

BEFORE THE OFFICE OF JUDGES/ HEALTH CARE AUTHORITY

RE: STONEWALL JACKSON MEMORIAL HOSPITAL, COMPANY  
CON File No. 21-7-12157-H  
A.P. Docket No. 22-HC-03

BRIEF FILED ON BEHALF OF  
STONEWALL JACKSON MEMORIAL  
HOSPITAL, COMPANY

Submitted by:

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## **I. INTRODUCTION**

This case involves an appeal from a decision of the West Virginia Health Care Authority (“the Authority”) denying an application (“the Application”) for a certificate of need filed by Stonewall Jackson Memorial Hospital, Company (“Stonewall”) pursuant to the provisions of W. Va. Code § 16-2D-1 *et seq.* The decision was issued by the Authority on June 13, 2022 (“the Decision”). Stonewall sought a certificate of need to construct a replacement hospital in Lewis County, West Virginia. St. Joseph’s Hospital of Buckhannon (“St. Joe”), a critical access hospital (“CAH”) located in Upshur County was designated by the West Virginia Health Care Authority (“the Authority”) as an affected person in the matter and appears here. The Decision was appealed to the Office of Judges/ Health Care Authority (“OOJ”) by filing a Request for Review on July 8, 2022. The filing was acknowledged by the OOJ by email also on July 8. Thereafter, the OOJ set a briefing schedule in this matter. This Brief is submitted pursuant to that schedule.

## **II. ARGUMENT**

### **A. Issues involved**

The issue that is the subject of this appeal is very limited. The Authority’s denial of the Stonewall certificate of need application outlined in the Decision was limited solely to the criteria contained in W.Va. Code § 16-2D-12(b)(1), which provides that:

(b) The authority may not grant a certificate of need unless, after consideration of the appropriateness of the use of existing facilities within this state providing services similar to those being proposed, the authority makes each of the following findings in writing:

(1) That superior alternatives to the services in terms of cost, efficiency and appropriateness do not exist within this state and the development of alternatives is not practicable. W.Va. Code § 16-2D-12(b)(1).

The Authority's finding on this issue is contained in two passages in the Decision. The first deals generally with the issue of the superior alternative:

While the proposed project may be the superior alternative in terms of cost, efficiency, and appropriateness as it relates to Stonewall, the review of the project does not end with the Applicant. The Authority must also determine whether the proposed project is the superior alternative as it relates to an Affected Person and the citizens of the State of West Virginia. *See* W. Va. Code § 16-20-1. Decision p. 37.

The second section deals with the issue more specifically:

The Authority finds that Stonewall's proposed project would cause SJB to lose its CAH status which would have a significant detrimental financial effect on SJB. The evidence of record showed that the loss of CAH status would result in SJB suffering significant annual monetary losses. Stonewall produced no evidence from WVUHS that it would supplement any financial losses incurred by SJB.

The Authority further finds that Stonewall has not proved that the development of alternatives is not practicable. Stonewall admitted it had not explored other sites for the project other than the proposed location. (Exhibit 23, p. 54). Stonewall produced no evidence that it had completed a market analysis of the surrounding area to determine if any other suitable property might exist. The burden of proof is on the Applicant to show that the development of alternatives to the project are not practicable. Stonewall has failed to meet this burden. Decision p. 38-39.

Both provisions are made in error with the errors being of both fact and law.

**B. The Authority wrongfully relied on W. Va. Code § 16-2D-1**

The first general finding quoted above cites W. Va. Code § 16-2D-1 as support for the finding. W. Va. Code § 16-2D-1 provides:

(1) That the offering or development of all health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state and to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services.

(2) That the general welfare and protection of the lives, health and property of the people of this state require that the type, level and quality of care, the feasibility of providing such care and other criteria as provided for in this article, including certificate of need standards and criteria developed by the authority pursuant to provisions of this article, pertaining to health services within this state, be subject to review and evaluation before any health services are offered or developed in order that appropriate and needed health services are made available for persons in the area to be served.

