THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

APPELLANT'S MOTION FOR RELIEF FROM BOND AND PETITION FOR SUPERSEDEAS PENDING FINAL RESOLUTION OF APPEALS PROCESS

Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") submits this Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of the Appeals Process pursuant to Rule 241 of the South Carolina Appellate Court Rules ("SCACR") and S.C. Code Ann. § 1-23-380(2).

I. SUMMARY OF ARGUMENT

As required by S.C. Code Ann. § 44-7-220(B), Carolinas posted a $1.5 million dollar bond to perfect its appeal of the Administrative Law Court's denial of its application for a certificate of need to construct a hospital in Fort Mill, South Carolina. Carolinas now seeks relief from the appeal bond because it is unconstitutional under the South Carolina and United States Constitution. The bond requirement under § 44-7-220(B) violates the separation of powers doctrine under the South Carolina Constitution because it interferes with the South Carolina Supreme Court's constitutional authority to promulgate its rule of procedure and practice in the appellate courts of this State. The bond requirement also violates the Equal Protection Clause of the South Carolina and United States Constitution because it imposes an arbitrary and discriminatory appeal bond requirement on a narrow class of appellants without being rationally related to a legitimate state interest. Moreover, § 44-7-220(B) violates the due process provision of Article I, § 22 of the South Carolina Constitution by substantially burdening appellants' rights to judicial review of the Administrative Law Court's certificate of need decisions involving a competing applicant.

In addition, Carolinas seeks a supersedeas to prevent Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ("Piedmont") from constructing the hospital in question during the pendency of this appeal. Supersedeas is appropriate in this action to protect Carolinas from the irreparable harm it will suffer if Piedmont is allowed to erode Carolinas' market share through the construction of a new hospital while this appeal is pending. To the extent that the Court concludes that a bond is required to protect Piedmont from injury resulting from the

supersedeas, it should use all or part of the bond posted by Carolinas under § 44-7-220(B) as security to compensate Piedmont from any injury actually suffered as a result.

II. PROCEDURAL BACKGROUND

This case has a lengthy procedural history. In 2005, Carolinas, Piedmont, and a third applicant, Presbyterian Healthcare ("Presbyterian"), filed certificate of need ("CON") applications with the South Carolina Department of Health and Environmental Control ("DHEC") to construct and operate a sixty-four (64) bed general acute care hospital in York County, South Carolina ("Fort Mill CON"). On May 30, 2006, DHEC denied the Fort Mill CON applications of Carolinas and Presbyterian and granted the application of Piedmont for a new, one hundred (100) bed hospital. At the time, Piedmont argued and DHEC agreed that only an existing hospital in a county was entitled to apply for a CON to build a new hospital in the county. Carolinas and Presbyterian timely requested a contested case to challenge DHEC's decision with the South Carolina Administrative Law Court ("ALC"). The cases were consolidated and assigned to Judge Carolyn C. Matthews (the "First Contested Case").

In September 2009, Judge Matthews presided over a three (3) week hearing in the First Contested Case. After Carolinas and Piedmont concluded their cases, Judge Matthews granted their Motions for Summary Judgment on the grounds that DHEC had erroneously adopted Piedmont's legal argument that only Piedmont, as the existing hospital in York County, was eligible to apply for a new hospital in York County. As a result, Judge Matthews remanded the applications to DHEC for further review consistent with her instructions.

Piedmont appealed Judge Matthews's Order to the South Carolina Supreme Court, and Carolinas and Presbyterian cross-appealed. In a decision dated April 8, 2010, the South Carolina Supreme Court denied the appeal. According to the Supreme Court, Judge Matthews's Order was not a "final decision" that was immediately appealable under S.C. Code Ann. § 1-23-610, which limits appellate review to final decisions of the ALC. The Supreme Court concluded that "a final determination as to the [CON] has not been made" because Judge Matthews had remanded the matter to DHEC for further review. Accordingly, the Supreme Court dismissed the appeal and remanded the matter to DHEC in accordance with Judge Matthews's Order.

After DHEC regained jurisdiction over the Fort Mill CON matter, it reviewed the updated CON applications submitted by Carolinas, Presbyterian, and Piedmont. On September 9, 2011, after a full and complete review of the CON applications and updated materials, DHEC granted the CON to Carolinas and denied Piedmont's and Presbyterian's applications. On November 15, 2011, Presbyterian and Piedmont filed requests for a contested case with the ALC to review DHEC's award of the Fort Mill CON to Carolinas (the "Second Contested Case"). Presbyterian has since withdrawn from the Second Contested Case.

The Second Contested Case was assigned to Judge S. Phillip Lenski and progressed from the date of filing in November 2011 through a hearing on the merits conducted over fifteen (15) days in March and April 2013. Approximately a year after the hearing on the merits, the ALC issued a Final Order dated March 31, 2014 (the "Final Order") reversing DHEC's decision, granting a CON to Piedmont, and denying a CON to Carolinas. On April 9, 2014, Carolinas timely filed a Motion to Alter or Amend the Final

Order pursuant to ALC Rule 29(d) and Rule 59, SCRCP. On May 2, 2014, the ALC vacated the Final Order. On December 15, 2014, this Court issued an Amended Final Order (the "Amended Final Order") in which it maintained its previous ruling reversing DHEC's decision, granting a CON to Piedmont, and denying the CON to Carolinas. Carolinas received written notice of the entry of the Amended Final Order on December 15, 2014, and filed a Notice of Appeal (attached as **Exhibit A**) with the South Carolina Court of Appeals on January 14, 2015.

