

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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 South Carolina Department of Health and
Environmental Control is theRespondent, and

Roper St. Francis is theRespondent/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, Inc. d/b/a Roper St. Francis
Hospital-Berkeley,

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SC Court of Appeals

Of Whom South Carolina Department of Health and
Environmental Control is theRespondent, and

Roper St. Francis is theRespondent/Appellant.

INITIAL REPLY BRIEF OF APPELLANT/RESPONDENT

(caption continued from cover page):

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.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL1

ARGUMENT.....1

 I. THE ADMINISTRATIVE LAW COURT ERRED IN DETERMINING THAT THE BED TRANSFER STANDARD OF THE STATE HEALTH PLAN CAN BE USED TO CREATE A NEW HOSPITAL WHEN THE PLAIN LANGUAGE OF THE STANDARD ALLOWS A TRANSFER OF BEDS ONLY BETWEEN HOSPITALS THAT ARE ALREADY IN EXISTENCE.....4

 II. THE ADMINISTRATIVE LAW JUDGE ERRED IN DEFERRING TO THE DEPARTMENT’S INTERPRETATION OF THE BED TRANSFER STANDARD BECAUSE SUCH INTERPRETATION CONTRADICTS THE PLAIN LANGUAGE OF THE PLAN9

 III. THE ADMINISTRATIVE LAW COURT ERRED IN DETERMINING THAT TRIDENT AND ROPER ARE NOT COMPETING APPLICANTS BECAUSE THE NEED FOR FACILITIES AND SERVICES WOULD NOT BE EXCEEDED BY APPROVAL OF BOTH APPLICATIONS BECAUSE, AS A MATTER OF LAW, SUCH DETERMINATION IS INCONSISTENT WITH THE STATE HEALTH PLAN10

CONCLUSION.....11

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page(s)</u>
<i>Berkebile v. Outen</i> , 311 S.C. 50, 426 S.E.2d 760 (1993)	6
<i>CFRE, LLC v. Greenville County Assessor</i> , 395 S.C. 67, 716 S.E.2d 877 (2011).....	3
<i>City of Rock Hill v. Harris</i> , 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011).....	3
<i>Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control</i> , 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct.App. 2002).....	5, 6, 7
<i>ESA Servs., LLC v. S.C. Dept. of Revenue</i> , 392 S.C. 11, 707 S.E.2d 431 (Ct.App. 2011)	8
<i>MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control</i> , 379 S.C. 1, 5, 664 S.E.2d 471, 473 (2008)	2
<i>Neal v. S.C. Dep't of Health & Envtl. Control</i> , 383 S.C. 619, 682 S.E.2d 268 (2009).....	9
<i>Roper Hosp. v. Bd. of S.C. DHEC</i> , 306 S.C. 138, 140, 410 S.E.2d 558, 559 (1991).....	2
<i>Savannah Riverkeeper v. S.C. Dep't of Health & Envtl. Control</i> , 400 S.C. 196, 207, 733 S.E.2d 903, 908 (2012)	9
<i>S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.</i> , 397 S.C. 256, 260- 261, 725 S.E.2d 480, 483 (2012)	2
<i>Sloan v. S.C. Bd. of Physical Therapy Exam'rs</i> , 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006).....	5
<i>Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assocs. of South Carolina, LLC</i> , 387 S.C. 79, 83, 690 S.E.2d 783, 785 (2010).....	11
<i>Town of Summerville v. City of N. Charleston</i> , 378 S.C. 107, 100, 662 S.E.2d 40, 41 (2008)	3
<i>Triska v. Dep't of Health & Envtl. Control</i> , 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987).....	8

STATUTORY AUTHORITIES

Page(s)

3 S.C.Code Ann.Regs. 61-15, § 802 (Supp. 2012)4
S.C.Code Ann §§ 1-23-310, *et seq.* (Supp. 2005).....2
S.C.Code Ann. § 1-23-380(5)2
S.C.Code Ann. § 1-23-380(5)(a)-(d) (Supp. 2012).....3
S.C.Code Ann. § 1-23-380(5)(d) (Supp. 2010)2, 3
S.C.Code Ann. § 1-23-380(5)(d) (Supp. 2012)2
S.C.Code Ann. § 44-7-210(C) (Supp. 2012)4

