

BEFORE THE OFFICE OF JUDGES

IN RE: STONEWALL JACKSON MEMORIAL HOSPITAL, COMPANY

**CON FILE NO.: 21-7-12157-H
AP OC. NO.: 20-HC-03**

**RESPONSE BRIEF OF THE WEST VIRGINIA HEALTH CARE AUTHORITY,
TO BRIEF FILED ON BEHALF OF STONEWALL JACKSON
MEMORIAL HOSPITAL COMPANY**

Comes now the West Virginia Health Care Authority ("Authority"), by counsel, B. Allen Campbell, Senior Assistant Attorney General, pursuant to the Office of Judges' ("OOJ") Scheduling Order dated July 27, 2002, and submits the following Response Brief in the above-styled matter. The Authority responds to the Appeal Brief filed by Stonewall Jackson Memorial Hospital, Company ("Stonewall") on August 15, 2022. Appellant appeals an adverse Decision of the Authority dated June 13, 2022, which denied an application for a Certificate of Need ("CON") submitted by Stonewall to replace its current facility with a new 29-bed facility. The proposed new facility would be located 4.2 miles from Stonewall's current facility just east of the of the I-79 intersection with U.S. Route 33. While the proposed facility is only 4.2 miles from the location of the current facility, the proposed facility would be located closer than 15 (mountainous terrain) miles from another hospital, St. Joseph's Hospital of Buckhannon d/b/a St. Joseph's Hospital ("SJB"). SJB has been granted critical access hospital ("CAH") status from the United States Department of Health and Human Services, Centers for Medicare and Medicaid

Services ("CMS"). CMS allows hospital with a CAH designation to be reimbursed on a cost-basis for providing services to Medicare and Medicaid patients, as opposed to being reimbursed on a prospective payment basis. One of the requirements for a hospital to maintain its CAH designation is that the CAH hospital cannot be located closer than 15 (mountainous terrain) miles from another hospital. The Authority found the proposed project was not the superior alternative in terms of cost, efficiency, and appropriateness, and that Stonewall had failed to prove that the development of alternatives is not practicable. The Authority found that while the proposed project may be the superior alternative in terms of cost, efficiency, and appropriateness as it relates to Stonewall, the Authority also 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.

On appeal, Stonewall asserts the Authority made both factual and legal errors in finding that the proposed project is not the superior alternative. Stonewall argues the Authority wrongfully relied on W. Va. Code § 16-2D-1 as support for its findings, misapplied W. Va. Code § 16-2D-12(b)(1), and failed to take into account all evidence in making its decision. These arguments are without merit. The Authority carefully weighed the evidence and arguments presented at the hearing and correctly found the proposed project was not the superior alternative because of its projects significant impact on SJB and the West Virginians who rely on the services SJB provides. Moreover, the Authority correctly found that Stonewall did not provide any evidence that the development of alternatives is not practicable. For these reasons, and the reasons stated more fully below, the Authority respectfully requests the June 13, 2022, Decision of the Authority denying a Certificate of Need be Affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Authority received a Letter of Intent from Stonewall for the proposed project on September 3, 2021. Exhibit 1, below. On September 13, 2021, the Authority received the CON application and appropriate filing fee. Exhibit 3, below. On September 15, 2021, the Authority received replacement pages, received additional information regarding Stonewall's floor plan, and declared the application complete. Exhibits 5-8, below. The Notice of Review was issued on September 16, 2021. Exhibit 9, below. On October 14, 2021, the Authority received a request for affected party status and request for administrative hearing on behalf of SJB. Exhibit 10, below. On October 29, 2021, the Authority issued the Notice of Prehearing Conference and Administrative Hearing and Hearing Order. Exhibits 12-13, below.

A prehearing conference was held on January 18, 2022, and a full evidentiary hearing was held on January 25, 2022. The parties filed post-hearing briefs and proposed orders. The Authority issued its Decision on June 13, 2022. Stonewall filed a Request for Review with the Office of Judges ("OOJ") on July 8, 2022, and the OOJ issued a Scheduling Order on July 27, 2022. The Authority files this brief pursuant to that Scheduling Order.

Stonewall is a 70-bed acute care hospital located on U.S. Route 33 on western edge of Lewis County, West Virginia. Stonewall is a wholly owned subsidiary of Monongalia Health System, Inc. ("MHS"). MHS became the Sole Member of Stonewall, and entered into a Management Services Agreement, dated October 1, 2017, that provides for the provision of executive management of personnel, other management services, billing and collections, financial reporting and budgeting, insurance and

purchasing support. MHS has certain reserved powers including, but not limited to, the appointment of member of the board of directors, approval of capital expenditures, strategic planning, and management services.

