

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Ralph King Anderson, III, Administrative Law Judge

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Opinion No. 4873 (S.C. Ct. App. filed Aug. 17, 2011)

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MRI at Belfair, LLC, ..... Petitioner,

v.

South Carolina Department of Health and  
Environmental Control and Coastal Carolina Medical Center, ..... Respondents.

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PETITION FOR A WRIT OF CERTIORARI

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 20, 2011.

### QUESTIONS PRESENTED

1. The Court of Appeals erred in affirming the ALC's approval of DHEC's determination that the change from the original project approved in the CON was not a substantial change that resulted in a new project and required a new CON.
  - a. The amended project was a "substantial change" from the original project under the plain and ordinary meaning of that term as used in § 605 of Regulation 61-15 and the undisputed evidence in this case.
  - b. DHEC's determination was controlled by an error of law, that being its view that every hospital was entitled to at least one MRI machine.
  - c. The changed project was not the twenty-four hours, seven days a week operation touted and approved under the CON for the original project.
  - d. The "Project Review Criteria" § 802 of Regulation 61-15 are not relevant to the "substantial change" determination under § 605 of Regulation 61-15.
  - e. The Petitioner did not concede that the original project complied with the Project Review Criteria.
2. The Petitioner's burden of proof argument was properly before the Court of Appeals.
3. The Court of Appeals erred in not reaching the "transfer of ownership" issue.

### STATEMENT OF THE CASE

#### I. Introduction

This appeal is related to this Court's decision in *MRI at Belfair, LLC v. South Carolina Dep't of Health and Environ. Control*, 664 S.E.2d 471 (S.C. 2008) (hereinafter referred to as *Belfair I*). There, this Court reversed the CON granted to Coastal Carolina Medical Center (CCMC) for the construction of a permanent addition to its hospital with a new MRI machine to

provide MRI services (the MRI Wing). While *Belfair I* was pending before this Court, CCMC sought and DHEC approved a change to the CON, permitting CCMC to “construct” a different MRI facility. Rather than build the approved \$3.2 Million Dollar MRI Wing as a permanent addition to the hospital, DHEC allowed CCMC to remove the wheels from a temporary mobile MRI unit with a used MRI machine housed in a semi-trailer, place it on a concrete pad behind the hospital, place vinyl skirting around the trailer, and connect it to the hospital with a partially covered walkway (the MRI Trailer). This MRI Trailer project cost \$836,822.00, a 75% reduction from the approved MRI Wing.

The fundamental question presented here is whether the change from the MRI Wing to the MRI Trailer was a “substantial change” as envisioned by the General Assembly when it approved S.C. Reg. 61-15 § 605. If the change was “substantial,” then “construction” of the MRI Trailer required a new CON. If the change was not substantial, the MRI Trailer could be “built” without a new CON. DHEC found the change was not substantial; the ALC agreed with DHEC; and the Court of Appeals affirmed the ALC. As demonstrated below, it was error to approve the change from the MRI Wing to the MRI Trailer and thereby exempt the MRI Trailer from the requirements of a CON, including the notice and public hearing requirements for a CON.

To fully understand the issues presented here, it is necessary to first review this Court’s decision in *Belfair I*.

## **II. *Belfair I***

CCMC applied for a CON in 2004 to provide MRI services by adding the MRI Wing to the hospital directly next to the emergency room. *Belfair* opposed the CON, contending *inter alia* that MRI services would be better provided by the use of mobile MRI services. CCMC

contended that, because it was a hospital, it needed MRI services twenty-four hours a day, seven days a week, *i.e.*, it needed a 24/7 MRI. DHEC approved the CON, and Belfair requested a contested case hearing before the ALC. *Belfair I*, 664 S.E.2d at 472-473.

Prior to a hearing on the merits, the ALC considered cross-motions for summary judgment. CCMC argued that it was entitled to the CON “as a matter of law,” because the State Health Plan provided that hospitals should have at least one MRI whenever possible. Belfair contended DHEC had erred in approving the CON, because it had found the “Project Review Criteria” imposed by S.C. Code Ann. § 44-7-210 did not apply when a hospital sought a CON for its first MRI facility. The ALC denied Belfair’s motion but granted partial summary judgment to CCMC, “ruling that the MRI standards under the [State Health] Plan did not require CCMC to establish compliance with project review criteria.” *Belfair I*, 664 S.E.2d at 473. The case then proceeded to a merits hearing on the question of the “availability” of MRI services. The ALC approved DHEC’s decision to grant the CON, ruling that CCMC needed a 24/7 MRI operation to make MRI services sufficiently available. *Id.* Belfair appealed to the DHEC Board, which affirmed and incorporated the ALC’s decision. *Id.* Belfair appealed to the Court of Appeals, and the case was later certified to this Court. *Id.* at 472.

