2)(d). In conducting this review, it is common for health planners to review zip-code-level data, so the mere fact that BMH proposes to move the MRI within Beaufort County is irrelevant, as Beaufort County encompasses many different zip codes and communities with vastly different demographics, socioeconomic statuses, and access to health care.
- Here, while Belfair has not had the opportunity to conduct a complete health planning analysis to date, it is worth noting that Port Royal and Okatie are very different communities. According to the Census Bureau, Okatie (zip code 29909) is an overwhelmingly white community (94.2%), whereas Port Royal (zip 29906) is only 53.9% white and has a significant African American community (39.8%). According to the IRS, in Port Royal (zip 29906), approximately 72% of households have incomes below \$50,000 per year and only approximately 14.6% have incomes over \$75,000 per year, whereas in Okatie (zip 29909), approximately 44% of households have incomes below \$50,000 per year and approximately 45% have incomes over \$75,000 per year. This limited data alone demonstrates that BMH proposes to move an expensive piece of diagnostic equipment from a less advantage area to a more advantaged area, which is exactly the kind of project that should undergo CON review to ensure that it does not diminish a less advantaged community’s access to healthcare.
- To be clear, were BMH to apply for a CON as it must, Belfair suspects that there would be many more project review criteria that would not be met, and that there would be further reasons that community need and distribution (accessibility) were problematic, but those arguments are not ripe until BMH actually submits a full and complete CON application.
- In addition, even if the current NAD request is evaluated as if only the actual relocation costs—and not the acquisition costs—count toward the \$600,000 threshold (which would be incorrect), none of the costs associated with the new medical office building that BMH is building, including the costs associated with specifically building an MRI suite and any pro rata building costs attributable to that suite, are included in the estimate. In Belfair’s experience, these costs would easily push the project over the \$600,000 threshold.

July 14, 2020

Page 4

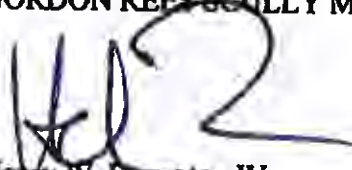
Therefore, at the very least, the Board should reverse the NAD and require that BMH submit additional information on *all* of the costs associated with building out MRI-ready space. Indeed, based on the information available, it appears that BMH is building an entire imaging suite complete with building and equipment costs that would easily exceed the \$600,000 threshold. In short, further investigation by the Department into the real project costs is needed before an NAD can properly issue.

- The July 1, 2010 NAD is flawed on its face because neither the CON Act nor the CON Regulations provide for an exemption or non-applicability determination for the relocation of diagnostic equipment. It was incorrect for the staff decision to issue an NAD under S.C. Reg. 61-15, Section 105, because Section 105 says nothing whatsoever about relocations. Moreover, it is improper to split a project into multiple NADs—one for replacement and one for relocation—to avoid the CON Act, as BMH has done here, in the same way for the same reasons that it is improper to split a project into multiple NADs to avoid the \$600,000 threshold. S.C. Reg. 61-15, Sec. 102(2).
- In sum, the proper lens through which to view BMH's request to relocate its 1.5T MRI is as a request to acquire new equipment in excess of the \$600,000 threshold, thus requiring a full CON. Because the CON Act applies to this request, the July 1, 2020 NAD was issued in error.
- Furthermore, the NAD request was incomplete by its own terms, as it did not include complete information on the proposed project. In particular, it lacked any information that would allow the Department to consider the impact of the change in location. While it included one spreadsheet of a years' worth of procedure volumes, it did not include any meaningful historical information for the old location or projection information for the new location, or any attempt at all to analyze where patients would come from and whether there would be an impact on the patient population left behind. If DHEC were to consider an NAD for the relocation (and it should not), the Department should have at least required significant information from BMH to analyze the effects of the relocation on the existing patient population, the need for an MRI in the new area, and the effects on other providers. For this reason as well, the NAD should not have issued.

Thank you for your consideration of this additional information. Please let us know if any additional information is needed by the Board.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm

July 14, 2020

Page 5

Enclosure

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)
Daniel Mock, AVP Operation (via FedEx)
Beaufort Memorial Hospital

EXHIBIT “A”
Staff Decision



Article #: 92148969009987901539819481

July 1, 2020

Via Certified Mail

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
955 Ribaut Rd.
Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
Following Project:
Beaufort Memorial Hospital
Relocation of current 1.5 T MRI located at 300 Midtown Dr, Port Royal,
SC to 122 Oaklie Center Blvd North, Oaklie, SC at a total project cost of
\$125,000.00
Matter: NA-20-04
Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code 544-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code 544-7-170; S.C. Code Regs. 61-15, 6105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

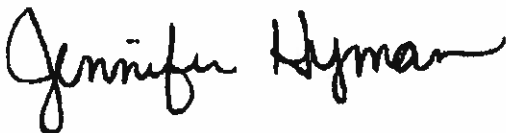
This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803) 545-0530; Division of Health Facilities Construction, Mr. Elle Macaron, (803) 545-4449; Division of Health Licensing, Ms. Angie Smith, (803) 545-4252; and Bureau of Certification, Ms. Maryjo Roué, (803) 545-4293.

Letter to Daniel Mock
July 1, 2020
Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

Should you have any question regarding the above information, please contact the Department at (803) 545-0260.

Very truly yours,



Jennifer Hyman
Project Coordinator, Certificate of Need Program
South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief
Bureau of Healthcare Planning and Construction

REQUEST FOR FINAL REVIEW
JULY 7, 2020

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 7, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

We represent MRI at Belfair, LLC ("Belfair") in connection with the attached/enclosed request of May 20, 2020, from Beaufort Memorial Hospital for a non-applicability determination ("NAD") concerning relocation of 1.5T MRI equipment from their location in Port Royal, SC to their new location in Okatie, SC. We received a FOIA response from the Department yesterday containing the NAD request. The FOIA response did not contain a determination from the Department. When we received the documents, we immediately asked DHEC staff whether a determination has been issued but we have not received a response. Belfair has an interest in this matter because it operates an MRI facility in very close proximity to Beaufort Memorial's Okatie location.

Out of an abundance of caution, if an NAD has been granted, please accept this communication as Belfair's written request pursuant to S.C. Code Ann. § 44-1-60(E) for final review by the DHEC Board. We are sending a copy of this request along with a \$100 filing fee by overnight delivery. While it is difficult to argue against a determination that we have not seen, Belfair's basic position is that the CON Act does not provide for an exemption or non-applicability determination for the relocation of a capital project that would otherwise require a CON. Indeed, the NAD request in this case did not check the box of DHEC's form for a 104.1 exemption or a 105.1 NAD because neither apply.

On April 4, 2019, DHEC issued an NAD to Beaufort Memorial to replace their 1.0T MRI in Port Royal with a 1.5T MRI as a replacement of "like" equipment under Section 105.1.a, despite a project cost of over \$1.2 million. The *raison d'être* for DHEC's approval was that Beaufort Memorial was simply replacing equipment for which it had previously received a CON without

July 7, 2020
Page 2

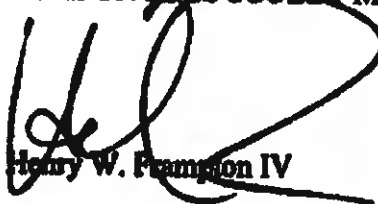
materially changing the service provided. Now, however, Beaufort Memorial seeks to move this equipment to a new area, effectively transforming a \$1.2 million capital project from a mere "replacement" of service to a provision of *new* service in a *new* area. As anyone familiar with Beaufort County would know, Port Royal and Okatie are nearly 20 miles apart, and are very different communities with vastly different demographics and access to medical care, and moving a piece of imaging equipment from one community to the other is likely to affect access to services that should be evaluated under via the CON process.

Note, if Beaufort Memorial is correct that the NAD process permits the relocation of equipment that only eluded CON review upon installation because it replaced existing equipment, then nothing prevents a health care provider from obtaining a replacement NAD for costly equipment in Beaufort County, and then another NAD to move it to Greenville County, so long as the relocation itself stays under the \$600,000 threshold. This is not at all what was intended by the CON Act because it prevents DHEC from reviewing large projects to ensure that they adhere to the objectives of the CON Act, which include cost containment, avoidance of unnecessary duplication, service to the public, and provision of high quality services throughout the State.

Thank you for your attention to this matter. Please advise us of the next steps, and please let us know if further information is required. If an NAD has not been granted, we provide the above information to DHEC staff for their use in evaluating the NAD request.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm
Enclosures

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)



Beaufort Memorial HOSPITAL

955 Ribaut Road | Beaufort, SC 29902
843-522-5200 | 877-532-6472
beaufortmemorial.org

May 20, 2020

Ms. Jennifer Hyman
SCDHEC Certificate of Need Division
2600 Bull Street.
Columbia, SC 29201-1708

Dear Ms. Hyman:

Beaufort Memorial Hospital is requesting a determination of the relocation of our current 1.5 Tesla MRI located at 300 Midtown Drive, Port Royal SC, to a new location: 122 Oaktie Center Blvd North, Oaktie, South Carolina 29909.

The new location is within Beaufort County and moving is an effort to consolidate our MRI and physician practice in a central location.

The cost to relocate the MRI is \$80,000.00 for the actual move and \$45,000.00 for a replacement chiller. I have attached quotes from the vendor, Cannon Medical, who would support the relocation.

For your review, the following attachments are included:

- #1. Valid vendor equipment quotes for relocation of the current MRI
- #2. Installation cost including removal
- #3. Total project cost summary
- #4. New location
- #5. Copy of initial CON/ NA letter approving current MRI
- #6. Side by side comparison of current and new equipment
- #7. Current patient volumes with proposed volumes at new location
- #8. Floor plan of affected area new location

Thank you for the review of this request. Please reach out if you have any questions or if further information is needed to make a determination on this project.

Regards,

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
Administration
955 Ribaut Rd.
Beaufort SC, 29902
dmock@bhmhsc.org
843-522-5668

SCDHEC
Received:

JUN - 8 2020

Certificate of Need Program

MAZ
move

Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ Replacement of Like Equipment Exemption
Note: There must be a previously existing CON

R.61-15 Section 104.1.e Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

- ☐ Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)

R.61-15 Section 105.1.e Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
 - ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
 - ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
 - ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
- ☒ 8. Floor plan of affected area(s). If construction is part of the proposal, please remit both "before" and "after" floor plans. The floor plans should contain enough detail to be a stand-alone plan outlining the specific area of the facility in which the unit is to be located

**Board:**

Mark R. Elam, Chairman
 Jim P. Creel, Jr., Vice-Chairman
 Charles M. Joye, II, P.E., Secretary
 J.B. (Sonny) Kinney

Seema Shrivastava Patel
 Richard V. Lee, Jr.
 Alex A. Singleton
 Robert R. Morgan, Jr., MD, MBA

August 12, 2020

Via Electronic Mail and US Mail Certified 9214 8969 0099 9790 1417 9562 84

Henry W. Frampton, IV, Esquire
 Email: HFRAMPTON@GRSM.COM
 Gordon & Rees
 40 Calhoun Street
 Suite 350
 Charleston, SC 29401

Via Electronic Delivery and US Mail

Beaufort Memorial Hospital
 Attn: Daniel Mock, AVP Operations
 Email: DMock@bmhsc.org
 955 Ribaut Road
 Beaufort, SC 29902

Via Electronic Mail

Meredith Sella, Esquire
 Email: sellamw@dhec.sc.gov
 SCHEC – Office of General Counsel
 2600 Bull Street
 Columbia, SC 29201

RE: Docket Nos. 20-RFR-37, Beaufort Memorial Hospital, Matter No. NA-20-04
 Issuance of determination of Certificate of Need and Health Facility Licensure Act applicability for the relocation of current 1.5 MRI located at 300 Midtown Drive, Port Royal, to 122 Oaktie Center Boulevard North, Oaktie, at a total project cost of \$125,000.00

Dear Mr. Mock and Counsel 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,



M. Denise Crawford
Clerk
S.C. Board of Health and Environmental Control

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.

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control and Beaufort Memorial
Hospital,

Respondents.

**NOTICE OF RE-ASSIGNMENT
(Contested Case)**

DOCKET NO. 20-ALJ-07-0235-CC

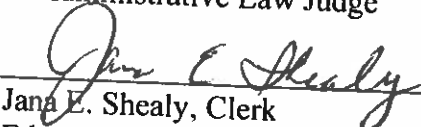
NOTICE IS GIVEN that a request for contested case hearing was filed on September 9, 2020. In accordance with S.C. Code Ann. § 1-23-570 (Supp. 2019), the Honorable Ralph King Anderson, III, Chief, Administrative Law Judge, was assigned to preside in this matter. ***This case is hereby re-assigned to the Honorable H. W. Funderburk, Jr., Administrative Law Judge.*** The Administrative Law Judge may be contacted by mail at 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201, and by telephone at (803) 734-0550.

Rules of Procedure governing matters before the Court may be obtained from the Clerk of Court or on the Court's website, www.scalc.net.

A copy of any document or any other item filed with the Court shall be sent to all other parties at the time of filing. If a mailing address changes, or if an address is incorrect, the Court must be notified immediately of the correct address.

This the twenty-fourth day of September 2020.

Ralph King Anderson, III
Chief Administrative Law Judge

By: 

Jana E. Shealy, Clerk
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

FILED

SEP 24 2020

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
	)	
Petitioner,	)	PETITIONER'S PREHEARING
	)	STATEMENT
v.	)	
	)	
South Carolina Department of Health and	)	
Environmental Control and Beaufort Memorial	)	
Hospital,	)	
	)	
Respondents.	)	

1. The nature of this proceeding.

MRI at Belfair, LLC d/b/a 3T MRI at Belfair (“Belfair”) challenges the non-applicability determination NA-20-04 issued by the DHEC to Beaufort Memorial Hospital (“Beaufort Memorial”) on July 1, 2020, for the relocation of certain MRI equipment from its current location in Port Royal, South Carolina to a new location in Bluffton, South Carolina.

2. Statutory provision(s) conferring subject matter jurisdiction on the Court and other applicable statutes and regulations.

Jurisdiction is conferred on this Court by S.C. Code Ann. §§ 44-1-60 and 1-23-600(A). The primary statutes and regulations applicable to this matter include S.C. Code Ann. §§ 44-7-160(6), 44-7-170(A)(3), 44-7-170(B)(1) and 24A S.C. Code Ann. Regs. 61-15 §§ 102, 103, and 105.

3. The issues to be presented for determination, including any claims or defenses expected to be raised.

The primary issue presented by this case is the application of the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110, *et seq.* (the “CON Act”) to

the proposed relocation of medical equipment.

Based on its statements to date, DHEC's position appears to be that the CON Act does not apply to the relocation of a piece of medical equipment, no matter the cost of the underlying equipment, as long as the relocation itself does not reach the \$600,000 threshold set in the applicable regulations. Thus, according to the logic of DHEC's position, a health care provider could obtain a CON (or a replacement of like equipment exemption or NAD) to install a new top-of-the-line \$2 million dollar piece of medical equipment in one location and, shortly thereafter, move it anywhere in the state as long as the relocation itself did not cost \$600,000 or more.

Belfair, on the other hand, contends that the CON Act applies to a relocation like the one at issue here for several reasons.

First, nothing in the CON Act or its regulations exempts relocations. Rather, the CON Act broadly applies to any acquisition of medical equipment in excess of \$600,000, and any exemption or non-applicability provision ceases to apply when the equipment is moved to a new location. Accordingly, a CON based on the original cost plus relocation expenses and other project costs is required.

Second, an NAD applies by its terms only to the original project and not to any changes to the project. Here, the project approved in NA-19-09 changed, rendering that NAD invalid, when Beaufort Memorial decided to relocate the MRI equipment. While Belfair contends that the decision to relocate invalidates a prior NAD whenever that decision is made, the invalidation is particularly clear when, as Belfair alleges here, the decision was made or substantially made before the expiration of the prior NAD when Beaufort Memorial had a clear obligation to notify DHEC of any changes to the project and failed to do so. Moreover, NA-20-04 violates Section 102(2) of the CON Regulations because it allowed Beaufort Memorial to split one expenditure into two or

more expenditures—that is, splitting acquisition of the “replacement” MRI equipment from installing that equipment in a wholly new location—to avoid CON review.

Third, NA-20-04 is invalid because it is based on and follows from NA-19-09, which is itself invalid because S.C. Code Ann. § 44-7-170(B)(1), which provides the statutory basis for Section 105 of the regulations, does not permit the replacement of medical equipment. Rather, that section applies only to the replacement of non-medical equipment. Because NA-19-09 purports to allow the replacement of medical equipment under Section 105 of the CON regulation, it is invalid.

Fourth, even if there are circumstances when DHEC may issue an NAD for relocation of a project that would otherwise require a CON (and Belfair contends there are not), determining whether to issue an NAD must involve some meaningful inquiry into such matters as whether the relocation was split from the purchase of the equipment to avoid CON review and whether the relocation implicates the purposes of the CON Act. Because there was no such review here, this matter at the very least must be remanded to DHEC to perform a proper analysis before making a non-applicability determination.

Fifth, by its own terms, the request for NA-20-04 does not appear to capture all relevant project costs, and Belfair contends that a proper review of those costs is likely to push the project beyond the \$600,000 threshold. Belfair will provide a more fulsome analysis of these costs upon taking appropriate discovery.

4. The action requested of the Court and a detailed statement of the law, including statutory and/or case citations that support the action requested.

For the reasons set forth in Item No. 3 above and those set forth in Belfair’s prior filing with DHEC, Belfair requests that the Court reverse DHEC’s decision to issue the NAD and hold

that the proposed project requires a Certificate of Need; alternatively, Belfair requests that the Court remand the matter to DHEC for Beaufort Memorial to provide complete information on the proposed project before a determination is made as to whether an NAD is appropriate.

To date, Belfair has been unable to locate any case law concerning the treatment of relocations under the CON Act. Accordingly, Belfair will rely primarily on the applicable provisions of the CON Act and its regulations, including but not limited to:

- S.C. Code Ann. § 44-7-160(6), requiring a CON for “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” and Section 102(f) of the CON Regulations setting the threshold at \$600,000.
- S.C. Code Ann. § 44-7-170(A)(3) and Section 104(a) of the CON Regulations, which together provide an exemption to the CON Act for replacement of medical equipment *for which a CON has been issued*.
- S.C. Code Ann. § 44-7-170(B)(1), which provides that the CON Act does not apply to non-medical projects.
- Section 102(2) of the CON Regulations, which prohibits splitting projects to avoid CON review.
- Section 105(2) of the CON Regulations, which sets forth the information that should be submitted by the party requesting an NAD and considered by DHEC in making non-applicability determinations.
- Section 105(3) of the CON Regulations, which provides the time period in which an NAD is valid. Likewise, DHEC’s NAD form, which specifically requires the party requesting an NAD to advise DHEC of any changes to the project and states that the NAD is not valid

of the project changes.

- Section 802 of the CON Regulations, which provide the project review criteria.
- S.C. Code Ann. § 44-7-120, which provides the purposes of the CON Act.
- Section 102(4) of the CON Regulations, which makes it clear that the CON Act generally applies to relocations.

Belfair reserves the right to supplement this list as discovery proceeds.

5. A brief summary of the facts to be presented at the hearing.

In brief, Belfair expects to submit evidence of the following facts:

- On April 4, 2019, Beaufort Memorial received NA-19-09 for the replacement of a 1.0T MRI machine and associated equipment with a 1.5T MRI machine and associated equipment at the Lowcountry Medical Group location in Port Royal, SC. Both items constitute medical equipment.
- The total project cost associated with NA-19-09 was over \$1.2 million.
- NA-19-09 was ostensibly issued under Section 105 of the CON Regulations and S.C. Code Ann. § 44-7-170(B)(1), and was not issued under Section 104 of the CON regulation or S.C. Code Ann. § 44-7-170(A)(3).
- A CON has never been issued for MRI equipment at the Lowcountry Medical Group location in Port Royal, SC.
- NA-19-09 required Beaufort Memorial to notify DHEC of any changes to the project to which it applied and expressly stated that it was not valid if the project changed.
- NA-19-09 was effective from the date of its issuance—April 4, 2019—until April 4, 2020.
- On information and belief, Beaufort Memorial's decision to relocate MRI equipment from the Port Royal, SC location to its new medical office building on Okatie, SC was made or

substantially made before (1) the issuance of NA-19-09, (2) the purported completion of the NA-19-09 project, and/or (3) the expiration of NA-19-09 on April 4, 2020.

- On July 1, 2020, Beaufort Memorial received NA-20-04 for the relocation of the newly installed 1.5T MRI machine and associated equipment from the Lowcountry Medical Center location in Port Royal, SC to a new location in Okatie, SC.
- With respect to the issuance of NA-20-04, Beaufort Memorial did not submit and/or DHEC did not consider (1) the acquisition costs of the 1.5T MRI machine and associated equipment, (2) all costs associated with the relocation of the 1.5T MRI machine and associated equipment, including all costs associated with the physical location in Okatie, (3) sufficient information on the impact of the change in location as they relate to the purposes of the CON Act.
- The relocation implicates numerous project review criteria ordinarily applied by DHEC to the acquisition of MRI equipment, including but not limited to Community Need Documentation, Distribution (Accessibility), Acceptability, Net Income, Financial Feasibility, Cost Containment, Efficiency, Distribution, Adverse Effects on Other Facilities, and Medically Underserved Groups. Additional project review criteria may be identified during discovery.

Belfair reserves the right to supplement this list as discovery proceeds.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority for the motion.

Belfair is not aware at this time of any motion to be filed but anticipates that there may be summary judgment motions by any/all of the parties and motions *in limine* to narrow the facts and issues before the Court.

7. A list of proposed witnesses and exhibits.

Proposed witnesses include (1) Mr. Daniel Mock, (2) Dr. Albert J. Borelli, (3) Ms. Jennifer Hyman, (4) Louis Eubank, and (5) any other Beaufort Memorial personnel involved in project planning, and (6) expert witness(es) to be named by Belfair. Belfair reserves the right to name additional witnesses as discovery proceeds and to call as a witness any person identified by any other party.

Proposed exhibits include the DHEC project file and documents and materials to be obtained in discovery from Beaufort Memorial and/or produced by Belfair's expert witness(es). Belfair reserves the right to name additional exhibits as discovery proceeds and to use an exhibit any document identified or produced by any other party.

8. Whether discovery is necessary and, if so, a proposed scheduling order.

Discovery is necessary, including but not limited to discovery for communications concerning the project and plans for the project, communications concerning the reasons for the proposed relocation, zip code level data concerning current utilization, projections for utilization following the proposed relocation, financial information concerning the 2019 equipment replacement and the proposed relocation (including concerning costs associated with the property and building proposed to house the relocated equipment), and other documents related to the proposed relocation project.

A proposed scheduling order is attached.

9. The estimated length of the hearing.

Belfair estimates that the hearing will last approximately three (3) days.

10. Suggested trial dates.

Belfair proposes that the matter be set for trial in May 2020 and will make itself available

for any date in that month.

11. An e-mail address where you can be reached

The attorneys and paralegal working on this matter can be reached by e-mail as follows:

A. Victor Rawl, Jr.: vrawl@grsm.com

Henry W. Frampton, IV: hframpton@grsm.com

Victoria T. Kepes: vkepes@grsm.com

Kailie D. Harris: kdharris@grsm.com

Dated. October 28, 2020

GORDON & REES LLP

By s A. Victor Rawl, Jr.
 A. Victor Rawl, Jr.
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 40 Calhoun Street, Suite 350
 Charleston, SC 29401
 Telephone: 843.278.5900
*Attorneys for Petitioner MRI at Belfair,
 LLC, d b a 3T MRI at Belfair*

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
Petitioner,	)	SCHEDULING ORDER
	)	
v.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	
	)	
Respondents.	)	

The Court, having conferred with counsel of record, believes it is appropriate to set forth the following schedule for the conduct of this matter. Therefore, it is hereby ORDERED that:

1. Each party is permitted to serve up to thirty (30) requests for production and ten (10) interrogatories, including all subparts, on any other party.
2. Petitioner shall name all expert witnesses no later than **January 15, 2021**.
3. Respondents shall name all expert witnesses no later than **January 29, 2021**.
4. All discovery in this matter shall be served in sufficient time to allow for all responses to discovery to be received and all fact witness depositions to be concluded no later than **March 15, 2021**, subject to each party's right subsequently to move the Court for an extension if circumstances warrant.
5. Unless the parties agree otherwise, expert witness depositions shall commence after the completion of fact discovery, **March 15, 2021**, and shall conclude no later than **April 16, 2021**.
6. Parties shall file any dispositive motions and motions challenging the qualifications of experts no later than **May 14, 2021**.

7. The parties shall exchange exhibits (all but demonstrative) and final witness lists no later than **May 21, 2021**.

8. Any pre-hearing motions and objections to exhibits must be filed no later than **May 28, 2021**, and responses filed not later than **June 4, 2021**. The Court will hold a hearing to address pre-hearing motions and objections on **June 7, 2021**.

9. It is expected that the case can be tried in three (3) days. Trial shall commence on or after **June 8, 2021**, and conclude on **June 10, 2021**, or until completed, subject to the Court's schedule.

10. The foregoing discovery schedule and framework is subject to the right of any party to seek a protective order on any grounds available under Rule 21, RPLAC and under Rules 26-37, SCRCp.

AND IT IS SO ORDERED

The Honorable H.W. Funderburk, Jr.
Administrative Law Judge

_____, 2020
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	<u>BEAUFORT MEMORIAL HOSPITAL'S</u>
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	<u>PREHEARING STATEMENT</u>
	)	
Respondents.	)	
	)	
	)	
	)	
	)	

Respondent Beaufort Memorial Hospital ("BMH") hereby submits this Prehearing Statement pursuant to the Order for Prehearing Statements filed on September 28, 2020 by the Honorable H.W. Funderburk, Jr., Administrative Law Judge. BMH reserves its right to amend and supplement this Prehearing Statement in the future as necessary.

1. THE NATURE OF THIS PROCEEDING:

This matter arises from the decision rendered on July 1, 2020, by the South Carolina Department of Health and Environmental Control (the "Department" or "DHEC") granting the request from BMH that the State Certification of Need and Health Facility Licensure Act, S.C. Code § 44-7-110, *et seq.* (the "CON Act"), did not apply to BMH's relocation of its current 1.5T MRI located at 300 Midtown Drive, Port Royal, South Carolina to 122 Okatie Center Boulevard North, Okatie, South Carolina at a total project cost of \$125,000 (the "Project"). BMH submitted its request to the Department on May 20, 2020 that the Department stamped as received on June 8, 2020. MRI at Belfair, LLC ("Belfair") submitted notice that it was an affected party to the Project in a letter to the Department dated July 6, 2020, that the Department

has noted as received by it on July 9, 2020. On July 1, 2020, the Department issued its determination (NA-20-04) that the CON Act did not apply to the Project. Belfair filed its request for final review to the Board of the Department on July 7, 2020 and supplemented that request for final review on July 14, 2020. The Department submitted its staff response on July 24, 2020. On August 12, 2020, the Board of the Department declined to hold a final review conference on Belfair's request, rendering the Department's decision on BMH's Project the final agency decision. On September 9, 2020, Belfair mailed its Request for Contested Case Hearing.

2. STATUTORY PROVISION(S) CONFERRING SUBJECT MATTER JURISDICTION ON THE COURT AND OTHER APPLICABLE STATUTES AND REGULATIONS:

Statutory provisions conferring subject matter jurisdiction include S.C. Const. Art. I, § 22, S.C. Code Ann. §§ 1-23-320, 1-23-600(A), 44-1-60(F) & (G), and 44-7-210(E). Other applicable statutes, regulations and authorities include:

- a. South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-600, *et seq.*, as amended;
- b. CON Act, S.C. Code Ann. §§ 44-7-110, *et seq.*, as amended;
- c. S.C. Regs. 61-15, as amended;
- d. South Carolina Rules of Procedure for the ALC; and
- e. Such other and further rules and statutes as may be determined.

3. THE ISSUES TO BE PRESENTED FOR DETERMINATION, INCLUDING ANY CLAIMS OR DEFENSES EXPECTED TO BE RAISED:

With respect to Belfair's appeal of the approval of BMH's request, the issue will be whether the Department properly determined that the CON Act did not apply to BMH's Project.

BMH reserves the right to present any claim or defense raised or considered below, and to present and address any issue, claim or defense that may arise during discovery.

4. A BRIEF SUMMARY OF THE FACTS TO BE PRESENTED AT THE HEARING:

In response to Belfair's contested case, BMH will present documentary evidence, fact witnesses and expert testimony, if needed, demonstrating that the approval of its request satisfies the applicable regulations and CON Act.

BMH submitted its request to the Department to determine that the CON Act did not apply to its Project on May 20, 2020. By letter dated July 6, 2020, Belfair notified the Department of Belfair's status as an affected person. The Department has indicated that this letter was received by it on July 9, 2020. Belfair did not provide any specific facts or documentation in support of its opposition to the Project. On July 1, 2020, the Department issued the letter granting BMH's request. On July 7, 2020, Belfair requested that the Board of the Department conduct a final review conference and supplemented this request on July 14, 2020. The Department submitted its staff response on July 24, 2020. On August 12, 2020, the Board of the Department declined to conduct a final review conference, thereby rendering final the Department's staff decision to grant BMH's request. On September 9, 2020, Belfair mailed its Request for Contested Case Hearing.

The South Carolina Health Plan does not contain specific standards regarding the acquisition and installation of MRI equipment, nor does the South Carolina Health Plan contain specific standards for determinations of whether the CON Act applies or not to a project. Compliance with the South Carolina Health Plan is therefore not an issue in this matter. BMH's Project does not include the acquisition of equipment; rather it merely moves the equipment it already has from one medical office building to another, consolidating MRI services with private physician offices all within the same service area of Beaufort County. BMH's Project does not trigger any CON review. The Project did not require review or approval from the Department;

however, BMH sought to confirm the same and requested the Department provide to it a written determination that the CON Act did not apply to its Project. In making its request, BMH used DHEC form 0431 and did not check either the box for an exemption or the box for a non-applicability determination. Neither applied to BMH's request. In fact, the form, itself, was not necessary for BMH's request. The Department staff's decision is supported by the record in this matter and complies with the CON Act and the Regulations.

The Department's approval of BMH's request should be affirmed. BMH reserves its right to assert any and all other positions identified during the process of the staff's review that support the approval of its request.

5. THE ACTION REQUESTED OF THE COURT AND A DETAILED STATEMENT OF LAW, INCLUDING STATUTORY AND/OR CASE CITATIONS, THAT SUPPORT THE ACTION REQUESTED:

BMH requests that the Department's decision of July 1, 2020 be affirmed. The Department's decision that the CON Act did not apply to BMH's Project is correct.

BMH reserves its right to amend this Prehearing Statement to address additional issues and to raise additional defenses that might arise during discovery.

6. A SUMMARY OF ANY MOTIONS EXPECTED TO BE RAISED AT THE HEARING AND THE APPROPRIATE AUTHORITY UNDERLYING THE MOTION:

At this time, BMH is considering a motion to dismiss because Belfair failed to preserve its right to appeal and did not submit timely, specific written opposition to BMH's request as required by the CON Act, Regulations and Administrative Law Court Rules. BMH also anticipates it will file any necessary motions *in limine*, if appropriate, as to any evidentiary issues regarding documents and witness testimony. BMH additionally intends to evaluate the necessity for other motions, including dispositive motions, at the completion of discovery and reserves the right to raise any motions necessary prior to or at the hearing.

7. A LIST OF PROPOSED WITNESSES AND EXHIBITS:

a. Proposed witnesses:

Russell Baxley, MHA
President and CEO, Beaufort Memorial Hospital

Daniel Mock
Assistant Vice President of Operations, Beaufort Memorial Hospital

Matthew Hurt
Advanced Imaging Manager, Beaufort Memorial Hospital

Possible physicians to be determined

Possible health planning expert to be determined

Louis W. Eubank, MSW, MPH
Chief, Bureau of Healthcare Planning and Construction
South Carolina Department of Health and Environmental Control; and

Jennifer Hyman
Project Coordinator, Certificate of Need Program
South Carolina Department of Health and Environmental Control.

b. Exhibits:

- (i) The Department's official file and record for the Project;
- (ii) BMH's submissions to the Department;
- (iii) Documents exchanged in discovery by the parties or otherwise produced by non-parties, and not otherwise objectionable by BMH.

BMH reserves the right to call additional witnesses, including those named by other parties and other experts to be designated at a later date, depending on information continuing to be obtained during the contested case. BMH also respectfully reserves its right to amend its list of witnesses and/or exhibits at a later time if necessary.

8. WHETHER DISCOVERY IS NECESSARY AND, IF SO, A PROPOSED SCHEDULE:

If the matter proceeds, BMH believes that discovery may be necessary by written discovery (including interrogatories, requests for production, requests for admission) and

depositions of witnesses identified by other parties, consistent with the parameters set forth in S.C. Code Ann. § 44-7-210(F) and Rule 21(B), South Carolina Rule of Administrative Law Court. BMH requests that the parties be permitted to develop a scheduling order for the court's review and approval, in conjunction with guidance from the Court on deadlines and trial dates that are available within the statutory time period in which a hearing and decision should be determined in this matter.

9. THE ESTIMATED LENGTH OF THE HEARING:

BMH believes that the contested case hearing will take approximately 2 business days.

10. SUGGESTED TRIAL DATE(S):

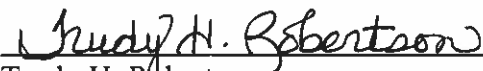
BMH requests that the parties be permitted to develop a scheduling order for the court's review and approval.

11. AN EMAIL ADDRESS WHERE YOU CAN BE REACHED:

trudyrobertson@mvalaw.com
donmeyer@mvalaw.com

with a copy to: wendystockhausen@mvalaw.com

Respectfully submitted,


 Trudy H. Robertson
 Donald Bancroft Meyer
 Moore & Van Allen, PLLC
 78 Wentworth Street
 P.O. Box 22828
 Charleston, SC 29413-2828
 (843) 579-7000 Telephone
 (843) 579-7099 Facsimile

Attorneys for Beaufort Memorial Hospital

October 28, 2020
 Charleston, SC

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and	)	
Environmental Control and Beaufort	)	
Memorial Hospital,	)	
	)	
Respondents.	)	
	)	
	)	
	)	
	)	

PROOF OF SERVICE AND CERTIFICATE OF THE DATE OF FILING BY MAIL

The undersigned does hereby certify that a copy of the foregoing *Prehearing Statement* was filed by mail and served, by depositing copies in the Regular U.S. mail, with sufficient postage attached thereto, on October 28, 2020 and addressed to:

The Honorable H.W. Funderburk, Jr.
Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Ashley C. Biggers
Vito M. Wicevic
SC DHEC-Office of General Counsel
2600 Bull Street
Columbia, SC 29201

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Attorneys for Beaufort Memorial Hospital

October 28, 2020
Charleston, SC

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
vs.	)	
	)	SOUTH CAROLINA DEPARTMENT
South Carolina Department of Health and	)	OF HEALTH AND
Environmental Control and Beaufort	)	ENVIRONMENTAL CONTROL'S
Memorial Hospital,	)	PREHEARING STATEMENT
	)	
Respondents.	)	
	)	
	)	

Pursuant to the South Carolina Administrative Law Court's ("Court" or "ALC") Order dated September 28, 2020, Respondent South Carolina Department of Health and Environmental Control ("the Department" or "DHEC"), by and through its undersigned counsel, hereby submits the following prehearing statement.

1. The nature of the proceeding.

This matter is before the Court pursuant to a request for contested case hearing filed by MRI at Belfair, LLC ("Belfair") challenging the Department's issuance of a Certificate of Need ("CON") Non-Applicability Determination ("NAD") concerning Beaufort Memorial Hospital's ("BMH") relocation of a 1.5T MRI located at 300 Midtown Dr., Port Royal, S.C. to 122 Okatie Center Blvd. North, Okatie, S.C. at a total project cost of \$125,000 ("the Project").

2. Statutory provision(s) conferring subject matter jurisdiction on the Court and other applicable statutes and regulations.

The statutory provisions conferring subject matter jurisdiction to the ALC include S.C. Code Ann. §§ 1-23-600, 44-1-60, and 44-7-210. Other applicable statutes and regulations include *State Certification of Need and Health Facility Licensure Act* ("the CON Act"), S.C. Code Ann. §§ 44-7-110, *et seq.*, and *Certification of Need for Health Facilities and Services* ("the CON Regulation"), 3 S.C. Code Ann. Regs. 61-15.

3. The issues to be presented for determination, including any claims or defenses

expected to be raised.

The issue presented for determination is whether the Department's decision is consistent with the CON Act, the CON Regulation, and the *2018-2019 South Carolina Health Plan* enacted July 12, 2018 ("the Plan").

4. The action requested of the Court and a detailed statement of the law, including statutory and/or case citations, that support the action requested.

The Department requests the Court dismiss Belfair's contested case and uphold DHEC's issuance of the NAD. A person or health care facility is required to obtain a CON from the Department before undertaking certain projects. S.C. Code Ann. § 44-7-160; 3 S.C. Code Ann. Regs. 61-15 § 102(1). The CON Act and CON regulation describe types of institutions and transactions that are exempt from CON requirements and for which the CON requirements do not apply. S.C. Code Ann. § 44-7-170; *see also* 3 S.C. Code Ann. Regs. 61-15 §§ 104 & 105. Projects that CON review are *not applicable to*, but require a *written determination of non-applicability* from DHEC include "replacement of like equipment with similar capabilities . . ." S.C. Code Ann. § 44-7-170(B)(1); 3 S.C. Code Ann. Regs. 61-15 § 106.1.a. "Like equipment with similar capabilities" is defined by Regulation 61-15 § 103.16 as

Medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

There are a number of other projects that are *exempt* from CON review, but require a *written exemption determination* from DHEC. *See* S.C. Code Ann. § 44-7-170(A) and 3 S.C. Code Ann. Regs. 61-15 § 104.

In 2019, the Department issued a NAD to BMH for the replacement of an MRI with a like MRI with similar capabilities. BMH implemented the NAD in early 2020. On June 8, 2020, DHEC received BMH's request for a NAD concerning its proposed relocation of the MRI within

Beaufort County. The relocation does not require a CON pursuant to S.C. Code Ann. § 44-7-160 and Regulation 61-15 § 102. The relocation does not otherwise require a written exemption determination or NAD determination pursuant to S.C. Code Ann. § 44-7-170 and Regulation 61-15 §§ 104 and 105. The Department issued its July 1, 2020 letter which states, in pertinent part, “[b]ased on the material you provided in support of your request, it is the decision of the Department that the [CON] Act is not applicable to the project” For these reasons, the Department will request the Court dismiss Belfair’s contested case and uphold the Department’s decision.

5. A brief summary of the facts to be presented at the hearing.

On April 4, 2019, DHEC issued a non-applicability determination (“NAD”) (NA-19-09) to BMH for replacement of its 1.0T MRI with a 1.5T MRI. Belfair did not oppose or otherwise appeal NA-19-09. In February 2020, DHEC received notice from BMH that NA-19-09 was fully implemented.

On June 8, 2020, DHEC received a request for a non-applicability determination (“NAD”) from BMH for the relocation of its 1.5T MRI at 300 Midtown Dr., Port Royal, SC to 122 Okatie Center Blvd. North, Okatie, S.C. at a total project cost of \$125,000 (“the Project”). The Project does not involve: the construction or other establishment of a new healthcare facility; a change in the existing bed complement of a healthcare facility; an expenditure by or on behalf of a health care facility in excess of \$2,000,000; 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; or the acquisition of medical equipment in excess of \$600,000. *See* S.C. Code Ann. § 44-7-160 and 3 S.C. Code Ann. Regs. 61-15 § 102. Moreover, the Project does not fit into any of the institutions, acquisitions, or transactions requiring a written exemption determination or a written determination of non-

applicability pursuant to S.C. Code Ann. § 44-7-170 or Regulation 61-15 §§ 104 and 105. After consideration of the information submitted, DHEC concluded that the CON Act and Regulation are not applicable to the Project. Accordingly, DHEC staff issued its NAD letter on July 1, 2020.

Belfair thereafter submitted to DHEC notice by email dated July 6, 2020, that it was an affected person to the Project. Belfair then filed a request for final review ("RFR") on July 7, 2020, and supplemented its RFR on July 13, 2020. On August 12, 2020, the Board mailed notice of its decision not to conduct a final review conference. Belfair thereafter filed a request for contested case with the Court on September 9, 2020.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority for the motion.

The Department anticipates filing a motion to dismiss or for summary judgment in accordance with Rule 19 of the Rules of Procedure for the Administrative Law Court and Rules 12 and 56 of the South Carolina Rules of Civil Procedure.

7. A list of proposed witnesses and exhibits.

Witnesses:

Margaret Murdock, CON Program Director
Bureau of Healthcare Planning and Construction
SCDHEC

Exhibits:

The NAD file for the BMH Project.

The Department reserves its right to supplement its witness and exhibit list as may prove necessary.

8. Whether discovery is necessary and, if so, a proposed schedule.

To the extent a motion does not dispose of the contested case, the Department anticipates discovery will be necessary as provided for in S.C. Code Ann. § 44-7-210(F) and Rule 21(B), SCRALC. The Department believes it would be beneficial for counsel for all parties to confer regarding a proposed scheduling order to the extent discovery is necessary.

9. The estimated length of the hearing.

The Department anticipates the contested case hearing may take approximately two days.

10. Suggested trial date(s).

Over the next six months, the Department is generally available with exception to trials scheduled for November 16-20, 2020, February 8-12, 2021, and May 24-27, 2021. The Department believes it would be beneficial for counsel for all parties to confer regarding a proposed scheduling order.

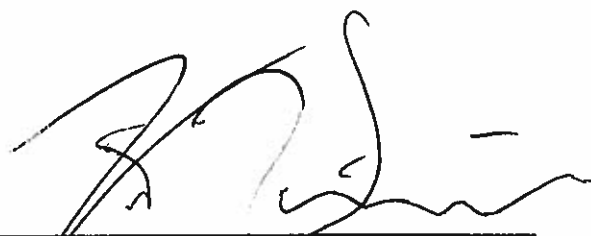
11. An email address where you can be reached.

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Paralegal: Rita DeCarlis
E-mail: decarlrd@dhec.sc.gov

October 28, 2020

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and	)	CERTIFICATE OF SERVICE
Environmental Control and Beaufort	)	
Memorial Hospital,	)	
	)	
Respondents.	)	
	)	
	)	

I, Rita D. DeCarlis, a Paralegal for South Carolina Department of Health and Environmental Control, hereby certify that I have this 28th day of October 2020, served **South Carolina Department of Health and Environmental Control's Prehearing Statement** upon all parties and counsel of record via U. S. Mail and Electronic Mail as follows:

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October 28, 2020
Columbia, South Carolina


Rita D. DeCarlis

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	<u>BEAUFORT MEMORIAL HOSPITAL'S MOTION TO DISMISS AND MOTION TO STAY</u>
	)	
Respondents.	)	
	)	

Respondent Beaufort Memorial Hospital ("BMH") hereby submits this Motion to Dismiss the contested case request of Petitioner Belfair MRI at Belfair, LLC ("Belfair") pursuant to Rule 19 of the Rules of Procedure for the Administrative Law Court and Rules 12(b)(1) and (6) of the South Carolina Rules of Civil Procedure. Additionally, BMH moves to stay discovery in this matter pending a ruling from the Court on the within Motion.

I. PROCEDURAL BACKGROUND

On July 1, 2020, the South Carolina Department of Health and Environmental Control (the "Department" or "DHEC") responded to a request of BMH by confirming that the State Certification of Need and Health Facility Licensure Act, S.C. Code § 44-7-110, *et seq.* (the "CON Act"), did not apply to BMH's relocation of its current 1.5 Tesla Magnetic Resonance Imaging scanner (1.5T MRI) located at 300 Midtown Drive, Port Royal, South Carolina to a new location in Beaufort County at 122 Okatie Center Boulevard North, Okatie, South Carolina at a total project cost of \$125,000 (the "Project"). BMH submitted its request to the Department on May 20, 2020, and the Department stamped the request as received on June 8, 2020. On July 1, 2020, the Department issued its determination (NA-20-04) that the CON Act did not apply to the Project.

Belfair's affected party letter to the Department is dated July 6, 2020, and it was received by the Department on July 9, 2020. Belfair thereafter filed its request for final review of the Department's decision to the Board of the Department on July 7, 2020 and supplemented that request for final review with a second letter on July 14, 2020. The Department submitted its staff response on July 24, 2020. On August 12, 2020, the Board of the Department declined to hold a final review conference on Belfair's request, rendering the Department's decision on the Project the final agency decision. On September 9, 2020, Belfair mailed its Request for Contested Case Hearing.

II. LEGAL ARGUMENT

- A. The Department previously issued a NAD (NA-19-09) to BMH to replace its MRI with like equipment. Belfair did not oppose or appeal this decision, and BMH implemented the 2019 NAD.**

A person or health care facility is required to obtain a CON from the Department before undertaking certain projects. S.C. Code Ann. § 44-7-160; S.C. Regs. 61-15, § 102(1). The CON Act and CON Regulation (S.C. Regs. 61-15) list types of institutions and transactions that are exempt from CON requirements and for which the CON requirements do not apply. S.C. Code Ann. § 44-7-170; S.C. Regs. 61-15, §§ 104 and 105. Projects that CON review are not applicable to, but require a written determination of non-applicability from DHEC include "replacement of like equipment with similar capabilities" S.C. Code Ann. § 44-7-170(B)(1); S.C. Regs. 61-15, § 106.1a. "Like equipment with similar capabilities" is defined by Regulation 61-15, § 103.16 as:

Medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

On April 4, 2019, the Department issued a Non-Applicability Determination (“the 2019 NAD”) (NA-19-09) to BMH for the replacement of an MRI with a like MRI with similar capabilities. Belfair did not oppose or otherwise appeal the 2019 NAD. BMH implemented the 2019 NAD in early 2020.

B. The relocation of a previously approved piece of equipment within the same service area does not require a CON, a written exemption or a NAD.

In May 2020, BMH requested confirmation from the Department that certificate of need review was not needed for its proposed relocation of the MRI within Beaufort County. The Project *does not involve*: the construction or other establishment of a new healthcare facility; a change in the existing bed complement of a healthcare facility; an expenditure by or on behalf of a health care facility in excess of \$2,000,000; a capital expenditure by or on behalf of a healthcare 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; or the acquisition of medical equipment in excess of \$600,000. This relocation, therefore, does not require a CON pursuant to S.C. Code Ann. § 44-7-160¹ and S.C. Regs. 61-15, § 102(1)².

¹ S.C. Code Ann. 44-7-160 provides:

A person or health care facility . . . is required to obtain a Certificate of Need from the department before undertaking any of the following:

- (1) the construction or other establishment of a new health care facility;
- (2) a change in the existing bed complement of a health care facility . . . ;
- (3) an expenditure by or on behalf of a health care facility in excess of an amount to be prescribed by regulation which, under generally acceptable accounting principles consistently applied, is considered a capital expenditure except those expenditures exempted in Section 44-7-170(B)(1) . . . ;
- (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;
- (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;
- (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.

² S.C. Regs. 61-15, § 102(1) similarly provides:

A person or health care facility . . . is required to obtain a Certificate of Need from the Department of Health and Environmental Control before undertaking any of the following:

- a. The construction or other establishment of a new healthcare facility;
- b. A change in the existing bed complement of a health care facility . . . ;

Further, the Project does not fit into any of the institutions, acquisitions, or transactions requiring a written exemption determination or a written determination of non-applicability (the latter sometimes referred to herein as a "NAD"). The relocation does not require a written exemption determination or non-applicability determination pursuant to either S.C. Code Ann. § 44-7-170 or S.C. Regs. 61-15, §§ 104 and 105. Specifically, S.C. Code Ann. § 44-7-170(A) provides in pertinent part that the following are exempt from Certificate of Need review:

(3) the replacement of like equipment for which a Certificate of Need has been issued which does not constitute a material change in service or a new service;....

S.C. Code § 44-7-170(B) further provides that "This article does not apply to: (1) an expenditure by or on behalf of a health care facility for nonmedical projects for services such as refinancing existing debt, parking garages, laundries, roof replacements, computer systems, telephone systems, heating and air conditioning systems, upgrading facilities which do not involve additional square feet or additional health services, replacement of like equipment with similar capabilities, or similar projects as described in regulations;...."

The applicable Regulations also demonstrate that no written determination is required, as the Project does not fall into any category that would require such a written determination.

First, S.C. Regs. 61-15, § 104(4) provides:

(4) The following projects are exempt from Certificate of Need review but do not require a written determination from the Department: the offices of a licensed private practitioner whether for individual or group practice. This exemption shall not apply to: (1) the construction or other establishment of a new health care facility, as in Section 102.1.a; or

c. An expenditure by or on behalf of a health care facility in excess of two million dollars (\$2,000,000) which, under generally acceptable accounting principles consistently applied, is considered a capital expenditure except those expenditures exempted in Section 104 . . . ;

d. 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;

e. If no capital expenditure is made, the offering of any 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 . . . ;

f. The acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of six hundred thousand dollars (\$600,000).

(2) the acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of six hundred thousand dollars (\$600,000), as in Section 102.1.f.

Second, S.C. Regs. 61-15, § 105(1) provides:

(1) Certificate of Need review is not applicable to the following, but prior to undertaking the proposed project, a written determination of non-applicability from the Department is required: a. Replacement of like equipment with similar capabilities as defined by the Department in Section 103.16. b. Acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is not in excess of six hundred thousand dollars (\$600,000). A written determination of nonapplicability is only required when any question exists as to whether or not the total project cost is below the six hundred thousand dollars (\$600,000) threshold.

Third, S.C. Regs. 61-15, § 105(5) provides:

(5) Certificate of Need review is not applicable to the following projects and a written non-applicability determination from the Department is not required. However, written notification shall be provided to DHEC Division of Health Facilities Construction prior to undertaking the following projects: a. An expenditure by or on behalf of a health care facility for non-medical projects, such as refinancing existing debt, parking garages, laundries, roof replacement, computer systems, telephone systems, and heating and air conditioning systems; b. The upgrading of medical facilities, which do not involve additional square feet to the facility or additional health services.

BMH's Project simply does not include the acquisition or replacement of equipment; rather it merely moves a previously approved piece of equipment already owned from one medical office building to another, consolidating MRI services with private physician offices all within the same service area of Beaufort County. BMH's Project does not trigger any CON review, nor does it require a written determination from DHEC.

The relocation did not require review or approval from the Department; however, BMH sought to confirm the same and requested the Department confirm that the CON Act did not apply to its Project. In making its request, BMH used DHEC form 0431³, but did not check either the box for an exemption or the box for a non-applicability determination. Neither applied to BMH's

³ See *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (allowing a trial court to consider documents that are attached or incorporated by reference in the pleadings when considering a motion to dismiss).

request. In fact, the form, itself, was not necessary for BMH's request. The Department issued its July 1, 2020 letter which states, in pertinent part, "[b]ased on the material you provided in support of your request, it is the decision of the Department that the [CON] Act is not applicable to the project"

C. Procedurally DHEC has no legal duty to issue a decision in writing, and there is no right or obligation of this Court to conduct a contested case hearing.

As indicated above, the Project did not require a CON, a written exemption or a non-applicability determination. The Department simply confirmed, by letter, BMH's understanding that the Project did not require CON review. In a similar case, the South Carolina Supreme Court in *Amisub of S.C., Inc. v. S.C. Dep't of Health* was required to consider whether the establishment of a medical office building which did not require CON review, a written exemption or a non-applicability determination gave rise to a contested case. *See Amisub of S.C., Inc. v. S.C. Dep't of Health*, 403 S.C. 576, 743 S.E.2d 786 (2013). The South Carolina Supreme Court concluded that it did not. As the court noted, "[s]ince 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." *Id.* at 595-596, 743 S.E.2d at 797.

There is no "legal duty" in this case that requires the Department to conduct a CON review, to issue a written exemption or to issue a non-applicability determination. In this situation, Belfair is not entitled to a contested case hearing, and this contested case should be dismissed as a matter of law.

D. Belfair is belatedly and improperly challenging the prior, 2019 NAD through this contested case proceeding.

As demonstrated by the foregoing, there is no basis upon which Belfair can challenge BMH's confirmatory request that nothing was needed from the Department to relocate its already existing, approved and operational equipment within Beaufort County. Instead, Belfair is using this contested case to belatedly and improperly attack the 2019 NAD. Belfair's tactics are revealed in its two letters to the Clerk of the DHEC Board.

In its July 7, 2020 letter to the Clerk of the DHEC Board, Belfair states: "[I]f Beaufort Memorial is correct that the NAD process permits the relocation of equipment that only eluded CON review upon installation because it replaced existing equipment, then nothing prevents a health care provider from obtaining a replacement NAD for costly equipment in Beaufort County, and then another NAD to move it to Greenville County, so long as the relocation itself stays under the \$600,000 threshold." First, there was no eluding of CON review by the 2019 NAD for the replacement of like equipment. The 2019 NAD was proper, and Belfair did not oppose or appeal that decision. Further, the current NAD does not seek to relocate equipment outside of the service area of Beaufort County.

In its second July 14, 2020 letter to the Clerk of the DHEC Board, Belfair states that its "basic position is that placing a 1.5T MRI in a brand-new location . . . should have been treated as a new project requiring a Certificate of Need." Belfair states that "the NAD of April 4, 2019 [the 2019 NAD] was issued in error, and a CON was required for the project. Likewise, the project was not exempt under S.C. Code Ann. 44-7-170(A)(3)/S.C. Reg. 61-15, Section 104 because a CON was not issued for the piece of equipment being replaced." Belfair argues that "[e]ven assuming the validity of the April 4, 2019 NAD (and it is not valid), that NAD was based on the representation by BMH that it would be replacing an MRI at its Port Royal, SC location."

