

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 South Carolina Department of Health
and Environmental Control is the Respondent, and

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

Of whom South Carolina Department of Health
and Environmental Control is the Respondent, and

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

Of whom South Carolina Department of Health
and Environmental Control is the Respondent, and

Trident Medical Center, LLC, is the Appellant-Respondent.

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

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STATEMENT OF ISSUE ON APPEAL

IF THIS COURT REVERSES THE ALC'S AFFIRMANCE OF DHEC'S INTERPRETATION OF THE STATE HEALTH PLAN TO ALLOW ROPER ST. FRANCIS HOSPITAL TO TRANSFER EXISTING BEDS TO A NEW SITE TO CONSTRUCT A NEW HOSPITAL, THEN THIS COURT MUST ALSO REVERSE DHEC'S INTERPRETATION OF THE STATE HEALTH PLAN TO ALLOW TRIDENT MEDICAL CENTER TO TRANSFER FACILITY-SPECIFIC BED NEED TO A NEW SITE TO CONSTRUCT A NEW HOSPITAL.

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 establish a fifty-bed hospital on vacant land adjacent to its Moncks Corner Medical Center in North/Central Berkeley County, using bed need assigned to its North Charleston facility. (R. pp. 4461-5378). Roper St. Francis Hospital–Berkeley (“Roper St. Francis”) filed its CON application on December 9, 2008, to transfer fifty 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. (R. pp. 5379-6662).

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. (R. pp. 5344-5359 and 6647-6659). On August 7, 2009, Trident filed two, separate contested case proceedings 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. (R. pp. 68 and 120 and 165). At the parties’ request, The Honorable John D. McLeod consolidated all three of these cases on January 7, 2010. (R. pp. 62-67).

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. (R. pp. 59-61). The ALC denied this motion on January 28, 2011. (*Id.*)

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. (R. pp. 55-58).

A fourteen-day contested case trial commenced before The Honorable John D. McLeod on January 30, 2012. On September 26, 2012, Judge McLeod issued an order sustaining DHEC's decision to approve both CON applications. (R. pp. 3-54). 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. (R. pp. 1-2).

Roper St. Francis agrees with final decision of the Administrative Law Court; however, Trident has appealed the ALC's order, arguing that Roper St. Francis's CON should not have been approved. While Roper St. Francis steadfastly believes the logic

behind Trident's arguments is flawed, if this Court were to agree with Trident's position, then the same logic must be applied to Trident, and its CON should be denied as well. Accordingly, Roper St. Francis has filed this cross-appeal to ensure that Trident's argument, if successful, cuts both ways.

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FACTS

Prior to these CON applications, Berkeley County was one of four counties in South Carolina with zero hospital beds.¹ (R. pp. 4366-4374). This was so even though Berkeley is the ninth largest county in the State of South Carolina. In 2008 (when the applications were filed), Berkeley County had an estimated 158,140 citizens, and in 2010, it had exceeded growth projections and its population had increased to 177,843 citizens. (R. pp. 4353 and 4108 lines 13-14 and 4111 lines 2-11).

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. Trident filed an 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.² (R. pp. 4461-5378). Trident's application is governed by the 2004-2005 South Carolina State Health Plan. (R. pp. 6663-6872).

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

¹ The 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. (R. pp. 6675-6676 and 6689 and 6882 and 6898-6900).

² An acute care hospital refers to a community hospital that treats patients from the community for general medical conditions such as surgery, obstetrics, emergency care, and general diseases, but not complex diagnoses or procedures such as open heart surgery or neurosurgery. (R. p. 747 lines 3-22 and 2964 lines 1-6). Tertiary care hospitals provide care for those complex procedures. (R. p. 2957 lines 7-14).

Berkeley County.³ (R. pp. 550 line 16 - 551 line 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. (R. pp. 1670 line 22 - 1671 line 4 and 6689). 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.*; R. p. 7048). In its CON application for a new hospital in Moncks Corner, Trident sought to transfer these 17 facility-specific beds and to increase this need to 50 beds to allow for the construction of its new hospital in Berkeley County. (R. pp. 6679 and 6689). In other words, Trident proposed to transfer *future bed need* to Moncks Corner, not existing, licensed beds.