After filing the Notice of Appeal, Carolinas filed a Cash Bond (attached as **Exhibit B**) pursuant to S.C. Code Ann. § 44-7-220(B) with the Clerk of the South Carolina Court of Appeals in the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), which is the maximum amount payable by that statute.

On January 28, 2015, Carolinas filed a Motion to Stay/Supersedeas (attached as **Exhibit C**) with the ALC, as required by Rule 241(d)(1). On February 10, 2015, Judge Lenski granted the Motion to Stay/Supersedeas (attached as **Exhibit D**). After the issuance of the Order on the Motion to Stay/Supersedeas, Piedmont maintained that Judge Lenski had failed to consider Piedmont's Response Memorandum, which was inadvertently sent to the wrong judge. Thereafter, on February 12th, Judge Lenski vacated his February 10th Order (attached as **Exhibit E**), and on February 20, 2015, he reversed his prior decision and denied Carolinas' Motion for Stay/Supersedeas (attached as **Exhibit F**). In his February 20, 2015 Order denying Carolinas' Motion to Stay/Supersedeas, Judge Lenski relied heavily on the legal arguments made in Piedmont's Response Memorandum, which in turn relied upon a single-judge decision in *Grand Strand Regional Medical Center v. South Carolina Dept. of Health and*

Environmental Control, App. Case No. 2014-000973 (S.C. Ct. App. Dec. 16, 2014). The single-judge decision in *Grand Strand* is currently being reviewed by a three-judge panel on a Petition for Rehearing.[1]

Carolinas now moves for relief from the bond requirement under § 44-7-220(B) and petitions the Court for supersedeas to prevent Piedmont from constructing the new hospital while this appeal is pending.

III. PERTINENT FACTS

In its court filing in connection with its opposition to Carolinas' Motion to Stay/Supersedeas filed with the ALC, Piedmont takes the position that: (1) no stay or supersedeas should be imposed; (2) it intends to proceed with the construction of a new hospital because of the absence of a stay or supersedeas; (3) the cost of the new hospital will range from $119 million to $146 million; and (4) if Carolinas is successful in its appeal, it will agree to cease "construction or operation" of the new, $100+ million hospital, which is adequate enough to preserve the *status quo*. *See* Piedmont Response Memorandum at pp. 1, 4 fn. 1, 10, 11 (attached as **Exhibit G**).

IV. LEGAL ARGUMENT

A. The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional.

1. History of S.C. Code Ann. § 44-7-220(B).

In 1990, by adopting 1990 South Carolina Laws Act 471 (S.B. 927) ("Act 471"), the South Carolina General Assembly created a judicial review process for the denial of CON applications that included a bond requirement for the first level of judicial review at the circuit court level. Significantly, this bond requirement imposed a discretionary, not

[1] Oral argument on the Petition for Rehearing in the *Grand Strand* case was conducted on February 25, 2015.

mandatory, award of the bond amount to the respondent if judicial review was unsuccessful. Act 471 provided in pertinent part:

> After the contested case hearing is concluded and a final board decision is made, a party who participated in the contested case hearing and who is affected adversely by the board's decision may obtain judicial review of the decision in the circuit court pursuant to the Administrative Procedures Act.... An applicant whose Certificate of Need application is denied by the board in favor of a competing application or a party adversely affected by the board's decision shall deposit a bond with the clerk of court for the circuit court before the filing of a petition to appeal a final decision of the board granting or denying a Certificate of Need. The bond must be secured by cash or a surety authorized to do business in this State in an amount equal to five percent of the total cost of the project or twenty thousand dollars, whichever is greater. **If the court affirms the decision of the board or dismisses the appeal, the court may award to the applicant approved for the Certificate of Need who is a party to the appeal all or a portion of the bond** and may award reasonable attorney's fees and costs incurred in the appeal.

(Emphasis added). Subsequently, in 2006 South Carolina Laws Act 387 (H.B. 3285) ("Act 387"), the South Carolina General Assembly streamlined judicial review of CON cases by providing for a direct appeal from the ALC to the South Carolina Court of Appeals without resort first to the circuit court. Although there had been a previous bond requirement for judicial review by the circuit court, the changes made by Act 387 did not clearly specify whether a bond was required in the Court of Appeals.

Thereafter, in July 2010, the South Carolina legislature enacted 2010 South Carolina Laws Act 278 (S.B. 337) ("Act 278"), which, among other things, clarified the bond requirement for CON appeals. Specifically, Act 278 amended S.C. Code Ann. § 44-7-220(B) to provide in pertinent part as follows:

> If the relief requested in the appeal is the reversal of the Administrative Law Court's decision to approve the Certificate of Need application..., the party filing the appeal 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 secured by cash or a surety authorized to do business in this State 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. **If the Court of Appeals affirms the Administrative Law Court's decision or dismisses the appeal, the Court of Appeals shall award to the party whose project is the subject of the appeal all of the bond** and also may award reasonable attorney's fees and costs incurred in the appeal. If a party appeals the denial of its own Certificate of Need application ... and there is no competing application involved in the appeal, the party filing the appeal is not required to deposit a bond with the Court of Appeals.

(Emphasis added).