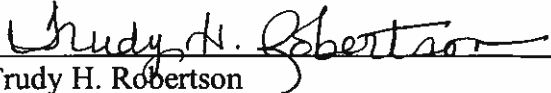
The 2019 NAD was proper and valid, period. Belfair did not oppose or appeal the 2019 NAD. It cannot now surreptitiously try to do so by disguising its belated arguments as an appeal on the relocation request of the already operational equipment. Belfair's present efforts are contrary to South Carolina's CON statutory and regulatory requirements, and it cannot use this contested case as a belated challenge of the 2019 NAD.

E. Discovery in this matter should be stayed pending a ruling from the Court on the within Motion to Dismiss.

BMH requests that all discovery, including responses to pending discovery requests, be stayed until the Court can rule upon BMH's Motion to Dismiss. This request is made in the interest of judicial economy and the costs that would be incurred by the parties in exchanging and responding to discovery if BMH's Motion to Dismiss is granted by the Court. The considerations for BMH's Motion are matters of law and do not require any factual discovery or development for a ruling.

III. CONCLUSION

For the reasons stated above, BMH requests that this Court grant its Motion to Dismiss. BMH further requests that this Court stay all discovery, including pending discovery requests, until such time as the Court considers and rules upon BMH's Motion to Dismiss.


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 Attorneys for Beaufort Memorial Hospital

January 8, 2021
 Charleston, SC

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and	)	
Environmental Control and Beaufort	)	
Memorial Hospital,	)	
	)	
Respondents.	)	
	)	
	)	

PROOF OF SERVICE AND CERTIFICATE OF THE DATE OF FILING BY MAIL

The undersigned does hereby certify that a copy of the foregoing *Beaufort Memorial Hospital's Motion to Dismiss and Motion to Stay* was filed by mail and served, by depositing copies in the Regular U.S. mail, with sufficient postage attached thereto, on January 8, 2021 and addressed to:

The Honorable H.W. Funderburk, Jr.
Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
Meredith W. Sella, Esquire
SC DHEC-Office of General Counsel
2600 Bull Street
Columbia, SC 29201

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Attorneys for Beaufort Memorial Hospital

January 8, 2021
Charleston, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	PETITIONER’S EXPERT WITNESS
v.	)	DISCLOSURES
	)	
South Carolina Department of Health and	)	
Environmental Control and Beaufort Memorial	)	
Hospital,	)	
	)	
Respondents.	)	

Pursuant to this Court’s November 5, 2020 Scheduling Order, Petitioner MRI at Belfair, LLC d/b/a 3T MRI at Belfair (“Belfair”) hereby makes the following expert witness disclosures, who Belfair expects to call at trial to present evidence by live or deposition testimony.

Belfair reserves the right to supplement the following list of expert witnesses with other witnesses who may offer their expert opinion to the extent qualified to do so. Belfair reserves the right to call each expert witness designated by any other party in this lawsuit. Belfair also reserves the right to call any and all independent expert witnesses who may have percipient expert testimony, but may also offer expert opinions to the extent qualified to do so. Belfair reserves the right to name, call, and/or designate any additional experts retained, and submit a supplemental expert witness list and/or report as the need may arise during the course of discovery and investigation. Belfair also reserves the right to identify additional witnesses to provide rebuttal testimony.

EXPERTS

Belfair hereby identifies the following retained expert witnesses:

1. Kathryn M.T. Platt, MBA
President
Platt HMC, Inc.
881 Piedmont Avenue

Atlanta, GA 30309
(404) 728-1974

In brief, Ms. Platt is expected to testify regarding Certificate of Need applications, exemptions and non-applicability reviews, including those requested or that should have been requested by Respondent, and all other aspects of the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110, *et seq.* (the “CON Act”) and related regulatory scheme. She is also expected to testify regarding project costs. This is not an exhaustive list but provides only a general overview of the topics about which Ms. Platt may offer testimony and does not include any topics which might be raised in rebuttal or in response to a question from Respondent or any other party at a deposition or during a hearing.

Ms. Platt will be compensated at a rate of \$375 per hour for any professional time spent, including travel time, and reimbursement for expenses to be invoiced at cost. A copy of her CV is attached hereto as **Exhibit A**.

2. Tori Tibshrary, MHA
Independent Senior Consultant
Platt HMC, Inc.
881 Piedmont Avenue
Atlanta, GA 30309
(404) 728-1974

In brief, Ms. Tibshrary is expected to testify regarding Certificate of Need applications, exemptions and non-applicability reviews, including those requested or that should have been requested by Respondent, and all other aspects of the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110, *et seq.* (the “CON Act”) and related regulatory scheme. She is also expected to testify regarding project costs. This is not an exhaustive list but provides only a general overview of the topics about which Ms. Tibshrary may offer

testimony and does not include any topics which might be raised in rebuttal or in response to a question from Respondent or any other party at a deposition or during a hearing.

Ms. Tibshrany will be compensated at a rate of \$275 per hour for any professional time spent, including travel time, and reimbursement for expenses to be invoiced at cost. A copy of her CV is attached hereto as **Exhibit B**.

Belfair reserves the right to identify additional witnesses to provide rebuttal testimony.

Dated: January 15, 2021

GORDON & REES LLP

By s/Henry W. Frampton, IV
Henry W. Frampton, IV (75314)
E-mail: hframpton@grsm.com
Victoria T. Kepes (102536)
E-mail: vkepes@grsm.com
40 Calhoun Street, Suite 350
Charleston, SC 29401
Telephone: 843.278.5900
*Attorneys for Petitioner MRI at Belfair,
LLC, d/b/a 3T MRI at Belfair*

EXHIBIT A

KATHRYN M. T. PLATT
President, Platt HMC, Inc.
881 Piedmont Ave.
Atlanta, GA 30309

WORK EXPERIENCE:

2008 -	<u>President</u> , Platt HMC, Inc. Atlanta, Georgia
1990 - 2007	<u>Principal</u> , Sullivan Consulting Group, Inc. Atlanta, Georgia
1988 - 1989	<u>Financial/Budget Analyst</u> , Massachusetts General Hospital Boston, Massachusetts
1986	<u>Mental Health Technician</u> , HCA West Lake Hospital Longwood, Florida

EDUCATION:

M.B.A. in Health Care Management and Finance
 (Cum Laude)
 Boston University
 Boston, Massachusetts

B.S. in Psychology
 Emory University
 Atlanta, Georgia

PROFESSIONAL EXPERIENCE:

Expert testimony in connection with Certificate of Need litigation related to health care planning, Certificate of Need preparation, and need determination, and finance.

- Accepted as an expert in healthcare planning and finance in Alabama, Florida, Georgia, Kentucky, North Carolina, South Carolina, and Tennessee.
- Provided expert testimony in administrative appeal hearings related to Certificate of Need applications for new and replacement hospitals; general and specialized hospital beds; addition of medical equipment; development of cancer treatment centers, skilled nursing facilities, hospices, home health agencies, renal dialysis, ambulance services, and ambulatory surgery centers.
- Coordinated and conducted analyses for expert testimony in appeal and administrative hearings connected with Certificate of Need litigation in the areas of health planning and finance.

Directed the development and review of Certificate of Need applications for new hospitals, other healthcare facilities, and development of new technology and services.

- Developed demographic profiles, utilization and patient origin projections.
- Analyzed the need for beds and specialized services within the planning regulations of numerous states using a variety of state and national planning methodologies.
- Prepared Certificate of Need responses to demonstrate the need for specialized services including acute care, psychiatric, comprehensive rehabilitation, ambulatory surgery, skilled nursing, assisted living, home health, hospice, open heart surgery, cardiac catheterization, lithotripsy, Gamma Knife, CyberKnife, robotic surgery, magnetic resonance imaging, CT, PET/CT, assisted living, renal dialysis, and radiation therapy services.
- Prepared utilization based financial projections and payor mix projections of numerous services for use in Certificate of Need applications.
- Prepared responses addressing review criteria and need methodologies for a variety of bed licensure categories and specialized services.
- Compiled responses to questions raised in completeness review for numerous Certificate of Need applications.

Prepared comprehensive market analyses of specialized service in competitive service areas.

- Conducted comparative analysis of financial, staffing, and utilization projections and assumptions.
- Analyzed financial impact of development of specialized services in competing health care facilities.

Participated in the rule-making process and development of state health plans on behalf of both providers and as an advisor to state regulatory bodies.

- Analyzed need methodologies for regulated services including general medical/surgical beds, pediatric beds, NICU beds, psychiatric beds, comprehensive rehabilitation beds, ambulatory surgery, open heart, cardiac catheterization, skilled nursing, assisted living, home health, hospice, MRI, PET scan, radiation therapy (linear accelerator, Gamma Knife, robotic surgery, renal dialysis, and lithotripsy).

Conducted and participated in development of strategic plans for acute care hospitals.

- Participated in the development of external economic and market assessment and internal assessments including physician interviews and surveys.
- Participated in structuring hospital formation of mission statement, goals, and objectives.

- Prepared financial projection of hospital and product line operating performance and financial impact alternative operating scenarios.
- Prepared presentations to strategic planning committees and for board retreats.

Prepared hospital financial analyses to support strategic decision-making.

- Prepared analysis of hospital and product line financial performance.
- Researched and prepared financial evaluation of alternative operating scenarios for several hospital acquisitions or operation of primary care centers.
- Prepared financial projections and valuation analysis for negotiation in several physician practice acquisitions.
- Developed, implemented, and monitored budget and management control tools.
- Developed and implemented ancillary department volume reporting and management systems.
- Developed, implemented, and monitored revenue and non-salary expense budgets of over \$400 million for a tertiary acute care hospital.
- Developed flexible bottom-line budget agreements for specific hospital ancillary departments.
- Analyzed the cost and reimbursement implications of development of hospital services and special projects.

EXHIBIT B

VICTORIA R. TIBSHRANY

1432 Berkeley Rd
Columbia, SC 29205
803-261-2535
toritibs@live.com

EDUCATION

University of South Carolina
Master of Health Administration

Columbia, SC
May 2001

- GPA: 3.85
- 2000 Suzan Boyd Honors Scholarship
- Omicron Delta Kappa (National Leadership Honor Society) Selectee

University of South Carolina
B.S. in Business Administration

Columbia, SC
May 1999

- Major: Finance

EMPLOYMENT

Platt Health Management Consulting

December 2009 - Present
Columbia, SC

Senior Independent Consultant

- Serves as primary consultant for projects located in South Carolina
- Prepares all aspects of Certificate of Need applications to include strategy, need, and competitive analyses for clients in South Carolina, North Carolina, Georgia, and Florida
- Prepares necessary follow-up documentation for Certificate of Need projects that have been approved
- Aids in strategy planning for clients considering going through the Certificate of Need application process
- Provides strategy input and written analysis for the opposition of projects going through the Certificate of Need process and in contested cases during document preparation, discovery, and hearings
- Serves Platt HMC as a resource for other staff consultants

South Carolina Department of Health and Environmental Control
Bureau of Health Facilities and Services Development

July 2001 – January 2009
Columbia, SC

Special Projects- Certificate of Need Program

November 2007 – January 2009

- Served as a part-time resource to the Bureau of Health Facilities and Services Development to assist with staff training and other special projects as needed
- Reviewed final completion reports for all completed Certificate of Need (CON) projects to assess compliance with the approval and performed penalty action for projects which were not in compliance
- Assumed duties of various CON staff members during times of extended leave

Program Director- Certificate of Need Program

September 2006 – November 2007

- Served as senior level resource to management for CON program and provided direction to the Bureau Director in the development of CON findings and recommendations for CON decisions
- Supervised and managed CON review staff, exemption staff, Graduate Assistants, and administrative staff and assisted in the guidance and direction of staff members to ensure proper development in work methods and research techniques in file development
- Was responsible for all personnel actions for the staff listed above to include recruitment/hiring, performance reviews, leave authorization, position descriptions, and disciplinary actions
- Served as senior staff reviewer and technical expert for the CON programs and as a resource for legal and CON review staff in understanding and applying the regulations and law to the State Health Plan criteria and standards
- Provided ongoing staff training to ensure thoroughness and consistency in the CON review process
- Provided technical consultation to health facility administrators and others as necessary
- Continued most of the Program Coordinator II duties listed below while training CON review staff to assume some of these duties in the first half of 2007

Program Coordinator II – Certificate of Need and Planning Program

June 2002 – September 2006

- Planned, coordinated, and directed compliance with state guidelines to the SC Certification of Need (CON) Program
- Consulted with healthcare administrators, physicians, attorneys, architects, and other professionals to evaluate applicability of the CON program to particular projects and provides assistance in development of an application appropriate to the type of determination sought by the applicant
- Made all applicability and exemption determinations for projects submitted to the Bureau of Health Facilities and Services Regulation
- Monitored approved Certificate of Need projects for compliance with the application
- Oversaw and tracked the development of projects given CON approval to ensure compliance with the program
- Visited sites, interviewed administrators, and conducted investigations to ensure that projects are in compliance with appropriate regulations and approved applications
- Determined projects that are out of compliance and followed up with appropriate action, such as a plan of correction, consent order, fine, or other legal action
- Composed the Bureau's monthly newsletter that outlines all monthly CON and applicability actions and other appropriate information

Program Coordinator II – Certificate of Need and Planning Program

November 2001 – June 2002

Inspector III – Certificate of Need and Planning Program

July 2001 – November 2001

- Reviewed and evaluated information provided in CON applications; requested additional information as needed to ensure completeness
- Consulted with healthcare facilities and individuals to provide technical assistance, interpretation of policy and rules, and advice regarding the need for healthcare services and equipment in South Carolina and regarding related regulations and law
- Assisted attorneys in preparation of contested case hearings and testified on matters pertaining to the CON and health planning programs
- Conducted special studies and analyses including staff findings, project summaries, and other evaluations
- Served on project review committee for examination and analysis of controversial applications
- Coordinated Freedom of Information distribution for the CON program
- Assisted Bureau Director in policy analysis and preparation of state documents for changes in health services regulations

Received the Health Regulation deputy area's Monthly Award for Excellence in March 2002, August 2003, February 2005, and March 2007

Lexington Medical Center*Administrative Resident – Administration / Planning***West Columbia, SC**

January 2001 - May 2001

PROFESSIONAL ACTIVITIES AND EDUCATION**Carolina Society for Healthcare Strategy and Market Development****SC DHEC Workforce Development Program (Management Training Program)**

March 2005 - November 2007

SC DHEC Employee Grievance Officer

May 2006 – November 2007

COMMUNITY INVOLVEMENT**Junior League of Columbia***Community Treasurer*

2006 to present

2008 to 2009

Leadership Columbia

Class of 2006

University of South Carolina Alumni Association*Young Alumni Board – Chairperson (2005-2006)*

1999 to present

2002 - 2006

Champions of Palmetto Health Children's Hospital*Executive Council – Member at Large*

2002 - 2007

2005 – 2006

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

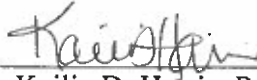
MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
Petitioner,	)	CERTIFICATE OF SERVICE
	)	
v.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	
	)	
Respondents.	)	

It is hereby certified that a true and correct copy of *Petitioner MRI at Belfair, LLC's Expert Witness Disclosures* was served via US mail upon the parties addressed below on this 15th day of January, 2021:

Trudy H. Robertson, Esq.
Donald Bancroft Meyer, Esq.
Moore & Van Allen PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Attorneys for Beaufort Memorial Hospital

Ashley C. Biggers, Esq.
Vito M. Wicevic, Esq.
Meredith W. Sella, Esq.
SC DHEC - Office of General Counsel
2600 Bull Street
Columbia, SC 29201
*Attorneys for South Carolina Department
of Health and Environmental Control*

GORDON & REES LLP

By 
Kailie D. Harris, Paralegal

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	
v.	)	PETITIONER'S RESPONSE IN
	)	OPPOSITION TO BEAUFORT
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	MEMORIAL HOSPITAL'S MOTION TO
	)	DISMISS
	)	
Respondents.	)	

Petitioner MRI at Belfair, LLC d/b/a 3T MRI at Belfair ("Belfair") respectfully submits this Response in Opposition to Beaufort Memorial Hospital's ("BMH") Motion to Dismiss and Stay. For the following reasons, the Court should deny the motion in full.

INTRODUCTION

This case presents a naked attempt by BMH to avoid Certificate of Need (CON) review by splitting their real project—construction of a new imaging center in a new service area—into multiple requests for non-applicability determinations (NADs). With respect to the MRI portion of the new imaging center, the plan is to couple a 2019 NAD for replacement of an MRI in Port Royal, South Carolina, with the NAD at issue here, which purports to allow relocation of that brand-new MRI to a new building in Okatie nearly 20 miles away. By splitting the project up, BMH seeks to place a brand-new \$1.2 million MRI in a brand-new location without any regulatory evaluation of the need for such a project. What is more, BMH is using other NADs and / or exemptions to create an entirely new multi-million dollar imaging center with zero CON review. This act of splitting project costs to avoid CON review is specifically prohibited by the applicable regulations.

FILED

JAN 22 2021

SC ADMIN. LAW COURT

This contested case arises in an ordinary way: Belfair requested a contested case hearing after the Department of Health and Environmental Control (“DHEC”) staff’s issued BMH, *at BMH’s express request*, a formal, written NAD, and the DHEC Board declined to schedule a final review conference. Now, more than five months *after* Belfair’s request for a contested case hearing, BMH asks the Court to dismiss this case on the bizarre theory that it neither needed nor wanted the NAD that it expressly requested and received. This contention is patently false, as the applicable regulations both allowed and indeed required BMH to either apply for a Certificate of Need or request an NAD in light of the nature and cost of the project.

BMH’s arguments that this case is subject to dismissal is wrong on numerous fronts. *First*, this Court has clear jurisdiction under the Administrative Procedures Act (“APA”), as Belfair has timely requested a contested case hearing following final agency action on a formal, written non-applicability determination.

Second, this case is not subject to dismissal under Rule 12(b)(6), SCRCF, because that rule does not apply in this Court, and, even if it did, BMH’s motion would be more than 100 days late.

Third, this case presents a clear and viable claim that the July 1, 2020, NAD was improperly issued because the proposed project requires a Certificate of Need. While further discovery is needed to flesh out Belfair’s claim, Belfair has alleged and expects to prove that a Certificate of Need is required because the project meets both the \$600,000 and \$2,000,000 cost thresholds, because CONs are location specific and projects cannot be moved without a new CON, and because there is simply no exemption applicable to relocations. More fundamentally, allowing BMH to layer NAD upon NAD to evade CON review would subvert the CON process. For all of these reasons, BMH’s motion should be denied.

PROCEDURAL BACKGROUND

In July 2003, DHEC issued an “exemption”¹ to the Lowcountry Medical Group for the replacement of an old 1.0T MRI with a new 1.0T MRI at 300 Midtown Dr., Port Royal, South Carolina (the “Port Royal” location) (“Exemption E-03-49”). (See Staff Response to Request for Final Review, Docket No. 20-RFR-37, at 2, attached hereto as **Exhibit A**.)

On April 4, 2019, almost 16 years after the original exemption, BMH received an NAD to replace the second MRI with a new Canon Medical Titan 1.5T MRI (“NA-19-03”).² (Ex. A, at 2.) In that NAD, DHEC explained that the NAD was based on S.C. Code Ann Regs. 61-15 § 105(1)(a), which provides that CON review is not applicable to the “[r]eplacement of like equipment with similar capabilities.” According to the materials submitted by BMH, the 1.5T MRI was purchased for \$1,229,037.00. (*Id.*) Per the CON regulations, the NAD was valid for 12 months—April 4, 2019 to April 4, 2020. (Ex. B.)

On May 20, 2020, approximately six (6) weeks after the expiration of NA-19-03, BMH requested *another* NAD regarding the exact same piece of equipment. This time, BMH requested an NAD for the “relocation” of the 1.5T MRI from the Port Royal location, where it had just been installed, to a brand new medical facility located almost 20 miles away and in a vastly different service area: 122 Okatie Center Blvd North, Okatie, South Carolina (the “Okatie” location). (See Request for NA determination at 1, attached to Platt. Aff. as Ex.1.) In that request, BMH submitted information showing that the purchase of the 1.5T MRI was with the express purpose of moving

¹ The CON regulations were updated in 2012 to separate exemption determinations from non-applicability determinations (“NADs”).

² DHEC in the Staff Response and BMH in their motion refer to this as NA-19-09, but the documents DHEC provided in response to a FOIA request indicate that this was NA-19-03, which is attached hereto as **Exhibit B**. Thus, it appears that both DHEC and BMH were referring to NA-19-03, attached hereto, which is the only NAD of April 4, 2019 that was provided by DHEC.

it to a brand new health facility, not to replace the old MRI as they originally claimed. (*Id.* at 20 (showing the justification of the **purchase** of the \$1.2 million MRI was a “future move to new Bluffton MOB”).) Despite this information, DHEC issued NA-20-04, an NAD based on the alleged total project cost reported by BMH of \$125,000.

In addition to moving the new 1.5T MRI to a brand new health facility, building out a room for the MRI with shielding and other necessary construction, BMH is also moving a CT scanner to the new facility under an exemption. (See Certificate of Need Update, DHEC, June 2020 at 22, attached hereto as **Exhibit C.**)³ As demonstrated in the drawings BMH submitted to DHEC, BMH is building an entirely new imaging center, in a brand new location, in a new service area, using brand new equipment, but attempting to avoid any review from DHEC. (See Ex. 1 to Platt Aff. at 25.)

Contrary to BMH’s claims, Belfair’s expert health planner, Kathy Platt, believes the project cost to install a new 1.5T MRI in a brand new medical facility such as the Okatie facility is well above and beyond the \$125,000 claimed by BMH. (See Platt Aff. ¶¶ 9-10, attached hereto as **Exhibit D.**)

On July 1, 2020, despite the clear problems with BMH’s request and submissions, DHEC issued the instant NAD for the “relocation” of the new MRI from Port Royal to Bluffton. (NA-20-04, attached hereto as **Exhibit E.**) Belfair timely requested final review. (Requests for Final Review, attached hereto as **Exhibit F.**) The DHEC Board declined to hold a final review conference, and Belfair timely requested a contested case hearing in this Court. (Denial of Final Review, attached hereto as **Exhibit G**; Request for Contested Case Hearing, attached hereto as

³ It is notable that despite a FOIA request to DHEC requesting all information and documents submitted by BMH regarding the new Okatie facility, DHEC failed to provide Belfair with any information or mention of the requested exemption regarding the CT scanner.

Exhibit H.)**THE REGULATORY SCHEME**

Because the claims in this case are based on the regulatory scheme set forth in the Certificate of Need Act (the “CON Act”), S.C. Code Ann. § 44-7-110, *et seq.*, and relevant regulations, it is helpful to begin with the relevant statutory and regulatory background.

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 high quality services are provided in health facilities in this state.” S.C. Code Ann. § 44-7-120 (emphasis added). As such, the Act requires that facilities apply for a CON prior to undertaking certain projects, and that DHEC undertake a CON review prior to issuing a CON. *Id.*

As relevant here,

“[a] health care facility . . . is required to obtain a [CON] from the department before undertaking . . . the construction or other establishment of a new health care facility, . . . [a]n expenditure by or on behalf of a health care facility in excess of []\$2,000,000[], . . . [and] 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].”

S.C. Code Ann. § 44-7-160(1), (3), and (6); S.C. Code Ann. Regs. 61-15, § 102(1)(a), (c), and (f).

With regard to expenditures, “[a]n applicant may not split or combine one expenditure into two or more expenditures for the purpose of avoiding [CON] review.” S.C. Code Ann. Regs. 61-15 § 102(2). “When any question exists, a potential applicant shall forward a letter requesting a formal determination by [DHEC] as to the applicability of the [CON] requirements to a particular project.”

Id. § 102(3) (emphasis added).

Certain projects and acquisitions are “exempt” from CON review, but require a written determination from DHEC of that exemption, and others are exempt without a written

determination. As relevant here, the following is exempted with the need for a written determination of exemption: “[t]he replacement of like equipment for which a [CON] has been issued and the replacement does not result in a material change in service or a new service.” S.C. Regs. Ann. 61-15 § 104.

In addition, CON review is “not applicable” to other projects, some of which require a written NAD from DHEC and some that do not. As relevant here, an NAD is required for the: (1) “[r]eplacement of like equipment with similar capabilities”; and (2) “[a]cquisition of medical equipment which is to be used for diagnoses or treatment if the total project cost is not in excess of []\$600,000[.]” S.C. Code Ann. Regs. Ann. 61-15 § 105(1). Notably, beyond the specific situations set forth in § 105 of the Regulation, an NAD is required by § 102(3) of the Regulations whenever a question exists as to the applicability of the CON laws to a project. S.C. Code Ann. Regs. 61-15, § 102(3). By this provision, a provider can—and indeed should—request an NAD whenever there is doubt about a project’s CON status, and obtaining an NAD carries the benefit of a formal regulatory determination that the project is permissible, which effectively guarantees the provider that DHEC will not seek to shut down the project on the grounds that it needed a CON. Where an NAD is granted, it is valid for a period of 12 months after issuance. *Id.*

The statutes and regulations do not contain any exemption or non-applicability status for the relocation of medical equipment or services.

DISCUSSION

BMH appears to state that their motion is based upon Rules 12(b)(1) and (6) of the S.C.R.C.P., but neither argument has any merit. First, this Court has jurisdiction over a contested case hearing on the review of a final agency decision under the APA. Second, Rule 12(b)(6) is not applicable in this case and is untimely in any event. Finally, Belfair has stated a clear and

viable claim that the NAD issued was improper because the proposed project requires a CON.

I. This Court Has Subject Matter Jurisdiction

BMH's argument that this Court lacks jurisdiction is not a serious one because this Court has jurisdiction over contested case hearings challenging final agency decisions. More specifically, this Court has jurisdiction over contested case hearings challenging the applicability of CON review. Under the APA, this Court has the power to preside over "contested case" proceedings. S.C. Code Ann. §§ 1-23-600(A)-(D); § 44-1-60(F). The APA defines a "contested case" 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 [ALC] after an opportunity for hearing." S.C. Code Ann. § 1-23-505(3).

As relevant here, any staff decision from DHEC "involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of [DHEC]," give rise to a contested case. S.C. Code Ann. § 44-1-60(A) and (C). CONs, written exemptions and "any issuance of a determination regarding the applicability of" a CON review, may all give rise to a contested case hearing. *See id.* § 44-7-210(G). The staff decision may be challenged by an affected person within 15 days of mailing, triggering a final review by the Board. *Id.* § 44-1-60(E)(2). Where the Board declines to hold a final review conference, an affected person "may file a request with the [ALC] for a contested case hearing within thirty calendar days after [] notice is mailed . . . that the board declined to hold a final review conference." *Id.* § 44-1-60(G)(1).

Here, each of the necessary steps has occurred. BMH submitted a request for an NAD. On July 1, 2020, DHEC issued an NAD, which constitutes a formal, written decision from DHEC. Just six days later, on July 7, 2020, Belfair filed a request a final review. On August 12, 2020, the

DHEC Board formally decline to hold a final review conference. In that denial, the Board noted that by denying the review, the staff response became the final agency decision and that an “affected person may request a contested case hearing before the [ALC] within thirty calendar days after notice is mailed.” (Ex. G, at 2.) On September 9, 2020, less than 30 days later, Belfair filed a request with this Court for a contested case hearing. (See Ex. H.) Thus, under the APA, this Court has jurisdiction over this contested case hearing.

BMH attempts to contradict themselves in its motion by arguing that, although they expressly sought and received an NAD from DHEC, they were not required to do so, and thus this Court lacks jurisdiction. This argument has multiple flaws.

First, the mere fact that BMH sought and received an NAD precludes this argument. Whether BMH now claims they wanted it or not, BMH received formal, written staff decision. DHEC then denied final review, finalizing the staff response as the final agency decision. Under the APA, any timely challenge to that decision belongs exclusively in this Court.

Second, BMH’s contention that their own request for an NAD was gratuitous and unnecessary is utterly absurd. Under the regulations, “[w]hen *any question exists*, a potential applicant shall forward a letter requesting a formal determination by [DHEC] as to the applicability of the [CON] requirements to a particular project...” S.C. Code Ann. Regs. 61-15 § 102(3) (emphasis added). Thus, it is the responsibility of health care facilities to decide in the first instance when they think there is a sufficient question to warrant requesting a written determination. Here, BMH made that decision and requested such a determination. Their request triggered the regulatory process requiring DHEC to consider the request and to issue a written determination.

It was decidedly in BMH’s best interest to make such a request. Failure to comply with

the CON regulations is grounds for DHEC to impose a variety of penalties, including monetary penalties, suspension of licenses and CONs, injunctions, and criminal charges. *Id.* § 701; S.C. Code Ann. § 44-7-320 through 44-7-340. Thus, requesting a determination on the front end is imminently reasonable. In doing so, BMH sought and received protection from an enforcement action by DHEC, monetary penalties, suspension of licenses and CONs, and criminal charges. Furthermore, as shown below, BMH was right to have a “question” as to applicability, since this project does indeed require a CON review. Having received the protection accorded by a formal, written NAD, it is entirely disingenuous for BMH to contend now, eight months after the fact, that they were not required to seek a written determination from DHEC. Indeed, such conduct is grossly inequitable and should be estopped.

In support of this contradictory argument, BMH relies exclusively on *Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center v. SCDHEC*, 403 S.C. 576, 743 S.E.2d 786 (S.C. 2013). That case, however, clearly explains that the ALC has jurisdiction over a contested case based on a final decision from DHEC, whether an NAD or CON, but only where a final written decision has been provided. *Id.* In *Amisub*, the petitioner had requested that DHEC require the respondent to submit a request for an NAD or a CON application on a specific project, but DHEC declined to require such an application. *Id.* at 580, 743 S.E.2d at 788. The petitioner requested a contested case hearing to challenge the validity of DHEC’s *refusal* to issue a written determination in response to the petitioner’s request. *Id.* at 581, 743 S.E.2d at 789. Thus, the petitioner attempted to challenge the fact that DHEC failed to make any final agency decision in writing. *Id.* The court reasoned that since no written final agency existed to contest and since a competitor cannot create such a determination by asking DHEC to review a competitor’s project, there was no agency action

to dispute and thus no jurisdiction. *Id.* at 596, 743 S.E. 2d at 797.⁴

Here, on the other hand, BMH requested and was granted a decision as to the applicability of a CON review. To be clear, once BMH requested a determination under § 102(3), nothing in the CON statute or regulations permitted DHEC ignore the request. Belfair only challenged that decision once it had been made and had been reduced to a formal, written determination. The DHEC Board confirmed that decision by denying a final review conference and expressly stating that written staff decision became “the final agency decision” in the matter. Under the regulations, as *Amisub* correctly explained, DHEC is required “to issue a final determination to [a party that requests one] regarding whether or not a CON is necessary for a proposed project.” 403 S.C. at 590, 743 S.E.2d at 794; *see also id.* at 596, 743 S.E.2d at 798 (“[W]here there is a CON, a 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.”); *A.O. Smith Corp. v. SCDHEC*, 428 S.C. 189, 199, 833 S.E.2d 451, 457 (S.C. Ct. App. 2019) (quotations and citations omitted) (“The ALC is authorized to make a final determination—after a final agency decision. . .”); *Medical University Hops. Auth. v. SCDHEC*, Docket No. 18-ALJ-17-0172-CC, 2019 WL 183991, at *9 (S.C.A.L.C. Jan. 4, 2019) (holding the ALC has jurisdiction over a decision extending a CON because in addition to authority under S.C. Code. § 44-7-210, the ALC has jurisdiction over “other actions of [DHEC] which may give rise to a contested case hearing” (citing § 44-1-60)). Once a final decision is given and a request for a contested case hearing is timely filed, as it was here, this Court has jurisdiction. Therefore, Belfair properly challenges a written determination regarding the applicability of CON review by filing a request for a contested case hearing.

For these reasons, this Court has jurisdiction over this contested case hearing challenging

⁴ It is noteworthy that the court in *Amisub* was interpreting the prior version of the relevant regulations, prior to the significant re-write promulgated in 2012.

the validity of DHEC's final decision finding that a CON review is not applicable to the "relocation" of the MRI at issue. The motion should therefore be denied.

II. The Motion is improper and untimely.

A motion to dismiss for failure to state a claim has no place in this Court. Rule 68 of the Rules of Procedure for the Administrative Law Court ("SCRALC") permits the ALC to apply the South Carolina Rules of Civil Procedure ("SCRCP") where the SCRALC do not address an issue. Since the SCRALC do not contain any basis upon which to file a motion to dismiss or any time period for doing so, it appears that BMH submits this motion under Rule 12(b)(6) for failure to state a claim under the SCRCP. In this proceeding, however, the claim is initiated by a request for a contested case hearing, rather than a complaint or other pleading. SCRALC, Rule 11. Thus, a motion to dismiss for failure to state a claim cannot logically be applied. There is no complaint for BMH to challenge, but merely a challenge to a final agency decision which states a claim by its very existence.

Moreover, to the extent any such motion is permitted (and it should not be), it is untimely. Rule 12(b)(6) requires that a motion for failure to state a claim must be made **prior to** any responsive pleadings. In this case, all parties have submitted prehearing statements and the parties are, according to this Court's Scheduling Order, supposed to be conducting discovery. Instead, BMH filed this motion four months after the request for a contested case hearing and more than two months after the parties filed Pre-Hearing Statements. Thus, the motion is untimely and should be denied.

III. Belfair has stated a clear and viable claim.

Even if the Court considers the substance of the motion (and it should not), Belfair has set forth a viable claim challenging a final agency decision on the applicability of a CON review to

the project at issue.

In reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the SCRCF, the court must “construe the complaint in the light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (S.C. 2009) (quotations and citation omitted). As previewed in the prehearing statement, Belfair has made a claim upon which the Court can grant relief in the form of a reversal of DHEC’s NAD and/or a remand to DHEC for BMH to provide the information necessary for a CON review.

Here, the project at issue (“relocation” of the 1.5T MRI), is subject to CON review because the project cost is well over \$600,000, the total expenditure appears to be well above \$2,000,000, and because CONs and NADs are site specific and cannot be transferred to a new location. Any other result would undermine the purpose of the CON Act and ignore the clear language in the statutory scheme.

A. The total project cost is well over \$600,000 and very likely over \$2,000,000.

First, the “relocation” of the 1.5T MRI required a CON review because the actual total project cost of the acquisition of medical equipment in this case was well over the \$600,000 threshold, and the total expenditure appears to be more than \$2,000,000. A “health care facility [] is required to obtain a [CON] from [DHEC] before undertaking . . . [a]n expenditure by or on behalf of a health care facility in excess of []\$2,000,000[; or] [t]he acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of [\$600,000].” S.C. Code Ann. § 44-7-160(3) and (6); S.C. Code Ann. Regs. 61-15, § 102(1)(c) and (f). The “total project cost” is defined as “the estimated total capital cost of a project including

land cost, construction, fixed and moveable equipment, architects' fees, financing cost, and other capital costs properly charged under generally accepted accounting princip[le]s as capital costs.” *Id.* § 103(24). In determining project costs, the South Carolina Supreme Court held that “DHEC must calculate the total project cost in a manner that reflects the **true** cost of the project at issue.” *MRI at Belfair, LLC and Hilton Head Regional Medical Center v. SCDHEC*, 392 S.C. 314, 319, 709 S.E.2d 626, 629 (S.C. 2011); *see also id.* at 322 n.4, 709 S.E.2d at 630 n.4 (“The key avoiding such gamesmanship [of manipulating costs for projects] is to look at the practical realities of the proposal.”).

Here, the “healthcare facility” requesting the “relocation” was the new Okatie facility, not the Port Royal facility. Thus, the Okatie facility was acquiring the 1.5T MRI and the total project costs of acquiring the MRI includes the cost of the equipment itself, along with other costs. Further, the cost of the entire expenditure made by the Okatie facility on a new imaging center at the new facility, includes, at a minimum, the cost of other imaging equipment, the cost to design and construct the appropriate area for the imaging center, and some prorated portion of the total value of the facility.

The purchase price of the 1.5T MRI at issue alone was \$1,277,517.89, less than a year before BHM incorrectly attributed no value to the “equipment” that was the focus of the request for an NAD. BMH, however, is required to include the value of the equipment in the project cost. Further, the MRI was originally purchased for the express purpose of placing it at BMH’s new Okatie facility, a fact that was improperly hidden from DHEC. (*See* Ex. 1 to Platt Aff. at 20 (Capital Expense Request for BMH representing that the 1.5T MRI purchase was for a “future move to new Bluffton MOB”)). As such, the full price of the equipment is attributable to the project at issue—placing it at the new facility. Therefore, the value of the equipment itself pushes

the total project cost well over \$600,000, and BMH is required to submit information for a full CON review.

Further, many costs associated with installing an MRI at a brand new facility were conspicuously not included in the total project costs. In fact, the drawings submitted by BMH with dates from 2018, show that BMH contemplated, planned for, and presumably constructed, a wing of the Okatie facility to house the new MRI and other imaging equipment. (*See* Ex. 1 to Platt Aff. at 25-26.). However, no such costs were included in the total cost project BMH provided to DHEC, resulting in a vastly undervalued project. Upon information and belief, the addition of those costs would raise the total project cost hundreds of thousands of dollars, further pushing the project costs over the \$600,000 threshold for the acquisition of equipment. (*See* Platt Aff. ¶ 9.)

With the addition of the equipment, installation, construction, design, and other costs, the total expenditure clearly approaches and may exceed \$2,000,000, for the MRI alone. But, BMH has failed to include another significant set of costs in this analysis—the costs of the remainder of the imaging center. The costs associated with the new CT scanner, and potentially other imaging equipment and associated costs, are very likely well over \$800,000. (*See* Platt Aff. ¶¶ 10.) Moreover, some portion of the value of the construction of the new facility should be attributed to this project. (*Id.* ¶ 8.) Thus, the expenditure of creating an entirely new imaging center at a brand new facility clearly exceeds the \$2,000,000 threshold and required a CON for this reason as well.

B. CONs, NADs and written exemptions are location specific.

A CON or NAD cannot be carried to a new location because a CON is requested and granted to a “healthcare **facility**,” not a corporate entity. *See* S.C. Code Ann. § 44-7-160; S.C. Code Ann. Regs. 61-15 § 102(a). The regulatory scheme simply does not permit an entity to relocate equipment to a new facility without a CON review for the new location.

In addition to the fact that CONs and NADs are granted to facilities only, the overall regulatory scheme provides that CONs, NADs, and exemptions are location specific. For example, the regulations provide that the purchase of new equipment may not require a CON review unless the purchase includes a relocation, indicating that a relocation requires a CON review. *Id.* § 102(4) (“These provisions do not apply to acquisitions or changes of ownership of health care facilities, services, and equipment that are already in existence, operational, and providing services. . . so long as the facility or service is not being relocated.” (emphasis added)). Further, the regulations clearly contemplate the need for CON review where a service is being relocated by specifying that an applicant seeking a relocation CON must supply location specific demographic information. *See* S.C. Code Ann. Regs. Ann. 61-15 § 801(2)(d) (“[i]n the case of a reduction, relocation, or elimination of a facility or service, the applicant should address the need that the population presently has for the service, the extent to which that need will be met by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other underdeveloped groups, to obtain needed healthcare.” (emphasis added)). Thus, the relocation of equipment which otherwise requires a CON review (i.e. where the total project cost is more than \$600,000 or the total expenditure is more than \$2,000,000) requires a CON review to ensure regulatory oversight into the effect of such a relocation on the relevant communities.

Finally, any conclusion other than the need for CON review would be contrary to the purposes of the CON Act. 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 high quality services are

provided in health facilities in this state.” S.C. Code Ann. § 44-7-120 (emphasis added). In other words, the General Assembly enacted the CON Act to ensure that health services were not unnecessarily grouped in overserved areas, leaving other areas without access to the same quality of services. To that end, the relocation of valuable equipment providing valuable services necessarily requires a CON review for DHEC to determine the impact on the access to healthcare in the affected areas.

Here, the original CON under which the old MRI was presumably installed at the Port Royal facility was specific to the Port Royal facility, and cannot be transferred or imputed to the new Okatie facility.⁵ Similarly, the NAD granted to BMH for replacement of the old MRI with the 1.5T MRI in 2019, NA-19-03, was also specific to the Port Royal facility. Thus, the relocation of equipment or the expenditure of moving and installing equipment in a new facility cannot be piggy-backed onto the old CON or NAD, as it would strip DHEC of the authority and obligation to ensure reasonable access to quality health services. If the MRI is moved without any review, the need for the services will have never been assessed for the new facility, nor will the effect of the removal of the service in the Port Royal area. To do so would deprive the public of the benefit of the CON Act. It would have the effect of creating an exemption to the CON Act that would render it entirely without teeth, an exemption the General Assembly has not created. If entities were permitted to purchase valuable equipment under a CON, NAD or exemption issued to a facility in an underserved area and merely wait 12 months before moving the equipment wherever it pleases, the entire CON Act’s purpose will be undermined. For these reasons, the NAD in this case, which clearly attempts to do just that, is erroneous and must be reversed.

Plaintiffs appear to implicitly argue that some exception exists for the “relocation” to a new

⁵ Because BMH has not responded to discovery requests, Belfair has not yet been able to ascertain if an original CON was ever issued to the Port Royal facility for the original MRI.

facility within the same service area, but fails to explain the origination of such an exception and fails to cite to any support for such a claim, since none exists. (BMH Mot. at 5.) In fact, as noted above, CONs and NADs are specific to a facility, not a service area. Under the law, a move to a new facility across the street from the original facility would be relocation requiring a CON. The proposed relocation almost 20 miles away for an entirely new facility, therefore, clearly requires a CON.

Moreover, even if the Court considers the service area as a factor (and it should not), Port Royal and Okatie are distinct service areas with vastly different demographics and access to healthcare. (*See* Platt Aff. ¶ 11.) Therefore, the requested “relocation” constitutes the introduction of a new service (MRI imaging) to a new service area, and substantially changes the evaluation of the introduction of the equipment into the service area that was presumably reviewed by DHEC in the original CON. As a result, even by BMH’s standards, the proposed project requires a CON review.

For all of these reasons, Belfair has stated a substantial and viable set of arguments that the final agency decision being contested should be reversed and DHEC must require BMH submit the necessary information for a proper CON review.

CONCLUSION

For all the foregoing reasons, BMH’s Motion to dismiss should be denied.

[SIGNATURE ON FOLLOWING PAGE]

Dated: January 22, 2021

By s/Henry W. Frampton, IV
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LLC, d/b/a 3T MRI at Belfair*

FILED

JAN 22 2021

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
Petitioner,	)	CERTIFICATE OF SERVICE
	)	
v.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	
	)	
Respondents.	)	

It is hereby certified that a true and correct copy of *Petitioner MRI at Belfair, LLC's Response in Opposition to Beaufort Memorial Hospital's Motion to Dismiss* was served via certified US mail upon the parties addressed below on this 22nd day of January, 2021:

The Honorable H.W. Funderburk, Jr.
Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
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Columbia, SC 29201

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Meredith W. Sella, Esq
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Kailie D. Harris, Paralegal

FILED

JAN 22 2021

SC ADMIN. LAW COURT

EXHIBIT A

JUL 24 2020

Clerk, Board of Health
and Environmental Control**STAFF RESPONSE TO REQUEST FOR FINAL REVIEW**

Requestor: MRI at Belfair, LLC
In Re: **Docket No. 20-RFR-37** – Grant of Non-Applicability Determination to Beaufort Memorial Hospital for the relocation of current 1.5T MRI located at 300 Midtown Dr., Port Royal, SC to 122 Oaktie Center Blvd North, Oaktie, SC at a total project cost of \$125,000.

INTRODUCTION

The Department received a Certificate of Need (“CON”) Non-Applicability Determination request from Beaufort Memorial Hospital (“BMH”) for the relocation of current 1.5T MRI located at 300 Midtown Dr., Port Royal, SC to 122 Oaktie Center Blvd North, Oaktie, SC at a total project cost of \$125,000 (“Project”). BMH submitted the determination request in June 2020. MRI at Belfair, LLC (“Belfair”), a free-standing MRI service provider in Bluffton, SC, submitted notice that it was an affected party to the Project in a letter dated July 6, 2020, that was received by the Department on July 9, 2020. Belfair did not provide specific facts or documentation in support or opposition of this Project.

After consideration of the entire administrative record, Department staff concluded that a Non-Applicability Determination should be issued for the proposed Project because BMH presented substantial evidence that the Act is not applicable to the Project.

Based upon the above, staff issued its Non-Applicability determination on July 1, 2020.¹ Belfair filed its request for final review (“RFR”) on July 7, 2020. For the following reasons, the Department staff respectfully request that the Board decline to conduct a final review conference in this matter.

RELEVANT LAW²

The purposes of the *State Certification of Need and Health Facility Licensure Act* (“the CON Act”), S.C. Code Ann. Sections 44-7-110 *et seq.*, 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. S.C. Code Ann. § 44-7-120.

The CON Act requires a person or health care facility to obtain a CON from the Department before undertaking certain projects, including 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. S.C. Code Ann. § 44-7-160(6); 3 S.C. Code Ann. Regs. 61-15 § 102(1)(f).

The CON Act describes the types of institutions and transactions that are exempt from CON requirements and for which CON requirements do not apply. S.C. Code Ann. § 44-7-170. Section 105 of S.C. Code Ann. Regs. 61-15, “Determinations of Non-Applicability,” describes actions for

¹ A copy of staff’s decision is attached at Exhibit 1.

² Excerpts of the CON Act are attached at Exhibit 2.

which Certificate of Need review is not required and the process for obtaining a written NAD from the Department.

The Plan does not contain specific standards regarding the acquisition and installation of MRI equipment, nor does the Plan contain standards for determinations of non-applicability. Therefore, compliance with the Plan was not an issue in this decision.

RESPONSE TO REQUEST FOR REVIEW

1. Belfair claims the prior NAD issued to BMH on April 4 2019, which permitted BMH to replace their existing 1.0T MRI at their Port Royal, SC location under S.C. Code Ann. Regs. 61-15 §105, violates the CON Act.

The history of this equipment is as follows:

The Department issued Exemption E-03-49 to Lowcountry Medical Group on July 31, 2003, for the replacement of existing 1.0T MRI with like equipment having similar capabilities to include the use of a temporary mobile service during replacement period. E-03-49 was issued under Section 104.2.h of S.C. Code Ann. Regs. 61-15, *Certification of Need for Health Facilities and Services*. Regulation 61-15 was updated in 2012 to separate exemption determinations from determinations of non-applicability.

The Department issued NA-19-09 on April 4, 2019 to BMH for the replacement of a GE 1.0T MRI (E-03-49) with a Canon Medical Titan 1.5T MRI at a total project cost of \$1,229,037.00. NA-19-09 was issued under S.C. Code Ann. Regs. 61-15 §105(1)(a), “Replacement of like equipment with similar capabilities” as defined by the Department in section 103.16. S.C. Code Ann. Regs. 61-15 §103(16) explains that “like equipment with similar capabilities” means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service. NA-19-09 was not issued in error and is a valid determination, which Belfair never challenged until this RFR. Belfair did not oppose determination NA-19-09 in a timely manner and should not be allowed to do so now. BMH notified the Department in February 2020 that NA-19-09 was fully implemented. There were no changes in the project.

The Department issued NA-20-04 on July 1, 2020, to BMH for the relocation of current 1.5T MRI located at 300 Midtown Dr., Port Royal, SC to 122 Oaktie Center Blvd North, Oaktie, SC at a total project cost of \$125,000. The Project does not include the acquisition of equipment but merely moves the equipment from one medical office building to another, consolidating MRI services with private physician offices all within the same service area, Beaufort County. There is nothing about this project that triggers CON review. S.C. Code Ann. § 44-7-170(B)(1) (“replacement of like equipment with similar capabilities”); S.C. Code Ann. Regs. § 105.1.a. This Project did not require review or approval from the Department, but since BMH asked for a written determination the Department provided a written non-applicability determination indicating the CON Act did not apply.

2. Belfair states in its July 7, 2020, correspondence to the Board that the NAD request in this case did not check the box of DHEC's form for a 104.1 exemption or a 105.1 NAD.

The Department agrees that BMH did not check either box because they did not need to provide this form for this project. DHEC form 0431 is for Determinations for Replacement of Equipment and did not apply to this project, which involved moving rather than replacing equipment.

3. Belfair states the NAD request was incomplete as it did not include complete information on the proposed project, specifically, information that would allow the Department to consider the impact of the change in location.

The Project moves a piece of equipment from one medical office building to another seventeen (17) miles away within the same service area, Beaufort County. No additional information was needed by the Department. For the reasons set forth above, staff's decision is supported by the Record and complies with the CON Act and regulation.

REQUESTED ACTION

For the foregoing reasons, staff respectfully requests that the Board deny Belfair's request to conduct a final review conference.

Respectfully submitted:



Jennifer Hyman
Certificate of Need Program



Meredith W. Sella, Esquire
Staff Counsel for Healthcare Quality

Exhibit 1 – CON Staff Decision
Exhibit 2 – Excerpts of CON Act
Exhibit 2 – Excerpts of CON Regulation

EXHIBIT

1



Article #: 92148969009997901539819481

July 1, 2020

Via Certified Mail

Daniel Mock, AVP Operations
 Beaufort Memorial Hospital
 955 Ribaut Rd.
 Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
 Following Project:
 Beaufort Memorial Hospital
 Relocation of current 1.5 T MRI located at 300 Midtown Dr, Port Royal,
 SC to 122 Oaklie Center Blvd North, Oaklie, SC at a total project cost of
 \$125,000.00
 Matter: NA-20-04
 Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, 5105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803) 545-0530; Division of Health Facilities Construction, Mr. Elie Macaron, (803) 545-4449; Division of Health Licensing, Ms. Angie Smith, (803) 545-4252; and Bureau of Certification, Ms. Maryjo Roué, (803) 545-4293.

Letter to Daniel Mock

July 1, 2020

Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

Should you have any question regarding the above information, please contact the Department at (803) 545-0260.

Very truly yours,



Jennifer Hyman

Project Coordinator, Certificate of Need Program

South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief

Bureau of Healthcare Planning and Construction

*MAI
move*



Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ Replacement of Like Equipment Exemption
Note: There must be a previously existing CON

R.61-15 Section 104.1.a Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

- ☐ Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)

R.61-15 Section 105.1.a Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
 - ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
 - ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
 - ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
- ☒ 8. Floor plan of affected area(s). If construction is part of the proposal, please remit both "before" and "after" floor plans. The floor plans should contain enough detail to be a stand-alone plan outlining the specific area of the facility in which the unit is to be located

EXHIBIT

2

State Certification of Need and Health Facility Licensure Act

SECTION 44-7-110. Short title.

This article may be cited as the “State Certification of Need and Health Facility Licensure Act”.

HISTORY: 1962 Code Section 32-761; 1952 Code Section 32-761; 1947 (45) 510; 1971 (57) 376; 1979 Act No. 51 Section 1; 1988 Act No. 670, Section 1.

SECTION 44-7-120. Declaration of purpose.

The purpose of this article 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. To achieve these purposes, this article requires:

- (1) the issuance of a Certificate of Need before undertaking a project prescribed by this article;
- (2) adoption of procedures and criteria for submittal of an application and appropriate review before issuance of a Certificate of Need;
- (3) preparation and publication of a State Health Plan;
- (4) the licensure of facilities rendering medical, nursing, and other health care.

HISTORY: 1962 Code Section 32-763; 1952 Code Section 32-763; 1947 (45) 510; 1971 (57) 376; 1979 Act No. 51 Section 1; 1981 Act No. 16, Section 1; 1988 Act No. 670, Section 1; 1992 Act No. 511, Section 1.

SECTION 44-7-130. Definitions.

As used in this article:

(1) “Affected person” means the applicant, a person residing within the geographic area served or to be served by the applicant, persons located in the health service area in which the project is to be located and who provide similar services to the proposed project, persons who before receipt by the department of the proposal being reviewed have formally indicated an intention to provide similar services in the future, persons who pay for health services in the health service area in which the project is to be located and who have notified the department of their interest in Certificate of Need applications, the State Consumer Advocate, and the State Ombudsman. Persons from another state who would otherwise be considered “affected persons” are not included unless that state provides for similar involvement of persons from South Carolina in its certificate of need process.

(2) “Ambulatory surgical facility” means a facility organized and administered for the purpose of performing surgical procedures for which patients are scheduled to arrive, receive surgery, and be discharged on the same day. The owner or operator makes the facility available to other providers who comprise an organized professional staff.

(3) “Board” means the State Board of Health and Environmental Control.

(4) Reserved.

(5) “Competing applicants” means two or more persons or health care facilities as defined in this article who apply for Certificates of Need to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities.

(6) “Community residential care facility” means a facility which offers room and board and provides a degree of personal assistance for two or more persons eighteen years old or older.

(7) “Day-care facility for adults” means a facility for adults eighteen years or older which offers in a group setting a program of individual and group activities and therapies. The program is directed toward providing community-based care for those in need of a supportive setting for less than twenty-four hours a day, thereby preventing unnecessary institutionalization, and shall provide a minimum of four and a maximum of fourteen hours of operation a day.

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.

HISTORY: 1962 Code Section 32-762.1; 1952 Code Section 32-762.1; 1951 (47) 132; 1971 (57) 376; 1979 Act No. 51 Section 1; 1988 Act No. 397, Section 4. 670, Section 1.

SECTION 44-7-150. Duties of department.