Although Trident was the first to file a CON application, at the time it filed its application, Trident was 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. (R. pp. 651, lines 5-8 and 4381 and 4384). 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. To establish its new hospital, Roper St. Francis proposed to transfer 50 *existing* licensed acute care beds from its Roper St. Francis Hospital facility in Downtown Charleston to Goose Creek. (R. pp. 6889-6890 and 1607 lines 10-21). Roper St. Francis's CON application is governed by the 2008-2009 State Health Plan. (R. pp. 6873-7050).

Upon reviewing the CON applications submitted by both Roper St. Francis and Trident, DHEC found they were not competing applications, explaining: "The

³ A hospital must have, *inter alia*, inpatient medical services, commonly referred to as beds. (R. p. 6676). Moncks Corner Medical Center is not an existing hospital facility.

Department has determined the applications are not competing because the beds used for the Roper St. Francis Hospital-Berkeley project are a permanent bed transfer, not a bed increase; therefore, the bed need will not be exceeded. The proposed project [is] basically a re-positioning of currently licensed acute care beds from an area of limited growth to an area of strong growth and will have no impact on the Tri-County's bed count or bed need." (R. p. 6647). DHEC went on to approve both applications, finding they satisfied the State Health Plan, the Project Review Criteria, and the purposes of the CON Act.

Trident disagreed with the Department's decision and filed contested cases with the Administrative Law Court, arguing, among other things, that the State Health Plan does not allow an applicant to transfer beds to establish a hospital. Because Trident made this argument, Roper St. Francis was compelled to file a prophylactic action in order to protect its rights should Trident prevail. In the event the ALC were to find DHEC erred in allowing Roper St. Francis to transfer beds, Roper St. Francis argued that Trident would also be precluded from transferring facility-specific bed need to construct a new hospital in Berkeley County.

The Administrative Law Court sustained DHEC's decision to approve the CON applications filed by both Trident and Roper St. Francis. (R. pp. 3-54). Roper St. Francis believes this decision is correct but has filed this cross-appeal to ensure that Trident would also be bound if this Court were to reverse DHEC's interpretation of the State Health Plan with regard to the transfer of beds.

ARGUMENT

IF ROPER ST. FRANCIS IS NOT ALLOWED TO TRANSFER EXISTING BEDS TO A NEW SITE TO CONSTRUCT A NEW HOSPITAL, THEN TRIDENT MUST ALSO BE PROHIBITED FROM TRANSFERRING FACILITY-SPECIFIC BED NEED TO A NEW SITE TO CONSTRUCT A NEW HOSPITAL.

To establish their new facilities, both Trident and Roper St. Francis seek to transfer beds assigned to a different facility. Roper St. Francis seeks to transfer existing beds, and Trident seeks to transfer bed need. Trident opposes Roper St. Francis's application, arguing that the plain language of the bed transfer provision found in the State Health Plan does not specifically allow a facility to transfer beds to establish a hospital at a new location. (R. pp. 6889-6890 and 1858 lines 8-25). Yet, in Trident's application, it seeks to transfer facility-specific bed need from one location in North Charleston to a vacant lot in Moncks Corner. Thus, if Trident prevails in its argument against Roper St. Francis, this Court should find that Trident is also bound by it and prohibited from transferring its facility-specific bed need to establish a new hospital at a new location.

In making its argument against Roper St. Francis, Trident relies on the silence in the State Health Plan regarding the transfer of beds to establish a hospital. Roper St. Francis and DHEC joined together to combat this argument, explaining that the 2008-2009 State Health Plan allows affiliated hospitals "to transfer beds between themselves in order to serve their patients in a more efficient manner." (R. pp. 6889-6890).

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). "The primary rule of statutory construction is to ascertain and give effect to 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.