W. Va. Code § 16-2D-1.

This section provides no support for the Authority's cited finding. The proposal in this matter involved Stonewall replacing its aging facility that is presently located on the western side of Weston, Lewis County with a new facility to be located on the eastern side of Weston, Lewis County. Both locations were within Lewis County, one of the two counties in Stonewall's service area. The reasons for the relocation were well addressed in the hearing by Stonewall's Chief Administrative Officer, Kevin Stalnaker. The major reasons Stonewall chose the proposed location was that it provided easy access to the citizens of Stonewall's service area, it was located in an area where other economic develop as well as required infrastructure was present, and the nature of the building site lowered costs involved with the construction. *See* Tr. p. 15-16, 20-21, 56-59.

It is against that backdrop that the Authority ruled that the provisions of W. Va. Code § 16-2D-1 supported its ruling denying the Application. W. Va. Code § 16-2D-1 provides no support and does not allow the Authority to essentially choose the location of a hospital when the proposed new site is within the present service area of the existing hospital. Subsection (1) deals with the Authority's powers to prevent the unnecessary duplication of services. The services in this matter are already existing services that are simply being relocated. No services are being duplicated, unnecessarily or not, they are merely being relocated. Subsection (2) provides for a review so "that appropriate and needed health services are made available for persons in the area to be served."

The Application proposed a new hospital facility to better served the citizens of Stonewall' service area, making needed health services available and accessible to those who need them. St. Joe's is in Upshur County, not in the same service area as Stonewall. Further, as a CAH, St. Joe's does not provide the same level of services as a community hospital like Stonewall. There are several restrictions placed upon CAH's, such as the length of stay for inpatients, that are not placed upon community hospitals like Stonewall. The Authority claims its ruling is to protect the citizens of the sole county in St. Joe's service area, Upshur County, however, the new hospital will not be in Upshur County. It is proposed to be in Weston, Lewis County and planned and proposed to provide services to those citizens in the Stonewall service area, Lewis and Gilmer Counties. Further, the new facility is not adding any services or duplicating existing ones. It is merely relocating existing services to a different side of Weston. W. Va. Code § 16-2D-1 provides no support to the Authority's ruling in this matter and the Authority's reliance on it to support a finding that the proposed new location is not the superior alternative is incorrect and in error. As a result, the Decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record and is, as a result, arbitrary and capricious.

**C. The HCA wrongfully found that the proposal is not the superior alternative**

Later in the Decision, "[t]he Authority further finds that Stonewall has not proved that the development of alternatives is not practicable. Stonewall admitted it had not explored other sites for the project other than the proposed location. (*Exhibit 23, p. 54*). Stonewall produced no evidence that it had completed a market analysis of the surrounding area to determine if any other suitable property might exist. The burden of proof is on the Applicant to show that the development of alternatives to the project are not practicable. Stonewall has failed to meet this burden." *See* Decision, p. 38-39.

This finding is incorrect and in error. As discussed below, the finding adds a requirement that must be met by Stonewall that is not contained in anywhere in W. Va. § 16-2D-1 et seq. or the applicable Certificate of Need Standards. However, the ruling and Decision are incorrect and made in error before the extra requirement is even examined. W. Va. Code § 16-2D-12 provides that before an application can be approved and a certificate of need be granted, the Authority must find that the proposal is needed and consistent with the State Health Plan. See W. Va. Code § 16-2D-12(a). The Authority found that the project was needed. The section the of the State Health Plan applicable to this appeal is the Renovation-Replacement of Acute Care Facilities and Services chapter of the Certificate of Need Standards (“the Standards”). The Standards contain all the requirements that must be met by an applicant. The Authority found the project to be consistent with all the requirements in the Standards.<sup>1</sup>

First, the Authority ruled that “Stonewall has not proved that the development of alternatives is not practicable.” There is evidence regarding the review of alternatives in the Application and the record. The many reasons why the old facility needed to be replaced and not renovated was in both the Application and the record. The suitability of the proposed site for the new hospital as well as the reasons it was chosen outlined in the Application and in Stalnaker’s testimony. Further, in Stonewall’s case-in-chief, Stalnaker discussed the multiple other sites that St. Joe’s claimed were more superior to the proposed site, specifically noting the deficiencies with each proposed site. See Hearing Transcript pages 14-16, 19-21, 33-34, 54-62. Stalnaker discussed his familiarity with all of the locations proposed by St. Joe’s at the hearing showing that the reasons the alternative sites were not superior to the proposed site and were not practicable to develop a

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<sup>1</sup> The application was also subject to and found to be consistent with the Operating Room chapter of the Certificate of Need Standards.