In carrying out the purposes of this article, the department shall:

- (1) require reports and make inspections and investigations as considered necessary;
- (2) to the extent that is necessary to effectuate the purposes of this article, enter into agreements with other departments, commissions, agencies, and institutions, public or private;
- (3) adopt in accordance with Article I of the Administrative Procedures Act substantive and procedural regulations considered necessary by the department and approved by the board to carry out the department's licensure and Certificate of Need duties under this article, including regulations to deal with competing applications;
- (4) accept on behalf of the State and deposit with the State Treasurer, any grant, gift, or contribution made to assist in meeting the cost of carrying out the purpose of this article and expend it for that purpose;
- (5) The department may charge and collect fees to cover the cost of operating the Certificate of Need program, including application fees, filing fees, issuance fees, and nonapplicability/exemption determination fees. The department shall develop regulations which set fees as authorized by this article. The level of these fees must be determined after careful consideration of the direct and indirect costs incurred by the department in performing its various functions and services in the Certificate of Need program. All fees and procedures for collecting fees must be adopted pursuant to procedures set forth in the Administrative Procedures Act. Any fee collected pursuant to this section in excess of seven hundred fifty thousand dollars must be retained by the department and designated for the administrative costs of the Certificate of Need program. The first seven hundred fifty thousand dollars collected pursuant to this section must be deposited into the general fund of the State. Until fees are promulgated through regulation, all fees established as of January 1, 2009, remain in effect.

HISTORY: 1962 Code Section 32-764; 1952 Code Section 32-764; 1947 (45) 510; 1971 (57) 376; 1979 Act No. 51 Section 1; 1988 Act No. 670, Section 1; 2010 Act No. 278, Section 4, eff July 1, 2010.

SECTION 44-7-160. Certificate of Need required under certain circumstances.

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:

- (1) the construction or other establishment of a new health care facility;
- (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;
- (3) an expenditure by or on behalf of a health care facility in excess of an amount to be prescribed by regulation which, under generally acceptable accounting principles consistently applied, is considered a capital expenditure except those expenditures exempted in Section 44-7-170(B)(1). The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the development, acquisition, improvement, expansion, or replacement of any plant or equipment must be included in determining if the expenditure exceeds the prescribed amount;
- (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;
- (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;

(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.

HISTORY: 1962 Code Section 32-765; 1952 Code Section 32-765; 1947 (45) 510; 1971 (57) 376; 1979 Act No. 51 Section 1; 1988 Act No. 670, Section 1; 1992 Act No. 511, Section 6; 2010 Act No. 278, Section 5, eff July 1, 2010.

SECTION 44-7-170. Institutions and transactions exempt from article.

(A) The following are exempt from Certificate of Need review:

(1) the acquisition by a person of medical equipment to be used solely for research, the offering of an institutional health service by a person solely for research, or the obligation of a capital expenditure by a person to be made solely for research if it does not:

(a) affect the charges imposed by the person for the provision of medical or other patient care services other than the services that are included in the research;

(b) change the bed capacity of a health care facility; or

(c) substantially change the medical or other patient care services provided by the person.

A written description of the proposed research project must be submitted to the department in order for the department to determine if these conditions are met. A Certificate of Need is required in order to continue use of the equipment or service after the equipment or service is no longer being used solely for research;

(2) the offices of a licensed private practitioner whether for individual or group practice except as provided for in Section 44-7-160(1) and (6);

(3) the replacement of like equipment for which a Certificate of Need has been issued which does not constitute a material change in service or a new service;

(4) crisis stabilization unit facilities. Notwithstanding subsection (C), crisis stabilization unit facilities will not require a written exemption from the department.

(B) This article does not apply to:

(1) an expenditure by or on behalf of a health care facility for nonmedical projects for services such as refinancing existing debt, parking garages, laundries, roof replacements, computer systems, telephone systems, heating and air conditioning systems, upgrading facilities which do not involve additional square feet or additional health services, replacement of like equipment with similar capabilities, or similar projects as described in regulations;

(2) facilities owned and operated by the South Carolina Department of Mental Health and the South Carolina Department of Disabilities and Special Needs, except an addition of one or more beds to the total number of beds of the departments' health care facilities existing on July 1, 1988;

(3) educational and penal institutions maintaining infirmaries for the exclusive use of student bodies and inmate populations;

(4) any federal health care facility sponsored and operated by this State;

(5) community-based housing designed to promote independent living for persons with mental or physical disabilities. This does not include a facility defined in this article as a "health care facility";

(6) kidney disease treatment centers including, but not limited to, free standing hemodialysis centers and renal dialysis centers;

(7) health care facilities owned and operated by the federal government.

(C) Before undertaking a project enumerated in subsection (A), a person shall obtain a written exemption from the department as may be more fully described in regulation.

HISTORY: 1962 Code Section 32-766; 1952 Code Section 32-766; 1947 (45) 510; 1964 (53) 2117; 1965 (54) 472; 1968 (55) 2815; 1971 (57) 376; 1979 Act No. 51 Section 1; 1988 Act No. 670, Section 1; 1992 Act No. 322, Section 1; 1992 Act No. 511, Section 7; 1998 Act No. 303, Sections 2, 3; 2003 Act No. 27, Section 1, eff upon approval (became law without the Governor's signature on May 15, 2003); 2010 Act No. 278, Section 6, eff July 1, 2010; 2017 Act No. 10 (S.354), Section 2, eff April 24, 2017.

appropriate. The Project Review Criteria must be adopted as a regulation pursuant to the Administrative Procedures Act.

(B) The project review criteria promulgated in regulation must be used in reviewing all projects under the Certificate of Need process. When the criteria are weighted to determine the relative importance for the specific project, the department may reorder the relative importance of the criteria no more than one time after the project review meeting. When an application has been appealed, the department may not change the weighted formula.

HISTORY: 1962 Code Section 32-769; 1952 Code Section 32-769; 1947 (45) 510; 1951 (47) 506; 1979 Act No. 51 Section 1; 1988 Act No. 670, Section 1; 2010 Act No. 278, Section 8, eff July 1, 2010.

SECTION 44-7-200. Application for Certificate of Need; notice; prohibited communications.

(A) An application for a Certificate of Need must be submitted to the department in a form established by regulation. The application must address all applicable standards and requirements set forth in departmental regulations, Project Review Criteria of the department, and the South Carolina Health Plan.

(B) Within twenty days before submission of an 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.

(C) Upon publication of this notice and until a contested case hearing is requested pursuant to Section 44-1-60(G):

(1) members of the board and persons appointed by the board to hold a final review conference on staff decisions may not communicate directly or indirectly with any person in connection with the application; and

(2) no person shall communicate, or cause another to communicate, as to the merits of the application with members of the board and persons appointed by the board to hold a final review conference on staff decisions.

A person who violates this subsection is subject to the penalties provided in Section 1-23-360.

(D) After receipt of an application with proof of publication and payment of the initial application fee, the department shall publish in the State Register a notice that an application has been accepted for filing. Within thirty days of acceptance of the application, the department may request additional information as may be necessary to complete the application. The applicant has thirty days from the date of the request to submit the additional information. If the applicant fails to submit the requested information within the thirty-day period, the application is considered withdrawn.

(E) After a Certificate of Need application has been filed with the department, state and federal elected officials are prohibited from communicating with the department with regard to the Certificate of Need application at any time. This prohibition does not include written communication of support or opposition to an application. Such written communication must be included in the administrative record.

HISTORY: 1962 Code Section 32-770; 1952 Code Section 32-770; 1947 (45) 510; 1979 Act No. 51 Section 1; 1988 Act No. 670, Section 1; 1990 Act No. 471, Section 1; 1992 Act No. 511, Section 9; 2010 Act No. 278, Sections 9, 10, eff July 1, 2010.

SECTION 44-7-210. Certificate of Need review procedures.

(A) After the department has determined that an 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; however, in the case of competing applications, the review period begins on the date of notice to affected persons that the last of the competing applications is complete and notice is published in the State Register. The staff shall issue its decision to approve or deny the

application no earlier than thirty calendar days, but no later than one hundred twenty calendar days, from the date affected persons are notified that the application is complete, unless a public hearing is timely requested as may be provided for by department regulation. If a public hearing is properly requested, the staff's decision must not be made until after the public hearing, but in no event shall the decision be issued more than one hundred fifty calendar days from the date affected persons are notified that the application is complete. The staff may reorder the relative importance of the project review criteria no more than one time during the review period. The staff's reordering of the relative importance of the project review criteria does not extend the review period provided for in this section.

(B) The department may not issue a Certificate of Need unless an application complies with the South Carolina Health Plan, Project Review Criteria, and other regulations. Based on project review criteria and other regulations, which must be identified by the department, the department may refuse to issue a Certificate of Need even if an application complies with the South Carolina Health Plan. In the case of competing applications, the department shall award a Certificate of Need, if appropriate, on the basis of which, if any, most fully complies with the requirements, goals, and purposes of this article and the State Health Plan, Project Review Criteria, and the regulations adopted by the department.

(C) On the basis of staff review of the application, the staff shall make a staff decision to grant or deny the Certificate of Need and the staff shall issue a decision in accordance with Section 44-1-60(D). Notice of the decision must be sent to the applicant and affected persons 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).

However, a person may not file a request for final review in opposition to the staff decision on a Certificate of Need unless the person provided written notice to the department during the staff review that he is an affected person and specifically states his opposition to the application under review.

(D) The staff's decision is not the final agency decision until the completion of the final review process provided for in Section 44-1-60(F).

(E) A contested case hearing of the final agency decision must be requested in accordance with Section 44-1-60(G). The issues considered at the contested case hearing considering a Certificate of Need are limited to those presented or considered during the staff review.

(F) Notwithstanding any other provision of law, including Section 1-23-650(C), in a contested case arising from the department's decision to grant or deny a Certificate of Need application, grant or deny a request for exemption under Section 44-7-170, or the issuance of a determination regarding the applicability of Section 44-7-160, the following apply:

- (1) each party may name no more than ten witnesses who may testify at the contested case hearing;
- (2) each party is permitted to take only the deposition of a person listed as a witness who may testify at the contested case hearing, unless otherwise provided for by the Administrative Law Court;
- (3) each party is permitted to serve only ten interrogatories pursuant to Rule 33 of the South Carolina Rules of Civil Procedure;
- (4) each party is permitted to serve only ten requests for admission, including subparts; and
- (5) each party is permitted to serve only thirty requests for production, including subparts.

The limitations provided for in this subsection are intended to make the contested case process more efficient, less burdensome, and less costly to the parties in Certificate of Need cases. Therefore, the Administrative Law Court may, by court order, lift these limitations beyond the parameters set forth in this subsection only in exceptional circumstances when failure to do so would cause substantial prejudice to the party seeking additional discovery.

(G) Notwithstanding any other provision of law, in a contested case arising from the department's decision to grant or deny a Certificate of Need application, grant or deny a request for exemption under Section 44-7-170, or the issuance of a determination regarding the applicability of Section 44-7-160, the Administrative Law Court shall file a final decision no later than eighteen months after the contested case is filed with the Clerk of the Administrative Law Court, unless all parties to the contested case consent to an extension or the court finds substantial cause otherwise.

EXHIBIT

3

61-15. Certification of Need for Health Facilities and Services.

CHAPTER 1

PURPOSE, APPLICABILITY AND DEFINITIONS

SECTION 101 Purpose

The purpose of these Regulations 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.

SECTION 102 Applicability.

1. A person or health care facility as defined in this Regulation is required to obtain a Certificate of Need from the Department of Health and Environmental Control before undertaking any of the following:

- a. The construction or other establishment of a new health care facility;
- b. 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;
- c. An expenditure by or on behalf of a health care facility in excess of two million dollars (\$2,000,000) which, under generally acceptable accounting principles consistently applied, is considered a capital expenditure except those expenditures exempted in Section 104. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the development, acquisition, improvement, expansion, or replacement of any plant or equipment must be included in determining if the expenditure exceeds the prescribed amount;
- d. 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;
- e. If no capital expenditure is made, the offering of any 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. For purposes of this section, operating costs include expenditures incurred by the health care facility and any person or other entity on behalf of the health care facility to establish a new service. A person or other entity shall not be allowed to incur costs thereby attempting to enable a health care facility to avoid Certificate of Need review and establish a new service as described above;
- f. The acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of six hundred thousand dollars (\$600,000);

2. An applicant may not split or combine one expenditure into two or more expenditures for the purpose of avoiding Certificate of Need review, nor may the Department be allowed to lump projects together arbitrarily to bring them under Certificate of Need review.

3. 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. Such a letter shall contain a detailed description of the project including the extent of modifications, changes in services and total costs. Additional information may be requested as may be reasonably necessary to make such applicability determination. The Department shall respond within sixty (60) calendar days of receipt of the necessary information.

4. These provisions do not apply to acquisitions or changes of ownership of health care facilities, services, and equipment that are already in existence, operational, and providing services in a particular service area, and which have undergone the review and obtained the approval that was appropriate under the law at the time they first entered the relevant service area, so long as the facility or service is not being relocated. For facilities, services, and equipment which have previously undergone Certificate of Need review, the Certificate of Need must be fulfilled prior to a change of ownership.

HISTORY: Amended by State Register Volume 36, Issue No. 5, eff May 25, 2012.

SECTION 103 Definitions.

1. Affected person means the applicant, a person residing within the geographic area served or to be served by the applicant, persons located in the health service area in which the project is to be located and who provide similar services to the proposed project, persons who before receipt by the Department of the proposal being reviewed have formally indicated an intention to provide similar services in the future, persons who pay for health services in the health service area in which the project is to be located and who have notified the Department in writing of their interest in Certificate of Need applications, the State Consumer Advocate and the State Ombudsman. Persons from another state who would otherwise be considered “affected persons” are not included unless that state provides for similar involvement of persons from South Carolina in its Certificate of Need process. A person may not file a request for final review in opposition to the staff decision on a Certificate of Need unless the person provided written notice to the Department during the staff review that he is an affected person and specifically states his opposition to the application under review. Affected persons may request in writing to be notified of a Department decision by regular mail or electronic mail in lieu of certified mail.

2. Ambulatory surgical facility means a distinct, free-standing, self-contained entity that is organized, administered, equipped and operated exclusively for the purpose of performing surgical procedures or related care, treatment, procedures and/or services for which patients are scheduled to arrive, receive surgery or related care, treatment, procedures and/or services and be discharged on the same day. The owner or operator makes the facility available to other providers who comprise an organized professional staff.

3. Arrangement for financing means a financial commitment, i.e. enforceable contract.

4. Board means the State Board of Health and Environmental Control.

5. Children and adolescents in need of mental health treatment in a residential treatment facility means a child or adolescent under age eighteen who manifests a substantial disorder of cognitive or emotional process, which lessens or impairs to a marked degree that child’s capacity either to develop or to exercise age-appropriate or age-adequate behavior. The behavior includes, but is not limited to, marked disorders of mood or thought processes, severe difficulties with self-control and judgment including behavior dangerous to self or other, and serious disturbance in the ability to care for and relate to others.

6. Competing applicants means two or more persons and/or health care facilities as defined in this regulation who apply for Certificates of Need to provide similar services and/or facilities in the same service area and whose applications if approved would exceed the need for this facility or service. An application shall be considered competing if it is received by the Department no later than fifteen (15) calendar days after a Notice of Affected Persons is published in the State Register for one or more applications for similar services and/or facilities in the same service area. All applications received by the Department within fifteen (15) days of publication of the Notice of Affected Persons in the State Register for the first application(s) will be considered to be competing. Any applications received by the Department later than the fifteenth day following publication of the Notice of Affected Persons in the State Register for the first application(s) will not be considered to be competing with the(se) application(s).

7. Department means the Department of Health and Environmental Control.

8. Facility for chemically dependent or addicted persons means a facility organized to provide outpatient or residential services to chemically dependent or addicted persons and their families based on an individual treatment plan including diagnostic treatment, individual and group counseling, family therapy, vocational and educational development counseling, and referral services.

9. Fees mean the Department may charge and collect fees to cover the cost of operating the program. The fees for review of certificate of need projects include: (a) initial filing fee; (b) application fee; and (c) issuance fee.

a. Initial filing fee is five hundred dollars (\$500), which must be submitted as a non-refundable initial payment at the time the application is submitted.

b. Application fee is one half of one percent (.5%, .005) of the total project cost (as defined in Section 103.25) which is payable when the application is deemed complete under Section 303. The application fee shall not exceed seven thousand dollars (\$7,000).

c. Issuance fee is seven thousand five hundred dollars (\$7,500) payable upon the granting of a Certificate of Need to any project whose total project cost (as defined in Section 103.25) is greater than one

million four hundred thousand dollars (\$1,400,000). Should the project not be approved, the issuance fee will not be assessed.

10. Freestanding or Mobile technology means medical equipment owned or operated by a person other than a health care facility for which the total cost is in excess of that prescribed in these regulations and for which specific standards or criteria are prescribed in the South Carolina Health Plan.

11. Good cause is defined as:

- a. presentation of significant and relevant information not previously considered by the Department;
- b. demonstration that there have been significant changes in factors or circumstances relied upon by the Department in reaching its decision;
- c. demonstration that the Department has materially failed to follow its adopted procedures in reaching its decision; or
- d. such other basis for a public hearing as the Department determines constitutes good cause.

12. Health care facility for the purposes of Certificate of Need means acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, nursing homes, ambulatory surgical facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, intermediate care for the persons with intellectual disability, inpatient hospice facilities, radiation therapy facilities and any other facility for which Certificate of Need review is required by state law.

13. Health service means clinically related, diagnostic, treatment, or rehabilitative services, and includes alcohol, drug abuse, and mental health services for which specific standards or criteria are prescribed in the South Carolina Health Plan.

14. Hospital means a facility organized and administered to provide services to accommodate two or more non-related persons for the diagnosis, treatment and care of such persons over a period exceeding 24 hours and provides medical or surgical care or nursing care of illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care is administered by or under the direction of persons currently licensed to practice medicine, surgery, or osteopathy.

15. Institutional health services means health services provided in or through health care facilities and includes the entities in or through which such services are provided.

16. Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

17. Nursing home means a facility with an organized nursing staff to maintain and operate organized facilities and services to accommodate two or more unrelated persons over a period exceeding twenty-four hours which is operated either in connection with a hospital or as a freestanding facility for the express or implied purpose of providing nursing care for persons who are not in need of hospital care.

18. Person means an individual, a trust or estate, a partnership, a corporation including an association, joint stock company, insurance company, and a health maintenance organization, health care facility, a state, a political subdivision or an instrumentality including a municipal corporation of a state, or any legal entity recognized by the State.

19. Psychiatric Hospital means an institution which is primarily engaged in providing to inpatients, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons.

20. Residential treatment facility for children and adolescents means a facility operated for the assessment, diagnosis, treatment, and care of two or more "children and adolescents in need of mental health treatment" which provides:

- a. a special education program with a minimum program defined by the South Carolina Department of Education.
- b. recreational facilities with an organized youth development program; and
- c. residential treatment for a child or adolescent in need of mental health treatment.

21. Solely for research means a service, procedure, or equipment which has not been approved by the Food and Drug Administration (FDA) but which is currently undergoing review by the FDA as an

investigational device. FDA research protocol and any applicable Investigational Device Exemption (IDE) policies and regulations must be followed by a facility proposing a project ‘solely for research.’

22. To develop when used in connection with health services, means to undertake those activities which on their completion will result in the offering of a new institutional health services or the incurring of a financial obligation in relation to the offering of such a service.

23. To offer when used in connection with health services means that the health care facility holds itself out as capable of providing or as having the means for the provision of, specified health services.

24. Total project cost is the estimated total capital cost of a project including land cost, construction, fixed and moveable equipment, architect’s fee, financing cost, and other capital costs properly charged under generally accepted accounting principals as a capital cost. The determination of project costs involving leased equipment of buildings will be calculated based on the total value (purchase price) of the equipment or building being leased.

HISTORY: Amended by State Register Volume 36, Issue No. 5, eff May 25, 2012.

Code Commissioner’s Note

Pursuant to 2011 Act No. 47, Section 14(B), the Code Commissioner substituted “intellectual disability” for “mental retardation” and “person with intellectual disability” or “persons with intellectual disability” for “mentally retarded”.

SECTION 104 Exemption Determinations.

1. The following are exempt from Certificate of Need review, but prior to undertaking these projects, a written determination from the Department is required:

a. The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

b. The acquisition by a health care facility of medical equipment to be used solely for research, the offering of an institutional health service by a health care facility solely for research, or the obligation of a capital expenditure by a health care facility to be made solely for research if it does not: (a) affect the charges of the facility for the provision of medical or other patient care services other than the services which are included in the research; (b) change the bed capacity of the facility; or (c) substantially change the medical or other patient care service of the facility. FDA research protocol and any applicable Investigational Device Exemption (IDE) policies and regulations must be followed by the facility. A written description of the proposed research project must be submitted to the department in order for the department to determine if the above conditions are met. A Certificate of Need is required to continue use of the equipment or service after the equipment or service is no longer being used solely for research;

c. The permanent reduction in bed capacity, including the permanent closure of a health care facility.

2. In order to request an exemption, the following information must be provided to the Department in writing at a minimum:

a. A complete description of the proposed project, including, but not limited to, location of the project, and total project costs,

b. Other documentation requested by the Department in order to determine compliance with these regulations;

c. Additional information as may be reasonably necessary for the Department to make a determination.

3. If an exemption is granted, it is valid for a period of twelve (12) months from the date of issuance. If the proposal is not implemented within this twelve-month period, the exemption becomes void and another exemption must be requested in order for the applicant to undertake the proposal.

4. The following projects are exempt from Certificate of Need review but do not require a written determination from the Department: the offices of a licensed private practitioner whether for individual or group practice. This exemption shall not apply to: (1) the construction or other establishment of a new health care facility, as in Section 102.1.a; or (2) the acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of six hundred thousand dollars (\$600,000), as in Section 102.1.f.

HISTORY: Amended by State Register Volume 36, Issue No. 5, eff May 25, 2012.

SECTION 105 Determinations of Non-Applicability.

1. Certificate of Need review is not applicable to the following, but prior to undertaking the proposed project, a written determination of non-applicability from the Department is required:

a. Replacement of like equipment with similar capabilities as defined by the Department in Section 103.16.

b. Acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is not in excess of six hundred thousand dollars (\$600,000). A written determination of non-applicability is only required when any question exists as to whether or not the total project cost is below the six hundred thousand dollars (\$600,000) threshold.

2. The following information must be provided to the Department in writing at a minimum:

a. A complete description of the proposed project, including, but not limited to, location of the project, total project costs, capital and/or operational cost;

b. Other documentation requested by the Department in order to determine compliance with these regulations;

c. Additional information as may be reasonably necessary to make a determination.

3. If a determination of non-applicability is granted, it is valid for a period of twelve (12) months from the date of issuance. If the proposal is not implemented within this twelve (12) month period, the non-applicability determination becomes void and another determination must be requested in order to undertake the proposal.

4. Certificate of Need review is not applicable to the following projects and a written non-applicability determination from the Department is not required prior to undertaking these projects:

a. Health care facilities owned and operated by the federal government;

b. Any federal health care facility sponsored and operated by this State;

c. Educational and penal institutions maintaining infirmaries for the exclusive use of their respective student bodies and inmate populations;

d. Facilities owned and operated by the South Carolina Department of Mental Health and the South Carolina Department of Disabilities and Special Needs, except an addition of one or more beds to the total number of beds of the departments' health care facilities existing on July 1, 1988;

5. Certificate of Need review is not applicable to the following projects and a written non-applicability determination from the Department is not required. However, written notification shall be provided to DHEC Division of Health Facilities Construction prior to undertaking the following projects:

a. An expenditure by or on behalf of a health care facility for non-medical projects, such as refinancing existing debt, parking garages, laundries, roof replacement, computer systems, telephone systems, and heating and air conditioning systems;

b. The upgrading of medical facilities, which do not involve additional square feet to the facility or additional health services;

EXHIBIT B



Article #: 92148969009997901414472114

April 4, 2019

Via Certified Mail

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
955 Ribaut Rd.
Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
Following Project:
Beaufort Memorial Hospital
Replacement of a GE 1.0T MRI (E-03-49) with a Canon Medical Titan 1.5T
MRI at a total project cost of \$1,229,037.00
Matter: NA-19-03
Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, §105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

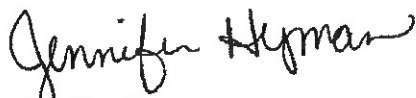
This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803.545.0530); Division of Health Facilities Construction, Mr. William McCallum (803.545.4215); Division of Health Licensing, Ms. Gwendolyn Thompson, (803.545.4370); and Bureau of Certification, Ms. Mary Jo Roue (803.545.4293).

Letter to Daniel Mock
April 4, 2019
Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

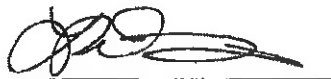
Should you have any question regarding the above information, please contact the Department at 803.545.4200.

Very truly yours,



Jennifer Hyman
Project Coordinator, Certificate of Need Program
South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief
Bureau of Healthcare Planning and Construction

EXHIBIT C



CERTIFICATE OF NEED UPDATE

**South Carolina Department of Health and Environmental Control
June 2020**

CON #	FACILITY	PROJECT DESCRIPTION	STATUS
2441	Professional Case Management of South Carolina, LLC d/b/a Professional Case Management of South Carolina – Aiken 6330 Woodside Executive Court Aiken, SC 29803 (Aiken County) Contact: Greg Austin (303) 253-7472 CON Reviewer: Louis Eubank	Establishment of a Specialty Home Health Agency in Aiken County at a total project cost of \$25,000.	Deemed Accepted 4/28/17
2454	Professional Case Management of South Carolina, LLC d/b/a Professional Case Management of South Carolina – Barnwell 6330 Woodside Executive Court Aiken, SC 29803 (Barnwell County) Contact: Greg Austin (303) 253-7472 CON Reviewer: Louis Eubank	Establishment of a Specialty Home Health Agency in Barnwell County at a total project cost of \$25,000.	Deemed Accepted 6/23/17
2455	Professional Case Management of South Carolina, LLC d/b/a Professional Case Management of South Carolina – Edgefield 6330 Woodside Executive Court Aiken, SC 29803 (Edgefield County) Contact: Greg Austin (303) 253-7472 CON Reviewer: Louis Eubank	Establishment of a Specialty Home Health Agency in Edgefield County at a total project cost of \$25,000.	Deemed Accepted 6/23/17
2456	Professional Case Management of South Carolina, LLC d/b/a Professional Case Management of South Carolina – Lexington	Establishment of a Specialty Home Health Agency in Lexington County at a total project cost of \$25,000.	Deemed Accepted 6/23/17

	6330 Woodside Executive Court Aiken, SC 29803 (Lexington County) Contact: Greg Austin (303) 253-7472 CON Reviewer: Louis Eubank		
2457	Professional Case Management of South Carolina, LLC d/b/a Professional Case Management of South Carolina – Orangeburg 6330 Woodside Executive Court Aiken, SC 29803 (Orangeburg County) Contact: Greg Austin (303) 253-7472 CON Reviewer: Louis Eubank	Establishment of a Specialty Home Health Agency in Orangeburg County at a total project cost of \$25,000.	Deemed Accepted 6/23/17
2695	Medical University Hospital Authority d/b/a MUSC Health – Sea Islands 1884 Seabrook Island Road Johns Island, SC 29455 (Charleston County) Contact: Patrick Cawley, MD (843) 792-4000 CON Reviewer: Maggie Murdock	Construction of a 10,940 sf Free Standing Emergency Department in Charleston County at a total project cost of \$15,298,187.	Approved 4/27/20 SC-20-17
2698	Spartanburg Rehabilitation Institute, Inc. d/b/a Spartanburg Rehabilitation Institute 160 Harold Fleming Court Spartanburg, SC 29303 (Spartanburg County) Contact: Angie Anderson (505) 977-8522 CON Reviewer: Maggie Murdock	Construction for the addition of 15,100 sf and the addition of 20 Rehabilitation beds (for a total of 60 Rehabilitation beds) at a total project cost of \$6,254,842.00.	Approved 5/26/20 SC-20-22
2709	Beaufort County Memorial Hospital d/b/a Beaufort Memorial Hospital 955 Ribaut Road Beaufort, SC 29902 (Beaufort County) Contact: Russell Baxley (843)522-5140 CON Reviewer: Maggie Murdock	Renovation of existing space and addition of 4 psychiatric beds for a total of 18 psychiatric beds at a total project cost of \$249,550.	Approved 5/13/20 SC-20-19

2710	Spartanburg Regional Health Services District, Inc. d/b/a Pelham Medical Center 2755 S. Highway 14 Greer, SC 29650 (Spartanburg County) Contact: Cheves Steck (864)560-7046 CON Reviewer: Dave Fiorini	Purchase of PET/CT Scanner unit at a total project cost of \$2,400,000.	Approved 5/26/20 SC-20-21
2711	Spartanburg Regional Health Services District, Inc. d/b/a Spartanburg Medical Center - Church Street Campus and Spartanburg Medical Center - Mary Black Campus 1700 Skylyn Drive Spartanburg, SC 29307 (Spartanburg County) Contact: Cheves Steck (864)560-7046 CON Reviewer: Maggie Murdock	Relocation of 24 licensed psychiatric beds from Spartanburg Medical Center Church Street Campus to Spartanburg Medical Center-Mary Black Campus for a total of 39 psychiatric beds.	Approved 5/13/20 SC-20-20
2712	South Carolina Sports Medicine and Orthopaedic Center, PA d/b/a South Carolina Sports Medicine and Orthopaedic Center 9100 Medcom Street North Charleston, SC 29406 (Charleston County) Contact: Dawson Cherry (843)569-3367 CON Reviewer: Maggie Murdock	Purchase of a 3T MRI unit at a total project cost of \$2,339,737.	Approved 5/26/20 SC-20-23
2713	Greenwood Eye Surgery Center, LLC (GESCLLC) d/b/a Greenwood Eye Surgery Center 3-acre lot adjacent to 665 W. Alexander Road, Greenwood, SC 29649 (G-PIN: 6845-833-188/Tax Map #: 6845-833-188-000) (Greenwood County) Contact: Cynthia Esco (864)227-2020 CON Reviewer: Louis Eubank	Construction for the establishment of a new ambulatory surgery center restricted to ophthalmic procedures at a total project cost of \$3,984,230.	Approved 5/26/20
2714	Self Regional Healthcare 1325 Spring Street Greenwood, SC 29646	Construction for the renovation of the emergency department and the	Approved 6/29/20

	(Greenwood County) Contact: Sara Sears (864)725-5045 CON Reviewer: Louis Eubank	addition of 344 sf at a total project cost of \$22,500,000.	
2715	KershawHealth d/b/a The Health Services District of Kershaw County d/b/a KershawHealth Karesh Long Term Care 100 Knights Hill Rd. Camden, SC 29020 (Kershaw County) Contact: Derial L. Ogburn (803)236-3005 CON Reviewer: Jennifer Hyman	Construction of a 87,690 sf facility for the replacement of the current KershawHealth Karesh Long Term Care and the addition of 36 skilled nursing beds for a total of 132 skilled nursing beds at a total project cost of \$34,568,758.	Under Review
2716	Lexington County Health Services District, Inc. d/b/a LMC Northeast 3016 Longtown Commons Drive Columbia, SC 29229 (Richland County) Contact: Tod Augsburger (803)791-2610 CON Reviewer: Jennifer Hyman	Purchase of a 1.5T MRI scanner for a 1,518 sf outpatient MRI services suite within a new 225,000 sq ft medical office building at a total project cost of \$1,907,721.	Approved 6/29/20
2717	St. Francis Hospital, Inc. d/b/a Bon Secours St. Francis Simpsonville-Freestanding Emergency Department Grandview Drive/Interstate 385 Simpsonville, SC 29680 (Greenville County) Contact: Matthew Caldwell (864)255-1121 CON Reviewer: Maggie Murdock	Construction of a freestanding emergency department at a total project cost of \$24,315,576.	Under Review
2718	McLeod Loris Seacoast Hospital d/b/a McLeod Health Seacoast 400 Highway 9-East Little River, SC 29566 (Horry County) Contact: Monica Vehige (843)366-3090 CON Reviewer: Dave Fiorini	Addition of 50 general hospital beds for a total of 155 general hospital beds at a total project cost of \$16,280,000.	Under Review
2719	Peachtree Operating Group, LLC d/b/a Peachtree Centre 1434 North Limestone Street Gaffney, SC 29340	Conversion of 40 assisted living beds to skilled nursing beds for a total of 151 skilled nursing beds at a total project cost of \$944,540.	Approved 6/26/20

	(Cherokee County) Contact: Amanda Gallman (864)487-2717 CON Reviewer: Louis Eubank		
2720	SCHHA, LLC d/b/a MUSC Health at Home by BAYADA 1300 SC HWY 544, Unit F107 Conway, SC 29526 (Horry County) Contact: Enrico Ballezzi (609)392-1900 CON Reviewer: Maggie Murdock	Establishment of a Home Health Agency in Marion County at a total project cost of \$37,000.	Approved 6/29/20
2721	SCHHA, LLC d/b/a MUSC Health at Home by BAYADA 1300 SC HWY 544, Unit F107 Conway, SC 29526 (Horry County) Contact: Enrico Ballezzi (609)392-1900 CON Reviewer: Maggie Murdock	Establishment of a Home Health Agency in Florence County at a total project cost of \$62,000.	Approved 6/29/20
2722	Lexington Regional Rehabilitation Hospital, LLC d/b/a Lexington Regional Rehabilitation Hospital 12 th Street Ext./Taylor Rd. Cayce, SC (Lexington County) Contact: Angie Anderson (505)977-8522 CON Reviewer: Jennifer Hyman	Construction for the establishment of a 36 bed Freestanding Inpatient Rehabilitation Hospital in Lexington County at a total project cost of \$21,487,644.	Under Review
2723	Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center 222 South Herlong Avenue Rock Hill, SC 29732 (York County) Contact: Mark Nosacka (803)329-6829 CON Reviewer: Jennifer Hyman	Addition of 36 general hospital beds for a total of 268 general hospital beds at a total project cost of \$333,810.	Under Review
2724	Medical University Hospital Authority d/b/a MUSC Medical Center 171 Ashley Avenue Charleston, SC 29425 (Charleston County) Contact: Patrick Cawley, MD	Purchase of a Synaptive Modus V robotic digital microscope at a total project cost of \$1,132,250.	Under Review

	(843)792-4000 CON Reviewer: Maggie Murdock		
2725	Palmetto Faith Operating, LLC d/b/a Wellsprings Health and Rehabilitation 451 W. Lucas Street Florence, SC 29501 (Florence County) Contact: Rusty Flathmann (803)315-6005 CON Reviewer: Maggie Murdock	Construction of a 63,620 sf replacement facility and the addition of 32 skilled nursing beds for a total of 136 skilled nursing beds at a total project cost of \$15,869,014.	Under Review
2726	Prisma Health-Upstate d/b/a Prisma Health Greenville Memorial Hospital 701 Grove Road Greenville, SC 29605 (Greenville County) Contact: Nancy Peek (864)797-7513 CON Reviewer: Louis Eubank	Renovation of existing space and conversion of 16 existing neonatal intermediate (Level II) care beds to neonatal intensive (Level III) care beds for a total of 28 (Level III) and 52 (Level II) neonatal care beds at a total project cost of \$2,200,000.	Deemed Accepted 3/27/20
2727	Spartanburg Regional Health Services District, Inc. d/b/a Spartanburg Medical Center - Church Street Campus 101 East Wood Street Spartanburg, SC 29303 (Spartanburg County) Contact: Cheves Steck (864)560-7046 CON Reviewer: Maggie Murdock	Conversion of a diagnostic cardiac catheterization laboratory to a therapeutic cardiac catheterization laboratory at a total project cost of \$0.	Approved 6/23/20
2729	Prisma Health-Upstate d/b/a Prisma Health Home Health Agency 300 E McBee Ave, Suite 500 Greenville, SC 29601 (Greenwood County) Contact: Nancy Peek (864)797-7513 CON Reviewer: Dave Fiorini	Establishment of a Home Health Agency in Greenwood County at a total project cost of \$4,600.	Under Review
2730	Prisma Health-Upstate d/b/a Prisma Health Home Health Agency 300 E McBee Ave, Suite 400 Greenville, SC 29601	Establishment of a Home Health Agency in Spartanburg county at a total project cost of \$18,600.	Under Review

	(Spartanburg County) Contact: Nancy Peek (864)797-7513 CON Reviewer: Dave Fiorini		
2731	Prisma Health-Upstate d/b/a Prisma Health Home Health Agency 300 E McBee Ave, Suite 400 Greenville, SC 29601 (Newberry County) Contact: Nancy Peek (864)797-7513 CON Reviewer: Dave Fiorini	Establishment of a Home Health Agency in Newberry County at a total project cost of \$3,700.	Under Review
2732	Prisma Health-Upstate d/b/a Prisma Health Home Health Agency 300 E McBee Ave, Suite 400 Greenville, SC 29601 (Abbeville County) Contact: Nancy Peek (864)797-7513 CON Reviewer: Dave Fiorini	Establishment of a Home Health Agency in Abbeville County at a total project cost of \$1,800.	Under Review
2733	Prisma Health-Upstate d/b/a Prisma Health Home Health Agency 300 E McBee Ave, Suite 400 Greenville, SC 29601 (Laurens County) Contact: Nancy Peek (864)797-7513 CON Reviewer: Dave Fiorini	Establishment of a Home Health Agency in Laurens County at a total project cost of \$16,800.	Under Review
2734	Carolina Cardiology Associates, PA (CCA) 196 Cardiology Drive Rock Hill, SC 29732 (York County) Contact: Dr. Jugalkishor K. Shah (803)447-1920 CON Reviewer: Jennifer Hyman	Construction of a 4415 sf single specialty Ambulatory Surgery Center specializing in Cardiac Vascular procedures with one Operating Room at a total project cost of \$2,031,975.	Deemed Accepted 4/24/20
2735	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Lexington County)	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Lexington County at a total project cost of \$12,000.	Deemed Complete 6/26/20

	Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman		
2736	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Abbeville County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Abbeville County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2737	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Aiken County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Aiken County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2738	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Allendale County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Allendale County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2739	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Anderson County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Anderson County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2740	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Bamberg County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Bamberg County at a total project cost of \$2,000.	Deemed Complete 6/26/20

2741	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Barnwell County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Barnwell County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2742	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Beaufort County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Beaufort County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2743	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Calhoun County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Calhoun County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2744	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Charleston County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Charleston County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2745	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Cherokee County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Cherokee County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2746	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Chester	Deemed Complete 6/26/20

	(Chester County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	County at a total project cost of \$2,000.	
2747	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (York County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in York County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2748	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Clarendon County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Clarendon County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2749	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Colleton County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Colleton County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2750	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Darlington County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Darlington County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2751	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Dillon County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Dillon County at a total project cost of \$2,000.	Deemed Complete 6/26/20

2752	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Dorchester County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion services in Dorchester County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2753	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Edgefield County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Edgefield County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2754	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Fairfield County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Fairfield County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2755	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Florence County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Florence County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2756	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Georgetown County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Georgetown County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2757	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in	Deemed Complete 6/26/20

	West Columbia, SC 29169 (Greenville County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Greenville County at a total project cost of \$2,000.	
2758	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Greenwood County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Greenville County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2759	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Hampton County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Hampton County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2760	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Horry County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Horry County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2761	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Jasper County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Jasper County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2762	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Kershaw County) Contact: Varner Richards (803)794-0200	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Kershaw County at a total project cost of \$2,000.	Deemed Complete 6/26/20

	CON Reviewer: Jennifer Hyman		
2763	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Lancaster County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Lancaster County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2764	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Laurens County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Laurens County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2765	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Lee County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Lee County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2766	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Marion County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Marion County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2767	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Marlboro County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Marlboro County at a total project cost of \$2,000.	Deemed Complete 6/26/20

2768	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Oconee County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Oconee County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2769	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Newberry County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Newberry County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2770	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (McCormick County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in McCormick County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2771	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Orangeburg County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Orangeburg County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2772	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Pickens County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Pickens County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2773	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Richland	Deemed Complete 6/26/20

	(Richland County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	County at a total project cost of \$2,000.	
2774	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Saluda County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Saluda County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2775	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Spartanburg County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Spartanburg County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2776	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Sumter County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Sumter County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2777	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Union County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Union County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2778	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Berkeley County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Berkeley County at a total project cost of \$2,000.	Deemed Complete 6/26/20

2779	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Chesterfield County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Chesterfield County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2780	Intramed Plus d/b/a Intramed Plus, Inc. 112 Saluda Ridge Ct., Suite 100 West Columbia, SC 29169 (Williamsburg County) Contact: Varner Richards (803)794-0200 CON Reviewer: Jennifer Hyman	Establishment of a Specialty Home Health Agency limited to home infusion nursing services in Union County at a total project cost of \$2,000.	Deemed Complete 6/26/20
2781	Ambulatory Partners, LLC 3045 St. Matthew Rd. Orangeburg, SC 29118 (Orangeburg County) Contact: Dion Franga & Amit Sanghi (803)447-1920 CON Reviewer: Maggie Murdock	Construction of a 16,640 sf Multi-Specialty Ambulatory Surgery Facility with 2 operating rooms and diagnostic imaging at a total project cost of \$12,537,535.	Deemed Complete 6/26/20
2782	Encompass Health Rehabilitation Hospital of Irmo, LLC 108 Evergreen Drive Irmo, SC 29063 (Richland County) Contact: Walter Smith (205)970-7926 CON Reviewer: Jennifer Hyman	Construction for the establishment of a 50 bed Freestanding Inpatient Rehabilitation Hospital in Richland county at a total project cost of \$36,661,437.	Deemed Accepted 4/24/20
2783	Georgetown Treatment Specialists, LLC 1306 North Faser Street Georgetown, SC 29440 (Georgetown County) Contact: Andrew Simpson (864)909-7834 CON Reviewer: Jennifer Hyman	Establishment of an Opioid Treatment Program (OTP) in Georgetown County at a total project cost of \$111,200.	Deemed Complete 6/26/20
2784	The Regional Medical Center of Orangeburg and Calhoun Counties	Renovation of an existing 10,016 sf building for the establishment of a multi specialty Ambulatory	Deemed Complete 6/26/20

	d/b/a RMC Ambulatory Surgery Center 3000 St. Matthews Rd. Orangeburg, SC 29118 (Orangeburg County) Contact: Charles E. Williams (803)395-2466 CON Reviewer: Maggie Murdock	Surgery Facility with 6 operating rooms at a total project cost of \$2,406,060.	
2785	Medical University Hospital Authority d/b/a MUSC Health Florence Medical Center Freestanding Emergency Department 3697 West Palmetto Street Florence, SC 29501 (Florence County) Contact: Vance Reynolds, CEO (843)674-2501 CON Reviewer: Maggie Murdock	Construction of a 10,500 sf Freestanding Emergency Department (FSED) in Florence County at a total project cost of \$15,283,144.	Deemed Accepted 5/22/20
2786	Roper St. Francis Hospital - Berkeley, Inc. d/b/a Roper St. Francis Hospital – Berkeley 100 Callen Boulevard Summerville, SC 29486 (Berkeley County) Contact: Shannon Cantwell (843)789-1754 CON Reviewer: Maggie Murdock	Establishment of diagnostic cardiac catheterization services through the addition of a diagnostic cardiac catheterization laboratory at a total project cost of \$141,938.	Deemed Accepted 5/22/20
2787	Sumter Behavioral Health, LLC d/b/a Midlands Behavioral Health Hospital 3180 Broad Street Sumter, SC 29150 (Sumter County) Contact: Rusty Flathmann (803)315-6005 CON Reviewer: Louis Eubank	Construction for the establishment of a 32-bed psychiatric hospital in Sumter County at a total project cost of \$15,079,889.	Deemed Complete 6/26/20
2788	Conway Hospital, Inc. d/b/a Conway Medical Center - Carolina Forest 300 Singleton Ridge Rd Myrtle Beach, SC 29526 (Horry County) Contact: Bret Barr, CEO (843)347-8048	Construction for the establishment of a 50-bed acute care hospital in Horry County through transfer of 50 licensed hospital beds from Conway Medical Center at a total project cost of \$160,832,776.	Deemed Accepted 5/22/20

	CON Reviewer: Maggie Murdock		
2789	Amedisys Home Health Inc. of South Carolina d/b/a Amedisys Home Health of Clinton 210 Physicians Park Drive, Suite U Clinton, SC 29325 (Cherokee County) Contact: Keith Hambrick, VP (336)978-7925 CON Reviewer: Not yet assigned	Establishment of a Home Health agency in Cherokee county at a total project cost of \$14,288.	Deemed Accepted 6/26/20
2790	Bon Secours-St. Francis Xavier Hospital, Inc. d/b/a Bon Secours St. Francis Xavier Hospital 2095 Henry Tecklenburg Dr Charleston, SC 29414 (Charleston County) Contact: Shannon Cantwell (843)789-1754 CON Reviewer: Maggie Murdock	Purchase of a da Vinci XI robotic surgical system at total project cost of \$2,584,448.	Deemed Accepted 6/26/20
2791	Roper St. Francis Mount Pleasant Hospital d/b/a Mount Pleasant Hospital 3500 Highway 17 North Mount Pleasant, SC 29466 (Charleston County) Contact: Shannon Cantwell (843)789-1754 CON Reviewer: Maggie Murdock	Purchase of a da Vinci XI robotic surgical system at total project cost of \$2,584,448.	Deemed Accepted 6/26/20
2792	Medical University Hospital Authority d/b/a MUSC Health Indian Land Medical Center 9258 Charlotte Highway Indian Land, SC 29720 (Lancaster County) Contact: Patrick Cawley, MD, CEO (843)792-4000 CON Reviewer: Jennifer Hyman	Construction for the establishment of a 98-bed acute care hospital in Lancaster County through the transfer of 98 licensed hospital beds from MUSC Health Lancaster Medical Center at a total project cost of \$235,020,333.	Deemed Accepted 6/26/20

For more information about individual projects, please call (803) 545-4200 for the CON Reviewer listed.

STATUS KEY

Application Received-	The date the application was received by the Department with the proof of publication and initial application fee.
Application Submitted-	The date the application was received but does not meet all filing requirements for the Department to publish in the State Register as accepted for filing.
Deemed Accepted-	The date of publication in the State Register that an application has been received by the Department and deemed "accepted for filing".
Deemed Complete-	The date of publication in the State Register that an application has been "deemed complete". The 120 or 150 day review period begins on this date.
Under Review-	The staff is reviewing the application.
Approved-	The date a decision was made to approve the project.
Denied-	The date a decision was made to deny the project.
CON Issued-	The date the Certificate of Need was issued; the applicant may proceed with the project.
Appealed-	The decision has been appealed.

PROJECTS UNDER APPEAL

CON #	FACILITY	PROJECT DESCRIPTION	STATUS
2340	Roper St. Francis Hospital - Berkeley Inc. d/b/a Roper St. Francis Hospital – Berkeley (Berkeley County)	Addition of Cardiac Catheterization services to Roper St. Francis Hospital - Berkeley at a total project cost of \$2,873,366.	Appealed
2449	Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County	Expansion of radiation therapy services by adding a sixth linear accelerator at a total project cost of \$9,804,548.	Appealed
2459	Medical University Hospital Authority d/b/a MUSC Health Emergency Services	Construction of a 15,300 sf Freestanding Emergency Department (FSED) in Berkeley County at a total project cost of \$13,584,161.	Appealed
2520	Medical University Hospital Authority d/b/a MUHA Community Hospital	Construction of a 128-bed general acute hospital in Berkeley County	Appealed

		at a total project cost of \$325,000,000.	
2523	South of Broad Healthcare d/b/a South of Broad Hospital	Construction of a 20-bed acute care "microhospital" in Beaufort County at a total project cost of \$44,895,195.	Appealed
2541	Trident Medical Center, LLC d/b/a James Island Emergency	Construction of a 12,760 BGSF Freestanding Emergency Department in Charleston County at a total project cost of \$12,493,978.	Appealed
2546	Tidelands Health ASC, LLC d/b/a Tidelands Health Medical Park at the Market Common Endoscopy Center	Development of an endoscopy only ambulatory surgery facility at a total project cost of \$10,177,913.	Appealed
2553	Conway Hospital, Inc. d/b/a Conway Medical Center d/b/a CMC Health Plaza South	Development of a 13,224 sf multispecialty ambulatory surgery facility with 2 operating rooms at a total project cost of \$11,692,394.	Appealed
2569	Tidelands Health ASC, LLC d/b/a Tidelands Health Medical Park at the Market Common Ambulatory Surgery Center	Development of a multi-specialty Ambulatory Surgery Facility within the new Tidelands Health Medical Park at the Market Common at a total project cost of \$13,926,702.	Appealed
2573	Grand Strand Regional Medical Center, Inc. d/b/a Grand Strand Medical Center	The expansion of 9,766 BGSF and renovation of 6,552 BGSF to include the addition of a Hybrid Operating Room at a total project cost of \$20,759,624.	Appealed
2622	Conway Hospital, Inc. d/b/a Conway Medical Center	Development of an Emergent and Elective Percutaneous Coronary Intervention (PCI) at a total project cost of \$5,008,937.94.	Appealed
2641	McLeod Regional Medical Center d/b/a McLeod Seacoast Hospital	Renovation for the establishment of radiotherapy services and the purchase of one linear accelerator in Horry County at a total project cost of \$8,987,961.	Appealed
2652	Grand Strand Regional Medical Center	Renovation and expansion (7,703 sf) for the addition of one comprehensive cardiac cath lab, and one EP lab at a total project cost of \$17,375,000.	Appealed
2681	Lexington County Health Services District, Inc. d/b/a LMC Northeast Outpatient Surgery Center 3016 Longtown Commons Drive Columbia, SC 29229	Construction of a new Ambulatory Surgical Facility with the transfer of 3 outpatient surgery suites at a total project cost of \$19,894,166.	Appealed

	(Richland County) Contact: Tod Augsburger (803) 791-2610 CON Reviewer: Jennifer Hyman		
2684	Aiken Regional Medical Centers, LLC d/b/a Aiken Regional Medical Centers 302 University Parkway Aiken, SC 29801 (Aiken County) Contact: Matt Merrifield (803) 641-5659 CON Reviewer: Jennifer Hyman	Renovation for the addition of an Electrophysiology (EP) laboratory at a total project cost of \$2,734,298.	Appealed
2686	American Health Imaging of South Carolina, LLC 7335 St. Andrews Road Irmo, SC 29063 (Lexington County) Contact: Scott Arant (404) 296-5887 CON Reviewer: Jennifer Hyman	Establishment of a Freestanding Imaging center with MRI and CT in Lexington County (Irmo) at a total project cost of \$2,002,400.	Appealed
2687	American Health Imaging of South Carolina, LLC 1835 Gervais Street Columbia, SC 29201 (Richland County) Contact: Scott Arant (404) 296-5887 CON Reviewer: Jennifer Hyman	Establishment of a Freestanding Imaging center with MRI and CT in Richland County at a total project cost of \$2,102,400.	Appealed
2688	American Health Imaging of South Carolina, LLC 3221 Sunset Boulevard, Suite B Lexington, SC 29169 (Lexington County) Contact: Scott Arant (404) 296-5887 CON Reviewer: Jennifer Hyman	Establishment of a Freestanding Imaging center with MRI and CT in Lexington County (West Columbia) at a total project cost of \$2,198,025.	Appealed
2703	McLeod Loris Seacoast Hospital d/b/a McLeod Outpatient Surgery Center Carolina Forest MOB #3 McLeod Health Boulevard Myrtle Beach, SC 29579 (Horry County) Contact: Monica Vehige (843) 366-3090 CON Reviewer: Maggie Murdock	Construction of a new multispecialty Ambulatory Surgical Facility with 4 Operating Rooms and 2 Endoscopy Suites at a total project cost of \$15,306,507.	Appealed

PROJECTS WHICH DO NOT REQUIRE CERTIFICATE OF NEED REVIEW

EXEMPTIONS

For the Department to grant an exemption, the project must meet the requirements in Section 104 and be filed in accordance with Section 104 of Regulation No. 61-15

FACILITY	PROJECT DESCRIPTION	STATUS
Bon Secours - St Francis Xavier Hospital	Decrease in licensed bed capacity by 11 general acute care beds resulting in a licensed bed capacity of 190 general acute care beds.	E-20-23 7/1/20
Beaufort Memorial Hospital	Replacement of existing 17 year old 16 slice CT Scanner (SC-07-43) with a new 80 slice CT including the relocation from 300 Midtown Drive, Port Royal, SC to 122 Okatie Center Blvd North, Okatie, SC 29909 at a total project cost of \$557,613.00	E-20-24 7/1/20
McLeod Health – McLeod Regional Medical Center of the Pee Dee	Replacement of existing 9 year old Shimadzu DAR9400F fixed C-arm angiography equipment (SC-03-09) with a Shimadzu CV-C16-100 at a total project cost of \$1,286,526.00	E-20-25 7/1/20
Bon Secours- St Francis Xavier Hospital	Replacement of existing GE HDxt 1.5T MRI scanner (SC-05-16) with a new GE Signa Pioneer 3.0T MRI scanner including utilization of a mobile MRI during the replacement process a total project cost of \$2,341,725.00	E-20-26 7/1/20

PROJECTS WHICH DO NOT REQUIRE CERTIFICATE OF NEED REVIEW

NON-APPLICABLE

For a project to qualify for a non-applicability determination, it must not meet the Standards listed in Section 102.1 of Regulation No. 61-15 and be filed in accordance with Section 105 of Regulation No. 61-15. For more information about exemptions and non-applicable projects, please call Jennifer Hyman at 803-545-0260.

