IN THE SUPREME COURT OF MISSISSIPPI

JACKSON HMA, LLC, MISSISSIPPI BAPTIST MEDICAL CENTER, INC., and ST. DOMINIC-JACKSON MEMORIAL HOSPITAL — **PLAINTIFF-APPELLANTS**

V. — **NO. 2011-IA-00196-SCT**

MISSISSIPPI STATE DEPARTMENT OF HEALTH, BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, and UNIVERSITY OF MISSISSIPPI MEDICAL CENTER — **DEFENDANT-APPELLEES**

consolidated with

BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING and UNIVERSITY OF MISSISSIPPI MEDICAL CENTER — **DEFENDANT-APPELLANTS**

V. — **NO. 2011-IA-00211-SCT**

JACKSON HMA, LLC, MISSISSIPPI BAPTIST MEDICAL CENTER, INC., and ST. DOMINIC-JACKSON MEMORIAL HOSPITAL — **PLAINTIFF-APPELLEES**

INTERLOCUTORY APPEAL FROM HINDS CHANCERY COURT, FIRST JUDICIAL DISTRICT

BRIEF FOR PLAINTIFF-APPELLEES

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to M.R.A.P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

1. St. Dominic-Jackson Memorial Hospital, Mississippi Baptist Medical Center, Inc. and Jackson HMA, LLC d/b/a Central Mississippi Medical Center (Plaintiff-Appellees).

2. Ed Brunini, Jr. and Jonathan R. Werne of Brunini, Grantham, Grower & Hewes, PLLC (counsel for St. Dominic-Jackson Memorial Hospital).

3. R. Andrew Taggart, Jr., Jamie Planck Martin, and Jenna L. Bailey, of Taggart, Rimes & Usry, PLLC (counsel for Mississippi Baptist Medical Center, Inc.).

4. Thomas L. Kirkland, Jr., Allison C. Simpson, and Andy Lowry, of Copeland, Cook, Taylor & Bush, P.A. (counsel for Jackson HMA, LLC).

5. Mississippi State Department of Health (Defendant-Appellee).

6. Mary Currier, M.D., M.P.H., State Health Officer (head of Department).

7. Harold E. Pizzetta, III, Esq. and Robert E. Fagan, Jr., Esq. (counsel for Department).

8. The Honorable Jim Hood (Attorney General).

9. University of Mississippi Medical Center (Defendant-Appellant).

10. James Keeton, M.D. (vice chancellor for health affairs).

11. The University of Mississippi (of which UMMC is a department).

12. Daniel W. Jones, M.D. (chancellor of UM and of UMMC).

13. John Thomas Newsome, III, Esq. (counsel for UMMC and its chief legal officer).

14. Board of Trustees of State Institutions of Higher Learning (Defendant-Appellant).

15. Dr. Hank M. Bounds, Commissioner; Dr. Bettye Neely, President; Robin Robinson, Vice President; Ed Blakeslee; Dr. L. Stacy Davidson, Jr.; Bob

Owens; Aubrey Patterson; Alan W. Perry; Christine Lindsay Pickering; Scott Ross; Dr. Douglas W. Rouse; C. D. Smith, Jr.; and Amy Whitten (members of Board).

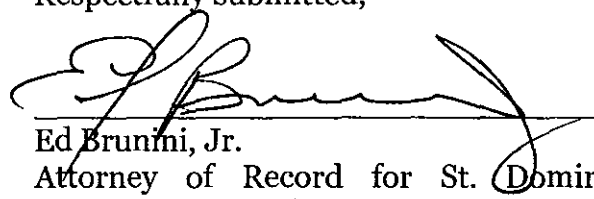
16. Keyla S. McCullum, Esq. (counsel for Board).

17. Christy D. Jones, Esq., Paul N. Davis, Esq., Mark W. Garriga, Esq., and Donna Brown Jacobs, Esq. of Butler, Snow, O'Mara, Stevens & Cannada, PLLC (counsel for UMMC and former counsel for Board).

18. J. Cal Mayo, Jr., Esq. of Mayo Mallette, PLLC (counsel for Board).

19. The Honorable Patricia D. Wise (chancery judge).

Respectfully submitted,



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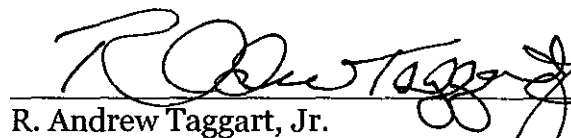

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STATEMENT OF THE ISSUES

I. Does the Certificate of Need Law apply to the University of Mississippi Medical Center?

II. Is the University of Mississippi Medical Center exempted from the Certificate of Need Law by virtue of its being managed and controlled by the Board of Trustees of State Institutions of Higher Learning?

STATEMENT OF THE CASE

Plaintiff-Appellees ("Contestants") filed this suit to resolve a straightforward question of statutory interpretation: does the Certificate of Need Law ("CON Law") apply to the University of Mississippi Medical Center ("UMMC")? Because the answer is so obviously "yes," UMMC deflects attention from that question in favor of implausible or extraneous considerations: is the Board of Trustees of State Institutions of Higher Learning ("the Board") constitutionally exempt from obeying the law? Is UMMC somehow unable to function as a teaching hospital if it complies with the same CON Law that it has conformed to for over 30 years? Hence this suit is supposedly a "direct attack on the IHL Board's authority" (Brief at 1), and the outcome of requiring UMMC to follow the law would somehow "effectively stagnate UMMC" (Brief at 19).[1]

But that is not so. The Board is not "attacked" by a statute of general application like the CON Law, and Contestants do not seek to deprive the Board or UMMC of anything that rightfully belongs to either. However emotional UMMC becomes about this case, the issues before this Court are traditional matters of statutory and constitutional interpretation, properly addressed by reference to this Court's precedents, rather than by melodramatic posturings about the future of UMMC. The policy concerns of UMMC and the Board, while almost surely baseless, are in any event reserved for the Legislature. This Court should decline the invitation to enact for UMMC what the Legislature has not seen fit to grant.

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[1]The UMMC/Board initial brief is herein cited as "Brief." Citations to record excerpts ("R.E.") are to those filed with our Brief for Plaintiff-Appellants, so as not to overburden the Court with duplicative papers in this consolidated appeal.

(Plaintiffs are "Contestants" because they contested the Department's ruling that UMMC could buy major medical equipment without a CON.)

I. COURSE OF PROCEEDINGS BELOW

Contestants do not object to their opponents' presentation of the proceedings below.

II. RELEVANT FACTS

The facts as presented by UMMC[2] wear their bias plainly enough that little comment is required here. We refer the Court to the statement of facts in the Brief for Plaintiff-Appellants, and add three further considerations:

(1) Although UMMC now pretends it submitted its CON application for the linear accelerator "as it had many others over the years, in an effort to apprise MSDH of its activities in an area of common interest," Brief at 3, UMMC does not cite the application itself for that proposition, for the good reason that no such statement appears anywhere in it. R.E. 5. Indeed, the apparently secret "understanding" between the Mississippi State Department of Health and UMMC was unsupported in the trial court by any evidence preceding Dr. Currier's appointment in 2010 as State Health Officer. Contestants, like the rest of the public, can surely be forgiven if it seemed to them that UMMC was filing real applications for real CONs—which the Department really did grant, a fact inconsistent with the claim that UMMC was simply helping the Department keep "apprised."

(2) Nor does this allegedly "voluntary" compliance fit with the Board's query in 1980 to the Attorney General on whether UMMC needed a CON before it solicited new expenditures from the Legislature. Miss. Att'y Gen. op., 1980 WL 28756 (Nov. 7,

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[2]We will usually refer to UMMC and the Board jointly as "UMMC."

1980). Had UMMC or the Board believed they were only "voluntarily" complying, why would they have asked whether such a solicitation violated the CON Law?

(3) But perhaps the most telling evidence that UMMC's present position is a recent concoction is the Attorney General opinion no. 2000-0572 of September 20, 2000, withdrawing its recent opinion (no. 2000-0326, July 14, 2000) that the CON Law did not apply to UMMC. (See appendix A to this brief.) The withdrawal opinion was based in part upon a document attached to it, an August 25, 2000 letter from UMMC to the Department. Dr. Wallace Conerly, then dean of the school of medicine at UMMC, wrote to the State Health Officer about the July 14 opinion (emphasis added):

> I feel uncomfortable with this opinion. In no way do I want the Mississippi State Board of Health, you, the staff of the Mississippi State Department of Health or any others in the health care industry to think that the Medical Center is trying to circumvent this Certificate of Need Law of the state. **We have conformed to the law since it began in 1979 and have no intentions of changing that stance.** . . .

After noting UMMC's role in teaching and indigent care, Dr. Conerly went on to say:

> For these reasons I want to officially inform you that **the University of Mississippi Medical Center and more specifically the University Hospitals and Clinics will continue to follow the Certificate of Need statutes as has been done since 1979**, the Attorney General[']s opinion notwithstanding. I ask that you please inform your staff and the Board of Health of **this official stance** of the Medical Center Administration so that there will be **no misunderstanding or confusion** about this matter.

(emphasis added). Dr. Conerly did not say that UMMC was following the law "voluntarily" or as some sort of convenience to the Department, or that such had ever been the case. That "misunderstanding and confusion," it seems, was invented only later.

In the present case, after the misguided July 2010 Attorney General opinion, UMMC belatedly decided that it needed its third linear accelerator, not for patient care

(as it certified in its 2009 CON application, R.E. 5), but because it must have "state of the art" equipment for its desired program in radiation oncology. Brief at 10 n.13. Leaving aside that such desires are legally irrelevant under the CON Law, there is no evidence that UMMC's existing units are *not* "state of the art." And the accreditation standard quoted at note 13 of UMMC's brief says only that UMMC has to have "two or more" devices, which it already does. UMMC never did place into evidence any proof that its existing devices won't satisfy any applicable accreditation standard.

In any event, the questions presented in this case must be decided not on what UMMC desires, but on what the law permits. To that issue we now turn.

SUMMARY OF THE ARGUMENT

UMMC and the Board were not entitled to summary judgment below, because the CON Law applies to UMMC and is not unconstitutional.

Nothing in the history of the Board's creation, or in the language of article 8, § 213A of the Mississippi Constitution, supports the claim that the Board's "management and control" of UMMC and its other institutions is "autonomous" or otherwise above the law. That management and control is better understood in terms of the same management and control exercised by the governing bodies of private institutions, as attested by the history and text of § 213A. This Court has already held in *Mississippi Publishers* that statutes of general application are binding on the Board. Moreover, the CON Law moreover is validly enacted under the Legislature's general police power to protect the health and welfare of the people of Mississippi, and as the Attorney General found in a comparable instance, the Board and its institutions are subject to the police power. The Board cannot carry the heavy burden of showing that UMMC is unconstitutionally disadvantaged by having to comply with the same CON Law that Contestants and other hospitals must comply with. Thus, UMMC is equally subject to the CON Law that it has in fact obeyed ever since 1979 when that law was enacted.

Nor does the text of the CON Law itself support UMMC's being exempted from it. The Department has already stated that this statute clearly applies to UMMC as a "person" and as a "health care facility," so that UMMC would have to prove that this administrative-agency interpretation of the CON Law is blatantly contrary to said statute. UMMC fails to prove any such thing. The scope of the CON Law plainly includes "political subdivisions" like UMMC. This Court's holdings that UMMC is protected by

the Mississippi Tort Claims Act, which UMMC thinks to cite in favor of its position, really undermine it. There is no serious question whether UMMC buys its major medical equipment "for the provision of medical services" and thus must comply with the CON Law regarding such purchases. And there is no conflict between the statutes enabling UMMC to build facilities, buy equipment, and offer services just like any other hospital, and the CON Law which sets certain general restrictions on how and whether that power may be exercised in a given case—again, just as it restricts other hospitals.

Nothing in the constitution or the CON Law exempts UMMC from having to play by the rules in its self-confessed competition with other providers. This Court should deny UMMC and the Board the relief they seek, and remand this case for the chancery court to enter its declaratory judgment that the CON Law applies to UMMC.

ARGUMENT

First, UMMC argues that the CON Law is unconstitutional; then it proceeds to argue that the CON Law doesn't apply to it anyway. The presentation of the issues in UMMC's brief is logically backward—if the CON Law did not, on its own terms, apply to UMMC, then there would be no need to reach the constitutional issue of the Board's alleged autonomy. *State v. Watkins*, 676 So. 2d 247, 249 (Miss. 1996) (courts avoid judging constitutionality of statutes unless "compelled to do so"). The UMMC brief's arrangement itself quietly concedes that UMMC must win this case on the constitutional issue, or not at all.

Most of these issues have been covered in the Brief for Plaintiff-Appellants in this consolidated appeal (hereby incorporated by reference as if set forth herein) to which we also refer this Court rather than repeat all of the same arguments. Herein, Contestants focus on rebutting UMMC's contention that the chancery court erred in not granting it summary judgment.

I. THE CON LAW DOES NOT CONFLICT WITH THE BOARD'S "MANAGEMENT AND CONTROL" OF UMMC.

A. The Board's Authority Does Not Make It Above the Law.

Section II.A. of UMMC's argument is light on actual argument, being mostly a tendentious recitation of the Board's and UMMC's creation and powers, designed to obscure the legal issues in this case. Contestants have never disputed that UMMC and the Board serve valuable functions. The issue is whether UMMC and the Board must obey the law. UMMC is a valuable part of Mississippi's health care community, but that does not entitle the courts to strike down a statute that allegedly hinders UMMC. The courts are not "at liberty to declare an Act [of the legislature] void, because in their

opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words." *Albritton v. City of Winona*, 178 So. 799, 803 (Miss. 1938) (quoting *Miss. State Tax Comm'n v. Flora Drug Co.*, 148 So. 373, 376 (Miss. 1933)) (bracketed words in original). Nor can any spirit UMMC thinks pervades the statute-books suffice to strike the CON Law.