new hospital facility. That testimony clearly showed that the other locations were (1) known to Stonewall, and (2) were not deemed by Stonewall to even be worth exploring for the various reasons stated in the testimony. The predominant reason was that the other locations, some of which were not even available for sale, were in areas where no utility services or infrastructure were available, or the locations were in mountainous areas which would lead to astronomical increases in the construction costs of the hospital or both. Thus, there were other locations for the new hospital that would have avoided the loss of CAH status to St. Joe's, but those locations would have added to the cost of a new facility for Stonewall. As argued in the Briefs filed before the Authority, Stonewall does not believe that adding millions to the cost of its new facility by building it on an uninhabited mountain side in an area of Lewis County where there are no other services, utilities or adequate roads to be the superior alternative. This is especially true when St. Joe's had various alternatives that were noted in discovery and in testimony that were available to it to either maintain its CAH status or manage the hospital in such a way that the loss was not a cause for its closure.

W.Va. Code § 16-2D-12(b)(1) requires that there be evidence in the record demonstrating "that superior alternatives to the services in terms of cost, efficiency and appropriateness do not exist within this state and the development of alternatives is not practicable." There is such evidence in the record. The Authority's conclusion otherwise is incorrect and in error.

Further, as quoted above, the Authority added an additional requirement on Stonewall. It noted that "Stonewall produced no evidence that it had completed a market analysis of the surrounding area to determine if any other suitable property might exist." *See* Decision, p. 39. There is no requirement of a market analysis as a part of the proof needed to demonstrate "that superior alternatives to the services in terms of cost, efficiency and appropriateness do not exist

within this state and the development of alternatives is not practicable.” W.Va. Code § 16-2D-12(b)(1). The requirement of a market analysis is not contained in the statute or the Standards. Such a requirement is added without statutory basis. More importantly, the Authority found that such an analysis should have been offered to show that no other suitable property might exist. As noted, there is testimony in the record from Stonewall’s CAO that such property did not exist. The Authority’s ruling requires Stonewall to demonstrate that no other suitable locations exist for a new facility, which it did, but to do so in a particular manner that is not required in any statute, Standard or even past decisions. Such a ruling makes Stonewall’s burden of proof in this matter a moving target. Between the Application and the testimony at the hearing, Stonewall demonstrated that the chosen location was superior and that any other proposed locations were either not available, not suitable for very specific, stated reasons or bot. Yet that was not sufficient for the Authority, so an additional requirement of a market analysis was added. The finding that Stonewall did not demonstrate the superiority of the chosen location is in error and the addition of the requirement for a market analysis is in error.

The impact of these errors become clearer when the rest of the Decision, as well as a past decision by the Authority, is examined in more detail. First, in this Decision, the Authority ruled that Stonewall’s proposal is not the superior alternative as discussed above, but also found that the project is needed, consistent with the Accessibility section of the Standards (*See* Decision p. 26) as well as finding that there are no existing facilities providing services similar to those proposed in the service area. *See* Decision p. 39. Thus, the Decision denying the application is solely based upon the adverse impact the proposal will have on St. Joe’s. However, that ruling is made by the Authority while at the same time finding that Stonewall’s proposal is needed and will have no significant impact on the accessibility to health care services in both of the service area counties

as well as in Upshur County. *Decision* p. 26. The Authority further found that there are no existing facilities providing services similar to the proposal. *Decision* p. 39. The first finding recognizes that accessibility to health care services, one of the key public policy reasons for the Authority to exist as expressed in W.Va. § 16-2D-1, will not be impacted by this proposal, even in the highly unlikely event that St. Joe's does not continue to exist. The second finding recognizes that Stonewall and St. Joe's are not similar facilities and are not in the same service area. Yet the Authority ruled that Stonewall cannot construct a needed replacement facility in the location that best serves those it is charged with serving because a facility located in another one, which does not provide the full range of acute care hospital services, will be impacted. The result is that the proposal was denied by the Authority based solely on the fact that the proposed location for a community-based, full service acute care hospital will adversely impact a CAH not located in Stonewall's service area. That ruling was made while the Authority also found that the entire matter, including the construction of Stonewall's new hospital and the remote possibility of the closure of St. Joe's, will have no impact on the accessibility to health care services for anyone in either service area.

