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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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

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

Grand Strand Regional Medical Center, LLC .....Respondent,  
v.

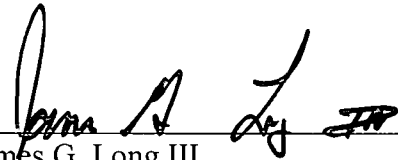
South Carolina Department of Health and  
Environmental Control..... Respondent below.

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

Grand Strand Regional Medical Center, LLC .....Respondent,  
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.

PETITION FOR REHEARING OR REVIEW OF DENIAL OF SUPERSEDEAS  
PENDING FINAL RESOLUTION OF APPEALS PROCESS



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

E. Wade Mullins III  
BRUNER POWELL  
1735 St. Julian Place, Suite 200  
P.O. Box 61110 (29260-1110)  
Columbia, SC 29204

Attorneys for Appellant  
Carolina Regional Cancer Center

Appellant, Carolina Regional Cancer Center, LLC (“CRCC”) filed on October 9, 2014, a Petition for Supersedeas Pending Final Resolution of Appeals Process. On December 16, 2014, this Court, by decision of an individual judge, denied CRCC’s Petition for Supersedeas. As set forth herein, the Petition raises a novel issue never before addressed by the Appellate Courts in South Carolina; namely the impact and purpose of the substantial bond required by S.C. Code Ann. § 44-7-220(B) (Supp. 2010). This section of the State Certification of Need and Health Facility Licensure Act (“CON Act”) was rewritten by amendment in 2010, and this appeal is the first case arising under the amended statute. This Court’s interpretation of the statute will have long lasting implications for appeals of Certificate of Need cases from the Administrative Law Court. Therefore, CRCC respectfully requests that the Petition be heard and decided by a full panel pursuant to Rules 241(d)(7) and 240(j), SCACR, which allows review of the decision of an individual Judge.

### **BACKGROUND**

Pending before this Court is the appeal of 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 day. 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.<sup>1</sup>

The CON Act, found at S.C. Code Ann. § 44-7-110, *et seq.*, was amended in 2010 and includes the 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. The bond must be . . . . in an amount equal to five percent of the total cost of the project 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 complied with the bond requirement by depositing a cash bond with this Court in the amount of \$489,431.25 on May 7, 2014. Currently, that money is on deposit and under the control of the Court of Appeals. The crux of this Petition is to determine the novel question of what is the impact and purpose of the bond requirement contained in Section 220 of the Act.

In addition to requiring the appellant to deposit a cash bond as CRCC has done, the 2010 amendment of Section 220 provides that if the Court of Appeals affirms the Administrative Law Court’s decision or dismisses the appeal, this Court “shall” award all of the bond amount to Grand Strand. This is a significant change to the law, as no longer does the Court have discretion as to whether to award the full amount of the bond or some portion thereof. The Court is further granted the discretion to award reasonable attorney fees and costs incurred for the appeal in addition to the bond. *Id.* Finally, Section 220(C) provides that if the Court of Appeals determines that the contested case or subsequent appeal was frivolous, the Court may award damages resulting from the delay,

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<sup>1</sup> 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.

as well as reasonable attorney fees and costs.

Although Section 220 of the CON Act clearly contemplates and protects the loss experienced by an applicant from delay associated with a stay pending appeal, the Section and the Act are silent as to whether Section 220 imposes an automatic stay on the issuance of the CON. In light of Rule 241(b)(11), SCACR, and given the general requirement found in the APA at S.C. Code Ann. § 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. The ALC denied CRCC's Motion for Stay/Supersedeas Pending Appeal on September 26, 2014. CRCC promptly then filed a Petition for Supersedeas, which was denied by a single Judge by Order dated December 16, 2014.

With this Petition, CRCC seeks review of the Court's December 16, 2014 Order and the granting of a supersedeas imposing a stay upon the issuance of a Certificate of Need awarded to Grand Strand because of the payment of the substantial bond required by the statute. In the alternative, CRCC submits that this Court should impose a stay of the issuance of the CON even if the Court finds that Section 220(B) does not impose an automatic stay. If the Court were to determine that the stay was not automatic or warranted, this Court must find that Section 220(B) of the CON Act violates the South Carolina and United States Constitutions, thereby requiring that the statute be declared null and void and the funds deposited on account with the Court of Appeals be promptly returned to CRCC.