FACILITY	PROJECT DESCRIPTION	STATUS
Beaufort Memorial Hospital	Relocation of current 1.5 T MRI located at 300 Midtown Dr, Port	NA-20-04 7/1/20

	Royal, SC to 122 Oaktie Center Blvd North, Oaktie, SC at a total project cost of \$125,000.00	

CON Staff

Louis Eubank	803-545-3652	EubankLW@dhec.sc.gov
Maggie Murdock	803-545-4492	MurdocMP@dhec.sc.gov
Dave Fiorini	803-545-4077	Fiorindn@dhec.sc.gov
Jennifer Hyman	803-545-0260	HymanJJ@dhec.sc.gov
Arnisha Keitt	803-545-3495	GoinsAD@dhec.sc.gov

EXHIBIT D

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
Petitioner,	)	AFFIDAVIT OF KATHYRN PLATT
	)	
v.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	
	)	
Respondents.	)	

PERSONALLY appeared before me Kathryn Platt who, first being duly sworn, stated as follows:

1. My name is Kathryn Platt and I am over 18 years of age. I have personal knowledge of the facts set forth in this affidavit.
2. I am the President of Platt HMC, Inc., which provides consulting services for health planning in the Southeast. T
3. I have an M.B.A. in Health Care Management and Finance and have significant experience working with the South Carolina Department of Health and Environmental Control ("DHEC") on Certificate of Need ("CON") reviews, exemptions to CON reviews, and non-applicability decisions ("NAD").
4. I have been qualified to testify as an expert health planner in the South Carolina Administrative Law Court approximately 10 times.
5. I have also worked extensively with healthcare facilities to determine total project costs in submitted information for CON reviews and other submission to DHEC.

6. I have read the documents submitted by Respondent Beaufort Memorial Hospital in connection with the request for an NAD for the “relocation” of the 1.5T MRI from a facility in Port Royal, South Carolina, to a new facility in Okatie, South Carolina, and all attachments. (See Request for NAD, attached hereto as **Exhibit 1.**)
7. Based on that review and other independent research and general knowledge of the subject matter, the project costs submitted in Beaufort Memorial Hospital’s Request do not include the required project costs under the CON Act and related regulations. See S.C. Code. Ann. §§ 44-7-110, *et seq.* (the “CON Act”).
8. The actual project costs involved in moving a piece of medical equipment from one facility to another must include the value of the equipment and the cost of construction, design, or other costs associated with building and outfitting the facility for the use of the equipment. In addition, a prorated portion of the value of the new medical facility must be included in the costs.
9. In this case, the project costs should have included the costs set forth in Paragraph 8. Although I have not yet received the benefit of discovery, I believe that had those costs been accounted for, they would exceed \$600,000.
10. In addition, the total project costs must include all costs associated with the project. Here, it appears that Beaufort Memorial Hospital is creating an entirely new imaging center at the new facility in Okatie, South Carolina, and should therefore include any imaging equipment and other costs associated with that equipment as part of one project. Again, although I have not yet had the benefit of discovery, I believe that the total project cost of the new imaging center at Okatie is more than \$2,000,000.

11. In South Carolina, a service area is not determined by county lines, but by the communities served in each area. Based on my experience, the communities of Port Royal, South Carolina and Okatie, South Carolina would not be in the same service area, as they are very different communities, and their health facilities serve different populations.
12. In South Carolina CON law and in health planning practice generally, evaluating the propriety of a healthcare project is a location-specific endeavor. Accordingly, Certificates of Need, NADs, and exemption determinations are location-specific. Moving a piece of major medical equipment from one community to another requires a fresh analysis of the need, accessibility, and other project review criteria attendant to issuing a new Certificate of Need.

FURTHER AFFIANT SAYETH NAUGHT:

Signature:

Kathryn M.T. Platt
Kathryn M.T. Platt

SWORN and subscribed to before me this

the 22nd day of January, 2021.

Melissa S. Hill

Notary Public for DeKalb County, GA

My commission expires: 3/8/2021



EXHIBIT 1



May 20, 2020

Ms. Jennifer Hyman
SCDHEC Certificate of Need Division
2600 Bull Street.
Columbia, SC 29201-1708

Dear Ms. Hyman:

Beaufort Memorial Hospital is requesting a determination of the relocation of our current 1.5 Tesla MRI located at 300 Midtown Drive, Port Royal SC, to a new location: 122 Oaktie Center Blvd North, Oaktie, South Carolina 29909.

The new location is within Beaufort County and moving is an effort to consolidate our MRI and physician practice in a central location.

The cost to relocate the MRI is \$80,000.00 for the actual move and \$45,000.00 for a replacement chiller. I have attached quotes from the vendor, Cannon Medical, who would support the relocation.

For your review, the following attachments are included:

- #1. Valid vendor equipment quotes for relocation of the current MRI
- #2. Installation cost including removal
- #3. Total project cost summary
- #4. New location
- #5. Copy of initial CON/ NA letter approving current MRI
- #6. Side by side comparison of current and new equipment
- #7. Current patient volumes with proposed volumes at new location
- #8. Floor plan of affected area new location

Thank you for the review of this request. Please reach out if you have any questions or if further information is needed to make a determination on this project.

Regards,

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
Administration
955 Ribaut Rd.
Beaufort SC, 29902
dmock@bmhsc.org
843-522-5668





Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ Replacement of Like Equipment Exemption
Note: There must be a previously existing CON

R.61-15 Section 104.1.a Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

- ☐ Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)

R.61-15 Section 105.1.a Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

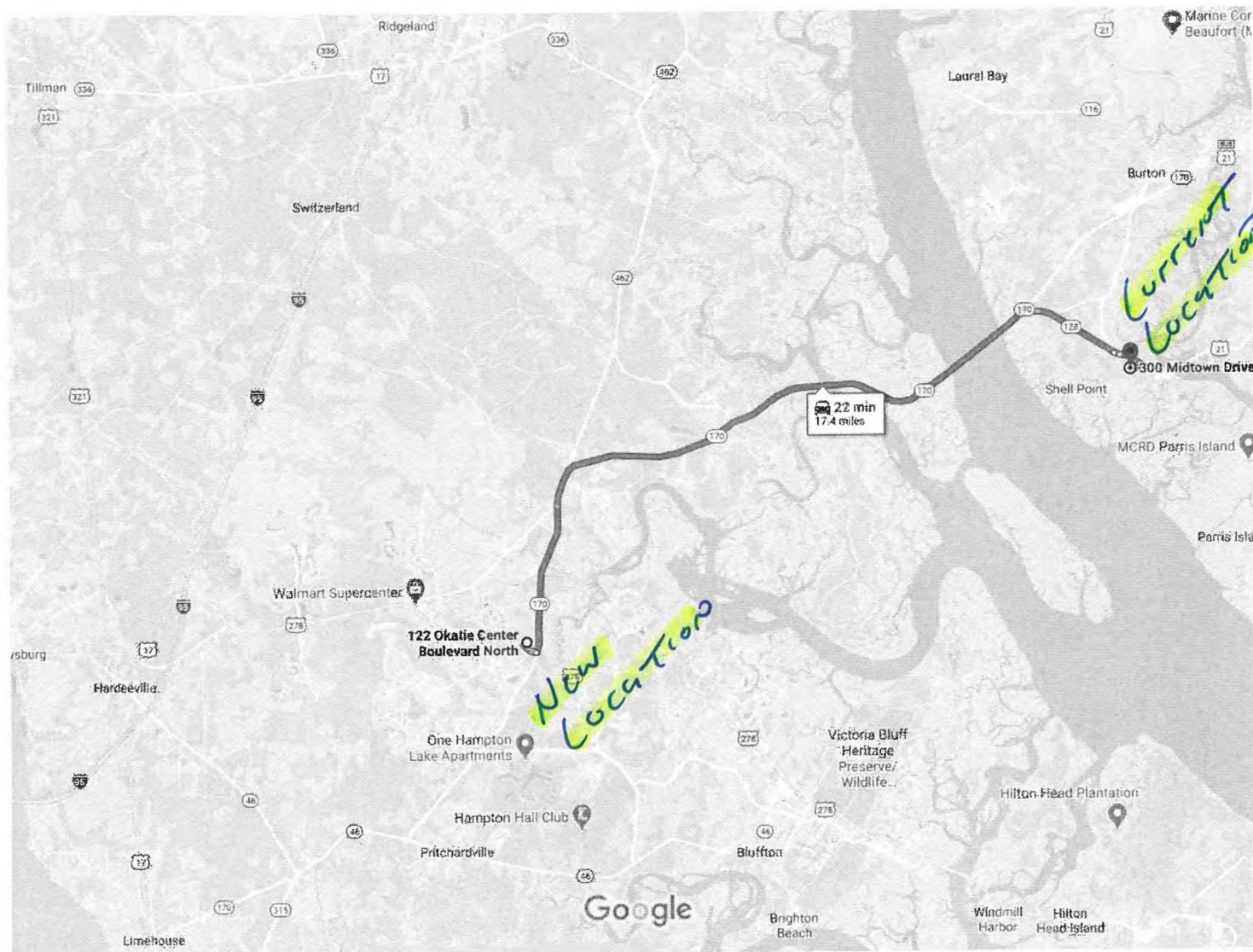
Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
 - ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
 - ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
 - ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
- ☒ 8. Floor plan of affected area(s). If construction is part of the proposal, please remit both "before" and "after" floor plans. The floor plans should contain enough detail to be a stand-alone plan outlining the specific area of the facility in which the unit is to be located

Google Maps

122 Okatie Center Blvd N to 300 Midtown Dr,
Beaufort, SC 29906

Drive 17.4 miles, 22 min



Map data ©2020 2 mi



via SC-170 E

22 min

Fastest route, the usual traffic

17.4 miles

Explore 300 Midtown Dr



Groceries



Hotels



Gas stations



Parking Lots



More



CANON MEDICAL SYSTEMS USA, INC.

Made For life

QUOTATION/ORDER SUMMARY

DATE: 3/11/2020
SID #: 30059255
QUOTE #: 125486-2

PRESENTED TO:

BEAUFORT MEMORIAL HOSPITAL
955 RIBAUT RD
BEAUFORT, SC. 29902

MR-SALES-ITEMS.200

MR SALES ITEMS - HQ ONLY

This quotation shall remain valid until March 31, 2020.

All prices are F.O.B. destination.

Payment terms are: Cash - 0% down payment, 80% upon shipment net 45 days, 20% net 30 days upon completion of installation and/or availability for first use, whichever is earlier.

This quotation/order will be subject to the Agreement for Magnetic Resonance Imaging equipment products between Vizient Supply, LLC and Canon Medical Systems USA, Inc., reference contract no. XR0395.

Please return signed quotation to Canon Medical Systems USA, Inc. by email OrderAdmin@us.medical.canon or fax 714-441-9320.

ACCEPTED AGREED AND ORDERED:

PURCHASER'S SIGNATURE/TITLE_____
DATE_____
CANON MEDICAL SYSTEMS REP_____
DATE

All information contained in this quotation is confidential and may not be disclosed to any third party without Canon Medical Systems' prior written consent.



CANON MEDICAL SYSTEMS USA, INC.

Made For life

EQUIPMENT SUMMARY:

MR-SALES-ITEMS.200

MR SALES ITEMS - HQ ONLY

PART NUMBER

QTY DESCRIPTION

OPC12/RDP.001

1 HASKRIS OPC12 OUTDOOR CHILLER AND WW3 INDOOR
HEAT EXCHANGER TO COOL TITAN 1.5T MRI

TOTAL QUOTE PRICE

\$31,216.00

Applicable Sales Tax Additional



CANON MEDICAL SYSTEMS USA, INC.

Made For life

FINANCE OPTIONS:

Finance options are available through Canon Medical Finance USA, a program of Canon Medical Systems USA, Inc.

CANON MEDICAL FINANCE USA OFFERINGS:

- Fair Market Value, \$1.00 Buy Out (Lease to Own), and Loan structures
- Finance terms ranging from 12 months to 84 months
- Financing for 3rd party assets (including, but not limited to leasehold improvements & I.T.)

CANON MEDICAL FINANCE USA BENEFITS:

- No progress payments. Payments begin after delivery and installation
- Upgrades to the current technology platform can be financed.
- Flexible finance structures, such as deferred payments, tiered repayments, and bridge financing, to meet cash flow needs

Finance options are subject to credit underwriting, approval, and a fully executed contract.

For more information, please contact Trish Malone, Dir. Financial Programs at:
tmalone@us.medical.canon or +1 714 669 1226



CANON MEDICAL SYSTEMS USA, INC.

Made For life

COMPONENT SUMMARY:

<u>PART NUMBER</u>	<u>QTY</u>	<u>DESCRIPTION</u>
OPC12/RDP.001	1	HASKRIS OPC12 OUTDOOR CHILLER AND WW3 INDOOR HEAT EXCHANGER TO COOL TITAN 1.5T MRI The Haskris cooling system consists of two units: Models OPC12 and WW3. Model OPC12 is an outdoor refrigerated chiller to be installed on a rooftop or concrete pad outside the building. The OPC12 is designed for extreme climates, is fully weather-proof and can operate comfortably in ambient air temperatures between -20F and +120F. Model WW3 is an indoor heat exchanger system that gets installed in the MRI equipment room. The WW3 is custom designed to Canon Medical Systems specification to include an integrated 3-circuit piping manifold, built-in city water backup circuit with Building Automation System (BAS) interlock and space saving footprint. Remote display panel is included.

All models are factory tested under full MRI heat load prior to shipment and offer an industry-leading reliability rating of 99.97% uptime. Models include UL and CSA certification. OSHPD certified designs are available.



CANON MEDICAL SYSTEMS USA, INC.

Made For life

PRODUCT WARRANTY AND SERVICE COVERAGE

SYSTEM WARRANTY TERMS

Canon Medical Systems warrants that the Equipment will be free from defects in material and workmanship, for the duration and subject to the terms and conditions stated below. Any part furnished to Customer during the warranty period (stated in the table below) to correct a warranty failure will be warranted to the extent of the unexpired term of the warranty applicable to the Equipment.

The warranty period will commence on the date the installation of the product is complete. Notwithstanding the foregoing, in the event that the installation of the product is delayed for a total of thirty (30) days or more from the date of delivery for any reason or reasons for which Canon Medical Systems is not responsible, the warranty period for such product may, at Canon Medical Systems' option, commence on the thirtieth (30th) day from the date such product is delivered to Customer.

WARRANTY EXCLUSIONS

Warranty coverage does not include any defect which results, in whole or in part, from (1) negligent storage or handling of the product by Customer, its employees, agents, or contractors, (2) failure of Customer to prepare the site or provide power requirements or operating environmental conditions in compliance with any applicable instructions or recommendations of Canon Medical Systems, (3) absence of any product, component, or accessory recommended by Canon Medical Systems but omitted at Customer's direction, (4) any design, specification or instruction furnished by Customer, its employees, agents, or contractors, (5) any alteration of the product by persons other than Canon Medical Systems, (6) combining Canon Medical Systems' product with any product furnished by others that is not approved by Canon Medical Systems, (7) combining incompatible products of Canon Medical Systems, without Canon Medical Systems' prior approval, (8) improper use of the product, improper maintenance of the product by a party other than Canon Medical Systems, or failure to comply with any applicable instructions or recommendations of Canon Medical Systems, or (9) acts of God, fires, floods, strikes or other labor disturbances, or other causes beyond the reasonable control of Canon Medical Systems.

Canon Medical Systems does not warrant any products not manufactured by Canon Medical Systems such as, without limitation, monitors, cameras, computer equipment, injectors, lasers, and coils not manufactured by Canon Medical Systems. Such items will be furnished subject only to the manufacturer's warranty, if any, and without any warranty whatsoever by Canon Medical Systems.

Warranty coverage also excludes consumables, including but not limited to batteries, storage media, positioning pads, table pads, power units, and printer consumables. Normal cryogen consumption is included during the initial warranty term.

REMEDIES

If Canon Medical Systems determines that any product fails to meet the above-mentioned warranty during the applicable warranty period, Canon Medical Systems will correct any such failure by either, at its option, repairing, adjusting, or replacing without charge to Customer any defective or nonconforming parts of the product. Canon Medical Systems will have the option to furnish either new or remanufactured replacement parts or assemblies. However, remanufactured parts will meet the manufacturer's specifications for new components as of the date of completion of installation. All defective parts replaced by Canon Medical Systems will become the property of Canon Medical Systems.

SOFTWARE UPDATES

Canon Medical Systems will furnish to Customer, free of charge for the life of the Equipment, all Canon Medical Systems software or hardware upgrades to the Equipment purchased by Customer, which are intended to correct a safety risk. Software updates offering enhancements to previously purchased software features will be provided during the term of the warranty, if they do not require hardware modifications or additions. Software upgrades providing new features or capabilities not originally purchased, will be made available for purchase by Customer upon request when compatible with the originally purchased hardware. Canon Medical Systems retains the sole right to determine whether a software release is considered an update or an upgrade for which Customer will be charged. The above items will be performed only during the Covered Hours stated in the warranty. Service required outside these hours will be billed at Canon Medical Systems' differential rates in effect at the time such items are provided to Customer.

WARRANTY SERVICE

Warranty service during the applicable warranty period will be performed without charge to Customer during Canon Medical Systems' normal business hours, Monday through Friday, excluding Canon Medical Systems holidays. Subject to the availability of personnel, after-hours service is available upon request at an additional charge.

Customer must promptly notify Canon Medical Systems within the applicable warranty period of any defect that is covered by the warranty, and make the Equipment promptly available for repair and maintenance.

DISCLAIMERS AND LIMITATIONS ON LIABILITY

Canon Medical Systems' obligations stated above will be Customer's sole and exclusive remedy for a breach of the warranty set forth above. SUCH WARRANTY WILL BE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Canon Medical Systems does not warrant that the operation of the Equipment will be uninterrupted.



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WARRANTIES BY PRODUCT LINE

ITEM TYPE	MAGNETIC RESONANCE
EQUIPMENT	12 Months
ACCESSORY OPTIONS	6 Months
REPLACEMENT & OPTIONAL PARTS*	90 Days
UPGRADE COMPONENTS	90 Days

* The above 90-day period applies only to parts that are not furnished pursuant to a warranty repair for the Equipment. Any part furnished to Customer during the warranty period to correct a warranty failure will be warranted to the extent of the unexpired term of the warranty applicable to the System.



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TERMS AND CONDITIONS OF SALE

1. **TITLE AND RISK OF LOSS.** Title and risk of loss to the Equipment purchased under this Agreement will pass to Customer: (a) if Canon Medical Systems is to provide installation, upon Canon Medical Systems' completion of installation, or (b) if Canon Medical Systems will not provide installation, upon delivery by Canon Medical Systems to Customer.

2. **TERMS OF PAYMENT.** Prices stated are F.O.B. Customer's facility. All taxes which are payable by Canon Medical Systems in connection with the sale, use, or possession of the Equipment (excluding income taxes), will be paid by Customer in addition to the quoted price. Terms of payment will be as stated in the first page of this Quotation. All invoices paid after due date will be assessed a late payment charge of the lesser of 1 1/2% per month or the maximum rate permitted by law.

3. **DELAYS.** If Customer changes the scheduled delivery date during the period of 120 days preceding the delivery date, Customer will nevertheless pay the installment of the purchase price which would have been payable upon delivery, on the Scheduled Delivery Date as if delivery had been made on such date. In addition, Customer will pay all extra costs incurred by Canon Medical Systems as a result of such delay, including, without limitation, storage and transportation. Storage fees will be charged at commercially comparable rates for storage on Canon Medical Systems' site. If delivery is delayed by 12 months or more from the Scheduled Delivery Date, except through the fault of Canon Medical Systems, the price set forth in this Agreement may be increased by Canon Medical Systems to a level equal to the prevailing price in effect at the time of the revised delivery date.

4. **EQUIPMENT INSTALLATION.** Canon Medical Systems will provide, at no additional cost, standard labor and rigging services to unload the Product from the transport vehicle and move to the final position. The shoring of floors, the widening of doorways, and other nonstandard rigging requirements will be negotiated between the Canon Medical Systems and Customer separately if it is determined they are required. Canon Medical Systems will install all Equipment purchased under this Agreement and connect them to existing power and/or plumbing lines at no additional charge to Customer. Customer will be responsible for electrical wiring, plumbing, carpentry, plastering, painting, or all other site preparation required prior to installation and connection of the Equipment by Canon Medical Systems. Customer will provide space at the installation site for the safe storage of Canon Medical Systems' tools, test equipment and other materials used for installation at no charge to Canon Medical Systems. Customer shall, at its cost, obtain all permits and licenses required by governmental authorities in connection with the installation and operation of the Equipment. Customer acknowledges that the System and Software are designed to operate within certain power, temperature, airborne contamination, and humidity ranges. Customer will be responsible for, without limitation: (i) preparing and maintaining the Customer facility in conformance with the Site Preparation Guide; (ii) maintaining its network infrastructure; (iii) providing Canon Medical Systems, access to a network connection in or near the area of the System being serviced by the equipment service staff; and (iv) supplying computer grade AC power. The Equipment relies upon a stable grounded connection to the main power grid in order to function effectively. Customer acknowledges that AC power supply quality may be a problem in old facilities or in those facilities receiving poor quality utility service and that power conditioning may be necessary in such cases.

5. **EQUIPMENT OPERATION.** Customer agrees that all Equipment purchased under this Agreement will be operated exclusively by duly qualified technicians and/or medical doctors in a safe and reasonable manner in accordance with Canon Medical Systems' written instructions, applicable laws and regulations, and for the purposes for which such Equipment was intended.

6. **LIMITED WARRANTY AND REMEDY.** A. For the warranty period described below by product, Canon Medical Systems, as its only obligation, will replace or repair, without charge to Customer during Canon Medical Systems' normal working hours (if Customer requests warranty service outside such hours, Customer will pay overtime premium for labor), any component of the Equipment that is defective in materials or workmanship, provided such defect is reported to Canon Medical Systems within the warranty period. Canon Medical Systems' warranty period is as follows: (a) Systems and Major Components - one year from date of completion of installation; (b) Accessories/Options (except glassware) - six months from date of completion of installation. Components not manufactured by Canon Medical Systems will be furnished subject only to the manufacturer's warranty, if any, and without any warranty whatsoever by Canon Medical Systems. During the warranty period, Canon Medical Systems will furnish free of charge any parts, including software required to correct any defect in the Equipment or as required under applicable laws.

B. Canon Medical Systems does not warrant that the operation of the Equipment of the System will be uninterrupted. All defective parts replaced by Canon Medical Systems will become the property of Canon Medical Systems. Replacement parts may be re-manufactured. However, such parts will meet the manufacturer's specifications for new components as of the date of completion of installation. CANON MEDICAL SYSTEMS' OBLIGATION TO REPAIR OR REPLACE DEFECTIVE PARTS OR SOFTWARE WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR A BREACH OF THE WARRANTY SET IN THIS AGREEMENT. SUCH WARRANTY WILL BE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. The warranty set forth in this Agreement will not apply to, and Canon Medical Systems will not be liable for any defects resulting from misuse, repairs performed by unauthorized third parties, accidents, acts of God, or neglect of anyone other than Canon Medical Systems.



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7. **LATEST HARDWARE AND SOFTWARE AT TIME OF DELIVERY.** Canon Medical Systems agrees that the Equipment ordered by Customer will, at the time of delivery to Customer, contain, at no additional charge to Customer, the latest hardware and software manufactured by Canon Medical Systems for such Equipment that are commercially available in the United States and which are provided as part of Canon Medical Systems' standard configuration for such Equipment at the time of delivery. This commitment applies only to components and not an upgrade to the entire system. Furthermore, it is limited to hardware and software that (a) have been ordered by Customer, and not any optional or other items that were not ordered by Customer, and (b) are cleared by the FDA as of the date of delivery of the Equipment.

8. **LIMITATION OF LIABILITY.** A. NEITHER CANON MEDICAL SYSTEMS NOR CUSTOMER WILL UNDER ANY CIRCUMSTANCES BE LIABLE FOR CONSEQUENTIAL, SPECIAL, INCIDENTAL, OR EXEMPLARY DAMAGES OR ECONOMIC LOSS ARISING OUT OF OR RELATED TO THE TRANSACTIONS CONTEMPLATED IN THIS AGREEMENT, EVEN IF EITHER PARTY IS APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING.

B. IN NO EVENT WILL CANON MEDICAL SYSTEMS' LIABILITY TO THE CUSTOMER (WHETHER BASED ON AN ACTION OR CLAIM IN CONTRACT, TORT, INCLUDING NEGLIGENCE, STRICT LIABILITY, OR OTHERWISE) ARISING OUT OF OR RELATING TO THE TRANSACTIONS CONTEMPLATED IN THIS AGREEMENT EXCEED THE AGGREGATE AMOUNT ACTUALLY PAID BY CUSTOMER TO CANON MEDICAL SYSTEMS UNDER THIS AGREEMENT. THE LIMITATION OF LIABILITY SET FORTH ABOVE WILL NOT APPLY TO CLAIMS FOR PERSONAL INJURY OR PROPERTY DAMAGE CAUSED BY EQUIPMENT DEFECTS.

9. **SECURITY INTEREST.** Canon Medical Systems hereby reserves and Customer grants to Canon Medical Systems a security interest pursuant to the Uniform Commercial Code, in and to the Equipment (and all products and proceeds of it) until full payment of the purchase price is received. In the event that Customer finances its acquisition of the Equipment through a lease, conditional sale contract, secured loan agreement or other financing agreement (collectively, "Lease") with Canon Medical Systems, then the security interest in the Equipment (and all products and proceeds thereof) shall secure all obligations of Customer due and to become due under the Lease.

10. **REMOVAL OF EQUIPMENT.** Until Canon Medical Systems has received full payment of the purchase price, Customer will not remove all or any part of the Equipment from Customer's premises, nor will Customer sell, lease, transfer or otherwise part with the possession of, or permit any lien or encumbrance to be placed on all or any part of the Equipment.

11. **TRADE-IN.** If this quotation includes the trade-in of Customer's existing equipment and the removal date of the trade-in equipment is delayed due to no fault of Canon Medical Systems or if the trade-in equipment is damaged or its condition deteriorates from the date of this quotation through the date of removal, Canon Medical Systems reserves the right to increase the pricing of the new equipment in an amount equal to the reduction in the resale price of the trade-in equipment. Customer must convey free and clear title to the trade-in equipment. If there are any liens or encumbrances on the trade-in equipment, Canon Medical Systems cannot accept the trade-in.

12. **REMEDIES OF CANON MEDICAL SYSTEMS.** If Customer fails to make any payment when due under this Agreement, or becomes insolvent or makes an assignment for the benefit of creditors, or if a petition in Bankruptcy is filed by or against Customer, or if the financial responsibility of Customer becomes impaired, or if Customer otherwise breaches any of the terms and conditions of this Agreement, then Canon Medical Systems may, without prior notice or demand, defer shipments, cancel the balance of the order, suspend performance of any obligation (including without limitation, all obligations set forth under Limited Warranty And Remedy above), and/or take immediate possession of the Equipment delivered, until the full purchase price of the Equipment is paid by Customer or, at Canon Medical Systems' discretion, until security satisfactory to Canon Medical Systems is given by Customer. Any costs incurred by Canon Medical Systems as a result of suspending performance or repossession or collection will be payable by Customer. Canon Medical Systems may sell repossessed Equipment with proceeds to be applied to unpaid balance and expenses incurred in sale, repossession and collection. Customer will pay any remaining deficiency. Canon Medical Systems may exercise any other rights available to it by law.

13. **EXCUSED PERFORMANCES.** Except for Customer's payment obligations hereunder, neither party will be liable to the other for non-performance or delay in performance resulting directly or indirectly from any occurrences beyond such party's control, including without limitation, strikes or other labor troubles, acts of God, war, accidents, fires, floods, other catastrophes, inclement weather, transportation, delays caused by suppliers, or laws, regulations, or acts of any governmental agency.

14. **SOFTWARE.** All rights and interest in any software that may be furnished under this Agreement, and any updates and enhancements to it, will remain the property of Canon Medical Systems. Such software is being furnished to Customer under a non-exclusive license. Customer will not, or allow others to decompile, modify, copy, reproduce, or transcribe the software nor allow third parties to use the same without Canon Medical Systems' prior written consent. In the event a third party's software is furnished to Customer, Customer may be required to execute a software license agreement as requested by such third party as a condition to delivery and/or purchase of the third party's product. Canon Medical Systems will furnish Customer with a copy of such license agreement for its review and execution. In the event Customer sells the Equipment to a third party, the purchaser thereof will have the same rights and obligations with respect to any Canon Medical Systems software as Customer. Customer will need to make its own determination whether it needs to obtain any consent from a third party for non-Canon Medical Systems software.

15. **CANCELLATION.** Customer may not cancel the order subject to this Agreement except with Canon Medical Systems' prior written consent. In the event of cancellation without Canon Medical Systems' written consent, Canon Medical Systems will be entitled to recover liquidated damages in an amount equal to twenty percent (20%) of the purchase price of the Equipment.



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16. ASSIGNMENT. Neither party may assign any of its obligations under this Agreement without the prior written consent of the other party. However, some of the obligations stated in this Agreement, such as the ones relating to installation of items not manufactured by Canon Medical Systems and the warranty thereof may be performed by Canon Medical Systems' contractors or suppliers.

17. EXPORT REGULATIONS. This Agreement involves products, and/or technical data that may be controlled under the U.S. Export Administration Regulations and may be subject to the approval of the U.S. Department of Commerce prior to export. Any export or re-export by Customer, directly or indirectly, in contravention of such Regulations is prohibited.

18. ATTORNEY'S FEES - COSTS. In the event of any legal proceeding involving any party to this Agreement against the other relating to the subject matter of this Agreement, the prevailing party in such proceeding will be entitled to recover reasonable attorney's fees, expert fees, and court costs against the non-prevailing party.

19. ACCEPTANCE BY CANON MEDICAL SYSTEMS. This Quotation/Order will not be binding on Canon Medical Systems even if signed by a Canon Medical Systems' employee, until Customer's order for the Equipment is booked by Canon Medical Systems' Headquarter office.

20. ENTIRE AGREEMENT. This quotation contains the entire agreement between the parties and supersedes all prior and contemporaneous agreements between the parties, whether oral or written, relating to its subject matter, including, without limitation, all different or additional terms and conditions which may be contained in Customer's bid documents, purchase order or any other documents furnished by Customer. The provisions of this Agreement may not be modified unless in writing and executed by both parties.



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Quote #: 125486/30059255	Project Reference: Haskris Outdoor Chiller and Indoor Heat Exchanger for Canon Medical Systems Titan 1.5T MRI
Date: 3/11/2020	Prepared For: Canon Medical Systems USA MRI Customer
Contact: BEAUFORT MEMORIAL HOSPITAL	Phone: email:

JOB SPECIFICATIONS	
APPLICATION:	MRI COOLING
VOLTAGE / PHASE / FREQUENCY:	208-230/3/60 or 460/3/60 (specify when ordering)
BTUH REQUIRED:	108,000
OUTDOOR CHILLER AMBIENT RANGE (°F):	-20 to +120
OUTDOOR CHILLER CONDENSING METHOD:	AIR COOLED
OUTDOOR CHILLER REFRIGERANT:	R-407C
MRI CIRCULATING FLUID:	WATER
MRI FLOW RATE (GPM):	15 @ 72.5 PSI
MRI SUPPLY TEMPERATURE (°F):	65

HASKRIS PART NUMBER:	WW3OPC12-230V-TAMS1.5T or WW3OPC12-460V-TAMS1.5T
OPC12 OUTDOOR CHILLER	
- ADDITIONAL 4 YEAR COMPRESSOR WARRANTY (parts only)	
- MODBUS CONNECTION INCLUDED/BACNET AVAILABLE	
- PROGRAMMABLE LOGIC CONTROLLER (PLC) INCLUDING:	
- o PUMP PRESSURE (FLOW) INDICATOR & HIGH/LOW ALARMS - o REFRIGERANT HIGH/LOW PRESSURE INDICATOR & ALARM - o POWER ON AND FAULT INDICATOR - o HIGH TEMP INDICATOR - o DIGITAL I/O DISPLAY STATUS - o COMPONENT MANUAL OVERRIDE FOR TROUBLESHOOTING	
- ECM (ELECTRONICALLY COMMUTATED) VARIABLE SPEED FAN	
- TANK LOW LEVEL INDICATOR (INCLUDED IN PLC)	
- CIRCUIT BREAKERS IN LIEU OF FUSES	
- SEMI-CLEAR TANK FOR EASE OF TANK LEVEL INDICATOR	
- HEAD PRESSURE CONTROL (DOWN TO -30°F AMBIENT)	
WW3 INDOOR HEAT EXCHANGER	
- BUILT-IN PIPING MANIFOLD w/FLOWMETERS AND METERING VALVES	
- BUILT-IN AUTOMATIC CITY WATER BACKUP SWITCHOVER	
- NON-FERROUS SYSTEM PUMP, 15 GPM @ 72 PSI	
ACCESSORIES AND SERVICES	
- REMOTE DISPLAY PANEL FOR OUTDOOR CHILLER	
- PROPYLENE GLYCOL	
- 1 YEAR LIMITED WARRANTY (see details below)	
- FREIGHT (CONTINENTAL USA)/START-UP SUPPORT/6 MO PM (upon request)	



Terms and Conditions of Sale

1. WARRANTY

Limited Warranty:

Haskris warrants that the Equipment will conform to the Product Specifications and will be free from any defects in title, quality, materials, design and/or workmanship. The warranty is limited to the following provisions and does not apply to claims where the product has been mishandled or used in a manner inconsistent with the Haskris instruction manual. Haskris makes no other warranty, express or implied, including all implied warranties of merchantability and fitness for a particular purpose.

Term & Conditions Provisions:

Warranty extends for twelve (12) months from date of start-up or eighteen (18) months from date of shipment, whichever occurs first. The warranty includes parts and on-site labor during normal business hours (M-F 8:00-5:00, excluding holidays). Any warranty labor must be authorized by Haskris, in writing, prior to proceeding with the repairs. Overtime charges will apply to warranty service provided outside normal business hours.

Notice of a warranty claim shall be submitted to Haskris in writing. Haskris shall have (60) days to remedy any warranty defects. If Haskris fails to remedy a warranty defect, Customer will then have the right to request that Haskris remove the non-conforming Equipment, in which case Haskris shall refund the amount paid by Customer for the removed Equipment within twenty (20) days from the date of removal by Haskris.

Parts Provisions:

Parts warranty does not include consumable items such as filtration elements. Replacement parts furnished during the system warranty are covered until the system warranty expires. Parts purchased after the system warranty expires will be covered for a period of 90-days. Defective parts must be returned, transportation prepaid, to Haskris. Normal outgoing surface transportation charges will be paid by Haskris.

Equipment Location:

Beaufort Memorial –
Lowcountry Imaging
300 Midtown Dr
Beaufort, SC 29906

Billing:

Beaufort Memorial Hospital
955 Ribaut Road
Beaufort, SC 29902

Quote Date: 12/14/2018

Payment: 60 Days

Price is valid for 60 days from date of quote.

PBOM#: Titan MR system

SEG: 30054694

Description: Canon Titan 1.5T MRI system

Relocation Price:

ESTIMATE \$75,000, Final pricing to be determined after review of new location.

INCLUDED:

The system relocation includes labor, travel, and rigging (see notes below) for the required Canon customer engineers in performance of the work specified below to deinstall and reinstall the above reference equipment during the hours of 8AM to 5PM, Monday through Friday excluding Canon Holidays.

Site Planning: The quoted price will also include support and assistance during the pre-installation and site preparation phase of the relocation process. This will include Canon typical site plans, site specific Preliminary and Final drawings as well as technical support during preliminary site investigation.

De-installation: A system audit will be performed prior to the de-installation of the equipment to determine if the system meets manufacturer specifications. The audit will determine current operation specifications. A separate quotation will be provided for any parts, labor and coils required to bring the system to Canon specification. The system will be mechanically disassembled to the extent possible and prepared for relocation by qualified riggers.

Re-installation: Canon customer engineers will assemble, calibrate and test the equipment to ensure the system meets all manufacturer specifications are at operation level when re-installed. A separate quotation will be provided for any parts, labor and coils required to bring the system to Canon specification. QA testing data will be provided to the customer and archived on site for future reference.

Rigging: The quoted price includes rigging the system out of current location, transportation to new location and rigging in to new location. The quoted price may vary if more than standard rigging is required (transport more than 25 miles, if a crane is required, delivery other than first floor, Etc.). A site inspection is required at the new and old locations).

Site Specific: The following site specific items are included in the relocation price.

1. To be determined after review of the existing site; system inspection; and review the new location.
2. Rigging cost to be determined after site review to be added to this quotation

EXCLUDED IN THIS QUOTE:

- Modification or reconstruction of a wall, partition, ceiling or any other portion of the facility necessary to remove or install the system. RF or if required magnet shielding.
- Any mechanical, electrical and environmental work required to meet Canon specifications as indicated on the final site drawings provided by CANON.
- Any replacement cables and parts needed to install the system at new location

Site Specific: The following site specific items are not included in the relocation price.

1. System options not manufactured by Canon Medical Systems such as but not limited to lasers, injectors, UPS power conditioners, chillers, HVAC, and workstations.
2. Penetration panel; RF and magnet shielding
3. Storage of system should it be required

CUSTOMER ACCEPTANCE

Purchaser's Signature

Canon Signature

Print Name / Title

Date

Rick Spears / ASM

Print Name / Title

12/14/2018

Date



OF DILLON, LLC

SC License #: G119780

December 27, 2018

Beaufort Memorial Hospital
Attn: Matt Hurtt – Dir. Of Advanced Imaging
955 Ribaut Road
Beaufort, SC. 29902

Ref: Beaufort Memorial Hospital – (Beaufort, SC)
Low Country Imaging Center- Canon MRI Renovation – Quote #1218

Mr. Hurtt,

SNB Construction, LLC, is pleased to provide a proposal to provide labor, material, equipment, supervision and subcontractors for the removal and replacement of the Magnet delivery window/RF-screen. The work to facilitate this is limited to that specified in this Scope of Work, is based on site visit conducted by SNB Construction LLC.

The Scope of Work is as follows:

Division 00 – Procurement (Not Applicable)

Division 01- General Requirements

1. Provide labor to complete work required.
2. Provide general supervision.
3. Construction clean-up for occupancy.
 - a. Customer to terminal clean/final clean area.

Division 2 – Existing Conditions (Not Applicable)

Division 3 – Concrete (Not Applicable)

Division 4 – Masonry (Not Applicable)

Division 5 – Metals (Not Applicable)

Division 6 – Woods, Plastics and Composites (Not Applicable)

Division 7- Thermal and Moisture Protection (Not Applicable)

Division 8 – Doors, Windows, and Glass (Openings)

1. Provide labor and materials to remove and re-install existing storefront for Magnet removal.

2125A Jody Road – Florence, SC 29501

- a. Existing conditions of storefronts are excluded.

Division 9 – Finishes (Not Applicable)

Division 10 – Specialties (Not Applicable)

Division 11 – Equipment (Not Applicable)

Division 12 – Furnishings (Not Applicable)

Division 13 – Special Construction (Not Applicable)

Division 14 – Conveying Systems (Not Applicable)

Division 21 – Fire Suppression (Not Applicable)

Division 22- Plumbing (Not Applicable)

Division 23- Heating, Ventilating and Air Conditioning (Not Applicable)

Division 25 – Controls (Not Applicable)

Division 26 – Electrical (Not Applicable)

Division 27 – Communications (Not Applicable)

Division 28 – Electronic Safety and Security (Not Applicable)

Division 31 – Earthwork (Not Applicable)

Division 32 – Exterior Improvements (Not Applicable)

Division 33 – Utilities (Not Applicable)

EXCLUSIONS: The following elements of design, engineering, construction, equipment or related work or services **ARE NOT INCLUDED** in the renovation work or otherwise a part of this Work Scope:

1. Mold abatement and/or the correction of existing conditions
2. Relocation and/or correction of existing underground utilities.
3. Any item or work not specifically stated to be included in this quote should be considered excluded.
4. Existing structural conditions and/or then correction of existing structural conditions outside of the items within this proposal.
5. Asbestos testing, abatement, or encapsulation.
6. Any upgrades to existing power conditions beyond the Scope of Work.
7. Any construction due to state or local code upgrades
8. Work in bio-hazardous, radioactive, toxic, asbestos or other high-risk environments.
9. **Any work involving telephone systems, computer data systems, alarms, code blue and nurse call or networking to other modalities (outside of items outlined in this proposal).**
10. Any state or room licensing fees.
11. Utilities needed for ancillary equipment such as film processors, film viewers, etc.
12. New utility power services, work involving emergency power, UPS or power conditioning equipment beyond this Scope of Work.
13. Relocation of existing main electrical services or expansion of main electrical power capacity.
14. Energy and building management systems except per inclusions.
15. Any work involving fire alarm or fire suppression systems additions or modifications except per inclusions.

16. De-installation of existing diagnostic imaging system and reinstallation of new diagnostic imaging system.
17. Removal of existing medical equipment, furniture and shelving.
18. Any DHEC related fees including, but not limited to, the review and permitting of plans.

Qualifications:

1. SNB Construction LLC, will need approximately one (1) Day to complete the removal and replacement, provided there is no delay on the part of equipment being removed.
2. All work to be performed during standard working hours of Monday through Friday, excluding holidays, between the hours of 7:00am-5:30pm or at the discretion of SNB Construction LLC.
3. Any changes to the scope of the work will be handled through a written change order process only.
4. Cost/Plus items shall be charged cost plus 10% for overhead and 5% for profit
5. This proposal expires **30 days** from date list on Page 1 above.

If you have any questions, please do not hesitate to contact me. We look forward to seeing you and your organization in the near future.

Materials and Labor:

All for the sum of: \$5,000.00

(Five thousand, dollars).

Work can begin on this project upon acceptance of this proposal/Exhibit and/or signature of AIA131-2014 (Standard AIA contract between Canon and Contractor with SNB Construction, LLC Amendments). By accepting this agreement, you are accepting the terms and conditions of AIA contract documents A141 2014 and A201 2007 to be included as part of this proposal/Exhibit.

This proposal and scope of work is confidential information and is the sole property of SNB Construction LLC. Distribution is prohibited without prior approval from SNB Construction LLC.

Please complete the following information and return to our office (Payment terms are "monthly progress payment"/invoices to be submitted each month and/or upon Substantial Completion. Customer to make payments to SNB Construction LLC within thirty (30) days of receipt of any application for payment/invoice. Any payment, outside of the substantial completion invoice (retainage in reduced to 5% for closeout), shall be subject to customer's right to withhold and retain ten percent (10%) of the payment amount set forth in each invoice, until the payment is made following Substantial Completion, which payment shall be made in full within thirty (30) days of receipt of invoice).

Accepted by (Signature): _____ Date: _____

Printed signature/Title: _____

PO#: _____ PO Amount \$ _____

*****All work in this scope is warranted for one (1) year after first use by customer and/or Certificate of Occupancy. Or manufactures standard warranty (which may be less or more than a year). Mechanical equipment is warranted for one year from startup. *****

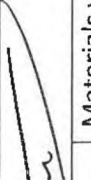
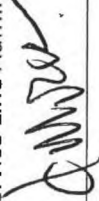
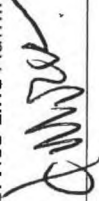
Thank you for the opportunity,

Samuel N Bracey

2125A Jody Road – Florence, SC 29501

President
SNB Construction LLC

**Beaufort Memorial Hospital
Capital Expense Request (CER)**

Item Requested/Project Title Canon Titan 1.5T MRI	Department Name LCMG Imaging	1.4202	☒ Growth ☐ Patient Safety
Priority with 1 being the most urgent: 1 x ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐	Requester Name Matthew Hurtt	Phone 522-5841	☐ Savings ☐ Regulatory
Total Equipment Cost		Unit Cost \$949,480	
Request is for Fiscal Year Current ☐ Qtr. ☐ Next ☐ Future ☐	Includes Multiple Vendors Yes ☐ No ☒	Project Yes ☐ No ☐	Freight Estimated Construction Cost \$278,037.89
Justification of Request. All requests \$25,000 and higher also require Business Review and ROI. Replacement of LCMG MRI with future move to new Bluffton MOB			
Signatures needed before submission to Materials Management			
Director 	Materials Management Director		
Service Line Administrator 	Materials will process request and submit to the Capitol Committee.		
CFO & CEO Signature – Approved Capital Only			
IT 	CFO	Division CFO- \$50k or greater	
Biomed	CEO		
Facilities	Approval Date	Hold for Quarter	



Article #: 92148969009997901414472114

April 4, 2019

Via Certified Mail

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
955 Ribaut Rd.
Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
Following Project:
Beaufort Memorial Hospital
Replacement of a GE 1.0T MRI (E-03-49) with a Canon Medical Titan 1.5T
MRI at a total project cost of \$1,229,037.00
Matter: NA-19-03
Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, §105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

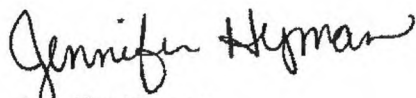
This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803.545.0530); Division of Health Facilities Construction, Mr. William McCallum (803.545.4215); Division of Health Licensing, Ms. Gwendolyn Thompson, (803.545.4370); and Bureau of Certification, Ms. Mary Jo Roue (803.545.4293).

Letter to Daniel Mock
April 4, 2019
Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

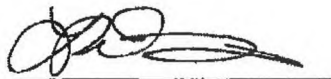
Should you have any question regarding the above information, please contact the Department at 803.545.4200.

Very truly yours,



Jennifer Hyman
Project Coordinator, Certificate of Need Program
South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief
Bureau of Healthcare Planning and Construction

Mr Previous Year Comparative #5

DATE: 06/03/20 @ 0933
USER: MHURTT

Beaufort Memorial Hosp RAD *Live*
PATIENT COUNT STATISTICS
DEPARTMENT: Imaging Services Department
SITES: BMP

DATES: 06/04/19-06/02/20

PAGE 1

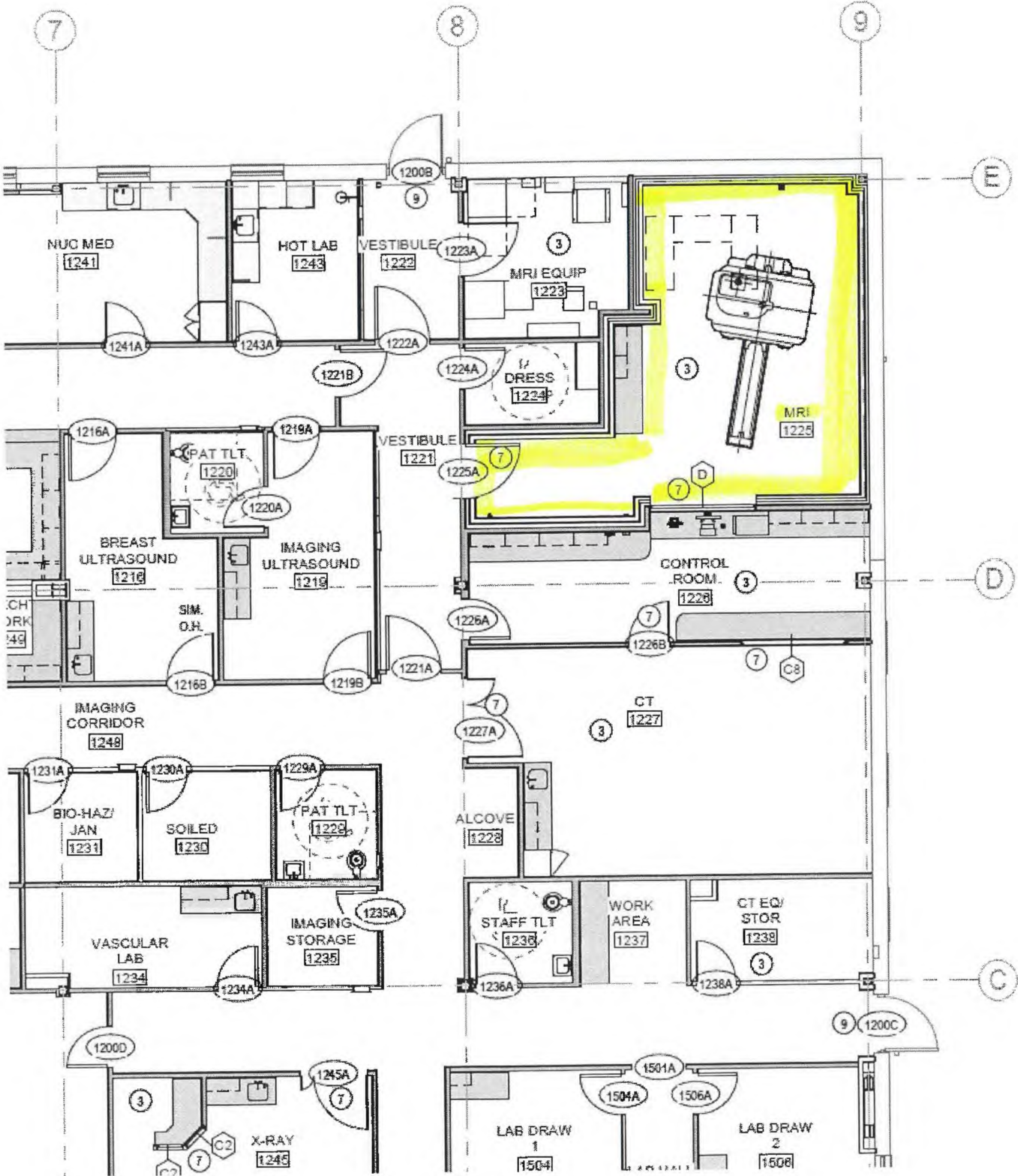
PROCEDURE	INPATIENTS ORDERS PATIENTS	OUTPATIENTS ORDERS PATIENTS	ER PATIENTS ORDERS PATIENTS	TOTAL PATIENTS ORDERS PATIENTS	TOTAL BY PROCEDURE
CATEGORY: Imaging-MRI					
MR Abdomen w/o Cont		2		2	2
MR Abdomen w/o Cont		29		29	29
MR Ankle Lt w/o Cont		13		13	13
MR Ankle Rt w/o Cont		12		12	12
MR Arm Rt w/o Cont		2		2	2
MR Brachial Plexus R		1		1	1
MR Brain w/o Cont		91		91	91
MR Brain w/o Cont		84		84	84
MR Calf Rt w/o Cont		1		1	1
MR Cervical Spine w Cont		151		151	151
MR Cervical Spine w/o Cont		15		15	15
MR Cervical Spine w/o Cont		1		1	1
MR Chest w/o Cont		1		1	1
MR Elbow Lt w/o Cont		1		1	1
MR Elbow Rt w/o Cont		1		1	1
MR Face Neck Orbit w/o Cont		7		7	7
MR Femur Lt w/o Cont		3		3	3
MR Femur Rt w/o Cont		1		1	1
MR Finger Rt w/o Cont		2		2	2
MR Foot Lt w/o Cont		9		9	9
MR Foot Lt w/o Cont		2		2	2
MR Foot Rt w/o Cont		10		10	10
MR Foot Rt w/o Cont		2		2	2
MR Forearm Rt w/o Cont		2		2	2
MR Forefoot Lt w/o Cont		1		1	1
MR Hand Lt w/o Cont		2		2	2
MR Hand Rt w/o Cont		1		1	1
MR Hip Bi w/o Cont		30		30	30
MR Hip Lt w/o Cont		1		1	1
MR Hip Lt w/o Cont		35		35	35
MR Hip Rt w/o Cont		12		12	12
MR IACS		3		3	3
MR Kidneys w/o Cont		1		1	1
MR Knee Bi Biomet		2		2	2
MR Knee Bi w/o Cont		33		33	33
MR Knee Lt Biomet		62		62	62
MR Knee Lt w/o Cont		23		23	23
MR Knee Rt Biomet		60		60	60
MR Knee Rt w/o Cont		1		1	1
MR Knee Rt w/o Cont		6		6	6
MR Lower Ext Lt w/o Cont		1		1	1
MR Lower Ext Rt w/o Cont		357		357	357
MR Lumbar Spine w/o Cont		25		25	25
MR Lumbar Spine w/o Cont		1		1	1
MR Lumbosacral Spine w/o Cont		3		3	3

DATE: 06/03/20 @ 0933
 USER: MHURTT

Beaufort Memorial Hosp RAD *Live*
 PATIENT COUNT STATISTICS
 DEPARTMENT: Imaging Services Department
 SITES: BMP
 DATES: 06/04/19-06/02/20

PAGE 2

PROCEDURE	INPATIENTS ORDERS PATIENTS	OUTPATIENTS ORDERS PATIENTS	ER PATIENTS ORDERS PATIENTS	TOTAL PATIENTS ORDERS PATIENTS	TOTAL BY PROCEDURE
MR Neck		1	1	1	1
MR Neuroquant Brain		30	30	30	30
MR Pancreas wwo Cont		1	1	1	1
MR Pelvis wo Cont		22	22	22	22
MR Pelvis wwo Cont		23	23	23	23
MR Pituitary		5	5	5	5
MR Prostate wwo Cont		4	4	4	4
MR Shoulder Bi wo Cont		2	2	2	2
MR Shoulder Lt wo Cont		47	47	47	47
MR Shoulder Rt wo Cont		61	61	61	61
MR Soft Tissue Neck		1	1	1	1
MR Thigh Lt wo Cont		2	2	2	2
MR Thigh Rt wo Cont		1	1	1	1
MR Thoracic Spine wo Cont		47	47	47	47
MR Thoracic Spine wwo Cont		6	6	6	6
MR Tib Fib Lt wo Cont		1	1	1	1
MR Tib Fib Rt wo Cont		1	1	1	1
MR Upper Ext Rt wo Cont		1	1	1	1
MR Upper Ext Rt wwo Cont		1	1	1	1
MR Wrist Lt wo Cont		7	7	7	7
MR Wrist Rt wo Cont		4	4	4	4
MR Abdomen w Cont		1	1	1	1
MR Carotids		25	25	25	25
MR Circle of Willis		1	1	1	1
MR Head w Cont		2	2	2	2
MR Head wo Cont		12	12	12	12
MR Lower Ext Bi w Cont		1	1	1	1
MR Lower Ext Bi wwo Cont		1	1	1	1
MR Lower Ext Lt wwo Cont		1	1	1	1
MR Neck wwo Cont		4	4	4	4
MRCP		13	13	13	13
TOTAL: Imaging-MRI		1437	1313	1437	1313
DEPARTMENT TOTAL		1437	1313	1437	1313



Side by Side Comparison

Existing GE 1.0 T (GE 1.0t LCC9x)			Canon Titan 1.5		
Field strength		1.0T			1.5T
Bore size		50cm			71cm
Table Weight Limit		350lbs			440lbs
Number of Channels		4			16
Coils		HNC, Spine, shoulder, foot/ankle, body matrix			Body Matrix, HNC, Spine, Large Flex(4 channel), Small Flex(16 channel), shoulder, knee/foot/ankle
Additional software		none			MAR Metal Artifact Reduction

* MAR software is now industry standard on MRI systems. This software is used to reduce artifacts encountered when scanning metal implants such as hip or knee revisions and does not constitute a material change in scanning abilities.

