

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Appellate Case No. 2012-213506
Case No. 09-ALJ-07-0332-CC

Trident Medical Center, LLC, d/b/a
Berkeley Medical Center, ...Appellant/Respondent,
v.

South Carolina Department of Health and
Environmental Control and Roper St. Francis
Hospital - Berkeley d/b/a Roper St. Francis Hospital,

Of Whom SCDHEC is the Respondent, and
Roper St. Francis is the Respondent/Appellant.

Case No. 09-ALJ-07-0333-CC

Trident Medical Center, LLC, d/b/a Berkeley
Regional Medical Center, ...Appellant/Respondent,
v.

South Carolina Department of Health and
Environmental Control and Roper St. Francis
Hospital - Berkeley d/b/a Roper St. Francis Hospital - Berkeley,

Of Whom SCDHEC is the Respondent, and
Roper St. Francis is the Respondent/Appellant.

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SC Court of Appeals

Case No. 09-ALJ-07-0336-CC

CareAlliance Health Services and Roper
St. Francis Hospital - Berkeley, ... Respondents/Appellants,

v.

South Carolina Department of Health and
Environmental Control and Trident Medical Center, LLC..... Respondents,
Of Whom Trident Medical Center, LLC, is the.....Appellant.

RESPONSE BRIEF OF RESPONDENTS-APPELLANTS
(CareAlliance Health Services and Roper St. Francis Hospital – Berkeley)

James G. Long III, Bar # 64103
Jennifer J. Hollingsworth, Bar # 73535
Tanya A. Gee, Bar # 70191
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.771.8900

Attorneys for Respondents-Appellants

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STATEMENT OF ISSUES ON APPEAL

- I. THIS COURT MUST AFFIRM THE DECISION OF THE ALC BECAUSE TRIDENT CANNOT OVERCOME THE HIGH BURDEN UNDER THE APPLICABLE STANDARD OF REVIEW FOR APPEALS FROM THE ALC OF A DECISION BY DHEC.
- II. THE ALC CORRECTLY HELD THAT THE BED TRANSFER PROVISION OF THE STATE HEALTH PLAN ALLOWS ROPER ST. FRANCIS TO TRANSFER BEDS TO CONSTRUCT A NEW HOSPITAL IN THE SERVICE AREA.
- III. THE ALC PROPERLY CONSIDERED THE DEPARTMENT'S INTERPRETATION AND APPLICATION OF THE BED TRANSFER PROVISION IN REACHING ITS DECISION TO AFFIRM THE DEPARTMENT'S APPROVAL OF THE ROPER ST. FRANCIS – BERKELEY CON APPLICATION.
- IV. THE ALC CORRECTLY DETERMINED THAT THE TWO CON APPLICATIONS ARE NOT "COMPETING APPLICATIONS" BECAUSE THE APPROVAL OF BOTH APPLICATIONS DOES NOT EXCEED THE NEED IN THE SERVICE AREA.
- V. TRIDENT HAS ABANDONED ITS CONTENTION THAT THE ROPER ST. FRANCIS CON APPLICATION DOES NOT OTHERWISE COMPLY WITH THE STATE HEALTH PLAN, PROJECT REVIEW CRITERIA OR OTHER REGULATIONS.

STATEMENT OF THE CASE

These proceedings involve two certificate of need (“CON”) applications for the establishment of hospital beds in Berkeley County, South Carolina. Trident Medical Center, LLC (“Trident”) filed an application on August 12, 2008, to construct a 50-bed hospital on vacant land adjacent to its Moncks Corner Medical Center in North/Central Berkeley County, using facility-specific bed need assigned to its North Charleston facility. **(Joint Ex. #1, Trident CON Application)** Roper St. Francis Hospital – Berkeley (“Roper St. Francis”) filed its CON Application on December 9, 2008, to transfer 50 existing beds from its Roper St. Francis Downtown facility in Charleston to Carnes Crossroads, located in Southern Berkeley County in the community of Goose Creek. **(Joint Ex. #2, Roper St. Francis CON Application)**

As the Department of Health and Environmental Control (“DHEC” or “the Department”) was reviewing the Applications, Trident argued that the projects were competing applications as defined by the CON Act and Regulations, and as competing applications, only one could be approved. DHEC disagreed and approved both Applications on June 26, 2009, finding that the CON Applications were not competing. **(6/26/09 Letters to Roper St. Francis and Trident Approving CON Applications)**

On August 7, 2009, Trident filed two, separate contested case proceedings in the Administrative Law Court challenging the Department’s decision to grant a CON to Roper St. Francis. On that same day, August 7, 2009, Roper St. Francis filed a contested case proceeding supporting the decision of DHEC. **(Contested Cases Filed by Trident and Roper St. Francis)** At the parties’ request, The Honorable John D. McLeod consolidated all three of these cases on January 7, 2010. **(Order of Consolidation)**

Prior to the contested case hearing, the Administrative Law Court (“ALC”) heard several pre-trial motions, including motions for summary judgment filed by both Trident and Roper St. Francis. In Trident’s first motion for summary judgment, which it filed on December 15, 2010, Trident argued that the two CON applications were competing applications as a matter of law and that the ALC should remand the applications to DHEC to determine which application best meets the applicable law. The ALC denied this motion on January 28, 2011. **(1/28/11 Order of The Honorable John D. McLeod Denying Trident’s Motion for Summary Judgment)**

Trident filed a second motion for summary judgment on December 9, 2011, arguing that DHEC erred as a matter of law when it (1) allowed Roper St. Francis to use the “bed transfer” section of the State Health Plan to create a new hospital; and (2) when it approved Roper St. Francis’s application to build a new hospital that would use those transferred beds. The same day Trident filed its second motion for summary judgment, Roper St. Francis also filed a motion for partial summary judgment, asking the ALC to rule that, as a matter of law, if the Court found the applications to be competing, the only remedy available was a remand to the Department to choose between the applications. The ALC denied Trident’s motion, and granted Roper St. Francis’s motion for partial summary judgment by Order dated February 10, 2012. **(2/10/12 Order of The Honorable John D. McLeod Granting Roper St. Francis’s Motion for Partial Summary Judgment)**

A fourteen-day contested case trial commenced before The Honorable John D. McLeod on January 30, 2012. On September 26, 2012, Judge McLeod issued a 52-page decision sustaining DHEC’s decision to approve both CON applications. **(9/26/12 Final**

Order and Decision) Trident filed a motion to alter or amend the judgment on October 5, 2012, which was heard on October 31, 2012, and denied on November 1, 2012.

(11/1/12 Order Denying Trident's Rule 59(e) Motion)

Roper St. Francis agrees with the final decision of the ALC; however, Trident has appealed the ALC's order, arguing that Roper St. Francis's CON should not have been approved. Roper St. Francis submits this brief in response to Trident's Initial Brief appealing the final decision of the ALC. Trident contends that the "plain language" of the bed transfer provision of the State Health Plan requires that the facilities transferring and receiving acute care beds must be in existence for the provision to be used, that the Department's interpretation of the bed transfer provision contradicts the "plain language" of the State Health Plan, and that the applications are competing and only one may be approved. Roper St. Francis disagrees with each issue on appeal and for the reasons shown herein, supports the ALC's final decision and requests denial of Trident's appeal.

STATEMENT OF THE FACTS

Prior to these CON applications, Berkeley County was one of four counties in South Carolina with zero hospital beds.¹ **(Resp't Ex. #75)** This was so even though Berkeley County is the ninth largest county in the State of South Carolina and has had a population explosion. **(Resp't Ex. #65)** In 2008 (when the applications were filed), Berkeley County had an estimated population of 158,140, and in 2010, it had exceeded growth projections and its population had increased to 177,843. **(Trial Tr. Baehr 3643:13-14 and 3646: 2-11; Resp't Ex. #59)** Forty years ago when Trident Medical Center was constructed, Berkeley County had a population of 56,199. **(Resp't Ex. #70)** The other counties in South Carolina without a hospital have populations of less than 20,000 people. **(Resp't Ex #75)** There are eight counties in South Carolina with 100 hospital beds and a population of less than 100,000 and seven counties with a similar population size to Berkeley County and well over 100 beds, including Florence with 831 beds for 177,843 people, Sumter with 283 beds for 107,456 people, and Aiken with 183 beds for 160,099 people. **(Resp't Ex. #75)**

Recognizing Berkeley County's size, its growing population, and its lack of hospital beds, both Trident and Roper St. Francis sought to construct hospitals there. Each applicant proposes to construct a small 50 bed acute care hospital in one of the two population centers in Berkeley County: Trident in Moncks Corner and Roper St. Francis in Goose Creek. An acute care hospital refers to a community hospital that treats patients from the community for general medical conditions such as surgery, obstetrics,