This Court affirmed on the issue of “availability.” In so ruling, this Court relied on the testimony of CCMC’s radiologist, CCMC’s president, and CCMC’s expert that CCMC needed a 24/7 MRI operation. *Belfair I*, 664 S.E.2d at 475. This Court’s emphasis on the need for “24/7” MRI service is not surprising – CCMC noted and relied on this need seven (7) times in eleven (11) pages of argument in its brief before this Court. (R. 1068, 1068-1069, 1070-1071, 1074, 1074-1075, 1075, 1076). As shown later, CCMC does not have and does not need a 24/7 MRI operation. As to the alternative of using mobile MRI services, this Court relied on the testimony

of CCMC's Chief of Staff that she had "concerns over the adequacy of the technology found in mobile MRI units." *Belfair I*, 664 S.E.2d at 475. As shown later, these "concerns" subsequently disappeared without explanation – the MRI Trailer approved in this case is a mobile MRI unit with a used MRI machine that was made "permanent" by removing the wheels and placing a vinyl skirt around the bottom of the mobile unit.

This Court reversed on the issue of whether the Project Review Criteria applied to a hospital's CON application for an MRI facility. The DHEC Board had held that "CCMC did not have to prove compliance with the project review criteria," because the State Health Plan stated that every hospital should have at least one MRI unit. *Belfair I*, 664 S.E.2d at 475. This Court disagreed, holding that the State Health Plan did not exempt hospitals from compliance with the Project Review Criteria. Accordingly, this Court reversed the CON award and remanded for a determination of whether CCMC's MRI Wing complied with the Project Review Criteria. *Id.* at 475-476.

## **II. The "Substantial Change" Regulation**

DHEC approved CCMC's request to change from the MRI Wing to the MRI Trailer before this Court issued its opinion in *Belfair I*. CCMC's request was governed by Regulation 61-15 § 605, which provides in full: "If an applicant amends or alters his project after receipt of a Certificate of Need, the department [DHEC] will decide whether or not the amendment is *substantial* and thereby constitutes a *new project*." (Emphasis added). If the proposed changes result in a "new project," then the applicant has two choices. It can abandon the proposed changes and implement the project approved under the existing CON, or it can seek a CON for the new project. The request for the new CON essentially voids the existing CON but the "new project" determination does not itself void the existing CON. (See R. 391-392, 392-393). If the

applicant seeks a CON for the new project, the CON requirements of notice and public hearing are triggered – this notice and hearing trigger was avoided in this case with the erroneous finding that the MRI Trailer was not a “new project.”

DHEC promulgated the substantial change regulation, but it did not become law until approved by the General Assembly. The regulation does not define “substantial” in any special way, nor does any other regulation or statute. Thus, when the General Assembly approved the regulation, it necessarily intended the use and application of the plain and ordinary meaning of “substantial.” The undisputed evidence in this case demonstrates that the change here was substantial.

As noted by the Court of Appeals, courts generally defer to an administrative agency’s interpretation of its own regulations. (Appx. at 8). That deference, however, does not permit the agency to avoid the plain meaning of a statute or regulation, and the courts do not defer to an interpretation that is controlled by an error of law or is arbitrary. These defects are present here.

As shown below, the changes in this case are manifestly substantial under the plain meaning of that word. Indeed, the changes are more than substantial, they are dramatic. As also shown below, DHEC’s “substantial change” analysis in this case was driven by its legally erroneous view and institutional bias – rejected in *Belfair I* – that every hospital is entitled to at least one MRI. This legal error led DHEC to apply what it admitted was a “simplistic” review of the change to the MRI Trailer. Thus, there can be no deference to DHEC in this case.<sup>1</sup>

The question presented here is not whether a CON would be, could be, or should be issued for the MRI Trailer. That question was to be answered if, and only if, CCMC decided to

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<sup>1</sup> At the time of the DHEC’s “change” decision in this case, this Court had not yet issued its opinion in *Belfair I*. Thus, DHEC did not have the benefit of that decision and its rejection of DHEC’s institutional bias in favor of hospital MRI applications. The term “bias” is not used in a pejorative sense. DHEC’s view of hospital MRI applications was based on a good faith – but legally erroneous – reading of the State Health Plan.

abandon the MRI Wing (which it in fact did) and seek a CON for the MRI Trailer. The only question here is whether CCMC's changes to the MRI Wing were substantial under the plain meaning of that word. Clearly they were and, therefore, the change to the MRI Trailer resulted in a new project that required a new CON application.

#### **IV. Facts and Procedural History**

##### **A. The Approval and "Construction" of the MRI Trailer**

DHEC approved the CON for the MRI Wing in November 2004. Belfair challenged it, and the ALC upheld the CON in November 2005. Belfair appealed to the DHEC Board, which adopted the ALC's order. Belfair appealed to the Court of Appeals in July 2006, and the appeal was later certified to the Supreme Court on March 19, 2007. (R. 1294).

