

# Mississippi Certificate of Need Alert

May 19, 2009

## The Mississippi Court of Appeals Reverses Desoto County Chancery Court's Grant of CON Application:

*Miss. State Dept. of Health & City of Cleveland v. Mid-South Assocs., LLC*

On April 21, 2009, the Mississippi Court of Appeal reversed the decision of the DeSoto County Chancery Court and upheld the Mississippi State Department of Health's (Department) decision to deny Mid-South Associates, LLC's (Mid-South) application for a Certificate of Need (CON). Mid-South filed a CON application in December 2006 seeking to relocate 75 nursing home beds from Bolivar Health and Rehabilitation Center (BHRC) in Bolivar County to DeSoto County.

The Department's staff analysis recommended that the CON application be denied because the project did not substantially comply with the objectives of the 2007 State Health Plan and the Mississippi CON Review Manual. Mid-South requested a hearing on the matter, which was held in June 2007. The City of Cleveland (City), where the BHRC is located, participated in the hearing as an interested party. The hearing officer adopted the findings and conclusion submitted by the Department's staff and the City and denied Mid-South's CON application. The State Health Officer (SHO) adopted the Department's staff analysis and the hearing officer's findings and issued a final order denying the CON.

Mid-South appealed the SHO's decision to the DeSoto County Chancery Court. The Chancellor set aside the SHO's decision and authorized the relocation of the 75 nursing home beds to DeSoto County.

The Department and the City appealed the Chancellor's decision on the grounds that (1) the Chancellor did not apply the correct standard of review, and (2) substantial evidence supported the rejection of Mid-South's CON application. The Court of Appeals addressed only the second ground, as it found that this constituted reversible error.

A CON final order issued by the SHO may only be vacated or set aside if the court finds that the order is "not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal." A court may not "substitute its judgment for that of the [Department] or reweigh the facts of the case." To be reversed on appeal, the Department's decision must have been "arbitrary and capricious and not based on substantial evidence."

The Court of Appeals stated that 2007 State Health Plan provides that Mississippi's health planning and health regulatory activities have four purposes: (1) to prevent unnecessary duplication of healthcare resources; (2) to provide cost containment; (3) to improve the health of Mississippi residents; and (4) to increase the accessibility, acceptability, continuity and quality of healthcare services. Cost containment and the prevention of unnecessary duplication of health resources are the two most important purposes considered in the CON process.

When considering Mid-South's CON application, the hearing officer found that the relocation of the nursing home would create an unnecessary duplication of health resources and that the project might actually cause healthcare costs to increase, rather than provide cost containment, because the new facility in DeSoto County intended to reduce its Medicaid utilization rates from approximately 62% to approximately 33%. The hearing officer also found that moving the nursing home beds to DeSoto County would create a void in Bolivar County, a medically underserved area, because residents would either have to relocate to DeSoto County or seek healthcare elsewhere.

The hearing officer found that Mid-South’s CON application failed to satisfy the criteria used by the Department to evaluate the need for a project. Specifically, the CON application did not satisfy the following criteria:

- a. The need that the population served or to be served has for the services proposed to be offered or expanded and the extent to which all residents of the area – in particular low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly – are likely to have access to those services.
- b. In the case of the relocation of a facility or service, the need that the population presently served has for the service, the extent to which that need will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly, to obtain needed health care.
- .....
- e. The community reaction to the facility will be considered. The applicant may choose to submit endorsements from community officials and individuals expressing their reaction to the proposal. If significant opposition to the proposal is expressed in writing or at a public hearing, the opposition may be considered an adverse factor and weighed against endorsements received.

The hearing officer also considered that elderly patients do not respond well to changes in their environment and that moving the beds to DeSoto County would create a future need for additional beds in Bolivar County, a need that cannot be met in light of the current moratorium on the construction of new nursing home facilities. Additionally, the Department received over 1,000 letters opposing the relocation and received no letters from Bolivar County residents supporting the relocation. The Department received only 11 letters in support of the relocation from DeSoto County residents.

Based on the Department’s and the hearing officer’s findings, the Mississippi Court of Appeals held that there was “substantial evidence in the record to support the hearing officer’s finding that the relocation project was not consistent with the State Health Plan. The Court stated that there was substantial evidence shown that the relocation of the nursing home beds ‘would have a significant adverse [a]ffect on the ability of an existing facility or service to provide indigent care.’ . . . [It] also [found] that the [Department] did not act arbitrarily or capriciously, outside its authority, or violate any vested constitutional rights.”

The Mississippi Court of Appeals, therefore, reversed the Chancellor’s judgment granting Mid-South’s CON and reinstated the Department’s denial of Mid-South’s CON application.

Phelps Dunbar LLP will continue to keep you updated on the latest developments related to Mississippi’s Certificate of Need program.

**PHELPS DUNBAR** LLP  
C O U N S E L O R S A T L A W

NEW ORLEANS BATON ROUGE JACKSON TUPELO GULFPORT HOUSTON TAMPA LONDON

Inquiries concerning topics addressed may be directed to any of our attorneys listed below. Your comments, questions, and suggestions are encouraged.

Moore, Jeffrey S.	(662) 690-8137	jeff.moore@phelps.com
Bush III, F. M.	(662) 690-8136	mike.bush@phelps.com
Cappleman, Kimberly L.	(662) 690-8113	kim.cappleman@phelps.com
Wallis, Amanda	(622) 690-8120	amanda.wallis@phelps.com

All rights reserved, Phelps Dunbar LLP publishes this information as a service to clients and friends of Phelps Dunbar LLP and should not be construed as legal or professional advice or as opinion on specific fact.