EXHIBIT E



Article #: 92148969009997901539819481

July 1, 2020

Via Certified Mail

Daniel Mock, AVP Operations
 Beaufort Memorial Hospital
 955 Ribaut Rd.
 Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
 Following Project:
 Beaufort Memorial Hospital
 Relocation of current 1.5 T MRI located at 300 Midtown Dr, Port Royal,
 SC to 122 Oaktie Center Blvd North, Oaktie, SC at a total project cost of
 \$125,000.00
 Matter: NA-20-04
 Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, §105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803) 545-0530; Division of Health Facilities Construction, Mr. Elie Macaron, (803) 545-4449; Division of Health Licensing, Ms. Angie Smith, (803) 545-4252; and Bureau of Certification, Ms. MaryJo Roué, (803) 545-4293.

Letter to Daniel Mock

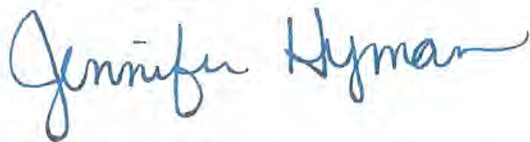
July 1, 2020

Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

Should you have any question regarding the above information, please contact the Department at (803) 545-0260.

Very truly yours,



Jennifer Hyman

Project Coordinator, Certificate of Need Program

South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief

Bureau of Healthcare Planning and Construction

EXHIBIT F

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER®

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 7, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

We represent MRI at Belfair, LLC ("Belfair") in connection with the attached/enclosed request of May 20, 2020, from Beaufort Memorial Hospital for a non-applicability determination ("NAD") concerning relocation of 1.5T MRI equipment from their location in Port Royal, SC to their new location in Okatie, SC. We received a FOIA response from the Department yesterday containing the NAD request. The FOIA response did not contain a determination from the Department. When we received the documents, we immediately asked DHEC staff whether a determination has been issued but we have not received a response. Belfair has an interest in this matter because it operates an MRI facility in very close proximity to Beaufort Memorial's Okatie location.

Out of an abundance of caution, **if** an NAD has been granted, please accept this communication as Belfair's written request pursuant to S.C. Code Ann. § 44-1-60(E) for final review by the DHEC Board. We are sending a copy of this request along with a \$100 filing fee by overnight delivery. While it is difficult to argue against a determination that we have not seen, Belfair's basic position is that the CON Act does not provide for an exemption or non-applicability determination for the relocation of a capital project that would otherwise require a CON. Indeed, the NAD request in this case did not check the box of DHEC's form for a 104.1 exemption or a 105.1 NAD because neither apply.

On April 4, 2019, DHEC issued an NAD to Beaufort Memorial to replace their 1.0T MRI in Port Royal with a 1.5T MRI as a replacement of "like" equipment under Section 105.1.a, despite a project cost of over \$1.2 million. The *raison d'être* for DHEC's approval was that Beaufort Memorial was simply replacing equipment for which it had previously received a CON without

July 7, 2020

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materially changing the service provided. Now, however, Beaufort Memorial seeks to move this equipment to a new area, effectively transforming a \$1.2 million capital project from a mere "replacement" of service to a provision of *new* service in a *new* area. As anyone familiar with Beaufort County would know, Port Royal and Okatie are nearly 20 miles apart, and are very different communities with vastly different demographics and access to medical care, and moving a piece of imaging equipment from one community to the other is likely to affect access to services that should be evaluated under via the CON process.

Note, if Beaufort Memorial is correct that the NAD process permits the relocation of equipment that only eluded CON review upon installation because it replaced existing equipment, then nothing prevents a health care provider from obtaining a replacement NAD for costly equipment in Beaufort County, and then another NAD to move it to Greenville County, so long as the relocation itself stays under the \$600,000 threshold. This is not at all what was intended by the CON Act because it prevents DHEC from reviewing large projects to ensure that they adhere to the objectives of the CON Act, which include cost containment, avoidance of unnecessary duplication, service to the public, and provision of high quality services throughout the State.

Thank you for your attention to this matter. Please advise us of the next steps, and please let us know if further information is required. If an NAD has not been granted, we provide the above information to DHEC staff for their use in evaluating the NAD request.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm
Enclosures

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)



Beaufort Memorial HOSPITAL

955 Ribaut Road | Beaufort, SC 29902
843-522-5200 | 877-532 6472
beaufortmemorial.org

May 20, 2020

Ms. Jennifer Hyman
SCDHEC Certificate of Need Division
2600 Bull Street.
Columbia, SC 29201-1708

Dear Ms. Hyman:

Beaufort Memorial Hospital is requesting a determination of the relocation of our current 1.5 Tesla MRI located at 300 Midtown Drive, Port Royal SC, to a new location: 122 Oaktie Center Blvd North, Oaktie, South Carolina 29909.

The new location is within Beaufort County and moving is an effort to consolidate our MRI and physician practice in a central location.

The cost to relocate the MRI is \$80,000.00 for the actual move and \$45,000.00 for a replacement chiller. I have attached quotes from the vendor, Cannon Medical, who would support the relocation.

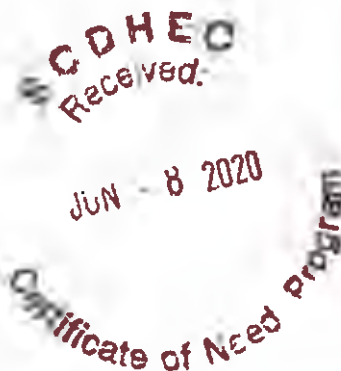
For your review, the following attachments are included:

- #1. Valid vendor equipment quotes for relocation of the current MRI
- #2. Installation cost including removal
- #3. Total project cost summary
- #4. New location
- #5. Copy of initial CON/ NA letter approving current MRI
- #6. Side by side comparison of current and new equipment
- #7. Current patient volumes with proposed volumes at new location
- #8. Floor plan of affected area new location

Thank you for the review of this request. Please reach out if you have any questions or if further information is needed to make a determination on this project.

Regards,

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
Administration
955 Ribaut Rd.
Beaufort SC, 29902
dmock@bmhsc.org
843-522-5668





Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ Replacement of Like Equipment Exemption
Note: There must be a previously existing CON

R.61-15 Section 104.1.a Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

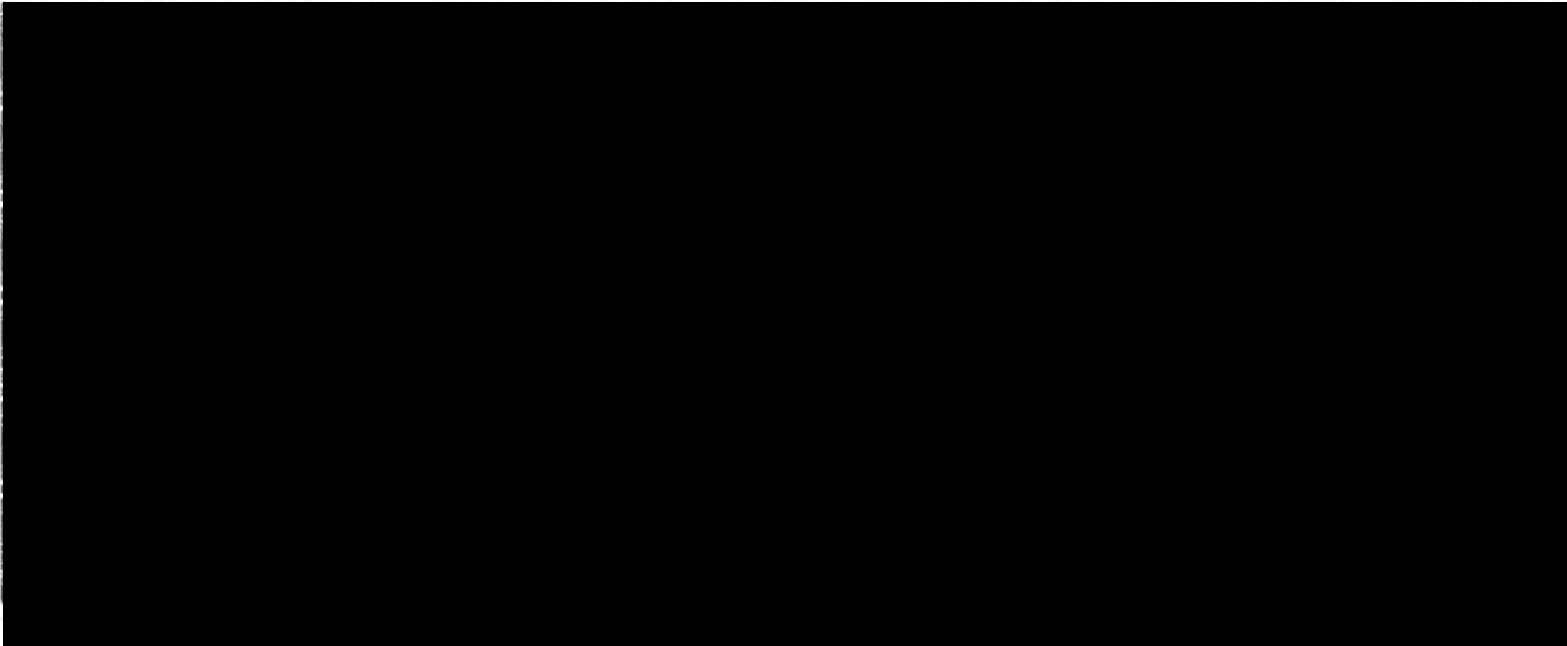
- ☐ Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)

R.61-15 Section 105.1.a Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
 - ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
 - ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
 - ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
- ☒ 8. Floor plan of affected area(s). If construction is part of the proposal, please remit both "before" and "after" floor plans. The floor plans should contain enough detail to be a stand-alone plan outlining the specific area of the facility in which the unit is to be located



HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 14, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

This letter is intended to supplement the prior Request for Final Review (RFR) submitted by MRI at Belfair, LLC ("Belfair") on July 7, 2020, as Belfair is now in possession of the non-applicability determination (NAD) issued to Beaufort Memorial Hospital (BMH) on July 1, 2020 for relocation of a 1.5T MRI from Port Royal, SC to Okatie, SC. Pursuant to S.C. Code Ann. 44-1-60, Belfair requests final review by the DHEC Board of the staff decision to issue an NAD. The staff decision is attached hereto as Exhibit A.

Belfair operates an MRI imaging center in Bluffton, SC, approximately 6 miles down US 278 from the proposed site of the relocated MRI. Belfair is an affected person and has standing to challenge the issuance of the NAD. The request for final review was submitted within 15 days of the issuance of the staff decision, and a \$100 check was enclosed for the filing fee. This letter supplements the original request for final review and is itself submitted within 15 days of the issuance of the staff decision.

Belfair's basic position is that placing a 1.5T MRI in a brand-new location, more than 17 miles from its original location and in a completely different community, should have been treated as a new project requiring a Certificate of Need. The grounds for this position are as follows:

- The CON Act provides that a CON is required for "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). The CON Regulations provides that the cost threshold is \$600,000. S.C. Reg. 61-15, Sec. 102(1)(f).

July 14, 2020

Page 2

- The CON Act exempts providers from obtaining a (second) CON for “the replacement of like equipment for which a Certificate of Need has been issued which does not constitute a material change in service or a new service.” S.C. Code Ann. 44-7-170(A)(3). In other words, once a provider obtains a CON for a piece of equipment, it may replace that equipment without obtaining a second CON, so long as it does not materially change the health service provided or offer a new health service. This exemption makes sense in light of the purposes of the CON Act because the project has already been fully vetted by DHEC to ensure that it promotes cost containment, avoid unnecessary duplication, properly serves the public needs, and provides high quality services, and there is no need for further review.
- The CON Act further provides that it does not apply to “an expenditure by or on behalf of a health care facility for nonmedical projects such as . . . replacement of like equipment with similar capabilities . . .” S.C. Code Ann. 44-7-170(B)(1). The CON Regulations require that providers obtain an NAD before undertaking the “[r]eplacement of like equipment with similar capabilities . . .” S.C. Reg. 61-15, Sec. 105(a).
- Here, BMH obtained an NAD from the Department on April 4, 2019, permitting BMH to replace their existing 1.0T MRI at the their Port Royal, SC location with a 1.5T MRI, despite the project cost of more than \$1,200,000. Notably, the Department issued the NAD under Section 105 of the CON Regulations, which apply to non-applicability, rather than under Section 104 of the CON Regulation, which apply to exemptions. This means that the 1.0T MRI being replaced was not itself acquired with a CON. Now, the staff decision provides a second NAD allowing to move the \$1.2 million project to a new location in Okatie, SC.
- As an initial matter, it violates the CON Act for the Department to issue NADs under Section 105 of the CON Regulations / S.C. Code Ann. 44-7-170(B)(1) for the replacement of *medical* equipment. By its plain terms, S.C. Code Ann. 44-7-170(B)(1) applies only to “nonmedical projects for services.” Therefore, the NAD of April 4, 2019 was issued in error, and a CON was required for the project. Likewise, the project was not exempt under S.C. Code Ann. 44-7-170(A)(3) / S.C. Reg. 61-15, Section 104 because a CON was not issued for the piece of equipment being replaced.
- Even assuming the validity of the April 4, 2019 NAD (and it was not valid), that NAD was based on the representation by BMH that it would be replacing an MRI at its Port Royal, SC location. Indeed, the NAD itself states that it is not valid if the project changes.
- Because the project has now changed—and indeed changed barely a year from issuance of the April 4, 2019 NAD—the April 4, 2019 NAD does not apply, and the acquisition of the 1.5T MRI with a project cost in excess of \$1.2 million falls squarely within the CON requirements of S.C. Code Ann. 44-7-160(6) and its associated regulations. Thus, even if the April 4, 2019 NAD was properly issued (and it was not), the CON Act does not permit BMH to move its \$1.2 million acquisition to a new location without obtaining a CON.
- Any other conclusion would effectively create an exemption to the CON Act that the General Assembly did not create. The General Assembly exempted the replacement of

July 14, 2020

Page 3

equipment *for which a CON has already been issued*. It did not exempt the replacement of medical equipment for which no CON was issued, much less did it exempt the purchasing new equipment under the guise of replacement and then, barely 12 months later, moving the new equipment to a new location without any meaningful regulatory review.

- The location of diagnostic equipment is of critical importance in reviewing the need for a particular project. Indeed, the community need and distribution (accessibility) project review criteria—both of which are typically identified by DHEC as relative importance criteria in MRI projects—directly address the location of the proposed project its relationship to the target population. Further, they specifically provide for the review of relocations to “address the need that the population presently has for the service, the extent to which that need will be met by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other underserved groups, to obtain needed health care.” S.C. Reg. 61-15, Sec. 802(2)(d). In conducting this review, it is common for health planners to review zip-code-level data, so the mere fact that BMH proposes to move the MRI within Beaufort County is irrelevant, as Beaufort County encompasses many different zip codes and communities with vastly different demographics, socioeconomic statuses, and access to health care.
- Here, while Belfair has not had the opportunity to conduct a complete health planning analysis to date, it is worth noting that Port Royal and Okatie are very different communities. According to the Census Bureau, Okatie (zip code 29909) is an overwhelmingly white community (94.2%), whereas Port Royal (zip 29906) is only 53.9% white and has a significant African American community (39.8%). According to the IRS, in Port Royal (zip 29906), approximately 72% of households have incomes below \$50,000 per year and only approximately 14.6% have incomes over \$75,000 per year, whereas in Okatie (zip 29909), approximately 44% of households have incomes below \$50,000 per year and approximately 45% have incomes over \$75,000 per year. This limited data alone demonstrates that BMH proposes to move an expensive piece of diagnostic equipment from a less advantage area to a more advantaged area, which is exactly the kind of project that should undergo CON review to ensure that it does not diminish a less advantaged community’s access to healthcare.
- To be clear, were BMH to apply for a CON as it must, Belfair suspects that there would be many more project review criteria that would not be met, and that there would be further reasons that community need and distribution (accessibility) were problematic, but those arguments are not ripe until BMH actually submits a full and complete CON application.
- In addition, even if the current NAD request is evaluated as if only the actual relocation costs—and not the acquisition costs—count toward the \$600,000 threshold (which would be incorrect), none of the costs associated with the new medical office building that BMH is building, including the costs associated with specifically building an MRI suite and any pro rata building costs attributable to that suite, are included in the estimate. In Belfair’s experience, these costs would easily push the project over the \$600,000 threshold.

July 14, 2020

Page 4

Therefore, at the very least, the Board should reverse the NAD and require that BMH submit additional information on *all* of the costs associated with building out MRI-ready space. Indeed, based on the information available, it appears that BMH is building an entire imaging suite complete with building and equipment costs that would easily exceed the \$600,000 threshold. In short, further investigation by the Department into the real project costs is needed before an NAD can properly issue.

- The July 1, 2010 NAD is flawed on its face because neither the CON Act nor the CON Regulations provide for an exemption or non-applicability determination for the relocation of diagnostic equipment. It was incorrect for the staff decision to issue an NAD under S.C. Reg. 61-15, Section 105, because Section 105 says nothing whatsoever about relocations. Moreover, it is improper to split a project into multiple NADs—one for replacement and one for relocation—to avoid the CON Act, as BMH has done here, in the same way for the same reasons that it is improper to split a project into multiple NADs to avoid the \$600,000 threshold. S.C. Reg. 61-15, Sec. 102(2).
- In sum, the proper lens through which to view BMH's request to relocate its 1.5T MRI is as a request to acquire new equipment in excess of the \$600,000 threshold, thus requiring a full CON. Because the CON Act applies to this request, the July 1, 2020 NAD was issued in error.
- Furthermore, the NAD request was incomplete by its own terms, as it did not include complete information on the proposed project. In particular, it lacked any information that would allow the Department to consider the impact of the change in location. While it included one spreadsheet of a years' worth of procedure volumes, it did not include any meaningful historical information for the old location or projection information for the new location, or any attempt at all to analyze where patients would come from and whether there would be an impact on the patient population left behind. If DHEC were to consider an NAD for the relocation (and it should not), the Department should have at least required significant information from BMH to analyze the effects of the relocation on the existing patient population, the need for an MRI in the new area, and the effects on other providers. For this reason as well, the NAD should not have issued.

Thank you for your consideration of this additional information. Please let us know if any additional information is needed by the Board.

Best regards,

GORDON REEF SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm

July 14, 2020

Page 5

Enclosure

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)
Daniel Mock, AVP Operation (via FedEx)
Beaufort Memorial Hospital

EXHIBIT “A”
Staff Decision



Article #: 92148969009997901539819481

July 1, 2020

Via Certified Mail

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
955 Ribaut Rd.
Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the Following Project:
Beaufort Memorial Hospital
Relocation of current 1.5 T MRI located at 300 Midtown Dr, Port Royal, SC to 122 Oaklie Center Blvd North, Oaklie, SC at a total project cost of \$125,000.00
Matter: NA-20-04
Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, §105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

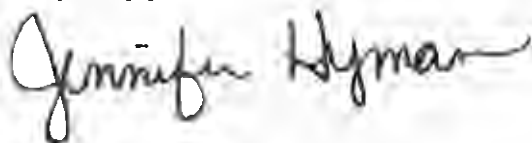
This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803) 545-0530; Division of Health Facilities Construction, Mr. Elie Macaron, (803) 545-4449; Division of Health Licensing, Ms. Angie Smith, (803) 545-4252; and Bureau of Certification, Ms. MaryJo Roué, (803) 545-4293.

Letter to Daniel Mock
July 1, 2020
Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

Should you have any question regarding the above information, please contact the Department at (803) 545-0260.

Very truly yours,



Jennifer Hyman
Project Coordinator, Certificate of Need Program
South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief
Bureau of Healthcare Planning and Construction

REQUEST FOR FINAL REVIEW
JULY 7, 2020

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 7, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

We represent MRI at Belfair, LLC ("Belfair") in connection with the attached/enclosed request of May 20, 2020, from Beaufort Memorial Hospital for a non-applicability determination ("NAD") concerning relocation of 1.5T MRI equipment from their location in Port Royal, SC to their new location in Okatie, SC. We received a FOIA response from the Department yesterday containing the NAD request. The FOIA response did not contain a determination from the Department. When we received the documents, we immediately asked DHEC staff whether a determination has been issued but we have not received a response. Belfair has an interest in this matter because it operates an MRI facility in very close proximity to Beaufort Memorial's Okatie location.

Out of an abundance of caution, if an NAD has been granted, please accept this communication as Belfair's written request pursuant to S.C. Code Ann. § 44-1-60(E) for final review by the DHEC Board. We are sending a copy of this request along with a \$100 filing fee by overnight delivery. While it is difficult to argue against a determination that we have not seen, Belfair's basic position is that the CON Act does not provide for an exemption or non-applicability determination for the relocation of a capital project that would otherwise require a CON. Indeed, the NAD request in this case did not check the box of DHEC's form for a 104.1 exemption or a 105.1 NAD because neither apply.

On April 4, 2019, DHEC issued an NAD to Beaufort Memorial to replace their 1.0T MRI in Port Royal with a 1.5T MRI as a replacement of "like" equipment under Section 105.1.a, despite a project cost of over \$1.2 million. The *raison d'être* for DHEC's approval was that Beaufort Memorial was simply replacing equipment for which it had previously received a CON without

July 7, 2020

Page 2

materially changing the service provided. Now, however, Beaufort Memorial seeks to move this equipment to a new area, effectively transforming a \$1.2 million capital project from a mere "replacement" of service to a provision of *new* service in a *new* area. As anyone familiar with Beaufort County would know, Port Royal and Okatie are nearly 20 miles apart, and are very different communities with vastly different demographics and access to medical care, and moving a piece of imaging equipment from one community to the other is likely to affect access to services that should be evaluated under via the CON process.

Note, if Beaufort Memorial is correct that the NAD process permits the relocation of equipment that only eluded CON review upon installation because it replaced existing equipment, then nothing prevents a health care provider from obtaining a replacement NAD for costly equipment in Beaufort County, and then another NAD to move it to Greenville County, so long as the relocation itself stays under the \$600,000 threshold. This is not at all what was intended by the CON Act because it prevents DHEC from reviewing large projects to ensure that they adhere to the objectives of the CON Act, which include cost containment, avoidance of unnecessary duplication, service to the public, and provision of high quality services throughout the State.

Thank you for your attention to this matter. Please advise us of the next steps, and please let us know if further information is required. If an NAD has not been granted, we provide the above information to DHEC staff for their use in evaluating the NAD request.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm
Enclosures

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)



Beaufort Memorial HOSPITAL

955 Ribaut Road | Beaufort, SC 29902
843-522-5200 | 877-532-6472
beaufortmemorial.org

May 20, 2020

Ms. Jennifer Hyman
SCDHEC Certificate of Need Division
2600 Bull Street.
Columbia, SC 29201-1708

Dear Ms. Hyman:

Beaufort Memorial Hospital is requesting a determination of the relocation of our current 1.5 Tesla MRI located at 300 Midtown Drive, Port Royal SC, to a new location: 122 Oaktie Center Blvd North, Oaktie, South Carolina 29909.

The new location is within Beaufort County and moving is an effort to consolidate our MRI and physician practice in a central location.

The cost to relocate the MRI is \$80,000.00 for the actual move and \$45,000.00 for a replacement chiller. I have attached quotes from the vendor, Cannon Medical, who would support the relocation.

For your review, the following attachments are included:

- #1. Valid vendor equipment quotes for relocation of the current MRI
- #2. Installation cost including removal
- #3. Total project cost summary
- #4. New location
- #5. Copy of initial CON/ NA letter approving current MRI
- #6. Side by side comparison of current and new equipment
- #7. Current patient volumes with proposed volumes at new location
- #8. Floor plan of affected area new location

Thank you for the review of this request. Please reach out if you have any questions or if further information is needed to make a determination on this project.

Regards,

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
Administration
955 Ribaut Rd.
Beaufort SC, 29902
dmock@bmhsc.org
843-522-5668

SCDHEC
Received:

JUN - 8 2020

Certificate of Need Program

MAI
move



Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ Replacement of Like Equipment Exemption
Note: There must be a previously existing CON

R.61-15 Section 104.1.a Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

- ☐ Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)

R.61-15 Section 105.1.a Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
 - ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
 - ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
 - ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
- ☒ 8. Floor plan of affected area(s). If construction is part of the proposal, please remit both "before" and "after" floor plans. The floor plans should contain enough detail to be a stand-alone plan outlining the specific area of the facility in which the unit is to be located

EXHIBIT G



0224

Board:

Mark R. Elam, Chairman	Seema Shrivastava-Patel
Jim P. Creel, Jr., Vice-Chairman	Richard V. Lee, Jr.
Charles M. Joye, II, P.E., Secretary	Alex A. Singleton
J.B. (Sonny) Kinney	Robert R. Morgan, Jr., MD, MBA

August 12, 2020

Via Electronic Mail and US Mail Certified 9214 8969 0099 9790 1417 9562 84

Henry W. Frampton, IV, Esquire
Email: HFRAMPTON@GRSM.COM
Gordon & Rees
40 Calhoun Street
Suite 350
Charleston, SC 29401

Via Electronic Delivery and US Mail

Beaufort Memorial Hospital
Attn: Daniel Mock, AVP Operations
Email: DMock@bmhsc.org
955 Ribaut Road
Beaufort, SC 29902

Via Electronic Mail

Meredith Sella, Esquire
Email sellamw@dhec.sc.gov
SCHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: Docket Nos. 20-RFR-37, Beaufort Memorial Hospital, Matter No. NA-20-04
Issuance of determination of Certificate of Need and Health Facility Licensure Act applicability for the relocation of current 1.5 MRI located at 300 Midtown Drive, Port Royal, to 122 Oaktie Center Boulevard North, Oaktie, at a total project cost of \$125,000.00

Dear Mr. Mock and Counsel 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,



M. Denise Crawford
Clerk
S.C. Board of Health and Environmental Control

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 H

South Carolina Administrative Law Court (SC ALC)
Request for Contested Case Hearing FORM
Mail to: 1205 Pendleton St., Suite 224, Columbia, SC 29201

Last Name: MRI at Belfair, LLC First: Middle: ☐ Mr. ☐ Miss ☐ Mrs. ☐ Ms. Docket No. (To Be Completed by ALC)

Mailing Address: 18 Clark Summit Dr. City: Bluffton State and Zip: SC 29910

Home Number: Work Number: 843-815-9700 Cell Number: *E-Mail Address: see atty info below

*By providing your e-mail address, you consent to receive court orders and notices via electronic transmission

REPRESENTATION

Are you representing yourself? ☐ Yes ☒ No

Are you represented by an Attorney? ☒ Yes ☐ No

Attorney Mailing Address:
Gordon & Rees, LLP
40 Calhoun St., Suite 350

Attorney Work Number and Cell Number:
843-714-2501 (o); 803-463-4004 (c)

Name of Attorney: A. Victor Rawl, Jr.

City, State and Zip:
Charleston, SC 29401

Attorney E-Mail Address:
vrawl@grsm.com

CASE INFORMATION

Name of Agency that Issued the Decision: DHEC
(Example - Dept. of Revenue, Dept. of Insurance, DHEC)

In order to have your case processed, you must attach the agency decision. Is it attached?: ☒ Yes ☐ No If no, please explain:

Date the decision was issued: August 12, 2020

Date the decision was received: August 12, 2020

Please provide a brief statement regarding why the hearing is being requested and the relief sought:

Petitioner believes that the Department improperly issued a non-applicability determination to Beaufort Memorial on July 1, 2020. Petitioner believes that a Certificate of Need should have been required and craves reference to its submissions to the DHEC Board requesting final review.

Payment via ☒ Check ☐ Money Order ☐ Cash for \$ submitted today to the Administrative Law Court via

(applicable filing fee pursuant to ALC Rule 71) is being ☒ U.S. Postal Service ☐ Hand-delivery

September 9, 2020

X Your Signature or Signature of Attorney

Date

PROOF OF SERVICE (MUST BE COMPLETED)

Your Name: Kaillie D. Harris

Date: September 9, 2020

City: Charleston

State: SC

I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing on all other parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):

SCDHEC - Office of General Counsel, Meredith Sella, Esq., 2600 Bull Street, Columbia, SC 29201

Name and/or Agency Name

Address

City, State and Zip

Beaufort Memorial Hospital, ATTN: Daniel Mock, AVP Operations, 955 Ribaut Rd., Beaufort, SC 29902

Name and/or Agency Name

Address

City, State and Zip

X Your Signature or Signature of Attorney

Date

Attention: All cases filed in the Administrative Law Court are subject to the Rules of Procedure found at the Court's website www.scalc.net or from the Clerk of Court. Failure to follow these rules may result in dismissal of your case.



Article #: 92148969009997901539819481

July 1, 2020

Via Certified Mail

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
955 Ribaut Rd.
Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
Following Project:
Beaufort Memorial Hospital
Relocation of current 1.5 T MRI located at 300 Midtown Dr, Port Royal,
SC to 122 Oaklie Center Blvd North, Oaklie, SC at a total project cost of
\$125,000.00
Matter: NA-20-04
Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, §105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

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Letter to Daniel Mock
July 1, 2020
Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

Should you have any question regarding the above information, please contact the Department at (803) 545-0260.

Very truly yours,



Jennifer Hyman
Project Coordinator, Certificate of Need Program
South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief
Bureau of Healthcare Planning and Construction

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 7, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

We represent MRI at Belfair, LLC ("Belfair") in connection with the attached/enclosed request of May 20, 2020, from Beaufort Memorial Hospital for a non-applicability determination ("NAD") concerning relocation of 1.5T MRI equipment from their location in Port Royal, SC to their new location in Okatie, SC. We received a FOIA response from the Department yesterday containing the NAD request. The FOIA response did not contain a determination from the Department. When we received the documents, we immediately asked DHEC staff whether a determination has been issued but we have not received a response. Belfair has an interest in this matter because it operates an MRI facility in very close proximity to Beaufort Memorial's Okatie location.

Out of an abundance of caution, if an NAD has been granted, please accept this communication as Belfair's written request pursuant to S.C. Code Ann. § 44-1-60(E) for final review by the DHEC Board. We are sending a copy of this request along with a \$100 filing fee by overnight delivery. While it is difficult to argue against a determination that we have not seen, Belfair's basic position is that the CON Act does not provide for an exemption or non-applicability determination for the relocation of a capital project that would otherwise require a CON. Indeed, the NAD request in this case did not check the box of DHEC's form for a 104.1 exemption or a 105.1 NAD because neither apply.

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July 7, 2020

Page 2

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Note, if Beaufort Memorial is correct that the NAD process permits the relocation of equipment that only eluded CON review upon installation because it replaced existing equipment, then nothing prevents a health care provider from obtaining a replacement NAD for costly equipment in Beaufort County, and then another NAD to move it to Greenville County, so long as the relocation itself stays under the \$600,000 threshold. This is not at all what was intended by the CON Act because it prevents DHEC from reviewing large projects to ensure that they adhere to the objectives of the CON Act, which include cost containment, avoidance of unnecessary duplication, service to the public, and provision of high quality services throughout the State.

Thank you for your attention to this matter. Please advise us of the next steps, and please let us know if further information is required. If an NAD has not been granted, we provide the above information to DHEC staff for their use in evaluating the NAD request.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm
Enclosures

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)



Beaufort Memorial HOSPITAL

955 Ribaut Road | Beaufort, SC 29902
843-522-5200 | 877-532-6472
beaufortmemorial.org

May 20, 2020

Ms. Jennifer Hyman
SCDHEC Certificate of Need Division
2600 Bull Street.
Columbia, SC 29201-1708

Dear Ms. Hyman:

Beaufort Memorial Hospital is requesting a determination of the relocation of our current 1.5 Tesla MRI located at 300 Midtown Drive, Port Royal SC, to a new location: 122 Oaktie Center Blvd North, Oaktie, South Carolina 29909.

The new location is within Beaufort County and moving is an effort to consolidate our MRI and physician practice in a central location.

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- #1. Valid vendor equipment quotes for relocation of the current MRI
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- #5. Copy of initial CON/ NA letter approving current MRI
- #6. Side by side comparison of current and new equipment
- #7. Current patient volumes with proposed volumes at new location
- #8. Floor plan of affected area new location

Thank you for the review of this request. Please reach out if you have any questions or if further information is needed to make a determination on this project.

Regards,

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
Administration
955 Ribaut Rd.
Beaufort SC, 29902
dmock@bmhsc.org
843-522-5668

SCDHEC
Received:

JUN - 8 2020

Certificate of Need Program

NAI
move



Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ Replacement of Like Equipment Exemption
Note: There must be a previously existing CON

R.61-15 Section 104.1.a Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

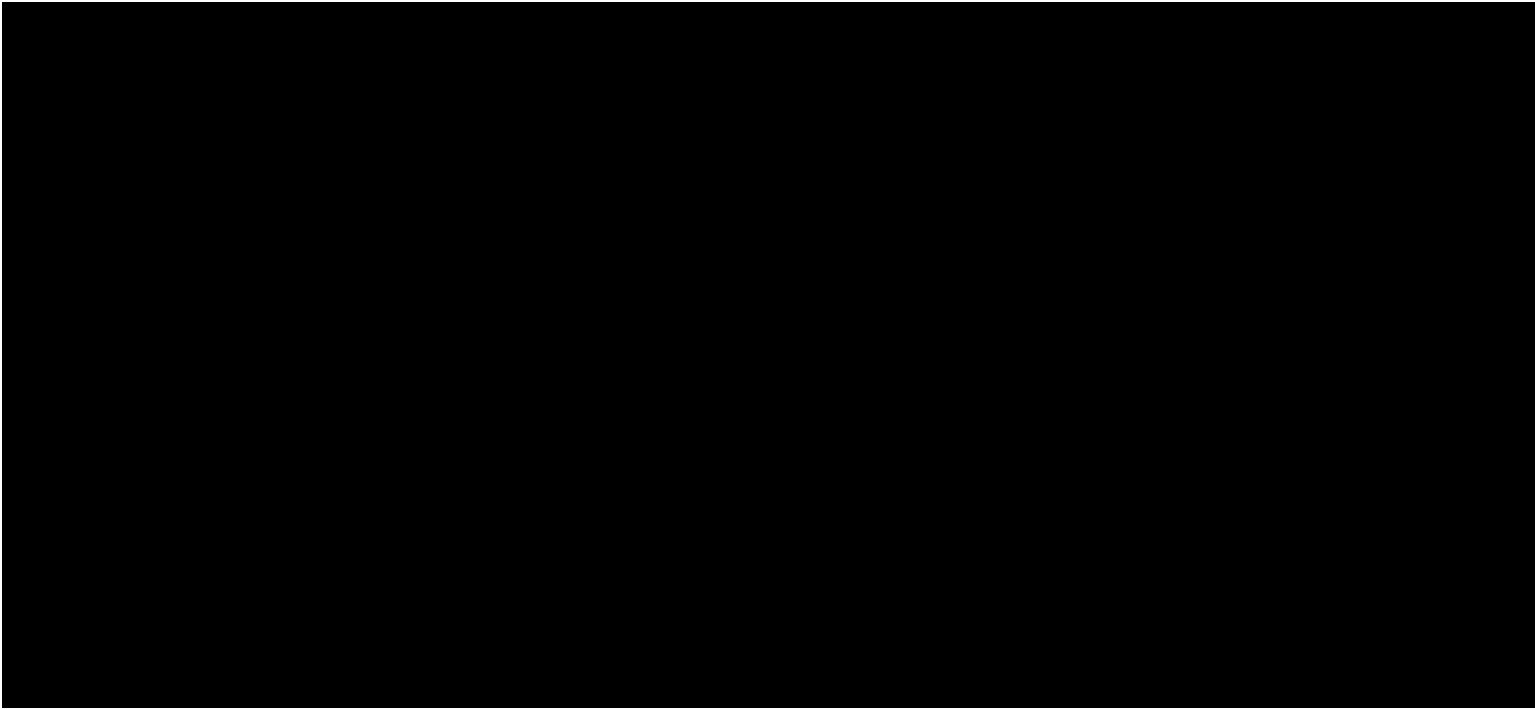
- ☐ Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)

R.61-15 Section 105.1.a Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
 - ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
 - ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
 - ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
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HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 14, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

This letter is intended to supplement the prior Request for Final Review (RFR) submitted by MRI at Belfair, LLC ("Belfair") on July 7, 2020, as Belfair is now in possession of the non-applicability determination (NAD) issued to Beaufort Memorial Hospital (BMH) on July 1, 2020 for relocation of a 1.5T MRI from Port Royal, SC to Okatie, SC. Pursuant to S.C. Code Ann. 44-1-60, Belfair requests final review by the DHEC Board of the staff decision to issue an NAD. The staff decision is attached hereto as Exhibit A.

Belfair operates an MRI imaging center in Bluffton, SC, approximately 6 miles down US 278 from the proposed site of the relocated MRI. Belfair is an affected person and has standing to challenge the issuance of the NAD. The request for final review was submitted within 15 days of the issuance of the staff decision, and a \$100 check was enclosed for the filing fee. This letter supplements the original request for final review and is itself submitted within 15 days of the issuance of the staff decision.

Belfair's basic position is that placing a 1.5T MRI in a brand-new location, more than 17 miles from its original location and in a completely different community, should have been treated as a new project requiring a Certificate of Need. The grounds for this position are as follows:

- The CON Act provides that a CON is required for "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). The CON Regulations provides that the cost threshold is \$600,000. S.C. Reg. 61-15, Sec. 102(1)(f).

July 14, 2020

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- The CON Act exempts providers from obtaining a (second) CON for “the replacement of like equipment for which a Certificate of Need has been issued which does not constitute a material change in service or a new service.” S.C. Code Ann. 44-7-170(A)(3). In other words, once a provider obtains a CON for a piece of equipment, it may replace that equipment without obtaining a second CON, so long as it does not materially change the health service provided or offer a new health service. This exemption makes sense in light of the purposes of the CON Act because the project has already been fully vetted by DHEC to ensure that it promotes cost containment, avoid unnecessary duplication, properly serves the public needs, and provides high quality services, and there is no need for further review.
- The CON Act further provides that it does not apply to “an expenditure by or on behalf of a health care facility for nonmedical projects such as . . . replacement of like equipment with similar capabilities” S.C. Code Ann. 44-7-170(B)(1). The CON Regulations require that providers obtain an NAD before undertaking the “[r]eplacement of like equipment with similar capabilities” S.C. Reg. 61-15, Sec. 105(a).
- Here, BMH obtained an NAD from the Department on April 4, 2019, permitting BMH to replace their existing 1.0T MRI at the their Port Royal, SC location with a 1.5T MRI, despite the project cost of more than \$1,200,000. Notably, the Department issued the NAD under Section 105 of the CON Regulations, which apply to non-applicability, rather than under Section 104 of the CON Regulation, which apply to exemptions. This means that the 1.0T MRI being replaced was not itself acquired with a CON. Now, the staff decision provides a second NAD allowing to move the \$1.2 million project to a new location in Okatie, SC.
- As an initial matter, it violates the CON Act for the Department to issue NADs under Section 105 of the CON Regulations / S.C. Code Ann. 44-7-170(B)(1) for the replacement of *medical* equipment. By its plain terms, S.C. Code Ann. 44-7-170(B)(1) applies only to “nonmedical projects for services.” Therefore, the NAD of April 4, 2019 was issued in error, and a CON was required for the project. Likewise, the project was not exempt under S.C. Code Ann. 44-7-170(A)(3) / S.C. Reg. 61-15, Section 104 because a CON was not issued for the piece of equipment being replaced.
- Even assuming the validity of the April 4, 2019 NAD (and it was not valid), that NAD was based on the representation by BMH that it would be replacing an MRI at its Port Royal, SC location. Indeed, the NAD itself states that it is not valid if the project changes.
- Because the project has now changed—and indeed changed barely a year from issuance of the April 4, 2019 NAD—the April 4, 2019 NAD does not apply, and the acquisition of the 1.5T MRI with a project cost in excess of \$1.2 million falls squarely within the CON requirements of S.C. Code Ann. 44-7-160(6) and its associated regulations. Thus, even if the April 4, 2019 NAD was properly issued (and it was not), the CON Act does not permit BMH to move its \$1.2 million acquisition to a new location without obtaining a CON.
- Any other conclusion would effectively create an exemption to the CON Act that the General Assembly did not create. The General Assembly exempted the replacement of

July 14, 2020

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equipment *for which a CON has already been issued*. It did not exempt the replacement of medical equipment for which no CON was issued, much less did it exempt the purchasing new equipment under the guise of replacement and then, barely 12 months later, moving the new equipment to a new location without any meaningful regulatory review.

- The location of diagnostic equipment is of critical importance in reviewing the need for a particular project. Indeed, the community need and distribution (accessibility) project review criteria—both of which are typically identified by DHEC as relative importance criteria in MRI projects—directly address the location of the proposed project its relationship to the target population. Further, they specifically provide for the review of relocations to “address the need that the population presently has for the service, the extent to which that need will be met by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other underserved groups, to obtain needed health care.” S.C. Reg. 61-15, Sec. 802(2)(d). In conducting this review, it is common for health planners to review zip-code-level data, so the mere fact that BMH proposes to move the MRI within Beaufort County is irrelevant, as Beaufort County encompasses many different zip codes and communities with vastly different demographics, socioeconomic statuses, and access to health care.
- Here, while Belfair has not had the opportunity to conduct a complete health planning analysis to date, it is worth noting that Port Royal and Okatie are very different communities. According to the Census Bureau, Okatie (zip code 29909) is an overwhelmingly white community (94.2%), whereas Port Royal (zip 29906) is only 53.9% white and has a significant African American community (39.8%). According to the IRS, in Port Royal (zip 29906), approximately 72% of households have incomes below \$50,000 per year and only approximately 14.6% have incomes over \$75,000 per year, whereas in Okatie (zip 29909), approximately 44% of households have incomes below \$50,000 per year and approximately 45% have incomes over \$75,000 per year. This limited data alone demonstrates that BMH proposes to move an expensive piece of diagnostic equipment from a less advantage area to a more advantaged area, which is exactly the kind of project that should undergo CON review to ensure that it does not diminish a less advantaged community’s access to healthcare.
- To be clear, were BMH to apply for a CON as it must, Belfair suspects that there would be many more project review criteria that would not be met, and that there would be further reasons that community need and distribution (accessibility) were problematic, but those arguments are not ripe until BMH actually submits a full and complete CON application.
- In addition, even if the current NAD request is evaluated as if only the actual relocation costs—and not the acquisition costs—count toward the \$600,000 threshold (which would be incorrect), none of the costs associated with the new medical office building that BMH is building, including the costs associated with specifically building an MRI suite and any pro rata building costs attributable to that suite, are included in the estimate. In Belfair’s experience, these costs would easily push the project over the \$600,000 threshold.

July 14, 2020

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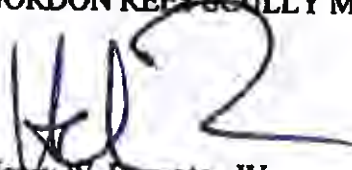
Therefore, at the very least, the Board should reverse the NAD and require that BMH submit additional information on *all* of the costs associated with building out MRI-ready space. Indeed, based on the information available, it appears that BMH is building an entire imaging suite complete with building and equipment costs that would easily exceed the \$600,000 threshold. In short, further investigation by the Department into the real project costs is needed before an NAD can properly issue.

- The July 1, 2010 NAD is flawed on its face because neither the CON Act nor the CON Regulations provide for an exemption or non-applicability determination for the relocation of diagnostic equipment. It was incorrect for the staff decision to issue an NAD under S.C. Reg. 61-15, Section 105, because Section 105 says nothing whatsoever about relocations. Moreover, it is improper to split a project into multiple NADs—one for replacement and one for relocation—to avoid the CON Act, as BMH has done here, in the same way for the same reasons that it is improper to split a project into multiple NADs to avoid the \$600,000 threshold. S.C. Reg. 61-15, Sec. 102(2).
- In sum, the proper lens through which to view BMH's request to relocate its 1.5T MRI is as a request to acquire new equipment in excess of the \$600,000 threshold, thus requiring a full CON. Because the CON Act applies to this request, the July 1, 2020 NAD was issued in error.
- Furthermore, the NAD request was incomplete by its own terms, as it did not include complete information on the proposed project. In particular, it lacked any information that would allow the Department to consider the impact of the change in location. While it included one spreadsheet of a years' worth of procedure volumes, it did not include any meaningful historical information for the old location or projection information for the new location, or any attempt at all to analyze where patients would come from and whether there would be an impact on the patient population left behind. If DHEC were to consider an NAD for the relocation (and it should not), the Department should have at least required significant information from BMH to analyze the effects of the relocation on the existing patient population, the need for an MRI in the new area, and the effects on other providers. For this reason as well, the NAD should not have issued.

Thank you for your consideration of this additional information. Please let us know if any additional information is needed by the Board.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm

July 14, 2020

Page 5

Enclosure

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)
Daniel Mock, AVP Operation (via FedEx)
Beaufort Memorial Hospital

EXHIBIT “A”
Staff Decision



Article #: 92148969009987901539819481

July 1, 2020

Via Certified Mail

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
955 Ribaut Rd.
Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
Following Project:
Beaufort Memorial Hospital
Relocation of current 1.5 T MRI located at 300 Midtown Dr, Port Royal,
SC to 122 Oaklie Center Blvd North, Oaklie, SC at a total project cost of
\$125,000.00
Matter: NA-20-04
Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code 544-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code 544-7-170; S.C. Code Regs. 61-15, 6105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

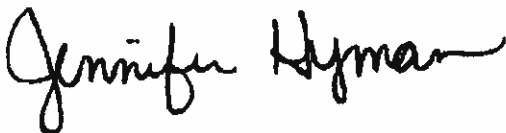
This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803) 545-0530; Division of Health Facilities Construction, Mr. Elle Macaron, (803) 545-4449; Division of Health Licensing, Ms. Angie Smith, (803) 545-4252; and Bureau of Certification, Ms. Maryjo Roué, (803) 545-4293.

Letter to Daniel Mock
July 1, 2020
Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

Should you have any question regarding the above information, please contact the Department at (803) 545-0260.

Very truly yours,



Jennifer Hyman
Project Coordinator, Certificate of Need Program
South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief
Bureau of Healthcare Planning and Construction

REQUEST FOR FINAL REVIEW
JULY 7, 2020

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 7, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

We represent MRI at Belfair, LLC ("Belfair") in connection with the attached/enclosed request of May 20, 2020, from Beaufort Memorial Hospital for a non-applicability determination ("NAD") concerning relocation of 1.5T MRI equipment from their location in Port Royal, SC to their new location in Okatie, SC. We received a FOIA response from the Department yesterday containing the NAD request. The FOIA response did not contain a determination from the Department. When we received the documents, we immediately asked DHEC staff whether a determination has been issued but we have not received a response. Belfair has an interest in this matter because it operates an MRI facility in very close proximity to Beaufort Memorial's Okatie location.

Out of an abundance of caution, if an NAD has been granted, please accept this communication as Belfair's written request pursuant to S.C. Code Ann. § 44-1-60(E) for final review by the DHEC Board. We are sending a copy of this request along with a \$100 filing fee by overnight delivery. While it is difficult to argue against a determination that we have not seen, Belfair's basic position is that the CON Act does not provide for an exemption or non-applicability determination for the relocation of a capital project that would otherwise require a CON. Indeed, the NAD request in this case did not check the box of DHEC's form for a 104.1 exemption or a 105.1 NAD because neither apply.

On April 4, 2019, DHEC issued an NAD to Beaufort Memorial to replace their 1.0T MRI in Port Royal with a 1.5T MRI as a replacement of "like" equipment under Section 105.1.a, despite a project cost of over \$1.2 million. The *raison d'être* for DHEC's approval was that Beaufort Memorial was simply replacing equipment for which it had previously received a CON without

July 7, 2020
Page 2

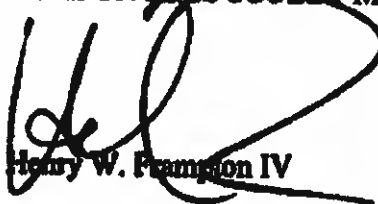
materially changing the service provided. Now, however, Beaufort Memorial seeks to move this equipment to a new area, effectively transforming a \$1.2 million capital project from a mere "replacement" of service to a provision of *new* service in a *new* area. As anyone familiar with Beaufort County would know, Port Royal and Okatie are nearly 20 miles apart, and are very different communities with vastly different demographics and access to medical care, and moving a piece of imaging equipment from one community to the other is likely to affect access to services that should be evaluated under via the CON process.

Note, if Beaufort Memorial is correct that the NAD process permits the relocation of equipment that only eluded CON review upon installation because it replaced existing equipment, then nothing prevents a health care provider from obtaining a replacement NAD for costly equipment in Beaufort County, and then another NAD to move it to Greenville County, so long as the relocation itself stays under the \$600,000 threshold. This is not at all what was intended by the CON Act because it prevents DHEC from reviewing large projects to ensure that they adhere to the objectives of the CON Act, which include cost containment, avoidance of unnecessary duplication, service to the public, and provision of high quality services throughout the State.

Thank you for your attention to this matter. Please advise us of the next steps, and please let us know if further information is required. If an NAD has not been granted, we provide the above information to DHEC staff for their use in evaluating the NAD request.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm
Enclosures

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)



Beaufort Memorial HOSPITAL

955 Ribaut Road | Beaufort, SC 29902
843-522-5200 | 877-532-6472
beaufortmemorial.org

May 20, 2020

Ms. Jennifer Hyman
SCDHEC Certificate of Need Division
2600 Bull Street.
Columbia, SC 29201-1708

Dear Ms. Hyman:

Beaufort Memorial Hospital is requesting a determination of the relocation of our current 1.5 Tesla MRI located at 300 Midtown Drive, Port Royal SC, to a new location: 122 Oaktie Center Blvd North, Oaktie, South Carolina 29909.

The new location is within Beaufort County and moving is an effort to consolidate our MRI and physician practice in a central location.

The cost to relocate the MRI is \$80,000.00 for the actual move and \$45,000.00 for a replacement chiller. I have attached quotes from the vendor, Cannon Medical, who would support the relocation.

For your review, the following attachments are included:

- #1. Valid vendor equipment quotes for relocation of the current MRI
- #2. Installation cost including removal
- #3. Total project cost summary
- #4. New location
- #5. Copy of initial CON/ NA letter approving current MRI
- #6. Side by side comparison of current and new equipment
- #7. Current patient volumes with proposed volumes at new location
- #8. Floor plan of affected area new location

Thank you for the review of this request. Please reach out if you have any questions or if further information is needed to make a determination on this project.

Regards,

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
Administration
955 Ribaut Rd.
Beaufort SC, 29902
dmock@bhmhsc.org
843-522-5668

SCDHEC
Received:

JUN - 8 2020

Certificate of Need Program

NAI
move

Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ Replacement of Like Equipment Exemption
Note: There must be a previously existing CON

R.61-15 Section 104.1.a Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

- ☐ Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)

R.61-15 Section 105.1.a Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
 - ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
 - ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
 - ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
- ☒ 8. Floor plan of affected area(s). If construction is part of the proposal, please remit both "before" and "after" floor plans. The floor plans should contain enough detail to be a stand-alone plan outlining the specific area of the facility in which the unit is to be located

**Board:**

Mark R. Elam, Chairman
 Jim P. Creel, Jr., Vice-Chairman
 Charles M. Joye, II, P.E., Secretary
 J.B. (Sonny) Kinney

Seema Shrivastava Patel
 Richard V. Lee, Jr.
 Alex A. Singleton
 Robert R. Morgan, Jr., MD, MBA

August 12, 2020

Via Electronic Mail and US Mail Certified 9214 8969 0099 9790 1417 9562 84

Henry W. Frampton, IV, Esquire
 Email: HFRAMPTON@GRSM.COM
 Gordon & Rees
 40 Calhoun Street
 Suite 350
 Charleston, SC 29401

Via Electronic Delivery and US Mail

Beaufort Memorial Hospital
 Attn: Daniel Mock, AVP Operations
 Email: DMock@bmhsc.org
 955 Ribaut Road
 Beaufort, SC 29902

Via Electronic Mail

Meredith Sella, Esquire
 Email: sellamw@dhec.sc.gov
 SCHEC – Office of General Counsel
 2600 Bull Street
 Columbia, SC 29201

RE: Docket Nos. 20-RFR-37, Beaufort Memorial Hospital, Matter No. NA-20-04
 Issuance of determination of Certificate of Need and Health Facility Licensure Act applicability for the relocation of current 1.5 MRI located at 300 Midtown Drive, Port Royal, to 122 Oaktie Center Boulevard North, Oaktie, at a total project cost of \$125,000.00

Dear Mr. Mock and Counsel 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,



M. Denise Crawford
Clerk
S.C. Board of Health and Environmental Control

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.

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
vs.	)	SOUTH CAROLINA DEPARTMENT
	)	OF HEALTH AND
South Carolina Department of Health and	)	ENVIRONMENTAL CONTROL’S
Environmental Control and Beaufort	)	RESPONSE TO BEAUFORT
Memorial Hospital,	)	MEMORIAL HOSPITAL’S MOTION
	)	TO DISMISS
Respondents.	)	
	)	
	)	
	)	

Respondent South Carolina Department of Health and Environmental Control (“DHEC” or “Department”) submits this Response to the Motion to Dismiss filed by Beaufort Memorial Hospital (“BMH”).