¹ The South Carolina State Health Plan identifies four Inventory Regions for hospitals, and each region is further divided into service areas. Berkeley County is part of the Tri-County Service Area, which also includes Charleston and Dorchester Counties. **(Joint Ex. #3 II-3 to II-4, II-17, Joint Ex. #4 II-2, II-18 to II-20)**

emergency care, and general diseases. An acute care hospital does not treat complex diagnoses or procedures such as open heart surgery or neurosurgery. (**Trial Tr. Gallati 283:3-22; Trial Tr. Bowling 2499:1-6**) Tertiary care hospitals provide care for those complex procedures. (**Trial Tr. Bowling 2492: 7-14**)

It is important to note that a hospital is not like a hotel. Patients do not have a regular check in or check out and because a high percentage of patients admitted to an acute care hospital are admitted through the emergency department, hospitals must maintain flexibility to handle variations and spikes with inpatient admissions. (**9/26/12 Final Order and Decision (hereinafter “Final Order”) Finding #14, 8; Trial Tr. Baehr 1537:19-1538:4; Trial Tr. Bowling 3134:5-18**) Further, a hospital census is affected by the season and the day of the week, as utilization is higher in the winter than the summer and higher during the week as compared to the weekend. The impact of these variations in admissions is much more significant on a smaller acute care hospital and as a result, optimal capacity for a 50 bed acute care hospital is 65% occupancy. In other words, a 50 bed hospital is at full capacity with 32.5 patients or heads on a pillow. (**Final Order, Finding #21, 10**) Therefore, both of the proposed hospitals are at full capacity with a total of 65 inpatients – 32.5 patients each.

Trident filed its CON Application on August 12, 2008, seeking to construct a 50-bed acute care hospital on vacant land adjacent to its existing free-standing Emergency Department in Moncks Corner. (**Joint Ex. #3**) Trident’s application is governed by the 2004-2005 South Carolina State Health Plan. Currently, Trident Health System is comprised of the following facilities: Trident Medical Center, a 296-bed tertiary care facility in Charleston County; Summerville Medical Center, a 94-bed acute care facility

in Dorchester County; and Moncks Corner Medical Center, a freestanding emergency department (with no overnight beds) in Berkeley County.² (**Trial Tr. Rardin 86:16-87:17**) Pursuant to the 2004-2005 State Health Plan, Trident Medical Center (located in North Charleston) had a facility-specific bed need of 42 beds. (**Trial Tr. Baehr 1205:22-1206:4; Joint Ex. #3, II-17**) Using the CON process, Trident had successfully converted 25 skilled nursing beds into general acute beds, leaving a need of 17 beds under the Plan. (**Id.; Joint Ex. #4, III-35**) In its CON Application for a new hospital in Moncks Corner, Trident sought to transfer this facility-specific bed need of 17 beds and to increase this need to 50 beds to allow for the construction of its new hospital in Berkeley County. (**Joint Ex. #3, II-7 & II-17**) In other words, Trident proposed to transfer *future bed need* allocated to Trident from its facility in North Charleston to construct a hospital in Moncks Corner.

When Trident filed its CON application, it was fully aware that Roper St. Francis had purchased 66 acres of land at Carnes Crossroads in Goose Creek for the purpose of constructing its own hospital in Berkeley County. (**Final Order, Finding #36, 16; Trial Tr. Rardin 187:5-8; Resp't Exs. #77 and #138**) The timeline of each applicant's actions clearly established that Trident's CON Application was a reaction to Roper St. Francis' decision to purchase a large parcel of land in Goose Creek. Thus, it was no surprise to Trident when, approximately four months after Trident filed its CON Application, Roper St. Francis filed a CON Application proposing to construct a 50-bed acute care hospital in Berkeley County on the land it had previously purchased. To establish its new hospital, Roper St. Francis proposed to transfer 50 *existing* licensed

² A hospital must have, *inter alia*, inpatient medical services, commonly referred to as beds. (**Joint Ex. #3, II-4**) Moncks Corner Medical Center is not an existing hospital facility.

acute care beds from its Roper St. Francis Hospital facility in Downtown Charleston to Goose Creek. **(Joint Ex. #4, II-9 to II-10; Trial Tr. Shelton 1142:10-21)** Roper St. Francis's CON Application is governed by the 2008-2009 State Health Plan.

Roper St. Francis is a non-profit healthcare system with three inpatient facilities: Roper Hospital Downtown, a 316-bed tertiary hospital located on the peninsula in downtown Charleston; Bon Secours St. Francis, a 204-bed acute facility in Charleston County; and Roper St. Francis Mt. Pleasant Hospital, an 85-bed acute care facility in Charleston County. **(Final Order, Finding #2, 4; Joint Ex. #5, III-16)** Roper St. Francis operates a freestanding Emergency Department and an ambulatory surgery facility in Berkeley County. **(Final Order, Finding #2, 4; Resp't Ex. #15)** Roper St. Francis has a significant market share in Berkeley County. At the time of these Applications, nearly one in four Berkeley County residents traveled past Trident Medical Center to seek care at Roper St. Francis facilities in downtown Charleston and west of the Ashley River. **(Resp't Exs. #45 and 76)** In its CON Application for a new hospital at Carnes Crossroads in Goose Creek, Roper St. Francis proposed primarily to serve this large existing patient population. **(Joint Ex. #2, 17)**

It is important to remember that the Roper St. Francis – Berkeley Hospital is a repositioning of existing licensed beds and will not add any new beds to the Tri-County Service Area. Currently, 95% of all the hospital beds in the Tri-County Service Area are physically located in Charleston County while only 53% of the tri-county population resides in Charleston County. **(Resp't Ex. #75, ROPER-BERKELEY004704)** The ALC relied on expert testimony to conclude that there exists a maldistribution of beds in the service area. **(Final Order, Finding #30, 13-14)** In other words, population growth

over the past few decades has created new population centers requiring healthcare facilities like Roper St. Francis to move acute care services closer to the population. **(Trial Tr. Bowling 2494:25-2495:7; Resp't Ex. #76)** Each applicant will rely heavily on its Berkeley County patients to support these small hospitals and each hospital system has the existing market share to accomplish that goal. **(Final Order, Finding #34, 16; Trial Tr. Brandt 825:19-826:8)** Relying on expert testimony, the ALC found more than a sufficient number of patients in Berkeley County to support each 50 bed hospital at capacity with no significant change in market share. **(Final Order, Finding #55, 23).** In conclusion of addressing the need for the hospitals, the ALC stated "I find by the greater weight of the evidence that both hospitals will be well-utilized and financially successful and the approval of both hospitals will not exceed the need." **(Final Order, Finding #56, 24)**

By way of background, the Certificate of Need ("CON") program is a comprehensive statutory scheme found at S.C. Code Ann § 44-7-110 *et seq.* (Rev. 2002) (the "CON Act") that has been in existence for decades. The CON Act vests the South Carolina Department of Health and Environmental Control ("DHEC" or "Department") with the control and administration of the CON program. DHEC publishes a State Health Plan every two years, and in addition has adopted Project Review Criteria to evaluate CON Applications, and promulgated a host of other regulations to support the statutory requirements. The CON Act identifies its four purposes and the types of projects or services covered under the Act. S.C. Code Ann. § 44-7-160. The State Health Plan identifies the specific services and equipment requiring a CON and includes an inventory, projections, standards and a statement of the most important project review criteria. S.C.

Code Ann § 44-7-180. Before the Department may grant a CON, the application must comply with the applicable State Health Plan and the Project Review Criteria found at Section 802 of Regulation 61-15. S.C. Code Ann. § 44-7-210(C). As discussed below, Trident has abandoned its claim below that the Roper St. Francis CON Application fails to comply with the Project Review Criteria but continues to contend that the Roper St. Francis CON Application does not comply with the bed transfer provision of the State Health Plan.

The construction of a hospital requires a CON. The State Health Plan provides three methods to obtain a CON to establish a hospital: transfer of existing licensed beds, facility-specific bed need, and service area bed need. **(Joint Ex. #4, II-7 to II-10)** When addressing the methods based on bed need, the State Health Plan focuses on the occupancy of a hospital bed. This is primarily because bed occupancy is a rational way to measure when and if to construct new hospitals and because the overnight stay in a hospital bed is what makes a hospital unique from other healthcare facilities. **(Final Order, Finding #15, 8)** To determine need for additional hospital beds under a facility-specific bed need or service area need method, the State Health Plan utilizes a bed need formula.