### **ARGUMENT**

The quandary for CRCC and this Court is the impact and purpose of the bond. The bond can exist for only one of two reasons: first, to compensate an applicant for loss

resulting from the delay to its project caused by a stay during appeal of an administrative decision to the Court of Appeals; or second, to punish an appellant by requiring the payment of a substantial sum to the applicant if the appellant seeks judicial review of the administrative decision and does not prevail. CRCC contends that the clear answer to the question is that Section 220(B) imposes a stay on the issuance of the CON pending the appeal. To conclude otherwise would mean that the impact and purpose of the bond requirement was to punish the appellant – such a result would serve no compelling interest, would simply impose a substantial and unreasonable burden on parties, and chill the ability of parties to have their case heard by the Court of Appeals. Such punishment would violate both the South Carolina and United States Constitutions.

**A. The Substantial Bond Deposited by CRCC Protects Grand Strand's Delayed Interests and the imposition of a stay is consistent with the purpose of the statute.**

CRCC has satisfied the bond requirement in Section 220(B) and has deposited the sum of \$489,431.25 with the Court of Appeals. The effect of posting this bond, as is true for all other appellate bonds, was to stay the underlying order on appeal. The cardinal rule of statutory construction is to ascertain the intent of the Legislature. *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). A statute must receive a practical, reasonable and fair interpretation consistent with the purpose, design and policy of lawmakers. *See id.* The purposes of the CON Act are set forth in Section 120 of the Act, which in short are to promote cost containment, prevent unnecessary duplication of facilities or services, guide the establishment of facilities and services to best serve public needs, and ensure high quality services are provided in this

State. S.C. Code Ann. § 44-7-120. Section 220 of the Act must be read in conjunction with those purposes. CRCC contends that the imposition of a stay is consistent with the purpose of the bond statute and the CON Act; namely, to protect an applicant from loss sustained by delay in the implementation of its project from the issuance of a stay during appeal.

The Order Denying Supersedeas rejects this assertion and states: “We do not believe the General Assembly drafted section 44-7-220(B) with the intent of protecting the losing party’s competitive interests during a CON appeal.” CRCC has never contended that the bond requirement was to protect a losing party’s competitive interests during appeal. The four purposes of the CON Act have no relation to the competitive interests of the parties and so it is unlikely that the Legislature considered competitive interests in the drafting of this statute. *See* S.C. Code Ann. § 44-7-120. Further, if the intent was focused on the competitive interests of the losing party, the amount of the bond would be related to the appellant’s existing operations. The Legislature based the amount of the bond on the costs to be incurred by the applicant, not the existing operations of the appellant. This further supports CRCC’s contention that the purpose of the bond is to protect the applicant from delay associated with the stay during appeal.

A second rule of statutory construction supporting CRCC’s position is that the statute must be read as a whole and sections which are part of the same general statutory law must be construed together, with each one given effect. *Ranucci v. Crain*, 409 S.C.493, 500, 763 S.E.2d 189, 192 (2014). A full review of Sections 220(B) and 220(C) clearly show that the bond is not related to any award of attorney fees and costs, and therefore, the statute is not a “loser pays” statute. *See generally* Charles W. Branham, III,

*It Couldn't Happen Here: The English Rule—But Not In South Carolina*, 49 S.C. L. Rev. 971 (1998) (discussing various forms of loser pays rules and the likely doom of a proposed statutory mechanism in South Carolina to impose a similar penalty scheme). Section 220(B) specifically authorizes the Court to award the applicant reasonable attorney fees and costs related to the appeal in addition to the entire bond. If the purpose of the bond is to compensate an applicant for its attorney fees and costs incurred during appeal, the total award of attorney fees and costs must be reduced by the amount of the bond or otherwise there would a double payment for the same expense. The Legislature chose to allow both the payment of the bond and the award of attorney fees and costs, obviously recognizing that the applicant would have a separate loss for each. To conclude that the bond requirement is yet additional compensation to a party solely because of the right to judicial review is absurd. “The prospect of ‘loser pays all’ calls into question the availability of justice.” *Id.* (internal quotation omitted). CRCC contends that the bond relates to the loss from delay to the project associated with the issuance of the stay during appeal.

Further, Section 220(C) specifically recognizes that there will be delay from judicial review in the Court of Appeals. This explicit recognition further supports CRCC’s contention that the purpose of the bond established in Section 220(B) is to compensate the applicant for loss from delay associated with the stay during appeal. *See e.g. Sloan*, 370 S.C. at 469, 636 S.E.2d at 606-07 (“The real purpose and intent of the lawmakers will prevail over the literal import of particular words.”) Considering the statutory construction provisions discussed herein and well known to this Court, the Court should impose a stay upon the issuance of the CON to Grand Strand pending

resolution of this appeal.

