

No. COA23-672

TWENTY-EIGHTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

FLETCHER HOSPITAL INC. d/b/a
ADVENTHEALTH HENDERSONVILLE,
Petitioner-Appellee,

v.

N.C. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF
HEALTH SERVICE REGULATION,
HEALTHCARE PLANNING &
CERTIFICATE OF NEED SECTION,
Respondent-Appellant,

and

MH MISSION HOSPITAL LLP,
Respondent-Intervenor-Appellant.

From the Office of
Administrative Hearings
22 DHR 02385

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* BY
UNIVERSITY OF NORTH CAROLINA HOSPITALS AT CHAPEL HILL
AND UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

The University of North Carolina Hospitals at Chapel Hill (“UNC Hospitals”) and University of North Carolina Health Care System (“UNC Health”; together with “UNC Hospitals,” “UNC”) respectfully move the Court, pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, for leave to file the accompanying brief as *amici curiae* in support of Respondent-Appellant North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section (the “Agency”). Both the motion and the brief are being filed within the time limits allowed for Appellant to file its brief.

DESCRIPTION OF AMICUS CURIAE

UNC Health was established in 1998 by N.C. Gen. Stat. § 116-37 (recently recodified at §116-350.5) and serves patients in North Carolina at fourteen hospitals across twenty campuses statewide. UNC Health also fosters education and innovation at UNC School of Medicine, one of the most highly ranked medical schools in the nation, whose faculty provides inpatient and outpatient care at UNC Health’s facilities. UNC Hospitals is North Carolina’s only state-owned, comprehensive, full-service academic medical center, and provides care for citizens across the state of North Carolina regardless of their financial status, race, creed, age, handicap, or lack of medical insurance. UNC continually assesses ways it can better meet its foundational purposes to “provide patient care, facilitate the education of physicians and other health care providers in partnership with the University of North Carolina at Chapel Hill School of Medicine and other health sciences schools affiliated with

the constituent institutions of The University of North Carolina System; conduct research collaboratively with the health sciences schools of the University of North Carolina at Chapel Hill and other institutions; facilitate clinical collaboration with and financial sustainability of the University of North Carolina at Chapel Hill School of Medicine; render other services designed to promote the health and well-being of the citizens of North Carolina; and drive innovation and transformation in health care services delivery.” N.C. Gen. Stat. § 116-350.5(a).

INTEREST OF UNC AS AMICI CURIAE

UNC submits this brief because of its strong interest in ensuring that a technicality like the one relied upon by the Administrative Law Judge (“ALJ”) in rendering the decision below, as well as other petitioners dissatisfied with an Agency decision, does not impede the expansion of healthcare services that would benefit North Carolinians. As a frequent participant in the Certificate of Need (“CON”) process, UNC understands that although public hearings are part of the CON process, they rarely result in public interest or feedback on an application, and typically just offer health care providers a chance to tout their own application and/or critique their competitors. During the COVID-19 pandemic, UNC (and every other CON applicant and interested party) participated in interim public hearing procedures established by the Agency without prejudice to their ability to offer the typical critiques provided to the Agency at a public hearing. Rather than addressing the MH Mission Hospital, LLP (“Mission”) CON application on its merits, the decision by the ALJ below advances a theory that threatens to undo the important work of the

Agency and unfairly punish applicants who were subject to the same interim public hearing procedures as all interested parties. This same theory has been advanced against UNC in a contested case hearing in which Duke University Health System, Inc. challenged the Agency's approval of UNC's application to expand its already-approved (pending resolution of appeal, *Duke University Health System, Inc. v. North Carolina Department of Health and Human Servs., Div. of Health Serv. Reg., Healthcare Planning and Cert. of Need Section*, COA-23-351) new community hospital in Durham County, which is also pending appeal in this Court.¹

REASONS WHY AN AMICI BRIEF IS DESIRABLE

UNC's conditionally-filed brief provides its perspective on issues of CON jurisprudence and statutory construction that are important to the resolution of this case, and may well impact other pending CON appeals as well. UNC offers the perspective of another frequent participant in the CON process that would have its growth hampered based on an alleged error that it had no part in causing. *Amici* seek to aid the decisional process by raising a matter of statutory construction and addressing the jurisprudential issues created by the Tribunal's merger of the substantial prejudice inquiry with the agency error inquiry. This perspective offered by *amici* will assist this Court in assessing the greater impact this ruling will have

¹ To be clear, *amici* do not contest or raise any challenge to the underlying, substantive challenge to the Agency's decision to award a CON to the Respondent-Intervenor and take no position on the same. *Amici* offer only its perspective as to the ALJ's determination on the statutory question raised by the Agency not holding an in-person public hearing under the unique circumstances presented by the COVID-19 pandemic, as such statutory issues affect UNC's presently pending appeal.

on other CON matters moving forward.

ISSUES OF LAW TO BE ADDRESSED

The brief covers the following issues:

- (1) Whether the public hearing provision contained in N.C.G.S. § 131E-185(a1)(2) is mandatory or directory; and
- (2) Whether the Agency's alleged failure to comply with the public hearing provision constitutes both agency error *and* substantial prejudice as a matter of law.

POSITION OF AMICI CURIAE

For the reasons detailed in its accompanying brief, UNC takes the position that, at minimum, the public hearing provision should not preclude the issuance of a CON; in fact, whether it is directory (as UNC's brief explains is the case) or mandatory, the result here should be issuance of the requested CON. The public hearing provision is merely directory because it does not provide for any consequence in the event it is not followed. As to substantial prejudice, the ALJ's decision below runs roughshod over the well-established dual burden for a petitioner to establish both agency error *and* substantial prejudice, which are separate inquiries. The ALJ's decision below should be reversed.

CONCLUSION

For the foregoing reasons, the University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System respectfully requests that the Court grant it leave to file the *amici curiae* brief contemporaneously filed in support of Respondent-Appellant North Carolina Department of Health and

Human Services, Division of Health Service Regulation, Healthcare Planning and
Certificate of Need Section.

Respectfully submitted, this the 9th day of October, 2023.

FITZGERALD LITIGATION

/s/ Electronically submitted

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon counsel of record by electronic transmission addressed as follows:

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