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The State of South Carolina

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The Honorable Patrick B. Harris
Member, House of Representatives
519-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Harris:

Referencing an amendment to be added to H.2101 by the Senate, you have inquired as the the effect of the proposed legislation on applications for certificates of need which will be pending at the time the proposed legislation, if adopted, will take effect.

The amendment to H.2101 which was adopted by the Senate on March 1, 1988, provides the following:

> Amend the bill, as and if amended, by adding an appropriately numbered SECTION to read:
>
> /SECTION ___. Section 44-7-140 of the 1976 Code is amended to read:
>
> "Section 44-7-140. The provisions of this article ~~shall~~ do not apply to privately-owned educational institutions maintaining infirmaries for the exclusive use of their student bodies and ~~hospitals maintained~~, and any helath care facility owned and operated by the federal ~~Government~~ government, or any federal health care facility sponsored and operated by this State."/
>
> Renumber sections to conform.
>
> Amend title to conform.

The article referenced in this amendment pertains in relevant part to the requirement of obtaining a certificate of need for hospital or such health care facilities from the South Carolina Department of Health and Environmental Control.

The relevant law has been succinctly stated in 51 Am.Jur.2d Licenses and Permits § 46:

> In general, a change in the law pending an application for a permit or license is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the permit or license should be granted. If, however, action on the application is unreasonably delayed until after the change has become effective, or if the appropriate officer arbitrarily fails to perform a ministerial duty to issue the license promptly on an application that conforms to the law at the time of filing, the law at the time of filing of the application ordinarily controls.

See also Annot., 169 A.L.R. 584 (change in law pending an application for a permit is operative as to the application, so that law as changed is determinative to the application); Op. Atty. Gen. dated September 14, 1983 (applications for notaries public pending when law was changed to require higher application fees were subject to higher fees) (copy enclosed). Thus, an application for a certificate of need for a health care facility owned and operated by the federal government or any federal health care facility sponsored and operated by the State of South Carolina would follow the law as amended while the application was pending, absent some sort of unreasonable delay or the arbitrary failure to perform some ministerial task which would result in the application procedure being delayed until after passage of the amendatory act.

This Office is aware that an application for a certificate of need has been contested and that an appeal is pending. The effect of adoption of the amendment to H.2101 on the pending appeal has been questioned. Of course, the ultimate disposition of the appeal remains within the discretion of the court having jurisdiction over the matter. However, the general law concerning this issue has been stated by the United States Supreme

Court in United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801),

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.

Id., 2 L.Ed. at 51. Thus, a court considering an appeal as to the issuance of a certificate of need at such time as H.2101, as amended, is enacted, would likely conclude based upon the foregoing law stated by the United States Supreme Court in the Schooner Peggy case, that a certificate of need is no longer necessary for health care facilities owned and operated by the federal government or any federal health care facility sponsored and operated by the State of South Carolina.

We trust that the foregoing has adequately responded to your inquiry. Please advise if clarification or additional assistance should be needed.

With kindest regards, I am

Sincerely,

T. Travis Medlock
Attorney General

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Enclosure