DHEC issued the CON for the MRI Wing on August 3, 2006 and delivered it to CCMC on the same day – the CON was valid for one year and CCMC was required to issue monthly progress reports. (R. 1311-1312). On the very next day, August 4, 2006, CCMC requested permission from DHEC to use a temporary, mobile MRI unit while it constructed the MRI Wing. DHEC approved this request on the same day, August 4, 2006. (R. 982). The MRI Wing had to be completed on or before August 3, 2007.

During this same time, Tenet HealthSystem Medical, Inc. (Tenet) was negotiating to purchase CCMC. The MRI Wing had to be completed before this purchase or the CON would be voided automatically upon the change in ownership. In other words, for Tenet to buy a hospital with a valid MRI operation, the MRI Wing had to be completed before the purchase.

CCMC sent monthly letters to DHEC advising that CCMC was pursuing the equipment and construction services needed to build the MRI Wing. (See, *e.g.*, R. 984, 1027, 1053 – letters from Sept. thru Nov. 2006). The November 2006 letter advised that CCMC anticipated

completion of the MRI Wing in mid 2007. (R. 1053). By March 2007, CCMC still had not broken ground on the MRI Wing construction project and advised that it was still awaiting final costs estimates for the electrical work. (R. 1301). CCMC sent the identical letter for the next three months on April 3, May 4, and June 7, 2007. (R. 1357-1359). Thus, as of June 7, 2007, only two months before the expiration of the CON, CCMC had not begun construction of the MRI Wing.

June 2007 was a very busy month for CCMC. Between June 8, 2007, and June 27, 2007, CCMC announced its intention to abandon the construction of the MRI Wing, sought to amend its original application and “build” the MRI Trailer, obtained DHEC’s permission to do so, and completed the MRI Trailer:

June 12, 2007: Only five (5) days after reporting to DHEC that it continued to pursue construction of the MRI Wing, CCMC requested a DHEC determination that substituting the MRI Trailer for the MRI Wing was not a substantial change to the CON. The request included detailed information on how and when CCMC proposed to “build” the MRI Trailer. (R. 1360-1361). CCMC blamed the legal costs involved in *Belfair I*, including the appeal to this Court, as the reason for changing to the MRI Trailer. (R. 1360). These are the same legal costs that led to this Court’s opinion that CCMC had erroneously convinced DHEC that it could obtain a CON for an MRI without meeting the Project Review Criteria.<sup>2</sup> Notably, this June 12 request was supported with a copy of an April 12, 2007, proposal to CCMC for enclosing (*i.e.*, making permanent) the temporary, mobile MRI unit. (R. 1367). It is thus clear that CCMC had long been considering the contested change to the MRI Trailer despite its contrary representations to DHEC in its monthly progress reports. Also notably, the sale to Tenet was set to close on July 1, 2007.

June 13, 2007: CCMC received a quote and proposed bill of sale for purchasing the used MRI unit being used at CCMC under DHEC’s prior permission for a temporary, mobile MRI. (R. 1363-1365). This quote mirrored a proposal sent the day before on June 12, 2007. (R. 1368). This mobile unit and its used MRI machine would become the approved MRI Trailer after removing the wheels and placing a vinyl skirt around the bottom of it.

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<sup>2</sup> DHEC took the same view of this “legal fees” issue. Mr. Grice was the supervisor of the DHEC CON program during the approval of the MRI Wing and the change to the MRI Trailer. He considered the legal fees incurred in *Belfair I* to be a driving force in CCMC’s need to change to the MRI Trailer. (R. 335). He also considered the appeals process to be “abusive” and “unnecessary” – this being the same process that led to this Court’s reversal of DHEC’s in-house policy that a hospital did not need to meet the Project Review Criteria when seeking a CON for its first MRI. (R. 328, 335-336).

June 21, 2007: CCMC received a proposal to construct the concrete pad needed for the MRI Trailer. (R. 1390). DHEC requested additional information on the proposed changes, and CCMC responded with the requested information on the very same day. (R. 1375-1379).

June 22, 2007: DHEC Staff approved the MRI Trailer as not being a substantial change from the MRI Wing. (R. 1380). CCMC received a Zoning Permit from the City of Hardeeville for skirting the mobile MRI unit – a part of “building” the MRI Trailer. (R. 1393). This is the same vinyl skirting for which CCMC had requested and received a proposal as early as April 2007, when CCMC was still reporting that it intended to construct the MRI Wing. (See R. 1367; see also R. 1357-1359).

June 26, 2007: CCMC bought the used MRI mobile unit and submitted its final completion report for the MRI Trailer. (R. 1381-1382).

June 27, 2007: DHEC requested confirmation that the quote for awning costs included in the final completion report was the actual cost, that the awning has been installed, and that the MRI Trailer was 100% complete. (R. 1423). This awning was the “roof” over the open walkway between the back of the hospital and the MRI Trailer. CCMC confirmed the quote was the actual cost and the MRI Trailer was 100% complete. (R. 1424). DHEC responded that all requirements had been fulfilled and the project was now closed. (R. 1426).

