BEFORE THE OFFICE OF JUDGES

IN RE: ROANE GENERAL HOSPITAL

CON File No. 21-5-12124-P
APPEAL DOCKET No. 22-HC-02

RESPONSE BRIEF
ON BEHALF OF APPLICANT/APPELLEE
ROANE GENERAL HOSPITAL

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I. INTRODUCTION

This Response Brief is submitted by Hospital Development Co. d/b/a Roane General Hospital ("RGH") in support of its Certificate of Need ("CON") application in the above-captioned matter (the "Application" or the "Project"), and in response to Minnie Hamilton Health Center, Inc. d/b/a Minnie Hamilton Health System's ("MHHC's") Brief submitted to the Office of Judges ("OOJ")[1] on or about June 24, 2022, which opposes the West Virginia Health Care Authority's (the "Authority's") decision to approve RGH's Application (hereafter the "Decision").

MHHC's opposition to the Decision could be essentially summarized as follows: the Decision is "fundamentally flawed" because it is neither sufficiently "reasoned" nor "articulate." *See* MHHC Brief at pp. 6-10. This absurd argument is nullified by a closer inspection of the Decision. In fact, the 54-page Decision methodically and thoroughly details each of the applicable standards and legal criteria, discusses the arguments from RGH and MHHC (as applicable) within the context of each standard and legal criterion, and concludes its findings with a reasoned explanation – replete with specific citations to the evidentiary record. The Authority's Decision is therefore fully drafted in accordance with the relevant standard set forth by the West Virginia Administrative Procedures Act (the "WV APA"). The only thing that is "fundamentally flawed" is MHHC's blatant attempt to snip out disparate sentences from the Decision's multiple

[1] When the Decision was issued, the OOJ was the statutorily-designated review agency for CON appeals pursuant to W. Va. Code § 16-2D-16. However, on or before September 30, 2022, should the OOJ not issue a final decision or otherwise dispose of any appeal, the appeal will be transferred to the Intermediate Court of Appeals of West Virginia. *See* W. Va. Code § 16-2D-16A. The parties to this appeal have been directed by the OOJ and the Intermediate Court of Appeals of West Virginia to submit briefs to the OOJ, and have been informed that the OOJ will transfer jurisdiction of this matter to the Intermediate Court of Appeals of West Virginia on or before September 30, 2022.

pages of context and analysis to artificially cast doubt on its sufficiency.

Moreover, within its overarching argument regarding the sufficiency of the Decision, MHHC embeds a scattershot of stale and meritless factual arguments that have already been considered and rejected by the Authority. This appeal does not present the opportunity for MHHC to get a second bite at the apple to re-litigate its previously rejected, baseless factual contentions. The Authority's factual determinations in the Decision are well supported by the record, and since the Authority is the state agency armed with the health planning expertise to administer the CON program, such factual determinations must be accorded with substantial deference on appeal.

Ultimately, the Authority's approval of RGH's Project – a Project which encompasses the provision of less than 0.7[2] full time equivalents (FTE) of physician services to an exceedingly rural population, a rural population which was forced by the status quo to travel a minimum of 20 to 40 minutes **each way** for care – was proper and was made in accordance with all CON laws, regulations, and standards. (Ex. 25, at p. 157); *see* (Ex. 21, Attachment M, at RGH000589); *see* (Ex. 3, Section E, at Replacement Pages 3-5); *see* Decision at pp. 50-51.

II. PROCEDURAL AND FACTUAL BACKGROUND

The West Virginia CON program exists by virtue of W. Va. Code § 16-2D-1, *et seq.*, and jurisdiction over this program is vested in the Authority. *See* W. Va. Code § 16-2D-3(a)(1). The CON program requires that certain "proposed health service[s]," as detailed by W.

[2] This figure is based on one of the multiple calculations contained in the Application to determine the projected utilization of the Project. *See* (Ex. 3, at Section E).

Va. Code § 16-2D-8, must be reviewed and approved by the Authority prior to the offering or development of the service.

In CON File No. 21-5-12124-P – the CON Application that is subject to this appeal – RGH proposes the relocation of an existing Rural Health Clinic ("RHC") from its current location on RGH's hospital campus to an off-campus site in Arnoldsburg, Calhoun County, West Virginia (hereafter the "Project"). (Ex. 3[3], at Section C, Page 1). The Project seeks to improve the ability of Arnoldsburg, Chloe, and Orma, West Virginia (hereafter collectively the "Service Area") residents to access primary care services, as well as cardiology and general surgery services (hereafter sometimes collectively referred to as the "Specialty Care" services). *Id.*; *see also* (Ex. 3 at Section E, Page 1). The Project is a reviewable "proposed health service" because it constitutes the establishment of an "ambulatory care center," pursuant to W. Va. Code § 16-2D-8(b)(8). *See* W. Va. Code § 16-2D-2(2); *see also* W. Va. Code § 16-2D-8(a)(1); *see also* W. Va. Code § 16-2D-2(33).