Repeatedly citing its "enabling statutes," UMMC blurs its argument by mixing constitutional and statutory authorities. The "enabling statutes" are not superior to the CON Law and cannot support an argument that the CON Law somehow interferes with the "management and control" granted by article 8, § 213A of the Mississippi Constitution. The issue is not whether the Board enjoys the "management and control" of UMMC, but rather what that phrase actually means. Little in this section of UMMC's brief casts any light on that issue. For instance, the fact that the Board's control of UMMC includes "control of the use, distribution and disbursement of all funds" (Miss. Code Ann. § 37-101-15(b)), merely places the Board in charge of UMMC's spending, the same way that every other private hospital in the state has some entity in charge of *its* spending. But the statute does not authorize the Board to buy things in disregard of regulatory authority, like slot machines, white-tailed deer from out of state,[3] or linear accelerators. As shown in the Brief for Plaintiff-Appellants, "management and control" in its plain and ordinary sense means the same kind of authority exercised by the managing and controlling boards of other hospitals, rather than making the Board a super-agency above the law.

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[3]Miss. Code Ann. § 49-7-54. "University research facilities" may buy such deer, but only upon "prior approval" by the Fish & Wildlife Commission—another unconstitutional interference with the Board's "management and control," no doubt, especially if the deer are bought with "self-generated funds."

One almost has to read this section of UMMC's brief twice to remember that UMMC is not itself constitutionally founded, but rather is purely a creature of the Legislature, which created UMMC and which could uncreate UMMC at its pleasure. UMMC repeatedly refers to its function of teaching physicians as if this elevated it above considerations related to health care, but quite obviously, the Legislature did not create a teaching hospital merely to teach physicians as an end in itself. The point of teaching physicians is to improve health care in Mississippi, just as the point of the CON Law is to improve health care in Mississippi. Our constitution rests the management and control of UMMC in the hands of the Board, but the policy goals that led the Legislature to create and maintain UMMC are not thereby made superior to the policy goals that led the Legislature to enact and maintain the CON Law. It is therefore wasted effort for UMMC to argue *policy* grounds for its alleged exemption from the CON Law. Those must be addressed to the Legislature.

Finally, before turning to the actual legal arguments UMMC makes at section II.B. of its brief, this Court may quickly dispose of two side issues.

First, it is illogical for UMMC to distinguish "need" in the sense of its wishing to have a third linear accelerator from "need" as defined by the State Health Plan. "Need" in the latter sense is a prerequisite for "need" in terms of UMMC's teaching purposes. UMMC does not want to buy the device so that its students can examine its parts, learn how it works, and study the operator's manual. Rather, UMMC wants the accelerator for the treatment of patients, in the course of which some of its students will learn about radiation oncology. No treatment, no teaching. As we must assume that UMMC does not plan to turn its device upon "guinea-pig" patients who do not actually require such

treatment, it also follows that there must be a sufficient number of patients with the relevant health conditions to benefit from the device. Thus, the ability to demonstrate need as defined by the State Health Plan is not an obstacle to any legitimate teaching purpose of UMMC's. It is a condition precedent to any such teaching's actually taking place. A $3 million device that has no patients to treat will be of little educational value.

Second, UMMC slurs Contestants as money-grubbers who cannot even aspire to the pure idealism of UMMC's educational quest. Brief at 11. Such rhetoric lacks any basis in reality. As set forth in the Brief for Plaintiff-Appellants and documented by the words of a UMMC officer (Dr. Keeton), UMMC has eagerly entered the healthcare marketplace—"we are competing," "no margin, no mission," etc. R.E. 6 at 274. Eighty-nine percent of UMMC's income is from sources other than the Legislature. R.E. 6 at 274. As for Contestants, two of them are nonprofit Christian hospitals, and the third (Jackson HMA) is a subsidiary of a company that has acquired and refurbished hospitals in numerous communities around Mississippi, some of which might not have a hospital at all otherwise. All three of Contestants' hospitals, just like UMMC, are staffed by devoted physicians, nurses, and staff working to provide the best medical care possible. The only difference is that, in this suit, UMMC has placed itself on record as putting medical care second, not first. Our high esteem for the medical providers at UMMC forces us to treat that averment as a litigating position rather than the truth.

B. This Court Has Never Placed the Board Above the Law.

1. Allain *and* Ray *Do Not Support the Board's Claim to Autonomy.*

This Court has addressed the Board's "management and control" function in three cases, *Allain*, *Ray*, and *Mississippi Publishers*, finding for the Board in *Allain* and

Ray but declining to address the Board's claim that its origin in article 8, § 213A gives it "autonomy." *See State ex rel. Allain v. Bd. of Trustees of State Insts. of Higher Learning*, 387 So. 2d 89, 92 (Miss. 1980).[4] (UMMC says that "this Court was squarely confronted with the general issue of the IHL Board's autonomy" in *Ray*, Brief at 12, but one searches *Ray* in vain for so much as the mention of the word "autonomy.")

In fact, this Court has expressly rejected the theory of the Board's autonomy:

> Van Slyke . . . charges that the Board is an **autonomous or fourth branch** of government merely because it is vested with authority by the Constitution. . . . [W]e find that the Chancellor cannot be held in error for finding that the Board of Trustees is part of the executive branch of government, **rather than an autonomous or fourth branch of government.**

Van Slyke v. Bd. of Trustees of State Insts. of Higher Learning, 613 So. 2d 872, 877 (Miss. 1993) (emphasis added).

The history set forth in *Allain* and expanded upon in *Mississippi Publishers*, 478 So. 2d 269, 273 (Miss. 1985), demonstrates that the political interference redressed by § 213A was in particular the interference of several governors who (in the eyes of their opponents, at least) arbitrarily dismissed faculty and staff so as to replace them with friendlier faces. See also Brief for Plaintiff-Appellants at 41. This is also attested by a historical source cited by UMMC in its brief. Richard A. McLemore, *Higher Education in the Twentieth Century*, in 2 *A History of Mississippi* 428-29, 435-36 (McLemore ed., 1973). It is quite clear that the "political interference" of which Dr. McLemore writes is nothing more than that of various governors mucking around in academic affairs:

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[4]Although UMMC mentions *Allain*'s holding regarding "self-generated funds" (Brief at 12), it *never argues* that this holding has any application in the present case. Issues not argued in a principal brief are waived. *AmSouth Bank v. Gupta*, 838 So. 2d 205, 210 (Miss. 2002); *Sanders v. State*, 678 So. 2d 663, 669-70 (Miss. 1996). The Brief for Plaintiff-Appellants distinguishes *Allain* (at 39-44).

> In Mississippi the public institutions of higher learning were occasionally threatened by **political interference**. In 1930 **Governor Theodore Gilmore Bilbo ruthlessly led a movement to remove his political opponents** from the administration and faculty of the institutions of higher learning where he was able to control the boards of trustees. This intervention led to an investigation by the Southern Association of Colleges and Schools and the subsequent expulsion of the institutions involved from membership. The Southern Association was also concerned with the situation in 1940, when **Governor Paul Burney Johnson, Sr., interfered with the administration** of the institutions of higher learning.

Id. at 423-24 (emphasis added). Johnson's interference and the Southern Association's negative response gave "new impetus" to the movement for an independent Board, writes McLemore, and thus led to the 1942 adoption of § 213A. *Id.* at 435-36. None of this history comes even close to buttressing UMMC's argument that its compliance with laws adopted by the Legislature or with the administrative process at the Department constitutes "political interference."

There is thus no basis for the claim that § 213A makes the Board's decisions above the law or was ever intended to do so. It aimed first and foremost, as its actual text shows, at reserving hiring and firing of personnel to the Board, making a future "Bilbo purge" impossible. *Id.* at 431-32; R.E. 18 at 965-66 (Sansing).

As for the *Ray* decision, 809 So. 2d 627 (Miss. 2002), it was confined to the narrow issue of whether the state's junior-colleges board could prevent a four-year university from offering classes at a Gulf Coast campus. *Ray*, 809 So. 2d at 629.[5] This Court held that the Legislature's grant of such power to the junior colleges amounted

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[5] *Ray* is unusual in that the Court held that the individual plaintiffs had no standing to sue, and that the community-colleges board was barred from proceeding because it did not have the Attorney General's leave to sue the Board. *Ray*, 809 So. 2d at 632-33 (citing Miss. Code Ann. § 7-5-1). With the suit thus disposed of, the *Ray* Court then nonetheless went on to decide the constitutional issue, although this Court usually avoids passing upon the constitutionality of any statute unless compelled to do so.

to "veto power over the IHL's constitutionally-mandated power to manage and control the State's universities." *Id.* at 637. In *Ray*, the statute held unconstitutional was expressly worded to conflict with the Board's "management and control": Miss. Code Ann. § 37-102-3 stated that the Board "shall not permit its universities to offer courses for college credit at the lower undergraduate level at an off-campus site unless approved by the State Board for Community and Junior Colleges." *Ray*, 809 So. 2d at 635. This Court found an express conflict with § 213A.

But there is no such express conflict in the CON Law. It does not purport to limit the Board *in particular*, but merely sets forth a general rule which *all* covered persons and health care facilities must follow. The present case is thus fully distinguishable from *Ray*. The CON Law seeks to control health care expenses, which, no matter whether incurred at a "teaching hospital" or some other health care facility, "contribute so greatly to the total national health bill." *Grant Ctr. Hosp. of Miss., Inc. v. Health Groups of Jackson, Miss., Inc.*, 528 So. 2d 804, 806 (Miss. 1988) (citation omitted). That purpose does not aim at subordinating the Board to another agency's approval. Any regulation of UMMC by the CON Law is not particular to UMMC but rather is equally applied to all the hospitals and providers in Mississippi—including, unless expressly exempted, all the hospitals owned by the state of Mississippi.

Even a constitutionally created board is "subject to legislative control absent constitutional provision otherwise." *State v. Bd. of Levee Comm'rs*, 932 So. 2d 12, 26 (Miss. 2006). This Court well knows the "very heavy burden" upon a party seeking to prove that a statute is unconstitutional. *Id.* at 19. A statute is unconstitutional "only if it *directly conflict[s]* with 'the clear language of the constitution.' " *Id.* (quoting *PHE,*

Inc. v. State, 877 So. 2d 1244, 1247 (Miss. 2004)) (emphasis added). The conflict must be clear and apparent, and any doubt as to whether the statute may be constitutional suffices to prove its constitutionality. *Id.* Any lawmaking power not expressly withheld in the constitution belongs to the Legislature. *Id.* at 21.

All that § 213A says about "management and control" is that the Board has it. The constitution doesn't say that this management and control is absolute, exclusive, or above the law. *Cf.* Miss. Code Ann. § 47-5-23 (MDOC vested "with the exclusive responsibility for management and control of the correctional system"); *id.* at § 39-3-17 (library commission has "exclusive control" of finances); *id.* at § 75-75-105 (athletic commission has "sole direction, management, control and jurisdiction" over boxing & wrestling matches). The Attorney General, for instance, argued to this Court that his management and control of litigation by state agencies was "exclusive," but this Court held otherwise, even where Miss. Code Ann. § 7-5-1 gave him "the sole power to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest." *Frazier v. State ex rel. Pittman*, 504 So. 2d 675, 690, 691-92 (Miss. 1987). Section 213A therefore cannot be read to mean *exclusive* "management and control" without this Court's adding a word that the Legislature and people of Mississippi did not see fit to include. "[A]s a Court, we are under a duty to construe the Constitution as written." *Golding v. Armstrong*, 97 So. 2d 379, 383 (Miss. 1957) (refusing to add words "or employment" where not present).

UMMC, under the direction of the Board, has as much right as any other person or hospital in Mississippi to apply for a CON, and nothing in the CON Law impairs the Board from exercising *just as much "management and control" of UMMC's*

acquisitions, etc. as any other Mississippi health care facility's managers possess—no more and no less. Without additional language, such as an express *constitutional* provision for the Board to buy whatever it deems "desirable" for UMMC, § 213A cannot be said to conflict with the CON Law. "The construction of a constitutional section is . . . ascertained from the plain meaning of the words and terms used within it." *Dunn v. Yager*, 58 So. 3d 1171, 1189 (Miss. 2011) (quoting *Ex parte Dennis*, 334 So. 2d 369, 373 (Miss. 1976)). If "management and control" in their ordinary meaning can be taken to mean "exemption from general regulatory authority," then Contestants and every other health care provider in Mississippi must be exempt from the CON Law as well, for they too are under someone's "management and control." But for better or worse, that is not the "plain meaning" of "management and control."

Thus, there is no direct conflict between § 213A and the CON Law, and any protestations to the contrary by UMMC or the Board are without merit.