OTHER AUTHORITIES

2 AM.JUR.2d *Administrative Law* § 2452
2004-2005 South Carolina Health Plan7
2008-2009 South Carolina Health Plan *passim*

STATEMENT OF ISSUES ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT ERR IN APPLYING THE BED TRANSFER STANDARD OF THE STATE HEALTH PLAN TO THE CREATION OF A NEW HOSPITAL WHEN THE PLAIN LANGUAGE OF THE STANDARD ALLOWS A TRANSFER OF BEDS ONLY BETWEEN HOSPITALS THAT ARE ALREADY IN EXISTENCE?

II. DID THE ADMINISTRATIVE LAW COURT ERR IN DEFERRING TO THE DEPARTMENT'S INTERPRETATION OF THE BED TRANSFER STANDARD WHEN SUCH INTERPRETATION CONTRADICTS THE PLAIN LANGUAGE OF THE PLAN?

III. DID THE ADMINISTRATIVE LAW COURT ERR IN DETERMINING THAT TRIDENT AND ROPER ARE NOT COMPETING APPLICANTS BECAUSE THE NEED FOR FACILITIES AND SERVICES WOULD NOT BE EXCEEDED BY APPROVAL OF BOTH APPLICATIONS WHEN, AS A MATTER OF LAW, SUCH DETERMINATION IS INCONSISTENT WITH THE STATE HEALTH PLAN?

ARGUMENT

INTRODUCTION

Appellant/Respondent Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center ("Trident") replies herein to the two separate briefs of the Respondent Department of Health and Environmental Control ("Department") and the Respondent/Appellant Roper St. Francis Hospital-Berkeley, Inc. d/b/a Roper St. Francis Hospital-Berkeley ("Roper") by addressing their specific arguments in the context of the issues as framed by Trident in its main brief.¹ As a preliminary matter applicable to all of the Respondents' arguments, Trident disputes the efforts of the Respondents to apply an inapplicable standard of review to this appeal.

In this appeal, Trident raises three issues, all of which allege that the Administrative Law Court's ("ALC") decision is affected by errors of law. Trident does

¹ Although the Respondents in their briefs do not retain the wording and numbering of Trident's issues, for ease of reference; Trident replies to the Respondents' arguments using this framework. Further, in offering this Reply to selected arguments of the Respondents, Trident incorporates and reiterates all of its arguments on all of the issues as set forth in its main brief.

not raise any issues or assert any arguments regarding the factual findings of the ALC. Despite Trident's limitation of the issues on appeal to errors of law, both Respondents devote a significant amount of argument to whether Trident has shown that the decision of the ALC is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Because Trident raises only questions of law, this standard is not applicable to Trident's appeal.²

In *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 5, 664 S.E.2d 471, 473 (2008), which involved a provider's challenge to the *State Health Plan*, the Court set forth the applicable standards for reviewing decisions of administrative bodies under the Administrative Procedures Act ("APA"):

This appeal is governed by the Administrative Procedures Act ("APA"), S.C.Code Ann §§ 1-23-310, *et seq.* (Supp. 2005). We may reverse or modify the Board's order if appellant's substantial rights have been prejudiced because the administrative decisions are: 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. § 1-23-380(5). As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence. *Roper Hosp. v. Bd. of S.C. DHEC*, 306 S.C. 138, 140, 410 S.E.2d 558, 559 (1991).

See also S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 260-261, 725 S.E.2d 480, 483 (2012) ("The construction of a regulation is a question of law to be determined by the court." 2 Am.Jur.2d *Administrative Law* § 245. We will correct the decision of the ALC if it is affected by an error of law, S.C.Code Ann. § 1-23-380(5)(d)

² In its brief, Roper contends that the applicable standard of review requires the appellate court to find a "manifest or gross error of law" before the decision of an administrative agency can be overturned. This contention is not supported by the Administrative Procedures Act or by the cases cited by Roper in support of this proposition, which concern application of the substantial evidence standard applicable to the review of the factual findings of the agency. *See* S.C.Code Ann. § 1-23-380(5)(d) (Supp. 2012) (Court can reverse or modify if decision is "affected by other error of law.").