Stonewall is located 1.7 miles west of downtown Weston on Route 119/US33 and 4.1 miles west of I-79, exit 99. Route 119/US33 is a narrow, winding, two-lane road that travels through downtown Weston, with multiple stoplights. Stonewall's current hospital is accessed via Hospital Drive, adjacent to Sharpe Hospital Road, which is the only access to that hospital. The two roads are 0.10 miles apart. Construction of Stonewall's current facility began in 1970 and concluded in 1972. Stonewall is now approximately fifty years old, outdated according to current building codes and construction standards, and is no longer well-suited to current demands of a modern hospital.

Stonewall sought a Certificate of Need to relocate and replace its current facility with a new 29-bed facility which would be located 4.2 miles from the current site and just east of the I-79 intersection with U.S. Route 33. Stonewall submitted it would continue to provide the same inpatient and outpatient services it currently provides including, but not limited to, cardiology, pulmonology, surgery, urology, family medicine, emergency medicine, pediatrics, obstetrics/gynecology, orthopedics, internal medicine, neurology, podiatry, and oncology. The capital expenditure for the proposed project is \$55,950,000.00 and would be funded through conventional financing case, and land equity.

Stonewall asserted the proposed service area for the proposed project is comprised of Lewis and Gilmer counties. The applicable review criteria for the project are contained in W. Va. State Health Plan Renovation-Replacement of Acute Care

Facilities and Services Standards approved by the Governor on June 2, 2010, and Operating Rooms Standards approved by the Governor on October 5, 1992.

Stonewall's Chief Executive Officer ("CEO"), Kevin Stalnaker, testified regarding a multitude of issues with Stonewall's existing facility. See Exhibit 3, p.36-46, below. Mr. Stalnaker believed the cost of maintaining the aging facility had become so expensive that renovation and replacement was no longer a feasible option for Stonewall.

SJB submitted that it understood the need to replace the aging structure and had no opposition to Stonewall building a new facility per se. SJB, does object, however, to Stonewall building the new facility at the proposed location. SJB contended that if Stonewall were allowed to build a new facility at the proposed location, the construction would have a catastrophic impact on SJB. Consequently, SJB contended building a new facility at the proposed site is not the superior alternative.

STANDARD OF REVIEW

The standard of review for decision of the Authority by the Office of Judges is set forth in W. Va. Code § 16-2D-16 which provides, in pertinent part, that an appeal be processed "in accordance with the provisions governing the judicial review of contested administrative cases in article five, chapter twenty-nine-a of this code." See also *Princeton Community Hospital v. State Health Planning and Development Agency*, 174 W.Va. 558, 328 S.E.2d 164 (1985). The specific standard of review is found at W. Va. Code § 29A-5-4(g), which provides

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are

- (1) In violation of the constitutional or statutory provision; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence of the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Consequently, the Office of Judges may not re-weigh the evidence but must limit the inquiry to the existence of substantial evidence to support the Authority's prior Decision. Only if the evidence does not in any reasonable way support the findings of fact or if the findings of fact do not support the conclusion of law, will the decision be found to be clearly erroneous and subject to reversal. *See West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 472 , S.E.2d 411 (1996).

ARGUMENT

The West Virginia Code provides that a CON can only be granted if the proposed health service is (1) found to be needed and (2) consistent with the state health plan, unless there are emergency circumstances that pose a threat to public health. The Standards applicable to Stonewall's proposed project are the W. Va. State Health Plan Renovation-Replacement of Acute Care Facilities and Services Standards and the Operating Rooms Standards. After reviewing Stonewall's application and considering the evidence of record, the Authority found Stonewall has shown need for the proposed project and had adequately addressed the criteria enumerated in the Standards. *See W. Va. Code 16-2D-12(a)*. However, these two factors alone are not the end of the analysis. In addition to the Authority finding that a proposed project is needed and consistent with the State Health Plan under W. Va. Code § 16-2D12(a), the Authority must make other required findings under W. Va. Code § 16-2D-12(b) and (c).

The sole issue in this appeal is the required finding found at W. Va. Code § 16-2D-12(b) and (b)(1). This code section provides

- (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 isn't practicable.