It is unreasonable to believe that all of this was accomplished in just eighteen (18) days, *i.e.*, that CCMC decided to abandon the MRI Wing on June 8, 2007 – only one day after telling DHEC that it continued to pursue construction of the MRI Wing – and then completed the MRI Trailer only 18 days later on June 26, 2007. More importantly, during this entire time, the appeal in *Belfair I* was pending before this Court, but CCMC and DHEC never advised this Court, the ALC, or Belfair that CCMC had abandoned the MRI Wing, proposed the MRI Trailer, received approval of the MRI Trailer, and completed the MRI Trailer.

The “June 2007 whirlwind” of activity begs two questions: how and why. The “how” is obvious – CCMC had been considering the change to the MRI Trailer long before June 2007, despite always telling DHEC that it was pursuing construction of the MRI Wing. The “why” is equally obvious – the sale of CCMC to Tenet was scheduled to close and did close on July 1,

2007, and some MRI project had to be completed before that sale or the CON would be voided upon the sale. (See R. 21).

Belfair learned of the change to the MRI Trailer on June 28, 2007, and immediately notified the ALC on June 29, 2007. (R. 1434-1436). Also on June 29, Belfair requested the DHEC Board to conduct a final agency review of the Staff decision to allow the MRI Trailer and requested a contested case hearing before the ALC on the change to the MRI Trailer. (R. 1447-1448; 1449-1450). On July 26, 2007, the DHEC Board announced that it would not review the Staff decision to allow the change to the MRI Trailer and, therefore, the Staff decision was the final agency decision. (R. 1459). On July 30, 2007, Belfair requested a contested case hearing before the ALC on this final agency decision, which led to the hearing and decision at issue in this appeal. (R. 1473-1474).

The contested case over the MRI Trailer was pending before the ALC when this Court issued *Belfair I* and remanded for application of the Project Review Criteria to the MRI Wing. (R. 27). The ALC consolidated the remanded case with the “substantial change” case. (R. 27). The approval and completion of the MRI Trailer mooted the question remanded by this Court – it was now known that CCMC would not and did not build the MRI Wing. Thus, applying the Project Review Criteria to the MRI Wing was a useless task. Accordingly, Belfair moved to dismiss the remanded case on the MRI Wing. CCMC and DHEC consented to this motion, and the ALC granted the motion. (R. 27). Thus, the only remaining issue was whether the MRI Trailer was a substantial change to the MRI Wing, *i.e.*, did the changes result in a new project and thereby require a new CON?

B. DHEC's "Substantial Change" Review Process

The DHEC Staff decision to approve the MRI Trailer was made by one person, Victoria Tibshrary. (R. 316). She testified at trial, as did her then supervisor, Joel Grice. (R. 328). Their testimony revealed that DHEC's policies and procedures for reviewing MRI change requests generally – and the review undertaken in the present case – were driven by legally erroneous conclusion that every hospital was entitled to have at least one MRI. This is the same legal error that this Court rejected in *Belfair I*.

Mr. Grice was the principal witness on DHEC's general procedure for reviewing change requests on hospital MRI projects. He described the process summarized below.

When reviewing requests to change an approved MRI project for which a CON had already been issued, DHEC did not give notice to or involve any "interested parties," even if they were known to exist, including any "interested persons" that had challenged the CON. (R. 333, 334). This approach reflects DHEC's earlier noted view that the CON appeal process generally, and the appeal in *Belfair I* specifically, was abusive and unnecessary. See n.2, *supra*.

At the time of the change request here, DHEC's view of MRI projects remained controlled by DHEC's position – later rejected by this Court in *Belfair I* – that every hospital was entitled to have at least one MRI machine. (See R. 339-341). This view was a deeply rooted institutional bias in favor of approving any application for an MRI from any hospital that did not have an MRI. If there were competing CON applications for an MRI from a hospital and a non-hospital provider, the hospital's application would be granted first, even if the non-hospital provider proposed a state-of-the-art facility. (R. 340-341). If there were competing applications between two non-hospital providers, then the relative capabilities and sophistication of the proposed MRI's became important. (R. 341-342).

As a result of its legally erroneous position that every hospital was entitled to have an MRI, DHEC took what Mr. Grice called a “rather simplistic” and “really very simplistic” approach to requests for changing an already approved hospital MRI project. (R. 315, 325). If the MRI had the same or a lower magnet strength, and if the project cost did not increase by more than 10%, then there was no substantial change and the amended project was approved as a matter of course. (R. 315; see also R. 313-314, 318-320, 325-326). A reduction in the cost of an MRI project was never considered to be a substantial change. (R. 320, 322-323). The overriding consideration was a change in magnet strength – the change was substantial only if the magnet strength was increased from that approved in the CON. (R. 318-319, 336). This view was so “simplistic” that when a CON application was accompanied by a detailed list of capabilities and ancillary equipment, a proposed change in equipment did not have to be supported by a corresponding detailed list if the magnet strength was the same or lower. (R. 345-346).