2. *"Management and Control" Do Not Supersede the Police Power.*

The *Ray* decision, which upheld the freedom of the Board from seeking any prior approval from the junior-colleges board for its curriculum, is also distinguishable on the same grounds which the Attorney General has already cited in connection with a statute directly affecting the curriculum which the Board may offer. We refer to Miss. Code Ann. § 75-76-34(1), which says that "no public school shall teach or train persons to be gaming employees." In its opinion no. 2004-0203 (May 12, 2004), the office of the Attorney General reasoned that § 75-76-34(1) does not infringe upon the Board's "management and control" powers and is thus not unconstitutional under *Ray*. Its basis

for that conclusion was that § 75-76-34(1) is (1) a statute "having general application" and also (2) enacted pursuant to the Legislature's *general police power*:

> The supreme court [in *Mississippi Publishers*] upheld the legislative policy in favor of open meetings, stating: "Nothing in the [Constitution] places the Board of Trustees beyond the reach of statutes having general application to all state agencies." *Id.* at 277. **It is our opinion that the courts would also uphold the Legislature's exercise of its police powers to restrict where, how, and by whom gaming employees may be trained.**
>
> We find the issue in *Ray, supra,* factually distinguishable from the issue addressed here. The statute ruled unconstitutional in *Ray* transferred control over curriculum from the IHL, a constitutionally established body, to a statutorily established body—the Community and Junior College Board. **Yet, the first and second year courses involved were legal** and already available at on-campus and off-campus locations throughout the higher education system. In contrast to section 75-76-34 of the Mississippi Code of 1972, as amended, **the statute in *Ray* was not an exercise of the legislative police power to regulate public morals, health and welfare.**

Miss. Att'y Gen. op. no. 2004-0203 (May 12, 2004) (emphasis added). As shown in the Brief for Plaintiff-Appellants at 42-44, the CON Law too is "an exercise of the legislative police power to regulate public morals, health and welfare." The Attorney General's office should have remembered this analysis when it opined on the CON Law in 2010.[6]

This Court should agree with that 2004 Attorney General opinion and apply its reasoning to the present case. "The police power of a sovereign state does not find its source in the written constitution of the state, it is a power inherent in the existence of a sovereign government." *Barnwell, Inc. v. Sun Oil Co.*, 162 So. 2d 635, 641 (Miss. 1964). "The rule is well established that any exercise of police power is valid if it has for

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[6]The claim that the Attorney General's office will not pronounce on the constitutionality of statutes, Brief at 4 n.3, seems not to be universally correct. Miss. Code Ann. § 7-5-25 (AG opinions) sets no such limit. This Court's holdings on that subject are of course supreme, but that is the case with the interpretation of Mississippi statutes as well, and the Attorney General's office does not hesitate to opine on those.

its object the protection and promotion of the public health, safety, morality or welfare, if it is reasonably related to the attainment of that object, and if it is not oppressive, arbitrary or discriminatory." *Hollywood Cemetery Ass'n v. Bd. of Mayor & Selectmen of the City of McComb*, 760 So. 2d 715, 718-19 (Miss. 2000). "The right to regulate and to promote development of industry" likewise falls within the sovereign police powers. *Superior Oil Co. v. Foote*, 59 So. 2d 85, 93 (Miss. 1952). "[T]he state exercises the highest governmental authority when it invokes its police powers. In other words, the police power takes precedence over all private rights even though they stem from constitutional bases." *Miss. Milk Comm'n v. Vance*, 129 So. 2d 642, 660 (Miss. 1961). "Every possible presumption is in favor of the validity of" any statute enacted under the police power. *Id.* at 663.

The fact that the Legislature's exercise of the police power could theoretically and incidentally hamper the Board is no more egregious than that the CON Law sets limits to what any entity, public or private, can do:

> Implicit in the theory of the police power . . . is the principle that **incidental injury to an individual will not prevent its operation**, once it is shown to be exercised for proper purposes of public health, safety, morals, and general welfare, and there is **no arbitrary and unreasonable application in the particular case.**

Red Roof Inns, Inc. v. City of Ridgeland, 797 So. 2d 898, 902 (Miss. 2001) (quoting *Grant v. Mayor & City Council of Baltimore*, 129 A.2d 363, 366 (Md. 1957)) (emphasis added).

Unconstitutionality must be proved beyond a reasonable doubt. *State ex rel. Hood v. Louisville Tire Ctr., Inc.*, 55 So. 3d 1068, 1072 (Miss. 2011). Under this very high standard, the Board cannot prove that its "management and control" of UMMC

(which, properly understood, gives it no more powers than are held by the managing boards of Contestants' hospitals) is superior to the police power of the State and to the CON Law duly enacted pursuant to that sovereign power.

The CON Law is not arbitrary as applied to UMMC: it gives UMMC the same right to apply for CONs, and to challenge other CON applications, as any other entity possesses. The fact that UMMC has complied ("voluntarily," it now says) with the CON Law for over 30 years, during a period of obvious expansion, growth, and success for UMMC, makes it impossible to find that the CON Law is "unreasonable or oppressive" towards UMMC. It clearly hasn't "stagnated" UMMC's growth.

Any alleged conflict between the Board's "management and control" and the police powers of the State of Mississippi cannot possibly rise to the level of the conflict between a parent's religious convictions (themselves protected by article 3, § 18 of the Mississippi Constitution) and the police power—yet in just such a conflict, this Court held unanimously that the police power to require vaccination of public-school students trumped the constitutional protections afforded to religious beliefs. *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979). The Board's "management and control," while important and guaranteed within reasonable limits, is not superior to freedom of religion.

Also, just like § 75-76-34 prohibiting public-institution gaming instruction, the CON Law is not a blatant power grab by one educational body such as the junior-colleges board against the Board, but rather a statute enacted for a general purpose having nothing directly to do with education. *Ray* thus simply is not on point.

The Board's "management and control" is to be understood in the ordinary sense of those words, not exaggerated into absolute power above the rule of law. The CON

Law, a statute of general application enacted pursuant to the police power vested in the Legislature as the representative of the people of Mississippi, is not unconstitutional.

C. The *Mississippi Publishers* Decision Rejects Board Autonomy.

As the Attorney General recognized in opining on Miss. Code Ann. § 75-76-34, this Court in *Mississippi Publishers* held that a statute having general application may bind the Board. 478 So. 2d at 277. Arguing that the Board is immune from the CON Law, UMMC tries to wriggle around this holding.

1. Statutes of General Application May Affect the Board's Decisions.

First, UMMC argues that the Open Meetings Law "did not interfere with the Board's substantive decisions" (supposedly unlike the statute in *Allain*), and offers in support the claim that this Court's holding was based on the fact that compliance with the Open Meetings Act would make "no intrusion into the decision-making power of the Board." Brief at 14 (quoting *Miss. Publishers*, 478 So. 2d at 276).[7] But *in context*, this quotation does not support the substantive/procedural distinction that UMMC seeks to import into this Court's judgment. The importance of *Mississippi Publishers* to this case merits quotation at length:

> **But the open meeting legislation is no intrusion into the decision-making power of the Board.** The Open Meetings Act was enacted for the benefit of the public and is to be construed liberally in favor of the public. "Openness in government is the public policy of this State." *Mayor & Alderman v. Vicksburg Printing & Publishing Co.*, 434 So. 2d 1333 (Miss. 1983).

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[7]In fact, the State Building Commission in *Allain* filed suit to halt the Board "from proceeding with the project without conforming to the statutes setting out the duties and obligations of the State Building Commission." *Allain*, 387 So. 2d at 90. It thus appears that the issue was not the "substantive" one of whether to build a laboratory, but the "procedural" one of how bids were to be let, etc. So it's not at all clear that any "substantive" power of the Board's was at risk in *Allain*.

> This Court acknowledges that openness in sensitive areas is sometimes unpleasant, or difficult, or competitive, and sometimes harmful. Nevertheless, in a democratic society the public's business must be open to maintain the public's confidence in its officials, to make intelligent judgments, and to select good representatives. *Athens Observer Inc. v. Anderson*, 245 Ga. 63, 263 S.E.2d 128 (1980). *Open Meetings Law: An Analysis and a Proposal*, 45 Miss. L. J. 1151 at 1160 (1974).
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> . . . .
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> **Nothing in the text of section 213-A or its companion statute, Miss. Code Ann. § 37-101-1 through 15 suggests that it places the Board of Trustees beyond the reach of statutes which have general application to all state agencies.** This Court **therefore** holds that the Open Meeting Law, § 25-41-1 et seq. are constitutional as applied to the Board of Trustees of the State Institutions of Higher Learning.

Id. at 276-77 (emphasis added). The Board is not "beyond the reach of statutes which have general application"—and "*therefore*," the statute was held constitutional as applied to the Board. What this Court actually said, then, supports the interpretation placed upon it by Contestants, that the general applicability of the Open Meetings Law was the crucial point, not any supposition that the Open Meetings Law would have no effect whatsoever on the substance of any agency's decisions.

Nor does the Board's present argument, that *Mississippi Publishers* implied some sort of distinction between substantive and procedural effects on Board decision-making, even make much sense. It would be rather strange if the requirement that decisions be made openly after public deliberation had been intended to have *no* effect on the substance of the decisions made. It makes much more sense to suppose that the public hoped very much for a positive effect on those decisions. How would it be "essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public

business be performed in an open and public manner," Miss. Code Ann. § 25-41-1, if the effect were not "substantive" but merely an indifferent matter of form?

The law journal article cited by this Court in *Mississippi Publishers*, which this Court evidently deemed relevant to the purposes behind such a law, had this to say:

> There is a symbiotic relationship between secrecy and evil in government. Corrupt practices are kept confidential because they are wrong, and the wrongs are made possible through secrecy. . . . Public officials should not have the attitude that only their views should be considered in the decisionmaking process. If meetings are closed, there can be no criticism by the public or the press. Thus, valid points of view never reach those who should respond to public opinions and attitudes.

William R. Wright II, Comment, *Open Meetings Law: An Analysis and a Proposal*, 45 Miss. L. J. 1151, 1161 (1974). It does not appear that the author believed that public meetings would have no "substantive" effect on decisions.[8]

But we don't need to look even that far: in *Mississippi Publishers* itself, this Court noted that "Board members testified to the benefit in decision making with a more detailed, private communication." *Miss. Publishers*, 478 So. 2d at 275. The Board argued at that time that privacy would *improve its decisions*, and thus did not appear sympathetic to any notion that the Open Meetings Law was without substantive effect. Its representations to the contrary in the present suit should be treated skeptically.

The rest of UMMC's argument under this heading is simply an extended foreboding that complying with the CON Law might conceivably, maybe, someday, have some sort of negative effect on UMMC. But the Legislature's policy that "persons" and "hospitals" like UMMC must obey the CON Law is not a proper matter for the courts to

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[8]Compare "corrupt practices are kept confidential because they are wrong" with the Department's assertion that it can make secret rulings as to whether a given UMMC project is sufficiently "educational" not to need a CON. T.31, 58; see Brief for Plaintiff-Appellants at 26-27.

adjudicate. If the CON Law now, after 30 years, suddenly jeopardizes UMMC, let UMMC take its complaint to the Legislature that created both it and the CON Law.

As for UMMC's sadness at the thought that complying with the CON Law might sometimes be a hindrance to its planning, Brief at 17-18, we are unaware of any authority holding that inconvenient laws are therefore unconstitutional, an argument that has yet to impress a single police officer who has pulled over a driver for disregarding an inconvenient speed limit.[9] The Board is subject to the law, convenient or otherwise. *Miss. Publishers*, 478 So. 2d at 276 (open meetings "sometimes unpleasant, or difficult, or competitive, and sometimes harmful," but legally required nonetheless). UMMC, like Contestants and every other hospital in Mississippi, is required to do a little planning ahead for big projects. That is a feature, not a bug, of the CON Law. R.E. 14 at 579 ("long range development plan" CON review criterion). Anyone can drive by UMMC's main campus and clinics and see that it has been quite successful with its plans and expansions. When UMMC exclaims that following the CON Law, *as it has done "voluntarily" for 30 years*, "would nullify the IHL Board's constitutional and statutory mandate," Brief at 19, or "effectively stagnate UMMC," Brief at 16, such hyperbole does not merit serious attention.

2. The CON Law Is a Statute "of General Application."

Rather desperately, UMMC also tries to distinguish the CON Law from the Open Meetings Law by claiming that, because the former states some exceptions, only the latter is of "general application to all state agencies" as held in *Mississippi Publishers*.

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[9]Could the Board, in its "management and control," direct its employees to drive 100 m.p.h. on the interstate, and be exempt from "interference with its decisions" by law enforcement officers? On the arguments in UMMC's brief, we don't see why not.

478 So. 2d at 277. But of course, the Open Meetings Law has exceptions too, beginning with "the judiciary" and extending to include the parole board, the Workers' Compensation Commission, and various arms of the revenue department. Miss. Code Ann. § 25-41-3(a). Perhaps UMMC means to argue indirectly that this Court got *Mississippi Publishers* wrong.[10]

Regardless, the list of exceptions marshaled by UMMC in its brief is rather paltry: mental-health facilities, state veterans' homes, and a handful of facility-specific exemptions. Brief at 19-20. These do not suffice to prove that the CON Law is not of "general application." The exceptions to the CON Law are not materially broader than those in the Open Meetings Law; moreover, the express naming of a few excepted agencies emphasizes the fact that the Legislature obviously intended the CON Law to be otherwise "generally applicable" to all other "persons" and "health care facilities." It's ironic for UMMC to complain that the CON Law is not "general" enough when UMMC's real gripe is that said law is so general as to include UMMC itself.

Mississippi Publishers, for the reasons stated above and in the Brief for Plaintiff-Appellants, supports summary judgment for Contestants, not for UMMC. The CON Law is a statute of general application that applies no less to UMMC than to any other comparable hospital in Mississippi.

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[10]UMMC also cites *Fordice v. Thomas*, 649 So. 2d 835, 845 (Miss. 1995), for the proposition that "statutes that apply to all state agencies must apply to those constitutionally created and otherwise." Brief at 20. We cannot find this proposition stated at page 845 of *Fordice* or anywhere else in that decision.

D. The CON Law Does Not Subject UMMC to Any "Political Process."

To convince this Court that the CON Law is a "political process," UMMC tries to argue that the statutory scheme for the State Health Officer's review of CON applications poses some sort of "political" threat to it. Considering that the Legislature vests sole discretion over the award or denial of a CON in the State Health Officer, who is the same official who got this case rolling by requesting the Attorney General to opine that the CON Law does not apply to UMMC, it must be confessed that Contestants find this a strange argument. Nonetheless, Contestants have no fear that Dr. Currier or any other State Health Officer would ever act politically rather than professionally in carrying out her official duties. UMMC should have no worries as well. UMMC's argument reflects a poor understanding both of the CON Law and of the carefully designed regulatory framework within which the Department implements the CON Law.