Further, the Authority's ruling does not comply with the public policy announced in W.Va. § 16-2D-1. The decision is not made "in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state and to avoid unnecessary duplication of health services." W.Va. Code § 16-2D-1. The Decision punishes the citizens of Lewis and Gilmer Counties while protecting a facility in Upshur County, when the Authority also ruled that the new hospital was needed and would not adversely impact access to health care services in the service area counties or in Upshur County. These findings are internally inconsistent and are in error.

Further, the Decision is diametrically opposed to one made in a very similar, if not identical matter decided by the Authority. In the matter involving United Hospital Center's proposal to relocate its facility from downtown Clarksburg, WV, to a location in Bridgeport, the Authority came to a totally different decision. *See* CON File, *Exhibit 20*, Attachment 6. United proposed to move the hospital from a downtown Clarksburg location to one on Interstate 79, like Stonewall's proposed location. The new location was in a growing area of Harrison County, like Stonewall's proposed location. However, like Stonewall's proposal the new location was closer to Fairmont General Hospital ("FGH"), another acute care facility located in Marion County, and would have, and in fact did, have a detrimental economic impact on FGH. In that case, the Authority made a similar finding regarding the Accessibility requirement in the Replacement Standards<sup>2</sup>. *See* CON File, *Exhibit 20*, Attachment 6, p. 54-55. In fact, the finding was more specific than the one in this matter, specifically mentioning the area between Morgantown and Bridgeport, which includes Marion County. Like here, the Authority also made a finding that there were no existing facilities providing services similar to those proposed in the service area, thus limiting the analysis to the service area and ignoring a facility located only a few miles away, but in another service area. *See* CON File, *Exhibit 20*, Attachment 6, p. 70. However, unlike this matter, the Authority ruled that the United Hospital Center proposal was the superior alternative, despite the adverse economic impact it would have on FGH. *See* CON File, *Exhibit 20*, p. 68-70. The findings in this matter are inconsistent with the findings in that matter, which had the same material facts, and the result is a Decision that is in error and is inconsistent with past Authority decisions. As a result, the Decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record, and is characterized by abuse of and clearly unwarranted exercise of discretion and is, as a result,

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<sup>2</sup> The Replacement Standards applied in the United Hospital Center case have since been amended, but the Accessibility section has remained unchanged.

arbitrary and capricious.

**E. The Authority's Review was not balanced and  
failed to take all evidence into account**

The Authority's ruling on the issue of the superior alternative in this matter did not review the facts in the record as a whole. The ruling did not review both sides of the matter. It simply found that St. Joe's would suffer economic harm and that was the end of the analysis. A number of matters were not taken into account regarding the proposed location of a new Stonewall facility. First, the review of the suitability of the proposed site to locate and build a hospital versus the suitability of the other sites proposed by St. Joe's was not balanced. Many of the sites were not for sale. Some were not an improvement on the location of the present facility, much less a new one. Many were located on mountain sides in wooded areas without population, access or infrastructure. All of the sites were discussed by Stonewall's CAO, Kevin Stalnaker in detail in his testimony. *See* Hearing Tr. p. 55-62. All of the sites proposed by St. Joe's would have increased the construction costs of the new facility, some of them astronomically. Locating a new hospital in an area where the construction costs would escalate astronomically because of the mountainous terrain is not the superior alternative. Locating a new hospital in an area that cannot even support the viability of a gas station (*See* Tr. p. 59) is not a superior alternative to the proposed location. Renovating the existing hospital on the current site is not a superior alternative to the proposed location. Stonewall's existing site is problematic for a number of reasons discussed in the hearing and has been for decades. *See* Tr. p. 15-17, 33-34. In the end, Stonewall is proposing to construct a new facility and the best location for that facility is on a site in a populated area, with easy access to patients, with businesses in the area and existing infrastructure, not in the woods on the side of a mountain, especially in an area that cannot even support a gas station. *See* Tr., p. 62,64-65. A balanced review would also have examined those facts and compared them to the economic loss

that St. Joe's could potentially suffer, but it was not. The economic loss was the sole factor examined.