I. Stonewall's construal of the Authority's reliance on W. Va. Code § 16-2D-1 as the basis for finding the proposed project is not the superior alternative is erroneous.

Stonewall's first argument is that the Authority incorrectly relied upon W. Va. Code § 16-2D-1 as the basis to support its finding that the proposed project is not the superior alternative. This argument is without merit and can be disposed of quickly. The text of the Authority's decision provides that while the proposed project may be the superior alternative in terms of cost, efficiency, and appropriateness as it related to Stonewall, the review of the project doesn't end with the Applicant. The Authority notes it must also determine whether a proposed project is the superior alternative as it relates to an Affected Person and the citizens of the State of West Virginia. The cite at the end of the paragraph is "See W. Va. Code § 16-2D-1." This is clearly a typographical error. It is clear from the context of the paragraph that the Authority was tracking the language of W. Va. Code § 16-2D-12. This is the statute that discusses the minimum criteria for review and provides the Authority must make written findings regarding whether the proposed project is the superior alternative in terms of cost,

efficiency, and appropriateness and that the development of alternatives is not practicable.

Moreover, even if this were not a typographical error, the cite is still appropriate. W. Va. Code § 16-2D-1 is merely the statutory provision which sets forth the Legislature's intent in creating the CON statutes. This code section provides that it is the public policy of this state

- (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.

The Authority's Decision found that the proposed project is not the superior alternative in terms of cost, efficiency, and appropriateness. Moreover, the Authority found that Stonewall failed to prove that the development of alternatives is not practicable. See Decision, p. 37. The Authority goes on to state that while the proposed project may be the superior alternative in terms of cost, efficiency, and appropriateness as it relates to Stonewall, a review of a project does not begin and end with how the project affects the Applicant. The Authority notes it must also determine whether the proposed project is the superior alternative as the proposed project relates to any Affected Persons and

the citizens of the State of West Virginia. The citation to W. Va. Code § 16-2D-1 reflects the notion that the Legislature intended that the Authority's inquiry is not limited to whether a proposed project is the superior alternative for an applicant, but also must include whether the proposed project will have a significant effect on Affected Persons or a detrimental effect on the State's citizens. W. Va. Code § 16-2D-1(b)(2) provides that the general welfare and protection of the lives, health, and property of the people of the state require the Authority examine and review the type, level and quality of care, the feasibility of providing such care and other criteria as provided for in the article, including CON standards and other criteria developed by the Authority be subject to review and evaluation before they may be offered. In other words, the Authority is not limited to simply reviewing a CON application. It must also review how the proposed service would impact any Affected Persons and the citizens of the State before approving a CON application.

II. The Authority correctly found the proposal is not the superior alternative.

Stonewall notes the limited issue on appeal is the criteria found at W. Va. Code § 16-2D-12(b)(1) which provides that the Authority may not grant a CON unless, after considering the appropriateness of the use of existing facilities providing similar services, the Authority finds 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.

With regard to W. Va. Code § 16-2D-12(b)(1) Stonewall submitted that it considered four alternatives: maintaining the status quo, renovating the current facility, replace the existing operating rooms, and replacing and relocating the hospital. Stonewall

rejected the status quo as a viable alternative, due to the facility's age, outdated design, poor access, and its placement in a floodplain. Stonewall rejected renovating the facility because it would require an investment of \$10 million and would only address the critical needs of the hospital. Additionally, renovating the existing hospital while continuing operations would include the dangers and risks of a major construction project in a hospital setting. Stonewall submitted this alternative would require the project to be completed in stages and would increase the costs and extend the timeframe. Stonewall rejected replacing the two existing operating rooms as an alternative. The constraints of the current facility would be an impediment to converting the existing operating rooms into modern state-of-the-art operating rooms. Stonewall also believes replacing the operating rooms in a new facility would be more efficient, cost effective, and will provide for improved clinical outcomes.

Stonewall asserts the only remaining viable alternative is to replace and relocate the hospital. According to Stonewall, replacing the facility at the chosen location is the superior alternative in terms of cost, efficiency, and appropriateness. The proposed location is close to existing infrastructure and public road access, which makes the project more cost effective for Stonewall. Additionally, Stonewall already owns the parcels of land at the proposed site. If the Authority were only required to review the project in terms of what might be the superior alternative for Stonewall, the proposed project would be the superior alternative. However, the scope of the Authority's review is greater than that.