In fact, the CON Law has created what should be as non-political a process as ever a government could hope to enact. As stated by another of the historical authorities cited by UMMC in its brief, "the most important step in the progress of public health work in Mississippi was taken in 1924 when the State Board of Health was *removed from politics*" and constituted by staggered appointments in such a manner that "no administration gains control of the Board." Laura D.S. Harrell, *Medical Services in Mississippi, 1890-1970*, in 2 *A History of Mississippi* 554-55 (Richard A. McLemore ed., 1973) (emphasis added). The State Board of Health is thus no less apolitical than the IHL Board.

As implemented by the Department, the CON Law creates a framework within which an applicant has every right to expect that professional expertise, not politics, will

determine the result. *See* Miss. Code Ann. § 41-7-197; Miss. Admin. Code § 15-5-1 (CON Review Manual). An application is first reviewed by the Department's staff, who publish an analysis recommending approval or disapproval based on a comparison to the State Health Plan and governing law. If the applicant or any affected party disagrees with the staff analysis, it can then request a hearing during the course of review, at which an independent hearing officer considers the testimony of fact and expert witnesses and issues her findings of fact, conclusions of law, and recommendations to the State Health Officer. Section 41-7-197 then vests the final decision in the State Health Officer, who is appointed by a politically neutral State Board of Health pursuant to § 41-3-1.1. Like Dr. Currier, previous appointees to the position of State Health Officer have been health care professionals, not "political footballs." The decision is then subject to the normal level of appellate review of an administrative decision. Miss. Code Ann. § 41-7-201.

But, UMMC protests, the Legislature has enacted statutes awarding CONs or "prioritiz[ing] the order in which MSDH must consider applications and where certain of the facilities should be allowed." Brief at 21. That is true but immaterial, for UMMC cites no example of any such enactment's supposedly infringing upon the "management and control" of UMMC. Thus, UMMC's argument really rests on the mere possibility that the Legislature might one day enact an unconstitutional statute within the CON Law. This Court does not address the constitutionality of unenacted (i.e., nonexistent) statutes. *Hughes v. Hosemann*, ___ So. 3d ___, No. 2010-CA-01949-SCT, at ¶ 13 (Miss. Sept. 8, 2011) (citing *Barnes v. Barnett*, 129 So. 2d 638 (Miss. 1961) & *Power v. Ratliff*, 72 So. 864 (Miss. 1916)). Hence it need not "anticipate conditions which may never arise." *Id.* at ¶ 28 (Randolph, J., concurring) (quoting *Ratliff*, 72 So. at 868).

True, the Legislature created a moratorium on nursing homes, and then lifted the moratorium in certain instances. The Legislature has sometimes directed the grant of a CON. But UMMC owes its own existence to the Legislature's wise choices regarding health policy, which neither UMMC nor the judicial branch is empowered to second-guess. As shown in the Harrell article cited above, were it not for politics, UMMC would not exist. Harrell, *supra*, at 540. Nor does the occasional waiver of a need requirement suggest that UMMC has to fear "political" treatment in the CON process. It has in fact been the direct beneficiary of one of those CON exceptions of which it now has the nerve to complain. Miss. Code Ann. § 41-7-191(4)(a)(vi) (Dep't may issue CON for psychiatric beds at UMMC; need waived). UMMC is not the only institution under the Board's "management and control" to have been thus blessed. *Id.* at § 41-7-191(16) (CON for Miss. State Univ.). UMMC has nothing to complain about regarding "politics."

The notion that "the IHL Board's decisions could be vetoed through the legislative process" is sheer fantasy. The idea that UMMC, of all institutions, would legitimately obtain a CON and then be the victim of a legislative "veto" of that CON requires a power of imagination far beyond that of Contestants. If and when that "condition" may "arise," UMMC may bring its challenge to this Court, but not today.

In fact, UMMC has its argument exactly backwards: it complains of exemptions and exceptions from the CON process, in a case where UMMC is arguing strenuously to be granted *just such an exception*. Absent any express legislative exception, however, UMMC's acquisitions of major medical equipment, etc. must (and ought to) be decided, not politically, but by the State Health Officer, a medical professional, with the aid of her Departmental staff of experts—to whose decisions the courts regularly defer on the basis

of just that expertise and professional knowledge. "The existence within government of discrete areas of quasi-legislative, quasi-executive, quasi-judicial regulatory activity in need of expertise is the raison d'etre of the administrative agency." *Miss. Transp. Comm'n v. Anson*, 879 So. 2d 958, 962-63 (Miss. 2004) (internal citation omitted). The Department is supposed to exist for the very purpose of giving the public interest its due, without political gamesmanship:

> [a]dministrative agencies are ambiguous creatures born of necessity, mired in the tension between public policy and personal claims of right. They pursue pragmatically the public interest balancing the utilitarian (and expertly divined) calculus of aggregate net benefit against the individual's claim to fair opportunity and process. They address pressing questions of political economy and science where there are seldom easy answers and almost never only two points of view. Our administrators also regulate and facilitate individual enterprise without which the public interest will surely suffer. Here, as well, "the life of the law has not been logic; it has been experience."

Miss. State Dep't of Health v. Baptist Mem'l Hosp.-DeSoto, Inc., 984 So. 2d 967, 981 (Miss. 2008) (quoting *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 315-16 (Miss. 1992)).

Entrusting CON decisions to a State Health Officer is the very opposite of reducing those decisions to a "political process." It is no more political than any other administrative agency's decision-making, which ultimately is overseen by this Court. UMMC's troubled argument to the contrary, which effectively suggests undoing the deference owed to administrative agencies, lacks all merit. That deference itself is constitutionally grounded in the separation of powers. *Miss. State Tax Comm'n v. Miss.-Ala. State Fair*, 222 So. 2d 664, 666 (Miss. 1969).

Properly understood by their plain meaning, the ordinary words "management and control" in § 213A do not conflict with the CON Law. The CON Law is constitutional as applied to UMMC. The chancery court erred in failing to so hold.

II. THE CON LAW APPLIES TO UMMC.

In part III of its argument, UMMC tries to work a little stage magic with its § 213A argument: *because* the CON Law conflicts with § 213A, we are told, the CON Law must therefore be twisted every whichaway to eliminate that supposed conflict. But if there is no conflict, then this sleight-of-hand is revealed for the empty trick it really is. The CON Law must be read for what it actually says, not for what UMMC wishes it said.

A. The Terms of the CON Law Apply to UMMC.

UMMC's brief omits to mention that the Department has itself conceded that the CON Law applies to UMMC. Where the Department's interpretation of the CON Law is not clearly contrary to the statutory language, the courts will give that interpretation great weight. *Dialysis Solution, LLC v. Miss. State Dep't of Health*, 31 So. 3d 1204, 1211 (Miss. 2010). In fact, the Department *does* act contrary to the CON Law when it engrafts a "teaching exception" thereon, just as it engrafted an extension provision onto the CON Law before this Court set it straight in the *Dialysis Solution* case. But in finding that the CON Law applies to UMMC, the Department acted well within its authority. UMMC comes nowhere near proving otherwise.

1. The Purpose of the CON Law Is Not Education.

Contestants are happy to agree with UMMC that the CON Law's purpose has nothing to do with education, but that proposition works against UMMC, not for it.

Because the CON Law does not have any educational purpose, no exceptions to it based on educational purposes can be invented by the Department or the courts. Once again, UMMC forgets which branch of our government it's addressing, and goes on about adequate numbers of physicians, medical education, etc. If the Legislature had thought that its policy goals in the CON Law impeded its policy goals in creating and sustaining UMMC, then the Legislature could have excepted UMMC from the CON Law. It did not, however, and its own evaluation of any competing public policies is outside the proper scope of this Court, which cannot

> write into the statute something which the legislature did not itself write therein, nor can [the judiciary] ingraft upon it any exception not done by the lawmaking department of the government. Whenever the judiciary shall undertake to violate these rules—indeed, we may say maxims—then it is guilty of usurpation in its most obnoxious form; and the courts dare not do this lest they destroy their own usefulness and power.

Kelly v. Miss. Valley Gas Co., 397 So. 2d 874, 877 (Miss. 1981) (quoting *Hamner v. Yazoo Delta Lumber Co.*, 56 So. 466, 490 (Miss. 1911)) (despite "considerable appeal," rejecting plea to add retaliatory-discharge cause of action to Workers Compensation Act). UMMC seems to fear having this case decided on the basis of law, not policy.

2. UMMC Is a "Person" and a "Hospital."

The June 2010 opinion by the Attorney General's office, although wrong in other respects, was nonetheless correct that the CON Law's definitions of "person" and "health care facility," include UMMC. R.E. 13 at 312 (citing Miss. Code Ann. § 41-7-173(p)). The Department, in its briefing before the chancery court, agreed:

> As an initial matter, it is clear that the CON statutes apply to UMMC. . . . Code Section 41-7-173(p) defines a "person" subject to the CON statutes as including "the state or a political subdivision or instrumentality of the state"; and a "healthcare facility" as including "facilities owned or operated by the state or political subdivision or

> instrumentality of the state . . . ." **Thus, the CON statutes expressly apply to state-owned facilities including UMMC.**

R.445 (emphasis added). Unless the Department's reading is "contrary to the plain statutory language," it must be upheld.[11] *BellSouth Telecomm., Inc. v. Miss. Pub. Serv. Comm'n*, 18 So. 3d 199, 202 (Miss. 2009).

(a) It's a Hospital.

But instead of showing that the Department's interpretation contradicts any statutory language, UMMC asks this Court to hold that UMMC is not a "hospital" under the CON Law, based on *Sullivan v. Washington*, 768 So. 2d 881 (Miss. 2000), and *Watts v. Tsang*, 828 So. 2d 785 (Miss. 2002).

UMMC's quotations from those cases spotlight the importance for the state of UMMC's training physicians, a valuable function Contestants have never questioned. Of course, the very existence of UMMC is a matter of Legislative policy and is not up to the Board, so it is for the Legislature, not the Board or UMMC, to decide how the policy objectives of UMMC may best be reconciled to the policy objectives of the CON Law.

In any event, *Watts* directly refutes UMMC's contention that a "teaching hospital" is not a "hospital":

> Further, UAS is properly considered an instrumentality of the State. "State" is defined as "the State of Mississippi and any office, department, agency, division, bureau, commission, board, institution, **hospital, college**, university, airport authority, **or any other instrumentality thereof**...." Miss. Code Ann. § 11-46-1(j) (emphasis added). UAS meets the definition of "State" because it is an instrumentality of UMMC, *a state teaching hospital.*

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[11]Note however that the definition of "health care facility" is actually at subsection (h) of § 41-7-173.

Watts, 828 So. 2d at 793 (italics added). Note that the boldfacing in that quotation was supplied by this Court in *Watts*, which found it relevant to UMMC's immunity that it is a "hospital"—else, why emphasize that word? UMMC is a school, but it is also a hospital, and insofar as it's a hospital, it must conform to the CON Law.

The selective quotation practiced by UMMC also fails to remind this Court of its holding that the "operational purpose" of UMMC is *care* to the indigent. *Sullivan*, 768 So. 2d at 885, 886. This belies UMMC's insistence that its teaching function takes first priority. Indeed, as acknowledged in both *Sullivan* and *Watts*, UMMC is *required by statute* (Miss. Code Ann. § 37-115-31) to ensure that at least half its patients are Medicaid beneficiaries. *Sullivan*, 768 So. 2d at 885, 886; *Watts*, 828 So. 2d at 793. We continue to wonder whether UMMC will concede that the Board's "management and control" are legally bound by what *Watts* calls a "mandate" by the Legislature to subordinate any contrary "teaching purpose" to § 37-115-31, or whether UMMC thinks that this, too, unconstitutionally infringes the Board's alleged superpowers. Perhaps UMMC will answer this question in its reply brief, and then explain how its answer comports with its litigating position in this case.

Therefore, nothing in *Sullivan* or in *Watts* supports the position that the CON Law does not apply to UMMC, or that UMMC cannot be "mandated" by statute to do certain things whether it wants to or not. Just the opposite: these cases support Contestants' position that UMMC *is* subject to the CON Law and *can* be bound by statutory law in general. The important policy considerations acknowledged by this Court in *Sullivan* and *Watts* are not in direct conflict with the policy goals of the CON Law, and the courts should not seek to second-guess the Legislature's public policy.

Finally, as regards whether UMMC is a "hospital," its brief cites the federal regulatory definition of a "teaching hospital" as "a hospital engaged in an approved GME [graduate medical education] residency program in medicine," etc. Brief at 25 n.26 (quoting 42 C.F.R. § 415.152). This is no help at all to UMMC. First, the definition itself says that UMMC is a "hospital." Second, the fact that it is "engaged in" an education program is a far cry from any confirmation that UMMC is "primarily" a school and not a hospital: rather, it's a "hospital" that is also "engaged in" educational activities. Most importantly, as Contestants have already shown, the definition of "hospital" in the federal Medicare law matches up word for word with the CON Law's definition of "hospital," no doubt by deliberate design of the Legislature (the Medicare laws being prior to the CON Law). 42 U.S.C. § 1395x(e)(1). This includes the part about a hospital's being "primarily *engaged* in providing" health care services, which UMMC pretends that it is not, except when it collects Medicare reimbursement from the federal government. Medicare in fact provides "*additional* payments, above and beyond the reimbursement rate for *treating Medicare patients*, to cover the 'direct' and 'indirect costs of medical education.' " *Henry Ford Health Sys. v. Dep't of Health & Human Servs.*, ___ F.3d ___, 2011 WL 3611452 at *1 (6th Cir. Aug. 18, 2011) (quoting 42 U.S.C. § 1395ww(d)(5)(b), (h)) (emphasis added). That is to say, UMMC as a hospital is reimbursed "for treating patients," and then gets bonus reimbursement for being, in addition to a hospital, a "teaching" hospital. Its teaching function supplements, but does not supersede, its function as a hospital.

(2) It's a Person.