If there was a change in the need for or the use of the MRI, this would never be considered a substantial change, because the “State Health Plan states every hospital should have its own MRI.” (R. 339). Here again, DHEC’s erroneous view of the State Health Plan on MRI’s guided its review of the requested change, just as it had guided its erroneous approval of the CON application. Thus, DHEC was unconcerned (but also unaware because CCMC never told DHEC) that CCMC’s much-touted need for a 24/7 MRI operation – in the CON proceedings and in the appeal to this Court – was not how CCMC in fact used its MRI facility. Indeed, the evidence demonstrates that CCMC’s current MRI facility cannot possibly operate on a 24/7 basis as currently staffed, and it also reveals that CCMC has no need for a 24/7 operation.<sup>3</sup>

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<sup>3</sup> Dr. Moesch is the medical director of radiology at CCMC and oversees the MRI operation. (R. 227). He is the only radiologist at CCMC. (Id.). He obviously is not at CCMC “twenty-four hours a day, seven days a week.” He admitted that the MRI operation is basically a 7-to-5, Monday-Friday operation. (R. 250). He admitted it is rare to do an MRI outside of those hours. (R. 245-247, 250). Doing so would require calling in an MRI technician for an

Ms. Tibshrary was the DHEC staff member who approved the project change in the present case. Her testimony, summarized below, reveals that her review was controlled by DHEC's legally erroneous policy that every hospital was entitled to have at least one MRI.

The review of a requested change was a comparison of the requested change to the application for the existing CON and the scope of the original project as approved, together with any additional information that might be requested from the applicant. (R. 361). As to requested changes for an MRI project, the principal criteria were magnet strength, cost, and location. (R. 362-363). DHEC approved CCMC's requested change because: (a) the location remained at the hospital; (b) there was no increase in cost; and (c) the MRI had the same magnet strength and nothing in the request indicated there were any significant changes in the equipment. (R. 366). Ms. Tibshrary admitted that she assumed the two machines had the same capability, because CCMC did not disclose any differences in its request for a change in its CON. (R. 402-403). The decreased project cost was not viewed as a substantial change, because DHEC did not consider cost reduction to be a substantial change – only cost increases were viewed as potential substantial changes if the increase exceeded 10%. (R. 377-378).

This was the first project in which Ms. Tibshrary reviewed a request to change an MRI project that involved going from an in-house, fixed unit to a mobile unit that was altered to be a "fixed" unit, *i.e.*, a mobile unit with the wheels removed and a vinyl skirt placed around the bottom. (R. 383). She was unaware of any similar request. (R. 383). There is no evidence of any similar change request having been considered or approved by DHEC.

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emergency situation. (R. 250). There is no evidence on the response time for these emergency call-ins. It is clear that CCMC's MRI facility is not the 24/7 operation touted to this Court in *Belfair I*. DHEC admitted at trial that – in reviewing the requested change – DHEC did not consider or request any information on whether there was any change in the need for MRI services or how those services had been provided in practice from the time of the CON. (R. 337).

Ms. Tibshrary testified that if the original CON been for a mobile unit at the hospital, but the requested change was for a fixed unit, then that would be considered a substantial change, because DHEC does not consider them to be the same equipment. (R. 379). For reasons that DHEC did not explain and that would necessarily defy logic, DHEC believes the opposite is not true. Thus, when CCMC sought to change from a fixed unit to a mobile unit, albeit a mobile unit with its wheels removed and a vinyl skirt placed around it, DHEC saw no substantial change. This is completely arbitrary.<sup>4</sup>

## ARGUMENTS

**I. The Court of Appeals erred in affirming the ALC's approval of DHEC's determination that the change from the MRI Wing to the MRI Trailer was not a "substantial" change.**

A. The MRI Trailer was a "substantial change" from the MRI Wing under the plain and ordinary meaning of that word.

The MRI Wing had a capital cost of \$3.2 Million – the MRI Trailer had a capital cost of \$836,822.00. (R. 30). The resulting 75% reduction in capital cost is not only a substantial change – it is a dramatic change. It defies all logic and reason to conclude that a project constructed at a 75% capital cost reduction remains substantially similar to the original project and its 400% higher capital cost. This cost reduction, standing alone, demonstrates a substantial change. The question of whether or not the "25% project" nevertheless qualifies for a CON is irrelevant – that question is to be answered by submitting and reviewing a CON application for the substantially changed project.

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<sup>4</sup> Ms. Tibshrary was confused about the change she approved. She thought the MRI unit actually in use at CCMC was a modular unit. It was not. It was a mobile unit that had been altered (wheels removed and vinyl skirting added) to look more like a modular unit, but it was always a mobile unit within a semi-truck trailer. (See R. 383-388). CCMC's responses for more information plainly revealed that the requested change was to use a mobile unit and convert the "coach [into] a modular building," *i.e.*, remove the wheels and add vinyl skirting around the bottom. (R. 1377-1378). CCMC's expert (Ms. Platt) also recognized that the changed project used a "stationary mobile unit" achieved by "parking a mobile unit permanently on site." (R. 259, 292).