Both Trident's and Roper St. Francis' CON Applications rely on different methods to support their project under the State Health Plan. Trident relies on the bed need formula for its North Charleston facility and proposes to utilize future facility-specific bed need for Trident Medical Center to construct a hospital in Monck's Corner. Roper St. Francis does not propose to add any new licensed beds to the service area and, therefore, need not rely on the bed need formula. Roper St. Francis proposes to transfer

existing licensed beds located at Roper Hospital Downtown to Goose Creek under the bed transfer provision of the State Health Plan. This provision in the State Health Plan has been used by hospital systems to construct satellite hospitals in Anderson, Charleston, Georgetown, Greenville, Spartanburg and Richland Counties. **(Final Order, Finding #61, 26; Joint Ex. #16, Trial Tr. Brandt 693:20-694:7 and 804:22-805:15; Trial Tr. Shelton 1132:16-1134:20)** Despite its frequent use to construct satellite hospitals, Trident contends that the bed transfer provision prohibits the transfer of existing licensed beds to a hospital that is not already existing.³ The ALC rejected Trident's interpretation of the bed transfer provision in the State Health Plan as being overly narrow, incorrect and in opposition to the intent of DHEC, the drafter of the provision. **(Final Order, Findings # 57-67, 24-28)**

In addition to challenging on appeal Roper St. Francis' compliance with the bed transfer provision of the State Health Plan, Trident appeals the ALC's decision that the two CON Applications are not "competing applications." If two or more CON applications are deemed "competing applications" as defined by the CON Act and the CON Regulations, only one of the CON applications may be approved. S.C. Code Ann. § 44-7-210(C); S.C. Code Ann. Regs. 61-15 § 307(2). The key question for the ALC below to determine whether these Applications are "competing applications" is whether the approval of both would exceed the need for the services or facilities. At trial, DHEC's witness testified to at least six important facts that supported their decision that the Applications were not competing applications. **(Trial Tr. Brandt 633:1-6 and**

³ Trident's position remains interesting and inconsistent since Trident transferred existing beds and future bed need to obtain a CON to construct a satellite hospital in Summerville and, with this Application, Trident has proposed to transfer future bed need – not existing beds – to construct a hospital, despite that the applicable State Health Plan does not expressly authorize it. **(Trial Tr. Shelton 1142:10–1143:24, Final Order, Finding #73; Initial Br. of Resp't-Appellant)**

824:12-828:9) Roper St. Francis submitted abundant evidence through expert and factual testimony, as well as documentary evidence, establishing that the approval of both Applications would not exceed the need. The ALC adopted these findings with a detailed discussion, determining that there was abundant factual evidence to support the decision that the approval of both hospitals would not exceed the need for the facilities or services.

(Final Order, Finding #45, 19)

The ALC, as the tribunal authorized to hear and decide contested cases challenging a CON decision, conducted a 14-day trial and issued a 52-page Final Order and Decision affirming the decision of the Department to grant both CON Applications. Trident has filed this appeal from that Final Order. For the reasons set forth below, Roper St. Francis respectfully requests that this Court affirm the decision below.

ARGUMENTS

I. THIS COURT MUST AFFIRM THE DECISION OF THE ALC BECAUSE TRIDENT CANNOT OVERCOME THE HIGH BURDEN UNDER THE APPLICABLE STANDARD OF REVIEW FOR APPEALS FROM THE ALC OF A DECISION BY DHEC.

This matter before the Court is an appeal of an Administrative Law Court's decision regarding the action of an administrative agency. The Administrative Procedures Act ("APA") governs appeals of such decisions of the ALC. The ALC presides over all contested cases challenging the Department's decision on a CON application and is the fact finder authorized to hear evidence and adjudicate the agency decision. S.C. Code Ann. § 1-23-600(A) (Supp. 2011). Specifically, Section 1-23-610(B) of the APA articulates the applicable standard of review for the Appellate Court:

The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B).

"The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d

674, 676 (Ct. App. 2008) (citing *Olson v. S.C. Dep't of Health and Env'tl. Control*, 379 S.C. 57, 63, 663 S.E.2d 500, 501 (Ct. App. 2008)). “Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the ALC reached.” *Bailey v. S.C. Dep't of Health and Env'tl. Control*, 388 S.C. 1, 6, 693 S.E.2d 426, 429 (Ct. App. 2010) (citing *Leventis v. S.C. Dep't of Health & Env'tl. Control*, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000)). In the seminal case of *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981), the Supreme Court described the substantial evidence rule as something less than the weight of the evidence and specifically stated that “a judgment upon which reasonable men might differ will not be set aside.” *Id.* at 136, 276 S.E.2d at 307. Further, it is clear that under the APA, judicial intervention is limited to cases with a gross or manifest error of law by the administrative agency. *Id.*; see also *Nat'l Health Corp. v. S.C. Dep't of Health and Env'tl. Control*, 298 S.C. 373, 378; 380 S.E.2d 841, 843 (Ct. App. 1989).

In light of this standard of review, Trident bears a heavy and high burden in this appeal. In the 52-page Final Order and Decision, the ALC made 94 Findings of Fact and 39 Conclusions of Law. Each finding and conclusion cites to a supporting exhibit, exact page of trial testimony, or relevant case or statute. Simply identifying conflicting evidence does not prevent the findings of the ALC from being supported by substantial evidence. See *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env'tl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005). To overturn the ALC decision based on an error of law, the error must be manifest. As explained more fully herein, the Court must give deference to the agency interpretation of its regulations unless there is a

compelling reason otherwise. “Substantial evidence,” “manifest error of law,” and “compelling reason to differ” are all high and difficult burdens that Trident has failed to overcome.

Notwithstanding the lengthy trial and large and complicated Record on Appeal, Trident has focused its appeal on three areas, thereby electing to abandon many issues raised in the ALC below. None of the three areas raised by Trident constitutes a manifest or clear error of law and substantial evidence exists to support the ALC’s findings and conclusions for all three areas as will be established hereinbelow

While Trident’s failure to satisfy this high burden is alone sufficient to deny the appeal, nonetheless other reasons exist for this Court to affirm the ALC decision. As shown herein, Roper St. Francis will establish that the ALC reached the correct decision with a thorough, detailed and deliberate analysis of the State Health Plan, the applicable law, and review of the testimony and evidence presented below. Accordingly, the Court should affirm the decision of the ALC.

II. THE ALC CORRECTLY HELD THAT THE BED TRANSFER PROVISION OF THE STATE HEALTH PLAN ALLOWS ROPER ST. FRANCIS TO TRANSFER BEDS TO CONSTRUCT A NEW HOSPITAL IN THE SERVICE AREA.

The 2008-2009 South Carolina State Health Plan is applicable to the Roper St. Francis CON Application seeking to transfer 50 existing licensed acute care beds from Roper Hospital Downtown to construct Roper St. Francis – Berkeley near Goose Creek, South Carolina. As with its predecessor Plans, the 2008-2009 State Health Plan has a multi-page section that sets forth the definitions, requirements, inventory and bed need calculations for hospitals and hospital beds. **(Joint Ex. #4, II-6 to II-21)** Roper St. Francis and Trident both agree that the pertinent section of the State Health Plan for the

Roper St. Francis CON Application is Section II(G)(1)(A)(4)(j)(1)-(8), which is commonly referred to as the bed transfer provision.⁴ **(Joint Ex. #4, II-9 to II-10)** DHEC staff and the DHEC Board have consistently interpreted the bed transfer provision to allow a hospital to transfer hospital beds from an existing facility to construct a new hospital in a new location provided subsections (j)(1)-(8) are satisfied by the applicant. **(Trial Tr. Brandt 801:11-805:6)** In such circumstances, the hospital transferring the beds is the transferring facility and the hospital to be constructed is the receiving facility. **(Trial Tr. Brandt 693:23-694:6)** In this case, the ALC clearly determined that Roper St Francis – Berkeley is the receiving facility and Roper Hospital Downtown is the transferring facility. **(Final Order, Finding #67, 28; Trial Tr. Brandt 693:20-694:1 and 805:12-18)** Trident continues to contend that the bed transfer provision prohibits the transfer of existing beds to construct a new facility because, according to Trident, the receiving facility must be an already existing facility. In the Final Order and Decision, the ALC rejected Trident's position, agreed with Roper St. Francis and DHEC, and concluded that the transfer proposed by Roper St. Francis is permitted by the State Health Plan. **(Final Order, Finding #63, 27)** Therefore, the crux of the case below was whether the Roper St. Francis CON Application complied with the State Health Plan. The crux of this appeal, however, is whether the ALC's determination in the affirmative is a clear error of law or whether substantial evidence exists to support the ALC Decision.

A. *The 2008-2009 State Health Plan does not prohibit the transfer of existing licensed beds to construct a new hospital.*

No matter how many times Trident attempts to say otherwise, the 2008-2009 State Health Plan bed transfer provision does not require that the facility receiving the

⁴ Trident refers to this section in its Initial Brief as the Bed Transfer Standard. The ALC's Final Order used bed transfer section and bed transfer provision. Roper St. Francis uses the term bed transfer provision.

transferred beds be an already existing facility. Neither the word existing nor any iteration thereof is contained in the language of the bed transfer provision. The ALC made 11 Findings of Fact related to the bed transfer provision and stated: “I find that the plain language of the [State Health] Plan does not require that the facility receiving the beds be an existing facility.” **(Final Order, Finding #60, 26)** The ALC unequivocally stated that “the [bed transfer] language allows a facility to transfer beds to establish a new hospital provided the bed transfer criteria are satisfied.” **(Final Order, Finding #63, 27)** These factual findings are clear and critical to the analysis of the State Health Plan because the findings confirm that the Plan does not prohibit a hospital from transferring its own beds to construct a new hospital that does not yet exist.