(Supp. 2010), and questions of law are reviewed de novo, *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 100, 662 S.E.2d 40, 41 (2008).”).

In its first two issues, Trident alleges that the ALC ignored the plain language of the *State Health Plan* Bed Transfer Standard when it affirmed the Department’s practice of allowing providers to use this provision to create new hospitals. In its third issue, Trident argues that, because the *2008-2009 State Health Plan* showed that the applicable service area had an excess of hospital beds in the service area, as a matter of law, Trident and Roper should have been reviewed as competing applicants. Trident does not challenge any factual findings of the ALC in support of its arguments on any of these issues.

Because these issues raise questions of law, the “substantial evidence” standard of the APA does not apply. Under the correct standard of review, the Court may reverse or modify the decision of the ALC based on its own review and interpretation of the law without deference to the lower court. S.C.Code Ann. § 1-23-380(5)(a)-(d) (Supp. 2012). *See, e.g., CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011) (“Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.”) (quoting *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)).

To the extent that Respondents argue and seek to apply the substantial evidence standard to any of Trident’s issues in this appeal, their arguments should be rejected.³

Trident addresses Respondent’s other arguments below.

³ Roper’s brief is replete with references and arguments concerning the substantial evidence standard, including the entirety of three sections of the brief. (Roper’s Brief, pp.13-15, 21-26, and 34-36). The Department also argues the substantial evidence standard, though not to the extent of Roper. (Department’s Brief, p. 13).

I. THE ADMINISTRATIVE LAW COURT ERRED IN DETERMINING THAT THE BED TRANSFER STANDARD OF THE STATE HEALTH PLAN CAN BE USED TO CREATE A NEW HOSPITAL WHEN THE PLAIN LANGUAGE OF THE STANDARD ALLOWS A TRANSFER OF BEDS ONLY BETWEEN HOSPITALS THAT ARE ALREADY IN EXISTENCE.

In its main brief, Trident argues, as a matter of law⁴, that Roper's proposed Carnes Crossroads Hospital fails to comply with the *2008-2009 Plan* and, therefore, cannot be approved.⁵ Trident contends that the Department's policy of allowing the Bed Transfer Standard to be used for the establishment of a new hospital contradicts the plain language of the Standard, which presupposes the existence of both a transferring and a receiving hospital in order for a bed transfer to occur. In its main brief, Trident discusses these plain language requirements in detail, including the requirement that the receiving facility demonstrate its historical utilization in order to justify the transfer of beds. Trident's argument is that a receiving hospital which does not physically exist cannot by its nature comply with the plain language requirements of the Bed Transfer Standard.

In its brief, Roper claims that Trident misrepresents the record in stating that the Department allows a single facility to act as both the transferring and the receiving facility under the Department's interpretation of the Bed Transfer Standard. Roper claims that the Department actually considers the non-existing applicant facility to be the receiving facility and the existing facility with the beds to be the transferring facility. This assertion ignores the Department's admissions at trial that, because the receiving facility does not exist, the only way the applicant can comply with the requirement

⁴ The only fact needed for this analysis is the undisputed fact that Roper's Carnes Crossroads Hospital exists only on paper and not as a bricks and mortar operating facility.

⁵ "The 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) (Supp. 2012). "The proposal shall not be approved unless it is in compliance with the State Health Plan." 3 S.C.Code Ann.Reg. 61-15, § 802 (Supp. 2012).

concerning historical utilization is to submit the utilization data of the existing hospital. This assertion also ignores the acknowledgment of the Chief of the Department's Bureau of Health Facilities and Services Development that the applicant hospital and the transferring hospital are the same licensed legal entity. (Tr., p. 697, ll. 14-15).