A balanced review would also have examined the ability of St. Joe's to adjust to a loss of CAH status or even avoid it. There is evidence in the record that St. Joe's could relocate to maintain its status and that the administration of the West Virginia United Health System ("WVUHS"), the owner of St. Joe's, had at least discussed it, if not approved it. *See* CON File, Hearing *Exhibit 3*. There was evidence in the record of the case that other hospitals in the WVUHS lost millions of dollars and did not close. *See* CON File, *Exhibit 20*, Attachments 3-5. There was evidence in the record of the case that St. Joe's was now a part of WVUHS, the largest health system in the State, which provides St. Joe's with access to management and resources. WVUHS also operates a health care system, meaning that patient referrals from St. Joe's to other WVUHS hospitals creates revenue for the system and the referral center hospitals in the system, but that revenue is not reflected on the books of St. Joe's.

However, all that testimony and information was disregarded over a single issue, the loss of CAH status for St. Joe's. The Authority ruled that "the review of the project does not end with the Applicant. The Authority must also determine whether the proposed project is the superior alternative as it relates to an Affected Person and the citizens of the State of West Virginia. *See* W. Va. Code § 16-20-1." *See* Decision p. 37. A finding like that was not made in the United Hospital Center case. In fact, in the entire section reviewing the issue of the superior alternative, the only mention of FGH was noting that the superior alternative would be for FGH to merge into the WVUHS. *See* CON File, *Exhibit 6*, p. 68-69. The balance of the discussion was regarding the deficiencies in the existing United Hospital Center facility and how the new location would solve those problems. *See* CON File, *Exhibit 6*, p. 68-70. Those issues were not

discussed in this matter.

The Authority did decide about the impact Stonewall's project would have on the citizens of Upshur County and the State of West Virginia. It ruled that the accessibility to health care services would not be adversely impact by this project. If the accessibility to hospital services for the citizens of Upshur County was not impacted by this project, then the sole reason for the denial is related to the financial impact on a competitor hospital. That is not a part of the public policy announced by the legislature in W. Va. Code§ 16-20-1. It is not one of the minimum criteria for review provided for in W. Va. Code§ 16-20-12. It is another addition to Stonewall's burden of proof imposed by the Authority without a statutory basis. Further, it is not ruling "in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state and to avoid unnecessary duplication of health services." W.Va. Code § 16-2D-1. It is ruling in a manner that is punishing the citizens of Lewis and Gilmer Counties while protecting a facility in Upshur County. It is a finding that the superior alternative to providing and expanding more modern and accessible health care services to the citizens of Lewis and Gilmer County is to protect a critical access hospital in Upshur County. It is a finding that the superior alternative for Stonewall is to spend millions more on the construction of a new hospital and locate it in an area where the economic development in Lewis County has bypassed, to protect the critical access hospital status of St. Joe's.

In the end, the Authority found that is better for Stonewall to locate the new hospital in an area that has no relation to the population center of its service area, while spending millions more on the hospital, all to preserve St. Joe's bottom line. That finding was made when the Authority had previously ruled in a case with the same issues in completely different manner, to

the detriment of FGH. FGH lost special status as a part of the United Hospital Center move and that caused a loss of revenue. United Hospital Center and its owner, WVUHS did not care about that at the time. However, in this matter, WVUHS and St. Joe's in effect argue that its revenue stream is the most important element for the Authority to consider. Stonewall's costs of construction, its location to best serve the population in its service area, its decades long planning is all irrelevant. St. Joe's bottom line is the only issue to consider. That is, of course, not the case and there are number of matters for the Authority to consider when looking at this single issue. It did not do so and that is error and is inconsistent with past Authority decisions. As a result, the Decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record and is, as a result, arbitrary and capricious.

**D. The Authority misapplied the provisions of W.Va. Code § 16-2D-12(b)(1)**

Finally, the specific and clear terms of W.Va. Code § 16-2D-12(b)(1) do not give the Authority the ability and power to deny this application under the stated circumstances. W.Va. Code § 16-2D-12(b)(1) provides that a certificate of need cannot be granted unless, "after consideration of the appropriateness of the use of existing facilities within this state providing services similar to those being proposed...."[t]hat superior alternatives to the services in terms of cost, efficiency and appropriateness do not exist within this state and the development of alternatives is not practicable." W.Va. Code § 16-2D-12(b) and (b)(1). The first passage from the Decision cited above contains language that clearly demonstrates that the Authority's decision is not consistent with this language. That passage is:

While the proposed project may be the superior alternative in terms of cost, efficiency, and appropriateness as it relates to Stonewall, the review of the project does not end with the Applicant. The Authority must also determine whether the proposed project is the superior alternative as it relates to an Affected Person and the citizens of the State of West Virginia.