In this case, because the statutory language applies the bond requirement to any party that is requesting appellate review of "the reversal of the ALC's decision to approve the Certificate of Need application," and because Carolinas' application and Piedmont's application were "competing," Carolinas was required to post a substantial bond in the maximum statutory amount of $1.5 million to pursue an appeal. Further, if Carolinas' appeal fails, forfeiture of the entire bond amount is now mandatory, not discretionary, regardless of the actual losses or delay incurred by the prevailing respondent.

2. The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional as a Violation of the Separation of Powers Doctrine.

The South Carolina Constitution mandates that the powers of government be divided between three branches and forbids one branch from interfering with the

operations of another branch. *State v. Langford*, 400 S.C. 421, 434, 735 S.E.2d 471, 478 (2012). The South Carolina Constitution provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

S.C. Const. art. 1, § 8. The separation of powers doctrine "prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws." *Langford*, 400 S.C. at 434, 735 S.E.2d at 478 (quoting *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982)).

Article V, § 4, of the South Carolina Constitution vests the authority to establish rules and procedures for the courts of the State in the South Carolina Supreme Court by providing, in relevant part:

> The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.

As such, South Carolina's constitutional mandate of separation of powers makes clear that the Supreme Court governs practice and procedure in the courts and that the General Assembly cannot make rules of court by enacting statutes. *In re Circuit Court Rule 102*, 1982 S.C. LEXIS 483, *3 (S. Ct. Aug. 31, 1982).

In this case, the General Assembly's enactment of the bond requirement under S.C. Code Ann. § 44-7-220(B) constitutes an unconstitutional violation of the separation of powers doctrine by making rules of the court for the perfection of an appeal from an

administrative decision and for an appeal bond, which is the exclusive domain of the judicial branch. The Supreme Court has promulgated rules governing appellate procedures for an appeal from a CON decision, and § 44-7-220(B) interferes with these rules by mandating certain actions required to perfect an appeal. Specifically, Rule 203(b)(6), (d)(2), and (e)(2), SCACR, prescribe the method for a party to appeal a CON decision from the ALC. The procedure and manner for perfecting an appeal from the ALC under Rule 203 do not require an appellant to file a bond for this Court to exercise jurisdiction over a CON appeal.

In contrast, § 44-7-220(B) requires an appellant from a CON decision involving a competing applicant to deposit a bond with the Court of Appeals of an amount equal to five percent of the total project cost up to a maximum of $1.5 million within five calendar days of filing the petition to appeal. Under § 44-7-220(B), the Court of Appeals does not have jurisdiction over a CON appeal involving a competing applicant unless the required appeal bond is posted within the statutory deadline. In effect, the bond requirement limits the jurisdiction of the Court of Appeals in such cases by creating a barrier to appeal that does not exist under the South Carolina Appellate Court Rules, as promulgated by the South Carolina Supreme Court.

Also, the Supreme Court has established the procedure governing appeal bonds in Rule 241, SCACR. Rule 241 provides as a general rule that a notice of appeal automatically stays matters decided in the decision on appeal with certain exceptions, including appeals from an administrative tribunal under S.C. Code Ann. § 1-23-380, such as the current matter. Under Rule 241(c), a party may move for a lifting of the automatic stay, or in cases subject to an exception of the automatic stay requirement, move for the

imposition of supersedeas, and the appellate court may condition the granting of supersedeas or lifting of the automatic stay upon the filing of a bond as it deems appropriate. Thus, Rule 241(c) grants the appellate courts considerable discretion in determining whether an appeal bond is appropriate and, if so, what the terms, conditions, and amount of such bond should be.

In contrast to the discretionary nature of an appeal bond under Rule 241(c), § 44-7-220(B) mandates with no exceptions that a party filing an appeal from a ALC decision denying a CON application involving a competing applicant must file a bond of up to a maximum of $1.5 million dollars. The appeal bond is required regardless of whether a stay or supersedeas is imposed. Moreover, the respondent is entitled to an award of all of the bond if it prevails on the appeal regardless of whether and to what extent it suffers any harm or damages as a result of the appeal. Thus, the mandatory forfeiture of the entire bond by an unsuccessful appellant serves as a penalty for filing an appeal. Put simply, § 44-7-220(B) removes the Court's discretion to determine whether a bond is appropriate, the amount of the bond, and to what extent, if any, the bond should be forfeited and awarded to the respondent. As such, § 44-7-220(B) directly conflicts with Rule 241(c) by removing the Court's authority in setting an appeal bond.

The conclusion that the bond requirement under § 44-7-220(B) violates the separation of powers doctrine comports with the South Carolina Supreme Court's Order promulgating former Circuit Court Rule 102, in which it declared its supreme and exclusive authority to promulgate rules of practice and procedure in South Carolina courts. *In re Circuit Court Rule 102*, 1982 S.C. LEXIS 483, *3 (S. Ct. Aug. 31, 1982). In that order, the South Carolina Supreme Court adopted former Circuit Court Rule 102,

which provided that an answer or demurrer to a complaint must be served within thirty days after service of the complaint. This rule conflicted with then S.C. Code Ann. § 15-13-310, which required an answer or demurrer to be served within twenty days of the complaint. Given the obvious conflict between the deadlines established by the statute and rule, the Supreme Court held that the deadline in Rule 102 superseded the deadline under § 15-13-310 because it, and not the legislature, had the exclusive constitutional power to promulgate rules of practice and procedure:

> There can be no question but that the orderly progression of cases through the judiciary is crucial to the exercise and functioning of the judicial power. Nothing could be more central to a tribunal than the procedure with which a controversy traverses from its initiation to its completion. Concomitant with this is the requirement that a court have authority to provide the procedural wherewithal to allow it to exercise its judicial power as required by the Constitution. We therefore hold that the judicial power of the court system inherently requires this Court to promulgate rules to promote justice and to insure its administration. . . .
>
> The judiciary is the branch required by the Constitution to promulgate rules or practice and procedure for the court system. In light of Article 1, § 8, this duty may not be performed, or discharged by another branch. 'The language is as strong as it is simple and clear. The Legislature cannot assume to itself to exercise of judicial powers' *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391. Nor may the Legislature infringe upon the court's duty in this area.