The Applicant, RGH, operates a 25-bed critical access hospital ("CAH") and a 35-bed skilled nursing facility in Spencer, Roane County, West Virginia. (Ex. 3, Section C, Page 1). Among other services, RGH's hospital facility provides emergency department services, laboratory services, imaging services, cardiopulmonary services, and surgical services. (Ex. 23[4],

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[3] RGH submitted a set of replacement pages to its application in CON File No. 21-5-12124-P (herein defined as the "Application"). These replacement pages are listed in the Authority's Exhibit Reference as Ex. 12. All references herein to the Application shall mean the Application, as amended by the replacement pages included in Ex. 12, unless otherwise specifically stated. Likewise, all citations herein to Ex. 3 (the Application) shall also encompass Ex. 12 (the replacement pages to the Application), unless otherwise specifically stated.

[4] MHHC submitted an amended Witness and Exhibit List (Ex. 23), which added certain pages to its existing Witness and Exhibit List (Ex. 22). All citations herein to Ex. 23 shall therefore also encompass Ex. 22, unless otherwise

Ex. A, at p. RGH-9). In addition to inpatient and outpatient hospital services, RGH owns and operates four RHCs – two located on RGH's hospital campus, and two located off-campus. (Ex. 3, Section C, Page 1). RGH's RHCs offer primary care services, and also offer certain specialty care services, including but not limited to the Specialty Care services proposed by the Project. (Ex. 23, Ex. A, at p. RGH-9); (Ex. 3, Section C, Page 1).

On July 12, 2021, RGH filed a letter of intent with the Authority for the Project. (Ex. 1). RGH's Application was subsequently filed on July 22, 2021. (Ex. 3). The capital expenditure associated with the Project is estimated to be approximately $439,720. (Ex. 3, at Section C, Page 1).

The Application was reviewed by the Authority and was determined to be complete on July 30, 2021. (Ex. 5). MHHC requested affected person status in a letter dated August 26, 2021, and an administrative hearing was requested upon the Application by MHHC in this same letter. (Ex. 7). Pursuant to MHHC's request for a hearing, a Hearing Order was entered by the Authority on September 14, 2021, which set the date for a public hearing in the matter and established other deadlines with respect to the CON review of the Application. (Ex. 10).

Pursuant to this Hearing Order, RGH filed a set of replacement pages to the Application on October 6, 2021. (Ex. 12). MHHC thereafter filed discovery requests upon RGH on October 20, 2021. (Ex. 14). Also on October 20, 2021, RGH filed discovery requests upon MHHC. (Ex. 13). On November 17, 2021, RGH and MHHC submitted their respective answers to the aforementioned discovery requests. (Exs. 15, 16). On December 1, 2021, MHHC filed

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specifically stated.

supplemental discovery responses, as well as a Motion to Compel upon RGH. (Exs. 17, 18). RGH filed a Response to MHHC's Motion to Compel on December 6, 2021. (Ex. 19). RGH submitted supplemental discovery responses to MHHC on December 7, 2021. (Ex. 20).

Pursuant to the Hearing Order, the prehearing conference was convened on December 7, 2021, at the Authority's offices. *See generally* (Ex. 24). At the prehearing conference, RGH and MHHC argued their respective positions regarding MHHC's Motion to Compel, and the Hearing Examiner denied the Motion to Compel in part and granted it in part.[5] RGH and MHHC also exchanged their respective lists of witnesses and exhibits at the prehearing conference. (Exs. 21, 22). On December 9, 2021, MHHC filed an Amended Witness and Exhibit List to include RGH's supplemental discovery responses. (Ex. 23).

Thereafter, the public hearing was conducted on December 14, 2021 at the Authority's offices. *See generally* (Ex. 25). Both RGH and MHHC were present and afforded an opportunity to offer testimony, to introduce documentary evidence, and to otherwise be heard. The Authority issued its Decision on April 29, 2022 granting CON approval for RGH's Project.

On May 25, 2022, MHHC filed a Request for Review with the OOJ. Subsequently, the OOJ established a Scheduling Order allowing the parties to file briefs. MHHC's initial Brief was filed with the OOJ on or about June 24, 2022.[6] This Response Brief on behalf of RGH is now filed pursuant to the Scheduling Order.

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[5] Specifically, the Hearing Examiner denied the Motion to Compel to the extent it requested documents after Raymona A. Kinneberg began working under Jackson Kelly PLLC's overall supervision and direction to provide Certificate of Need preparation, health care planning consultation, and expert witness services with respect to the Application, which occurred on April 29, 2021.

[6] While counsel for MHHC identified *via* email on June 26, 2022 that its initial Brief was mistakenly delivered to

II. ISSUES PRESENTED

The issues presented for review in this appeal are the following:

A. Whether the Authority's Decision was drafted in accordance with the relevant standard set forth by the WV APA and was supported by substantial evidence?

B. Whether the Authority's Decision comports with the legislative purposes of the CON law, as set forth by W. Va. Code 16-2D-1 §§ (1)-(2)?

III. STANDARD OF REVIEW

A. The standard of review with respect to the Authority's factual and legal findings.

The standard of review for an administrative appeal taken under the CON program is set forth at W. Va. Code § 29A-5-4. *See* W. Va. Code § 16-2D-16(b); *St. Mary's Hospital v. SHPDA*, 364 S.E.2d 805 (W. Va. 1987). W. Va. Code § 29A-5-4 provides in relevant part the following:

> (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:
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> (1) In violation of constitutional or statutory provisions; or
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> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon lawful procedures; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

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the Authority instead of the OOJ, upon information and belief, the OOJ received a copy of the initial Brief on or about June 24, 2022.