BACKGROUND

1. Beaufort County Memorial Hospital operates BMH, a licensed general hospital, and other healthcare services in Beaufort County, including an imaging center with magnetic resonance imaging (“MRI”) services in Port Royal, South Carolina.
2. MRI at Belfair, LLC (“Belfair”) is a freestanding MRI service provider located in Bluffton, South Carolina.
3. DHEC is the State agency responsible for administration of the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110, et seq., and Certification of Need, Regulation 61-15. A person or health care facility must obtain a CON from DHEC prior to the acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of \$600,000.00. S.C. Code Ann. § 44-7-160(6); 3 S.C. Code Ann. Regs. 61-15 § 102(1)(f). The CON Act and Regulation describe types of institutions and transactions that are

exempt from CON requirements and for which CON requirements do not apply. *See* S.C. Code Ann. § 44-7-170 and 3 S.C. Code Ann. Regs. 61-15 §§ 104 and 105.

4. Pursuant to Regulation 61-15 § 102(2)(h)¹, DHEC issued Exemption E-03-49 to Low Country Medical Group on July 31, 2003, for the replacement of an existing 1.0T MRI at 300 Midtown Drive, Port Royal, South Carolina, with like equipment having similar capabilities to include the use of a temporary mobile service during the replacement period. *See* Ex. 1.

5. BMH thereafter acquired Lowcountry Medical Group, including the 1.0T MRI at 300 Midtown Drive. Pursuant to Regulation 61-15 § 105(1)(a), DHEC issued NA-19-03 to BMH on April 4, 2019, for the replacement of a 1.0T MRI (E-03-49) with a 1.5T MRI. Belfair did not oppose or otherwise appeal NA-19-03. *See* Ex. 2. BMH notified DHEC in February 2020 that NA-19-03 was fully implemented.

6. On April 21, 2020, the Department received an email from BMH explaining its plans to relocate its 1.5T MRI from 300 Midtown Drive, Port Royal, South Carolina, to 122 Okatie Center Boulevard North, Okatie, South Carolina (“the Project”) and requesting “written consent” from DHEC to proceed. *See* Ex. 3. On June 8, 2020, DHEC received BMH’s request for a non-applicability determination form for the Project. *See* Ex. 4.

7. In Response to BMH’s correspondence, DHEC issued a letter on July 1, 2020 (“July 1st Letter”), stating that the CON Act “is not applicable to the [P]roject pursuant to S.C. Code § 44-7-170, S.C. Code Regs. 61-16, § 105 (2012) and related authority.” *See* Ex. 5.

8. After issuance of the July 1st Letter, Belfair submitted notice that it was an affected person to the Project in a letter dated July 6, 2019, but received by DHEC on July 9, 2020. *See* Ex. 6.

¹ In 2003, Regulation 61-15 Section 104(2)(h) stated, “The following are exempt from [CON]: . . . h. The replacement of like equipment with similar capabilities, or similar projects. Such exemptions must be obtained in writing from the Department.” Regulation 61-15 was amended in 2012 to separate exemption determinations from determinations of non-applicability.

Belfair challenged the July 1st Letter by filing a request for final review (“RFR”) with the Board of Health and Environmental Control (“Board”) on July 7, 2020, and supplemented its RFR on July 14, 2020. *See* Exs. 7 & 8. In its RFR, Belfair summarizes its argument as follows:

Belfair’s basic position is that placing a 1.5T MRI in a brand-new location, more than 17 miles from its original location and in a completely different community, should have been treated as a new project requiring a Certificate of Need.

The Board declined to conduct a final review conference and mailed notice of that decision to Belfair on August 12, 2020. Belfair thereafter filed a request for contested case hearing with the Court on September 9, 2020. In explaining why the hearing was requested, Belfair’s request for contested case hearing similarly states:

Petitioner believes that the Department improperly issued a non-applicability determination to Beaufort Memorial on July 1, 2020. Petitioner believes that a Certificate of Need should have been required and craves reference to its submissions to the DHEC Board requesting final review.

Belfair’s Prehearing Statement presents similar arguments.

9. For the following reasons, the Department agrees with BMH that the Project does not require a CON, a written exemption, or a written non-applicability determination.

ARGUMENT

The CON Act and Regulation require a person or health care facility to obtain a CON, a written determination of non-applicability, or a written exemption, prior to undertaking certain projects or activities. *See* S.C. Code Ann. §§ 44-7-160 and -170; 3 S.C. Code Ann. Regs. 61-15 §§ 102, 104, and 105. As a matter of law and for the following reasons, BMH’s Project does not require a CON, a written non-applicability determination, or a written exemption.

I. The Project does not require a CON.

The CON Act and CON Regulation provide that a person or health care facility is required to obtain a CON from DHEC before undertaking certain enumerated activities. S.C. Code Ann. § 44-7-160; 3 S.C. Code Ann. Regs. 61-15 § 102.1. Specifically, Regulation 61-15 § 102.1 states:

A person or health care facility as defined in this Regulation is required to obtain a Certificate of Need from the Department of Health and Environmental Control before undertaking any of the following:

- a. The construction or other establishment of a new healthcare facility;
- b. 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;
- c. An expenditure by or on behalf of a health care facility in excess of two million dollars (\$2,000,000) which, under generally acceptable accounting principles consistently applied, is considered a capital expenditure except those expenditures exempted in Section 104. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the development, acquisition, improvement, expansion, or replacement of any plant or equipment must be included in determining if the expenditure exceeds the prescribed amount;
- d. 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;
- e. If no capital expenditure is made, the offering of any 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. For purposes of this section, operating costs include expenditures incurred by the health care facility and any person or other entity on behalf of the health care facility to establish a new service. A person or other entity shall not be allowed to incur costs thereby attempting to enable a health care facility to avoid Certificate of Need review and establish a new service as described above;
- f. The acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of six hundred thousand dollars (\$600,000);

BMH is not establishing or constructing a new health care facility. BMH is not changing its existing bed complement. BMH is not expending a capital expenditure in excess of \$2,000,000.00. Moreover, BMH's imaging center is not a "health care facility," as defined by the CON Act and Regulation. *See* S.C. Code Ann. § 44-7-130(10); 3 S.C. Code Ann. Regs. 61-15 § 103.12. BMH is not making a capital expenditure associated with an addition or substantial expansion of a health service with standards or criteria prescribed in the State Health Plan. Relatedly, the Project does not involve the offering of a health service for which specific standards or criteria are prescribed in the State Health Plan. Finally, the Project is not an acquisition of medical equipment in excess of \$600,000.00 which is to be used for diagnosis or treatment. "Acquire" means "to get as one's own;" or "to come into possession or control of often by unspecified means." *See* <https://www.merriam-webster.com/dictionary/acquire> (last visited Jan. 20, 2021). The Project does not involve BMH coming into possession of any medical equipment.

BMH replaced its 1.0T MRI with a 1.5T MRI pursuant to a non-applicability determination in 2019 (NA-19-03). Belfair did not oppose or otherwise appeal this determination. There is no requirement that a person or health care facility obtain a CON for its relocation within a service area of a replacement MRI obtained through a non-applicability determination.

II. The Project does not require a written exemption.

Certain institutions and transactions are exempt from CON requirements. S.C. Code Ann. § 44-7-170(A); 3 S.C. Code Ann. Regs. 61-15 § 104. The CON Regulation distinguishes between transactions that are exempt, but require a written determination from DHEC and transactions that are exempt, but do *not* require a written determination from DHEC. Projects that are exempt, but prior to undertaking, require a written determination include:

a. The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

b. The acquisition by a health care facility of medical equipment to be used solely for research, the offering of an institutional health service by a health care facility solely for research, or the obligation of a capital expenditure by a health care facility to be made solely for research if it does not: (a) affect the charges of the facility for the provision of medical or other patient care services other than the services which are included in the research; (b) change the bed capacity of the facility; or (c) substantially change the medical or other patient care service of the facility. FDA research protocol and any applicable Investigational Device Exemption (IDE) policies and regulations must be followed by the facility. A written description of the proposed research project must be submitted to the department in order for the department to determine if the above conditions are met. A Certificate of Need is required to continue use of the equipment or service after the equipment or service is no longer being used solely for research;

c. The permanent reduction in bed capacity, including the permanent closure of a health care facility.

3 S.C. Code Ann. Regs. 61-15 § 104.1.a to -c. Projects that are exempt, but do *not* require a written determination from the Department are: “offices of a licensed private practitioner whether for individual or group practice.” *Id.* § 104.4.

The Project does not involve the replacement of like equipment for which a CON has been issued. The Project is not an acquisition of medical equipment for research, the offering of an institutional health service for research, or the obligation of a capital expenditure to be made solely for research. Accordingly, BMH was not required to obtain a written exemption from DHEC.

III. The Project does not require a written non-applicability determination.

The CON Act does not apply to certain facilities and expenditures. *See* S.C. Code Ann. § 44-7-170(B); 3 S.C. Code Ann. Regs. 61-15 § 105. Similar to exemptions, the CON Regulation describes projects that CON review is not applicable to, but require a written determination of non-applicability, and projects that CON review is not applicable to, but do *not* require a written determination of non-applicability. *See* 3 S.C. Code Ann. Regs. 61-16 § 105. Projects that CON

review is not applicable to, but do require a written non-applicability determination from the Department include:

- a. Replacement of like equipment with similar capabilities as defined by the Department in Section 103.16.²
- b. Acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is not in excess of six hundred thousand dollars (\$600,000). A written determination of nonapplicability is only required when any question exists as to whether or not the total project cost is below six hundred thousand dollars (\$600,000) threshold.

3 S.C. Code Ann. Regs. 61-15 § 105.1. Projects that CON review is not applicable to, but do *not* require a written non-applicability determination include:

- a. Health care facilities owned and operated by the federal government;
- b. Any federal health care facility sponsored and operated by this State;
- c. Educational and penal institutions maintaining infirmaries for the exclusive use of their respective student bodies and inmate populations;
- d. Facilities owned and operated by the South Carolina Department of Mental Health and the South Carolina Department of Disabilities and Special Needs, except an addition of one or more beds to the total number of beds of the departments' health care facilities existing on July 1, 1988;

Id. § 105.4. Finally, there are two sets of projects for which CON review is not applicable to and a written non-applicability determination is not required, but a written notification must be submitted to DHEC's Division of Health Facilities Construction:

- a. An expenditure by or on behalf of a health care facility for non-medical projects, such as refinancing existing debt, parking garages, laundries, roof replacement, computer systems, telephone systems, and heating and air conditioning systems;
- b. The upgrading of medical facilities, which do not involve additional square feet to the facility or additional health services;

² "Like equipment with similar capabilities" means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service. S.C. Code Ann. § 44-7-130(21); 3 S.C. Code Ann. Regs. 61-15 § 103.16.

Id. § 105.5.

BMH's Project is not a replacement of equipment with similar capabilities and is not the acquisition of medical equipment. Accordingly, a written non-applicability determination is not required from DHEC.

CONCLUSION

The universe of projects and activities undertaken by persons and health care facilities in the medical field is vast. As described above, the CON Act and Regulation prescribe certain projects and activities to require written approval from DHEC. BMH's Project, which involves the relocation within a service area of a replacement MRI obtained through a non-applicability determination, is not a project requiring written approval by DHEC.

Respectfully submitted,



Ashley C. Biggers (SC Bar # 17225)
 Email: biggerac@dhec.sc.gov
 Vito Wicevic (SC Bar # 100265)
 E-mail: wicevivm@dhec.sc.gov
 Meredith W. Sella (SC Bar # 102402)
 E-mail: sellamw@dhec.sc.gov
 SCDHEC – Office of General Counsel
 2600 Bull Street
 Columbia, SC 29201
 Telephone: (803) 898-3350
 Fax: (803) 898-3367

Paralegal: Rita DeCarlis
 E-mail: decarlrd@dhec.sc.gov

January 25, 2021

Exhibit 1



2600 Bull Street
Columbia, SC 29201-1708

ATTACHMENT #5

received
7.3.03

July 31, 2003

Re: E-03-49
Replacement of existing 1.0 T MRI with like equipment having similar capabilities to include the use of temporary mobile service during replacement period
Lowcountry Medical Group
Beaufort, South Carolina

Ms. Linda D'Amore, CEO
Lowcountry Medical Group
300 Midtown Drive
Beaufort, SC 29906

Dear Ms. D'Amore:

Based upon the information contained in your letter dated June 25, 2003, the above referenced project does not require Certificate of Need review because it is the replacement of like equipment with similar capabilities. Therefore, the project is exempted from review as stated in Section 104.2.h. of Regulation No. 61-15, Certification of Need for Health Facilities and Services. However, if this proposal should change from the information presented to the Department, this determination is not valid.

This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning any remaining components: Division of Health Facilities Construction, Mr. Bill Lafferty, (803) 545-4663; Division of Health Licensing, Mr. Dennis Gibbs, (803) 545-5370; Bureau of Certification, Ms. Karen Price, (803) 545-4205; Bureau of Radiological Health, Mr. Aaron Gantt, (803) 545-4400.

This exemption is valid for six (6) months from the date of this letter. If this project is not implemented within this time period, you will be required to apply to the Department for another determination. Please notify me in writing when the project has been implemented, provide a copy of the equipment invoice and verify the disposition of the existing equipment. Should you have any questions regarding the above information, please contact me at (803) 545-4200.

Sincerely,

E. Victoria Reich

E. Victoria Reich
Bureau of Health Facilities and Services Development

Exhibit 2



Article #: 92148969009997901414472114

April 4, 2019

Via Certified Mail

Daniel Mock, AVP Operations
 Beaufort Memorial Hospital
 955 Ribaut Rd.
 Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
 Following Project:
 Beaufort Memorial Hospital
 Replacement of a GE 1.0T MRI (E-03-49) with a Canon Medical Titan 1.5T
 MRI at a total project cost of \$1,229,037.00
 Matter: NA-19-03
 Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, §105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803.545.0530); Division of Health Facilities Construction, Mr. William McCallum (803.545.4215); Division of Health Licensing, Ms. Gwendolyn Thompson, (803.545.4370); and Bureau of Certification, Ms. Mary Jo Roue (803.545.4293).

Letter to Daniel Mock

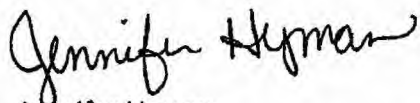
April 4, 2019

Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

Should you have any question regarding the above information, please contact the Department at 803.545.4200.

Very truly yours,



Jennifer Hyman

Project Coordinator, Certificate of Need Program

South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief

Bureau of Healthcare Planning and Construction

Exhibit 3

From: Matthew Hurtt <MHurtt@bmhsc.org>
Sent: Tuesday, April 21, 2020 3:11 PM
To: Hyman, Jennifer J.
Cc: Matthew Hurtt
Subject: Determination on new Okatie Imaging Center
Attachments: _202004211455.pdf

*** Caution. This is an EXTERNAL email. DO NOT open attachments or click links from unknown senders or unexpected email. ***

Jennifer,

I spoke with my VP just now and he had questions/concerns. The basic gist if this; We are planning to move the CT from our current imaging center to the new Medical Office Building (as you and I discussed) and upgrade the system as we do so. This cost will be less than \$600,000. We are also planning to move the MRI unit we upgraded at the end of last year (see attached reference) to this new location.

His concern is that without written consent from your office, that we could face a challenge from other providers area. He is worried that by not submitting, to your office, a request for determination that things could get sticky.

Can you assist us is which route should be taken, what paperwork should be submitted through your office and any other details I should be aware of?

Matthew Hurtt

Advanced Imaging Manager



**Beaufort Memorial
HOSPITAL**

O 843.522.5841 | mhurtt@bmhsc.org

955 Ribaut Road | Beaufort, SC 29902 | www.bmhsc.org

CONFIDENTIALITY NOTE: This e-mail message, including any attachment(s), contains information that may be confidential, medical, legal or other privileges, and/or proprietary non-public information. If you are not an intended recipient, please notify the sender by replying to this message and then delete it from your system. Use, dissemination, distribution, or reproduction of this message or its attachments (if any) by unintended recipients is not authorized and may be unlawful.



Article #: 92148969009997901414472114

April 4, 2019

Via Certified Mail

Daniel Mock, AVP Operations
 Beaufort Memorial Hospital
 955 Ribaut Rd.
 Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
 Following Project:
 Beaufort Memorial Hospital
 Replacement of a GE 1.0T MRI (E-03-49) with a Canon Medical Titan 1.5T
 MRI at a total project cost of \$1,229,037.00
 Matter: NA-19-03
 Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, §105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

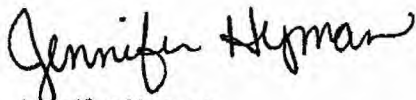
This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803.545.0530); Division of Health Facilities Construction, Mr. William McCallum (803.545.4215); Division of Health Licensing, Ms. Gwendolyn Thompson, (803.545.4370); and Bureau of Certification, Ms. Mary Jo Roue (803.545.4293).

Letter to Daniel Mock
April 4, 2019
Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

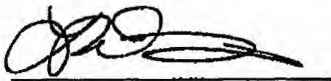
Should you have any question regarding the above information, please contact the Department at 803.545.4200.

Very truly yours,



Jennifer Hyman
Project Coordinator, Certificate of Need Program
South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief
Bureau of Healthcare Planning and Construction

Exhibit 4

*MAZ
move*



Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ **Replacement of Like Equipment Exemption**
Note: There must be a previously existing CON

R.61-15 Section 104.1.a Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

- ☐ **Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)**

R.61-15 Section 105.1.a Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
 - ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
 - ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
 - ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
- ☒ 8. Floor plan of affected area(s). If construction is part of the proposal, please remit both "before" and "after" floor plans. The floor plans should contain enough detail to be a stand-alone plan outlining the specific area of the facility in which the unit is to be located

Exhibit 5



Article #: 92148969009997901539819481

July 1, 2020

Via Certified Mail

Daniel Mock, AVP Operations
 Beaufort Memorial Hospital
 955 Ribaut Rd.
 Beaufort, SC 29902

**Re: Your Request for a Determination of Non-Applicability Regarding the
 Following Project:
 Beaufort Memorial Hospital
 Relocation of current 1.5 T MRI located at 300 Midtown Dr, Port Royal,
 SC to 122 Oaktie Center Blvd North, Oaktie, SC at a total project cost of
 \$125,000.00
 Matter: NA-20-04
 Beaufort, South Carolina**

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, §105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803) 545-0530; Division of Health Facilities Construction, Mr. Elie Macaron, (803) 545-4449; Division of Health Licensing, Ms. Angie Smith, (803) 545-4252; and Bureau of Certification, Ms. MaryJo Roué, (803) 545-4293.

Letter to Daniel Mock

July 1, 2020

Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

Should you have any question regarding the above information, please contact the Department at (803) 545-0260.

Very truly yours,



Jennifer Hyman

Project Coordinator, Certificate of Need Program

South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief

Bureau of Healthcare Planning and Construction

Exhibit 6

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER™

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 6, 2019

VIA US MAIL

Margaret Murdock
Jennifer Hyman
Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201



Re: Affected Person Notice – Beaufort Memorial NAD Request of May 20, 2020

Dear Ms. Murdock and Ms. Hyman:

Earlier today, we received a FOIA response from the Department that included Beaufort Memorial Hospital's request of May 20, 2020 for an NAD concerning the relocation of a 1.5T MRI from its Port Royal, SC location to its new facility in Okatie, SC. The FOIA response did not include any action by the Department on the request. Has there been any action to date? If so, could you please send it to me? We'll pay whatever FOIA fees are associated with the request. If there has been no decision, could you please note my client, MRI at Belfair LLC, as an "affected person" and provide notice to me when the Department takes action on the NAD request.

I would prefer notification by e-mail if that works for the Department. Otherwise, please use the Charleston, SC mailing address below.

Many thanks,

GORDON REES SCULLY MANSUKHANI, LLP

Henry W. Frampton IV

HWF:kdh

Exhibit 7

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 7, 2020

RECEIVED

JUL 07 2020

Clerk, Board of Health
and Environmental Control

20-RFR-37

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

We represent MRI at Belfair, LLC ("Belfair") in connection with the attached/enclosed request of May 20, 2020, from Beaufort Memorial Hospital for a non-applicability determination ("NAD") concerning relocation of 1.5T MRI equipment from their location in Port Royal, SC to their new location in Okatie, SC. We received a FOIA response from the Department yesterday containing the NAD request. The FOIA response did not contain a determination from the Department. When we received the documents, we immediately asked DHEC staff whether a determination has been issued but we have not received a response. Belfair has an interest in this matter because it operates an MRI facility in very close proximity to Beaufort Memorial's Okatie location.

Out of an abundance of caution, if an NAD has been granted, please accept this communication as Belfair's written request pursuant to S.C. Code Ann. § 44-1-60(E) for final review by the DHEC Board. We are sending a copy of this request along with a \$100 filing fee by overnight delivery. While it is difficult to argue against a determination that we have not seen, Belfair's basic position is that the CON Act does not provide for an exemption or non-applicability determination for the relocation of a capital project that would otherwise require a CON. Indeed, the NAD request in this case did not check the box of DHEC's form for a 104.1 exemption or a 105.1 NAD because neither apply.

On April 4, 2019, DHEC issued an NAD to Beaufort Memorial to replace their 1.0T MRI in Port Royal with a 1.5T MRI as a replacement of "like" equipment under Section 105.1.a, despite a project cost of over \$1.2 million. The *raison d'être* for DHEC's approval was that Beaufort Memorial was simply replacing equipment for which it had previously received a CON without

July 7, 2020

Page 2

materially changing the service provided. Now, however, Beaufort Memorial seeks to move this equipment to a new area, effectively transforming a \$1.2 million capital project from a mere "replacement" of service to a provision of *new* service in a *new* area. As anyone familiar with Beaufort County would know, Port Royal and Okatie are nearly 20 miles apart, and are very different communities with vastly different demographics and access to medical care, and moving a piece of imaging equipment from one community to the other is likely to affect access to services that should be evaluated under via the CON process.

Note, if Beaufort Memorial is correct that the NAD process permits the relocation of equipment that only eluded CON review upon installation because it replaced existing equipment, then nothing prevents a health care provider from obtaining a replacement NAD for costly equipment in Beaufort County, and then another NAD to move it to Greenville County, so long as the relocation itself stays under the \$600,000 threshold. This is not at all what was intended by the CON Act because it prevents DHEC from reviewing large projects to ensure that they adhere to the objectives of the CON Act, which include cost containment, avoidance of unnecessary duplication, service to the public, and provision of high quality services throughout the State.

Thank you for your attention to this matter. Please advise us of the next steps, and please let us know if further information is required. If an NAD has not been granted, we provide the above information to DHEC staff for their use in evaluating the NAD request.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm
Enclosures

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)



May 20, 2020

Ms. Jennifer Hyman
SCDHEC Certificate of Need Division
2600 Bull Street.
Columbia, SC 29201-1708

Dear Ms. Hyman:

Beaufort Memorial Hospital is requesting a determination of the relocation of our current 1.5 Tesla MRI located at 300 Midtown Drive, Port Royal SC, to a new location: 122 Oaktie Center Blvd North, Oaktie, South Carolina 29909.

The new location is within Beaufort County and moving is an effort to consolidate our MRI and physician practice in a central location.

The cost to relocate the MRI is \$80,000.00 for the actual move and \$45,000.00 for a replacement chiller. I have attached quotes from the vendor, Cannon Medical, who would support the relocation.

For your review, the following attachments are included:

- #1. Valid vendor equipment quotes for relocation of the current MRI
- #2. Installation cost including removal
- #3. Total project cost summary
- #4. New location
- #5. Copy of initial CON/ NA letter approving current MRI
- #6. Side by side comparison of current and new equipment
- #7. Current patient volumes with proposed volumes at new location
- #8. Floor plan of affected area new location

Thank you for the review of this request. Please reach out if you have any questions or if further information is needed to make a determination on this project.

Regards,

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
Administration
955 Ribaut Rd.
Beaufort SC, 29902
dmock@bmhsc.org
843-522-5668





Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ Replacement of Like Equipment Exemption
Note: There must be a previously existing CON

R.61-15 Section 104.1.a Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

- ☐ Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)

R.61-15 Section 105.1.a Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
 - ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
 - ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
 - ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
- ☒ 8. Floor plan of affected area(s). If construction is part of the proposal, please remit both "before" and "after" floor plans. The floor plans should contain enough detail to be a stand-alone plan outlining the specific area of the facility in which the unit is to be located

Exhibit 8

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

July 14, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

This letter is intended to supplement the prior Request for Final Review (RFR) submitted by MRI at Belfair, LLC ("Belfair") on July 7, 2020, as Belfair is now in possession of the non-applicability determination (NAD) issued to Beaufort Memorial Hospital (BMH) on July 1, 2020 for relocation of a 1.5T MRI from Port Royal, SC to Okatie, SC. Pursuant to S.C. Code Ann. 44-1-60, Belfair requests final review by the DHEC Board of the staff decision to issue an NAD. The staff decision is attached hereto as Exhibit A.

Belfair operates an MRI imaging center in Bluffton, SC, approximately 6 miles down US 278 from the proposed site of the relocated MRI. Belfair is an affected person and has standing to challenge the issuance of the NAD. The request for final review was submitted within 15 days of the issuance of the staff decision, and a \$100 check was enclosed for the filing fee. This letter supplements the original request for final review and is itself submitted within 15 days of the issuance of the staff decision.

Belfair's basic position is that placing a 1.5T MRI in a brand-new location, more than 17 miles from its original location and in a completely different community, should have been treated as a new project requiring a Certificate of Need. The grounds for this position are as follows:

- The CON Act provides that a CON is required for "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). The CON Regulations provides that the cost threshold is \$600,000. S.C. Reg. 61-15, Sec. 102(1)(f).

July 14, 2020

Page 2

- The CON Act exempts providers from obtaining a (second) CON for “the replacement of like equipment for which a Certificate of Need has been issued which does not constitute a material change in service or a new service.” S.C. Code Ann. 44-7-170(A)(3). In other words, once a provider obtains a CON for a piece of equipment, it may replace that equipment without obtaining a second CON, so long as it does not materially change the health service provided or offer a new health service. This exemption makes sense in light of the purposes of the CON Act because the project has already been fully vetted by DHEC to ensure that it promotes cost containment, avoid unnecessary duplication, properly serves the public needs, and provides high quality services, and there is no need for further review.
- The CON Act further provides that it does not apply to “an expenditure by or on behalf of a health care facility for nonmedical projects such as . . . replacement of like equipment with similar capabilities . . .” S.C. Code Ann. 44-7-170(B)(1). The CON Regulations require that providers obtain an NAD before undertaking the “[r]eplacement of like equipment with similar capabilities . . .” S.C. Reg. 61-15, Sec. 105(a).
- Here, BMH obtained an NAD from the Department on April 4, 2019, permitting BMH to replace their existing 1.0T MRI at the their Port Royal, SC location with a 1.5T MRI, despite the project cost of more than \$1,200,000. Notably, the Department issued the NAD under Section 105 of the CON Regulations, which apply to non-applicability, rather than under Section 104 of the CON Regulation, which apply to exemptions. This means that the 1.0T MRI being replaced was not itself acquired with a CON. Now, the staff decision provides a second NAD allowing to move the \$1.2 million project to a new location in Okatie, SC.
- As an initial matter, it violates the CON Act for the Department to issue NADs under Section 105 of the CON Regulations / S.C. Code Ann. 44-7-170(B)(1) for the replacement of *medical* equipment. By its plain terms, S.C. Code Ann. 44-7-170(B)(1) applies only to “nonmedical projects for services.” Therefore, the NAD of April 4, 2019 was issued in error, and a CON was required for the project. Likewise, the project was not exempt under S.C. Code Ann. 44-7-170(A)(3) / S.C. Reg. 61-15, Section 104 because a CON was not issued for the piece of equipment being replaced.
- Even assuming the validity of the April 4, 2019 NAD (and it was not valid), that NAD was based on the representation by BMH that it would be replacing an MRI at its Port Royal, SC location. Indeed, the NAD itself states that it is not valid if the project changes.
- Because the project has now changed—and indeed changed barely a year from issuance of the April 4, 2019 NAD—the April 4, 2019 NAD does not apply, and the acquisition of the 1.5T MRI with a project cost in excess of \$1.2 million falls squarely within the CON requirements of S.C. Code Ann. 44-7-160(6) and its associated regulations. Thus, even if the April 4, 2019 NAD was properly issued (and it was not), the CON Act does not permit BMH to move its \$1.2 million acquisition to a new location without obtaining a CON.
- Any other conclusion would effectively create an exemption to the CON Act that the General Assembly did not create. The General Assembly exempted the replacement of

July 14, 2020
Page 3

equipment *for which a CON has already been issued*. It did not exempt the replacement of medical equipment for which no CON was issued, much less did it exempt the purchasing new equipment under the guise of replacement and then, barely 12 months later, moving the new equipment to a new location without any meaningful regulatory review.

- The location of diagnostic equipment is of critical importance in reviewing the need for a particular project. Indeed, the community need and distribution (accessibility) project review criteria—both of which are typically identified by DHEC as relative importance criteria in MRI projects—directly address the location of the proposed project its relationship to the target population. Further, they specifically provide for the review of relocations to “address the need that the population presently has for the service, the extent to which that need will be met by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other underserved groups, to obtain needed health care.” S.C. Reg. 61-15, Sec. 802(2)(d). In conducting this review, it is common for health planners to review zip-code-level data, so the mere fact that BMH proposes to move the MRI within Beaufort County is irrelevant, as Beaufort County encompasses many different zip codes and communities with vastly different demographics, socioeconomic statuses, and access to health care.
- Here, while Belfair has not had the opportunity to conduct a complete health planning analysis to date, it is worth noting that Port Royal and Okatie are very different communities. According to the Census Bureau, Okatie (zip code 29909) is an overwhelmingly white community (94.2%), whereas Port Royal (zip 29906) is only 53.9% white and has a significant African American community (39.8%). According to the IRS, in Port Royal (zip 29906), approximately 72% of households have incomes below \$50,000 per year and only approximately 14.6% have incomes over \$75,000 per year, whereas in Okatie (zip 29909), approximately 44% of households have incomes below \$50,000 per year and approximately 45% have incomes over \$75,000 per year. This limited data alone demonstrates that BMH proposes to move an expensive piece of diagnostic equipment from a less advantage area to a more advantaged area, which is exactly the kind of project that should undergo CON review to ensure that it does not diminish a less advantaged community’s access to healthcare.
- To be clear, were BMH to apply for a CON as it must, Belfair suspects that there would be many more project review criteria that would not be met, and that there would be further reasons that community need and distribution (accessibility) were problematic, but those arguments are not ripe until BMH actually submits a full and complete CON application.
- In addition, even if the current NAD request is evaluated as if only the actual relocation costs—and not the acquisition costs—count toward the \$600,000 threshold (which would be incorrect), none of the costs associated with the new medical office building that BMH is building, including the costs associated with specifically building an MRI suite and any pro rata building costs attributable to that suite, are included in the estimate. In Belfair’s experience, these costs would easily push the project over the \$600,000 threshold.

July 14, 2020

Page 4

Therefore, at the very least, the Board should reverse the NAD and require that BMH submit additional information on *all* of the costs associated with building out MRI-ready space. Indeed, based on the information available, it appears that BMH is building an entire imaging suite complete with building and equipment costs that would easily exceed the \$600,000 threshold. In short, further investigation by the Department into the real project costs is needed before an NAD can properly issue.

- The July 1, 2010 NAD is flawed on its face because neither the CON Act nor the CON Regulations provide for an exemption or non-applicability determination for the relocation of diagnostic equipment. It was incorrect for the staff decision to issue an NAD under S.C. Reg. 61-15, Section 105, because Section 105 says nothing whatsoever about relocations. Moreover, it is improper to split a project into multiple NADs—one for replacement and one for relocation—to avoid the CON Act, as BMH has done here, in the same way for the same reasons that it is improper to split a project into multiple NADs to avoid the \$600,000 threshold. S.C. Reg. 61-15, Sec. 102(2).
- In sum, the proper lens through which to view BMH's request to relocate its 1.5T MRI is as a request to acquire new equipment in excess of the \$600,000 threshold, thus requiring a full CON. Because the CON Act applies to this request, the July 1, 2020 NAD was issued in error.
- Furthermore, the NAD request was incomplete by its own terms, as it did not include complete information on the proposed project. In particular, it lacked any information that would allow the Department to consider the impact of the change in location. While it included one spreadsheet of a years' worth of procedure volumes, it did not include any meaningful historical information for the old location or projection information for the new location, or any attempt at all to analyze where patients would come from and whether there would be an impact on the patient population left behind. If DHEC were to consider an NAD for the relocation (and it should not), the Department should have at least required significant information from BMH to analyze the effects of the relocation on the existing patient population, the need for an MRI in the new area, and the effects on other providers. For this reason as well, the NAD should not have issued.

Thank you for your consideration of this additional information. Please let us know if any additional information is needed by the Board.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm

July 14, 2020

Page 5

Enclosure

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)
Daniel Mock, AVP Operation (via FedEx)
Beaufort Memorial Hospital

EXHIBIT “A”
Staff Decision



Article #: 92148969009997901539819481

July 1, 2020

Via Certified Mail

Daniel Mock, AVP Operations
Beaufort Memorial Hospital
955 Ribaut Rd.
Beaufort, SC 29902

Re: Your Request for a Determination of Non-Applicability Regarding the Following Project:
Beaufort Memorial Hospital
Relocation of current 1.5 T MRI located at 300 Midtown Dr, Port Royal, SC to 122 Oaklie Center Blvd North, Oaklie, SC at a total project cost of \$125,000.00
Matter: NA-20-04
Beaufort, South Carolina

Dear Mr. Mock:

The South Carolina Department of Health and Environmental Control (hereinafter "Department") has reviewed your request for a determination whether the State Certification of Need and Health Facility Licensure Act, S.C. Code §44-7-110, *et seq.* ("Act") applies to the aforementioned proposed project. Based on the material you provided in support of your request, it is the decision of the Department that the Act is not applicable to the project pursuant to S.C. Code §44-7-170; S.C. Code Regs. 61-15, §105 (2012); and related authority. The Department bases its decision on the information you provided with your request.

If your Project should change from the information submitted in support of this request or you are otherwise unable to complete the Project consistent with the information provided, then this determination is no longer valid and you should alert the Department immediately about the variance between the Project and information.

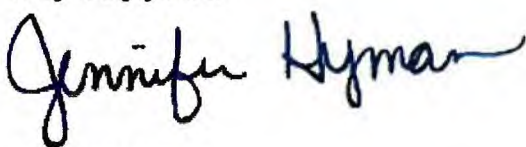
This determination does not constitute approval for any proposed construction, licensing or certification changes. You should contact the following individuals for information concerning these related issues: Bureau of Radiological Health, Ms. Susan Jenkins, (803) 545-0530; Division of Health Facilities Construction, Mr. Elie Macaron, (803) 545-4449; Division of Health Licensing, Ms. Angie Smith, (803) 545-4252; and Bureau of Certification, Ms. MaryJo Roué, (803) 545-4293.

Letter to Daniel Mock
July 1, 2020
Page 2

This determination is valid for twelve (12) months from the date of this letter. If the project is not implemented within this time period, you will be required to apply to the Department for another determination. **Please provide written notification when the project is implemented by forwarding copies of executed lease/purchase agreement(s) and/or construction agreement(s) to the Certificate of Need Program at the address below.** The Department is unable to provide a reminder of this requirement.

Should you have any question regarding the above information, please contact the Department at (803) 545-0260.

Very truly yours,



Jennifer Hyman
Project Coordinator, Certificate of Need Program
South Carolina Department of Health and Environmental Control

Reviewed By:



Louis Eubank, Chief
Bureau of Healthcare Planning and Construction

REQUEST FOR FINAL REVIEW
JULY 7, 2020

HENRY W. FRAMPTON IV
HFRAMPTON@GRSM.COM
DIRECT DIAL: (843) 714-2503

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CHARLESTON, SC 29401
WWW.GRSM.COM

July 7, 2020

VIA EMAIL AND FEDERAL EXPRESS

Honorable Denise Crawford
Clerk, SC Board of Health Environmental Control
Office of General Counsel
DHEC Board
2600 Bull Street
Columbia, SC 29201

Re: Beaufort Memorial Hospital / Non-Applicability Determination

Dear Ms. Crawford

We represent MRI at Belfair, LLC ("Belfair") in connection with the attached/enclosed request of May 20, 2020, from Beaufort Memorial Hospital for a non-applicability determination ("NAD") concerning relocation of 1.5T MRI equipment from their location in Port Royal, SC to their new location in Okatie, SC. We received a FOIA response from the Department yesterday containing the NAD request. The FOIA response did not contain a determination from the Department. When we received the documents, we immediately asked DHEC staff whether a determination has been issued but we have not received a response. Belfair has an interest in this matter because it operates an MRI facility in very close proximity to Beaufort Memorial's Okatie location.

Out of an abundance of caution, if an NAD has been granted, please accept this communication as Belfair's written request pursuant to S.C. Code Ann. § 44-1-60(E) for final review by the DHEC Board. We are sending a copy of this request along with a \$100 filing fee by overnight delivery. While it is difficult to argue against a determination that we have not seen, Belfair's basic position is that the CON Act does not provide for an exemption or non-applicability determination for the relocation of a capital project that would otherwise require a CON. Indeed, the NAD request in this case did not check the box of DHEC's form for a 104.1 exemption or a 105.1 NAD because neither apply.

On April 4, 2019, DHEC issued an NAD to Beaufort Memorial to replace their 1.0T MRI in Port Royal with a 1.5T MRI as a replacement of "like" equipment under Section 105.1.a, despite a project cost of over \$1.2 million. The *raison d'être* for DHEC's approval was that Beaufort Memorial was simply replacing equipment for which it had previously received a CON without

July 7, 2020
Page 2

materially changing the service provided. Now, however, Beaufort Memorial seeks to move this equipment to a new area, effectively transforming a \$1.2 million capital project from a mere "replacement" of service to a provision of *new* service in a *new* area. As anyone familiar with Beaufort County would know, Port Royal and Okatie are nearly 20 miles apart, and are very different communities with vastly different demographics and access to medical care, and moving a piece of imaging equipment from one community to the other is likely to affect access to services that should be evaluated under via the CON process.

Note, if Beaufort Memorial is correct that the NAD process permits the relocation of equipment that only eluded CON review upon installation because it replaced existing equipment, then nothing prevents a health care provider from obtaining a replacement NAD for costly equipment in Beaufort County, and then another NAD to move it to Greenville County, so long as the relocation itself stays under the \$600,000 threshold. This is not at all what was intended by the CON Act because it prevents DHEC from reviewing large projects to ensure that they adhere to the objectives of the CON Act, which include cost containment, avoidance of unnecessary duplication, service to the public, and provision of high quality services throughout the State.

Thank you for your attention to this matter. Please advise us of the next steps, and please let us know if further information is required. If an NAD has not been granted, we provide the above information to DHEC staff for their use in evaluating the NAD request.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP



Henry W. Frampton IV

HWF:rgm
Enclosures

cc: Jennifer Hyman (via e-mail only)
Maggie Parham Murdock (via e-mail only)



Beaufort Memorial HOSPITAL

955 Ribaut Road | Beaufort, SC 29902
843-522-5200 | 877-532-6472
beaufortmemorial.org

May 20, 2020

Ms. Jennifer Hyman
SCDHEC Certificate of Need Division
2600 Bull Street.
Columbia, SC 29201-1708

Dear Ms. Hyman:

Beaufort Memorial Hospital is requesting a determination of the relocation of our current 1.5 Tesla MRI located at 300 Midtown Drive, Port Royal SC, to a new location: 122 Oaktie Center Blvd North, Oaktie, South Carolina 29909.

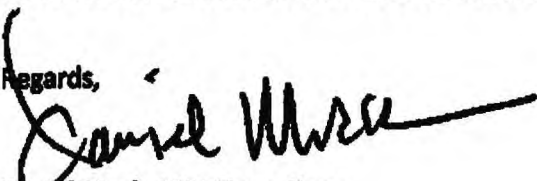
The new location is within Beaufort County and moving is an effort to consolidate our MRI and physician practice in a central location.

The cost to relocate the MRI is \$80,000.00 for the actual move and \$45,000.00 for a replacement chiller. I have attached quotes from the vendor, Cannon Medical, who would support the relocation.

For your review, the following attachments are included:

- #1. Valid vendor equipment quotes for relocation of the current MRI
- #2. Installation cost including removal
- #3. Total project cost summary
- #4. New location
- #5. Copy of initial CON/ NA letter approving current MRI
- #6. Side by side comparison of current and new equipment
- #7. Current patient volumes with proposed volumes at new location
- #8. Floor plan of affected area new location

Thank you for the review of this request. Please reach out if you have any questions or if further information is needed to make a determination on this project.

Regards,


Daniel Mock, AVP Operations
Beaufort Memorial Hospital
Administration
955 Ribaut Rd.
Beaufort SC, 29902
dmock@bmhsc.org
843-522-5668

SCDHEC
Received:

JUN - 8 2020

Certificate of Need Program

MAI
move



Determinations for Replacement of Equipment

This is a determination request for:

(Please check appropriate box)

- ☐ Replacement of Like Equipment Exemption
Note: There must be a previously existing CON

R.61-15 Section 104.1.a Exemption Determinations

The replacement of like equipment for which a Certificate of Need has been issued and the replacement does not result in a material change in service or a new service.

OR

- ☐ Replacement of Like Equipment with Similar Capabilities Non-Applicability (NA)

R.61-15 Section 105.1.a Determinations of Non-Applicability

A written determination of non-applicability from the Department is required for the replacement of like equipment with similar capabilities as defined by the Department in Section 103.16, which states: Like equipment with similar capabilities means medical equipment in which functional and technological capabilities are identical to the equipment to be replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use; and does not constitute a material change in service or a new service.

Each determination request must include:

- ☒ 1. Valid vendor quote or vendor estimate of Fair Market Value
- ☒ 2. Any construction and installation costs with valid documentation
- ☒ 3. Total Project Cost statement to include any freight, rigging, installation, and/or de-installation costs
- ☒ 4. Documentation of the disposition of the existing equipment
- ☐ a. Copy of any previously existing CON certificate or issuance letter (Required for an Exemption) for the equipment to be replaced or the original piece of equipment
- ☐ b. Copy of N/A approval letter under which original/existing piece of equipment was approved (Required)
- ☐ c. Copy of Exemption approval letter under which original/existing piece of equipment was approved (Required)
- ☒ 5. Side by side comparison of the existing unit versus the proposed unit. This comparison should include, but not be limited to functional and technical capabilities, diagnostic, therapeutic and treatment purposes
- ☒ 6. Listing of existing patient volumes and procedures performed on existing unit
- ☒ 7. Listing of proposed patient volumes and proposed procedures to be performed on proposed unit
- ☒ 8. Floor plan of affected area(s). If construction is part of the proposal, please remit both "before" and "after" floor plans. The floor plans should contain enough detail to be a stand-alone plan outlining the specific area of the facility in which the unit is to be located

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

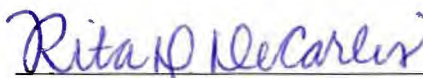
MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
vs.	)	
	)	
South Carolina Department of Health and	)	CERTIFICATE OF SERVICE
Environmental Control and Beaufort	)	
Memorial Hospital,	)	
	)	
Respondents.	)	
	)	
	)	

I, Rita D. DeCarlis, a Paralegal for South Carolina Department of Health and Environmental Control, hereby certify that I have this 25th day of January 2021, served **South Carolina Department of Health and Environmental Control's Response to Beaufort Memorial Hospital's Motion to Dismiss** upon all parties and counsel of record via U. S. Mail and Electronic Mail as follows:

Henry W. Frampton IV
Gordon & Rees
40 Calhoun Street, Suite 350
Charleston, SC 29401
Email: hframpton@grsm.com

Trudy H. Robertson
Donald Bancroft Meyer
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Email: trudyrobertson@mvalaw.com
donmeyer@mvalaw.com

January 25, 2021
Columbia, South Carolina



Rita D. DeCarlis

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

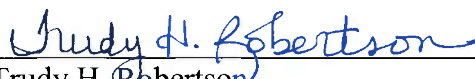
MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
	)	
Petitioner,	)	
	)	
vs.	)	RESPONDENT BEAUFORT
	)	MEMORIAL HOSPITAL'S
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	NAMING OF EXPERT WITNESSES
	)	
	)	
Respondents.	)	
	)	

NOW COMES Respondent, Beaufort Memorial Hospital, and in accordance with this Court's Scheduling Order of November 5, 2020, hereby names the following expert witnesses:

Daniel Carter
Nathan Marvelle
Ascendent Healthcare Advisors, Inc.
6320 Quadrangle Drive, Suite 180
Chapel Hill, NC 27517

Subject to and reserving Beaufort Memorial Hospital's positions in its pending Motion to Dismiss, Beaufort Memorial Hospital names the above expert witnesses and reserves the right to supplement or amend this list as discovery in this matter is initiated, undergone and as information may warrant during the discovery process and also reserves the right to supplement or amend this list in response to any experts designated by other parties.

Respectfully submitted,



Trudy H. Robertson

Donald Bancroft Meyer
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000 Telephone
(843) 579-7099 Facsimile

Attorneys for Respondent
Beaufort Memorial Hospital

January 29, 2021

Charleston, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	<u>BEAUFORT MEMORIAL</u>
	)	<u>HOSPITAL’S REPLY</u>
	)	<u>MEMORANDUM IN SUPPORT OF</u>
	)	<u>MOTION TO DISMISS</u>
Respondents.	)	<u>AND MOTION TO STAY</u>
	)	
	)	
	)	

Respondent Beaufort Memorial Hospital (“BMH”) hereby submits this Reply Memorandum in opposition to the Response Memorandum of Petitioner Belfair MRI at Belfair, LLC (“Belfair”) and in support of BMH’s Motion to Dismiss and Motion to Stay¹.

I. SUMMARY OF ARGUMENT

Belfair’s Response Memorandum focuses on several fact-intensive and procedural arguments that seek to convince this Court to deny BMH’s Motion to Dismiss. These arguments are flawed for three reasons: (1) as a matter of procedure and procedural history, BMH’s Motion to Dismiss was proper and timely; (2) as a matter of law, the relocation of an existing and approved MRI does not require an exemption, a non-applicability determination (“NAD”) or trigger certificate of need (“CON”) review, and therefore there is no right to a contested case hearing; and (3) as a matter of law and procedure, if Belfair intended to challenge the replacement of BMH’s MRI as requiring CON review, it must have timely asserted that challenge in the 2019 NAD process, which it failed to do, and it cannot make that challenge through this proceeding. As such,

¹ The stay portion of the Motion has been resolved by consent of the parties and the Court’s filing of the Amended Scheduling Order on February 2, 2021.

the existing, approved MRI can be relocated within Beaufort County without further review or the right to a contested case hearing.

II. LEGAL ARGUMENT

A. **BMH’s Motion to Dismiss was proper and timely.**

Belfair contends that a dispositive motion under SCRCP Rule 12 cannot be asserted before the ALC. This argument ignores the language of the governing procedural rules. ALC Rule 68 provides in pertinent part that: “The South Carolina Rules of Civil Procedure……, in contested cases……, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules.” The ALC judges have consistently ruled upon motions to dismiss or for summary judgment in their courtrooms, as ALC Rule 19(A) provides only that “[a]ll pre-hearing motions shall be written, contain the caption of the case and the title of the motion, the contested case docket number assigned by the Court and the name and address of the person preparing it. The motion shall also state the grounds for relief and the relief sought.” To emphasize the point, ALC Rule 71(D) (“Motion Fees”) identifies a specific filing fee for “Motion to Dismiss” and “Motion for Summary Judgment.” Belfair’s argument that a motion to dismiss cannot be made before the ALC is completely unsupported.

Belfair further argues, without citation of authority, that BMH’s Motion to Dismiss is untimely because a Rule 12(b)(6) motion must be made prior to the filing of any responsive pleadings. Here, both BMH and DHEC indicated that they were contemplating filing motions to dismiss in their prehearing statements. See BMH Prehearing Statement at ¶6; DHEC Prehearing Statement at ¶ 6. SCRCP Rule 12(h)(2) and (3) (“Waiver or Preservation of Certain Defenses”) provide as follows:

(2) A defense of failure to state a cause of action upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a

legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

The instant motion addresses both a failure to state a claim under Rule 12(b)(6) and a lack of subject matter jurisdiction under Rule 12(b)(1), neither of which has been waived. To the extent Belfair contends that a motion to dismiss cannot be raised in a prehearing statement and then later asserted by a separate motion, courts have routinely considered such motions as 12(c) motions that can be heard. *See, e.g., Jones v. Greninger*, 188 F.3d 322 (5th Cir. 1999) (motion to dismiss after responsive pleading treated as motion for judgment on the pleadings); *Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) (“Since [the South Carolina] Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure”).

B. The relocation of a previously approved piece of equipment within the same service area does not require a CON, a written exemption or a NAD.

Belfair concedes in its Response Memorandum that there is no exemption or NAD applicable to the relocation of equipment – Belfair states “[t]he statutes and regulations do not contain any exemption or non-applicability status for the relocation of medical equipment or services.” *See* Response Memorandum at p. 6. Instead, Belfair bases its argument almost entirely on its position that BMH’s Project is subject to CON review because the total project cost exceeds \$600,000 and, therefore, triggers CON review. The problem with Belfair’s argument is that the Project does not involve the “acquisition” of equipment – to which the \$600,000 threshold applies – but instead involves replacement equipment, to which the threshold does not apply.

The underlying regulation addressing an NAD, S.C. Regs. 61-15, § 105(1), clearly demonstrates the difference between the “acquisition” of equipment (which has a \$600,000

threshold for CON review) and the replacement of existing equipment (which has no such threshold). This regulation provides in pertinent part:

(1) Certificate of Need review is not applicable to the following, but prior to undertaking the proposed project, a written determination of non-applicability from the Department is required:

a. Replacement of like equipment with similar capabilities as defined by the Department in Section 103.16.

b. Acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is not in excess of six hundred thousand dollars (\$600,000). A written determination of nonapplicability is only required when any question exists as to whether or not the total project cost is below the six hundred thousand dollars (\$600,000) threshold.

As demonstrated above, these two determinations are separate and exclusive – each requires an NAD, but replacement equipment is not required to meet the \$600,000 “total project cost” threshold in order to obtain an NAD from DHEC – in fact it can be substantially higher without requiring CON review. For example, BMH’s 2019 NAD was based on a total project cost of \$1,229,037.00, which DHEC approved and which Belfair did not challenge, undoubtedly because the replacement of equipment is not subject to the \$600,000 threshold. *See* DHEC Response Memorandum, Ex. 2 (DHEC Approval Letter of 2019 NAD).

In Belfair’s supporting affidavit from its expert, Kathryn Platt, Ms. Platt states that she “believes” that BMH’s project exceeds both the \$600,000 equipment threshold, as well as the \$2.0 million capital expenditures threshold “although I’ve not yet had the benefit of discovery.” *See* Affidavit of Kathryn Platt at ¶¶ 9, 10. As demonstrated above, the threshold does not apply to existing, approved equipment, and this expert is clearly wrong based on the plain reading of S.C. Regs. 61-15, § 105(1). Additionally, in South Carolina an expert’s affidavit cannot be considered when it is conclusory and unsupported by facts. *See, e.g., Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003) (trial court properly refused to consider an expert affidavit filed in response to

a summary judgment motion where the affidavit largely contained only legal opinions, conclusions, and no factual support). Allegations in an affidavit that are made upon information and belief also do not meet the "personal knowledge" affidavit requirement. 354 S.C. at 68, 580 S.E.2d at 438.

Belfair insists that the regulations in S.C. Regs. 61-15 require that the relocation of existing equipment (to which CON review has already been deemed inapplicable) must undergo CON review when relocated within the same service area. *See* Response Memorandum at p. 15. The faulty premise of that argument is that it assumes that even though the original replacement of the MRI (which Belfair did not challenge) did not require CON review, DHEC must apply those disregarded thresholds to the same equipment and now require CON review for the relocation of the same, approved and existing MRI within the same county and service area. The portions of S.C. Regs. 61-15 to which it cites - § 102(4) and § 801(2)(d) – both do not express requirements within this context, and they instead apply to projects that must undergo CON review in the first instance. These regulations do not apply to matters like BMH’s Project that fall outside the CON Act and in which an existing, approved MRI is being moved within the same county and service area². There is nothing in the CON Act or the accompanying regulations that require CON review – which is the basic premise of Belfair’s argument – and there is no entitlement to a contested case hearing.

² Although an MRI is not covered by the 2020 S.C. Health Plan (“2020 SHP”), the 2020 SHP contains a transfer provision for “equipment,” between “affiliated facilities,” but the 2020 SHP does not apply to an imaging center which is not a “health care facility” within the meaning of the transfer provision, nor is the proposed transfer between “affiliated facilities.” *See* 2020 SHP at pp. 5-6; S.C. Regs. 61-15, § 103 (12).

C. Belfair is belatedly and improperly challenging the 2019 NAD through this contested case proceeding.

There is no basis upon which Belfair can challenge BMH's relocation of already existing, approved and operational equipment within Beaufort County. As demonstrated in its Response Memorandum, Belfair is using this contested case to belatedly and improperly attack the 2019 NAD. The 2019 NAD was proper and approved, and Belfair did not oppose or appeal that decision.

Belfair's opportunity to claim that the MRI was subject to CON review was during the prior 2019 NAD process, not now, and it has lost that right. Once the 2019 NAD was approved by DHEC, and that approval was final, BMH was required to implement the project, which it did by replacing the MRI in Port Royal. That MRI was installed and operational by January of 2020.

BMH thereafter asked DHEC in late May of 2020 to confirm that the existing and approved equipment could be relocated within Beaufort County, which is its service area for the MRI. As indicated in the argument above, the relocation of existing, approved equipment within a service area does not require CON review or any type of approval from DHEC, but BMH requested confirmation that the relocation was permissible and fell outside the CON Act, which DHEC confirmed in early July of 2020.

