

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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OCT 09 2014

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson III, Administrative Law Judge

SC Court of Appeals

13802

Case No. 2012-ALJ-07-0090-CC

Grand Strand Regional Medical Center, LLCRespondent,

v.

South Carolina Department of Health and

Environmental Control..... Respondent below.

Case No. 2012-ALJ-07-0091-CC

Grand Strand Regional Medical Center, LLCRespondent,

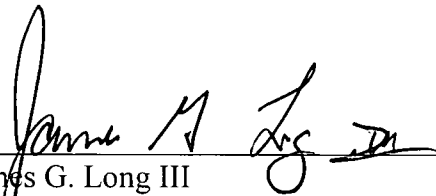
v.

South Carolina Department of Health and

Environmental Control and Carolina Regional Cancer Center..... Respondents below,

Of whom Carolina Regional Cancer Center is the.....Appellant.

APPELLANT'S PETITION FOR SUPERSEDEAS PENDING
FINAL RESOLUTION OF APPEALS PROCESS



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BACKGROUND

Pending before this Court is the appeal of Appellant Carolina Regional Cancer Center (“CRCC”) of the Amended Final Order and Decision of the Administrative Law Court (“ALC”) issued April 4, 2014, as well as a Reconsideration Order dated the same. Copies of each Order are attached as **Exhibits A** and **B**. By the appeal, CRCC challenges the decision of the ALC reversing the decision of the Respondent South Carolina Department of Health and Environmental Control (“DHEC” or “Department”) and granting a Certificate of Need (“CON”) to Respondent Grand Strand Regional Medical Center (“Grand Strand”) to add linear accelerator services to its hospital campus in Myrtle Beach, South Carolina.¹

The comprehensive statutory scheme of the CON Act, found at South Carolina Code Annotated 44-7-110, *et seq.*, includes a requirement at section 220 of the Act that the party filing an appeal of an ALC decision approving a CON application “shall deposit a bond with the Clerk of the Court of Appeals within five calendar days after filing the petition to appeal.” S.C. Code Ann. § 44-7-220(B). CRCC complied with the bond requirement by posting a cash bond with this Court in the amount of \$489,431.25 on May 7, 2014. The CON Act provides that should CRCC be unsuccessful in reversing the decision of the ALC to award the CON to Grand Strand, this Court “shall” award the bond amount to Grand Strand, as well as provides for the discretion to award additional attorney’s fees and costs incurred by Grand Strand in the appeal. *Id.*

Though the CON Act clearly contemplates and protects the delay associated with the appeal that would be experienced by Grand Strand were its project to be stayed

¹ The Department’s Decision was to deny the CON to Grand Strand and grant a CON to CRCC to expand its existing linear accelerator services in Horry County to Conway, South Carolina. The ALC’s affirmance of the CON issued to CRCC was not appealed by Grand Strand and is therefore the law of the case.

pending the appeal, no mention is made of a stay of the appealed decision in Section 220 and, given the general requirement found in the APA at South Carolina Code Annotated Section 1-23-380(2) that a notice of appeal does not itself stay enforcement of an agency decision, CRCC sought the issuance of a stay in the ALC. Concomitantly, this Court's Rules require that CRCC first ask the administrative tribunal to suspend its decision before seeking such relief in this Court. Rule 241(d)(1), SCACR.

The ALC denied CRCC's Motion for Stay/Supersedeas Pending Appeal on September 26, 2014. CRCC has thus exhausted its administrative remedies and seeks an Order of this Court imposing a supersedeas as to the issuance of a CON to Grand Strand pending final resolution of this appeal.

ARGUMENT

CRCC seeks the imposition of a supersedeas to prevent Grand Strand from proceeding with its project to add linear accelerator services to its hospital campus in Myrtle Beach, South Carolina, just three miles away from CRCC's existing operations. The ALC rejected CRCC's request for a stay, holding that though it agreed that the specific provision of S.C. Code Ann. § 44-7-220 and the bond requirement to perfect an appeal applied to the appeal of the CON decision at issue, "the [ALC] cannot read into that statute a stay requirement that is neither express nor implied." Order at 2 (attached as **Exhibit C**). As a result, CRCC was essentially required to 'purchase' its right to appeal the final decision for nearly one half million dollars, but is not entitled to a stay pending resolution of the appeal despite the CON Act's requirement that an unsuccessful appeal compensates Grand Strand for an appeal's delay of project implementation. The ALC's ruling results in an unconstitutional interpretation of the CON Act, as the

conclusion reached is that the bond requirement found in the CON Act represents a penalty on a party who exercises the statutory right of appeal.