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g).

With respect to the appellate review of a fact-finding body's factual determinations, our Supreme Court of Appeals has stated in relevant part that:

> . . . [a reviewing court] must uphold any [of a fact-finding body's] factual findings that are supported by substantial evidence, and [the reviewing court] owe[s] substantial deference to inferences drawn from these facts.

Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399, 406 (W. Va. 1995); *see also Cahill v. Mercer County Bd. of Educ.*, 539 S.E.2d 437, 440 (W. Va. 2000) (stating that "a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge . . .").

While the general standard of review of an administrative appeal under W. Va. Code § 29A-5-4(g) is considered *de novo*, it has also been held that this review is limited to a determination of whether the agency's decision was based on a consideration of relevant factors, and whether there has been a clear error of judgment. *Princeton Community Hospital v. SHPDA*, 328 S.E.2d 164 (W. Va. 1985). In discussing the deference to be accorded to a predecessor agency of the Authority under the CON program,[7] our Supreme Court of Appeals has stated that a determination of matters within that agency's area of expertise is entitled to substantial weight. *Princeton*, 328 S.E.2d at 171. Citing the case of *Ethyl Corporation v. EPA*, 541 F.2d 1 (D.C. Cir. 1979), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 394 (1976), the Court further stated:

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[7] The CON program was formerly administered by the State Health Planning and Development Agency ("SHPDA") until 1983. In 1983, the SHPDA was replaced by the HCCRA until 1997, at which time the agency assumed its current name.

> But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. The immersion in the evidence is designed solely to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors.

Princeton, 328 S.E.2d at 171. Our Supreme Court of Appeals has also emphasized that "when there is more than one reasonable interpretation, the courts ordinarily should follow [the interpretation] of the administrative board." *Martin*, 465 S.E.2d 399 at 415.

More recently, our Supreme Court of Appeals has clarified that judicial review of an agency's decision-making authority involves two (2) separate but interrelated questions, the second of which furnishes an occasion for agency deference. A reviewing court first must ask whether the Legislature has directly spoken to the precise question at issue. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); Syl. Pt. 3, *Appalachian Power Co. v. State Tax Department*, 466 S.E.2d 424 (W. Va. 1995); *W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 472 S.E.2d 411, 421-422 (W. Va. 1996) *Amedisys W. Virginia, LLC v. Pers. Touch Home Care of W.Va., Inc.*, 859 S.E.2d 341, 351 (W. Va. 2021). If the intention of the Legislature is clear, that is the end of the matter, and the agency's position must be upheld if it conforms to the Legislature's expressed intent. No deference is due an agency's actions at this stage.

However, if legislative intent is not clear, a reviewing court may not simply impose its own construction in its review of a statute, legislative rule, or other rule carrying the force of

law. *Chevron*, 467 U.S. at 842-43; Syl. Pt. 3, *Appalachian Power Co. v. State Tax Department*, 466 S.E.2d 424 (W. Va. 1995); *Boone*, 472 S.E.2d at 421-22; *W. Va. Consol. Pub. Ret. Bd. v. Wood*, 757 S.E.2d 752, 758 n.9 (W. Va. 2014), *citing United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Amedisys*, 859 S.E.2d at 351. Rather, if a statute, legislative rule, or rule carrying the force of law is silent or ambiguous with respect to the specific issue, the question for the reviewing court is whether the agency's answer is based upon a permissible construction of the aforementioned legal authority. *Id.* If it is, then the interpretation of the statute, legislative rule, or rule carrying the force of law by the agency charged with its administration is given great deference and weight. *Id.*

B. The standard of review for determining whether the Authority's Decision is sufficiently drafted in accordance with the WV APA.

Orders and decisions drafted by administrative agencies must accord to the standard set forth in the WV APA. Specifically, pursuant to W. Va. Code § 29A-5-3:

> Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law . . . Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings . . .

The West Virginia Supreme Court of Appeals construes W. Va. Code § 29A-5-3 to require that an agency's decision must:

> [enable a reviewing court to] appl[y] the appropriate standard of review, namely, did the evidence in any reasonable way support the findings of fact, and further did the findings of fact support the [agency's] conclusions of law.

Citizens Bank of Weirton v. W. Virginia Bd. of Banking & Fin. Institutions, 233 S.E.2d 719, 728 (W. Va. 1977). Moreover, regarding the specific detail required of an agency's findings, our Supreme Court of Appeals has determined that:

> [a]lthough the agency does not need to extensively discuss each proposed finding, such rulings must be sufficiently clear to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed.

Muscatell v. Cline, 474 S.E.2d 518, 528 (W. Va. 1996); *see also St. Mary's Hosp. v. State Health Planning & Dev. Agency*, 364 S.E.2d 805, 809 (W. Va. 1987).

The OOJ's predecessor, the State Tax Department, has long applied a similar interpretation of *Citizens Bank* and W. Va. Code § 29A-5-3 in its review of CON decisions, dating as far back as 1989. *See, e.g., In re: Thomas Memorial Hospital Radiation Therapy Services*, 1989 WL 433159, at *13.