**B. The Failure to Grant a Supersedeas leaves only one purpose for the Bond, to Punish the Appellant for Filing an Appeal.**

To accept the argument that the Legislature did not intend that the bond requirement would result in a stay of the CON project during appeal leads to the conclusion that the Legislature intended to punish aggrieved persons who felt judicial review of an administrative law judge decision was appropriate following a contested case hearing. As addressed herein, the purpose of the bond is not to compensate for attorney fees and costs incurred during the appeal and if CRCC's position is rejected, the purpose of the bond is not to compensate the applicant for loss from delay associated with the stay during appeal. Therefore, the only remaining purpose for the bond is to punish an appellant for seeking judicial review of the administrative decision below. At a minimum, such an interpretation would have a serious chilling effect on the ability and desire of parties to seek judicial review of a contested case and raises numerous constitutional problems with the statute.

A review of the CON Act does not support such an interpretation of the bond requirement in Section 220(B). The purposes of the CON Act relate to cost containment, unnecessary duplication, quality, and best serving the needs of the public. There is no mention of competition or the promotion of health care facilities or services, and certainly no mention of punishing parties for pursuing their constitutional right to judicial review. In fact, the recognition of the need to contain costs in the proliferation of health care services supports the argument that a stay is appropriate pending appeal, in light of the possibility that a reversal of the appealed decision results in a need to discontinue

challenged services.<sup>2</sup> See S.C. Code Ann. § 4-7-120. Moreover, with CON projects costing millions of dollars, the bond amount itself is significant and burdensome. To punish appellants and provide a windfall to applicants who do not suffer any loss from delay from the imposition of a stay is inconsistent with proper judicial review and could not have been the intent of the Legislature in amending Section 220(B).

As discussed herein, the view that Section 220(B) intends to punish parties who seek judicial review in the Court of Appeals and grant a windfall for applicants is unconstitutional. Another principle of statutory construction is that the Court, if possible, should interpret a statute to render the statute constitutionally valid. See *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 541, 737, 842 S.E.2d 830 (2012) (Hearn, J. dissenting) A finding that imposes a stay upon the depositing of the bond as CRCC has done renders Section 220(B) constitutionally valid. To conclude otherwise raises numerous constitutional issues with Section 220(B) which should be avoided if at all possible.

### **C. The Constitutional Implications are of Paramount Concern.**

CRCC is aggrieved at the Order's refusal to address the constitutional implication of the bond requirement. CRCC would show the Court that the bond requirement without a stay violates numerous constitutional provisions including, but not limited to, Article One, Sections Three and Twenty-Two of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution. Requiring CRCC to post a bond without a stay violates both procedural and substantive due process, is an improper

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<sup>2</sup> In the Order Denying Supersedeas, the Court notes that Grand Strand may proceed at its own risk and that Grand Strand acknowledges it would have to "cease operations at its facility if this court reverses the ALC's decision approving its CON." Neither the Order nor Grand Strand make any mention of the impact those unnecessary costs would have on the healthcare system and the people of South Carolina.

taking of property, imposes an onerous burden on CRCC's access to judicial review, and violates the Fourteenth Amendment's Equal Protection Clause by imposing substantial barriers to judicial review of CON decisions that are not rationally related to a legitimate state purpose.

In refusing to consider the grounds supporting the Petition, the Order declines to address the constitutional issues and suggests that "Appellant is free to raise the issue when addressing the merits of this appeal." Order Den. Pet. Super. Briefing for this matter is concluded and the Record on Appeal will be served within the next two weeks. To decline to consider the constitutional arguments and, instead, invite CRCC to address the issue in the appeal is impractical and will be prejudicial – distracting this Court away from the errors below legitimately raised in CRCC's appeal. This underlying appeal is the first known appeal following the amendment of the bond requirement in S.C. Code Ann. § 44-7-220 (Supp. 2010), and the Court's refusal to address the very concerning constitutional implications of the denial of a stay will have a far-reaching impact on other aggrieved persons. A novel issue such as the imposition of the substantial bond to appeal a CON decision, with mandatory payment to an applicant in addition to rights for attorney fees costs, and compensation for frivolous appeals, without allowing for a contemporaneous stay, requires the benefit of this Court's review. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 241, 701 S.E.2d 5, 25 (2010) (addressing a novel issue in South Carolina's modern jurisprudence for the benefit of the bench and bar, even though appellant failed to preserve for review). CRCC submits that if the Court declines to grant the supersedeas and issue the stay, that the Court allow expedited briefing and expedited argument on the constitutionality of Section 220(B) of the CON Act as interpreted by the

ALC and this Court.