In re Circuit Court Rule 102, 1982 S.C. LEXIS 483 at *6-8. Therefore, the South Carolina Supreme Court has unequivocally recognized its exclusive power to promulgate rules of judicial practice and procedure which the legislature cannot invade. *See also Rutherford v. Rutherford*, 307 S.C. 199, 414 S.E.2d 157 (1992) (invalidating statute that limited Supreme Court's appellate scope of review in family court cases because

judiciary – not legislature – had authority to make rules for the court's practice and procedure).

Although South Carolina courts have not addressed the constitutionality of statutory appeal bonds and penalties that conflict with the applicable judicial rules of procedure, other jurisdictions have declared similar statutory appellate procedures to be constitutionally infirm under the separation of powers doctrine emanating from their respective state constitutions.[2] The most notable decision voiding a similar bond or penalty requirement is found in *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408 (Ky. 2005). In *Elk Horn Coal*, the Kentucky Supreme Court addressed the constitutionality of a statute which required a party appealing a judgment for the collection of money that had been stayed pending the appeal to pay a penalty of ten percent of the judgment to the prevailing party if the appeal was unsuccessful. After declaring the penalty requirement unconstitutional under the Equal Protection Clauses of the United States and Kentucky Constitutions, the Kentucky Supreme Court also held that the appeal penalty was unconstitutional under Kentucky's separation of powers doctrine.

The court in *Elk Horn Coal* began its analysis by noting that the Kentucky Constitution delegates exclusively to the Kentucky Supreme Court the authority to adopt rules of practice and procedure governing the state's courts and that a constitutional violation of separation of powers occurs when the legislature promulgates rule of practice

[2] In addition to the cases discussed below, several jurisdictions have recognized that their judiciaries have the inherent authority to promulgate rules of practice and procedure before their courts under the separation of powers doctrine. *See Sands v. Albert Pike Motor Hotel*, 245 Ark. 755, 434 S.W.2d 288 (1968); *Holloman v. State*, 175 Ga. 232, 165 S.E. 11 (1932); *People ex rel. Stamos v. Jones*, 40 Ill. 2d 62, 237 N.E.2d 495 (1968); *Waite v. Burgess*, 69 Nev. 230, 245 P.2d 994 (1952); *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922); *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Ct. App. 1990); *Complaint Against Grady*, 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

and procedure for the courts, including the appellate jurisdiction of the Kentucky Supreme Court. *Id.* at 423. Recognizing it had established rules to deter frivolous discretionary appeals, the Kentucky Supreme Court found that the penalty imposed on an unsuccessful appellant under the statute involved in that case "deters discretionary review motions – both frivolous and meritorious – and it thereby limits or restricts the Kentucky Supreme Court in exercising its jurisdiction to review cases from lower courts." *Id.* at 424. Accordingly, the *Elk Horn Coal* court held that the statutory appeal penalty invaded the Kentucky Supreme Court's exclusive power to prescribe its own rules for exercising appellate jurisdiction. *Id.*

Similarly, the Illinois Court of Appeals invalidated a statutory method for perfecting an appeal from an administrative decision that conflicted with the Illinois Supreme Court's rules for appellate procedure under the separation of powers doctrine in *Consumers Gas Co. v. Illinois Commerce Com.*, 144 Ill. App. 3d 229, 493 N.E.2d 1148 (1986). In that case, a public utility providing natural gas products sought appellate review of the Illinois Commerce Commission's administrative decision denying its application for a rate increase. The statutory scheme enacted by the legislature for appealing decisions of the commission conflicted with the Illinois Supreme Court's procedure for pursuing direct appellate review. In deciding which appellate procedure governed the appeal, the court invoked the separation of powers doctrine to declare "judicial administration" to be one of the judiciary's "inherent powers worthy of protection against legislative encroachment." *Id.* at 236, 493 N.E.2d at 1152. Thus, the court held that the legislature's adoption of the statutory procedure for appealing an administrative decision of the commission was an unconstitutional violation of separation

of powers because the procedure conflicted with the Illinois Supreme Court's rules. *Id.* According to the court, the separation of powers doctrine "prohibited [the legislature] from establishing procedures for obtaining an appeal bond from an administrative decision where a supreme court rule is already in place for that purpose." *Id.* at 237, 493 N.E.2d at 1153.