The CON statutes provide a mechanism for Affected Persons to challenge the Con application. See W. Va. Code § 16-2D-13(g). An "Affected Person" as it is identified in the instant case is "a health care facility located within this state which provide[s] services

similar to the services of the facility under review and which will be significantly affected by the proposed project.” See W. Va. Code § 16-2D-2(1)(E).

SJB requested and was granted Affected Person status in this application. SJB submitted evidence that it was granted a CAH designation from CMS in 2014. The CAH designation enables CAH to be reimbursed on a cost-basis for providing services to Medicare and Medicaid patients, rather than on a prospective payment basis (“PPS”). One of the requirements for CH designation is that the hospital cannot be more than 15 (mountainous terrain) miles from another hospital. Stonewall's proposed location for the replacement facility is only twelve miles from SJB. It was undisputed at the hearing below that if Stonewall was allowed to proceed with the project, SJB would lose its CAH designation.

SJB presented evidence that before it operated as a CAH hospital in 2014, SJB operated as PPS hospital. From 2007 through 2013 SJB struggled financially and experienced a negative operating margin for five out of those seven years. SJB presented the testimony of a Keith Seeloff, Partner at Dixon Hughes Goodman LLP, who testified as a healthcare financial expert. Mr. Seeloff testified that SJB was on the brink of bankruptcy in 2013 with only 21 days cash on hand. Once SJB received its CAH designation and began billing on a cost basis, SJB became financially viable. SJB contended that if Stonewall was allowed to build its facility at the proposed location, it would lose its CAH designation, have to return to billing on a PPS basis. SJB asserted this would have a catastrophic effect on the hospital.

Stonewall argued that since obtaining its CAH designation, SJB had become part of the West Virginia United Health System (“WVUHS”), and was now directly owned by

United Hospital Center ("UHC"). Stonewall argued this would give SJB access to capital and management that was previously unavailable to it in 2013, and noted that two other hospitals in that system, Camden Clark Medical Center and Reynolds Memorial Hospital have remained open despite losses over the last four years. However, despite its assertions, Stonewall produced no evidence or testimony that either UHC or WVUHS had agreed to provide SJB with any financial assistance should it lose its CAH designation. These assertions by Stonewall were merely speculation. Therefore, the proposed project at its proposed location is not the superior alternative because it would significantly impact SJB, a financially stable, existing CAH hospital, by causing it to lose its CAH designation and forcing it to return to a reimbursement system which in the past almost lead to its bankruptcy.

The second part of W. Va. Code § 16-2D-12(b)(1) requires the Authority to determine whether an applicant has demonstrated that "the development of alternatives is not practicable." The Authority found Stonewall had failed to show that the development of alternatives is not practicable. Stonewall asserts Mr. Stalnaker discussed multiple other sites SJH claimed were more superior to the proposed site and specifically noted deficiencies with each proposed site. However, it is incumbent on the applicant to identify to the Authority what alternatives it considered and why it determined those alternatives were not practicable. Stonewall failed to meet this burden. While Stonewall submitted substantial evidence detailing why replacing the physical structure itself was the most practicable alternative, it did not present an analysis that showed why alternative sites which would not significantly affect an already existing CAH would not be practicable. On direct exam Mr. Stalnaker presented testimony on the history of how Stonewall had

acquired the two parcels on which it plans to relocate the hospital as well as testimony that it would be more cost efficient for Stonewall to build on the parcels it already owns. However, it was undisputed at the hearing that building the new facility on the proposed site would cause SJB to lose its CAH designation significantly affecting SJB. Consequently, Stonewall had the burden to show why building its proposed facility on an alternative site was "not practicable." Mr. Stalnaker provided anecdotal evidence that some sites suggested by SJB would not be appropriate either because the property was too steep, might be in a flood plain, did not have adequate infrastructure, or was not for sale. However, Stonewall did no market analysis of alternative sites, provided no cost analysis of how much the additional cost of developing an alternative site would increase the cost of the project, or provide any evidence it attempted to investigate any site at all other than the proposed location.

SJB provided evidence and testimony from Kim Licciardi, a licensed West Virginia commercial realtor at Black Diamond Realty, who conducted a market survey of potentially suitable locations for the project that would not affect SJB's CAH status. Although Mr. Stalnaker discounted many of these properties in his direct exam, Stonewall failed to show that it had conducted any analysis at other locations other than the proposed location would not be practicable.

Consequently, contrary to Stonewall's assertions, the Authority did not add an additional requirement for Stonewall. The Authority simply required what the statute proscribes – that the Applicant show the proposed project is the superior alternative in terms of cost, efficiency, and appropriateness and that it show that the development of alternatives is not practicable.