Trident’s Initial Brief attempts to gloss over this important distinction. As a result, Trident’s own description of the “plain language” of the bed transfer provision evidences the fallacy of its argument. According to Trident’s Initial Brief, “the plain language of the Bed Transfer Standard *indicates* that it applies only when both the hospital transferring the beds and the hospital receiving the beds are in existence” **(Trident Initial Br. 12)** Language purportedly so “plain,” would not need to “indicate” but would state expressly that the receiving hospital must be already existing. “We cannot construe a statute without regard to its plain and ordinary meaning, and we will not resort to subtle or forced construction in an attempt to limit or expand the scope of a statute.” *Berkebile v. Outen*, 311 S.C. 50, 55, 426 S.E.2d 760, 763 (1993). In *Berkebile*, the Supreme Court considered the interpretation of Code Section 32-1-10 (1991). The statute allows a person to seek recovery for a gambling loss over a certain threshold. The crux of the appeal was whether the statute required that the gambling loss arise from an

“illegal” game. The Supreme Court held that it did not for the basic reason that the statutory language did not include language limiting it to an illegal game. Thus, the Supreme Court stated it will “not judicially engraft extra requirements to legislation which is clear on its face.” *Id.* at 55-56, 426 S.E.2d at 763. Likewise to the *Berkebile* opinion, the word “existing” or any similar word is not contained anywhere within the bed transfer provision of the State Health Plan. Nowhere does the provision require that the receiving facility be an existing bricks and mortar establishment. Trident’s construction of the bed transfer provision is exactly the type of forced construction rejected by courts. If DHEC intended that the State Health Plan prohibit the transfer of beds to construct a new hospital, the addition of a few words or sentences would have accomplished the result. This Court should not adopt the forced construction presented by Trident and as a result “judicially engraft extra requirements” that are absent from the State Health Plan.

B. *Principles of statutory construction support the ALC’s interpretation of the State Health Plan.*

When interpreting a regulation, this Court and the ALC employ the same rules that govern the construction of statutes. *See Murphy v. S.C. Dep’t of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). However, the State Health Plan is not a regulation or a statute, it is a document prepared by DHEC staff and presented for approval by the DHEC Board every two years. *See* S.C. Code Ann. § 44-7-180. While the State Certification of Need and Health Facility Licensure Act (“CON Act”), codified at S.C. Code Ann. § 44-7-110 *et seq.*, requires the issuance of the State Health Plan, the CON Act merely requires that the Plan include an inventory, projections of need, standards for distribution, and a statement as to the most important project review

criteria. *See* S.C. Code Ann. § 44-7-180(B). Unlike a regulation or statute, the State Health Plan is not approved by the Legislature but is an agency-promulgated document approved by the agency's Board.⁵ Thus, it is important to realize that the CON Act does not mandate a narrow or strict interpretation of the State Health Plan. Section 44-7-210(C) merely states that "[t]he Department may not issue a Certificate of Need unless an application complies with the State Health Plan, Project Review Criteria, and other regulations." S.C. Code Ann. § 44-7-210(C). Section 44-7-180(B) states that "nothing in this provision shall be construed as requiring the department to approve any project which is inconsistent with the South Carolina Health Plan." *Id.* at -180(B). Therefore, the question for the Department and the ALC below was whether the application complies with the State Health Plan or is inconsistent with the Plan. Determining compliance requires judgment from the Department in its review of the application. Accordingly, unless the State Health Plan specifically prohibits the approval of the application through the use of unmet standards or criteria, the Department retains the ability to find that the application complies with the State Health Plan.

In *MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 379 S.C. 1, 664 S.E.2d 471 (2008), the Supreme Court interpreted whether the MRI standards contained in the State Health Plan satisfied the CON Act based on statutory interpretation principles.⁶ "The primary rule of statutory construction is to ascertain and give effect to

⁵ Though challenged at trial, Trident did not appeal the ALC's findings and conclusions that the State Health Plan as promulgated by the Department satisfies the statutory mandate of the CON Act. Therefore, as an issue raised below but not included on appeal, the ALC's conclusions numbered 16 through 20 are the law of the case. *See S.C. Coastal Conservation League*, 363 S.C. at 76, 610 S.E.2d at 487 ("A ruling not challenged on appeal is the law of the case, regardless of the correctness of the ruling.")

⁶ Because the State Health Plan is neither a statute nor a regulation, this Court may conclude that *MRI at Belfair* is limited to whether the State Health Plan satisfies the requirements of the CON Act and, therefore, statutory construction principles do not apply when simply interpreting the meaning of the State Health Plan. If statutory construction principles do not apply, the Board's clear statement on the meaning of the

the intent of the legislature.” *Tempel v. S.C. State Election Comm’n*, 400 S.C. 374, 377-78, 735 S.E.2d 453, 455 (2012). Furthermore, the words of the statute must be given their plain and ordinary meaning. And, when interpreting regulations, courts also give deference to the interpretation of a regulation by the agency charged with its enforcement. *Murphy*, 396 S.C. at 640, 723 S.E.2d at 195. “Where a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The most clear and definite fact about the bed transfer provision is that it does not state that the receiving facility must be an already existing hospital.

“The canon of construction ‘*expressio unius est exclusion alterius*’ or ‘*inclusio unius est exclusion alterius*’ holds that ‘to express or include one thing implies the exclusion of another, or of the alternative.’” *Hodges* at 86, 533 S.E.2d at 581 (*citing Black’s Law Dictionary* 602 (7th ed. 1999)). The DHEC Board had many opportunities over the years to state that the receiving facility must be an existing facility. It never did. The Board’s failure to include that the receiving facility must be “existing” is strong evidence that the intent of the DHEC Board is not to narrowly constrict the bed transfer provision, allowing flexibility for the Department to approve the construction of satellite hospitals by way of bed transfer. **(Joint Ex. #16, 5)**

Most importantly, “[a]ll rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used,

bed transfer provision (discussed *infra*) must be the guiding principle of the Board’s intent and therefore, the DHEC Board’s recent ruling on this exact question ends this matter in favor of Roper St. Francis. **(Joint Ex. #16)** In its 52-page opinion, the ALC relied upon *Murphy* and *MRI at Belfair* as the basis to utilize statutory construction principles to interpret the State Health Plan.

and that language must be construed in light of the intended purpose of the statute.” *Taylor v. Aiken County Assessor*, ___ S.C. ___, 741 S.E.2d 31, 34 (Ct. App. Mar. 27, 2013). In interpreting the State Health Plan, the ALC considered the legislative intent of the CON Act and noted that one of the primary goals of enacting the Certificate of Need program was to “guide the establishment of health facilities and services which will best serve public needs” S.C. Code Ann. § 44-7-120. **(Final Order, Finding #59, 26)** The ALC went on to examine the plain and ordinary meaning of the State Health Plan, recognizing that “[t]he word ‘existing’ or a similar iteration is not contained in the language of the bed transfer provision” and that “the plain language of the Plan does not require that the facility receiving the transfer of beds be an existing facility.” **(Final Order, Finding #60, 26)** Further bolstering its decision, the ALC explained that such an interpretation was consistent with “the long-standing policy of the Department . . . that allows the construction of new hospitals throughout the transfer of existing licensed beds from affiliated entities.” **(Final Order, Finding #61, 26; Joint Ex. #16, 7; Trial Tr. Brandt 693:20-694:7 and 804:22-805:15; Trial Tr. Shelton 1132:16-1134:20)** Further, the Department’s witness testified as to how allowing flexibility for hospitals to redistribute beds was good healthcare planning. **(Trial Tr. Shelton 1154:8-1155:3)**

C. *Substantial evidence supports the ALC’s decision that the Roper St. Francis CON Application complies with the State Health Plan and the purposes of the CON Act.*

The ALC found that the Roper St. Francis’ CON Application complies with the State Health Plan and specifically with the bed transfer provision, which would include the introductory paragraph and the applicable subsections (j)(1)-(8). **(Final Order, Finding #67, 28)** On appeal, Trident’s sole objection to the approval of the Roper St. Francis CON Application is Trident’s contention that the 2008-2009 State Health Plan

prohibits the transfer of beds to construct a satellite hospital. As shown with detailed facts and conclusions in the Decision below and highlighted herein, substantial evidence was introduced at trial to support the ALC's decision that the Application was correctly approved and the bed transfer criteria were satisfied.