Like the statutes invalidated in *Elk Horn Coal* and *Consumers Gas Co.*, the bond requirement in § 44-7-220(B) violates the separation of powers doctrine by encroaching upon the judicial department's exclusive authority to promulgate rules of appellate practice and procedure. Just as the Kentucky and Illinois Constitutions vest the authority to establish rules and procedure exclusively in their respective supreme courts, the South Carolina Constitution vests the same authority in the South Carolina Supreme Court. *See* S.C. Const. art. 1, § 8 and art. V, § 4. Pursuant to such power, the South Carolina Supreme Court has promulgated rules of procedure for the perfection of an appeal from an administrative decision and for the issuance of an appeal bond to protect a prevailing litigant from injury resulting from the delay of an appeal in appropriate circumstances, which are similar to the rules of court adopted by the Kentucky and Illinois Supreme Courts that superseded the statutory procedures in *Elk Horn Coal* and *Consumers Gas Co.* Section 44-7-220(B) effectively operates as the statutory appeal penalty did in *Elk Horn Coal* because it imposes a substantial penalty on an unsuccessful appellant, thereby deterring meritorious appeals and limiting the appellate courts' ability to review cases from the ALC. Moreover, the mandatory provisions of § 44-7-220(B) limit the courts' inherent authority to determine the terms and conditions of the bond imposed on a CON appellant. Similarly, the bond requirement under § 44-7-220(B), if not satisfied, conflicts

with the existing Supreme Court rules for perfecting an appeal from an administrative decision by depriving the appellate courts' of jurisdiction over CON appeals, and it is therefore similar to the statutory scheme voided in *Consumers Gas Co.* Accordingly, *Elk Horn Coal* and *Consumer Gas Co.* support the conclusion that the legislature's adoption of the bond requirement in § 44-7-220(B) constitutes an unconstitutional violation of the separation of powers doctrine.[3]

In sum, the bond requirement under § 44-7-220(B) violates the separation of powers doctrine by encroaching upon the judiciary's exclusive authority to promulgate rules of appellate practice and procedure. The bond requirement conflicts with the Supreme Court's rule for perfecting an appeal from an administrative tribunal by requiring a substantial appeal bond that deters appeals from a CON decision involving a competing applicant and thereby limits the Court of Appeals' ability to review such cases. Moreover, the mandatory bond requirement conflicts with the rule for appeal bonds by limiting the Court of Appeals' inherent discretion to determine the appropriate terms and conditions of an appeal bond. Therefore, the Court of Appeals should invalidate the bond requirement under § 44-7-220(B) as an unconstitutional violation of the separation of powers doctrine.

3. The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional as a Violation of the Equal Protection Clause.

The Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection of the law essentially means "that all persons

[3] As aptly stated in *Elk Horn Coal*, the fact that the bond requirement has existed for many years unchallenged does not mean that it is constitutionally sound. *Elk Horn Coal.*, 163 S.W.3d at 412 ("But the long existence of an appeal penalty as a part of the law of this state does not insulate it from a constitutional challenge.").

similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny. *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 26, 736 S.E.2d 651 (2012). If the classification does not implicate a suspect class or abridge a fundamental right[4], the rational basis test is used. *Id.* at 26, 736 S.E.2d at 656. Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis. *Id.* at 26, 736 S.E.2d at 656-657.

In this case, the bond requirement of § 44-7-220(B) violates the Equal Protection Clauses because it treats CON appellants differently than other appellants without being rationally related to any legitimate state interest. Section 44-7-220(B) imposes on appellants of an adverse CON decision involving competing applicants a substantial appeal bond that is not imposed on any other appellant. This bond requirement is a mandatory precondition to perfecting a CON appeal, and the appellate courts of this State have no discretion in requiring such bond. Moreover, § 44-7-220(B) mandates that the entire bond be forfeited to the respondent if the appellant is unsuccessful regardless of the

[4] While there may be some question about whether right of access to judicial review is a "fundamental right," one court considering a similar statute found it to be unconstitutional even under the "rational basis" standard. *See Elk Horn Coal,* 163 S.W.3d at 419 ("Instead of requiring a 'rational basis,' we have construed our Constitution as requiring a 'reasonable basis' or a 'substantial and justifiable reason' for discriminatory legislation in areas of social and economic policy. . . . We need not decide, however, whether the facts of this case require us to invoke Kentucky's heightened standard because we hold that KRS 26A.300 fails the rational basis test, which is sufficient to show a violation of the equal protection provisions of both Constitutions.").

merits of the appeal or the damage suffered by the respondent as a result of the appeal. Thus, the bond requirement operates as a penalty, imposes a substantial burden on unsuccessful CON appellants, and is unlike any appeal requirement imposed on other unsuccessful appellants in South Carolina courts.

Similar statutory bond penalties have routinely been held to violate the Equal Protection Clauses. The leading case on this issue is *Lindsey v. Normet*, 405 U.S. 56 (1971), in which the United States Supreme Court invalidated an Oregon law that imposed a double bond on tenants bringing an appeal under the state's Forcible Entry and Wrongful Detainer ("FED") statute. Under that statute, a tenant appealing an adverse decision under the FED statute was required to post a bond for twice the amount of rent during the pendency of the appeal, which was automatically forfeited to the landlord without proof of actual damage. *Id.* at 75. The purpose of the double bond requirement was to deter frivolous appeals. *Id.*

The Supreme Court ruled that the double bond requirement was unconstitutional under the Equal Protection Clause because no other appellant was subject to the automatic assessment of unproved damages:

> It cannot be denied that the double-bond requirement heavily burdens the statutory right of an FED defendant to appeal. While a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord. This requirement is unnecessary to assure the landlord payment of accrued rent since the undertaking an FED defendant must file pursuant to the general appeal bond statute, ORS § 19.040 (b), must cover 'the value of the use and occupation of such property . . .