Specifically, in the decision of *In re: Thomas Memorial Hospital Radiation Therapy Services*, CON File No. 88-3-3006-X/E, Docket No. 88-HC-017 (May 16, 1989), the State Tax Department made the following response to an argument that a Health Care Cost Review Authority (HCCRA)[8] decision did not meet the *Citizens Bank* standard:

> A review of the HCCRA decision does show that it presents an evaluation of conflicting evidence. The HCCRA decision evaluated pertinent testimony, statistical data, and expert opinions in an organized fashion. Thereafter, it articulated a conclusion based upon the evaluation.
>
> While the Cancer Center may disagree with HCCRA's conclusions, this review agency has no trouble in understanding HCCRA's reasons for its decision. Accordingly, the HCCRA decision

[8] *See infra*, n. 7. The HCCRA was the predecessor to the Authority.

conforms to the requirements of W. Va. Code § 29A–5–3.

In re: Thomas Memorial Hospital Radiation Therapy Services, 1989 WL 433159, at *13.

Utilizing a similar approach, and citing our Supreme Court of Appeals' decision in *Muscatell* (quoted *supra*), the OOJ recently determined that an Authority decision is drafted in accordance with the WV APA if:

> This body [is] able to ascertain that the critical issues before the agency were considered and weighed and not overlooked or concealed.

In re: West Virginia University Hospitals, Inc., CON File No 18-1/2/3/4/5/6/7/8/9/10-11411-P, Ap. Doc. No. 19-HC-02, p. 8 (2019) (citing *Muscatell v. Cline*, 474 S.E.2d 518, 528 (W. Va. 1996) (attached as **Exhibit A**)).

IV. ARGUMENT

1. The Decision is sufficiently drafted in accordance with the WV APA, and supported by substantial evidence.

MHHC's central argument is that the Decision is "fundamentally flawed" because it is purportedly not "reasoned" nor "articulate." MHHC Brief at pp. 6-10. Specifically, MHHC asserts that the Decision "summarily declares throughout the Decision that its findings are based on 'careful review and consideration of the facts, evidence, and arguments of both parties'" without sufficient explanation. *See* MHHC Brief at p. 6. Based on this, MHHC concludes that the Authority "arrogate[d] its responsibility to examine and weigh the underlying evidentiary facts which led the agency to its conclusions . . ." *Id.*

MHHC's argument is as confounding as it is meritless. While MHHC would have

this Court believe that the Decision's findings were exclusively supported by a sentence-long generic declaration, a closer reading of the 54-page Decision overwhelmingly refutes this absurd allegation. As further detailed below – throughout its 54 pages – the Decision appropriately discusses each statutory criterion and State Health Plan Standard for Ambulatory Care Centers ("SHP Standard") criterion as it relates to the Application, the specific arguments of the parties, and the evidence the Authority considered, all in a methodical and comprehensive manner. The Decision is undoubtedly drafted in accordance with the standard set forth by the WV APA, and is well-supported by the record.

A. The Decision's finding regarding the Application's Service Area population/utilization calculation was sufficiently drafted in accordance with the WV APA, and was supported by substantial evidence.

MHHC devotes a significant portion of its Brief arguing that the Decision's finding with respect to the Application's Service Area population and expected utilization was inadequately drafted. *See* MHHC Brief at pp. 8-10. MHHC particularly makes much ado about the Decision's finding that the Application's Service Area zip code population calculation was proper. *See* MHHC Brief at p. 8. Specifically, MHHC argues that the Decision:

> . . . simply states that "the existence/identity of the zip code reference, as well as the rationale for its use to interpolate the [Authority] provided population data, was fully established in the record for consideration" without any indication of where such information is "fully established" or, more importantly, without any articulate discussion of how these evidentiary facts led the agency to its conclusion.

Id. (quoting pp. 18-19 of the Decision).

Yet, MHHC conveniently fails to include the Authority's extensive analysis and

discussion on pages 17-19 of the Decision, which directly precedes the partial-sentence quote that MHHC snipped out in its above argument.[9] In fact, the Authority's full explanation regarding the zip code calculation is as follows, with MHHC's cherry-picked, partial-sentence quote bolded and underlined below:

> After careful review and consideration of the facts, evidence, and arguments of both parties, the Authority determines that RGH reasonably and rationally calculated the service area population and properly established the expected utilization for the health services proposed by the application in accordance with the Ambulatory Care Centers Standards and the CON law.
>
> The Authority finds that RGH reasonably and properly calculated the then-current and five-year projected population of the service area (2021 and 2026) based on the most recent population data which was publicly made available by the Authority and other readily obtainable, publicly available information (Ex. 3, Section E, p. 1 and Ex. 25, pp. 22-23, 69-70, 102) Aside from summarily proclaiming that it is of questionable accuracy and is unverified, MHHC failed to present any testimony or offer any evidence of record to refute the credibility of the zip code reference utilized by RGH to calculate the zip code population breakdown.
>
> The Authority rejects MHHC's inference that the application's population analysis is flawed because the zip code reference was not specifically identified as a source in the application. The zip code reference was utilized to break down the provided population data by zip code, since zip code-specific population percentages are not provided. (Ex. 25, pp. 22-23, 69, 71, 72) Thus, **the existence/identity of zip code reference, as well as the rationale for its use to interpolate the Authority provided population data, was fully established in the record for consideration.**