The bed transfer provision introductory paragraph states that the provision addresses the increasing need for facilities to create arrangements "in order to serve their patients in a more efficient manner." (**Joint Ex. #4, II-9**) The provision specifically states that affiliated hospitals may wish to transfer beds as a means to accomplish this greater efficiency. (*Id.*) The clearly documented purpose of the acute care hospital Roper St. Francis seeks to establish in Berkeley County is to "bring enhanced access to Roper St. Francis aligned patients residing in the Goose Creek / Berkeley County area who currently travel out of the local area for inpatient care;" as well as to "provide a significant positive impact to the residents of the Goose Creek and Berkeley County area by establishing a community-based, not-for-profit hospital in Goose Creek, thereby significantly enhancing access to hospital services in Berkeley County." (**Joint Ex. #2, 000015-000016**)

In the CON Application and at trial, Roper St. Francis demonstrated a significant historical presence in the Berkeley County market – serving 23%, or nearly 1 in 4 inpatient hospital admissions for non-tertiary, non-specialty diagnoses. (**Final Order, Finding #33, 15; Joint Ex. #2, 000026**) Even without an inpatient facility in the county, Berkeley County residents choose to travel significant distances to Downtown Charleston and West Ashley to obtain their inpatient care at a Roper St. Francis facility. (*Id.*) Roper St. Francis' project distributes existing service area beds to an area of growth located

where its existing patients work and live, thereby advancing the very purposes of the CON Act. **(Final Order, Finding #59, 25-26)** Currently, there are 1,739 existing licensed beds in the Tri-County Service Area, 95% of which are located on the Charleston Peninsula, while only 53% of the service area population resides in Charleston County. **(Final Order, Finding #30, 13-14; Resp't Ex. #75, ROPER-BERKELEY004704)** Given the obvious geographic limitations to growth on the Peninsula, the population is understandably growing to the north and west of downtown. **(Trial Tr. Bowling 2469:15-2470:16)** In the words of Trident's witness, longtime resident and former Mayor of Moncks Corner, John West, the population growth north from the south through Berkeley County is coming "[l]ike a freight train." **(Trial Tr. West 978:2-6)** As a result, there is a maldistribution of beds in the Tri-County Service Area. **(Final Order, Finding # 30, 13-14; Trial Tr. Richardson 3110:17-3111:14)** Roper St. Francis more than demonstrated the historical utilization in Berkeley County at Roper St. Francis Hospitals and the projected utilization at Roper St. Francis – Berkeley. As a result, the transfer of 50 existing licensed beds from an area of limited growth on the Peninsula to an area of explosive growth in neighboring Berkeley County shows why there is such a great need for this project. Obviously, the use of these beds in Berkeley County is both reasonable and an appropriate use of existing resources and inventory. **(Joint Ex. #2, 001262)**

It cannot be disputed and the ALC confirmed that the remaining criteria set forth in the bed transfer provision were satisfied by Roper St. Francis. The transfer of beds from Roper Hospital Downtown to Roper St. Francis – Berkeley will not increase the number of beds in the service area. **(Final Order, Finding #46, 19)** Further, Roper St.

Francis presented evidence and the ALC found that the redistribution of patients to Berkeley County will more than offset the loss of beds at Roper Hospital Downtown, thereby adequately explaining the impact of the transfer on the transferring facility. **(Final Order, Finding #66, 28)** Finally, the transfer is permanent. **(Final Order, Finding #64, 27)**

Beyond the documented and appropriate purpose of the expansion to Roper St. Francis – Berkeley and repositioning of existing beds from Roper Hospital Downtown, Roper Hospital Downtown and Roper St. Francis – Berkeley have a “formal legal relationship with a central organization” as contemplated by the “affiliated hospitals” definition in the State Health Plan. The phrase is defined as “two or more health care facilities . . . who have a formal legal relationship with a central organization and whose relationship has been established for reasons other than for transferring beds, equipment or services.” **(Joint Ex. #4, II-2)** Roper St. Francis – Berkeley clearly has more than a cursory and potentially limited relationship with Roper Hospital Downtown. Roper St. Francis – Berkeley is an extension of the Roper St. Francis Healthcare System and is a continuation of the strong network of acute care facilities serving Roper St. Francis patients throughout the Tri-County Service Area. **(Final Order, Finding #2, 4; Joint Ex. #2)** While one could imagine a circumstance where two unrelated hospitals enter into a sham affiliation merely to sell or transfer beds or services with the intention to quickly unaffiliate after the transfer, that is clearly not the case here. The relationship of Roper St. Francis – Berkeley with the Roper St. Francis Healthcare System and Roper Hospital Downtown are thoroughly discussed throughout the CON application. Significantly, Roper St. Francis – Berkeley is being established to provide needed acute

care services to the residents of Berkeley County, including a very substantial number of patients who currently travel significant distances to obtain their care on the crowded Charleston peninsula at Roper Hospital Downtown. As explained in the Department's letter approving the application, the project is a "re-positioning of currently licensed acute care beds from an area of limited growth to an area of strong growth" (**Joint Ex. #2, 001262**) The project is a furtherance of Roper St. Francis' mission to provide excellent quality of care to the residents of the Tri-County Service Area. As a result, Trident's contention that Roper St. Francis' CON Application does not meet the definition of "affiliated hospitals" is misplaced. The record is replete with documentary and testimonial evidence that the relationship between Roper Hospital Downtown, the transferring facility, and Roper St. Francis – Berkeley, the receiving facility, is far more than simply transferring beds, equipment or services. (**Joint Ex. #4, II-2**)

Trident's Initial Brief is brimming with references to "existing" hospitals in its discussion of the bed transfer provision, despite the complete absence of that word from the bed transfer provision or any of its criteria. The ALC's Final Order specifically found that "the plain language of the Plan does not require that the facility receiving the transfer of beds be an existing facility." (**Final Order, Finding #60, 26**) Contrary to Trident's assertion in its Initial Brief, the Department did not deem that a single hospital would be both the transferring and the receiving facility, but instead the testimony in the record is that the Department considers the applicant (Roper St. Francis – Berkeley) to be the receiving facility, while in this case Roper Hospital Downtown is the transferring facility. (**Trial Tr. Brandt 693:20-694:1**) To argue differently is a misrepresentation of the record.

Likewise, Trident cites to trial testimony where the attorney led the witness through a ridiculous vocabulary game of “English language” versus “Department language” to justify its position completely glossing over (or ignoring) the testimony establishing the longstanding policy of the Department’s interpretation, its purpose and application, as well as the affirmance of the policy and reasoning by the Department Board. Despite Trident’s contention otherwise, the ALC heard and considered the evidence and clearly found that the Roper St. Francis CON Application satisfied the bed transfer provision and that the Application complied with the State Health Plan. The ALC’s Final Order properly considered the entirety of the record and evidence before it, including on the issue of the Department’s interpretation and application of the bed transfer provision, and properly upheld the Department’s decision to approve the Roper St. Francis – Berkeley CON application. Roper St. Francis respectfully requests that this Court do the same and deny this appeal by Trident.

III. THE ALC PROPERLY CONSIDERED THE DEPARTMENT’S INTERPRETATION AND APPLICATION OF THE BED TRANSFER PROVISION IN REACHING ITS DECISION TO AFFIRM THE DEPARTMENT’S APPROVAL OF THE ROPER ST. FRANCIS – BERKELEY CON APPLICATION.

It is undisputed that DHEC has consistently and over a long number of years approved CON applications to transfer existing licensed beds from one hospital to construct a satellite hospital that does not yet exist. At least six new hospitals have been created by the transfer of existing licensed beds or bed need in Anderson, Charleston, Georgetown, Greenville, Spartanburg and Richland Counties. **(Final Order, Finding #61, 26; Joint Ex. #16, 7; Trial Tr. Brandt 693:20-694:7 and 804:22-805:15; Trial Tr. Shelton 1132:16-1134:20)** As the ALC was informed through testimony and documentary evidence, the Department has a long history of allowing satellite hospitals

to be constructed by way of the bed transfer provision, which has been upheld both by the Department Board and the ALC. Ms. Brandt, who at the time of the decision and at trial was the Chief for the Division of Health Licensing, testified that, regarding the bed transfer provision:

My knowledge is that historically that's been allowed for the creation of new hospitals. In other words, an existing hospital can transfer their existing beds for the creation of a new hospital, and that's been done in a lot of cases. And also while I was at the Department was when we went before the Board and I was present when there was -- based on Parkridge case, the same bed transfer provision was brought up before the Board and then before the ALC. So I was present at the time to have knowledge of the 2008-2009 Health Plan, even if I wasn't present when it was effective.