*See* W. Va. Code § 16-20-1.

*See* Decision p. 37.

The Authority's statutory power is to determine if there are superior alternatives to the proposed services. The finding in the Decision outlined in the above passage is not predicated on any services that are being offered by Stonewall. As is made clear in the second passage previously cited, the sole issue cited is the location of the new facility and its impact on St. Joe's. The statute does not mention the location of the services or the impact on other facilities located in a different service area. The Authority's mention of "the citizens of West Virginia" is interesting. The impact on the citizens on Lewis and Gilmer Counties, the two service area counties will be a positive one as they will have access to a modern hospital. The Authority also specifically found that access to hospital services for Upshur County citizens will not be adversely impacted by this project. The superior alternative for other citizens need not be analyzed as citizens in, for example, Mingo County won't be accessing services in Lewis, Gilmer or Upshur Counties. The impact of this project on the citizens of West Virginia, aside from the three counties that are the subject of this case, is nil.

The Authority has thus ruled, under the guise of W.Va. Code § 16-2D-12(b) and (b)(1), that the project location, not the services to be provided, will impact St. Joe's, a hospital located outside of the Stonewall service area. Further, the Authority has ruled that it must determine whether the proposed project is the superior alternative as it relates to an Affected Person and the citizens of the State of West Virginia. Yet, W.Va. Code § 16-2D-12(b) and (b)(1) do not provide that authority or responsibility. W.Va. Code § 16-2D-12(b) and (b)(1) provides that the Authority must look at superior alternatives to the services, not the location of those services.

Previous versions of Chapter 16, Article 2D contained provisions that specifically dealt

with the impact of construction projects on other providers. For example, the section from the 2015 Code outlining the minimum criteria for certificate of need review, W.Va. Code § 16-2D-6, contained a provision that required:

In the case of a construction project: (A) The cost and methods of the proposed construction, including the costs and methods of energy provision; and (B) the probable impact of the construction project reviewed on the costs of providing health services by the person proposing the construction project and, on the costs, and charges to the public of providing health services by other persons within this state.

W.Va. Code § 16-2D-6(a)(12) (2015).

Other provisions in minimum criteria section of the 2015 statute list a consideration of “[t]he relationship of the services proposed to the existing health care system of the area within this state in which the services are proposed to be provided” and “(i)n the case of a reduction or elimination of a service, including the relocation of a facility or a service, the need that the population presently served has for the service...” W.Va. Code § 16-2D-6(a)(6) and (12) (2015).

All of those provisions dealt specifically with such issues as relocation, construction and the relationship of the proposed services with other existing providers. None of those provisions are in the applicable statute now, having been specifically repealed by the legislature and eventually replaced by the present version of the minimum criteria for certificate of need reviews that does not mention construction projects, the relocations of services, or the impact on other providers. However, the same requirements set forth in W.Va. Code § 16-2D-12(b) and (b)(1) were in the old statute. *See* W.Va. Code § 16-2D-6(e)(1) (2015). Thus, the superior alternative requirement now set forth on the code was in the previous code, but the relocation of services that was specifically mentioned in the same section previously is now not mentioned, having been specifically removed by the legislature. The Authority’s ruling ignores the legislative change and,

in the ruling in this matter, includes all the prior criteria that have been removed from the statute into the remaining superior alternative provision. That was not the legislature's intent. The legislature did not repeal part of the statute and intend that it, in effect, remain in place and be enforced. However, that is what the Authority has done in this matter.

Further, the Authority's finding it must rule on impact of this project on the citizens of West Virginia is also overreach and not a part of the provisions of the existing statute. Although no longer contained in the code, the issue is specifically dealt with in the Standards, Section VIII, Accessibility. The Authority's finding on that issue has been previously discussed, but to repeat, the Authority found that the accessibility of patients in both the service area and in Upshur County were not impacted by the project, as that is defined in the Standards. The Authority ruled that the location of the new hospital and its impact on St. Joe's is not the superior alternative. That is not a finding that is authorized by the plain language of W.Va. Code § 16-2D-12(b)(1) and that finding contradicts the finding made by the Authority regarding accessibility.