The MRI Wing was to be an addition to the hospital building and adjacent to the Emergency Room. As implemented under the approved change, the MRI Trailer was located on the opposite side of the hospital (away from the ER) and in a converted mobile trailer parked outside the hospital and connected by a partially covered walkway. (R. 395). On its face, this change in location is substantial. It moved the MRI from a location that was as close as possible to the ER to a location that was far away as possible and still be “connected” to the hospital. This change was particularly substantial given the much touted need in *Belfair I* for an MRI to treat ER patients needing emergency MRI’s.

The equipment change was also substantial. The MRI Wing was to include a new MRI at a cost of \$1.8 Million – the MRI Trailer had a used MRI at a cost of \$535,000.00. (R. 31). As with the overall project cost, the 70% reduction in equipment cost, combined with the change from a new machine to a used machine, is substantial on its face.

As demonstrated earlier, DHEC’s approval of these manifestly substantial changes was controlled and predestined by its legally erroneous view that every hospital is entitled to at least one MRI machine. As a result, and as also demonstrated earlier, DHEC did not inquire and was thus unaware that CCMC’s actual MRI operation had devolved to a 7-5, Monday-Friday operation rather than the 24/7 operation touted in the CON application and *Belfair I*.

- B. The “Project Review Criteria” are irrelevant to the “substantial change – new project” determination and, in any event, application of the Project Review Criteria does not negate the undisputed evidence showing that the MRI Trailer was a “substantial change” to the MRI Wing approved in the CON, thereby resulting in a new project that required a new CON.

DHEC, the ALC, and Court of Appeals concluded it was proper to apply the “Project Review Criteria” in S.C. Reg. 61-15, § 802 to determine whether CCMC’s request to change from the MRI Wing to the MRI Trailer was substantial and therefore a new project

requiring a new CON application. (Appx. at 6-7). This was error. The Project Statute (§ 44-7-230(A)) limits any project to that approved in the CON. Thus, absent a specific statute or regulation on the substantial change question (and there is none), this statute sets forth the parameters for the substantial change analysis. There is no statute and no regulation that incorporates the Project Review Criteria into the substantial change analysis.

Section 230(A) requires, in relevant part, that, once issued, a CON is “valid only for the project *described* in the application *including* location, beds and services to be offered, physical plant, capital or operating costs, *or other factors as set forth in the application*, except as may be modified in accordance with regulations.” (Emphasis added). The italicized wording can only limit the validity of a CON to the project meeting the named descriptive factors, *or* additional descriptive factors set forth in the CON application. It does not justify finding that an amended project that is substantially different from the original project is not a new project simply because it meets some CON Project Review Criteria discussed in the Application.

Although it may seem “logical” that the catch-all phrase in S.C. Code Ann. § 44-7-230(A) includes the Project Review Criteria,<sup>5</sup> the Court of Appeals misapprehended the Legislative intent of maintaining factors for consideration under S.C. Code Ann. § 44-7-230(A) as separate and apart from the Project Review Criteria. (Appx. at 7).

The Court of Appeals incorrectly found that “Belfair conceded Coastal’s MRI Project [the MRI Wing], as set forth in its CON application satisfied the relevant project review criteria.” (Appx. at 3). Prior to hearing, Belfair moved for dismissal of its challenge to DHEC’s decision to issue a CON for the MRI Wing. CCMC and DHEC consented to Belfair’s motion and the ALC issued an order dismissing Belfair’s challenge. Belfair’s motion contained no concession

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<sup>5</sup> However, if the General Assembly had considered “other factors” to mean Project Review Criteria, it would have said so. *Stardancer Casino, Inc. v. Stewart*, 556 S.E.2d 357, 364 (S.C. 2001).

that the MRI Wing satisfied relevant project review criteria. Likewise, the ALC's order granting Belfair's motion contained no finding on this point. Moreover, it is the law of the case under *Belfair I* that the Project Review Criteria had not been applied to the MRI Wing. Since those criteria were never applied to the CON after remand, it was impossible to compare the MRI Trailer's compliance to that of the MRI Wing were it proper to do so (and it was not).

The CON Act subjects new projects to various due process mechanisms that protect "affected persons," including notice and public hearing requirements.<sup>6</sup> Affected persons are deprived of these protections when an amended project that is substantially different from the approved project, is deemed to satisfy the "substantial change" regulation, because it otherwise meets the Project Review Criteria. In this case, CCMC never even broke ground on the MRI Wing. Just before its CON was set to expire, CCMC switched projects and yet managed to avoid any of the notice and public hearing requirements that should have occurred on the MRI Trailer project that CCMC actually implemented.