(Trial Tr. Brandt 801:11-802:1) Mr. Les Shelton, a longtime employee of the Department with no role in the decisions on appeal, testified to a number of satellite hospitals created through the bed transfer provision, where the receiving facility was the applicant not yet constructed and the transferring facility was an existing affiliate, including Providence Northeast Hospital, Anderson Area Medical Center, Village Healthcare, Palmetto Parkridge, Waccamaw Neck Hospital, and Roper St. Francis – Mount Pleasant. **(Trial Tr. Shelton 1132:16-1134:20)**

In addition, the DHEC Board addressed this very question in a dispute over the Parkridge Hospital in Richland County and clearly stated that the bed transfer provision allows the transfer of existing licensed beds to establish a new hospital. **(Joint Ex. #16)** Despite the ALC's Finding that the bed transfer provision does not require that the receiving facility to be an already existing hospital, Trident challenges the ALC's consideration of the Department's interpretation and application of the bed transfer provision for prior projects. Trident's challenge requires acceptance of its unsupported proposition that allowing for the creation of a satellite hospital through the transfer of

existing service area beds “contradicts the plain language of the Plan.” (**Trident Initial Br. 20**) Again, according to Trident, the “plain language” of the bed transfer provision “definitely contemplates” a bricks and mortar receiving facility. How “plain language” can “definitely contemplate” remains a mystery of Trident’s arguments on appeal.

As shown in Section II herein, the ALC thoroughly analyzed the bed transfer provision of the State Health Plan with a statutory construction analysis and found that the State Health Plan allows the transfer of existing licensed beds to construct a new hospital, independent of deference to the Department or consideration of the Department’s prior and current interpretation of the Plan. Therefore, while Trident posits the Final Order in the context that the ALC deferred to the Department in spite of contrary language in the State Health Plan, Trident’s position misrepresents the ALC’s Final Order. The ALC clearly finds that “the language of the *2008-2009 State Health Plan* does not require that the receiving facility be an existing facility when the application to transfer beds is made, and that the language allows a facility to transfer beds to establish a new hospital provided the bed transfer criteria are satisfied.” (**Final Order, Finding #63, 27**)

A. *No compelling reason exists to reject the Department’s interpretation.*

It is well settled that courts will give deference to the agency’s interpretation of its own regulations. *Brown v. S.C. Dep’t of Health and Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 581 S.E.2d 836 (2003). The Supreme Court has clarified the well-settled provision to require that there must be a compelling reason to differ with the agency’s interpretation of its regulation. *S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486; *see also, Murphy v. S.C. Dep’t of Health and Envtl. Control*, 396 S.C. 633, 640-41, 723 S.E.2d 191, 195

(2012) (affirming deference to DHEC with no reason to deviate from its construction and application where interpretation was reasonable and consistent with regulation). The most common, if only, circumstance when our courts have refused to defer to the interpretation or application of the agency is when the agency interpretation was refuted by the plain language of the statute or regulation. *Savannah Riverkeeper v. S.C. Dep't of Health and Envtl. Control*, 400 S.C. 196, 206, 733 S.E.2d 903, 908 (2012) (J. Toal, concurring).

The most generous interpretation of the 2008-2009 State Health Plan for Trident would be that the Plan is silent as to whether beds may be transferred to construct a new hospital. Similar to the Legislature in the enactment of legislation, the Department should be presumed to be aware of its earlier State Health Plans and judicial decisions interpreting its provisions. *See e.g., Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (reciting this presumption as applied to the legislature in review of rules of statutory construction). The Department's consistent interpretation of the bed transfer provision to allow the creation of new satellite hospitals through bed transfers, and the continuation of the bed transfer provision without any prohibition of or modification to this practice, results in the conclusion that the State Health Plan allows such transfers.

In *S.C. Coastal Conservation League*, the dispute in part stemmed from whether DHEC's Office of Ocean and Coastal Resource Management ("OCRM") should apply the "small island" regulation or the "transportation-projects" regulation to a permit request. During the review process, OCRM staff applied the small island regulation and issued the permit. The ALC applied both regulations and approved the permit, and on appeal the OCRM Panel affirmed the ALC decision using the transportation-projects

regulation. *S.C. Coastal Conservation League*, 363 S.C. at 71, 610 S.E.2d at 484. The circuit court reversed the Panel and vacated the permit. *Id.* at 72, 610 S.E.2d at 484-85. The Supreme Court reversed the circuit court, finding that there was no compelling reason to overturn the Panel's decision that the transportation regulation governed. *Id.* at 75, 610 S.E.2d at 486. Specifically, the Supreme Court noted that it was the Panel's decision that was entitled to deference, not the staff decision. *See id.*

A second recent case with a similar result is *Murphy v. S.C. Dep't of Health and Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012). Ms. Murphy opposed the issuance of a water quality certification related to the renovations of Chapin High School that would fill in 727 feet of stream. The crux of the parties' dispute was the interpretation and application of the phrase "vicinity of the project" within the water quality certification regulations. *Id.* at 636-37, 723 S.E.2d at 193. The Supreme Court's opinion affirmed that DHEC should receive deference for its interpretation of "vicinity of the project," despite that the Department's interpretation of regulation allowed the Department to determine vicinity on a case by case basis – and in this instance the 'vicinity' was more than just the 727 feet of stream impacted by the project and could include many miles. *See Id.* at 640, 723 S.E.2d at 195. Thus, the Supreme Court gave deference to a DHEC decision that allowed the Department to exercise discretion in its interpretation of the regulation. Since the issuance of the *Murphy* opinion just last year, the Supreme Court expounded on its decision in *Murphy* and cited to *Comm'rs of Public Works v. S.C. Dep't of Health and Envtl. Control*, 372 S.C. 351, 641 S.E.2d 763 (Ct. App. 2007), for the proposition that if the statute is ambiguous, the Court should defer to

the Board's interpretation. *Kiawah Dev. Partners v. S.C. Dep't of Health and Envtl. Control*, 401 S.C. 570, ___, 738 S.E.2d 455, 466 (Feb. 27, 2013).

An analysis of the few cases in which the Supreme Court has concluded that the agency was not entitled to deference, the consistent factor is a determination that the regulation or statute was absolutely clear and plain. If there is any doubt about the interpretation, DHEC's longstanding interpretation should be followed.

B. *Only the interpretation of the DHEC Board is entitled to deference.*

In its Brief, Trident spends many pages improperly pitting the DHEC staff witnesses through leading testimony elicited by Trident about "English language" and "DHEC language." Trident's reliance on the trial testimony of the DHEC witnesses to attempt to circumvent the proper deference afforded to the Department Board's interpretation of the bed transfer provision is misplaced. The DHEC Board has clearly interpreted this very provision to allow the transfer of existing beds to construct a new hospital just as Roper St. Francis proposes in its Application. The evidence before the ALC and on appeal includes the Decision on Remand of the DHEC Board in the matter of Palmetto Health Baptist Parkridge ("Parkridge"). **(Joint Ex. #16)** In the Parkridge matter, Palmetto Health in downtown Columbia sought to create a satellite hospital in northwest Richland County through the transfer of 76 licensed acute care beds. **(Id. at 1)** The Department Board was asked by the ALC to "determine the narrow issue of whether the transfer of licensed acute care beds from an existing hospital to create a new hospital is consistent with the 2004-2005 South Carolina Health Plan, including the 'Plan Transfer Standard.'" **(Id.)** In an 8-page Decision issued May 8, 2009, the DHEC Board concluded that the bed transfer provision "allows for approval of a CON application for

the transfer of licensed general acute care hospital beds to establish a new hospital.” (*Id.* at 8)

The Supreme Court has specifically stated in at least two prior opinions that deference is afforded to the Board, not the staff. As discussed earlier, in *S.C. Coastal Conservation League*, the OCRM staff contended that the small island regulation applied. The Panel affirmed the ALC determination that the transportation regulation applied, thus disagreeing with its staff decision. The Supreme Court gave deference to the Panel decision. *S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486. In *Neal v. S.C. Dep’t of Health and Env’tl. Control*, 383 S.C. 619, 682 S.E.2d 268 (2009), the Supreme Court reversed the Court of Appeals decision that relied heavily and gave deference to the testimony of an OCRM employee about the interpretation of the regulation. *See id.* at 270. The employee drafted the regulation and testified to the interpretation of the word “plat” in the regulation and concluded that a survey did not constitute a plat under the regulation. The Panel disagreed with his interpretation. In its opinion, the Supreme Court stated that an agency’s appellate panel, not its staff, is entitled to deference in interpreting agency regulations. *See id.* Similarly, the DHEC Board functions as the OCRM Panel and the DHEC Board’s statements on this issue are entitled to deference from the Court.