Stonewall asserts the ruling in the instant matter is "diametrically opposed" to the one it made in *In re: United Hospital Center/West Virginia United Health Systems, Inc.* CON File # 02-6-7476-H (Oct. 24, 2003). Although this 20 year old case has many dissimilarities to the current case, perhaps the most glaring one is the amount of evidence submitted regarding site selection process. The decision indicates that UHC and WVUHS presented 264 pages of documents evidencing UHC's consideration of the possible expansion and renovation of its existing facility including UHC's retaining two architectural firms and a construction manager to assist it in its evaluation of this alternative. UHC and WVUHS also presented 258 pages of documents evidencing the process and criteria that UHC used to select the site for UHC and WVUHS' proposed replacement hospital and UHC's retaining of site selection experts, architects, facility planners, construction managers, engineers, environmental experts, geotechnical experts, aeronautics experts, acoustics experts, appraisers, and attorneys to assist it in its selection site. The UHC President also testified at extraordinary length and in extraordinary detail regarding all of the alternatives that UNC and WVUH considered. See Exhibit 20, attachment 6, p.69, below.

None of that occurred in the instant case. Stonewall presented none of the experts utilized by UHC in the earlier decision. Stonewall only presented its CEO who gave anecdotal testimony of what sites might be appropriate based on his being from Lewis County. Additionally, the West Virginia Code and the applicable Standards have been revised since this decision was issued.

III. The Authority's review was balanced and took all evidence into account.

The Authority reviewed the evidence before it equally and provided a fair and balanced review of the evidence in reaching its decision. Stonewall asserts that the review of the suitability of the proposed site to locate and build a hospital versus the suitability of other sites proposed by St. Joe's was not balanced. This contention is without merit. The Authority recounted in the decision the history of how Stonewall acquired the parcels on which it proposed to build its new facility, noted that Stonewall preferred this location because it was near the Route 33/I-79 intersection and because the land was more economically developed than other locations in the county. The Authority recognized that Stonewall bought one parcel of land in the late 1990s and the second parcel in 2017 – after SJB has been designated a CAH facility in 2014. Consequently, when buying this second parcel Stonewall had knowledge that if it chose to develop a new hospital on this site after 2014, it would affect SJB's CAH designation. The Authority also recognized that the new proposed facility would only be 4.2 miles away from the existing facility, but that this relocation would place the new facility within 15 miles of SJB.

On appeal, Stonewall suggests that the Authority unfairly balanced the review of alternative sites in favor of the sites suggested by SJB. This was not the case. The Authority recognized that Mr. Stalnaker disagreed with the suitability of the sites suggested by SJB. However, Stonewall presented no evidence, other than the anecdotal testimony of Mr. Stalnaker, of experts who had conducted an analysis of whether alternative sites exist for the proposed project that would not significantly affect SJB's CAH status. The Authority made no determination that the sites suggested were indeed appropriate sites for the relocation. The Authority correctly recognized that Stonewall had

the burden of proof to show that the development of alternatives is not practicable, and that Stonewall had failed to meet this burden. Unlike in the UHC case Stonewall noted, Stonewall provided no expert testimony or evidence from experts, architects, facility planners, construction managers, engineers, environmental experts, geotechnical experts, aeronautics experts, acoustics experts, or appraisers suggesting that practicable alternatives do not exist. While Stonewall presented Mr. Stalknaker testified regarding the suitability of the locations suggested by SJB, Stonewall presented no evidence that it had conducted its own analysis to determine that the proposed site was the most practicable.

SJB provided a financial expert who testified at length regarding the effect loss of CAH status would have on SJB. Stonewall asserts on appeal that a balanced review would have compared this economic loss with the increased cost of locating the renovation on an alternative site. Unfortunately, Stonewall did not provide any evidence assessing the increased cost other than Mr. Stalnaker's anecdotal testimony.

Additionally, Stonewall asserted below that SJB is now a part of WVUHS and that any financial losses could be absorbed by WVUHS or could be mitigated through SJB's management relationship with UHC and WVUHS. Again, Stonewall presented no evidence that WVUHS would be willing to absorb financial losses from SJB. No witnesses from WVUHS were called and there was no testimony that WVUHS was willing to take on any losses incurred by SJB. Finally, Stonewall asserted that SJB could just relocate to maintain its CAH status. Apparently Stonewall's argument here is the Authority should force an existing CAH hospital to abandon its facility, incur the cost of applying for CON review, relocating and building its own replacement hospital all because Stonewall wants

to relocate its facility with 15 miles of the existing facility. Such a finding would be contrary to the Legislative purpose of the CON statutes found in W. Va. Code § 16-2D-1.