Despite Belfair's best attempts to muddy the waters by now claiming that the Project exceeds the \$600,000 project cost threshold and must be reviewed, it has lost the right to make that argument. This replacement equipment is not subject to the \$600,000 threshold, and Belfair has waived any argument that it is not "replacement equipment" falling outside CON review by failing to timely challenge the 2019 NAD.

III. CONCLUSION

To be very clear, BMH's proposed relocation of an MRI within Beaufort County does not result in any increase in the number of approved MRIs in the service area. Belfair was not aggrieved by the original replacement of the MRI, but it is now disgruntled by the fact that BMH's MRI is being relocated to an area in Beaufort County that is closer to its own imaging center in Bluffton. There is no legal basis for its opposition to this relocation, it has no right to a contested case hearing under the circumstances, and it should not be allowed to re-challenge the 2019 NAD in this proceeding when it failed to object to the replacement MRI in that prior process.

For the reasons stated above, BMH requests that this Court grant its Motion to Dismiss.



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February 8, 2021

Charleston, SC

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	
	)	
Respondents.	)	
	)	

PROOF OF SERVICE AND CERTIFICATE OF THE DATE OF FILING BY MAIL

The undersigned does hereby certify that a copy of the foregoing *Beaufort Memorial Hospital's Reply Memorandum in Support of Motion to Dismiss and Motion to Stay* was filed by mail and served, via electronic mail and by depositing copies in the Regular U.S. mail, with sufficient postage attached thereto, on February 8, 2021 and addressed to:

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Administrative Law Judge
South Carolina Administrative Law Court
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	PETITIONER’S MOTION TO ALTER OR
v.	)	AMEND THE ORDER GRANTING
	)	JUDGEMENT IN FAVOR OF
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	RESPONDENTS
	)	
Respondents.	)	

Pursuant to Rule 59(e), SCRCPP, Petitioner MRI at Belfair, LLC d/b/a 3T MRI at Belfair (“Belfair”) respectfully moves the Court to alter and amend its Order of March 30, 2021, granting Respondent Beaufort Memorial Hospital’s Motion to Dismiss (the “Order”). For the reasons set forth herein, the Court must alter or amend the Order and deny Beaufort Memorial Hospital’s (“BMH”) Motion to Dismiss in full.

INTRODUCTION

The Order should be altered or amended to reverse the conversion of the motion to one for summary judgement without notice, to address each of Belfair’s arguments, and to deny the motion to dismiss. Specifically, Belfair submits this motion requesting the Court amend or alter the Order for the following reasons:

First, the Rules of Civil Procedure require the Court to provide Belfair the proper notice before converting the motion to one for summary judgment, and no such notice was given.

Second, under the Rules of Civil Procedure, to the extent the motion is considered one for summary judgment, the Court must either deny summary judgment or permit Belfair the

opportunity to take discovery before ruling on the motion because Belfair demonstrated the need for discovery to establish facts necessary to support its claim.

Third, the Order erred in finding that the facilities at issue are not “health care facilities” under the applicable code and regulation.

Fourth, the Order failed to address BMH’s improper cost splitting in violation of the CON regulations and erroneously held that the purchase of the MRI is not at issue in the challenge to the 2020 Non-Applicability Determination (“NAD”).

Fifth, the Court should alter the Order to find that the “relocation” of the 1.5T MRI was an acquisition requiring a Certificate of Need (“CON”) review, that the value of the equipment is included in the total project costs of an acquisition, and that the costs submitted by BMH did not include all required project costs.

Sixth, the Court should amend or alter the Order to address whether CONs, NADs, and written exemptions are location specific, and hold that, pursuant to the regulatory scheme, CONs, NADs and written exemptions are location specific.

Thus, the Court should alter or amend the Order to: (1) reverse the conversion to a motion for summary judgment and deny the motion to dismiss in its entirety; or (2) deny summary judgment; or (3) postpone ruling on summary judgment to permit Belfair to complete the required discovery.

PROCEDURAL BACKGROUND¹

In July 2003, DHEC issued an “exemption”² to the Lowcountry Medical Group for the replacement of an old 1.0T MRI with a new 1.0T MRI at 300 Midtown Dr., Port Royal, South Carolina (the “Port Royal” location) (“Exemption E-03-49”).

On April 4, 2019, BMH received an NAD to replace an MRI at its facility located at 300 Midtown Dr., Port Royal, South Carolina (the “Port Royal” facility) with a new Canon Medical Titan 1.5T MRI (“NA-19-03”). Although BMH did not disclose it at the time, the 1.5T MRI was purchased for a new then unfinished facility in Okatie (the “Okatie facility”), not for permanent placement at the Port Royal facility. According to the materials submitted by BMH, the 1.5T MRI was purchased for \$1,229,037.00.

On May 20, 2020, approximately six weeks after the expiration of NA-19-03, BMH requested **another** NAD regarding the exact same piece of equipment. This time, BMH requested an NAD for the “relocation” of the 1.5T MRI from the Port Royal location, where it had just been installed, to the brand new Okatie facility located almost 20 miles away and in a vastly different service area. In that request, BMH submitted information showing that the purchase of the 1.5T MRI was with the express purpose of moving it to a brand new health facility, not to replace the old MRI. The request for “relocation” did not include in the total project costs the cost of the equipment or many other categories of costs required under the regulations. Despite this information, DHEC issued NA-20-04 based on the alleged total project cost reported by BMH of \$125,000.

¹ Belfair’s Response in Opposition to BMH’s Motion to Dismiss contains a more complete procedural background.

² The CON regulations were updated in 2012 to separate exemption determinations from non-applicability determinations (“NADs”).

In addition to moving the new 1.5T MRI to a brand new health facility, building out a room for the MRI with shielding and other necessary construction, BMH is also building an entirely new imaging center, in a brand new location, in a new service area, using brand new equipment, but attempting to avoid any review from DHEC.

Belfair timely requested final review of NA-20-04, and the DHEC Board declined to hold a final review conference. Belfair then timely requested a contested case hearing in this Court on September 9, 2020. At the Court's direction, the parties filed pre-hearing statements on October 28, 2020. Pursuant to the Court's scheduling order, Belfair then submitted written discovery requests to BMH. BMH never responded to discovery, but filed an untimely motion to dismiss on January 8, 2021. After briefing, the Court issued the Order converting the motion to dismiss to one for summary judgment without notice to Belfair and granting summary judgment despite the clear need for discovery and genuine issues of material fact.

DISCUSSION³

I. THE COURT IMPROPERLY CONVERTED THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT.

Belfair respectfully submits that the conversion of a 12(b)(6) motion to a motion for summary judgment violated the Rules of Civil Procedure. Rule 12(b), SCRCRCP, provides that while a court may treat a motion to dismiss for failure to state a claim as one for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." No such opportunity was given here.

Prior to the Order, Belfair was unaware of any intent to convert the motion to one for summary judgment, as Beaufort Memorial did not request that the motion be converted, nor did

³ Because the Order held that this Court has jurisdiction over the contested case hearing, the arguments supporting jurisdiction are not repeated herein.

the Court intimate its intention to do so. Belfair had no pleading from which to rely on, since the complaint here is an informal letter and notice for a contested case hearing, rather than a traditional complaint. Thus, Belfair's submissions and arguments focused on the pleading standard under Rule 12(b)(6) and not on the generation of evidence required to respond to a Rule 56 motion. The affidavit attached to the response was merely an initial statement from Belfair's expert to support the claims, not an affidavit in response to a motion for summary judgment (though, notably, Belfair is the only party that submitted an affidavit at all). Since Belfair was not given reasonable opportunity and time to present all materials relevant to a summary judgment motion, the Court must permit Belfair that opportunity prior to ruling on summary judgment. *See BPS, Inc. v. Worthy*, 362 S.C. 319, 331, 608 S.E.2d 155, 162 (Ct. App. 2005) ("The circuit judge committed reversible error in proceeding to consider and convert the initial Rule 12(b)(6) motion to a motion for summary judgment without giving [plaintiff] adequate and reasonable opportunity and time to present all materials pertinent to a Rule 56 motion.").

Because the conversion to summary judgment was inappropriate, the Order should be altered and the holding that, in this case, "Rules 12(b)(1) and (6) are inappropriate," should stand. (See Order at 4.) Since motions under Rules 12(b)(1) and (6) are inappropriate, the motion must be denied in full.

II. THE COURT MUST ALLOW BELFAIR THE OPPORTUNITY TO SEEK DISCOVERY.

Even if the Court declines to alter the decision to convert the motion to one for summary judgment (and it should not), the Court must alter or amend the Order and either deny it in full, or grant Belfair the opportunity to conduct discovery to rebut the factual allegations in BMH's Motion to Dismiss. Rule 56(f) states:

[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

“Summary judgment is a drastic remedy to be invoked cautiously and must be denied if [the non-moving party] demonstrates a scintilla of evidence in support of [it’s] claims.” *Abdelgheny v. Moody*, 432 S.C. 346, 349, 852 S.E.2d 225, 227 (Ct. App. 2020).

Here, the Order incorrectly finds that there are no genuine disputes of material fact by ignoring the evidence presented and the need for discovery. The Order erroneously stated that the “Belfair’s assertion depends on including the original purchase value in the relocation costs” and that the “only evidence is that these costs will be at or below \$125,000.” (Order at 10.) This is indisputably wrong for at least two reasons.

First, Belfair’s argument **does not** rely on including the original purchase value in the relocation costs. In fact, to the extent it relies on the value of the equipment, Belfair argues that the value of the equipment is the value at the time of the move to Okatie, but is likely somewhere close to the purchase price paid less than a year earlier. Moreover, Belfair’s argument does not depend on the value of the equipment, as Belfair alleges that there were many other costs that BMH was required to include but did not and which are likely to reach the applicable cost threshold. Platt specifically stated that the project costs “must include . . . the cost of construction, design, or other costs associated with building and outfitting the facility for the use of the equipment,” and a “prorated portion of the value of the new medical facility.” (See Ex. D. to Belfair’s Opp’n, ¶ 7 (hereinafter “Platt Aff.”)) BMH blatantly failed to include a number of other costs in the total project cost in violation of the regulations. Thus, Belfair has clearly established

the need for discovery to support the allegations of missing costs that result in a project cost of more than \$600,000 or \$2,000,000.

Second, Platt's affidavit specifically provides that "the project costs submitted in [BMH's] Request do not include the required project costs under the CON Act and related regulations." (Platt Aff. ¶ 7.) In other words, Belfair submitted a sworn statement that the costs submitted by BMH of \$125,000, failed to include multiple categories of costs and is therefore an incorrect statement of costs. Thus, Belfair has provided evidence that the costs submitted by BMH were incorrect on many levels and evidence that the costs will be **far above the \$125,000** claimed.⁴ As a result, the ultimate conclusion that the costs here could not exceed \$600,000, and that no evidence exists to support a total project cost over \$125,000, is demonstrably wrong. Belfair must be allowed to take discovery to provide evidence of the additional costs to support the well-pleaded claim. As a result, there is a clear dispute of fact as to the actual total project costs, which goes to the heart of whether a CON review is required.

Therefore, under Rule 56(f) the Court should deny the motion, or at the very least, must permit Belfair the opportunity to conduct discovery before ruling on summary judgment. The Order granting the "drastic remedy" of summary judgment cannot stand when Belfair has demonstrated far more than a scintilla of evidence to support its claims and has been denied the

⁴ In addition to this direct evidence, the Order erred in granting summary judgment based on an issue of fact that is clearly in dispute and that materially affects the application of the law to this case. At a minimum, the Court must permit Belfair the opportunity to seek discovery to establish that the costs far exceeded the \$125,000 claimed. Without the benefit of discovery, it is entirely untenable to expect Belfair to produce evidence beyond an expert's statement that many required project costs were not included. *See Baughman v. America Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.").

opportunity to seek discovery on the issues the Court has claimed are not in dispute. To the contrary, the project costs involved are very much disputed, and summary judgment was improper.

III. THE COURT ERRED IN FINDING THAT THE FACILITIES ARE NOT “HEALTH CARE FACILITIES” UNDER THE LAW.

The Court erroneously held that neither facility involved is a “health care facility” as defined in S.C. Code Ann. § 44-7-130(10) and S.C. Code Regs. 61-15 § 103(12). Both define a “health care facility” as:

acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, intermediate care facilities for persons with intellectual disability, narcotic treatment programs, and any other facility for which Certificate of Need review is required by federal law.

S.C. Code Ann. § 44-7-130(10). The Attorney General has clarified that the term “should be construed broadly to include hospital owned and leased buildings, thoroughfares, [and] parking lots...” S.C. Op. Att’y Gen., 2005 WL 2652377 (September 27, 2005). Further, according to BMH’s website, the Okatie facility offers rehabilitation facilities and radiation therapy, and is therefore a “health care facility” under the law.

Moreover, the relevant statute requires “a person **or** health care facility . . . to obtain a [CON] from the department before undertaking” various actions. S.C. Code Ann. § 44-7-160 (emphasis added). Thus, even if neither the Okatie nor Port Royal facilities are “health care facilities” (and clearly they are), the CON Act would still apply to both when they undertake to acquire medical equipment or make an expenditure over \$2,000,000 on behalf of a health care facility. See Okatie Medical Pavilion, <https://www.bmhsc.org/location/okatie-medical-pavilion> (last visited April 6, 2021). Therefore, the Court should amend or alter the Order to reverse the holding that neither facility is a “health care facility.”

IV. THE ORDER ERRED IN FAILING TO RECOGNIZE BMH'S IMPERMISSIBLE COST SPLITTING TO AVOID CON REVIEW.

The Order incorrectly states that “[i]f ‘acquisition’ were an issue, it would have been addressed in NA-19-03,” but fails to acknowledge BMH’s deception and improper cost splitting. In doing so, the Order made no mention or determination as to BMH’s clear violation of S.C. Code Ann. Regs. 61-15 § 102(2). Section 102(2) provides in relevant part that, “[a]n applicant may not split or combine one expenditure into two or more expenditures for the purpose of avoiding Certificate of Need review.”

As demonstrated in Belfair’s prior briefs, BMH has done exactly that—attempted to split the expenditure of the new MRI for Okatie into two different “projects” to avoid CON review. BMH first submitted the original NAD request in 2019. In that request, BMH claimed that the MRI was purchased to replace an old one at the Port Royal Facility. Were that the actual intent and full scope of the project, Belfair would not have reason to challenge the MRI purchase. However, at that time, BMH had not revealed the entire scope of the project or its intent to improperly split project costs and NA-19-03, standing alone, is not objectionable.

However, in submitting the 2020 NAD request, the full scope of the project was revealed to include both the purchase of the MRI and placement at Okatie. In that request and for the first time, BMH submitted evidence that the actual scope of the project included both the purchase and placement at Okatie. (See Ex. 1 to Platt Afff. at 20 (a capital expense request included in the 2020 NAD request showing that the 1.5T MRI was purchased to “move to new Bluffton MOB”)). The 2020 NAD request was a clear attempt to impermissibly split the total project cost of the new MRI purchased for the new Okatie facility into two projects: the purchase and the placement at Okatie. It was not until the 2020 NAD request that the improper splitting occurred and the attempt to circumvent the CON review was revealed. Thus, the Order must be amended to address BMH’s

violation of S.C. Code Ann. Regs. 61-15 § 102(2). Since NA-20-04 was so clearly an attempt to split costs to avoid CON review, it must be reversed and BMH must be required to submit to a CON review.

Moreover, BMH is also attempting to impermissibly split the costs of an entirely new imaging center in the brand new Okatie facility by parceling out each piece of equipment as a separate project. Publicly available evidence has also established that NA-20-04 is a part of this impermissible cost splitting for the much more significant project—a new imaging center. (Platt Aff. ¶ 10.) The Order did not address this larger blatant deception and obvious attempt to circumvent CON review for the new imaging center and the Court must therefore amend or alter the Order to recognize the violation and deny the motion.

V. THE ORDER ERRED IN HOLDING THE “RELOCATION” WAS NOT AN ACQUISITION.

Even if BMH had not clearly violated the regulations by attempting to circumvent CON review by splitting the costs of a larger project (and clearly it has), the alleged “relocation” still qualifies as an acquisition. The Order incorrectly classified the acquisition of the 1.5T MRI by the new Okatie facility as something other than an acquisition. The Order recognized that the costs associated with the “relocation” are potentially an “issue” in this case, (*see* Order, at 9,) but incorrectly claims that no acquisition occurred because BMH already owns the MRI. (Order at 6.) Without any citation or explanation, the Order concluded that no CON was required for a relocation. In doing so, the Order ignores the plain language of the regulations and the entire regulatory scheme.

Although BMH wrongly classifies this transaction as a “relocation,” the transaction involves the acquisition of an almost new 1.5T MRI at a brand new facility. It cannot be classified as anything other than an acquisition. A “person or health care facility [] is required to obtain a

[CON] from [DHEC] before undertaking . . . [a]n expenditure by or on behalf of a health care facility in excess of []\$2,000,000[; or] [t]he acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of [\$600,000].” S.C. Code Ann. § 44-7-160(3) and (6); S.C. Code Ann. Regs. 61-15, § 102(1)(c) and (f). The “total project cost” is defined as “the estimated total capital cost of a project including land cost, construction, fixed and moveable equipment, architects’ fees, financing cost, and other capital costs properly charged under generally accepted accounting princip[le]s as capital costs.” *Id.* § 103(24).

Here, the “relocation” is on behalf of the new Okatie facility, not the Port Royal facility. Thus, the Okatie facility was acquiring the 1.5T MRI and the total project costs of acquiring the MRI includes the cost of the equipment itself and many other costs. Further, the cost of the entire expenditure made by the Okatie facility on a new imaging center at the new facility, includes, at a minimum, the cost of other imaging equipment, the cost to design and construct the appropriate area for the imaging center, and some prorated portion of the total value of the facility. Virtually none of these costs were included in BMH’s request for an NAD. Because the Court has failed to address whether the “relocation” is an acquisition and failed to consider the obvious deficiencies and holes in the project costs reported by BMH, the Court should amend the Order to take these into account and hold that Belfair has stated a claim and/or has provided significantly more than a scintilla of evidence to support those claims.

VI. THE ORDER FAILS TO ADDRESS WHETHER CONS, NADS, AND WRITTEN EXEMPTIONS ARE LOCATION SPECIFIC.

Finally, the Court should amend or alter the Order because the Order fails to address whether CONS, NADS, and written exemptions are location specific. As demonstrated more fully in Belfair’s Opposition, CONS and NADS cannot be carried to a new location because CONS and NADS are granted to a “healthcare facility,” not a corporate entity. S.C. Code Ann. § 44-7-160;

S.C. Code Ann. Regs. 61-15 § 102(a). Further, the regulatory scheme does not permit a corporate entity to relocate equipment between facilities without CON review for the new location.

In fact, the regulatory scheme clearly establishes the location specific nature of CONs and NADs. Specifically, the regulations provide that the purchase of new equipment may not require a CON review **unless the purchase includes a relocation**. *Id.* § 102(4) (“These provisions do not apply to acquisitions or changes of ownership of health care facilities, services, and equipment that are already in existence, operational, and providing services. . . **so long as the facility or service is not being relocated.**” (emphasis added)). Further, the regulations clearly contemplate the need for CON review where a service is being relocated by specifying that an applicant seeking a relocation CON must supply location specific demographic information. *See* S.C. Code Ann. Regs. Ann. 61-15 § 801(2)(d) (“[i]n the case of a reduction, **relocation**, or elimination of a facility or service, the applicant should address the need that the population presently has for the service, the extent to which that need will be met by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other underdeveloped groups, to obtain needed healthcare.” (emphasis added)). Thus, the relocation of equipment which otherwise requires a CON review (i.e. where the **total** project cost is more than \$600,000 or the total expenditure is more than \$2,000,000) requires a CON review to ensure regulatory oversight into the effect of such a relocation on the relevant communities.⁵

⁵ In addition to other regulatory references to the location specific nature of a CON, the process also demonstrates this limitation. A CON is granted on the basis of a thorough application process which includes, in part, submission of significant information about the location of the facility, service and/or equipment, the need of public in the service area, and an endorsement from the community, all of which are location specific. S.C. Code Ann. Regs 61-15 §§ 202(2)(a-c).

Finally, any conclusion other than the need for CON review would be contrary to the purposes of the CON Act. 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 high quality services are provided in health facilities in this state.” S.C. Code Ann. § 44-7-120 (emphasis added). In other words, the General Assembly enacted the CON Act to ensure that health services were not unnecessarily grouped in overserved areas, leaving other areas without access to the same quality of services. To that end, the relocation of valuable equipment providing valuable services necessarily requires a CON review for DHEC to determine the impact on the access to healthcare in the affected areas.

Here, the original CON under which the old MRI was presumably installed at the Port Royal facility was specific to the Port Royal facility, and cannot be transferred or imputed to the new Okatie facility. Similarly, the NAD granted to BMH for replacement of the old MRI with the 1.5T MRI in 2019, NA-19-03, was also specific to the Port Royal facility. Thus, the relocation of equipment or the expenditure of moving and installing equipment in a new facility cannot be piggy-backed onto the old CON or NAD, as it would strip DHEC of the authority and obligation to ensure reasonable access to quality health services. If the MRI is moved without any review, the need for the services will have never been assessed for the new facility, nor will the effect of the removal of the service in the Port Royal area. To do so would deprive the public of the benefit of the CON Act. It would have the effect of creating an exemption to the CON Act that would render it entirely without teeth, an exemption the General Assembly has not created. If entities were permitted to purchase valuable equipment under a CON, NAD or exemption issued to a facility in an underserved area and merely wait 12 months before moving the equipment wherever

it pleases, the entire CON Act's purpose will be undermined. For these reasons, the NAD in this case, which clearly attempts to do just that, is erroneous and must be reversed.

Moreover, even if the Court considers the service area as a factor (and it should not), Port Royal and Okatie are distinct service areas with vastly different demographics and access to healthcare. (See Platt Aff. ¶ 11.) Therefore, the requested "relocation" constitutes the introduction of a new service (MRI imaging) to a new service area, and substantially changes the evaluation of the introduction of the equipment into the service area that was presumably reviewed by DHEC in the original CON. As a result, even by BMH's standards, the proposed project requires a CON review.

Because the Order did not address the location specific nature of CONs, NADs, and written exemptions, the Court must alter or amend the Order and should hold that CONs, NADs, and written exemptions are location specific and the motion must be denied in full.

CONCLUSION

For all the foregoing reasons, the Order should be amended or altered to deny BMH's Motion to Dismiss in full.

Dated: April 9, 2021

GORDON & REES LLP

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and	)	<u>BEAUFORT MEMORIAL</u>
Environmental Control and Beaufort	)	<u>HOSPITAL'S MEMORANDUM IN</u>
Memorial Hospital,	)	<u>OPPOSITION TO PETITIONER'S</u>
	)	<u>MOTION TO ALTER OR AMEND</u>
Respondents.	)	
	)	
	)	
	)	

Respondent Beaufort Memorial Hospital ("BMH") hereby submits this Response Memorandum in opposition to the Motion to Alter or Amend of Petitioner Belfair MRI at Belfair, LLC ("Belfair").

I. STANDARD OF REVIEW

The Rules of Procedure for the Administrative Law Court ("ALC Rules") do not contain a specific provision for "motions to alter or amend." Instead, the ALC Rules only contemplate "motions to reconsider" pursuant to ALC Rule 29.D, which provides that: "[a]ny party may move for reconsideration of a final decision of an administrative law judge in a contested case, subject to the grounds for relief set forth in Rule 59, SCRCP"

There are relatively few South Carolina cases that have addressed the court's standard of review of motions made under Rule 59, SCRCP, and South Carolina courts typically look to the construction placed on the corresponding Rule 59 of the Federal Rules of Civil Procedure. *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (interpreting successive motions under SCRCP Rule 59(e)); *see also Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since [the South Carolina] Rules of Procedure

are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure").

Because of the interests in finality and conservation of judicial resources, Rule 59(e) motions should be granted sparingly. *Rouse v. Nielsen*, 851 F. Supp. 717, 734 (D.S.C. 1994) (analyzing analogous federal rule). Under federal procedural law, motions for reconsideration made under Rule 59(e) are limited in scope and are not to be used to rehash the same arguments and facts previously presented. *Dockins v. Benchmark Communications*, 180 F.R.D. 294, 295 (D.S.C. 1998), *aff'd*, 176 F.3d 745 (4th Cir. 1999). A motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the court rethink what the court has already thought through, rightly or wrongly. *Dockins*, 180 F.R.D. at 295.

Accordingly, the federal courts have recognized only three grounds for revisiting a settled matter under Rule 59: (1) to accommodate an intervening change in the law; (2) to account for new evidence not previously available; and (3) to correct a clear error of law or prevent manifest injustice. *Id.* (quoting *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997)). The purpose of the rule restricting review on motions to reconsider is to ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps with additional arguments. *See McMahan & Co. v. Donaldson, Lufkin & Jenrette Securities Corp.*, 727 F. Supp. 833 (S.D.N.Y. 1989). The proponent of such a motion is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then advance new facts and theories in response to the court's rulings. *Id.*

On its face, Belfair's Motion does not meet any of the criteria necessary to consider and grant a motion under SCRCF Rule 59(e), and it should be denied. There has been no intervening change in the law. There is no new evidence offered in support of the Motion that was not

previously available. Further, the Court committed no clear error of law and there is no manifest injustice to be prevented here.

II. LEGAL ARGUMENT

A. Notice and an opportunity to conduct additional discovery would not change the outcome.

Belfair's first and second arguments contend that this Court did not provide sufficient notice of the consideration of BMH's Motion as a summary judgment motion, and as such, the Court did not afford Belfair additional time to conduct discovery. It is a fundamental point, however, that Belfair must demonstrate that the lack of such notice and an opportunity to conduct discovery was prejudicial because additional discovery would have aided its position in the case. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (finding the nonmoving party must demonstrate it is not merely engaged in a 'fishing expedition' by showing the likelihood that further discovery will uncover additional relevant evidence); *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009) ("A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.")

Here, Belfair presented a comprehensive affidavit of its expert witness, Kathy Platt, together with various supporting documents that it contended were conclusive on the legal issues presented by BMH's Motion to Dismiss. This Court disagreed, finding that those facts were not material, and that as a matter of law the relocation of a previously-approved (and now non-reviewable) MRI to a new location is permissible and does not require the Court to consider the project as requiring Certificate of Need (CON) review or otherwise require BMH to adhere to the

regulatory requirements that apply to the acquisition of medical equipment, including its cost. Additionally, allowing discovery to further support the contents of Ms. Platt's comprehensive affidavit would not have changed the outcome. As one South Carolina court has noted in a similar case: "[A]ppellant had within her control all of the information she needed to defend the motion, and the time requested for more discovery was not necessary to 'uncover additional evidence,' but rather only to document existing evidence...." *Smith v. Jones (In re Estate of Smith)*, 419 S.C. 111, 121-122, 796 S.E.2d 158, 163 (Ct. App. 2016) (Few J., concurring). Belfair felt comfortable enough with the facts it presented through Ms. Platt's affidavit that it consented to a stay of discovery - as the Court mentioned in Footnote 5 of its Order, there was a stay of discovery in the Amended Scheduling Order, which states: "With all parties fully reserving their respective positions with respect to the Motion to Dismiss, the parties have agreed to a stay of discovery pending a ruling on the Motion to Dismiss...." Here, judgment as a matter of law was appropriate, even when the contents of Ms. Platt's affidavit were considered.

Because the facts upon which Belfair bases its argument do not present genuine issues of material facts, summary judgment is proper as a matter of law, and Belfair has failed to demonstrate why allowing further discovery of those facts will aid the Court in deciding the issues any differently.

B. The relocation of a previously approved piece of equipment within the same service area does not require a CON, a written exemption or an NAD.

Belfair's third, fourth, fifth and sixth arguments focus on the same arguments that Belfair advanced in its legal memorandum, through Ms. Platt's affidavit and at the hearing, which boil down to three basic arguments: (1) that BMH's MRI location is a "health care facility" requiring regulatory review; (2) that the relocation of the MRI constituted a "purchase" and acquisition of medical equipment and evaded review through impermissible cost-splitting; and (3) and that the

project required either a written exemption, a NAD or a CON because the regulatory scheme is "location specific".

Previously, Belfair has conceded that there is no exemption or NAD applicable to the relocation of equipment – Belfair acknowledged that "[t]he statutes and regulations do not contain any exemption or non-applicability status for the relocation of medical equipment or services." See Response Memorandum at p. 6. As this Court correctly noted, the State Health Plan does not apply to MRI equipment. See Order at p. 6, n. 6. More importantly, the MRI itself is not a "health care facility" under the regulations, and it is being relocated to a medical office building, which is also not a "health care facility." The CON Act definitions specify that: "Health care facility' means acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, methadone treatment facilities, tuberculosis hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, habilitation centers for mentally retarded persons or persons with related conditions, and any other facility for which [CON] review is required by federal law." S.C. Code § 44-7-130(10). "Hospital" is defined as "a facility organized and administered to provide overnight medical or surgical care or nursing care of illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care is administered by or under the direction of persons currently licensed to practice medicine, surgery, or osteopathy." *Id.* § 44-7-130(12). The MRI and its location are not a "health care facility" or "hospital", they do not provide "overnight" care and clearly do not fall under these definitions. See *Amisub of S.C., Inc. v. S.C. Dept. of Health and Env'tl. Control*, 403 S.C. 576, 743 S.E.2d 786 (2013) (urgent care center is not a "health care facility" requiring CON review).

The second premise of Belfair's legal argument is that the relocation of existing approved medical equipment within a service area constitutes a "purchase" or an "acquisition" that triggers the CON Act's regulatory scheme and accompanying review and the cost-splitting prohibition. The problem with Belfair's argument is that BMH's MRI relocation does not involve the "purchase" or the "acquisition" of medical equipment – it is already owned by BMH. As BMH has previously pointed out, the applicable regulations make a clear distinction between acquisition and replacement of medical equipment. See S.C. Regs. 61-15, § 105(1). In this case, the MRI was replaced and the replacement approved by DHEC, with no objection from Belfair. In fact, BMH's 2019 NAD was approved based on a total project cost in excess of \$1.2 Million, which project cost Belfair did not challenge. See DHEC Response Memorandum, Ex. 2 (DHEC Approval Letter of 2019 NAD). It is now existing equipment owned by BMH that is being moved to another location in the same service area. There is nothing in the CON Act or the accompanying regulations that require CON review of the relocation of owned equipment, which is neither purchased nor acquired, simply because Belfair is unhappy about the location to which the MRI is being moved.

The third premise of Belfair's argument that CON review is required because it is "location specific" fails because the CON Act and regulations do not require review of the relocation of an owned MRI moved within the same service area *where it is already approved to operate*. Belfair did not challenge the purchase and replacement of the MRI in the service area originally, and it cannot reinvigorate this challenge by now belatedly claiming that the relocation of existing equipment equates to the purchasing or acquiring of new equipment in the service area.

C. Belfair's repetition of its prior legal and factual arguments cannot be reconsidered.

As noted above, motions for reconsideration made under Rule 59(e) are limited in scope and are not to be used to rehash the same arguments and facts previously presented. *Dockins*, 180 F.R.D. at 295. Belfair's third, fourth, fifth and sixth arguments are all part of the same, prior arguments that Belfair has advanced to this Court in its legal memorandum, in Ms. Platt's affidavit and during oral argument at the hearing conducted on March 16, 2021. As such, they cannot be considered in a motion for reconsideration under ALJD Rule 29.D, which incorporates Rule 59, SCRPC, nor do they constitute a basis for relief under Rule 59(e).

III. CONCLUSION

For the reasons stated above, BMH requests that this Court deny the Motion to Alter or Amend of Petitioner Belfair MRI at Belfair, LLC in its entirety.


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April 19, 2021

Charleston, SC

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	
	)	
Respondents.	)	
	)	

PROOF OF SERVICE AND CERTIFICATE OF THE DATE OF FILING BY MAIL

The undersigned does hereby certify that a copy of the foregoing *Beaufort Memorial Hospital's Memorandum in Opposition to Petitioner's Motion to Alter or Amend* was filed by mail and served, via electronic mail and by depositing copies in the Regular U.S. mail, with sufficient postage attached thereto, on April 19, 2021 and addressed to:

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Administrative Law Judge
South Carolina Administrative Law Court
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1205 Pendleton Street, Suite 224
Columbia, SC 29201

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April 19, 2021

Charleston, SC

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
vs.	)	SOUTH CAROLINA DEPARTMENT
	)	OF HEALTH AND
South Carolina Department of Health and	)	ENVIRONMENTAL CONTROL'S
Environmental Control and Beaufort	)	RESPONSE TO BELFAIR'S MOTION
Memorial Hospital,	)	TO ALTER OR AMEND
	)	
Respondents.	)	
	)	
	)	

Respondent South Carolina Department of Health and Environmental Control (“DHEC” or “Department”) submits this Response in Opposition to the Motion to Alter or Amend the Order Granting Judgment in Favor of Respondents filed by Petitioner MRI at Belfair, LLC d/b/a 3T MRI at Belfair (“Belfair”).

STANDARD OF REVIEW

Belfair’s Motion to Alter and Amend is based on Rule 29(D) of the Rules of the Administrative Law Court (“ALC”) and Rule 59(e) of the South Carolina Rules of Civil Procedure, and asks that “the Order ... be amended or altered to deny BMH’s Motion to Dismiss in full” (Mot., p. 14). SCALC Rule 29(D) allows any party to move for reconsideration of a final decision in a contested case to alter or amend the final decision, “subject to the grounds for relief set forth in Rule 59, SCRCF.” Rule 59(e), SCRCF, and Rule 59(e), FRCP, are identical with exception of the time limitation for filing. Neither Rule expressly states standards for requesting relief; however, “courts interpreting Rule 59(E) of the Federal Rules of Civil Procedure have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error

of law or prevent manifest injustice.” *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993) (discussing Rule 59(e), FRCP). “In the context of a motion for reconsideration, a ‘manifest injustice’ is defined as an error by the court that is ‘direct, obvious, and observable.” *Register v. Cameron & Barkley Co.*, 481 F.Supp.2d 479, n.1 (D.S.C 2007) (finding the fact that plaintiff incurred significant costs but have no remedy for recovery is not a “manifest injustice” warranting relief under Rule 59(e), FRCP); *see also* 11 Wright & Miller § 2810.1 (“The rule 59(e) motion may not be used to relitigate old matters . . .”). It is an “extraordinary remedy which should be used sparingly.” 11 Wright & Miller § 2810.1. There has been no change in controlling law. There is no new evidence or need for new evidence to dispose of relevant issues to this matter. There are no clear errors of law or manifest injustices as a result of the Court’s Order. Therefore, the Department respectfully requests the Court deny Belfair’s Motion.¹

ARGUMENT

According to Belfair, the two purported grounds for the Beaufort Memorial Hospital (“BMH”) Project needing a certificate of need (“CON”) are:

- (1) The Project involves an expenditure by or on behalf of a health care facility in excess of two million dollars (\$2,000,000.00) which is considered a capital expenditure. *See* S.C. Code Ann. § 44-7-160(3); 3 S.C. Code Ann. Regs. 61-15 § 102(1)(c).
- (2) The Project involves an acquisition of medical equipment which is to be used for diagnosis or treatment that is in excess of six hundred thousand dollars (\$600,000.00). *See* S.C. Code Ann. § 44-7-160(6); 3 S.C. Code Ann. Regs. 61-15 § 102(1)(f).

Threshold questions with these two grounds for CON review are: (1) does the Project involve an expenditure “by or on behalf of a health care facility?” And (2) does the Project involve an “acquisition of medical equipment?” The Court correctly determined, as a matter of law, that the

¹ The Department declines to address Part VI of Belfair’s Motion regarding CONs, NADs, and written exemptions being location specific, as it is unnecessary for the Court’s disposition of this matter. (Motion, pp. 11-14). The relevant question for the Court is whether BMH’s Project requires a CON or other approval from the Department. The Court correctly concluded the Project “is not subject to CON review under the Act” and “[t]he Department has properly determined that the Act does not apply to the [Project].” (Order, p. 10).

Project does not involve health care facilities and does not involve an acquisition. While there may be disputes about the Project's total expenditures, such issues are not material or relevant and the Court properly dismissed Belfair's contested case hearing.

A. The Project does not involve “healthcare facilities.”

The Court correctly found that “neither the current nor the proposed location is a ‘health care facility’ as defined in S.C. Code Ann. § 44-7-130(10) and S.C. Code Regs. 61-15 § 103(12).” (Order, p. 6). Instead, the Project involves equipment at physician's offices. (*Id.*, p. 10). Belfair claims this finding is in error. In support of its argument, Belfair points to a non-binding Attorney General's Opinion that does not concern the Certificate of Need program. (Motion, p. 8). Belfair's argument is erroneous.

BMH's Okatie and Port Royal facilities are physician's offices, not “health care facilities.”

“Health care facility” is defined as:

acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, intermediate care facilities for persons with intellectual disability, narcotic treatment programs, and any other facility for which [CON] review is required by federal law.

S.C. Code Ann. § 44-7-130(10); 3 S.C. Code Ann. Regs. 61-15 § 103(12). While BMH operates a licensed hospital, which is undeniably a “health care facility,” the hospital is not making an expenditure. The Project involves a physician's office, which is separate and distinct from the hospital. The physician's office will not offer medical and surgical services to its patients on an overnight basis. *See* S.C. Code Ann. § 44-7-130(12); 3 S.C. Code Ann. Regs. 61-15 § 103(14) (defining “hospital” as “a facility organized and administered to provide overnight medical or surgical care or nursing care of illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care is administered by or under the direction of persons

currently licensed to practice medicine, surgery, or osteopathy.”). The physician’s office clearly is not part of BMH’s hospital.

The fact that BMH owns and operates a hospital in addition to the physician’s office makes no difference. The Supreme Court, in the context of a hospital-owned urgent care center, stated the following:

The General Assembly did not choose to include an “urgent care center” in its statutory definition of a “health care facility.” The only possible item the center could fall under is a “hospital,” but the center clearly does not meet the CON Act’s definition of a hospital because it does not offer medical and surgical services to its patients on an overnight basis. Thus, to *sua sponte* include an “urgent care center” within the statutory definition of a “health care facility” would be beyond the function of this Court. Moreover, we are concerned that [the Petitioner’s] suggestion that we should treat physicians’ offices owned by hospitals differently from those that are not would constitute an improper judicial restriction on a legislative provision, and it would effectively eviscerate the private business model, a result that we do not believe was ever intended by the General Assembly. The statutory and regulatory provisions regarding the exemption for a private physician’s office contain the only restrictions set forth by the General Assembly and DHEC, respectively, and [the Petitioner] cannot independently engraft additional limitations that were not so specified by those authorities.

Amisub of S.C., Inc. v. S.C. Dep’t of Health & Env’tl. Control, 403 S.C. 576, 597, 743 S.E.2d 786, 797 (2013). Similar to the hospital-owned urgent care center in *Amisub*, the hospital-owned physician’s office here is not a “health care facility,” as defined by the CON Act and Regulation. Therefore, because the Project does not involve “[a]n expenditure by or on behalf of a health care facility,” no further inquiry is necessary for the total cost of the Project.

B. The transaction is not an “acquisition.”

After citing the dictionary definition of “acquisition,” the Court correctly found, “[s]ince BMH previously obtained the MRI scanner in question as replacement equipment pursuant to NA-19-03, no acquisition is involved in the current matter.” (Order, p. 6). Belfair asks the Court to alter the Order to find the relocation was an acquisition. (Motion, p. 10). Belfair claims, “the

‘relocation’ is on behalf of the new Okatie facility, not the Port Royal facility” and, thus, “the Okatie facility was acquiring the [MRI]” (*Id.*, p. 11). Belfair’s argument is without support.

Belfair ignores the plain, ordinary meaning of “acquire.” As the Court notes, an “acquisition” is “the gaining of possession or control over something.” *Black’s Law Dictionary* (11th ed. 2019). BMH already acquired the MRI as a replacement equipment pursuant to NA-19-03. Accordingly, there is no acquisition. Belfair’s distinguishing between the Port Royal and Okatie facilities is unavailing. BMH owns and operates both facilities. The MRI is being relocated and, at all times, is owned by BMH. Since this matter does not involve “the acquisition of medical equipment,” no further inquiry is needed regarding the Project’s total cost.

CONCLUSION

Belfair’s Motion does not warrant amending of the Court’s Order. There is no intervening change in controlling law. Because the Project does not involve “health care facilities” or “an acquisition of medical equipment,” there is no need for new or additional evidence. Finally, there are no errors of law or manifest injustices. Belfair is simply relitigating old matters. Accordingly, the Department respectfully requests the Court deny Belfair’s Motion to Alter or Amend.

[Signature page follows]

Respectfully submitted,



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April 19, 2021

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
vs.	)	
	)	
South Carolina Department of Health and	)	CERTIFICATE OF SERVICE
Environmental Control and Beaufort	)	
Memorial Hospital,	)	
	)	
Respondents.	)	
	)	
	)	

I, Rita D. DeCarlis, a Paralegal for South Carolina Department of Health and Environmental Control, hereby certify that I have this 19th day of April 2021, served **South Carolina Department of Health and Environmental Control's Response to MRI at Belfair, LLC's Motion to Alter or Amend** upon all parties and counsel of record via U. S. Mail and Electronic Mail as follows:

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April 19, 2021
Columbia, South Carolina



Rita D. DeCarlis

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	
v.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	PETITIONER'S MOTION FOR LEAVE TO FILE A REPLY TO RESPONDENT BEAUFORT MEMORIAL HOSPITAL'S MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO ALTER OR AMEND
	)	
Respondents.	)	

Petitioner MRI at Belfair, LLC d/b/a 3T MRI at Belfair ("Belfair"), by and through its undersigned attorneys, out of an abundance of caution files this Motion for Leave to File a Reply to Respondent Beaufort Memorial Hospital's ("BMH") Memorandum in Opposition to Petitioner's Motion to Alter or Amend,¹ and in support thereof, states as follows:

1. On March 30, 2021, the Order Granting Beaufort Memorial Hospital's Motion to Dismiss was entered by this Court.
2. Pursuant to Rule 59(e), SCRCPP, Belfair filed its Motion to Alter or Amend the Order Granting Judgment in Favor of Respondents on April 9, 2021.
3. On April 19, 2021, BMH filed its Memorandum in Opposition to Petitioner's Motion to Alter or Amend ("Opposition").
4. BMH's Opposition presents a mischaracterization of the consent to a stay of discovery. Specifically, BMH's Opposition advances the contention that Belfair's consent to a

¹ The Rules of Procedure for the Administrative Law Court generally permit the filing of a reply brief. S.C.A.L.C. Rule 19. However, because the Rules are not entirely clear as to a reply brief in the context of a motion to alter or amend, Belfair submits this motion for leave to file a reply out of an abundance of caution.

FILED**APR 21 2021****SC ADMIN. LAW COURT**

stay of discovery was somehow evidence that Belfair did not require discovery to provide evidence sufficient to create a genuine issue of material fact.

5. Petitioner's Reply Brief is necessary to address this gross mischaracterization of Belfair's consent to a stay of discovery, which specifically reserved Belfair's rights as to Belfair's position and arguments.

6. This Reply Brief will provide the clarification necessary to permit the Court to make a fully informed decision relative to these important issues.

7. In light of the above, Belfair respectfully requests the opportunity to address these matters in the form of a Reply Brief. Belfair's proposed Reply Brief is attached hereto as **Exhibit A**.

WHEREFORE, for the reasons set forth above, Belfair respectfully requests that this Court grant its Motion for Leave to File a Reply to Respondent BMH's Memorandum in Opposition to Petitioner's Motion to Alter or Amend.

Dated: April 21, 2021

GORDON & REES LLP

By s/Henry W. Frampton, IV
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 Telephone: 843.278.5900
 Attorneys for Petitioner MRI at Belfair,
 LLC, d/b/a 3T MRI at Belfair

FILED

APR 21 2021

EXHIBIT A

FILED
APR 21 2021
SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	PETITIONER'S REPLY TO
v.	)	RESPONDENT BEAUFORT MEMORIAL
	)	HOSPITAL'S MEMORANDUM IN
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	OPPOSITION TO PETITIONER'S
	)	MOTION TO ALTER OR AMEND
	)	
Respondents.	)	

Petitioner MRI at Belfair, LLC d/b/a 3T MRI at Belfair ("Belfair"), by and through the undersigned counsel, respectfully submits this Reply to Beaufort Memorial Hospital's ("BMH") Memorandum in Opposition to Petitioner's Motion to Alter or Amend, in order to correct a specific duplicitous contention pursued by BMH.

In the Opposition, BMH purports to advance an argument that discovery is unnecessary by stating that "Belfair felt comfortable enough with the facts it presented . . . that it consented to a stay of discovery." (BMH's Memo. in Opp'n at 4.) This statement is not only factually wrong, it is a gross mischaracterization of the nature of the consent. Instead, the consent to a stay of discovery was based on the fundamental nature of the motion as a motion to dismiss under Rule 12, SCRCF, not a motion for summary judgment. Under the Rule 12 standard, "the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). Thus, Belfair's consent to a stay of discovery was based on the understanding that the court would limit its ruling to the allegations in the complaint.

Moreover, counsel for Belfair merely consented to a stay of discovery as a professional

courtesy, specifically preserving all rights with regard to Belfair's position. BMH's attempt to use that courtesy as a weapon against Belfair is disingenuous and entirely inappropriate. It is also notable that at the time BMH requested the stay, Belfair had already granted one generous extension for BMH to respond to Belfair's written discovery requests that were due December 23, 2020, until January 22, 2021. (See Email Exchange between Counsel, attached hereto as Exhibit A.) Instead of endeavoring to answer discovery, BMH filed the motion to dismiss on January 8, 2021, and waited until January 21 to request a consent to a stay from Belfair. (See Ex. A.) The consent to the stay was a generous agreement to streamline the issues, not an admission or acknowledgment that discovery was unnecessary. To the contrary, Belfair has repeatedly explained the specific need for discovery relating to project costs, the new Okatie facility, and the impermissible cost splitting. (See e.g. Belfair's Resp. to BMH's Mot. to Dismiss, at 2, 4 n.3, 14; Ex. D. to Belfair's Resp. to BMH's Mot. to Dismiss, at ¶¶ 9-10; Belfair's Pre-Hearing Statement at ¶¶ 5, 7-8).¹

The Court, therefore, erred in converting the motion to one for summary judgment and must alter or amend the Order to deny the motion to dismiss in its entirety.²

CONCLUSION

For the foregoing reasons, Belfair's Motion to Alter or Amend the Order should be granted and the Court should deny BMH's Motion to Dismiss in full.

¹ Belfair also repeatedly noted the need for additional discovery to prove elements of the claim at the hearing on the matter on Tuesday, March 16, 2021.

² Moreover, BMH mistakenly argues that Belfair has failed to state grounds upon which the Court could grant the Motion to Alter or Amend. In fact, it is well settled that a Rule 59(e) motion is necessary to address issues argued and not ruled upon by the trial court. See *Talley v. S.C. Higher Educ. Tuition Grants Committee*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986). Belfair outlined multiple issues previously raised that the Order failed to rule on that are properly addressed with rule 59(e) motion. As such, Belfair has submitted more than sufficient grounds to grant the Motion to Alter or Amend.

Dated: April 21, 2021

By s/Henry W. Frampton, IV
Henry W. Frampton, IV (75314)
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LLC, d b a 3T MRI at Belfair*

FILED

APR 21 2021

SC ADMIN. LAW COURT

EXHIBIT A

FILED

APR 21 2021

SC ADMIN. LAW COURT

From: Trudy Robertson <trudyrobertson@mvalaw.com>
Sent: Friday, January 22, 2021 8:54 AM
To: Hal Frampton
Cc: Victoria Kepes; Kailie Harris; Don Meyer; Vic Rawl
Subject: Re: MRI at Belfair v. SCDHEC and BMH - 20-ALJ-07-0235

Certainly, Hal. We recognize that you are reserving your client's positions. I will be back in touch with a draft amended scheduling order. Thank you.

Trudy H. Robertson
 Moore & Van Allen, PLLC
 843-579-7061 (dd)

On Jan 22, 2021, at 8:45 AM, Hal Frampton <hframpton@grsm.com> wrote:

EXTERNAL EMAIL - USE CAUTION

Trudy,

As long as it's clear that Petitioner does not concede anything with respect to the motion to dismiss, we're fine with holding discovery in abeyance until that motion is ruled upon. Please forward your proposed scheduling order for our review whenever it's ready.

Hal



YOUR 50 STATE PARTNER

HAL W. FRAMPTON, IV Partner

40 Calhoun Street, Suite 350, Charleston, SC 29401
 2111 South 67th Street, Suite 300, Omaha, NE 68106

D: 843-714-2503 C: 843-801-1252 hframpton@grsm.com

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From: Trudy Robertson <trudyrobertson@mvalaw.com>
Sent: Thursday, January 21, 2021 6:14 PM
To: Hal Frampton <hframpton@grsm.com>; Victoria Kepes <vkepes@grsm.com>; Kailie Harris <kdharris@grsm.com>
Cc: Don Meyer <donmeyer@mvalaw.com>; Vic Rawl <vrawl@grsm.com>
Subject: RE: MRI at Belfair v. SCDHEC and BMH - 20-ALJ-07-0235

Hal, good afternoon. I am following up on the status of our discovery responses. Since the below exchange, BMH has filed a motion to dismiss the matter and to stay discovery pending

the consideration of its motion. With respect to the stay on discovery, will you agree to hold discovery in abeyance pending a ruling on motion to dismiss by the Court? Please let me know. If so, I can prepare a proposed amended Scheduling Order that accounts for a discovery period should the Court deny the motion to dismiss and send it to you for your review/comment. Thank you.

Trudy

From: Hal Frampton <hframpton@grsm.com>
Sent: Tuesday, December 15, 2020 11:53 AM
To: Trudy Robertson <trudyrobertson@mvalaw.com>; Victoria Kepes <vkepes@grsm.com>; Kailie Harris <kdharris@grsm.com>
Cc: Don Meyer <donmeyer@mvalaw.com>; Vic Rawl <vrawl@grsm.com>
Subject: RE: MRI at Belfair v. SCDHEC and BMH - 20-ALJ-07-0235

EXTERNAL EMAIL - USE CAUTION

Trudy,

That is no problem at all. We'll look for the responses on January 22

Hal



YOUR 50 STATE PARTNER

HAL W. FRAMPTON, IV Partner

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D: 843-714-2503 C: 843-801-1252 hframpton@grsm.com

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From: Trudy Robertson <trudyrobertson@mvalaw.com>
Sent: Tuesday, December 15, 2020 10:29 AM
To: Hal Frampton <hframpton@grsm.com>; Victoria Kepes <vkepes@grsm.com>; Kailie Harris <kdharris@grsm.com>
Cc: Don Meyer <donmeyer@mvalaw.com>
Subject: MRI at Belfair v. SCDHEC and BMH - 20-ALJ-07-0235

Hal and Victoria: Good morning. I am writing to request an extension to the written discovery served by MRI at Belfair on BMH in this matter. The responses are currently due on December 23, 2020. I ask for a 30 day extension through January 22, 2021. Thank you in advance for your professional courtesies.

Thank you,
 Trudy

Trudy H. Robertson
 Attorney at Law
 843.579.7061

• 843.579.8722
trudyrobertson@mvalaw.com

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Moore & Van Allen

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Moore & Van Allen

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Moore & Van Allen

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,

Petitioner,

 $\mathbf{v}_i$

South Carolina Department of Health and
Environmental Control and Beaufort Memorial
Hospital,

Respondents.

) Docket No.: 20-ALJ-07-0235-CC

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of *Petitioner MRI at Belfair, LLC's Motion for Leave to File a Reply to Respondent Beaufort Memorial Hospital's Memorandum in Opposition to Petitioner's Motion to Alter or Amend* was served via email and U.S. Mail upon the parties as properly addressed below on this 21st day of day of April, 2021:

The Honorable H.W. Funderburk, Jr.
Administrative Law Judge
South Carolina Administrative Law Court
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Columbia, SC 29201
perkins@scalc.net

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FILED

APR 21 2021

SC ADMIN. LAW COURT

Kailie D. Harris, Paralegal

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC,	)	DOCKET NO. 20-ALJ-07-0235-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	<u>BEAUFORT MEMORIAL</u>
	)	<u>HOSPITAL'S MEMORANDUM IN</u>
	)	<u>OPPOSITION TO PETITIONER'S</u>
	)	<u>MOTION FOR LEAVE TO FILE A</u>
Respondents.	)	<u>REPLY</u>
	)	
	)	
	)	

Respondent Beaufort Memorial Hospital ("BMH") hereby submits this Response Memorandum in Opposition to the Motion for Leave to File a Reply of Petitioner Belfair MRI at Belfair, LLC ("Belfair").

I. STANDARD OF REVIEW

The Rules of Procedure for the Administrative Law Court ("ALC Rules") do not contain a specific provision for "motions to alter or amend" but such motions are generally treated as "motions for reconsideration." In general, motions during the contested case are governed by ALC Rule 19 (which permits replies), while motions for reconsideration after a ruling are governed specifically by ALC Rule 29.D. Given the limited time available to this Court for a ruling on a motion for reconsideration, replies are not addressed in ALC Rule 29.D, which requires that the ALJ should rule on the motion within thirty (30) days of the opposing party's response. As stated more fully below, BMH does not believe a reply is allowed or that it is warranted here, as it is futile.