In its brief, Roper also argues that Trident admits that the applicability of the Bed Transfer Standard only to existing hospitals is not "plain" because Trident uses the word "indicates" when describing the requirements.⁶ Similarly, Roper points to Trident's focus on certain requirements of the Bed Transfer Standard to illustrate its limited application to existing hospitals as being further evidence that the Standard is not plain.⁷ Both of these arguments are specious.

Trident sets forth the entire Bed Transfer Standard, including the preamble which states its purpose, and asks the Court to read the entire provision as a whole and in context, giving the words their ordinary and common meanings. *See Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct.App. 2002) ("When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand the regulation's operation."). *See also Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006) ("A statute as a whole must receive practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers."). Trident believes that such a reading leads to the

⁶ Roper argues that "Language purportedly so 'plain,' would not need to 'indicate' but would state expressly that the receiving hospital must be already existing." Roper's Brief, p. 17.

⁷ Roper claims "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." (Roper's Brief, p. 35).

inevitable conclusion that an entity that exists only on paper cannot meet the requirements placed on the receiving facility in order to effectuate a transfer of beds under the Standard.

Both Respondents argue that, because the Bed Transfer Standard does not contain the word “existing”, the Court is unable to conclude that the requirements of the Standard can only be met by an existing receiving facility. In support of this contention, Roper cites the case of *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993), in which the South Carolina Supreme Court declined to read into a 1712 statute allowing a gambler to recoup his losses the requirement that the gambling activity be illegal. In *Berkebile*, the defendant video poker operator urged this interpretation based on the argument that the age of the statute and the social climate in which it was adopted indicated that the law was meant to apply only to illegal gambling activities.⁸

Trident’s argument in this appeal is not based on external factors outside the four corners of the Standard nor is it based on determining the extrinsic intent of the Board when it approved the Plan as written. Again, Trident simply urges the Court to read the entire Bed Transfer Standard, applying plain and ordinary meanings to the words, to determine whether it can be applied to a non-existing hospital. In that regard, Trident would assert that, instead of *Berkebile*, the Court should draw a comparison with the decision in *Converse Power Corp. v. S.C. Dep’t of Health & Envtl. Control*, 350 S.C. 39, 564 S.E.2d 341 (Ct.App. 2002).

In *Converse*, the Court considered the application of the Department’s regulation concerning the permitting of shellfish operations. The plaintiff in *Converse* attempted to

⁸ As noted by the Court, one glaring problem with the defendant’s argument was that all gambling was not illegal even in the eighteenth century when the law was passed. *Berkebile*, 311 S.C. at 54, 426 S.E.2d at 762.

apply for a permit to operate a facility to distribute shellfish to the public. The Department informed the plaintiff that, before an inspection could be conducted and a permit issued, the plaintiff had to first construct and begin operation of the facility. The plaintiff maintained that nothing in the regulation required that the facility be in existence in order to receive a permit. The Department contended that, even though the regulation did not use the term “existing”, the plain requirements of the regulation concerning inspection of a facility prior to permitting could apply only when the facility was in fact in existence.

The Court agreed, holding, “We find DHEC’s interpretation of the regulations is reasonable and not arbitrary or capricious. [The regulation] requires DHEC to inspect ‘an operation’ prior to issuing a permit. The language requiring inspections prior to issuance clearly anticipates an operating facility at the time of inspection.” *Id.* at 48, 564 S.E.2d at 346.

In this case, Trident argues that the plain language of the requirements of the Bed Transfer Standard anticipates that the receiving hospital must physically exist in order for the Department to approve a bed transfer to it. As in *Converse*, the law does not need to contain the actual word “existing” for the requirement to be there.⁹

Roper also contends that, because the State Health Plan is drafted by the Department, without the approval of the Legislature, it is not a regulation or a statute so the usual rules of statutory construction do not apply. Roper contends further that nothing