As for whether UMMC is a "person" under § 41-7-173(p), UMMC does not deny this so much as shift focus to the provision at § 41-7-191(1)(f) that a person, such as UMMC, must have a CON to buy "any major medical equipment for the provision of medical services." Brief at 27. Because its "*principal* purpose" in the present case is "maintaining academic accreditation and advancing its radiation oncology education, training and research program," says UMMC, it isn't buying the linear accelerator "for the provision of medical services." Brief at 27-28 (emphasis added). (As we saw in the preceding subsection (1), however, the "operational purpose" of UMMC is providing health care.)

But § 41-7-191(1)(f) does not say "*principally* for the provision of medical services." It just says "for." And UMMC indisputably bought its device *for* providing medical services to patients, *in the course of which* it will also teach its students how to provide those services. As this Court noted in one of the decisions cited by UMMC, "the resident must be able to *practice medicine* under the guidance of a learned physician in order to master his or her profession." *Sullivan*, 768 So. 2d at 885 (emphasis added). Students are no less practicing medicine, and thus "providing medical services," when they do so for an educational purpose.

On UMMC's theory, Jackson HMA could acquire any major medical equipment it pleased without a CON, because its "primary purpose" was not to provide medical services, but to increase shareholder value. St. Dominic and Baptist could do the same, because their "primary purpose" was not to provide medical services, but to serve the Lord. Contestants do not deny these ultimate goals, but they will not be claiming

exemptions from the CON Law on any such basis, because they would be foolish to do so. Those ultimate goals are achieved *by* the provision of medical services, and on any sane reading of the CON Law, the same applies to UMMC's ultimate goal of educating physicians, which it can accomplish only by providing medical services.

If further evidence were needed that UMMC's argument is flawed, the CON Law's provision on major medical equipment includes an exemption for "the acquisition of major medical equipment used *only for* research purposes." Miss. Code Ann. § 41-7-191(f) (emphasis added). This Court interprets a word in different parts of a statute "in the same sense throughout" barring any clear appearance from the whole of the statute that the Legislature meant it to mean something different. *Barbour v. State ex rel. Hood*, 974 So. 2d 232, 241-42 (Miss. 2008) (quoting *Millsaps Coll. v. City of Jackson*, 101 So. 574, 575 (Miss. 1924)). UMMC's argument amounts to asking this Court to insert the word "only" into the statutory phrase "for the provision of medical services" so that it reads "*only* for the provision of medical services." But the provision on research purposes makes it undeniably clear that the Legislature knew the difference between "for" and "only for."

Indeed, the Legislature seems to have anticipated in advance that entities like UMMC might try to work around the CON Law by claiming that they want major medical equipment "for" research purposes, and forestalled any such chicanery by stating unmistakably that the exemption applies only to such equipment used "only for" research. And of course, the Legislature made not even that much of an exception for any "teaching purpose" UMMC might claim to have; it created no such exception at all. As UMMC admits, the Legislature cannot be supposed to have forgotten, when it

enacted the CON Law, that there was a teaching hospital down the road which it had created a few years back. Brief at 25. The Legislature knew perfectly well what it was doing (and *not* doing), and this Court should not presume otherwise.

Finally, this Court in *Sullivan*, pursuant to the test it created in *Miller v. Meeks*, 762 So. 2d 302 (Miss. 2000), found that sovereign immunity attached to UMMC's physician because he was employed by a "political subdivision" (i.e., UMMC). *Sullivan*, 768 So. 2d at 884. Likewise, *Watts* was predicated upon Dr. Tsang's being an "employee" of UMMC for purposes of the Mississippi Tort Claims Act ("MTCA"), Miss. Code Ann. § 11-46-1 et seq. *Watts*, 828 So. 2d at 791. According to the MTCA,

> "Employee" means **any officer, employee or servant of the State of Mississippi or a political subdivision of the state**, including elected or appointed officials and persons acting on behalf of the state or a political subdivision in any official capacity, temporarily or permanently, in the service of the state or a political subdivision whether with or without compensation.

Id. (emphasis added) (quoting Miss. Code Ann. § 11-46-1(f)). Because Dr. Tsang was effectively an employee of UMMC,[12] he was held immune under the MTCA. *Id.* at 799. This could not have been the case were UMMC not a "political subdivision of the state" under the MTCA. And thus, pursuant to Miss. Code Ann. § 41-7-173(p), UMMC as a "political subdivision" is a "person" under the CON Law, which expressly defines "person" to include "the state or a political subdivision or instrumentality of the state." It is strange to behold UMMC's efforts to argue itself out from under the MTCA, but that

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[12]Under the byzantine corporate structure of UMMC and its subsidiaries, Dr. Tsang was actually employed by the Board and compensated in part by University Anesthesia Services ("UAS"), but this Court wisely held that arrangement to be "illusory," accepting the evidence that "membership in UAS was provided for in the Board's contract with Dr. Tsang, and is clearly part and parcel of the employment system at UMMC." *Watts*, 828 So. 2d at 790.

is what its litigating position in this case threatens to do. This Court should continue to hold that the MTCA applies to UMMC, just as does the CON Law.

UMMC is both a covered "person" and a covered "health care facility" under the CON Law, as the Department correctly found. This Court should agree.

B. The CON Law Does Not Conflict with § 37-115-25(1).

UMMC declares that this Court's recent ruling in the *Daricek* case "actually requires a decision in UMMC's favor." Brief at 28. Unfortunately for UMMC, the analysis in *Daricek* "actually" works against it. Like the statutes analyzed in *Daricek*, the CON Law and the UMMC enabling statutes can and should be reconciled.

The issue in *Daricek* was which statute set the condemnation procedures for an unsatisfactory seawall. *Carl Ronnie Daricek Living Trust v. Hancock County*, 34 So. 3d 587, 591-92 (Miss. 2010). This Court held that the Real Property Acquisition Policies Act ("RPAPA") neither repealed nor superseded the earlier Seawall Act. *Id.* at 599, 600.

UMMC's approach here is to assume that a conflict exists between its enabling statutes and the CON Law, and to argue that its enabling statutes are "more specific" because they apply *only to UMMC*, whereas the CON Law applies to persons and health care facilities more generally. But that is to view the issue from the wrong perspective. The question is not whether the CON Law is meant to apply to UMMC—we already know, from the analysis above and from that set forth in our principal brief, that UMMC is the kind of entity to which the CON Law applies (a "person" and a "health care facility"). UMMC's argument makes no more sense than if the Board argued that § 213A applies only to it and is thus "more specific" than the CON Law.

Rather, the issues raised by § 37-115-25 are equipment, buildings and services: may UMMC acquire, build, or offer these without a CON? *Here* is where one must look for any supposed conflict between the CON Law and the enabling statutes, § 37-115-25 in particular.

The fact is that there is no "direct conflict" at all between § 37-115-25 and the CON Law, so that it would be improper to resort to the canons of statutory construction. *Branaman v. Long Beach Water Mgmt. Dist.*, 730 So. 2d 1146, 1152 (Miss. 1999). The rule that the specific controls over the general "applies only when statutes are irreconcilably inconsistent." *State ex rel. Hood v. Madison County ex rel. Bd. of Supervisors*, 873 So. 2d 85, 91 (Miss. 2004). Before this Court ventures to rule that one statute supersedes another, it will first seek to "construe them to be harmonious and give effect to the Legislature's intent." *Buckel v. Chaney*, 47 So. 3d 148, 159 (Miss. 2010).[13] That is what this Court should do in the present case.

Section 37-115-25 can and should be read so as not to conflict with the CON Law, and this is easily done. First, the former authorizes UMMC to buy "needed" equipment

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[13]In *Buckel*, the issues was of exemptions from the Public Records Act, and this Court held that exemptions from statutes was a matter purely for the Legislature:

> The manner in which the Legislature determines the exemptions to the Public Records Act is strictly within the power of the Legislature: "[t]he preferred policy of disclosing public records must cede to the legislatively-mandated exemptions thereto as 'the wisdom or folly of the pertinent legislation is strictly within the constitutional power of the Legislature[.]' Any disagreements with those directives are best aimed toward the Legislature."

Id. (quoting *Miss. State Univ. v. People for Ethical Treatment of Animals*, 992 So. 2d 595, 610 (Miss. 2008)). The same applies to UMMC's "preferred policy" in favor of its "teaching mission," which "must cede to the legislatively-mandated" exceptions in the CON Law. Any "disagreements" by UMMC "are best aimed toward the Legislature."

without defining how "need" is determined, and the latter requires a showing of "need" as defined by the State Health Plan for major medical equipment (i.e., equipment costing $1.5 million or more). By interpreting the CON Law to supply the definition of "need" in the instance of one particular category of equipment, this Court can resolve any "apparent conflict" between the statutes in that regard. According to *Daricek*, that is therefore the preferred result.

Second, the statutory authorization for UMMC to build facilities does not mean that UMMC can build whatever it wants contrary to law. Section 37-115-25(1) should be compared with the statute authorizing trustees of community hospitals to contract "for the *construction*, remodeling, expansion or acquisition, by lease or purchase, of hospital or health care facilities, including real property, within the service area for community hospital purposes . . . ." Miss. Code Ann. § 41-13-35(5)(j) (emphasis added). Just like § 37-115-25, this authorizes a community hospital to build "hospital or health care facilities." Yet community hospitals routinely seek CONs for equipment, buildings, and services. See App. B (recent CON determinations re: community hospitals). *See also* Op. Att'y Gen. no. 2010-0613 (Nov. 3, 2010) (cmty. hosp. obtained CON to build orthopedic facility). Singing River Hospital System and Delta Regional Medical Center are community hospitals which have been the subject of CON decisions by this Court regarding the building of facilities. *Singing River Hosp. Sys. v. Biloxi Reg'l Med. Ctr.*, 928 So. 2d 810 (Miss. 2006); *Greenwood-Leflore Hosp. v. Miss. State Dep't of Health*, 980 So. 2d 931 (Miss. 2008) (contesting Delta Regional CON). Were all these facilities only "voluntarily complying" with the CON Law? We think not.

Put another way, the mere fact of having the statutory *power* to build a health care facility does not mean that one has the statutory *right* to build one without a CON, where the Legislature in exercise of the general police power of the state has required that a CON be obtained before constructing *any* such facility. There is thus no conflict between § 37-115-25, without which UMMC would have no right to build anything *with or without* a CON, and the CON Law, which sets an additional requirement that UMMC like all hospitals must meet before building health care facilities.

Third, as for "services," the CON Law applies only to an enumerated list of services (quoted in full by UMMC, Brief at 17 n.19). Miss. Code Ann. § 41-7-191(1)(d). Services in *general* not included on this list do not require a CON, only those *specifically* listed (or which would require a capital expenditure above the CON threshold). But in any event, authorization to provide services is like authorization to build facilities: it gives UMMC the same ability as other hospitals have to offer services, but like those entities, UMMC still has to apply for a CON where the specific service is covered by § 41-7-191. Here again, there is no conflict.

Even if this Court were to resort to the canons of statutory construction, and credit UMMC's argument to the point of finding the test of "specific vs. general" ambiguous here, the alternative test of order in time plainly favors the CON Law, enacted in 1979 and amended many times thereafter. Section 37-115-25 was passed in 1950 and the only amendment to it was the addition of a subsection (2) regarding physician recruitment agreements, irrelevant both to the CON Law and to the present case.[14] The CON Law is thus indisputably later and therefore controlling.

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[14]UMMC's argument at the end of its brief (at 33), that the addition of an unrelated subsection makes what is now subsection (1) "later" than the CON Law, is

This result is afforded extra support by the fact that the Legislature defined "person" and "health care facility" to include UMMC, and especially by the fact that the Legislature enacted a waiver of need in 1999 for UMMC to provide pediatric psychiatric beds. Miss. Code Ann. § 41-7-191(4)(a)(vi); 1999 Miss. Laws ch. 495. If the Legislature had imagined that § 37-115-25(1) exempted UMMC from needing a CON to provide such a "service," then why would it have enacted this subsection (4)(a)(vi)? UMMC's desired interpretation renders this portion of the CON Law "superfluous" or "meaningless" and is thus an interpretation "to be avoided." *State ex rel. Pair v. Burroughs*, 487 So. 2d 220, 226 (Miss. 1986).

Thus, according to the precedents of this Court, there is no irreconcilable conflict between the CON Law and § 37-115-25. UMMC is subject to the CON Law and has been ever since the CON Law was enacted. This Court should so hold.

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neither persuasive nor legally sound. See Brief for Plaintiff-Appellants at 14-15.

CONCLUSION

The CON Law is not repugnant to the Board's "management and control" of UMMC, and the plain language of the CON Law applies to UMMC. The chancery court properly denied summary judgment to UMMC and the Board; its error rather was in failing to grant summary judgment to Contestants.

Contestants ask that this Court affirm the order of the Hinds Chancery Court denying Defendant-Appellants summary judgment in this matter, and remand for that court to enter its declaratory judgment holding that the CON Law applies to UMMC and to provide such further relief as is consistent with that holding.

Respectfully submitted, this the 5th day of October, 2011.

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CERTIFICATE OF SERVICE

The undersigned counsel of record in the above-styled cause hereby certifies that he has on this date caused to be served via United States mail (postage prepaid) a true and complete copy of the foregoing document upon each of the following:

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So certified, this the ***5th*** day of October, 2011.

Andy Lowry

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2000 WL 1511919
September 20, 2000

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2000 WL 1511919 (Miss.A.G.)