Rule 241(c), SCACR, allows for the imposition of a supersedeas as to matters decided in a decision on appeal. The Rules further contemplate that this Court should consider “whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR. CRCC seeks supersedeas of the CON issuance to Grand Strand because, without such suspension of the matter, Grand Strand could proceed to build and open its health care facility during the pendency of this appeal. As a result, CRCC and the citizens of South Carolina would suffer the very consequences the CON Act was designed to prevent: unnecessary duplication of facilities and services and increased health care costs, rendering some or all of the issues on appeal moot. S.C. Code Ann. § 44-7-120. Further, the other purposes of the Act, namely, to guide the establishment of health facilities and ensure high quality services, would be thwarted. *Id.* To allow Grand Strand to spend nearly ten million dollars to construct a facility to house expensive and highly technical equipment such as a linear accelerator with the possibility and high likelihood that the project would be later closed and shuttered violates common sense and certainly is harmful. In addition, CRCC specifically will be harmed if Grand Strand proceeds with its project prior to CRCC exhausting its appeal. The CON program exists to prevent unnecessary duplication of services. Allowing two new linear accelerators to come online in such close proximity to the existing units will adversely impact the existing units in a substantial way. Once Grand Strand’s facility opens, referral patterns will change and CRCC will be adversely impacted. The bell cannot be unring, so to speak.

The harm described herein can be prevented by the imposition of a supersedeas in conjunction with the appellate bond CRCC has already posted with the Clerk of the Court of Appeals. The Rule authorizing the imposition of a supersedeas recognizes that certain protections may be appropriate should matters within a decision be stayed, including the filing of a bond. Rule 241(c)(3), SCACR. The CON Act recognizes the importance of such protection and mandates that a party appealing the issuance of a CON, as CRCC is here,² must file with the Court of Appeals a cash or surety bond equal to five percent of the total project cost or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars. S.C. Code Ann. § 44-7-220(B). CRCC properly complied with this bond requirement and delivered to this Court's coffers nearly half a million dollars to secure its appellate rights. CRCC submits that the protection afforded by the CON Act and the substantial bond are sufficient to warrant the imposition of the supersedeas.

If CRCC is successful in its appeal, as it believes it will be, the status quo will be preserved with the supersedeas as to Grand Strand's CON and CRCC will not suffer the adverse impact identified by the Department in its decision to deny Grand Strand a CON. Should CRCC not be successful and this Court affirms the ALC's decision, Grand Strand will receive the entire \$489,431.25 bond, substantially more than any financial loss to be suffered by Grand Strand from delay, and Grand Strand will be entitled to proceed with its project.

When deciding a petition for supersedeas, one factor the Court considers is whether the appeal has merit. *See Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d

² As addressed above, Grand Strand has not appealed the issuance of the CON to CRCC and did not post a bond with this Court.

469, 470 (explaining that a supersedeas may be issued to preserve the fruits of a meritorious appeal). CRCC has asserted four grounds for reversal of the ALC's Amended Final Order in its Initial Brief. Through the appeal, CRCC has offered important statutory and legal issues for resolution by this Court, one or more of which CRCC believes affords the basis to reverse the decision to award Grand Strand a CON.

The likelihood of success on appeal, however, is but one factor, and this factor becomes decreasingly important when there is a strong showing that irreparable injury in the absence of a stay would occur or that a stay would not cause substantial harm. 4 C.J.S. Appeal and Error § 528. Our Supreme Court has recognized that a supersedeas is appropriate where the appellant raises a novel issue. *See, e.g., Matter of Decker*, 322 S.C. 212, 471 S.E.2d 459 (1995) (granting a supersedeas of contempt order because issues raised on appeal were novel questions of law). With its appeal, CRCC offers at least two novel issues for consideration by this Court, including whether the ALC erred by awarding to Grand Strand a linear accelerator contained in a later filed South Carolina Health Plan and whether the ALC erred in failing to remand the issue of whether Grand Strand's CON application was independently approvable. CRCC submits that the ALC erred in regard to both of these points. These novel legal issues are ripe for appellate review by this Court.

To the extent Grand Strand argues the delay associated with the supersedeas is harmful, the compensation to Grand Strand represented in the bond more than fairly redresses any inconvenience from delay. The CON Act mandates that this Court "shall" award to Grand Strand the bond amount should CRCC fail in its appeal, and further allows for the possibility of additional compensation through attorney's fees and costs

incurred by the appeal. S.C. Code Ann. § 44-7-220(B). Were this Court to conclude as the ALC that this compensation to Grand Strand is independent and not related to a delay in the project that is subject to the appeal bond, then the CON Act is interpreted to offer a “windfall” to persons who otherwise are required to defend legitimate but unsuccessful appellate challenges to administrative decisions.