⁹ Respondents contend that Trident takes inconsistent positions with regard to the Department’s authority to approve Roper’s application versus the Department’s authority to approve Trident’s own application. Trident refers to its Brief as Respondent/Appellant in response to Roper’s appeal for its actual argument in this regard. However, Trident points out that, in that brief, Trident agrees that “to the extent that the Court determines that the 50-Bed Rule of the 2004-2005 Plan does not expressly allow for the establishment of a new hospital through the use of an applicant’s need, the Court must reverse the ALC and Department’s decisions approving Trident’s application in the same manner as the Court must reverse Roper’s approval as being inconsistent with the applicable Plan.” Trident Brief as Respondent/Appellant, p. 6.

in the CON Act requires that the Plan be construed narrowly or strictly. Roper argues that, as a result, the Department has the discretion to decide when projects are consistent with the Plan, apparently without regard to the plain language of the Plan.

As for the contention that the rules of statutory construction do not apply, the ALC adopted those rules in its Final Order and Decision and applied them to its construction of the Bed Transfer Standard. (Order, p. 25). Roper did not move to reconsider the Court's application of the rules of statutory construction to the issues before it and that issue is, therefore, not preserved for review. *See ESA Servs., LLC v. S.C. Dept. of Revenue*, 392 S.C. 11, 707 S.E.2d 431 (Ct.App. 2011) (Because the ALC was unable to clarify discrepancies in its order through reconsideration, issues were not properly before the Court).

Further, although the CON Act does not speak to construction of the *Plan*, the *Plan* itself provides that "the criteria and standards set forth in the Plan speak for themselves, and each section of the Plan must be read as a whole." *2008-2009 State Health Plan*, Chapter I(I), p. I-4.

Finally, as argued by Trident in Issue II of its main brief, "Far from giving the Department the sole and unbridled discretion to interpret the Plan at will, the [CON] Act imposes a strict statutory structure, requiring both public notice and public comment, which is designed to result in the consistency of health planning in the State. . . . Allowing the Department to create nebulous standards for the establishment of new hospitals by 'interpreting' portions of the Plan contrary to their plain meaning violates both the statutory process and the purpose of the State Health Plan." (Trident Brief of Appellant/Respondent, p. 24). *See, also, Triska v. Dep't of Health & Env'tl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987) ("DHEC must follow its own regulations and

the provisions of the Administrative Procedures Act . . . in carrying out the legitimate purposes of the agency.”).

II. THE ADMINISTRATIVE LAW JUDGE ERRED IN DEFERRING TO THE DEPARTMENT’S INTERPRETATION OF THE BED TRANSFER STANDARD BECAUSE SUCH INTERPRETATION CONTRADICTS THE PLAIN LANGUAGE OF THE PLAN.

Both the Department and Roper argue that the Department’s consistent and long term application of the Bed Transfer Standard to allow the creation of new hospitals compels deference to, and adoption of, the Department’s practice in that regard. As argued fully in Trident’s main brief, the courts recognize that an agency specifically is not entitled to the usual deference accorded in the construction of its laws and regulations when its construction contravenes the plain and unambiguous language of those laws and regulations. *See Savannah Riverkeeper v. S.C. Dep’t of Health & Env’tl. Control*, 400 S.C. 196, 207, 733 S.E.2d 903, 908 (2012) (“An agency’s interpretation of a statute or regulation that is erroneous or controlled by error of law presents a compelling reason not to defer to the agency’s interpretation.”).

The Respondents also attempt to discount the testimony of the Department witnesses conceding that the Department’s interpretation does not comport with the plain English meaning of the words of the Bed Transfer Standard. Roper argues in particular that this testimony should be disregarded because the Board of Health and Environmental Control is the body which is entitled to deference and not the staff. In support of this contention Roper cites *Neal v. S.C. Dep’t of Health & Env’tl. Control*, 383 S.C. 619, 682 S.E.2d 268 (2009). In this case, unlike in *Neal*, however, there is no disagreement between staff and the Board on the manner in which the Bed Transfer Standard is to be applied. As evidenced by the Order on Remand (Jt. Ex. 16) of the Board in another matter, the Board simply affirmed the staff’s interpretation and application of the

Standard to the project under consideration. Ultimately, whether Department staff or the Board agree, it is for the Court to apply the rules of construction and to determine what the plain English meaning of the Standard is based on the face of the provision itself.