Office of the Attorney General
State of Mississippi
Opinion No. **2000-0572**

September 20, 2000

OPINI@ON TO CONERLY DATED 7-14-00 IS WITHDRAWN

Re: Withdrawal of Opinion

A. Wallace Conerly, M.D.
Vice Chancellor for Health Affairs
Dean, School of Medicine
The University of Mississippi Medical Center
2500 North State Street
Jackson, Mississippi 39216-4505

Dear Dr. Conerly:

Attached to this opinion is a copy of your letter dated August 25, 2000, to Dr. Ed. Thompson at the Mississippi State Department of Health wherein you informed Dr. Thompson that The University Medical Center will continue to conform to the Certificate of Need statutes. In light of this letter and in accordance with our phone conversation, our opinion to you dated July 14, 2000, is hereby withdrawn.
Very truly yours,

Mike Moore
Attorney General

By: Mike Lanford
Deputy Attorney General

2000 WL 1511919 (Miss.A.G.)

END OF DOCUMENT

Term Best Section

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MISSISSIPPI STATE DEPARTMENT OF HEALTH
DIVISION OF HEALTH PLANNING AND RESOURCE DEVELOPMENT
JULY 2011

CON REVIEW HG-CO-0511-010
MONTFORT JONES MEMORIAL HOSPITAL
COST OVERRUN TO CON NO. R-0812
(EXPANSION/RENOVATION OF HOSPITAL)
APPROVED CAPITAL EXPENDITURE: $15,500,000
ADDITIONAL CAPITAL EXPENDITURE: $3,013,721
REVISED CAPITAL EXPENDITURE: $18,513,721
LOCATION: KOSCIUSKO, ATTALA COUNTY, MISSISSIPPI

STAFF ANALYSIS

I. PROJECT SUMMARY

A. Applicant Information

Montfort Jones Memorial Hospital (MJMH) is a public, county owned hospital and is governed by a board of trustees appointed by the Attala County Board of Supervisors.

The facility is licensed for 71 acute care beds which include 64 general medical/surgical beds and 7 cardiac intensive care beds.

The occupancy rates, average lengths of stay (ALOS), and the Medicaid utilization rates for Montfort Jones Memorial Hospital are as follows for the years 2008 through 2010:

Montfort Jones Memorial Hospital
Utilization Data

Fiscal Year	Occupancy Rate (%)	ALOS (Days)	Medicaid Utilization Rate (%)
2008	35.22	4.65	96%
2009	32.29	5.27	N/A
2010	26.73	4.30	65%

Source: Division of Health Facilities Licensure and Certification, MSDH.

B. Project Background

Montfort Jones Memorial Hospital obtained Certificate of Need No. R-0812 with an effective date of June 24, 2010 and an expiration date of June 24, 2011. The original project involved the expansion and renovation of the hospital and

entailed 64,720 square ft. of new construction and 23,800 square ft. of renovation.

C. **Project Description**

Montfort Jones Memorial Hospital now requests Certificate of Need authority for a cost overrun to its CON No. R-0812. The applicant explains that the construction/renovation cost have increased primarily from an overall estimated cost of $13,200,000 to $13,966,170 because of (i) the increase in the costs of construction since the filing of the original CON application, (ii) the additional cost of constructing a parking area for the newly constructed part of the hospital, (iii) the additional cost of replacing the roof of the existing building, (iv) the additional cost of painting the existing building, and (v) the additional cost of minor refurbishment to the existing structure that will be accomplished by the hospital staff. The allocation has shifted based on the specifics set forth in the construction contract.

The cost of site work increased from $400,000 to $1,657,876 because upon inspection it was determined that much of the property where the new addition to the hospital would be located was formerly used as non-toxic, non-chemical, non-refuse landfill that had to be excavated and refilled with solid soil.

Although the hospital has begun construction under the Construction Contract and does not anticipate any additional increase, a contingency reserve in the amount of $450,000, approximately 3% of the construction/renovation cost, has, in an abundance of caution, been added to the cost estimated to complete the project.

II. TYPE OF REVIEW REQUIRED

The original project was reviewed under the applicable statutory requirements of Section 41-7-191, subparagraph (1) (j), Mississippi Code of 1972, as amended.

The State Health Officer reviews all projects for cost overrun in accordance with duly adopted rules, procedures, plans, criteria and standard of the Mississippi State Department of Health. Cost overrun projects qualify for expedited review pursuant to section 41-7-205(c), Mississippi Code of 1972, as amended.

In accordance with Section 41-7-197(2) of the Mississippi Code or 1972 Annotated, as amended, any affected person may request a public hearing on this project within 20 days of publication of this staff analysis. The opportunity to request a hearing expires on August 8, 2011.

$18,513,721 for the project. The construction area square ft. includes 64,720 square ft. The renovation square ft. includes 23,800 square ft. The total square footage for the project is 88,520 square ft. The construction cost per square ft. has increased from $172.28 per square ft. to $201.69 per square ft. Architectural fees, which are calculated as a percentage of the construction/renovation costs, increased as such construction/renovation costs increased. This price is comparable to the median price listed in the RSMeans Building Construction Cost Data 2011, 69th annual edition.

Due to the increased capital expenditure, the applicant determined that it will be necessary to finance a portion of the capital expenditure with revenue bonds. Therefore, $308,014 was added to the cost for capitalized interest and $160,000 was added for bond issuance fees. This cost overrun project does not change the scope of the original project.

B. Method of Financing

Of the estimated capital expenditure in the amount of $18,513,721, most of the project or about two-thirds is being financed with the hospital's accumulated cash reserves. Only $6,500,000 is being financed with hospital revenue bonds issued by Attala County and purchased by the Mississippi Development Bank and/or loan with the Mississippi Development Bank. The debt service on the bonds/loans will be payable over 25 years with an interest rate at 5.27%

C. Effect on Operating Cost

The applicant projects the revised gross patient revenue of $34,002,323, expenses of $16,983,247, and net income of $1,749,516 during the first year of operation for this amendment project.

The complete First Year of Operation Plan is presented in "attachment 1" of the staff analysis.

D. Cost to Medicare/Medicaid

According to the applicant, the additional capital expenditure is not expected to have a material effect on Medicare, Medicaid or other patients or payors as a result of this cost overrun project.

V. RECOMMENDATION OF OTHER AFFECTED AGENCIES

A copy of the application was provided to the Division of Medicaid for review and comment. The Division of Medicaid estimates a total increased annual cost of $10,944 in inpatient hospital services. The Division of Medicaid opposes this project.

VI. CONCLUSIONS AND RECOMMENDATION

This project continues to be in substantial compliance with the overall objectives of the FY 2010 *State Health Plan; Certificate of Need Review Manual; Revised 2009;* and all adopted rules, procedures, and plans of the Mississippi State Department of Health in effect at the time of approval.

The Division of Health Planning and Resource Development recommends approval of the application submitted by Montfort Jones Memorial Hospital for a cost overrun to CON #R-0812 (Expansion/Renovation of Hospital).

Attachment 1
Montfort Jones Memorial Hospital

Revised Projected Operating Statement for First Year of Operation

Revenue	
Inpatient Care Revenue	$17,842,396
Outpatient Care Revenue	16,159,927
Gross Patient Care Revenue	34,002,323
Charity Care	238,016
Deductions from Revenue	15,155,694
Net Patient Care Revenue	18,608,612
Other Operating Revenue	124,150
Total Operating Revenue	**18,732,763**
Operating Expenses:	
Salaries	6,331,242
Benefits	2,950,081
Supplies	2,202,807
Services	-
Lease	-
Depreciation	1,244,196
Interest	308,014
Other	3,946,907
Total Operating Expense	**16,983,247**
Net Operating Income (Loss)	**1,749,516**
General Assumptions:	
Inpatient days	10,119
Outpatient visits	19,514
Procedures	0
Charge per outpatient day	828
Charge per inpatient day	1,763
Charge per procedure	-
Cost per inpatient day	1,678
Cost per outpatient day	870
Cost per procedure	-

MISSISSIPPI STATE DEPARTMENT OF HEALTH
DIVISION OF HEALTH PLANNING AND RESOURCE DEVELOPMENT
SEPTEMBER 2011

CON REVIEW HG-RC-0611-013
MEMORIAL HOSPITAL AT GULFPORT
NEONATAL INTENSIVE CARE UNIT EXPANSION
CAPITAL EXPENDITURE: $6,663,350
LOCATION: GULFPORT, HARRISON COUNTY, MISSISSIPPI

STAFF ANALYSIS

I. PROJECT SUMMARY

A. Applicant Information

Memorial Hospital at Gulfport ("Memorial" or the "Hospital") is a nonprofit, 445-bed community hospital owned by the City of Gulfport and the Gulfport-West Harrison County Hospital District. The hospital is governed by a seven-member Board of Trustees. The Hospital is accredited by the Joint Commission on the Accreditation of Healthcare Organizations also known as JCAHO and licensed by the Mississippi State Department of Health (MSDH). Memorial is currently licensed to operate a total of 445 beds.

The occupancy rates, average lengths of stay (ALOS), and the Medicaid utilization rates for Memorial are as follows:

Memorial Hospital at Gulfport
Utilization Data

Fiscal Year	Occupancy Rate (%)	ALOS (Days)	Medicaid Utilization Rate (%)
2008	66.99	5.22	19%
2009	59.15	4.94	N/A
2010	60.24	4.88	23%

Source: Division of Health Facilities Licensure and Certification, MSDH.

B. Project Description

Memorial Hospital at Gulfport requests Certificate of Need (CON) authority for the expansion and renovation of its Neonatal Intensive Care Unit (NICU). Memorial Hospital asserts that the proposed NICU project will expand capacity by adding five beds and reconfigure the existing space in order to achieve a state of the art NICU. The Hospital further asserts that the current NICU at Memorial was built in 1996, licensed to operate 18-beds in an open ward manner, and has not been significantly

modernized since its original construction. According to the applicant, the Hospital seeks to upgrade its NICU to comply with the most currently accepted standard of care for Neonatal Intensive Care Units with respect to size, design, equipment, and technology.

The applicant indicates that the scope of the proposed project involves 21,622 square feet of space on the second floor of the Hospital. The new NICU will consist of 14,158 square feet, of which 3,430 square feet will be new construction, and 10,728 will be renovated space. The remaining 7,464 square feet of renovated space involves the relocation and reorganization of the well baby and transitional nursery areas; relocation of two post partum rooms; and the relocation and reorganization of Women's Services administrative and classroom space. As a result, the NICU will expand from its 18-bed open ward unit to a 23-room unit designed consistent with the single family room concept. The applicant plans to utilize two (2) of the rooms as isolation rooms, eleven (11) for single occupancy, and the remaining (10) ten will be designed to accommodate two neonates, when needed. Furthermore, the applicant's proposed location of the NICU is intended to meet the requirement of being located in close proximity to the labor and cesarean delivery rooms and easily accessible from the Hospital's ambulance entrance for transport. Additionally, the NICU will be located away from routine Hospital traffic; thus, easily accessible to family members of the sick baby.

Memorial Hospital asserts that with regard to design of the proposed NICU, Memorial Hospital at Gulfport intends to utilize a design encompassing the single family room concept. The applicant believes that the single family room design better allows the Hospital to provide family centered care which ensures that parents are co-providers and decision-making partners in their baby's care. The applicant further believes that this concept seeks to ensure that each encounter builds on the family's strengths so they may become nurturing caregivers. Also, by utilizing the single family room design it minimizes the separation of newborns and families as parents are not required to leave the unit when another baby needs immediate and critical care. According to the applicant, additional benefits of the single family room are enhanced privacy for breastfeeding mothers; acoustical absorption so that background and transient noises are within acceptable ranges; and more individualized temperature control provided within each room.

The total proposed capital expenditure is $6,663,350, and of that amount, approximately 14.08 percent is for new construction, 39.77 percent is for renovation, 27.76 percent for non-fixed equipment, 5.25 percent for fixed equipment, 4.59 percent for fees (architectural, consultant, etc.), 0.15 percent for legal and accounting fees, 3.00 percent for other fees, and 5.39 percent for contingency reserve. The project is expected to result in an additional 4.0 FTE (Full-time equivalent employees) registered nurses at an annual additional cost of $120,000 the first year of operation, $130,000 the second year, and $180,000 the third year. The applicant indicates the proposed capital expenditure will be funded from the

hospital's accumulated cash reserves. Memorial intends to obligate the capital expenditure by March 2012, with a completion date of March 2013.

The MSDH Division of Health Facilities Licensure and Certification has approved the site for the Neonatal Intensive Care Unit Expansion, as proposed.

II. TYPE OF REVIEW REQUIRED

This project is reviewed in accordance with Section 41-7-173, 41-7-191 (1)(c) and (1) (j), and 41-7-193 of the Mississippi Code of 1972, Annotated, as amended, and duly adopted rules, procedures, plans, criteria, and standards of the Mississippi State Department of Health.

In accordance with Section 41-7-197(2) of the Mississippi Code 1972, Annotated, as amended, any affected person may request a public hearing on this project within 20 days of publication of the staff analysis. The opportunity to request a hearing expires on October 3, 2011.

III. CONFORMANCE WITH THE STATE HEALTH PLAN AND OTHER ADOPTED CRITERIA AND STANDARDS

A. State Health Plan (SHP)

The *FY 2011 State Health Plan* contains criteria and standards which the applicant is required to meet before receiving CON authority for construction, renovation, and expansion. This application is in substantial compliance with the overall objectives of the *Plan.*

Neonatal special care services are reviewable under Certificate of Need when either the establishment or expansion of the services involves a capital expenditure in excess of $2,000,000 and/or the addition or conversion of beds.

Those facilities desiring to provide neonatal special care services shall meet the capacity and levels of neonatal care for the specified facility (Specialty or Subspecialty) as recommended by the American Academy of Pediatrics, Policy Statement, Levels of Neonatal Care (PEDIATRICS Vol. 114 No. 5 November 2004).

Projects for existing providers of neonatal special care services which seek to expand capacity by the addition or conversion of neonatal special care beds: The applicant shall document the need for the proposed project. The applicant shall demonstrate that the facility in question has maintained an occupancy rate for neonatal special care services of at least 70 percent for the most recent two years or 80 percent neonatal special care services occupancy rate for the most recent year, notwithstanding the neonatal special care bed need outlined in Table 4-4 in the Plan.

The applicant may be approved for such additional or conversion of neonatal special care beds to meet projected demand balanced with optimum utilization rate for the Perinatal Planning Area.

SHP Criterion 1 – Need

The proposed project requests approval of a Certificate of Need to be issued to Memorial Hospital at Gulfport for a construction/renovation/expansion project involving its NICU. Components of this construction/renovation and expansion project involve the addition of 5 beds and the reconfiguration of the existing NICU space.