C. *The ALC’s reliance on Monroe was appropriate.*

Trident contends that the ALC’s reliance on *Monroe v. Livingston*, 251 S.C 214, 161 S.E.2d 243 (1968), along with the ALC’s discussion of a “tipping point,” resulted in the ALC ignoring the purportedly plain language of the bed transfer provision. (**Trident Initial Br. 21**) A complete reading of the Final Order and the pertinent paragraphs show that Trident’s contention has no merit. (**Final Order, Findings #58-63, 25-27**) Neither

the ALC nor the DHEC Board state that the plain language of the bed transfer provision is contrary to the ALC decision. In fact, in numerous instances, the ALC holds the opposite. *Monroe* is an opinion from over 40 years ago wherein the Supreme Court rejected the longstanding practice of the Tax Commission regarding the collection of poultry taxes. The Supreme Court found that the Tax Commission's application of the statute was "patently erroneous" and should be rejected, even if it had been interpreted that way over a long period of time. *See id.* at 217, 161 S.E.2d at 244. As Roper St. Francis has explained *infra*, *Monroe* and more recent cases have held that an interpretation of a statute or regulation that was at odds with its plain language was a compelling reason to ignore the deference typically afforded the agency.⁷ The ALC's discussion of a 'tipping point' is consistent with the case law. There is no pendulum or balancing to determine how much deference to provide the agency. The cases hold that the agency is provided deference unless the decision clearly and unambiguously violates the plain language of the regulation or statute at issue. Without doubt, Trident's "definite contemplation" of the purportedly plain Plan language is not clear or unambiguous.

Trident also focuses on the ALC's acknowledgement that DHEC is the final arbiter of the State Health Plan. The rules of statutory construction always begin with the cardinal rule that the Court must ascertain and effectuate the intent of the legislature. *Media Gen. Comm. Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 694 S.E.2d 525 (2010); *Marlboro Park Hosp. v. S.C. Dep't of Health and Env'tl. Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004). The ALC correctly noted that as to the State Health Plan,

⁷ It is important to note that *Monroe* is a case brought by a taxpayer against the tax commission (the predecessor of the Department of Revenue) and revenue laws are generally construed against the taxing authority. *See Taylor*, 741 S.E.2d at 33. Unlike a revenue case, in this CON appeal, the Department is entitled to deference in the interpretation of its regulations.

the Department, not the Legislature or any other body, was the entity that drafts and approves the Plan and, therefore, it is the intent of the Department Board that governs. The DHEC Board's decisions and rulings are the most persuasive evidence of the intent of the State Health Plan. Thus, a compelling reason exists to consider the Board's interpretation of the Plan, particularly so where the Board has been asked and answered the very question of interpretation at issue here with the bed transfer provision. (**Joint Ex. #16**)

D. *The Record contains substantial evidence necessary to support the approval of the Roper St. Francis CON Application.*

The ALC's decision is clearly supported by substantial evidence, including the precedent of the Department in approving similar applications, the Department Board's approval of the staff's interpretation, and the ALC's related ruling affirming the Department Board's interpretation. Regardless of how the DHEC witnesses may have characterized language, both Ms. Brandt and Mr. Shelton unequivocally testified that the bed transfer provision allowed a hospital to transfer existing beds to construct a satellite hospital and that DHEC's longstanding interpretation of this provision was consistent with the purposes of the CON Act.

This Court's review asks only whether the ALC's decision is supported by substantial evidence. "[T]his Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALJ reached. 'The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.'" *Hill v. S.C. Dep't of Health and Env'tl. Control*, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010) (quoting *DuRant v. S.C. Dep't of Health & Env'tl. Control*, 361 S.C. 416, 420, 604 S.E.2d

704, 707 (Ct. App. 2004)). The ALC determined that, upon review of the State Health Plan, the rules of statutory construction, the prior practice of the Department, and the decisions of the Department Board and ALC, the bed transfer provision does not require that the receiving facility be an existing facility. The ALC's Final Order quoted from this Court's ruling in *Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573, 578-79, 595 S.E.2d 851, 854 (Ct. App. 2004):

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that the language must be constructed in the light of the intended purpose of the statute. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.

Id. (internal citations omitted). Trident argues that because the Department and the ALC do not agree with its convoluted analysis of the bed transfer provision, which in its recitation to this Court requires a grammatical exercise in bolding and italics to isolate words and phrases, that somehow the refusal to accept their "plain language" interpretation of the State Health Plan is in error and should be reversed. Trident's very interpretation violates a basic tenet of statutory construction – "words in a statute must be construed in context." *Sparks v. Palmetto Hardwood, Inc.*, __ S.C. __, __ S.E.2d __, No. 27229, 2013 WL 812501 *2 (March 6, 2013) (citing *S. Mut. Church Ins. Co. v. S.C. Windstorm and Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991)). Trident seeks to highlight the plurality of isolated words at the expense of reading the provision as a whole within the context of the purposes of the CON Act.

Regardless of the convoluted nature of Trident's reasoning, or the exercise in language isolation the argument requires, this proceeding is not an opportunity for

Trident to reargue *yet again* its interpretation of the bed transfer provision. So long as there is substantial evidence in the record to support the ALC's Final Order, this appeal fails. And in fact, substantial evidence does exist to support the ALC's holding that the bed transfer provision does not require a receiving facility to be *existing* in order to satisfy its criteria. This holding is substantially supported not only by the facts in the record of this proceeding, but also by the precedent of the Department in approving similar satellite hospitals, and the decisions of the Department Board and Administrative Law Court in this case that a facility need not be existing to receive transferred beds.

Substantial evidence is evidence which allows reasonable minds to reach the same conclusion as the ALC when considering the record as a whole. *See e.g., Friends of Earth v. Public Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the ALC's finding from being supported by substantial evidence." *Leventis v. S.C. Dep't of Health and Env'tl. Control*, 340 S.C. 118, 130-31, 530 S.E.2d 643, 650 (Ct. App. 2000). While Trident may not agree with the interpretation of the bed transfer provision by the Court below, the Department staff, the DHEC Board, and Roper St. Francis, nonetheless it is apparent that substantial evidence exists in the record to support the propriety of the Roper St. Francis – Berkeley CON Application under its terms and therefore warrant affirmance of the ALC Final Order by this Court on appeal.

IV. THE ALC CORRECTLY DETERMINED THAT THE TWO CON APPLICATIONS ARE NOT “COMPETING APPLICATIONS” BECAUSE THE APPROVAL OF BOTH APPLICATIONS DOES NOT EXCEED THE NEED IN THE SERVICE AREA.

Trident’s final argument on appeal is that the ALC’s decision finding the applications were not competing is “inconsistent with the State Health Plan.” The CON Act specifically defines “competing applicants” as follows:

[T]wo or more . . . health care facilities . . . who apply for Certificates of Need to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities.

S.C. Code Ann. § 44-7-130(5). The parties below agreed that the two applications satisfied the first few elements of the definition; namely that each is a health care facility applying to provide similar services or facilities in the same service area in the time frame established by the Department. In cases where competing applications are at issue, the critical element is the final element: “whose applications, if approved *would exceed the need for services or facilities.*” *Id.* (emphasis added). Therefore, the question for ALC was whether the approval of both CON Applications would exceed the need for services or facilities and the ALC concluded that the approval of both would not exceed the need. The question for this Court on appeal is whether the ALC decision is supported by substantial evidence. As shown in the Final Order and as set forth herein, the substantial evidence standard is easily satisfied by Roper St. Francis.

Trident simply misreads or misrepresents the content of the ALC’s Final Order in its argument that the applications are competing, and also attempts by way of footnote to render irrelevant the very important decision of the South Carolina Supreme Court on the exact issue of whether CON applications were competing where the record contained substantial evidence showing that the need would not be exceeded with approval of both

applications. See *Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC*, 387 S.C. 79, 690 S.E.2d 783 (2010).

As to Trident's analysis of the ALC's Final Order, it is inaccurate to represent to this Court that the ALC simply affirmed the Department's decision on the issue of competing applications, without reference to the numerous Findings of Fact and Conclusions of Law made thereon. Rather than merely accepting at face value that the relocation of existing beds by Roper St. Francis obviated any requirement to analyze need further, the ALC undertook substantial inquiry into the testimony and voluminous data presented at trial and determined that there was sufficient need in the service area, as proposed by both applicants, to support both projects.

As the party appealing the decision of the Department, Trident had the burden at trial of proving by a preponderance of the evidence that the approval of both facilities would exceed the need for the facilities in the service area. **(Final Order, Finding #43, 18)** As explained in the *Spartanburg* Opinion, this Court's role is to determine whether factual evidence exists in the record supporting the ALC's conclusion that the need for the facilities will not be exceeded with the approval of both applications. See *Spartanburg*, 387 S.C. at 91, 690 S.E.2d at 789. While the fact that Roper St. Francis was repositioning existing beds rather than adding new beds to the inventory was an important fact supporting the ALC decision, the ALC was also persuaded by the great amount of evidence and testimony surrounding the large geographic size of Berkeley County, the distribution of the Berkeley County population, the location of the proposed facilities within the service area, and the financial feasibility of both systems' projects as abundant factual evidence supporting the approval of both applications and evidencing

that the need would not be exceeded. **(Final Order, Findings #44-56, 19-24; Final Order, Conclusions #26-27, 47-48)**

Trident's own trial witness, longtime resident and former mayor of Moncks Corner, John West, testified at length regarding the population explosion in Berkeley County, the distinctions between the Goose Creek and southern Berkeley County communities versus the Moncks Corner and northern Berkeley County communities, as well as the significant economic development in the area. **(Trial Tr. West 971:24-979:7)** Moreover, both applicants projected capacity within their respective 50-bed acute care facilities primarily from their existing patient bases only – that is, without significant or material changes in the market shares of the existing providers.⁸ For Trident to continue to argue to this Court that approval of both applications exceeds the need for the facilities, particularly without having met its burden below, flies in the face of the substantial evidence in the record and is wholly without merit.