The Authority has the power to interpret and apply the applicable statutes and the Standards to its decisions, but that ability is limited, as is this Court's level of deference to be given to those interpretations and applications. The Supreme Court of the United States established a legal test (the "*Chevron* Test") for determining when to defer to an administrative agency's interpretation of a statute. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782 (1984). Under the *Chevron* Test, the court first asks if Congress has spoken clearly to the precise issue at question and, if so, the test is over. If Congress has not spoken to the issue, the court must then ask if the regulations arise from a permissible construction of the statute. *Id.* That is, whether the plain language of the statute is ambiguous or silent on an issue. *Id.* at 843. If Congress's intent is clear, the analysis ends at step one. If Congress's intent is unclear, the court must move to step two. The

second step of a *Chevron* test requires courts to determine if the regulations arise from a permissible construction of the statute.

In *West Virginia Health Care Cost Review Authority v. Boone Mem. Hospital*, 196 W. Va. 326, 472 S.E.2d 411 (1996), this Court discussed the same standard for review of an agency's legislative rule and stated as follows:

"Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage." Syllabus Point 3, *Appalachian Power Co. v. State Tax Department of West Virginia*, W. Va., 466 S.E.2d 424 (1995).

In this matter, the Legislature spoke clearly when it wrote that "superior alternatives to the services..." were the issue. The statute did not provide that superior alternatives to construction or superior alternatives to the location of services were the issue. It did not provide that part of the superior alternative analysis should be an analysis of the impact on providers not even located in the service area. The word "services" is not ambiguous. Further, when the legislative changes to the statute are added to the analysis it is clear that the issues such as location and construction were specifically removed and not replaced.

Thus, the plain meaning of the statute is clear, and the Authority did not rule, as the statute requires, that there are superior alternatives to the services proposed by Stonewall. It ruled that the proposed location of those services may cause a hardship on another facility located in another area. The reason is simple. Stonewall is not expanding or changing the services it offers now when

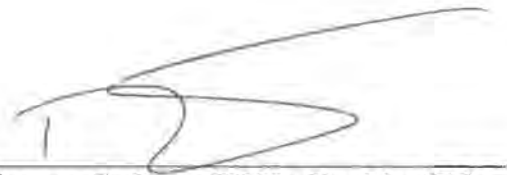
it moves to a new facility. The same services will be offered at the new facility and those services will have no impact on St. Joe's. The only impact will be caused by the location and that is not a part of the analysis under W.Va. Code § 16-2D-12(b)(1). The Authority is certainly entitled to deference in interpreting a statute or its regulations, but it cannot add requirements or provisions to a statute that is unambiguous. Just like it cannot add the requirement that Stonewall perform a market analysis to the Standards, it cannot interpret the plain meaning of 'services' to mean the location of those services. The Authority did not do so in the decision in the United Hospital Center case even though the minimum criteria statute was expanded at that time to include more than the 'services' section that is the applicable code now. *See CON File, Exhibit 20, Attachment 6, p. 68-70.* In the discussion regarding the superior alternative in that matter, the issue of the location of the new hospital was not discussed even though, as here, the location of the hospital caused an adverse impact on FGH. It did discuss it in this case, even though the statute is more restrictive. That discussion and the ruling that resulted from it were made in error. The Authority does not have the power to make the ruling on the location of the new hospital. As a result, the Decision is made in violation of constitutional and statutory provisions and is in excess of the statutory authority and jurisdiction of the Authority. It should be reversed.

### **III. CONCLUSION**

The actions of the Authority in this matter, including adding a requirement to the Standards and interpreting the plain meaning of services to include the location of the services, are in error and allowing the Authority to amend the Standards and interpret a statute that is clear and precise lead to arbitrary and capricious decisions such as was made in this matter. The Decision is made in violation of constitutional and statutory provisions; is in excess of the statutory authority and jurisdiction of the Authority; is made upon unlawful procedures; is affected by other errors of law;

is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; is arbitrary and capricious; and is characterized by abuse of and clearly unwarranted exercise of discretion. As a result, Stonewall respectfully requests the Office of Judges/ Health Care Authority reverse the Decision.

**STONEWALL JACKSON MEMORIAL  
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*By Counsel,*



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CERTIFICATE OF SERVICE

I, Thomas G. Casto, do hereby certify that I have served the foregoing *Brief Filed on Behalf of Stonewall Jackson Memorial Hospital, Company* by delivering a true and exact copy thereof this 15<sup>th</sup> day of August, 2022, to:

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