

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK  
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING  
POST OFFICE BOX 11549  
COLUMBIA, S.C. 29211  
TELEPHONE 803-734-3970

March 1, 1988

The Honorable Patrick B. Harris  
Member, House of Representatives  
519-B Blatt Building  
Columbia, South Carolina 29211

Dear Representative Harris:

Referencing an amendment proposed to be added to H.2101 by the Senate, you have inquired as to the effect of the proposed legislation on applications for certificates of need which will be pending at the time the proposed legislation, if adopted, will take effect.

The amendment proposed to be added to H.2101 by the Honorable Thomas E. Smith, Jr., as stated in the Senate Journal for Tuesday, February 16, 1988, at page 15, provides the following:

Amend the bill, as and if amended, by adding the following new section appropriately numbered:

/SECTION \_\_\_\_\_. The certificate of need provisions in Article 3, Chapter 7, Title 44 of the 1976 Code do not apply to facilities owned or operated by the South Carolina Department of Mental Health and the South Carolina Department of Mental Retardation. This section shall take effect immediately upon the signature of the Governor./

Renumber sections to conform.

Amend title to conform.

The motion has been temporarily carried over to be considered at a later date.

The Honorable Patrick B. Harris  
Page 2  
March 1, 1988

The relevant law has been succinctly stated in 51 Am.Jur.2d  
Licenses and Permits § 46:

In general, a change in the law pending an application for a permit or license is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the permit or license should be granted. If, however, action on the application is unreasonably delayed until after the change has become effective, or if the appropriate officer arbitrarily fails to perform a ministerial duty to issue the license promptly on an application that conforms to the law at the time of filing, the law at the time of filing of the application ordinarily controls.

See also Annot., 169 A.L.R. 584 (change in law pending an application for a permit is operative as to the application, so that law as changed is determinative to the application); Op. Atty. Gen. dated September 14, 1983 (applications for notaries public pending when law was changed to require higher application fees were subject to higher fees) (copy enclosed). Thus, an application for a certificate of need for a facility owned or operated by the Department of Mental Health or Department of Mental Retardation would follow the law as amended while the application was pending, absent some sort of unreasonable delay or the arbitrary failure to perform some ministerial task which would result in the application procedure being delayed until after passage of the amendatory act.

This Office is aware that an application for a certificate of need has been contested and that an appeal is pending. The effect of adoption of the amendment to H.2101 on the pending appeal has been questioned. Of course, the ultimate disposition of the appeal remains within the discretion of the court having jurisdiction over the matter. However, the general law concerning this issue has been stated by the United States Supreme Court in United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801),

It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the

The Honorable Patrick B. Harris  
Page 3  
March 1, 1988

judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.

Id., 2 L.Ed. at 51. Thus, a court considering an appeal as to the issuance of a certificate of need at such time as H.2101, as amended, is enacted, would likely conclude based upon the foregoing law stated by the United States Supreme Court in the Schooner Peggy case, that a certificate of need is no longer necessary for facilities owned or operated by the Department of Mental Health or the Department of Mental Retardation.

We trust that the foregoing has adequately responded to your inquiry. Please advise if clarification or additional assistance should be needed.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

PDP/an

Enclosure

REVIEWED AND APPROVED BY:

*Robert D. Cook*  
\_\_\_\_\_  
Robert D. Cook  
Executive Assistant for Opinions