The Legislature recognized that the class of parties affected by a project may have a very different composition if the project varies from the CON application, and so it adopted the Project Statute. S.C. Code Ann. § 44-7-230. The Project Statute requires final drawings and specifications, limits the duration of a CON, requires an implementation timetable to be followed, and denies any transfer of a CON. S.C. Code Ann. § 44-7-230(C)-(E). Central to this case, the Legislature states a CON is valid *only* for "the project described in the application including location, beds and services to be offered, physical plant, capital or operating costs, or

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<sup>6</sup> "After the department has determined that an application is complete, affected persons *must* be notified in accordance with department regulations. The notification of affected persons begins the review period." S.C. Code Ann. § 44-7-210(A) (emphasis added); "The department may hold a public hearing, if timely requested, to gather information and obtain public comment and opinion about the proposed project." S.C. Code Ann. § 44-7-210(B)

other factors as set forth in the application, except as may be modified in accordance with regulations.” § 44-7-230(A).

The Court of Appeals correctly noted the purpose of the CON Act but failed to apprehend how this purpose is frustrated by allowing CON applicants to substantially amend their project as long as the amended project meets the Project Review Criteria. Such action defeats the due process requirements adopted by the Legislature that allow the public to participate in the determination of the “health facilities and services which will best serve public needs.” (Appx. at 5) (discussing S.C. Code Ann. § 44-7-120).

Specifically, by limiting the validity of an issued CON to “the project described in the application including location, beds and services to be offered, physical plant, capital or operating costs, or other factors as set forth in the application,” the Legislature has ensured that the appropriate class of affected individuals have had an opportunity to be heard by DHEC on the project before the project is implemented. If DHEC and the ALC are permitted to use the Project Review Criteria to deem that no “substantial changes” have occurred because, in any event, the changes would be acceptable if they appeared in a new project application, CON applicants will be permitted to avoid the notice and public hearing requirements for new projects.<sup>7</sup>

CCMC has performed, and the courts have thus far permitted, an end-run in this case by never breaking ground on the MRI Wing approved by DHEC but, instead, implementing an entirely different project without providing any notice to any affected or potentially-affected

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<sup>7</sup> For example, it is undisputed under CCMC’s evidence – the testimony of its Director of Radiological Services – that CCMC does not need and does not have a 24/7 MRI operation as touted in its CON application and its arguments in *Belfair I*. See n.3, *supra*. Thus, the Health Plan’s stated requirement that the suitability of shared mobile services be considered in hospital MRI applications would be highly relevant in any CON application for the CCMC’s real MRI project, the MRI Trailer, which is nothing more than a mobile unit made “permanent” by removing the wheels from the trailer and adding a vinyl skirt around the bottom of the trailer.

persons. As a result of conflating the Project Review Criteria into S.C. Code Ann. § 44-7-230(A), CCMC has “built” an MRI facility that differs substantially – and dramatically – from the project approved in the CON. The Legislature intended such a “substantial change” to undergo the process of obtaining a new, valid CON. The Court of Appeals mistakenly frustrated this statutory scheme by allowing the MRI Trailer’s supposed satisfaction of the Project Review Criteria to override changes from the MRI Wing that were manifestly substantial and resulted in a new project.

Allowing this process yields in a “secret de facto” CON application whereby an applicant convinces DHEC – without notice to anyone – that its proposed changes satisfy all the requirements for a CON and, therefore, should be allowed under the existing CON. That simply is not the question, nor is it the process mandated by statute and regulation. Rather, the first question is narrow and straightforward: do the proposed changes reflect a substantial change to the existing project under the plain and ordinary meaning of “substantial”? If they do (as they manifestly do here), then there is a new project that requires a new CON application (at which time the Project Review Criteria will be applied).<sup>8</sup>

- C. The Court of Appeals’ “substantial evidence” analysis applied the wrong law by applying the Project Review Criteria, and the controlling facts on the question of “substantial change” are undisputed and come from witnesses for DHEC and CCMC.

The arguments made above on the issue of “substantial change” are based on undisputed facts, including the testimony of witnesses presented by DHEC and CCMC. As shown above, these facts demonstrate that the MRI Trailer was a substantial change from the MRI Wing and, therefore, the MRI Trailer was a new project that could not be pursued unless

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<sup>8</sup> This process also creates potential problems for applicants. For example, if the ALC had found that CCMC’s MRI Trailer did not meet the Project Review Criteria, then CCMC could not later obtain a new CON for the same MRI Trailer. The ALC had already ruled in a proceeding that is binding on CCMC and DHEC that the MRI Trailer does not meet the Project Review Criteria. Again, this is not the process mandated by statute and regulation.

CCMC obtained a new CON. In addition, as also argued above, the Project Review Criteria are not applicable to the issue of “substantial change.” Thus, the Court of Appeals erred in its “substantial evidence” analysis, because that analysis hinges on applying the Project Review Criteria. For example, the Court of Appeals relied on the Project Review Criteria of “cost containment” to overcome the manifest “substantial change” in capital costs between the MRI Wing and the MRI Trailer, a change that necessarily resulted in a new project under the plain and ordinary meaning of “substantial.”