Memorial Hospital contends that for the most recent two fiscal years, ending on September 30, 2010, the Hospital's NICU maintained an occupancy rate of 71%. Additionally, the applicant documents that for the two year period June 2009 to May 2011, Memorial maintained an occupancy rate of 70.8%.

The applicant states that the utilization rate coupled with being the sole provider of Level 3 Sub-Specialty Neonatal Services on the Gulf Coast and in Perinatal Planning Area IX, it is imperative that Memorial Hospital at Gulfport provide an appropriate level of NICU services to the residents of its region. The applicant further states that Memorial's NICU currently provides NICU services to five medical centers in three counties. Further, as a community hospital, Memorial provides essential medical care to the medically underserved population of the service area. Therefore, the applicant believes additional NICU capacity is needed for the appropriate delivery of neonatal intensive care services for the entire Gulf Coast region.

SHP Criterion 2 – Dedicated Neonatal Special Care Unit Beds

The applicant contends that the existing NICU at Memorial meets this criterion. Memorial's current Neonatal Intensive Care Unit is licensed to operate 18 beds. Thus, this CON application seeks to add 5 beds and replace the 18-bed open ward unit with 23 single family rooms.

SHP Criterion 3 – Normal Driving Time

The applicant certified that services will be available to 95% of the population within one hour normal driving time in rural areas and within 30 minutes normal driving time in urban areas.

SHP Criterion 4 – Protocols

The applicant affirmed that Memorial Hospital at Gulfport is the only Level 3 Sub-Specialty Neonatal Service provider on the Gulf Coast and in PPA IX. The Hospital has established referral networks to transfer infants requiring more sophisticated

care, if required. According to the applicant, transfer agreements are currently in place with the following facilities: University of South Alabama Medical Center, Ochsner Medical Center, and Tulane University Hospital.

SHP Criterion 5 – Information Requirement

Memorial assures that all information and data required by this criterion will be made available to the Mississippi State Department of Health within the expected time frame.

SHP Criterion 6 – Admission Policies

Memorial confirmed that the facility does not have policies or procedures which would exclude patients because of race, age, sex, ethnicity, or ability to pay.

B. General Review (GR) Criteria

Chapter 8 of the *Mississippi Certificate of Need Review Manual, Revised May 1, 2010;* addresses general criteria by which all CON applications are reviewed. This application is in substantial compliance with general review criteria contained in the manual.

GR Criterion 1- Consistency with the *State Health Plan*

The project is in substantial compliance with all criteria, standards, and policies of the *FY 2011 Mississippi State Health Plan* applicable to the expansion of Neonatal Special Care Services.

GR Criterion 2 – Long Range Plan

The applicant states that the long range goal of the Hospital is to provide high quality facilities and services to patients seeking health care services at Memorial Hospital as Gulfport in consistent with this CON proposal. As previously stated, Memorial believes that the proposed expansion and renovation of neonatal intensive care services at the Hospital will significantly enhance the patient care provided to families of the Gulf Coast region and Perinatal Planning Area IX.

GR Criterion 3 – Availability of Alternatives

According to the applicant, the Hospital could have chosen not to expand or renovate space for the purpose of improving the neonatal intensive care services at the Hospital. However, if this alternative were chosen, patients would continue to experience disruption in services resulting from operational inefficiencies and space configurations not conducive to the efficient delivery of patient care.

The applicant believes the best solution is the proposed project which fosters improvements in the delivery of health care services and cost effectiveness by renovating space where appropriate and expanding only that space needed for the appropriate delivery of neonatal intensive care services.

GR Criterion 4 - Economic Viability

Based on the applicant's financial projections, the operations of this project appears to result in a net gain of $587,000 the first year, $647,500 the second year, and $668,000 the third year after completion of the project. Therefore, the economic viability appears to be good.

The application contained a letter from the hospital's financial analyst attesting to the financial feasibility of the project.

GR Criterion 5 - Need for the Project

a. **Access by Population Served**: The applicant indicates that the service is available to all residents of the service area, including low income persons, racial, and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups.

b. **Relocation of Services**: This application does not propose the relocation of services. Memorial proposes to expand its NICU bed capacity by 5-beds.

c. **Current and Projected Utilization of Like Facilities in the Area**: No additional services are being proposed.

d. **Probable Effect on Existing Facilities in the Area**: The project proposes expansion and renovation of the neonatal intensive care unit at Memorial Hospital at Gulfport. No new services are being proposed by the applicant. Therefore, no significant effect is anticipated on existing facilities in the area.

e. **Community Reaction**: The application contains five (5) letters of support from the citizens of the community. No letters of opposition were received in the department from the community.

GR Criterion 6 - Access to the Facility or Service

a. **Medically Underserved Population**: Memorial affirmed that all residents of the health planning service area, including Medicaid recipients, charity/medically indigent patients, racial and ethnic minorities, women, handicapped persons and the elderly have access to the services of the existing facilities and will continue to have access to the Hospital. The applicant proposes to provide 3% of gross revenue the first year, or

$38,375,500, and 3% the second year, $39,527,000, to care for the medically indigent patients. The Hospital operates 7 days per week, 24 hours per day, and 365 days per year. Memorial is accessible to the public via U.S. Highway 90 and 49. The transportation and travel time to the facility will not change because this proposed project will be at the existing hospital.

b. **Performance in Meeting Federal Obligations**: The applicant submits that Memorial has no obligations under federal regulations requiring uncompensated care, community service, or access by minority/handicapped persons.

c. **Unmet Needs to be Served by Applicant**: The applicant submits that Memorial is a community "safety net" hospital which has consistently served a large number of Medicare, Medicaid, and medically indigent patients. According to the applicant, this project will improve access by medically underserved groups through an increased capacity of NICU beds and services.

GR Criterion 7 - Information Requirement

The applicant affirms that it will record and maintain the information required by this criterion and make it available to the Mississippi State Department of Health within 15 business days of request.

GR Criterion 8 - Relationship to Existing Health Care System

Memorial asserts that the proposed project will complement the existing health care facilities and services offered within the service area without adverse impact.

The applicant believes that once the proposed project is completed it will allow the Hospital to continue providing much needed neonatal intensive care services to patients of the service area. The applicant states that if the proposed project is not implemented, there will be a continuing risk that Memorial will not be able to accommodate patients and facilities in need of NICU care.

Because no new services will be offered as a result of this project, staff concludes that this project would have no adverse affect on other providers in the referenced service area.

The Department received no letters of opposition concerning the proposed project.

GR Criterion 9 - Availability of Resources

The applicant states that Memorial has demonstrated a satisfactory staffing history. The applicant projects four (4) additional full-time equivalent personnel at an

estimated annual cost of $120,000 the first year of operation for this proposed project.

The applicant intends to recruit needed personnel from its present recruiting efforts and affiliation arrangements.

GR Criterion 14 - Construction Projects

a. **Cost Estimate**: The application contains a cost estimate prepared by Blitch Knevel Architects, a professional corporation, licensed to do business in Mississippi.

b. **Schematic Drawing**: The application contains a schematic drawing of the proposed project.

c. **Space Allocations**: The applicant submits that space will conform to applicable local and state licensing standards.

d. **New Construction Projects**: This project involves new construction of 3,430 square feet of space and 18,192 square feet of renovated space.

e. **Cost per Square Foot**: The applicant projects the project will cost $406.40 per square foot for new construction and $176.42 per square foot for renovation. Staff calculations are: $320.55 per square foot for new construction and $192.60 per square foot for renovation (see Attachment 2). The *Means Building Construction Cost Data, 2011, Edition,* lists new construction costs for hospitals ranging from $184 (where 20% of projects cost less) to $315 (where 25% of projects cost more) per square foot. This project slightly exceeds the high range for construction listed in this publication.

GR Criterion 16 - Quality of Care

Memorial Hospital at Gulfport is in compliance with the *Minimum Standards for the Operation of Mississippi Hospitals*, according to the Division of Health Facilities Licensure and Certification, MSDH. The facility is accredited by the Joint Commission on Accreditation of Health Care Organizations.

IV. FINANCIAL FEASIBILITY

A. Capital Expenditure Summary

The total estimated capital expenditure is allocated as follows:

	Item	Cost ($)	Percent (%) of Total
a.	Construction Cost -- New	$938,500	14.08
b.	Construction Cost -- Renovation	2,650,000	39.77
c.	Capital Improvements	0	0
d.	Total Fixed Equipment Cost	350,000	5.25
e.	Total Non-Fixed Equipment Cost	1,850,000	27.76
f.	Land Cost	0	0
g.	Site Preparation Cost	0	0
h.	Fees (Architectural, Consultant, etc.)	306,000	4.59
i.	Contingency Reserve	358,850	5.39
j.	Legal and accounting fees	10,000	0.15
k.	Other	200,000	3.00
	Total Proposed Capital Expenditure	**$6,663,350**	***100.00**

*Percent off due to rounding.

The above capital expenditure is proposed for construction and renovation of Memorial Hospital at Gulfport NICU expansion project. The proposed project involves approximately 3,430 square feet of new space at an estimated cost of $320.55 per square foot and 18,192 square feet of renovation at an estimated cost of $176.42 per square foot (see Attachment 2). The *Means Building Construction Cost Data, 2011 Edition,* lists the costs for hospital construction to range from $184 to $315 per square foot. The *Means Building Construction Cost Data* does not compare costs of renovation projects.

The application contains a letter signed by the Vice President of Finance with Memorial Hospital confirming the financial feasibility of the project.

B. Method of Financing

The applicant proposes to finance the proposed capital expenditure from accumulated cash reserves.

The applicant provided financial statements documenting the ability to fund the project.

C. **Effect on Operating Cost**

Memorial Hospital at Gulfport's three-year projected operating statement is presented at Attachment 1.

D. **Cost to Medicaid/Medicare**

The applicant's projection to third party payors is as follows:

Payor Mix	Utilization Percentage (%)	First Year Revenue ($)
Medicare	-	$ -
Medicaid	74	1,905,000
Commercial	12	319,000
Self Pay	1	37,000
Other	13	330,000
Total	**100**	**$ 2,591,000**

V. RECOMMENDATIONS OF OTHER AFFECTED AGENCIES

The Division of Medicaid was provided a copy of this application for review and comment; however, no comments were received prior to posting of the staff analysis.

VI. CONCLUSION AND RECOMMENDATION

This project is in substantial compliance with the criteria and standards for the expansion of Neonatal Special Care Services as contained in the *FY 2011 Mississippi State Health Plan*; the *Mississippi Certificate of Need Review Manual, 2010 Revision*; and duly adopted rules, procedures, and plans of the Mississippi State Department of Health.

The Division of Health Planning and Resource Development recommends approval of the application submitted by Memorial Hospital at Gulfport for its Neonatal Intensive Care Unit Expansion project.

Attachment 1

Memorial Hospital at Gulfport Three-Year Operating Statement (Project Only)			
	Year I	Year 2	Year 3
Revenue			
Patient Revenue:			
Inpatient	$ 2,591,000	$ 2,851,000	$ 3,136,000
Outpatient			
Gross Patient Revenue	**$ 2,591,000**	**$ 2,851,000**	**$ 3,136,000**
Charity Care			
Deductions from Revenue	1,845,000	2,030,000	2,232,000
Net Patient Revenue	**746,000**	**821,000**	**904,000**
Expenses			
Operating Expenses:			
Salaries	$ 120,000	$ 130,000	$ 180,000
Benefits	24,000	26,000	36,000
Supplies	15,000	17,500	20,000
Services			
Lease			
Depreciation			
Interest			
Other			
Total Expenses	**$ 159,000**	**$ 173,500**	**$ 236,000**
Net Income (Loss)	**$ 587,000**	**$ 647,500**	**$ 668,000**
Assumptions			
Inpatient days	479	527	638
Outpatient days			
Procedures			
Charge per outpatient day			
Charge per inpatient day	$ 5,409	$ 5,410	$ 4,915
Charge per procedure			
Cost per inpatient day	$ 332	$ 329	$ 370
Cost per outpatient day			
Cost per procedure			

Memorial Hospital at Gulfport
HG-RC-0611-013
Attachment 2

Computation of Construction and Renovation Cost

	Cost Component	Total	New Construction	Renovation
A	New Construction Cost	$938,500	$938,500	
B	Renovation Cost	$2,650,000		$2,650,000
C	Total Fixed Equipment Cost	$350,000	$55,522	$294,478
	Total Non-Fixed Equipment Cost	$1,850,000		
	Land Cost	$0	$0	
D	Site Preparation Cost	$0	$0	
E	*Fees (Architectural, Consultant, etc.)*	$306,000	*$48,542*	*$257,458*
F	*Contingency Reserve*	$358,850	*$56,926*	*$301,924*
G	*Capitalized Interest*	$0	*$0*	*$0*
	Other	$210,000	*$0*	
	Total Proposed Capital Expenditure	**$6,663,350**	**$1,099,490**	**$3,503,860**
	Square Footage	**21,622**	3,430	18,192
	Allocation Percent		15.86%	84.14%
	Costs Less Land, Non-Fixed Eqt., Other	**$4,813,350**	**$1,099,490**	**$3,503,860**
	Cost Per Square Foot	**$222.61**	**$320.55**	**$192.60**

Source: FY 2011 Mississippi State Health Plan

MISSISSIPPI STATE DEPARTMENT OF HEALTH
DIVISION OF HEALTH PLANNING AND RESOURCE DEVELOPMENT
MAY 2011

CON REVIEW HG-RE-0211-002
GREENWOOD LEFLORE HOSPITAL
REPLACEMENT OF CENTRAL PLANT EQUIPMENT
CAPITAL EXPENDITURE: $10,767,909
LOCATION: GREENWOOD, LEFLORE COUNTY, MISSISSIPPI

STAFF ANALYSIS

I. PROJECT SUMMARY

A. Applicant Information

Greenwood Leflore Hospital (Greenwood) is a public nonprofit, short-term, general acute care hospital jointly owned by the City of Greenwood and Leflore County. The hospital is governed by a five-member Board of Hospital Commissioners, and is accredited by the Joint Commission on Accreditation of Healthcare Organizations.