III. THE ADMINISTRATIVE LAW COURT ERRED IN DETERMINING THAT TRIDENT AND ROPER ARE NOT COMPETING APPLICANTS BECAUSE THE NEED FOR FACILITIES AND SERVICES WOULD NOT BE EXCEEDED BY APPROVAL OF BOTH APPLICATIONS BECAUSE, AS A MATTER OF LAW, SUCH DETERMINATION IS INCONSISTENT WITH THE STATE HEALTH PLAN.

In response to this issue, Respondents argue that the substantial evidence in the record supports the ALC's determination that the approval of both projects would not exceed the need for hospital beds in the service area. Again, Trident does not raise this issue as a question of fact to which the substantial evidence rule applies. Trident contends, as an alternative ground for reversing the decision of the ALC, that, even if the Bed Transfer Standard applies, the ALC erred as a matter of law in holding that Trident and Roper were not competing applicants under the Certificate of Need Act.¹⁰

Trident argues that the Department was required to conclude that the need for hospital beds in the service area would be exceeded by the approval of both Trident and Roper's applications because when Roper applied to construct a new \$113 million hospital at Carnes Crossroads, the *2008-2009 Plan* showed that Roper's inventory of beds exceeded Roper's need for hospital beds by six and that there was a 48 bed surplus in the Tri-County Service Area. (Jt. Ex. 4, p. II-19). What the *Plan* shows as need in the service area is not a disputed fact. The *Plan* shows an excess of beds in the service area.

Trident makes the legal argument that, under the competing applications law, the test for determining competing applicants is not whether the bed count for the facility or

¹⁰ The Department also argues at page 12 of its brief that lack of need in the *Plan* does not prohibit a transfer of beds by Roper. In this issue, however, Trident argues only that excess need in the service area requires that Roper's application be reviewed and judged as competing with Trident's.

for the service area remains unchanged or unaffected, as the Department found in the case of Roper's transfer of beds. Under the competing applications law, the test is whether the approval of both projects would *exceed* the need for the services or facilities. Because the *2008-2009 Plan* reflects that there is an aggregate excess of beds in the Tri-County Service Area and that each of Roper's existing hospitals has an excess of beds, as a matter of law, Trident argues that the ALC was required to conclude that Roper's proposed hospital *by itself or in conjunction with Trident's proposed hospital* exceeded the need for hospital beds in the service area. To draw any other conclusion is inconsistent with the *2008-2009 State Health Plan*.

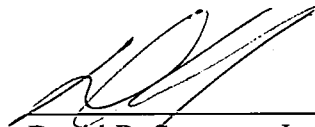
Roper asserts that, in making this argument, Trident attempts to "eviscerate" the holding of the Court in *Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assocs. of South Carolina, LLC*, 387 S.C. 79, 83, 690 S.E.2d 783, 785 (2010) by pointing out the legal differences in the posture of that case versus the case at bar. As noted in Trident's main brief, *Spartanburg* did not concern services for which the need is specifically calculated in the Plan. Thus, in the *Spartanburg* case, the parties had to present factual evidence concerning the need. In this case, *as a matter of law*, Trident contends that approval of both applications exceeds the need set forth in the *Plan*.

CONCLUSION

For all of the reasons stated above and in Trident's main brief, Trident respectfully requests that the Court hold that the Bed Transfer Standard, set forth in the *2008-2009 State Health Plan*, Chapter II, Section G.1.(A)(4)(j), is not applicable to the establishment of a new hospital and that the Order of the ALC granting Roper's Certificate of Need Application for the Carnes Crossroads Hospital must be reversed. In the alternative, Trident requests that the Court hold that Trident and Roper are competing

applicants under the law, reverse the Order of the ALC to the contrary, and remand this case to the Department for a determination of which applicant best meets the goals and standards of the CON program.

Respectfully submitted,



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