Decision at pp. 18-19. Despite MHHC's best efforts to bury its head in the sand, the Decision

[9] MHHC's Brief even fails to properly denote that the sentence it snips out of the decision is not even the full sentence utilized by the Authority, critically omitting the word "thus," and therefore ignoring that the sentence was a conclusion of the Authority's preceding analysis. *Compare* MHHC Brief at p. 8. *with*, Decision at pp. 18-19.

clearly details the rationale behind the Authority's finding as to the Service Area zip code population calculation, and in fact expressly considered the same meritless argument that MHHC now rehashes in its Brief, but "reject[ed]" it. *Id.*; *see also* Decision at p. 17. And – contrary to MHHC's criticism – the Decision not only concretely explains why it rejected MHHC's zip code argument, but also **supports** its rationale with explicit citations to the record, namely to relevant sworn testimony from RGH's expert health planner, Raymona A. Kinneberg. *See* Decision at pp. 18-19, (*citing* Ex. 25 at pp. 22-23, 69, 71, 72). In fact, the Authority's findings on pages 18-19 of the Decision are preceded by **almost a full page** of the Authority's analysis of the parties' arguments (Decision at pp. 16-17), and is followed by **nearly two full pages** of the Authority's discussion of its rationale and the evidence it relied upon (Decision at pp. 18-20).

A deeper dive in the evidentiary record confirms that the Authority's finding regarding the Application's Service Area zip code population calculation is supported by substantial evidence. MHHC's rejected zip code argument specifically takes issue with Ms. Kinneberg's use of a readily obtainable, publicly available website to conduct a breakdown of the population percent of each zip code within Calhoun County. *See* MHHC Brief at p. 8. However, as the Authority correctly details in its Decision:

> [a]side from summarily proclaiming that it is of questionable accuracy and is unverified, MHHC failed to present any testimony or offer any evidence of record to refute the credibility of the zip code reference utilized by RGH to calculate the zip code population breakdown.

Decision at p. 18. In contrast, Ms. Kinneberg testified that – based on her background, experience, and expertise as a health planner – her zip code population calculation reflects a reasonable

approach. *See* (Ex. 25, at pp. 23, 102). In fact, in another primary-care CON decision (approved by the Authority on February 14, 2022), the applicant used **the exact same zip code reference in the Application** to formulate a zip code-specific service area population. *In re: WMC Physician Practices, LLC*, CON File No. 21-11-12322-P (Decision dated February 14, 2022). The Authority's explicit consideration and rejection of MHHC's zip code argument was therefore supported by substantial evidence.

MHHC also rehashes the stale argument that the Application's population analysis is flawed because the zip code reference was not specifically identified as a source in the Application – again an argument considered and rejected by the Authority. *See* Decision at p. 18; MHHC Brief at p. 8. However, the instructions in the Authority's form application[10] state in relevant part that: "data provided by the Authority shall be used; in addition, the applicant may propose to use other data – in which event, the source of the data must be stated as well as the rationale for using it." (Ex. 3, at Section E, Page 1).

RGH's Application did in fact use Authority-provided data as the basis of its Service Area population calculation. *Id.*; *see also* (Ex. 25, at pp. 22-23). The zip code reference was only utilized to break down the Authority-provided population data by zip code, since zip code-specific population percentages are not provided. *See* (Ex. 25 at pp. 22-23, 69-70, 102). Additionally, the zip code reference was specifically identified as a source in RGH's hearing exhibits, and Ms. Kinneberg identified the zip code reference (and also identified the rationale for

[10] To the extent MHHC draconianly argues that the entire Application is flawed because this additional information was provided to the Authority through expert testimony and was otherwise established in the record, the document referenced is merely a form application issued by the Authority, and does not have the force and effect of law.

its use) during her testimony at the public administrative hearing. *See, e.g.,* (Ex. 21, at Attachment I); *see also* (Ex. 25, at pp. 22-23, 69, 71, 72). Thus, as the Authority accurately stated in its Decision, the existence/identity of the zip code reference – as well as the rationale for its use to interpolate the Authority-provided population data – was established in the record for the Authority's consideration. Decision at pp. 18-19.

MHHC also attempts to muddy the waters by raising the fact that the Authority denied MHHC's Motion to Compel additional discovery in this matter. *See* MHHC Brief at pp. 8-9. With respect to reviewing discovery decisions of fact-finders on appeal, our Supreme Court of Appeals has held that:

> A [fact-finder] is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion. A trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration.

Syl. Pt. 1, *B.F. Specialty Co. v. Charles M. Sledd Co.*, 475 S.E.2d 555, 556 (W. Va. 1996). Yet again, MHHC conveniently omits a key detail from its argument. Among other problems, its Motion to Compel sought information that was protected by the derivative work product doctrine, since Ms. Kinneberg began working under Jackson Kelly PLLC's overall supervision and direction to provide CON preparation, health care planning consultation, and expert witness services with respect to the Application on April 29, 2021.[11] This issue was fully argued by both parties *via*

[11] The derivative attorney-client privilege applies to consultants utilized by attorneys to aid in the provision of legal services, and is well recognized in West Virginia. *See State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht*, 583 S.E.2d 80, 88 (W. Va. 2003) ("the attorney-client privilege also extends to others who are advised of confidential

pleading(s), responsive pleading(s), and extensive oral argument, and was correctly settled by the Authority's Hearing Examiner at the prehearing conference. *See* (Exs. 18, 19, 24).