IV. The Authority correctly applied W. Va. Code § 16-2D-12(b)(1).

The Authority correctly applied W. Va. Code § 16-2D-12(b)(1). Stonewall asserts the Authority's decision is not consistent with the statutory language of W. Va. Code § 16-2D-12(b) and (b)(1). This assertion is incorrect. Stonewall's first argument is that the Decision is not consistent with the language of the statute because the Authority found that in determining the superior alternative in terms of cost, efficiency, and appropriateness, a review of the project does not end with an analysis of the application, but must also include whether it is the superior alternative as it related to an Affected Person and citizens of the State of West Virginia. This language is consistent with the statute. Stonewall correctly asserts the Authority's statutory power is to determine if there are superior alternatives to the proposed project. The CON statutes require the Authority to consider the impact of applications not only on the Applicant, but also of any affected persons who might be significantly affected and to provide for the general welfare of the citizens of the State of West Virginia.

Although the statute does not specifically mention the location of the services or the impact on other facilities, those concepts are encompassed in determining what is the "superior alternative." The CON statutes provide that when an application for CON review is filed an "Affected Person" may ask for an administrative hearing on the application. W. Va. Code § 16-2D-13(g). An affected person, in the instant case, is a health care facility who provides similar services and is significantly affected by the proposed project. W. Va. Code § 16-2D-2(1)(E). As evidenced in this case, one of the things that can

significantly affect an Affected Person is the location of the proposed services. In determining what is the superior alternative, the Authority cannot ignore the location of the proposed project when the location has a significant impact on the Affected Person. To hold such a narrow view of W. Va. Code § 16-2D-12(b) and (b)(1) would be contrary to the Legislative purpose in creating the CON review process.

Stonewall's assertion that the Legislature somehow removed the issue of location from the Authority's purview is without merit. Although code sections dealing with relocation were removed in the Legislature's rewrite of the statute in 2016, nothing in the rewrite of the statute prevents the Authority from considering location in determining the superior alternative. In fact, as this case demonstrates, such a narrow view is untenable and would limit the Authority's ability to determine whether an Affected Person is significantly affected or whether a superior alternative exists for the project. The proposed project here is the renovation and relocation of a physical brick and mortar building. To hold that the location of this brick and mortar building is not a part of superior alternative analysis is an unjustifiable narrow interpretation of the statute that directly contradicts the Legislative intent of the CON statutes.

CONCLUSION

The Authority weighed the substantial evidence of record and correctly found that the proposed project submitted by Stonewall was not the superior alternative. Stonewall's proposed renovation and relocation project would have a significantly detrimental effect on SJB, causing it to lose its CAH status. Losing this designation would have a catastrophic financial impact on SJB. The Authority correctly applied W. Va. Code § 16-2D-12(b) and (b)(1) in determining that the proposed project was not the

superior alternative, and that Stonewall did not prove the development of alternatives is not practicable. Stonewall presented no evidence that it had undertaken any studies to determine if another location was available for its proposed new hospital that would not cause SJB to lose its CAH status.

WHEREFORE, the West Virginia Health Care Authority respectfully requests its Decision in the above-styled matter be AFFIRMED.

Respectfully submitted,

WEST VIRGINIA HEALTH CARE AUTHORITY

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BEFORE THE HEALTH CARE AUTHORITY/OFFICE OF JUDGES

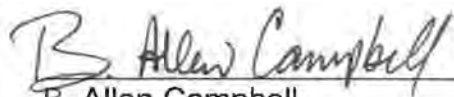
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 CON FILE NO.: 21-7-12157-H
 AP DOC NO.: 22-HC-03**

CERTIFICATE OF SERVICE

I, B. Allen Campbell, Senior Assistant Attorney General, counsel for West Virginia Health Care Authority, do certify that on the 15th day of September, 2022, the foregoing **"Response Brief of the West Virginia Health Care Authority, to Brief Filed on Behalf of Stonewall Jackson Memorial Hospital Company"** was filed with the Office of Judges, via Hand Delivery, and served upon all parties by delivering true copies thereof, via First Class Mail and electronic mail, as follows:

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