As part of Trident's final argument, by way of footnote it attempts to eviscerate and render irrelevant the important recent Supreme Court decision on competing CON applications - *Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC*, 387 S.C. 79, 690 S.E.2d 783 (2010). Positing that because the health service under review was linear accelerators as opposed to acute care hospitals, Trident claims that the opinion is therefore not relevant to the issues before this Court. Trident could not be more wrong.

In *Spartanburg*, the ALC was faced with applications that were for similar

⁸ Specifically, Trident's application is based solely on its existing patient base in Berkeley County and assumes *no* change in market shares. **(Joint Ex. #1, 000035-000036)** Roper St. Francis-Berkeley assumed half of its patient base would be redirected from existing aligned patients and only 40% would originate from non-Roper St. Francis-aligned patients, a number completely offset by Berkeley County population growth. **(Joint Ex. #2, 000028-000029; Resp't Ex. #70)**

services (linear accelerators), in the same service area (Cherokee/Spartanburg/Union Service Area), filed within the statutory time frame, and which the Department determined were competing on the belief that approval of both would have exceeded the need for linear accelerator services in the service area. *See Spartanburg*, 387 S.C. at 81-82, 690 S.E.2d at 784. Under the applicable State Health Plan, in order for a new linear accelerator to be approved, certain threshold volumes must be met by existing providers and the applicant(s). *See id.* at 83, 690 S.E.2d at 785. After a five day hearing following months of discovery, the ALC concluded that the approval of both applications would not exceed the need. In its review, the Supreme Court was persuaded by the abundant factual evidence in the record to support the ALC decision that the CON applications were not competing. *Id.* at 91, 690 S.E.2d at 789. Just as was found in *Spartanburg*, there is abundant factual evidence to support the ALC decision that the CON Applications in this matter are not competing applications as defined by the CON Act. **(Final Order, Finding #45, 19)**

Trident argues that because the need for linear accelerator services is calculated differently than for acute care hospital beds, somehow the entire analysis and learned reasoning of the Supreme Court in reviewing the ALC's decision in *Spartanburg* should be ignored. In fact, the opposite is true. The Scope of Review contained in the *Spartanburg* opinion is verbatim what applies to this appeal. Trident's focus on the *method* of calculating "need" being different for acute care hospitals and linear accelerators as distinguishing the analysis is misplaced. Not only is it irrelevant to the importance of the Supreme Court's analysis of the competing applications issue and the review of the ALC's decision in *Spartanburg*, but in fact in this case the bed need

calculation and existing inventory does not prohibit the approval of both Applications. As has been established repeatedly both at trial and in the Final Order, Roper St. Francis is not *adding* any new licensed beds to the inventory, so the lack of a bed need for Roper St. Francis or the Tri-County Service Area under the 2008-2009 State Health Plan is wholly irrelevant to the issues before the Court. “Roper St. Francis’ project is a repositioning of existing licensed beds within the service area.” **(Final Order, Finding #46, 19)** Roper St. Francis is “bringing the services to the population, enhancing access.” **(Trial Tr. Richardson 3119:20-3120:5)** Trident’s lengthy discussion of the bed need inventory has no bearing on the analysis of need for the projects.

In reviewing the evidence in the record supporting the existence of need for the beds that will be located in Berkeley County, there is substantial evidence supporting the ALC’s conclusion that Trident failed to meet its burden on this issue. Again in striking similarity to the issues facing the ALC and Supreme Court in the *Spartanburg* matter, the population and geographic circumstances facing Cherokee County and Spartanburg County are those same circumstances revealed by the record for Berkeley County – the growing population of the more urban Goose Creek area and the need for greater access for the more rural Moncks Corner area and surrounding communities. It should not be forgotten that what these applications propose are not massive tertiary care facilities with hundreds of beds to fill. Rather, the affirmance of the ALC’s Final Order results in 50 general acute care beds being placed in Goose Creek, with a 2010 Census population of 35,936, and 50 general acute care beds being placed in Moncks Corner, with a 2010 Census population of 7,885. **(Resp’t Ex. #70, RICHARDSON-Berkeley 000683)** These small community hospitals require an average daily census of only 35 patients to

be considered full. **(Final Order, Finding #55, 23)** With a projected total discharges of 18,470 in Berkeley County alone in 2017, 327 beds could be supported solely by that patient volume. **(Resp't Ex. #70, RICHARDSON-Berkeley 000684)**

There is clearly substantial evidence supporting the decision of the ALC that the positioning of 50 additional beds and 50 transferred beds in Berkeley County, for a total of 100 beds serving a 2010 population of 177,843, will *not* exceed the need for the services or facilities. Because of the abundance of evidence to support this conclusion, the ALC's Final Decision should be affirmed and this appeal by Trident denied. *See Spartanburg*, 387 S.C. at 91, 690 S.E.2d at 789.

V. TRIDENT HAS ABANDONED ITS CONTENTION THAT THE ROPER ST. FRANCIS CON APPLICATION DOES NOT OTHERWISE COMPLY WITH THE STATE HEALTH PLAN, PROJECT REVIEW CRITERIA OR OTHER REGULATIONS.

The CON Act states that DHEC may not issue a CON unless the application complies with the applicable State Health Plan, project review criteria, and other regulations. *See* S.C. Code Ann. § 44-7-210(B). The ALC and DHEC correctly determined that the 2008-2009 State Health Plan does not prohibit the transfer of beds to construct a satellite hospital. Once it is established that the action applied for is not prohibited, the question becomes whether the application complies with the State Health Plan, Project Review Criteria, or other regulations.

At the trial below, Trident contended that the Roper St. Francis CON Application should be denied for the following reasons other than compliance with the bed transfer provision: (1) adverse impact of the project outweighs access improvement; (2) failure to identify the served communities; (3) errors on the financial pro formas resulting in the project's failure to meet the feasibility test by year three; and (4) lack of acceptability

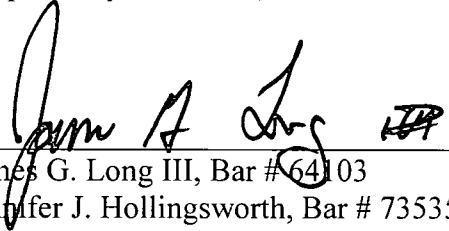
from competing hospitals. **(Final Order, Finding #75, 30-31)** The ALC rejected all of these arguments and Trident has not raised any of these issues on appeal. As a result of its failure to raise these issues, Trident has abandoned its objection to Roper St. Francis' compliance with the Project Review Criteria and other regulations, and Roper St. Francis' compliance is the law of the case. *See S.C. Coastal Conservation League*, 363 S.C. at 76, 610 S.E.2d at 487 (“A ruling not challenged on appeal is the law of the case, regardless of the correctness of the ruling.”); *see also Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (reiterating that even “short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”)

While Trident addresses the bed transfer criteria in its brief, its discussion of the State Health Plan focuses solely on whether the receiving facility must be an existing facility. Trident makes no effort or argument to show that Roper St. Francis has failed to comply with the State Health Plan in any other particular other than its contention about the bed transfer provision requires two existing hospitals. As a result, Trident has waived any other objection to whether the Roper St. Francis CON Application complies with the State Health Plan. In its Final Order, the ALC made significant detailed Findings as to how the proposed Roper St. Francis hospital at Carnes Crossroads satisfies each of the bed transfer criteria and the State Health Plan itself. **(Final Order, Findings #64-67, 27-28; Conclusion #23, 46-47)** Therefore, the ALC's rulings on these matters are the law of the case.

CONCLUSION

For the reasons set forth herein, Roper St. Francis respectfully requests that this Court deny the Petition of the Appellant/Respondent Trident Medical Center, LLC, and affirm the Final Order and Decision of the Administrative Law Court in its entirety.

Respectfully submitted,



James G. Long III, Bar # 64103
Jennifer J. Hollingsworth, Bar # 73535
Tanya A. Gee, Bar # 70191
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.771.8900

Attorneys for Respondents-Appellants

June 12, 2013
Columbia, South Carolina