> from the time of the appeal until the delivery of the possession thereof,' and since the landlord may bring a separate action at law for payment of back rent under ORS § 91.220. Moreover, the landlord is protected against waste or damages occurring during the appeal by the § 19.040 (b) undertaking that the tenant must file if he wishes to remain in possession of the property during the appeal. The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond. The impact on FED appellants is unavoidable: if the lower court decision is affirmed, the entire double bond is forfeited; recovery is not limited to costs incurred by the appellee, rent owed, or damage suffered. No other appellant is subject to automatic assessment of unproved damages. We discern nothing in the special purposes of the FED statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination.

Id. at 77-78. Thus, the Court held that double bond requirement was discriminatory, arbitrary, and irrational and, therefore, in violation of the Equal Protection Clause.

Relying on *Lindsey*, other courts have declared appeal bonds and penalties to be unconstitutional under the Equal Protection Clause because of their discriminatory effect on unsuccessful appellants. For example, in *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976), the Ninth Circuit Court of Appeals invalidated a double-bond requirement under the federal Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499g(a). Although the court recognized that the statute was intended to deter frivolous appeals, it refused to uphold the requirement, observing that "*Lindsey* expressly held that there is no rational relationship between this admittedly legitimate purpose and a double bond requirement." *O'Day*, 536 F.2d at 860.

And in *Elk Horn Coal*, the Kentucky Supreme Court not only invalidated the appeal penalty imposed on money judgment appellants under the separation of powers

doctrine, it also ruled that the penalty violated the Equal Protection Clause under *Lindsey*. The court held that the penalty was discriminatory because it only applied to a small number of appellants without advancing the purported state interest of deterring frivolous appeals:

> Ultimately, the problem with the statute is that while it may deter a small number of frivolous appeals – though, more likely than not, these appeals would already be deterred by other provisions – it deters even more meritorious appeals. And, because it applies to such a narrow class. . . it violates *Lindsey's* command that an appeal right 'cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.'

Elk Horn Coal, 163 S.W.3d at 421 (quoting *Lindsey*, 405 U.S. at 77) (emphasis in original).

Lindsey and its progeny instruct that the bond requirement under § 44-7-220(B) violates the Equal Protection Clauses of the South Carolina and United States Constitutions. The statute imposes an appeal bond on one narrow class of appellant. Unlike nearly every other appellant, an unsuccessful CON applicant must post a substantial appeal bond to obtain judicial review of a lower decision. And although the appeal bond can be so substantial that it will deter frivolous appeals, it will similarly deter non-frivolous appeals. Moreover, the amount of bond is not rationally tied to any injury suffered by a successful respondent as a result of the appeal, because such respondent is automatically awarded the entire amount of the bond regardless of whether it suffered an injury. As a result, the bond requirement is not rationally related to any legitimate state interest, and even if it did, it would nevertheless be unconstitutional because it arbitrarily and irrationally imposes a penalty on unsuccessful CON appellants. Therefore, the Court

should rule that the bond requirement violates the Equal Protection Clauses and is invalid.

4. The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional as a Violation of the Due Process Clause.

Article I, § 22 of the South Carolina Constitution establishes due process rights for persons appearing before administrative tribunals, such as the ALC. This section provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. art. I, § 22 (emphasis added). This provision is intended to serve "as a safeguard for the protection of liberty and property of citizens in recognition of the increasing governmental powers delegated to administrative agencies." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997).

In applying this provision, South Carolina appellate courts "have consistently indicated that the protections provided under [Article I, § 22] are the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions." *South Carolina Ambulatory Surgery Ctr. Ass'n v. South Carolina Workers' Comp. Comm'n*, 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010). Due process under this section requires "notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008) (emphasis added).

The bond requirement under S.C. Code Ann. § 44-7-220(B) constitutes a violation of CON appellants' due process rights because it significantly burdens their access to judicial review. Article I, § 22 of the South Carolina Constitution guarantees a person appealing from an administrative or quasi-administrative agency the right to judicial review without limitation in all instances. Section § 44-7-220(B) interferes with that right by requiring a substantial appeal bond as a pre-condition to any judicial review of a CON decision involving a competing applicant by the ALC. The bond requirement, thus, effectively prevents an unsuccessful CON applicant from appealing an adverse decision if it cannot afford the bond or does not want to risk the forfeiture of the bond – regardless of the merits of the prospective appeal. In other words, § 44-7-220(B) deters the exercise of the right to judicial review guaranteed by Article I, § 22 of the South Carolina Constitution. Under § 44-7-220(B), there is no right to judicial review; rather, judicial review is a legislatively created privilege available only to those who are able and willing to purchase it. Therefore, that section's bond requirement constitutes an unconstitutional infringement on the right to judicial review guaranteed by Article I, § 22 of the South Carolina Constitution, and it should be invalidated accordingly. *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (declaring constitutionally invalid fees and costs requirements that interfered with access to state judicial system).

B. This Court has the Inherent Authority To Grant a Supersedeas.

The Court should stay the judgment by exercising its equitable and discretionary power to grant a supersedeas under Rule 241(c), SCACR.

Rule 241(c) provides in pertinent part as follows:

> (1) In a case subject to an exception [of the automatic stay], any party may move for an order imposing a supersedeas of

> matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal.
>
> (2) In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot;
>
> (3) The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate.