The hospital is currently licensed to operate 188 medical/surgical beds, and 20 rehabilitation beds. The total licensed bed capacity is 208.

The occupancy rates, average lengths of stay (ALOS), and the Medicaid utilization rates for Greenwood Leflore Hospital are as follows for the years 2008 through 2010:

Greenwood Leflore Hospital
Utilization Data

Fiscal Year	Occupancy Rate (%)	ALOS (Days)	Medicaid Utilization Rate (%)
2008	62.10	4.85	23.71
2009	58.05	4.87	22.53
2010	51.21	4.68	23.17

Source: Division of Health Facilities Licensure and Certification, MSDH

B. Project Description

Greenwood Leflore Hospital requests Certificate of Need (CON) authority for replacement of central plant equipment on the campus of the existing hospital. The applicant states that the proposed project will upgrade the hospital's current facilities by replacing the central plant equipment, including chillers, boilers and related equipment items. According to the applicant, the project does not involve any clinical or other health services, but is simply intended to replace central plant equipment in order to upgrade the hospital's heating and cooling systems. There is a limited amount of 6,100 square feet of renovation work required for the installation of the equipment for the proposed project.

According to the applicant, the proposed project is necessary so that the hospital may provide efficient and cost-effective services in the future.

The total proposed capital expenditure is $10,767,909 and of that amount, approximately 13 percent is for renovation, 11 percent for fees (architectural, consultant, etc.), 6 percent for contingency reserve, 8 percent for capitalized interest and 62 percent for fixed equipment. The applicant proposes to finance this project through a bank loan from Regions Bank of Birmingham, Alabama. The application contained a letter from Regions Healthcare Banking, Birmingham, Alabama concerning financing the project.

The applicant indicates that the anticipated date for obligation of the capital expenditure will be May 2011 and the anticipated date the project will be complete will be August 2012.

MSDH Division of Health Facilities Licensure and Certification found the site for the proposed project to be acceptable.

II. TYPE OF REVIEW REQUIRED

The Mississippi State Department of Health reviews applications for construction, renovation, expansion, or capital improvement involving a capital expenditure in excess of $5,000,000 for non-clinical services, under the applicable statutory requirements of Section 41-7-191, subparagraph (1) (j) of the Mississippi Code of 1972, Annotated, as amended, and duly adopted rules, procedures, plans, criteria, and standards of the Mississippi State Department of Health.

In accordance with Section 41-7-197(2) of the Mississippi Code 1972, Annotated, as amended, any affected person may request a public hearing on this project within 20 days of publication of the staff analysis. The opportunity to request a hearing expires on June 6, 2011.

III. CONFORMANCE WITH THE STATE HEALTH PLAN AND OTHER ADOPTED CRITERIA AND STANDARDS

A. State Health Plan (SHP)

The *FY 2011 State Health Plan* contains criteria and standards which an applicant is required to meet before receiving CON authority for construction, renovation, expansion, or capital improvement involving a capital expenditure in excess of $2,000,000. The application is in substantial compliance with these criteria.

SHP Criterion 1 – Need

Projects which do not involve the addition of any acute care beds: The applicant shall document the need for the proposed project. Documentation may consist of, but is not limited to, citing of licensure or regulatory code deficiencies, institutional long-term plans (duly adopted by the governing board), recommendations made by consultant firms, and deficiencies cited by accreditation agencies (JCAHO, CAP, etc.). In addition, for projects which involve construction, renovation, or expansion of emergency department facilities, the applicant shall include a statement indicating whether the hospital will participate in the statewide trauma system and describe the level of participation, if any.

According to the applicant, this project involves an upgrade to Greenwood Leflore Hospital's current physical facilities through the replacement of its central plant equipment, including chillers, boilers and related equipment items. There is clearly a need for the replacement of this equipment to facilitate the efficient operation of the hospital. The hospital's current central plant was originally constructed in 1949, and maintains some equipment in excess of 50 years of age, which has clearly exceeded its life expectancy. This project will provide Greenwood Leflore Hospital with new equipment within the central plant and provide additional redundancy to insure vital services are maintained when primary equipment fails. Within this project, the hospital has focused on energy conservation and identified significant energy savings within the scope of this project through redesign of the existing systems. In order to insure that this project is implemented in a proper and cost-effective manner, the hospital has engaged the mechanical and electrical engineering firm of Corbett, Legge & Associates, PLLC.

This project will not involve additional beds or the offering of a new institutional health service.

SHP Criterion 2 – Bed Service Transfer/Reallocation/Relocation

This project does not involve the transfer/reallocation or relocation of beds.

SHP Criterion 3 – Uncompensated Care

According to the applicant, Greenwood is a primary "safety net" hospital for the Mississippi Delta. The hospital provides a significant amount of indigent and charity care on an annual basis, and will continue to do so, in order to fulfill its mission to the community.

SHP Criterion 4 – Cost of Project

According to the applicant, the project primarily involves the replacement of plant equipment. There is a limited amount of renovation work associated with the project. The project includes the renovation of approximately 6,100 square feet at a cost of $663.29 per square foot. The proposed project involves the purchase of fixed equipment. Greenwood asserts that the equipment costs for the project do not exceed the median costs for similar equipment by more than 15 percent. The hospital has engaged a mechanical and engineering firm to provide guidance on this project, including the purchase and installation of the equipment at a reasonable cost.

Staff calculates the cost of $1,765.23 per square foot for renovation for the proposed project. See Attachment 1.

SHP Criterion 5 – Floor Area and Space Requirements

The applicant indicates that the total project will be 6,100 square feet of renovated space. The applicant asserts that this project does not involve new construction, but is limited to the replacement of equipment within the central plant area of the hospital.

B. General Review (GR) Criteria

Chapter 8 of the *Mississippi Certificate of Need Review Manual, Revised May, 2010;* addresses general criteria by which all CON applications are reviewed. This application is in substantial compliance with general review criteria.

GR Criterion 3 – Availability of Alternatives

The applicant asserts that due to the age of the hospital's physical plant, there are no feasible alternative to the replacement of the central plant equipment. The hospital has worked to insure that the project is developed in a cost-effective manner. Greenwood believes that the upgrading of the hospital's central plant will significantly benefit the hospital health care system by insuring that the hospital has adequate facilities to provide care and services to the residents of the service area.

GR Criterion 4 - Economic Viability

The applicant asserts that since the project involves only the replacement of the hospital's physical plant equipment. The proposed project does not involve the utilization of hospital services or charges. Therefore, it is not dependent upon future projected revenues.

The application contained a letter from the hospital's chief financial officer attesting to the financial feasibility of the project.

GR Criterion 5 - Need for the Project

The applicant states that Greenwood located in the heart of Mississippi Delta, is a safety net provider for a large population of medically underserved groups, including low income persons and racial and ethnic minorities. The hospital is accessible to all residents of its service area, regardless of ability to pay. The applicant believes that in order to continue to serve the needs of this dependent population, Greenwood Leflore Hospital must maintain and upgrade its hospital facilities, as needed. The hospital's central plant is outdated, and has exceeded its useful life. By replacing the hospital's central plant equipment, Greenwood Leflore Hospital will be able to continue to serve the health care needs of the residents of its service area.

The applicant asserts that the final objective of the proposed project is to upgrade the physical plant of the hospital through the replacement of outdated equipment, so that the hospital may provide efficient and cost-effective services in the future.

The application received three (3) letters of support for the proposed project. The Department received no letters of opposition concerning the proposed project.

GR Criterion 6 - Access to the Facility or Service

According to the applicant, the hospital is a Mississippi community hospital and a safety net provider for medically underserved populations in the Mississippi Delta. Since the hospital is accessible to all residents of the hospital's service area, regardless of ability to pay, Greenwood Leflore Hospital's pay or mix directly reflects the demographic characteristics of that community. The hospital provides approximately 20 percent in charity care revenue, and 22 percent Medicaid.

The applicant states tha t the hospital has no existing obligations under any federal regulation requiring provision of uncompensated care, community service, or access by minority/handicapped persons.

Greenwood Leflore Hospital's historical commitment to the needs of Medicare, Medicaid and medically indigent patients is well recognized and documented. The hospital will continue to serve these needs in the future.

The applicant submits that the percentage of gross patient revenue (GPR) of health care provided to charity care patient for the years 2008 and 2009 are as follows for this project:

Gross Patient Revenue
Amount

	Charity Care (%)
Historical Year 2008	20.7
Historical Year 2009	19.4

Greenwood Leflore Hospital projects that it will provide similar amounts of charity care years following completion of this project.

GR Criterion 7 - Information Requirement

The applicant asserts that it will record and maintain the information required by this criterion and make it available to the Mississippi State Department of Health within 15 business days of request.

GR Criterion 8 - Relationship to Existing Health Care System

According to the applicant, the proposed project will enhance the hospital's health care services by upgrading the hospital's physical plant equipment.

The applicant believes that failure to implement the proposed project will be at significant risk of a disruption of hospital operations, due to an outdated physical plant in obvious need of upgrading and replacement.

Because no new services will be offered as a result of this project, staff concludes that this project would have no adverse affect on other providers in the referenced service area.

GR Criterion 14 - Construction Projects

a. **Cost Estimate**: The application contains a cost estimate prepared by Corbett Legge & Associates, PLLC.

b. **Schematic Drawing**: The application contains a schematic drawing of the proposed project.

c. **Space Allocations**: The applicant submits that space will conform to applicable local and state licensing standards.

d. The project does not involve new construction.

e. **Cost per Square Foot**: The proposed project involves approximately 6,100 square feet of renovated space at an estimated cost of $1,765.23 per square foot (See Attachment 1). The *Means Construction Cost Data, 2011* does not compare costs for renovation.

GR Criterion 16 - Quality of Care

Greenwood Leflore Hospital is in compliance with the *Minimum Standards for the Operation of Mississippi Hospitals*, according to the Division of Health Facilities Licensure and Certification, MSDH. The facility is accredited by the Joint Commission on Accreditation of Health Care Organizations.

IV. FINANCIAL FEASIBILITY

A. Capital Expenditure Summary

The total estimated capital expenditure is allocated as follows:

	Item	Cost	Percent of Total
a.	Construction Cost -- New	0	0
b.	Construction Cost -- Renovation	$1,343,554	13%
c.	Capital Improvements	0	0
d.	Total Fixed Equipment Cost	6,661,858	62%
e.	Total Non-Fixed Equipment Cost	0	0
f.	Land Cost	0	0
g.	Site Preparation Cost	0	0
h.	Fees (Architectural, Consultant, etc.)	1,216,497	11%
i.	Contingency Reserve	816,000	6%
j.	Capitalized Interest	670,000	8%
k.	Other	0	0
	Total Proposed Capital Expenditure	**$10,767,909**	**100%**

The above capital expenditure is proposed for replacement of central plant equipment on the campus of Greenwood Leflore Hospital. The proposed project involves approximately 6,100 square feet of renovated space at an estimated cost of $1,765.23 per square foot (See Attachment 1). The *Means Construction Cost Data, 2011*, does not compare costs of renovation projects.

B. Method of Financing

The applicant proposes to finance this project through a bank loan from Regions Bank of Birmingham, Alabama. The application contained a letter from Regions Healthcare Banking, Birmingham, Alabama concerning financing the project.

C. Effect on Operating Cost

Greenwood Leflore Hospital states that the proposed project will replace the hospital's central plant equipment on the campus of Greenwood Leflore Hospital. The applicant asserts that the only effect on operating cost will be interest for year one ($281,250), for year two ($375,000), for year three ($541,667) and depreciation cost of $400,000 for year three. The applicant projects a decrease in other cost of ($158,333) for year three for the proposed project.

D. Cost to Medicaid/Medicare

The proposed project will not generate inpatient and outpatient revenue. Therefore, costs to Medicaid, Medicare, and third party payors will be negligible.

V. RECOMMENDATIONS OF OTHER AFFECTED AGENCIES

The Division of Medicaid estimates that the increased annual cost to Medicaid for the proposed project will be $103,440 in inpatient hospital services, and that outpatient services will be paid as outlined in the Medicaid State Plan. The Division of Medicaid opposes this project.

VI. CONCLUSION AND RECOMMENDATION

This project is in substantial compliance with the criteria and standards for the construction, renovation, expansion, capital improvements, replacement of health care facilities, and addition of hospital beds as contained in the *FY 2011 State Health Plan*; the *Mississippi Certificate of Need Review Manual, Revised May 1, 2010*; and duly adopted rules, procedures, and plans of the Mississippi State Department of Health.

The Division of Health Planning and Resource Development recommends approval of the application submitted by Greenwood Leflore Hospital for the replacement of central plant equipment.

Greenwood Leflore Hospital
HG-RE-0211-0002
Attachment 1
Computation of Renovation Cost*

Cost Component	Total	Renovation
New Construction Cost	0	0
Renovation Cost	$1,343,554	$1,343,554
Total Fixed Equipment Cost	$6,661,858	$6,661,858
Total Non-Fixed Equipment Cost	0	0
Land Cost	0	0
Site Preparation Cost	0	0
Fees (Architectural, Consultant, etc.)	$1,216,497	*$1,216,497*
Contingency Reserve	$816,000	*$816,000*
Capitalized Interest	$670,000	*$670,000*
Other	0	*0*
Total Proposed Capital Expenditure	**$10,767,909**	**$10,767,909**

Square Footage	**6,100**	**6,100**
Allocation Percent		100%

Costs Less Land, Non-Fixed Eqt. & Other	**$-0-**	**$10,767,909**
	$1,765.23	**$1,765.23**

***Source:** *Mississippi Certificate of Need Review Manual, Revised May 1, 2010*