In finding the State Health Plan allowed existing beds and bed need to be transferred to construct a new hospital, the ALC first ascertained legislative intent 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 (emphasis added). (R. p. 28). 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.” (*Id.*) 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.” (R. pp. 28 and 7519-7526 and 1157 line 20 – 1158 line 7 and 1597 line 16 – 1599 line 20).

In approving both CON applications, the ALC recognized that “[t]he positions taken by Trident in its interpretations of the State Health Plans applicable to these applications have been inconsistent.” (R. p. 32). This is so because at the same time that Trident argues the plain language of the 2008-2009 State Health Plan does not specifically allow a facility to transfer existing beds to establish a new location, “Trident seeks to transfer facility-specific bed need . . . to vacant land to establish a new hospital

in Berkeley County, despite the fact that the applicable provision at Chapter II.G.1(A)(4)(d) of the *2004-2005 State Health Plan* is silent about whether facility-specific bed need can be transferred to a new site.” (*Id.*) In allowing Trident to transfer bed need, the ALC used the same reasoning it used in its analysis allowing Roper St. Francis to transfer beds, and specifically stated that its decision with regard to Trident’s transfer was “consistent with [its] finding as to the bed transfer provision” as it applied to Roper St. Francis. (*Id.*)

Under the 2004-2005 State Health Plan, the transfer provision upon which Trident relies is silent as to whether the facility to which the bed need is being transferred must be a brick and mortar building already in existence, just as the 2008-2009 transfer provision upon which Roper St. Francis relies is silent. The 2004-2005 provision states:

Should there be a need shown for additional beds for a hospital, then an increase may be approved. In order to provide for a cost-effective addition, up to the greater of 50 beds or the actual projected number of additional beds may be approved, provided the hospital can document and demonstrate the need for additional beds.

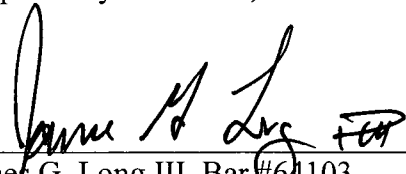
(R. p. 6679).

Roper St. Francis agrees with the ALC’s reasoning and believes the State Health Plan allows both parties to transfer beds to create new hospitals. However, if the Court were to agree with Trident and find that the State Health Plan prohibits the Roper St. Francis project, then Roper St. Francis asks this Court to apply that ruling to Trident’s new hospital as well.

CONCLUSION

Roper St. Francis urges this Court to affirm the order of the ALC in its entirety. However, if this Court were to reverse the ALC's finding that hospitals can transfer beds and bed need between facilities, then this finding should apply to Roper St. Francis and Trident equally such that both CON applications would be denied. In other words, what's good for Goose Creek is good for the gander (in this case, Moncks Corner).

Respectfully submitted,



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Columbia, South Carolina

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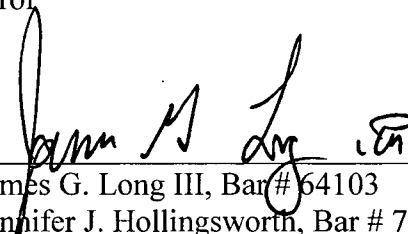
South Carolina Department of Health and
Environmental Control and Trident Medical Center, LLC..... Respondents,
Of Whom Trident Medical Center, LLC, is the..... Appellant.

PROOF OF SERVICE

I, James G. Long III, hereby certify that on August 6, 2013, I caused a copy of the Final Appellant Brief of Respondents-Appellants to be served on the following by hand delivery addressed as follows:

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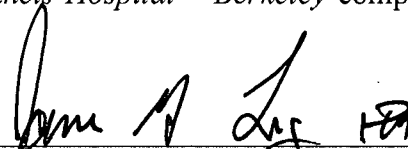
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CERTIFICATE OF COUNSEL

The undersigned certifies that the *Final Appellant Brief of Respondents-Appellants CareAlliance Health Services and Roper St. Francis Hospital – Berkeley* complies with Rule 211(b), SCAR.



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