While the right to supersedeas before this Court is independent of the ALC’s refusal to grant a stay, nonetheless CRCC will briefly address the implications of the ALC’s reasoning for denial of a stay. The constitutional implication of the ALC’s refusal to issue a stay is of great concern. The right to appeal is not available only to those individuals or entities that can secure the price of admission. To hold that the lack of the word “stay” in Section 44-7-220 means that a stay is not available to a party appealing the issuance of a CON under the CON Act is an absurd (and unconstitutional) interpretation. The position of CRCC is that a stay is appropriate in matters subject to the bond requirements of Section 44-7-220, as such a mechanism exists to equalize the rights of the parties to the appeal – CRCC is able to protect the bases for its objections that would otherwise be rendered moot should Grand Strand proceed during the appeal process, and Grand Strand stands to be compensated should the delay to its project by the appeal not result in success for CRCC.

“Statutory language must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose.” *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 7, 753 S.E.2d 537, 540 (2014) (internal quotation omitted). Even where language may be plain and unambiguous, “[n]evertheless, ‘however plain the ordinary meaning of the

words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.” *Id.* (quoting *Kiriakides v. United Artists Commc’ns, Inc.*, 312 S.C. 271, 275, 440, S.E.2d 364, 366 (1994). Here, CRCC submits that it is an inescapable conclusion that a delay of the issuance of the CON to Grand Strand is appropriate pending a final decision on appeal in light of the very substantial bond payment required by the CON Act in order to perfect an appeal of the ALC decision. To construe the CON Act and rules governing appeals differently results in a conclusion that the “filing fee” associated with a CON appeal is at least one hundred thousand dollars up to one million five hundred thousand dollars simply for the right of appellate review. A filing fee of this magnitude would quite literally close the courthouse doors to many affected persons who may otherwise rightfully have matters to address with this Court. “If possible, the court will construe the statute so as to escape the absurdity and carry the intention [of the Legislature] into effect.” *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366. CRCC submits that accepting the bond requirements without allowing for a supersedeas is an absurd result that would represent an unconstitutional impairment of the right to judicial review.

CONCLUSION

For the reasons set forth herein, CRCC respectfully requests that this Court impose a supersedeas as to the issuance of a CON to Grand Strand for the addition of linear accelerator services in Horry County pending a final resolution of this matter on appeal.

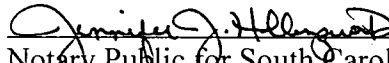
VERIFICATION

Personally appeared before me, the undersigned, who being duly sworn, deposes and states under oath that he is the agent for the Appellant in the above-referenced actions and that he has read the contents of the foregoing Petition for Supersedeas Pending Final Resolution of Appeals Process and that the matters contained therein are true to the best of his knowledge.



Richard R. Lewis
SVP, CFO United States Operations
21st Century Oncology, Inc.

Sworn to before me
This 8 day of October, 2014

 J.S.
Notary Public for South Carolina
My Commission expires: 9-10-19

THE STATE OF SOUTH CAROLINA

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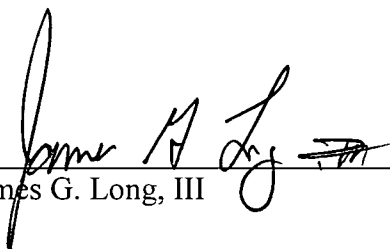
Of whom Carolina Regional Cancer Center is the.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on October 9, 2014, he caused a copy of Petition for Supersedeas Pending Final Resolution of Appeals Process to be served to the following addresses via hand-delivery:

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James G. Long, III

Jennifer J. Hollingsworth
Member
Admitted in SC

October 9, 2014

VIA HAND DELIVERY

The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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SC Court of Appeals

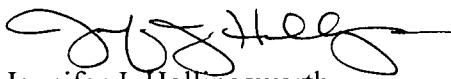
Re: Grand Strand v. SCDHEC (Carolina Regional Cancer Center)
Appellate Case Tracking # 2014-000973

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of Appellant's Petition for Supersedeas Pending Final Resolution of Appeals Process in the above-referenced matter, as well as our filing fee in the amount of \$25.00. Please file the originals and return the clocked copies to me via our courier.

By copy of this letter, I am hereby serving copies of the same on opposing counsel.

Very truly yours,


Jennifer J. Hollingsworth

JJH/ect

cc: William R. Thomas, Esquire (via Hand Delivery)
Walter H. Cartin, Esquire (via Hand Delivery)
Ashley C. Biggers, Esquire (via Hand Delivery)
Vito M. Wicevic, Esquire (via Hand Delivery)