**D. A Supersedeas to Stay the Project is Critical to Prevent Mootness.**

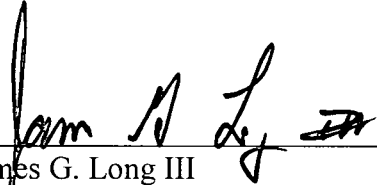
In denying the Petition for Supersedeas, the Court cited to Rule 241(c)(2), SCACR, finding that “there is no danger the court will lose jurisdiction or the issues will become moot if Grand Strand is allowed to proceed with its project.” Order Den. Pet. Super. The Order fails to acknowledge that irreversible impact on CRCC that will occur with the commencement of Grand Strand’s linear accelerator services just three miles from CRCC’s existing facility, if allowed to proceed before exhaustion of the appeal. This Court can have no certainty that a future favorable decision for CRCC will reverse the damage to CRCC’s referral base, thus there is no way to ensure the failure to stay the project does not render future relief ineffectual. The entirety of Grand Strand’s project *requires* redirection of the referrals from the medical oncology group, which is CRCC’s largest referral source. The irreparable harm faced by CRCC with the refusal to stay Grand Strand’s project is not dissimilar to that faced by the physician litigant in *Levine v. Spartanburg Reg’l Svcs. Dist.*, 367 S.C. 458, 464-65, 626 S.E.2c 38, 41-42 (Ct. App. 2005), for whom this Court upheld a preliminary injunction. In *Levine*, the plaintiff physician established irreparable harm would result absent an injunction, in part, because she had “built a patient referral base through her work at the Hospital. This referral base would erode and potentially disappear if Levine lost her privileges at the Hospital while the merits of her underlying action against the [defendants] are litigated.” *Id.* Further, the opinion of a single Judge that the denial of the supersedeas will not moot the case is not binding on a future panel in the Court of Appeals or Supreme Court. Therefore, this Court should grant the stay or at a minimum grant full review to consider all the issues

raised in this Petition.

### CONCLUSION

For the reasons set forth herein, CRCC respectfully requests that this Court review the Order Denying Supersedeas and grant the relief set forth in the Petition for Supersedeas Pending Final Resolution of Appeals Process.

RESPECTFULLY SUBMITTED,



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

E. Wade Mullins III  
BRUNER POWELL  
1735 St. Julian Place, Suite 200  
P.O. Box 61110 (29260-1110)  
Columbia, SC 29204

Attorneys for Appellant  
Carolina Regional Cancer Center

December 30, 2014

THE STATE OF SOUTH CAROLINA

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Ralph King Anderson III, Administrative Law Judge

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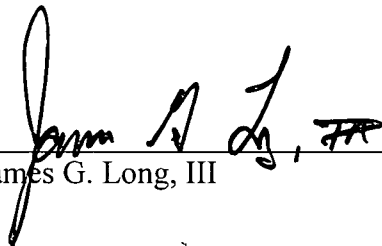
Of whom Carolina Regional Cancer Center is the.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on December 30, 2014, he caused a copy of Petition for Review of Denial of Supersedeas Pending Final Resolution of Appeals Process to be served to the following addresses via hand-delivery:

William R. Thomas, Esquire  
Walter H. Cartin, Esquire  
Amber Carter, Esquire  
Parker Poe Adams & Bernstein, LLP  
1201 Main Street, Suite 1450  
Columbia, SC 29201

Ashley C. Biggers, Esquire  
Vito M. Wicevic, Esquire  
South Carolina Department of Health  
and Environmental Control  
2600 Bull Street  
Columbia, SC 29201

  
James G. Long, III

James G. Long III  
Member  
Admitted in SC

December 30, 2014

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**VIA HAND DELIVERY**

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

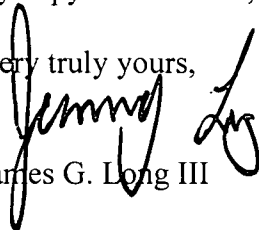
**Re: Grand Strand v. DHEC (Carolina Regional Cancer Center)  
Appellate Case Tracking # 2014-000973**

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Appellant's Petition for Rehearing or Review of Denial of Supersedeas Pending Final Resolution of Appeals Process in the above-referenced matter. Please file the originals and return a clocked copy to me via our courier.

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

Very truly yours,



James G. Long III

JGL/ect  
Enclosures

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

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