Even more fundamentally, Ms. Kinneberg was extensively cross-examined by MHHC's counsel as to the formulation of the Application, including the Application's Service Area zip code population calculation and the sources thereof. See, e.g., (Ex. 25 at pp. 69, 71, 72). MHHC was therefore not, as it infers, starved from the ability to make its meritless zip code argument to the Authority by virtue of the denial of its Motion to Compel. Quite contrarily, as reflected by the Decision, MHHC in fact made this meritless argument to the Authority, and the Authority explicitly considered and rejected it based on the substantial evidence contained in the record. See Decision at pp. 17-19. Ultimately, MHHC falls miles short of meeting the high burden of proof to demonstrate that the Authority abused its discretion in denying the Motion to Compel (i.e. that the denial of MHHC's Motion to Compel was ". . . against the logic of the circumstances before the [fact-finder] and so arbitrary and unreasonable as to shock [the Court's] sense of justice"). Syl. Pt. 1, *B.F. Specialty Co. v. Charles M. Sledd Co.*, 475 S.E.2d 555, 556 (W. Va. 1996).

Regardless, this argument is no more than a red herring. The denial of the Motion to Compel is completely irrelevant to MHHC's overarching argument – that the Decision is not sufficiently drafted in accordance with the WV APA. *See* MHHC Brief at pp. 6-10. This Court

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information at the direction of the attorney"). In protecting communications involving expert consultants, courts have recognized that attorneys could not practice in the complex, modern world without the assistance of others. *See United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) ("The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.").

must accordingly reject MHHC's thinly-veiled attempt to confuse the issues by raising a wholly irrelevant (and completely baseless) argument.

B. Each of the Decision's other findings identified in MHHC's Brief were sufficiently drafted in accordance with the WV APA and were supported by substantial evidence.

While MHHC focuses the vast majority of its Brief on the Decision's findings related to the Application's Service Area population zip code calculation, MHHC also identifies other areas of the Decision which it purports are not adequately addressed/detailed, including the Authority's determination that the Project is financially feasible, and through other references *via* a string citation. *See* MHHC Brief at pp. 6, 10. Yet, each of these purported insufficiencies suffer from the exact same myopic reading of the Decision identified above, and could be just as easily dispatched.

For example, as was the case above, MHHC attempts to have this Court believe that the Decision's analysis of the Project's financial feasibility was limited to a bare, generic sentence. *See* MHHC Brief at p. 10. To this end, MHHC cites one sentence on page 37 of the Decision, and concludes that the Authority reached its finding without sufficient explanation. *See id.* However, the sentence quoted by MHHC on page 37 (relating to the financial feasibility of the Project) is preceded by **almost three full pages** of discussion of the parties' arguments on this very subject (Decision at pp. 34-36), and is followed by **almost two full pages** of the Authority's discussion of its rationale and the evidence it relied upon (replete with specific citations to the record) to determine that the Project was financially feasible. Decision at pp. 37-39.

MHHC's utter failure to analyze the Decision is not limited to the issues of Project's

Service Area population zip code calculation or the Project's financial feasibility. MHHC also references sundry other findings of the Decision *via* string citation in an attempt to identify additional instances where the Decision purportedly failed to provide sufficient explanation/analysis. *See* MHHC Brief at p. 6. For example, MHHC also cites the Authority's finding on page 11 (a finding that the Application properly formulated the Service Area) as inadequate. *See id.* However, this finding is immediately preceded by nearly **two full pages** of discussion of the parties' arguments (Decision at pp. 9-10), and is followed by **almost a full page** of discussion explicitly detailing the bases of the Authority's finding and the evidence in the record relied upon (Decision at pp. 11-12). Similarly, MHHC cites a finding on page 47 of the Decision (finding that the Project is a superior alternative), but this finding is preceded by **over two full pages** of discussion of the parties' arguments (Decision at pp. 45-47), and is followed by nearly **one full page** of the Authority's discussion of its rationale and the evidence in the record it relied upon (Decision at pp. 47-48). Finally, MHHC cites the Authority's finding on page 30 (finding that the Project will be adequately staffed), but this finding also sufficiently details the arguments of the parties and the evidence relied upon, and explicitly dismisses MHHC's argument on this subject as speculative. *See* Decision at pp. 30-31.

The bottom line is that the Authority's factual findings are well supported by the record, and therefore must be accorded with substantial deference, and must not be disturbed on appeal. *Martin v. Randolph County Bd. of Educ.*, 465 S.E.2d 399, 406 (W. Va. 1995); *see also Cahill v. Mercer County Bd. of Educ.*, 539 S.E.2d 437, 440 (W. Va. 2000). The Decision also comprehensively details the facts of the case and the parties' arguments in an organized and

detailed fashion as they pertain to each applicable section of the CON law and the SHP Standards. The Authority then makes several explicit findings that the Project meets each applicable criterion of the CON law and the SHP Standards, and appropriately references the evidence that it relied upon and its rationale. The Decision is therefore drafted in a manner that enables this Court to determine if the evidence – "in any reasonable way" – supports the findings of fact, and if these findings of fact in turn support the agency's conclusions of law. *Citizens Bank*, 233 S.E.2d at 728; *see also* W. Va. Code § 29A-5-3.