The purpose of a supersedeas is to stay proceedings in order to preserve the *status quo* pending the determination of the appeal and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him. *Graham v. Graham*, 301 S.C. 128, 390 S.E.2d 469 (Ct. App. 1990), citing 4A C.J.S. *Appeal & Error* § 662 at 494-95, 497 (1957). As a rule, a supersedeas does not reverse, annul, or undo what has already been done, or impair the force of the judgment, order, or decision of a trial court - a supersedeas suspends a judgment but does not annul the judgment itself. *Id.* The "*status quo*" is defined in Black's Law Dictionary as, "the existing state of things at any given date."

Similarly, S.C. Code Ann. §1-23-380 of the Administrative Procedures Act ("APA"), which is entitled "Judicial review upon exhaustion of administrative remedies," permits the Court to order a stay of the judgment. This statute provides in pertinent part:

> A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final

> decision in a contested case is entitled to judicial review pursuant to this article and Article 1.
>
> (2) Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the agency decision. . . . The agency may grant, or the reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.

Lastly, an equitable stay may also be invoked if justified by circumstances which outweigh any potential harm to the party against whom it operates. In making this determination, the court "must weigh competing interests and maintain an even balance." *Merritt Bros., Inc. v. Marine Midland Realty Corp.*, 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992) (citing *U.S. Central Building Supply, Inc. v. Wilke*, 685 F. Supp. 936, 938 (D. Md. 1988)); *see also Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

In this case, a stay is appropriate because any victory on appeal by Carolinas will be "hollow" if Piedmont has already pursued building a new hospital and eroded Carolinas' market share and patient base, with no accompanying remedy for Carolinas. Additionally, allowing Piedmont to construct a $100+ Million hospital and then cease operations if Piedmont does not prevail on appeal is inconsistent with the CON Act, which has a purpose to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services

which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." *See* S.C. Code Ann. § 44-7-120.

To the extent that the Court finds it appropriate to protect Piedmont from any delay caused by a stay should it prevail on appeal, it can exercise its inherent, equitable power to stay the judgment subject to the bond posted by Carolinas under § 44-7-220(B). In such case, the Court may use all or part of the existing bond to secure Piedmont's interest during the pendency of the appeal. If Piedmont ultimately prevails in this appeal, then the Court could award all or part of the bond to Piedmont to compensate it for any injury it suffered upon Piedmont's demonstration of such injury.

While there appears to have been no South Carolina case that has addressed this precise issue of whether such a bond is appropriate in these circumstances, a comparable case is *Melton v. Walker*, 209 S.C. 330, 40 S.E.2d 161 (1946). In *Melton*, the South Carolina Supreme Court addressed whether an appeal from an attachment stays the underlying proceedings when the South Carolina Code is silent on such a stay and concluded that the existence of an attachment bond as a remedy justifies the stay, even where the statutes do not address the issue expressly. The Supreme Court stated:

> Apparently this court has not heretofore had to solve the precise problem now presented, to wit, whether appeal from an order dissolving an attachment stays proceedings upon the order. . . . The facts now before us do make the issue and we think that the code contemplates that the appeal stays dissolution of the attachment until it is decided, dismissed or abandoned. The immediately apparent hardship upon the defendant is not real because he had his remedy for release of the property by the filing of a replevin bond under section 544 of the Code of 1942. Moreover, his rights are protected by the bond given by the plaintiff, pursuant to section 530, in order to procure the attachment. If the law were as the respondent here insists, plaintiff's right of appeal might indeed be a hollow right

> and his victory a fruitless one, if meanwhile the attached property be released and dissipated.

Id. at 335, 40 S.E.2d at 163.

For these reasons, the posting of a substantial cash bond by Carolinas justifies a stay of the ALC's Amended Final Order and any further action by the agency in reliance on that Amended Final Order. *See* Rule 241(c)(1), SCACR, *supra*.

V. CONCLUSION

For the foregoing reasons, Appellant Carolinas respectfully requests that the Court grant its Motion for Relief from Bond and Petition for Supersedeas Pending Resolution of the Appeals Process.

Respectfully submitted,

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Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System

March 16, 2015
Charleston, South Carolina

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 action and that he has read the contents of the foregoing Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of the Appeal Process and that the matters contained therein are true to the best of his knowledge.

F. Del Murphy, Jr.
Senior Vice President
Planning & Development
CHS Management Company
Carolinas HealthCare System

Sworn to before me
This 13 day of March, 2015

Tameika Chappel
Notary Public for North Carolina
My Commission expires: 6/21/19

TAMEIKA CHAPPEL
Notary Public
Mecklenburg County
NORTH CAROLINA

EXHIBIT A

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 14 2015
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Petitioner,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

NOTICE OF APPEAL

The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Appellant"), appeals the Final Order of the Honorable S. Phillip Lenski dated March 31, 2014 (the "Final Order") and the Amended Final Order dated December 15, 2014 (the "Amended Final Order"), which granted a Certificate of Need to Petitioner Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center and denied a Certificate of Need to Appellant. Appellant received written notice of the entry of the Final Order on March 31, 2014. On April 9, 2014, Appellant timely filed a Motion to Alter or Amend the Final Order pursuant to Rule 29(d) of the Rules of

Procedure of the Administrative Law Court and Rule 59 of the South Carolina Rules of Civil Procedure. On May 2, 2014, the Honorable S. Phillip Lenski vacated the Final Order. On December 15, 2014, the Honorable S. Phillip Lenski issued the Amended Final Order.[1] Appellant received written notice of the entry of the Amended Final Order on December 15, 2014.