## **II. Belfair’s “burden of proof” argument was properly before the Court of Appeals.**

This issue involves the effect of a “substantial change” finding and what must be proven to obtain a “substantial change” finding. The Court of Appeals held this issue was not preserved for appeal, because it was not raised in Belfair’s motion to reconsider. (Appx. at 8). This was error.

In opening argument, Belfair argued there was a substantial change and, therefore, the MRI Trailer could not go forward unless CCMC sought and obtained a new CON. (R. 151). During trial, Belfair elicited the following testimony from Ms. Tibshrary, the DHEC Staff member that conducted the “substantial change” review in this case and approved the MRI Trailer: (1) if the proposed changes are substantial, then the amended project is a new project that requires a new CON; (2) the original CON is not voided by a “substantial change” finding, because the applicant is free to abandon the proposed changes and complete the original project under the CON; (3) but if the applicant wants to pursue the new project, then it must apply for a new CON, and the act of making that application – not the substantial change finding – voids the original CON. (See R. 391-392, 392-393). In closing arguments, Belfair again argued that a showing of “substantial change” means the applicant must obtain a new CON to pursue the

amended project. (R. 465). At the request of the ALC (R. 455), the parties submitted proposed orders. Belfair's proposed order set forth the burden and approach argued on appeal. (R. 84-101). The ALC refused to sign Belfair's order. Thus, the issue was raised to the ALC and ruled upon. Therefore, there was no need for a 59(e) motion to preserve the issue for appeal.

Moreover, and assuming a 59(e) motion was necessary on this issue, Belfair's proposed order was attached to and incorporated into its 59(e) motion. (R. 82). The proposed order again set forth the burden and approach argued on appeal. (R. 84-101). The ALC again ruled on it by refusing to sign the proposed order. Thus, the issue was preserved for appeal.

### **III. The Court of Appeals erred in not reaching the "transfer of ownership" issue.**

As shown above, the change from the MRI Wing to the MRI Trailer was a "substantial change" resulting in a new project that required a new CON application. Thus, when Tenet purchased CCMC, the project approved in the CON had not been completed and, therefore, the CON automatically terminated upon the "transfer of ownership" to Tenet. Accordingly, the Court of Appeals erred in refusing to reach this issue and rule the only way permissible under the law – the CON was voided upon the transfer of ownership.

## **CONCLUSION**

The integrity of the CON process is the core issue here, including the integrity of the "substantial change" review process. In *Belfair I*, this Court reversed the CON for the MRI Wing, because DHEC's approval was based on the legal error that every hospital is entitled to at least one MRI machine. Here, that same legal error controlled DHEC's approval of the change to the MRI Trailer. In *Belfair I*, this Court relied on the heavily touted need for a 24/7 MRI operation. Here, it was shown that CCMC does not have and does not need a 24/7 MRI. In *Belfair I*, this Court accepted CCMC's rejection of a mobile MRI due to concerns over the

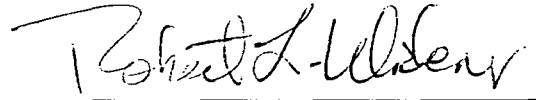
equipment. Here, CCMC requested and received approval to change to the same mobile MRI, albeit after removing the wheels and placing a vinyl skirt around the bottom of it.

The change from the MRI Wing to the MRI Trailer was “substantial” under the plain and ordinary meaning of that word. Indeed, the change was dramatic. Thus, any approval of the MRI Trailer should have been pursuant to a new CON application with the attending notice and public hearing requirements. The Court of Appeals erred in allowing the ALC and DHEC to conflate the Project Review Criteria (a CON requirement) into the “substantial change” analysis. In *Belfair I*, DHEC erred by refusing to apply these criteria to the CON for the MRI Wing. Here, DHEC, the ALC, and the Court of Appeals erred in applying those original CON criteria to the “substantial change” analysis. CCMC has thus been allowed to “hide the ball” and make an “end run” around the applicable CON requirements, receiving approval for a “Cadillac” facility and then changing to a substantially lesser facility just before the expiration of the CON. CCMC was also thus allowed to avoid the CON rule that a change in ownership (the sale of CCMC to Tenet) voids a CON and requires a new CON application. The judicial approval of this process by the Court of Appeals will encourage other CON applicants to take the same tact, obtaining a CON based on a “Cadillac” project and then change to a much lesser project without satisfying the notice and public hearing requirements for a CON. The question presented here is whether the change from the MRI Wing to the MRI Trailer was a substantial change. The question is not whether MRI Trailer could be, would be, or should be approved under an application for a new CON.

For all of the foregoing reasons, and for the other reasons set forth in this petition, and in the briefs and rehearing petition presented to the Court of Appeals, which are incorporated herein

by reference, Belfair respectfully requests this Court to grant certiorari and reverse the Court of Appeals.

Respectfully Submitted,



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