While MHHC may not agree with the Authority's findings, the Decision "presents an evaluation of conflicting evidence, . . . [and] evaluated pertinent testimony, statistical data, and expert opinions in an organized fashion." *In re: Thomas Memorial Hospital Radiation Therapy Services*, 1989 WL 433159, at *13. Moreover, the Decision enables this Court "to ascertain that the critical issues before the [Authority] were considered and weighed and not overlooked or concealed." *Muscatell v. Cline*, 474 S.E.2d 518, 528 (W. Va. 1996)); *see also* Exhibit A at p. 8. The Decision is therefore sufficiently drafted in accordance with W. Va. Code § 29A-5-3, as construed by the Supreme Court of Appeals of West Virginia, and MHHC's baseless arguments must be rejected.

2. The Decision's approval of the Project is consistent with the Legislative purposes of the CON law.

As an offshoot of its overarching argument that the Decision is not sufficiently drafted, MHHC asserts that the Authority did not adequately consider the Legislative purposes of the CON law in rendering its Decision. *See, e.g.,* MHHC Brief at pp. 6,7, 10. Specifically, MHHC purports that it has "two approved clinics" in Arnoldsburg, West Virginia, and that the Authority

did not properly consider and explain how approval of the Project was "consistent with the effective development of necessary and adequate means of providing for the health services of [West Virginians]" and how it "avoid[s] unnecessary duplication of health services, [and contains or reduces] increases in the cost of delivering health services." (hereafter the "Legislative Purposes") MHHC Brief at pp. 6-7, 10, *see also* W. Va. Code § 16-2D-1.

Yet again, the Authority's Decision and the record fully refutes MHHC's baseless arguments. First and foremost, MHHC's inference that it has two existing clinics in Arnoldsburg which offer health services to the general public is simply not true. *See* MHHC Brief at pp. 6-7. MHHC has one (1) existing clinic in Arnoldsburg, but it is a school-based clinic that **does not offer services to the general public**, and only offers (at most) 0.2 FTE mid-level primary care services weekly to Arnoldsburg Elementary School students and their household family members[12] (hereafter the "Arnoldsburg SBC"). *See, e.g.*, (Ex. 25, at pp. 178-179, 191); (Ex. 21, Attachment A, pp. 4-11); Decision at pp. 24-25. MHHC even admitted that the Arnoldsburg SBC is limited from treating the general public by the Safe Schools Act. *See* Decision at p. 24.

While MHHC may attempt to ignore the Authority's detailed consideration of the Arnoldsburg SBC's provision of services, the Authority dedicated nearly two full pages (and one footnote) of its Decision to its determination on this point alone, complete with citations to the record which support the Authority's determination. Decision at pp. 24-25; *see also* (Ex. 21,

[12] MHHC's provision of health care services to anyone other than staff and students at the Arnoldsburg SBC (*i.e.* MHHC's current limited provision of health services to "household members" of students) may constitute a potential violation of the CON law. *See* Decision at p. 24, *see also* (Ex. 25, at pp. 198-199).

Attachment A, at RGH000010-11). As the Authority details in its Decision, it recently affirmed its common-sense position in a prior case that, if a school-based clinic does not have CON approval to provide services to the general public, it is not considered an "existing provider" for purposes of the SHP Standards in a CON application. Decision at p. 24 (citing *In re: Pocahontas Memorial Hospital*, CON File No. 21-4-12029-H (November 6, 2021)).

Since the Legislature has not directly spoken to the exact meaning of an "existing provider" within the context of the SHP Standards, and since and the Authority's interpretation of this term to exclude the Arnoldsburg SBC (a clinic that does not even serve the general public) was eminently reasonable, the Authority's exclusion of the Arnoldsburg SBC's minimal utilization to the non-public (only 0.2 FTE) must be accorded with deference on appeal. *See Chevron*, 467 U.S. at 842-43; *see Boone*, 472 S.E.2d at 421-22; *see also Amedisys*, 859 S.E.2d at n. 5 (holding that the Authority's existing interpretation of the SHP Standards is entitled to *Chevron* deference so long as it is neither arbitrary nor capricious). Moreover, the Decision also explicitly states that, **even if** the Arnoldsburg SBC's utilization were considered, unmet need for both it and the Project would still exist. Decision at n. 14.