II. LEGAL ARGUMENT

A. Belfair misconstrues BMH's argument on Belfair's consent to a stay of discovery.

Belfair contends that the reason it needs to file a reply is to correct the "gross mischaracterization" of Belfair's consent to a stay of discovery pending a resolution of BMH's dispositive motive. *See* Belfair's Motion for Leave to File a Reply at p. 2, ¶5. Belfair misses the point entirely – in its response, BMH was not contending that Belfair consented to a stay of discovery for all purposes, or that Belfair consented without a reservation of Belfair's rights. To the contrary, BMH cited specifically to the language in the Consent Amended Scheduling Order that stated: "*With all parties fully reserving their respective positions with respect to the Motion to Dismiss*, the parties have agreed to a stay of discovery pending a ruling on the Motion to Dismiss...." (emphasis added). Instead, BMH argued that Belfair presented a detailed, comprehensive affidavit from its expert in opposition to BMH's dispositive motion, which set forth specific facts in opposition but: (1) Belfair's further discovery was intended to document the facts that were already available, rather than to find additional, new facts; and (2) the facts presented in the affidavit were not material facts, as they had no relevance to the ALC's consideration of the relocation of existing medical equipment, which as a matter of law did not require a CON, an NAD or an exemption. Belfair's consent to the stay is a non-issue in this context. *See, e.g., Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009) ("A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.")

B. Belfair's argument reinforces the basic flaw in its Motion to Alter or Amend.

Belfair's additional argument (made in the "draft" reply attached as Exhibit A to its Motion) is that this Court did not consider the arguments Belfair raised to the Court previously. *See* Belfair's Motion for Leave to File a Reply at Exhibit A, p. 2. As BMH has stated in its Response Memorandum, motions for reconsideration made under Rule 59(e) are limited in scope and are not to be used to rehash the same arguments and facts previously presented prior to the Court's ruling. *Dockins v. Benchmark Communications*, 180 F.R.D. 294, 295 (D.S.C. 1998), *aff'd*, 176 F.3d 745 (4th Cir. 1999). As such, Belfair's reliance on arguments already advanced unsuccessfully to this Court prior to the Court's ruling cannot serve as the basis for relief under ALC Rule 29.D, which incorporates Rule 59, SCRPC.

III. CONCLUSION

For the reasons stated above, BMH requests that this Court deny the Motion for Leave to File a Reply as not allowed or required by ALC Rule 29.D and as futile.



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Attorneys for Beaufort Memorial Hospital

April 22, 2021

Charleston, SC

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair,	)	Docket No.: 20-ALJ-07-0235-CC
	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital,	)	
	)	
Respondents.	)	
	)	

PROOF OF SERVICE AND CERTIFICATE OF THE DATE OF FILING BY MAIL

The undersigned does hereby certify that a copy of the foregoing *Beaufort Memorial Hospital's Memorandum in Opposition to Petitioner's Motion for Leave to File a Reply* was filed by mail and served, via electronic mail and by depositing copies in the Regular U.S. mail, with sufficient postage attached thereto, on April 22, 2021 and addressed to:

The Honorable H.W. Funderburk, Jr.
Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

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Attorneys for Beaufort Memorial Hospital

April 22, 2021

Charleston, SC

RECEIVED**Jun 11 2021****SC Court of Appeals**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Court Judge

Docket No. 20-ALJ-07-0235-CC

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair, Appellant,

v.

South Carolina Department of Health
and Environmental Control and
Beaufort Memorial Hospital,

Respondents.

NOTICE OF APPEAL

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair appeals the decision of the Honorable H.W. Funderburk, Jr., dated May 14, 2021. Appellant received a copy of this decision on May 14, 2021.

Dated: June 11, 2021

GORDON & REES LLP

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RECEIVED**Jun 11 2021****SC Court of Appeals**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Court Judge

Docket No. 20-ALJ-07-0235-CC

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair, Appellant,

v.

South Carolina Department of Health
and Environmental Control and
Beaufort Memorial Hospital, Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the South Carolina Administrative Law Court and Respondents South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital, via E-mail and U.S. Mail, upon their respective attorneys of record as properly addressed below this 11th day of June, 2021:

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Meredith W. Sella, Esq.
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Attorneys for Beaufort Memorial Hospital

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Dated: June 11, 2021

GORDON & REES LLP

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June 11, 2021

VIA E-MAIL

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED

Jun 11 2021

SC Court of Appeals

Re: *MRI at Belfair, LLC, d/b/a 3T MRI at Belfair v. South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital*
Docket No.: 20-ALJ-07-0235-CC

Dear Ms. Kitchings:

Please find enclosed the following documents for filing regarding the above-referenced matter:

- Notice of Appeal
- Order Granting in Part and Denying in Part Petitioner's Motion to Alter or Amend and Granting Respondent's Motion to Dismiss, filed in the South Carolina Administrative Law Court
- Proof of Service

A check for the requisite filing fee will follow via U.S. Mail today. Please do not hesitate to contact me should you have any questions or concerns.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP

Kailie D. Harris

/kdh
Enclosures

June 11, 2021

Page 2

cc (via E-mail): Trudy H. Robertson, Esq.
Donald Bancroft Meyer, Esq.
Ashley C. Biggers, Esq.
Vito M. Wicevic, Esq.
Meredith W. Sella, Esq.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
Docket No. 20-ALJ-07-0235-CC

MRI at Belfair, LLC, d/b/a 3T MRI	)	
at Belfair,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
South Carolina Department of Health	)	
and Environmental Control and	)	
Beaufort Memorial Hospital,	)	
	)	
Respondents.	)	
-----	)	

MOTION HEARING

Tuesday, March 16, 2021
10:03 a.m. - 10:52 a.m.

The hearing before the Honorable H.W. Funderburk, Jr., was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Columbia, South Carolina, on the 16th day of March, 2021 before Nadine A. Garrett, Court Reporter and Notary Public in and for the State of South Carolina.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

APPEARANCES

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Attorney for the Respondent DHEC

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EXHIBITS

(No exhibits were marked during this hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.



MRI AT BELFAIR V. SC DHEC

4

CALL TO ORDER:

THE COURT: We're on the record this morning for Case Number 20-ALJ-7-0235. It's a contested case. Petitioner is the MRI at Belfair, LLC, represented by Mr. Frampton; is that correct?

MR. FRAMPTON: Yes, Your Honor.

THE COURT: All right. And we have the Department - South Carolina Department of Health and Environmental Control, Ms. Biggers.

MS. BIGGERS: Yes, Your Honor.

THE COURT: Okay. And the Beaufort Memorial Hospital, represented by Ms. Robertson.

MS. ROBERTSON: Yes, Your Honor.

THE COURT: All right. We're here this morning on a Motion to Dismiss. And my understanding is that there are several issues involved in that motion. And I'm not -- I'll let y'all bring them out. Anything preliminary before we start?

MR. FRAMPTON: No, sir.

MS. ROBERTSON: No, Your Honor.

THE COURT: We'll begin with the Respondent mover -- as the moving party. They'll present their argument. DHEC has filed a motion in support of that -- I'm sorry, a memorandum in support

MRI AT BELFAIR V. SC DHEC

5

1 of that motion. Ms. Biggers, you -- are you
2 going to speak as well?

3 **MS. BIGGERS:** I don't have any particular argument
4 to add to our written memorandum, but I'm
5 available to answer any questions, if Your
6 Honor has any.

7 **THE COURT:** Okay. There may very well be some that
8 would be particular to you. In that case, Mr.
9 Frampton, you will not be double-teamed this
10 morning.

11 **MR. FRAMPTON:** Always good, Your Honor.

12 **THE COURT:** All right. All right. Ms. Robertson.

13 **MS. ROBERTSON:** Thank you, Your Honor.

14 **THE COURT:** If you will.

15 **POSITION OF THE RESPONDENT:**

16 **MS. ROBERTSON:** Yes. Thank you. And good morning.

17 **THE COURT:** Good morning.

18 **MS. ROBERTSON:** As Your Honor has indicated, we are
19 before you this morning on the Respondent,
20 Beaufort Memorial Hospital's, motion to dismiss
21 this contested case that has been filed by the
22 Petitioner, MRI at Belfair. The stay portion
23 of our motion, Your Honor, you probably know
24 has been resolved. You entered an amended
25 consent scheduling order that addressed the

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1 issues where we had also asked for a stay. And
2 we are now basically stayed discovery pending
3 your ruling on this motion.

4 **THE COURT:** Right. That is -- I think that's a
5 useful thing to do. We may or may not resolve
6 the matter as a result of this, but just in
7 case.

8 **MS. ROBERTSON:** Certainly and we appreciate that.
9 And that was by consent of the parties as well,
10 so thank you. Your Honor, just a brief
11 overview before we get into the arguments here.
12 This matter involves the relocation of a piece
13 of approved equipment, and that is an MRI.
14 It's important to keep in mind, I think, as we
15 go through today's discussion that we're not
16 talking about the acquisition of new equipment.
17 We are only talking about and this matter is
18 related to the relocation of equipment. And
19 that's equipment that has been approved, that's
20 existing, and is already operational. There's
21 no change at all to the number of MRIs, that
22 piece of equipment in Beaufort County. We're
23 not looking to add any. We're not taking any
24 away. And as Your Honor, I'm sure, knows from
25 experience in CON cases, a person or a

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1 healthcare facility, is required to obtain a
2 Certificate of Need, a CON as it is commonly
3 called, from the Department before undertaking
4 certain projects. Some projects require
5 Certificate of Need, a CON. Some projects are
6 exempt from CON review. Some projects require
7 what we call a written determination of non-
8 applicability, or an NAD. There are different
9 paths, depending on the type of project. A
10 relocation of existing equipment, however,
11 falls under none of these paths. As a matter
12 of law, the relocation of an existing and
13 approved piece of equipment -- here it's an MRI
14 -- it does not require a CON. It does not
15 require an exemption. And it does not require
16 the determination of a non-applicability. And
17 it's for these reasons, Your Honor, that we're
18 asking you to dismiss this appeal as a matter
19 of law. Now, I want to step back just a little
20 bit and briefly -- on the procedure. There's
21 a few dates to touch upon as we start our
22 discussion. Those dates are outline in our
23 memo. And I'm only going to touch upon a few of
24 those. It was back in May of 2020, Your Honor,
25 that the Beaufort Memorial Hospital, which is

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1 a non-profit community hospital in Beaufort,
2 submitted a request to have confirmed by the
3 Department that the CON Act did not apply to
4 its relocation of an MRI that it owned. It
5 sought to move that MRI from one location in
6 Beaufort County to another location in Beaufort
7 County for a total project cost of \$125,000.
8 It was about a 17-mile move, is what they're
9 seeking, from one physician office building to
10 another physician office building. The
11 Department responded, answered Beaufort's
12 request. They confirmed that the CON Act did
13 not apply. They did this on July the 1st,
14 2020. They agreed that the relocation of the
15 MRI from that one location in Beaufort County
16 to another location in Beaufort County, the CON
17 Act did not apply to that relocation. It was
18 not until after the Department confirmed this
19 for Beaufort that MRI at Belfair, which I'll
20 shorten to Belfair, if that's okay, that they
21 even sought or submitted anything to the
22 Department where they claim to be an affected
23 party on July the 6th. On the 7th of July,
24 they then sought to get final review from the
25 DHEC Board. And then on the 14th of July, they

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1 submitted that request. Ultimately, the Board
2 declined to review the matter. Then they filed
3 this contested case. And one important piece
4 of background information, Your Honor, is back
5 in 2019. DHEC had previously issued a non-
6 applicability determination, the NAD, to
7 Beaufort to replace an existing MRI that it
8 already owned. The CON Act and its regulations
9 allowed equipment to be replaced with what is
10 defined as like equipment with similar
11 capabilities. You can get a written
12 determination of non-applicability to do that.
13 Equipment becomes dated. Equipment gets old.
14 There are reason is you replace that equipment.
15 And if it's like equipment with similar
16 capabilities, you can go to the Department, get
17 a written determination of non-applicability,
18 and move forward. So, back in 2019, prior to
19 the relocation we're here about today, Beaufort
20 replaced an MRI with similar capabilities, it
21 sought the non-applicability determination from
22 the Department to do that, and the Department
23 approved that. And that's what we've referred
24 to in our memo as the 2019 NAD. That was back
25 in April of 2019. Belfair did not oppose that.

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1 They did not appeal any portion of that
2 decision. They said nothing. Beaufort
3 implemented that 2019 non-applicability
4 determination. Once you receive that, you have
5 a certain period of time in which you must
6 implement and move forward. They did that.
7 That decision, Your Honor, is not before The
8 Court today. But it is -- and I mention it,
9 because it's nevertheless, I think, at the very
10 heart of Belfair's argument here today. They
11 are really, I think, belatedly attempting to
12 attack that decision of the Department, that
13 2019 decision that that equipment should not
14 have been replaced. If they intended, Your
15 Honor, to challenge that replacement, the
16 timely time to do that and to challenge it was
17 at the time that the 2019 decision was
18 rendered, at that 2019 process. They did not
19 do that. So, we come back to the issue before
20 Your Honor, which is now the relocation of that
21 already-approved MRI within the same county.
22 It's both Beaufort Memorial Hospital's position
23 and it's the Department's decision -- position
24 that existing approved MRI equipment that's
25 already in operation, already located in

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1 Beaufort County can simply be relocated without
2 review by the Department and without the right
3 to a contested case hearing. Again, Your
4 Honor, there's -- relocations require no CON,
5 no written exemption, and no non-applicability
6 determination. And if we can, just for a
7 moment, Your Honor, I would like on the ELMO,
8 if I could, put up just for ease of reference.
9 This is the regulatory provision, Your Honor,
10 that tracks the statute that says when a person
11 or healthcare facility is required to obtain a
12 Certificate of Need. These are the instances
13 when you must get a Certificate of Need. If we
14 look at these just briefly, we can see they do
15 no apply here. There's no construction or
16 establishment of a new healthcare facility. No
17 A. Look at B. There's no change in an
18 existing bed compliment. If we look at C,
19 there's no expenditure in excess of two million
20 dollars. Look at D. There's no capital
21 expenditure by a healthcare facility that's
22 associated with the addition or substantial
23 expansion of any healthcare service for which
24 specific standards of criteria are prescribed
25 in the South Carolina Health Plan. And, Your

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1 Honor, just for reference, an MRI has no
2 standards in the State Health Plan. So, that
3 doesn't apply in any respect. E does not
4 apply. There's not -- we're not seeking to do
5 something that hasn't been done in the
6 preceding 12 months and for which there are
7 standards. Again, there are none in the State
8 Health Plan for an MRI. And then F, the
9 acquisition of medical equipment which is to be
10 used if it exceeds 600,000. That's the
11 equipment threshold, and we're not acquiring
12 any medical equipment here, Your Honor. So,
13 this Certificate of Need provision does not
14 apply. Now, there are also regulations and
15 statutory provisions that talk about the
16 exemptions, that talk about the non-
17 applicability determinations. And I'm going to
18 describe this a little bit more later, Your
19 Honor, but Belfair actually concedes in its
20 memorandum in opposition that there is no
21 exemption, and there's no non-applicability
22 status for a relocation of equipment. They
23 agree with that. So, I'm not going to put up
24 those provisions for us to walk through because
25 they don't apply. And they're outline in our

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1 brief at pages four to five for reference. But
2 here, we don't have acquisition of equipment.
3 We're not even replacing any equipment at this
4 point. We're only relocating within the same
5 county. So, what, Your Honor, is really going
6 on here? It's what -- I think I mentioned
7 earlier is what's going on, is Belfair
8 belatedly and improperly challenging the prior
9 2019 non-applicability determination through
10 this contested case attempt. This should not
11 and it cannot be allowed. There's no basis to
12 challenge relocation of existing equipment.
13 Again, and I know I keep repeating, but it's no
14 CON, no exemption, no non-applicability needed
15 for that. And, Your Honor, I think if we look
16 at Belfair's writings in this matter, their
17 tactics, what they're really trying to do, is
18 revealed. It's very telling. They wrote two
19 letters to the DHEC Board when they were
20 requesting final review. Just briefly
21 reference those. And they're in our memo, but
22 I'll briefly reference them here. In the July
23 7th letter, they state that this speaks of
24 eluding CON review for the replacement of the
25 MRI. There's no eluding. There was a clear

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1 statutory and regulatory authority for
2 replacement of like equipment. BMH, Beaufort,
3 met that in 2019. Belfair didn't oppose or
4 appeal. That's done. They go on in their July
5 14th letter to the Board, they state that their
6 basic position is that placing an MRI in a
7 brand new location should be treated as a new
8 project requiring a CON. Again, we are not
9 placing any new piece of equipment. We're not
10 acquiring equipment in order to meet any of
11 those provision under the CON statute and
12 regulation. Belfair is in essence and quite
13 clearly attacking the 2019 non-applicability,
14 which they did not oppose and did not appeal.
15 Now, if we look at their opposition memo, Your
16 Honor, it's a lot of smoke and mirrors, I
17 think. They try to assert what appears on the
18 surface to be very fact-intensive arguments,
19 but what they're really doing again is
20 confusing the acquisition of equipment with the
21 relocation of existing equipment. Again, no
22 acquisition. Their memo and what I referenced
23 earlier where they conceded there's no
24 exemption and no NAD is on page six of their
25 memo. They state, the statutes and regulations

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1 do not contain any exemption or non-
2 applicability status for the relocation of
3 medical equipment or services. Instead, their
4 argument is almost entirely on that this
5 project is subject to CON review. Somehow
6 under this statute, because the project cost
7 exceeds 600,000, that's the path by which they
8 go. And if we look at F under the CON statute
9 and -- I mean, this is the regulation tracking
10 the statute, we know you've got to have the
11 acquisition of medical equipment for that
12 threshold to be applicable. We don't have that
13 here. And their argument really falls apart if
14 we look at the guiding regulation for the
15 written determination of a non-applicability
16 and what applies here and what doesn't. And
17 I'll just, Your Honor, for ease, put up this
18 language on the ELMO. This is the Regulation
19 105.1. Here's where we can really see the
20 difference between an acquisition of equipment,
21 which has the \$600,000 threshold for CON
22 review, and the replacement of existing
23 equipment, which has no threshold. This
24 provision, Your Honor, the first portion under
25 part A, it talks about in 1, Certificate of

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1 Need review is not applicable to the following,
2 but a written determination of non-
3 applicability from the Department is required
4 prior to undertaking the project. And this
5 goes back to the request for replacement of
6 like equipment with similar capabilities under
7 A back in 2019. There's no monetary threshold
8 for that. Under B, here we again talk about
9 acquisition of equipment. If it's less than
10 the 600,000, you just get the written non-
11 applicability determination. If it's greater
12 than 600,000, it goes back to the CON
13 requirement. These two provisions are
14 separate. They're exclusive. The replacement
15 of like equipment is not linked at all to a
16 threshold, monetary threshold. In fact, when
17 you replace equipment, the amount of that
18 equipment can be substantially higher than
19 \$600,000. In fact, back in the 2019 non-
20 applicability determination that was acquired
21 by Beaufort, it was. The amount of that
22 replacement equipment was a million, 229 and
23 some odd change. DHEC approved that as a
24 replacement piece of equipment with similar
25 capabilities because it was. Belfair did not

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1 challenge, as I've already said now several
2 times I know. But undoubtedly, Your Honor, it
3 did not challenge it because the replace
4 equipment is not subject to a monetary
5 threshold. They couldn't. If they wanted to
6 challenge whether it was a true replacement
7 equipment and met the definition, again, they
8 had to do that back in 2019. They now proffer
9 an affidavit of an expert, Ms. Kathy Platt.
10 She states things like she believes that the
11 project somehow exceeds \$600,000 equipment
12 threshold, as well as the two million dollar
13 capital expenditures threshold. Again, those
14 are the thresholds we looked for CON review.
15 Those don't apply here. And she's simply
16 wrong, Your Honor. As a healthcare consultant,
17 she's simply wrong here to try to apply those
18 thresholds to existing approved equipment.
19 There are other evidentiary issues with her
20 affidavit that we point out in our memo; belief
21 and stating things on information and belief,
22 that's not personal knowledge. Also, her
23 affidavit is obviously very conclusory and
24 unsupported. But the real flaw in it is it's
25 -- she's talking about acquisition of medical

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1 equipment and that's not in play here. So,
2 that is Your Honor, what -- is the faulty
3 premise for Belfair's argument. It assumes
4 that, even though the original replacement of
5 the MRI did not require CON review, then DHEC
6 must now somehow apply the disregarded
7 thresholds that didn't apply back then, now
8 they're going to come back and apply it to the
9 same MRI equipment and require a review for
10 relocation of the same piece of equipment.
11 There's no logic or support for this position.
12 It wasn't required to replace it and it
13 certainly can't be required to relocate it.
14 Again, the statutes, the regulations they cite,
15 they all go to projects that undergo CON review
16 in the first instance when you acquire
17 equipment. They simply don't apply it to the
18 relocation of existing, approved, operational
19 equipment that is just trying to moved within
20 a county where it already exists, about 17
21 miles, Your Honor. And I'll just close with a
22 few items and save any remarks for rebuttal
23 potentially, Your Honor. And I will recite
24 this in our memo. And I -- and our motion is
25 based on the premise that, as a matter of law,

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1 you simply don't have a CON, you don't have an
2 exemption, you don't have a non-applicability
3 determination, so this matter, as a matter of
4 law, needs to be dismissed. In addition to
5 that, Your Honor, there's some guidance in a
6 case that talks about where there's no legal
7 duty owed by the Department to issue a staff
8 decision, which is the trigger that gives rise
9 to a contested case. There can be no
10 corresponding obligation to afford a contested
11 case. So, that too -- and that's the *Amisub*
12 case that's cited in our brief, Your Honor. We
13 think that applies here. There's no legal duty
14 by the Department to even answer our question
15 seeking to confirm we needed nothing, Beaufort
16 needed nothing, because it doesn't require
17 anything. Because there's no legal duty to do
18 that, there's certainly no corresponding right
19 to come here now and have a contested case.
20 Belfair also argues that Rule 12, Motion to
21 Dismiss, is somehow not able to be asserted
22 before this Court. That position, Your Honor,
23 ignores the rules, Administrative Law Court
24 rules, Civil Procedure rules, is completely
25 unsupported. Administrative Law Court has

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1 consistently addressed dispositive motions,
2 both motions to dismiss, as we've brought,
3 motions for summary judgement as well. And the
4 motion is clearly timely. It was preserved, if
5 it needed to be, in the pre-hearing statements
6 by both Respondents, the dispositive motion to
7 be considered. And so, they have been, Your
8 Honor. And we would ask that you dismiss this
9 matter as a matter of law. Thank you, Your
10 Honor.

11 **THE COURT:** Before you step down.

12 **MS. ROBERTSON:** Yes, sir.

13 **THE COURT:** You've referred to this. And it may be
14 that you referred to both the Port Royal
15 facility and the Okatie facility as physicians'
16 office buildings.

17 **MS. ROBERTSON:** They are. They're medical office
18 buildings with physicians in them, a number of
19 other services, but they're what we call
20 medical office buildings.

21 **THE COURT:** Then, it's not what you -- what's
22 defined as a healthcare facility?

23 **MS. ROBERTSON:** Well, Beaufort Memorial Hospital is
24 clearly a healthcare facility.

25 **THE COURT:** Right.

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1 **MS. ROBERTSON:** As the person seeking to relocate.
2 But a medical office building doesn't require
3 anything under the rules for it to be
4 constructed. But this piece of equipment is
5 sitting in the Port Royal physician office --
6 I call it a medical office building -- there,
7 and it's going to moved to the Okatie, which is
8 another medical office building with physician
9 offices throughout, various types of providers
10 in these spaces.

11 **THE COURT:** Nobody staying overnight?

12 **MS. ROBERTSON:** No, sir. It is not an inpatient
13 facilities.

14 **THE COURT:** Okay.

15 **MS. ROBERTSON:** That is correct.

16 **THE COURT:** And the MRI is a diagnostic tool?

17 **MS. ROBERTSON:** It is. I mean, I ---

18 **THE COURT:** It's not a treatment tool.

19 **MS. ROBERTSON:** I'm a layperson, but I would call it
20 a diagnostic tool. It's the -- yes. The
21 imaging diagnostic tool for which physicians
22 use to then proceed with care.

23 **THE COURT:** Okay. All right. Okay. I may have
24 some other questions. I may address those to
25 Ms. Biggers.

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1 MS. ROBERTSON: Certainly. Certainly. Thank you.

2 THE COURT: I want to give her some reason to be
3 here.

4 MS. ROBERTSON: Sure. Thank you.

5 THE COURT: All right. Mr. Frampton.

6 POSITION OF THE PETITIONER:

7 MR. FRAMPTON: Thank you, Your Honor. Your Honor,
8 I'm Hal Frampton, representing the Petitioner,
9 MRI at Belfair. I think it is useful if we
10 break down the motion that's been filed into
11 its two components, the 12(b)(1) component and
12 the 12(b)(6) component, because I believe that
13 it was filed both as a jurisdictional motion
14 and as a motion as to the merits of the case.
15 So, I think we always start with jurisdiction,
16 because if there's not jurisdiction, then we
17 can't all be here. So, we'll start there and
18 that's where *Amisub* case comes in that Ms.
19 Robertson cited. And so, let's just start at
20 the very basics, which what does it take for
21 this Court to have jurisdiction? And the
22 Administrative Procedures Act tells us that
23 this Court has jurisdiction over contested
24 cases. And a contested case under the -- the
25 statutes applicable to a CON, a contested case

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1 arises out of the Department of Health and
2 Environmental Control issuing a written
3 determination on a CON matter. And that
4 includes, specifically under the statute, the
5 Department issuing a written, formal
6 determination that the CON Act does not apply
7 to a particular project. And once that formal
8 written determination is issued by the staff,
9 then it triggers the rest of the statute, that
10 an affected person can request final review.
11 If the DHEC Board declines to issue a final
12 review conference or to hold a final review
13 conference, then we got 30 days to file a
14 contested case. And my point in going back to
15 those basics is that every single one of those
16 steps happened here. Beaufort Memorial
17 specifically requested in writing that the
18 Department issue a written determination that
19 the CON Act did not apply to this particular
20 project -- what they're calling the project,
21 the relocation of this MRI. They submitted
22 that like any other request for what we call an
23 NAD, a Non-Applicability Determination. The
24 Department issued an NAD, a formal written
25 determination on July 1st of last year. It

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1 looks like every other NAD that's ever come out
2 of the Department. That they made a formal
3 determination that the CON Act did not apply to
4 this project. We requested final review
5 timely. We filed for a contested case timely.
6 That is what is required for this Court to have
7 jurisdiction. And it is all accomplished here.
8 It's a little bit odd to us that Beaufort
9 Memorial is now taking the position that we
10 didn't really want an NAD or we didn't really
11 want -- we didn't -- we didn't somehow request
12 an NAD. Well, they did. It's all of record.
13 It's all in front of the Court. Every single
14 one of those steps happened. And there was
15 good reason for it. They say that they --
16 there wasn't any real requirement that DHEC
17 issue one. But section 102 of the CON
18 regulations, 102.3, says, when any question
19 exists, a potential applicant shall forward a
20 letter requesting a formal determination by the
21 Department as to the applicability of the
22 Certificate of Need requirements to a
23 particular project. And then, once that is
24 done, DHEC has an obligation to respond.
25 They've got 60 days under the Regulation to

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1 respond and tell you in a formal fashion
2 whether the CON Act applies or not. So, I'm
3 just sort of baffled by the notion that
4 Beaufort Memorial is taking the position now
5 that we didn't really want a Non-Applicability
6 Determination. They went directly under the
7 reg, they asked for one, and they got it. So,
8 jurisdictionally, we're done. And this is
9 totally, totally different from the Amisub
10 case. In the Amisub case that's been cited to
11 the Court, DHEC didn't issue a formal written
12 determination. And in fact, the Petitioner
13 there tried to file a contested case based on
14 a telephone call with DHEC staff and said,
15 well, in the telephone call they told us that
16 they weren't going to do X, Y, or Z, and we're
17 going to treat that as the staff decision. And
18 then, the lawyer like wrote up an affidavit --
19 private lawyer, not DHEC lawyer, wrote up an
20 affidavit and said, we're going to let this
21 affidavit serve as the written decision that
22 triggers a contested case. And of course, not
23 terribly surprisingly, the Supreme Court said
24 that doesn't work. You've got to actually have
25 a written determination from the DHEC staff.

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1 But we have that here. And in terms of the
2 idea that -- I'm not sure that it matters
3 whether the staff was formerly required to
4 issue it or not because they did issue it, but
5 they were because under -- the regulation I've
6 cited, 102.3, when someone thinks there's a
7 questions as to the applicability of the CON
8 Act and they submit that formerly to the
9 Department, the Department has a regulatory
10 obligation to respond and to issue a written
11 determination, which is exactly what happened
12 here. So, again, jurisdictionally, I think
13 it's crystal clear that we're here properly
14 under the Administrative Procedures Act on a
15 contested case hearing. And finally on -- the
16 last point I would say on that is that, if
17 Beaufort Memorial's position is that 102.3
18 doesn't apply, if their position is that there
19 was no question as to whether the CON Act
20 applied, then I would wonder why in the world
21 did they ask it. Why'd they ask that question
22 formerly in a letter of DHEC and ask DHEC to
23 respond? It simply doesn't make sense.
24 Obviously, there was a question. And, look,
25 healthcare facilities have very good reason for

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1 engaging in this process. When they formerly
2 asked the question and they get a formal
3 response, they've got regulatory protection.
4 DHEC can't go after them for doing something
5 wrong when DHEC has already approved the
6 action. So, it makes perfect sense what they
7 did. They just can't have their cake and eat
8 it too. They can't ask for an NAD, get an NAD
9 and then, say, oh, but by the way, we didn't
10 really want it, so you can't file a contested
11 case based on that NAD. That doesn't work.
12 This Court has jurisdiction. We're here
13 properly. With respect to the 12(b)(6)
14 arguments -- and that's where our issue came
15 with respect to a Motion to Dismiss. We
16 understand that The Court has authority to
17 consider its on jurisdiction. Every court has
18 that. Our point was simply that a standard
19 Rule 12(b)(6) standard doesn't make a great
20 deal of sense in this context because that's a
21 standard that's designed for someone filing a
22 complaint under Rule 8 of the Rules of Civil
23 Procedure. And that doesn't happen here, so I
24 don't think that standard fits very well with
25 what this Court does. But if the Court wants

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1 to consider something like a 12(b)(6), then the
2 standard is simply, have we made allegations
3 that, taken in the light most favorable to us,
4 and assuming the benefit of discovery, will
5 lead us to a place that we'll be able to prove
6 that this NAD wasn't properly issued. And I
7 think it's very clear that we've done. And,
8 frankly, we've done more than someone would
9 have to do at this stage on that front. At
10 heart, we have several theories as to why this
11 NAD was improper and we think that discovery
12 will bear those out. First and foremost, our
13 -- if you had to sort of crystalize this case
14 on our side as much as you can, it is this:
15 That, at heart, what Beaufort Memorial is doing
16 here is violating Regulation section 102.2,
17 which is they are -- which says, an applicant
18 may not split or combine one expenditure into
19 two or more expenditures for the purpose of
20 avoiding Certificate of Need review. And we
21 think that is exactly what we're doing here.
22 What we've alleged and what I think discovery
23 will bear out is that, back in 2018, when they
24 decided to buy this brand new 1.5 Tesla MRI
25 machine, their intent was to place that MRI in

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1 a brand new location in their Okatie Medical
2 Center, which was under construction at that
3 point. And, frankly, when they applied for the
4 2020 NAD, they maybe inadvertently included
5 some documentation from 2018 that pretty well
6 bears that fact out, that that was the intent
7 all along. And so, our point is, if the intent
8 all along was to buy a new piece of medical
9 equipment to place in a brand new location,
10 that clearly requires a Certificate of Need.
11 But they avoided CON review by breaking those
12 expenditures into two parts in violation of
13 Regulation 102.2. They started with a vanilla
14 replacement NAD in 2019. And, look, Ms.
15 Robertson is right, we didn't challenge that
16 one because there weren't any ground to at that
17 point. They looked like they were simply
18 replacing a magnet in place in Port Royal.
19 What they didn't tell anyone, including DHEC at
20 that time, is that the plan wasn't really to
21 put it in Port Royal for any meaningful amount
22 of time. The plan was to put it in this brand
23 new facility in Okatie. So, they applied for
24 an NAD in 2019 and then, just as soon as the
25 one-year period on that NAD ran out, they

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1 applied for a new NAD to relocate the magnet to
2 Okatie, which was the real plan all along. And
3 that's our point. And I think if we bear that
4 out in discovery, and I think we will, then
5 that will be a violation of 102.2, and the
6 Court will conclude that you collapsed those
7 two projects because they're really one
8 project, one acquisition project in a new
9 location, and that requires a Certificate of
10 Need under the regulations that Ms. Robertson
11 showed you, that it's an acquisition great than
12 \$600,000 of medical equipment that needs to be
13 analyzed. In addition, we take issue with the
14 notion that a relocation avoids CON review as
15 a general manner because it's not an
16 acquisition. CONs are site specific
17 throughout. I mean, you apply for a CON in a
18 particular location. They're applied to by a
19 facility. And so, we would suggest to The
20 Court that, when you're moving a very expensive
21 medical -- piece of medical equipment from one
22 location to another, that is an acquisition as
23 to the new location that gets analyzed under
24 the standard CON. And we've got -- that
25 opinion is backed by our expert, Kathy Platt.

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1 Again, her affidavit is based on the limited
2 information available to us, but that's because
3 we're at the pleading stage. We're not even
4 required to have an expert at this point, but
5 we do. So, the notion that her affidavit is
6 somehow deficient kind of baffles me, given
7 that, again, we're at the pleading stage. We
8 haven't gotten to take any discovery yet. But
9 anyway, that is an acquisition as to the new
10 location and we believe that, if you treat it
11 as such, the cost will clearly exceed the
12 \$600,000 threshold. We also think that, even
13 apart from the equipment itself, even apart
14 from the MRI, and this is in Ms. Platt's
15 affidavit too, and it's been in our RFRs, we
16 don't think that they have taken account of all
17 of the true budget costs, that there are
18 acquiring chillers, they're acquiring a number
19 of things, and that, if you put those costs
20 together, including some equipment
21 acquisitions, you're going to get to the
22 \$600,000 threshold. And I think we're entitled
23 to discovery to try to bear that out. Finally,
24 we've also noted the two million dollar
25 threshold for the -- for all medical

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1 expenditures. An, again, Ms. Platt thinks,
2 based on her experience and the little bit that
3 we've seen so far, that we're going to reach
4 that threshold with the benefit of discovery.
5 Because the reality is they're creating this
6 imaging center, and it's a brand new imaging
7 center. It's got CT. They're moving a CT
8 scanner. It's got MRI. It's got X-ray. It's
9 got DEXA scan. It's got all kinds of stuff.
10 They're doing it piecemeal by not acting like
11 it's one project, when it's really one project.
12 And if you put those costs together, you're
13 going to get to the two million thresholds, so
14 I think you need a CON there. So, for -- at
15 its heart, again, if we're in a 12(b)(6)
16 posture, have we alleged enough, if borne out
17 by discovery, that would demonstrate that the
18 real project requires a CON? Yes. I think we
19 clearly have. I think we're entitled to
20 discovery to bear that out. And I think that
21 we're clearly properly in front of this Court
22 jurisdictionally, given that we're challenging
23 an NAD that Beaufort Memorial clearly asked for
24 and clearly received. And for all of those
25 reasons, Your Honor, I would urge you to deny

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1 the motion and allow this case to proceed to
2 discovery.

3 **THE COURT:** While I got you up here.

4 **MR. FRAMPTON:** Yes, sir.

5 **THE COURT:** How do you determine a service area
6 under the State Health Plan?

7 **MR. FRAMPTON:** Well, that's determine on a project-
8 by-project basis. When you apply for a CON,
9 they look at the service area and determine, in
10 a pragmatic sense, where the people are going
11 to be coming for who are going to access this
12 service.

13 **THE COURT:** Okay. So, isn't the service area the
14 county?

15 **MR. FRAMPTON:** No, sir. I don't think it is. And I
16 don't think there's been any determination to
17 that effect. I think that in Beaufort County,
18 particularly when you've got a county that is
19 as sort of stratified as it is in may ways
20 demographically, that service areas are not
21 necessarily going to follow the county lines,
22 and that Port Royal is a vastly different
23 community than Bluffton. Port Royal is
24 somewhat disadvantaged. It's military. It's
25 much bluer collar. People aren't traveling as

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1 far. Bluffton is very much a white collar
2 retiree community. I think they're in
3 different service areas. Ms. Platt thinks
4 they're in different service areas.

5 **THE COURT:** So, you think -- you would say that the
6 service area that you defined as Port Royal
7 would be different than Beaufort?

8 **MR. FRAMPTON:** Probably.

9 **THE COURT:** Although they share the same border
10 sign?

11 **MR. FRAMPTON:** They might be. We've not analyzed
12 that. What we've analyzed and what Ms. Platt
13 has looked at is, can she say that Okatie and
14 Port Royal are different service areas. And
15 she believes she can. I would also say that,
16 with respect to Beaufort Memorial's argument
17 and DHEC's argument that relocations are just
18 totally unregulated, the service area doesn't
19 matter for that argument. If their argument is
20 right, you can move a piece of equipment to
21 Greenville without any regulatory review. And
22 I don't think any of us think that is correct.

23 **THE COURT:** I probably draw the line somewhere
24 between this and that. Yeah.

25 **MR. FRAMPTON:** Well, there isn't any statutory or

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1 regulatory basis for them drawing the line in
2 the service area and saying, well, as long as
3 it's the same service area, it's okay. That's
4 not cited to anything. And, again, I don't
5 think there's been a regulatory determination
6 of the service area. And if there has, if this
7 NAD makes a regulatory determination of the
8 service area, then we're entitled to challenge
9 that through a contested case hearing and we're
10 properly here.

11 **THE COURT:** All right. I guess there's a question
12 that I really need to ask everybody. What
13 State Health Plan covers this transaction? And
14 the answer I -- let me -- I'll start with Ms.
15 Biggers.

16 **MS. BIGGERS:** Your Honor, the State -- no State
17 Health Plan ---

18 **THE COURT:** Pull your mask so I can hear you, so it
19 gets recorded properly.

20 **MS. BIGGERS:** No State Health Plan covers this
21 transaction. MRIs are not -- do not have
22 standards and ---

23 **THE COURT:** There are no standard or criteria for
24 MRIs.

25 **MS. BIGGERS:** Correct.

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1 **THE COURT:** Okay.

2 **MS. BIGGERS:** And there -- so, there -- for that
3 reason, they also do not meet the statutory or
4 regulatory definition of a health service,
5 which is defined as -- including the
6 requirement that it is a service that has
7 standards in the State Health Plan.

8 **THE COURT:** And that would be a treatment.

9 **MS. BIGGERS:** Correct.

10 **THE COURT:** Versus a diagnostic procedure.

11 **MS. BIGGERS:** It would be -- I mean, in general, the
12 equipment that has -- that is in the State
13 Health Plan now and has been in the past is
14 used for treatment purposes and may also be
15 used for diagnostic purposes. But at one point
16 in time, historically, MRIs did have standards
17 in the State Health Plan. I believe that the
18 2003 State Health Plan was the last State
19 Health Plan that had MRIs and that they were
20 removed in the two -- from the 2004-2005. If
21 it wasn't the 2004-2005, it was the one after
22 that that removed MRIs from the State Health
23 Plan.

24 **THE COURT:** Okay. So, when this facility was
25 originally opened and an MRI machine was put in

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1 it in at Port Royal, and I think there was --
2 somebody said -- I think that was in your
3 material, Mr. Frampton. It was 16-year gap.
4 That would take it back when it was covered.
5 Sixteen years ago. And I'm not sure if that it
6 was 16 years ago ---

7 **MS. BIGGERS:** If it was ---

8 **THE COURT:** --- from now, but.

9 **MS. BIGGERS:** I'm not sure. I'm not -- if it's --
10 I'm not sure if it would've -- when the 2004-
11 2005 plan was ---

12 **THE COURT:** If it would have been in ---

13 **MS. BIGGERS:** --- adopted. It sounds ---

14 **THE COURT:** That that MRI machine would have
15 originally come in under a plan, maybe.

16 **MS. BIGGERS:** If it was ---

17 **THE COURT:** And let me say -- maybe I know more
18 about this than I should. But there was an
19 original MRI machine that was put in by a
20 predecessor in interest. Then there was an
21 upgrade to that machine. And at that time,
22 Beaufort Memorial, perhaps, acquired that
23 practice? Maybe Ms. Robinson -- Robertson.
24 I'm sorry.

25 **MS. ROBERTSON:** I think you're right, Your Honor.

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1 Historically, this was -- if I've got the name
2 right, Lowcountry Medical Associates, I
3 believe.

4 **THE COURT:** Lowcountry Medical. Right.

5 **MS. ROBERTSON:** And Beaufort did acquire that
6 practice and this MRI was already there.

7 **THE COURT:** The one that you've now upgrade here.
8 But that was the second MRI, I believe.

9 **MS. ROBERTSON:** Right. I believe you're correct in
10 that.

11 **THE COURT:** Right.

12 **MR. FRAMPTON:** And, Your Honor, I -- we've tried to
13 trace it back to the first one and figure out
14 how the first one got installed and what the
15 regulatory approval for that was. We've tried
16 to FOIA it. And I don't have an answer to
17 that. I can't figure it out.

18 **THE COURT:** Okay.

19 **MR. FRAMPTON:** I bet we'd figure it out in
20 discovery.

21 **THE COURT:** Good argument, sir. All right. If you
22 have anything -- nothing else to add?

23 **MR. FRAMPTON:** No, Your Honor.

24 **THE COURT:** Then, I'll come to Ms. Robertson for a
25 reply.

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REPLY POSITION OF THE RESPONDENT:

MS. ROBERTSON: Yes, Your Honor. I -- just briefly.

Mr. Frampton said numerous times in his argument before this Court, he used the word acquisition. Let me take this off. I'm sorry. I just realized I'm speaking ---

THE COURT: I may want to listen to this later. I appreciate the clarity.

MS. ROBERTSON: Yes. Yes. Mr. Frampton said numerous times the word acquisition. He talked about this in the concept -- he says this is one acquisition project, when he's trying to blur this as multiple expenditures that, somehow or another, Beaufort is seeking to divide up to avoid CON review. Simply not the case. There are not multiple acquisitions occurring here in any respect. But he said, one acquisition project. He talked about it being greater than 600,000 of equipment. He called it equipment acquisition. Again, all very telling flaws in their argument because we don't have an acquisition of equipment. We're not adding an MRI. We're not taking an MRI away. But to accept what they are saying is to nullify this entire provision for replacement

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1 of like equipment. Clearly, someone who owns
2 an MRI can replace that like -- with like
3 equipment with similar capabilities. That is
4 exactly what Beaufort did in 2019. Absolutely
5 allowed under the regulatory structure. It
6 then -- later, it's implemented, it is seeking
7 to relocate it. It has other MRIs in Beaufort.
8 It's seeking to locate this one to Okatie to
9 another physician office building. And by
10 their very concession and admission, there's no
11 process under an exemption or a non-
12 applicability determination that applies to any
13 relocation. So, I think it's important, Your
14 Honor -- the concept of the 102.2, the
15 splitting of CON projects just is not at play
16 here. There's no acquisitions going on. It's
17 important to remember we're not adding any MRI
18 to the market. And we do believe -- I mean,
19 the county is where it's staying. We're not
20 seeking to move it anywhere else. And that's
21 the area in which the MRI is used, within that
22 county and the service market of the provider
23 within Beaufort County. And, Your Honor, has
24 pointed out there's no State Health Plan
25 standards at play here. And there's nothing

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1 that defines what that is, as far as the
2 service area. But the county is reasonable and
3 we're certainly not taking it outside of the
4 county. And I would just briefly, on the
5 jurisdictional argument because I think if Your
6 Honor has jurisdiction, you still have the
7 power to dismiss this matter as a matter of law
8 when you don't have a CON at issue, you don't
9 have an exemption at issue, and you don't have
10 an non-applicability determination at issue.
11 But on the jurisdictional issue, I would like
12 to just briefly -- I'm going to go back to the
13 ELMO one more time. This is a little difficult
14 to read just because I know it's dark. But I
15 want to show you this, Your Honor, because Mr.
16 Frampton repeatedly said that Beaufort asked
17 for non-applicability. This is the form that
18 Beaufort used when it went the Department and
19 confirmed what the Department was telling them
20 -- telling it, you don't need anything,
21 Beaufort. But we know we have litigious folks
22 in the Beaufort County area with MRIs, so
23 Beaufort did seek to get that confirmed in
24 writing from the Department. This is a form
25 that Beaufort filled out. If you look at it --

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1 if you can read it, this is, I think, part of
2 some of the submissions. The first box,
3 replacement of like equipment, exemption. We
4 didn't check that box. The next box,
5 replacement of like equipment, and then it goes
6 over to the non-applicability, NA. We didn't
7 check that box. We didn't ask for an
8 exemption. We didn't ask for a non-
9 applicability determination under the
10 regulations.

11 **THE COURT:** Which application is this one? What
12 date? Is this '19 or the '20?

13 **MS. ROBERTSON:** This is the '20. This is when we
14 sought from DHEC to confirm we didn't need
15 anything. So, Beaufort asked for nothing
16 except to confirm we're going to relocate this
17 and we don't need anything else from the
18 Department, and they answered that and said,
19 you don't need anything. They said, subject to
20 CON review, you don't need anything. So, we
21 don't ---

22 **THE COURT:** They sent you an NAD.

23 **MS. ROBERTSON:** They called it that, but it's
24 because the CON did not apply. They determined
25 that the Certificate of Need did not apply to

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1 this project, but we didn't ask for an NAD
2 under the regulations as a defined NAD.
3 Beaufort didn't ask for that. So, they're
4 answering us, Your Honor, and giving us in
5 writing what they had told us because we didn't
6 want to have to face any litigation. We wanted
7 it confirmed that we could relocate and we were
8 correct that nothing applied. I think the
9 *Amnisub* language is instructive if we're going
10 to look at the jurisdiction issue because, if
11 there's no legal duty for the Department to
12 issue any decision -- and it was no legal duty
13 for them to do that. They answered this. We
14 didn't ask for anything specific. But when
15 there's no legal duty for them to do it because
16 nothing applied, that trigger, the CON trigger,
17 the statutory trigger that gives rise to a
18 contested case is not there. So, there's no
19 corresponding right to a contested case under
20 these somewhat unique facts that Your Honor has
21 before it. This really is a matter that's
22 subject to dismissal. And, clearly, we believe
23 dismissal is an appropriate vehicle by which
24 this Court can act. Thank you, Your Honor.

25 **THE COURT:** All right. Ms. Biggers.

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1 **MS. BIGGERS:** Yes, sir.

2 **THE COURT:** My impression that with the nos that
3 there is no -- because it's not covered by the
4 State Health Plan, these MRIs, then there's no
5 -- the service area is irrelevant for that
6 purpose.

7 **MS. BIGGERS:** Well, if a CON were required because
8 it -- if this were an actual acquisition of
9 equipment, rather than relocation of existing,
10 and they applied for a CON because it exceeded
11 the monetary threshold to acquire brand new
12 equipment, we would be -- a service area would
13 be relevant for CON review of that, even though
14 MRIs don't have standards in the State Health
15 Plan. And I believe that staff would certainly
16 be looking to see what an applicant for CON
17 said in their CON application about what their
18 service area is. I'm not sure if there is
19 another place in the State Health Plan where,
20 if they were reviewing a CON application for
21 something that didn't have standards in the
22 Plan, if there might be something in the Plan
23 that would -- they would still generally
24 consider ---

25 **THE COURT:** Well, how would the State Plan --

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1 assuming that it might, by some stretch of my
2 imagination, cover this issue, what would --
3 what does the State Health Plan say a service
4 area is?

5 **MS. BIGGERS:** Well, see, it has different ---

6 **THE COURT:** It has areas that are like five -- four
7 or five, six in the state.

8 **MS. BIGGERS:** Right. It has -- it talks about the
9 state as a whole, but for individual services
10 and standards that are addressed in the plan,
11 it has -- it'll identify a service area for
12 that type of service or facility. I can't
13 recall right now what it says in the ---

14 **THE COURT:** And some of those are counties and some
15 of those are travel times.

16 **MS. BIGGERS:** Right. I'm not ---

17 **THE COURT:** The roads are getting a little better
18 between Beaufort and Hilton Head. That's why
19 they put -- that's why Okatie's blossomed like
20 a mushroom at night. So, maybe I meant to ask
21 you questions that I should be answering
22 myself.

23 **MS. BIGGERS:** I -- let me -- if this helps, I'm not
24 aware of anything in the Plan that would
25 generally make -- identify, as a general rule,

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1 a service area to be smaller than a county.
2 There may be some specific services where there
3 is a drive time identified and that drive time
4 or that radius, it could be -- depending on how
5 long it takes to drive somewhere, it's possible
6 it could be smaller than a county where it were
7 specified that it would be -- it should be
8 looked at that way. Otherwise, I'm not aware
9 of a general service area that's smaller than
10 a county.

11 **THE COURT:** Okay. Let me ask you one more, just
12 because you haven't had a chance to play in the
13 sandbox as much as the rest of us. What would
14 have happened, from your point of view, from
15 the Agency point of view, if Beaufort Memorial
16 had relocated the MRI machine it previously had
17 from Port Royal to Okatie and then upgraded the
18 machine?

19 **MS. BIGGERS:** Well, I ---

20 **THE COURT:** Again, using the same time frames. Just
21 switching the sequence of events.

22 **MS. BIGGERS:** They had relocated and then upgraded?
23 I believe that the relocation -- assuming
24 everything else equal, I believe that there
25 still would not have been a reason why there

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1 would be -- need to be a CON review or a
2 written -- a specific request for an exemption
3 or NAD for the relocation of the existing
4 equipment. And then, when -- then for the
5 replacement itself, then that would be either
6 -- depending on whether they had previously
7 received a CON for it or not, it might be -- it
8 would be addressed in one of the two regulation
9 provisions that we were looking at earlier and
10 be -- depending on which one -- and staff would
11 have looked at either -- whatever applicable
12 factors would be relevant, depending on which
13 one they were -- whether it was a replacement
14 of like equipment with similar capabilities for
15 which a CON previously been granted or -- or
16 replacement of equipment for which a CON had
17 previously been granted or one with similar
18 capabilities that has a specifically defined
19 term in the statute.

20 **THE COURT:** But it's the Department's view that a
21 relocation doesn't necessarily require
22 anything?

23 **MS. BIGGERS:** Correct.

24 **THE COURT:** All right. Mr. Frampton, I've been
25 enlarging the sandbox a little bit. If you'd

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1 like to take another crack at my wild
2 imagination, I'll let you.

3 REPLY POSITION OF THE PETITIONER:

4 **MR. FRAMPTON:** I will, Your Honor. But I would be -
5 - I'll be very brief. And I would just say
6 that, even to the last question that you asked
7 of Ms. Biggers, I think under Section 102.2 the
8 intent matters. If you are doing this sort of
9 two-step process of we're going to replace and
10 relocate or relocate and replace all as one
11 real project for the purpose of evading CON
12 review, then I think you trigger 102.2, and
13 that's a problem. That's our point here, is
14 that we think we'll be able to prove that this
15 was one plan all along to ultimately get a new
16 piece of equipment to a new location that had
17 never been reviewed by anybody as to whether --
18 a very large and very expensive piece of
19 equipment, that had never been reviewed by
20 anybody as to whether there was a proper need
21 for it. And I think that's a problem. So, I
22 think that the intent matters. And you only to
23 get intent through Discovery. I also would say
24 that, again, I don't -- you spoke about service
25 area. I know that when I -- and I have less

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1 experience probably than everyone here, but I
2 have done a few of these CONs for MRI machines.
3 And when we do them, somewhere the Department
4 -- when someone actually applies for a CON to
5 acquire an MRI machine under that -- above that
6 \$600,000 threshold, the Department establishes
7 a service area probably based largely on what's
8 in the application. And then when someone
9 challenges the CON, you fight over whether
10 that's the right service area. And that's a
11 pragmatic decision that health planners fight
12 over, as to where the people are really coming
13 from. And so, that goes back to our point,
14 that I don't think a service area has been
15 defined in a true regulatory fashion yet. But
16 if it has, if the position of the Department is
17 that we establish a service area by the
18 issuance of this NAD, then we challenge it.

19 **THE COURT:** Thank you, sir. Ms. Robertson, you
20 always get to go last.

21 **FURTHER REPLY POSITION OF THE RESPONDENT:**

22 **MS. ROBERTSON:** Thank you, Your Honor. You can't
23 evade CON review when there is no CON review
24 applicable. We can't have it the way they're
25 arguing. Your Honor asked the question, what if

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1 we relocated and then replaced. Or if replace
2 and then relocate. You're still appropriately
3 utilizing the very regulations that are allowed
4 for you to replace a piece of equipment with
5 similar like equipment with similar
6 capabilities. It's under that 105.1 when
7 you're replacing. And the relocation doesn't
8 need anything. The word acquisition keeps
9 coming up. We're not acquiring. This process
10 is very much allowed under the regulation.
11 Intent is -- whether -- I don't believe it was
12 what he is saying, but you can't evade
13 something you're not required to do, and you
14 follow the specific regulatory paths that are
15 provided, and that's what Beaufort did. And
16 there's no new piece of equipment being added
17 to this market. I think that's very important,
18 Your Honor. Thank you.

19 **THE COURT:** All right. Thank you. And I will
20 continue my wrestling with this matter and try
21 to get a decision one way or the other out to
22 the parties within a more than reasonable
23 period of time. That's my don't hold me to
24 that. We're adjourned. Thank you.

25 **(There being no further questions, the motion hearing**

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1 concluded at 10:52 a.m.)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jan 26 2022

APPEAL FROM THE ADMINISTRATIVE LAW COURT **SC Court of Appeals**

H.W. Funderburk, Jr., Administrative Law Court Judge

Case No. 2021-000617

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair Appellant,

v.

South Carolina Department of Health
and Environment Control and

Beaufort Memorial Hospital Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal contains all material proposed to be included by any of the parties, and no other material.

Dated: January 7, 2022

/s/ A. Victor Rawl, Jr.

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