With respect to its second purported Arnoldsburg clinic, MHHC filed a CON exemption application **nearly two (2) months after the Application was filed** for the development of a community-based clinic which proposes to provide primary care services in Arnoldsburg. *See In re: Minnie Hamilton Health Center*, CON File No. 21-7-12162-X. The Authority offered nearly two additional pages of explanation in the Decision specially addressing this point. Decision at pp. 25-27. As detailed in the Decision, the Authority has previously held

that only providers who offer services when an application is filed are considered "existing providers" for purposes of determining the unmet need for the application under review. *See* Decision at pp. 25-26. In fact, upon information and belief, MHHC's planned clinic was not operational at the time of the public administrative hearing in this matter (when the record was closed). *See, e.g.*, (Ex. 25, at pp. 178-179). Again, since the Legislature has not directly spoken to the exact meaning of an "existing provider" within the context of the SHP Standards, and since the Authority's interpretation of this term to exclude MHHC's planned, non-operational clinic was undoubtedly reasonable, the Authority's exclusion of MHHC's non-operational clinic must be accorded with deference on appeal. *See Chevron*, 467 U.S. at 842-43; *see Boone*, 472 S.E.2d at 421-22; *see also Amedisys*, 859 S.E.2d at n. 5 (holding that the Authority's longstanding, consistent interpretation of the SHP Standards are entitled to *Chevron* deference so long as they are neither arbitrary nor capricious).

And again, as was the case with the Arnoldsburg SBC detailed above, "even if MHHC's proposed clinic was considered an existing provider of primary care services in the service area (which it is not), there is an unmet need in the service area for both the project and the MHHC exemption application proposal." Decision at p. 27 (citing Ex. 21, Attachment D; Ex. 25, pp. 46-29; Ex. 29, p. 21). It is therefore clear that neither the Arnoldsburg SBC nor MHHC's non-operational, planned clinic negate the need for the Project. The Authority's exclusion of these clinics was therefore consistent with the Legislative Purposes and their goal to promote the development of necessary health services.

More generally, the Decision's analysis of the need for the Project spans **for almost**

20 pages. Decision at pp. 8-28. Its analysis of the Project's cost and financial feasibility spans **almost another 8 pages**. Decision at pp. 33-41. These nearly 28 pages of the Decision do not even include the Authority's discussion of why the Project is a superior alternative to the status quo in terms of cost, efficiency, and appropriateness, a matter discussed by pages 45 through 48 of the Decision. For example, as the Authority explicitly recognized, the Project "will reduce monetary and temporal costs associated with the status quo, since service area residents will no longer be required to find arrangements to travel a minimum of 20-40 minutes (each way) to receive primary care and specialty care services." Decision at p. 48; *see* (Ex. 25, at p. 157); *see* (Ex. 21, Attachment M, at RGH000589).

By making all of these detailed findings in the Decision, and by otherwise addressing every single applicable statutory and SHP Standards criterion that is required to be addressed in the Decision, the Authority clearly considered the Legislative Purposes (i.e. that the Project will provide necessary health services and not result in increased costs to consumers), and determined that the Project was consistent with them. Strikingly, MHHC itself acknowledged in a public Facebook post that the Project was "exciting news" and that "having multiple opportunities is beneficial to our region," and MHHC's Chief Executive Officer, Steven Whited, even testified under oath that **he does not oppose the Application**. (Ex. 21, at Attachment O); (Ex. 25, at p. 189); *see also* (Ex. 25, at p. 196). While MHHC's (self-contradictory) opposition to the Project's provision of less than 0.7[13] physician FTEs to one of the most rural areas of the state is indeed perplexing, one thing is certain: MHHC's inference that the Decision did not consider nor comport

[13] *See supra*, n. 2.

with the Legislative Purposes is patently false.

V. CONCLUSION

The Authority's Decision to grant a CON for the Project was rational, was well supported by the record, and was made in accordance with applicable laws and regulations. The Authority thoroughly detailed the extensive factual record presented at the public hearing, weighed the facts and arguments of the parties, and made conclusions regarding each applicable criterion of the CON law and SHP Standards that were applicable to the Project.

If MHHC's baseless arguments regarding the sufficiency of the Decision were to be accepted, administrative agencies would practically never be able to draft an opinion "adequate" to the losing party (even when those decisions are 54 pages long, with excessive detail, and replete with supporting citations to the record, as is the case with the instant Decision). Hence, this Court would become clogged with appeals from every single decision rendered by the Authority on the basis of the decision not being "adequately" drafted from the losing party's perspective. But it is the WV APA – not MHHC's nonsensical standard of "adequacy" – that governs. Contrary to MHHC's attempt to conjure doubt regarding the adequacy of the Decision through cherry-picking incomplete, disparate sentences, the Decision is clearly drafted in accordance with the WV APA. And to the extent MHHC's Brief merely seeks for this Court to re-weigh the evidence on appeal, the Authority's factual findings are entitled to substantial deference, and a *de novo* reweighing of the facts is prohibited under the applicable standard of review.

RGH's trusted experience – combined with its dedication to patient-centered care – makes this Project the perfect antidote to the serious access-to-care problems that Service Area

residents currently endure. Accordingly, RGH respectfully requests that this Court reject MHHC's appeal and affirm the Authority's Decision to confer CON approval to the Application.

Respectfully submitted,

HOSPITAL DEVELOPMENT CO.
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BEFORE THE OFFICE OF JUDGES

IN RE: ROANE GENERAL HOSPITAL

CON File No. 21-5-12124-P
APPEAL DOCKET No. 22-HC-02

CERTIFICATE OF SERVICE

I, Alaina N. Crislip, do hereby certify that I have served the foregoing ***Response Brief on Behalf of Applicant/Appellee Roane General Hospital*** by hand delivery and electronic mail to counsel of record as addressed below on this 26th day of July 2022:

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