January 14, 2015

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Attorneys for Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center

Ashley C. Biggers, Esquire
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Columbia, SC 29201

Attorneys for the South Carolina Department of Health and Environmental Control

[1] The Final Order, the May 2, 2014 order vacating the Final Order, and the Amended Final Order are attached hereto as required by South Carolina Appellate Court Rule 203(d)(2)(B).

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Petitioners,

v.

South Carolina Department of Health and Environmental Control
And The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

PROOF OF SERVICE OF NOTICE OF APPEAL

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of the foregoing ***Notice of Appeal*** by hand delivery, addressed as follows:

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley &
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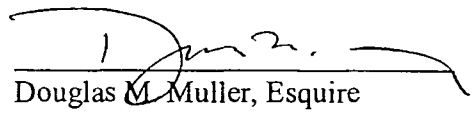

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January 14, 2015

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control
And The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is the ..... Appellant.

PROOF OF SERVICE

This is to certify that on January 14, 2015 I served the Administrative Law Court in the foregoing matter with a copy of the ***Notice of Appeal*** by hand delivery, addressed as follows:

The Honorable Jana E. Shealy
Clerk, Administrative Law Court
Edgar Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

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Attorneys for Petitioner The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

January 20, 2015

Charleston, South Carolina

EXHIBIT B

RECEIVED
JAN 16 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Petitioner-Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

BOND

WHEREAS, Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Appellant") has filed a Notice of Appeal, effectively appealing the (1) Final Order of the Honorable S. Phillip Lenski dated March 31, 2014 (the "Final Order") and (2) Amended Final Order dated December 15, 2014 (the "Amended Final Order"). A copy of the Notice of Appeal (without Orders) is attached hereto as **Exhibit A**;

WHEREAS, the subject appeal seeks the reversal of the Administrative Law Court's decisions to grant a Certificate of Need to Petitioner Amisub of South Carolina,

Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center for a 100-bed hospital in Fort Mill, South Carolina, (the "Project") and to deny a Certificate of Need to Appellant; and

WHEREAS, pursuant to S.C. Code Ann. § 44-7-220(B), Appellant has paid unto the Office of the Clerk of the South Carolina Court of Appeals the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), in cash, said amount being the maximum amount payable by statute as the total cost of the Project is One Hundred and Nineteen Million Eight Hundred and Eight Thousand and Nine Hundred and Sixty-Four and no/100 Dollars ($119,808,964.00), as set forth in Paragraph 10 of the Findings of Fact in the Amended Final Order and as alleged by Petitioner-Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that Appellant is bound unto the Petitioner-Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center in the principal sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), to the extent this sum or any portion thereof may be determined to be due to the Petitioner-Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center upon final adjudication of Appellant's appeal. This cash bond is given pursuant to S.C. Code Ann. § 44-7-220(B) and shall be awarded or released only upon appropriate Order of the South Carolina Court of Appeals. Nothing contained in this Bond shall be deemed an admission of any liability on the part of the Appellant or waive Appellant's

right to seek relief from the provisions of S.C. Code Ann. § 44-7-220(B) or to challenge its validity.

Should the South Carolina Court of Appeals reverse, in whole or in part, the Final Order and Amended Final Order of the Administrative Law Court, then this cash bond shall be void and the cash returned to Appellant.

Respectfully submitted,

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Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

January 16, 2015

Charleston, South Carolina

EXHIBIT C

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center Petitioners, v. South Carolina Department of Health and Environmental Control and The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center - Fort Mill, Respondents.	)	Docket No. 11-ALJ-07-0575-CC **RESPONDENT THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A CAROLINAS MEDICAL CENTER-FORT MILL'S MOTION TO STAY/SUPERSEDEAS PENDING APPEAL AND MEMORANDUM IN SUPPORT**

Respondent The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") submits this Motion to Stay/Supersedeas Pending Appeal pursuant to Rules 205 and 241(d) of the South Carolina Appellate Court Rules ("SCACR"), S.C. Code Ann. § 1-23-380(2) and Rule 65 of the South Carolina Rules of Civil Procedure ("SCRCP").

I. PROCEDURAL BACKGROUND

This Certificate of Need ("CON") contested case was initiated by Petitioner Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ("Piedmont") on November 15, 2011. After a hearing on the merits, this Court issued a Final Order dated March 31, 2014 (the "Final Order") which granted a CON to Piedmont and denied a CON to Carolinas. Carolinas received written notice of the entry of the Final Order on March 31, 2014. On April 9, 2014, Carolinas timely filed a Motion to Alter or Amend the Final Order pursuant to Administrative Law Court ("ALC") Rule 29(d) and Rule 59, SCRCP. On May 2, 2014, this Court vacated the Final Order. On December 15, 2014, this Court issued an Amended

Final Order (the "Amended Final Order"). Carolinas received written notice of the entry of the Amended Final Order on December 15, 2014, and filed a Notice of Appeal (attached hereto as **Exhibit A**) with the South Carolina Court of Appeals on January 14, 2015. Carolinas subsequently filed a Cash Bond (attached hereto as **Exhibit B**) pursuant to S.C. Code Ann. § 44-7-220(B) with the Clerk of the South Carolina Court of Appeals in the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), which is the maximum amount payable by statute as the total cost of Piedmont's hospital project is One Hundred and Nineteen Million Eight Hundred and Eight Thousand and Nine Hundred and Sixty-Four and no/100 Dollars ($119,808,964.00), as set forth in Paragraph 10 of the Findings of Fact in the Amended Final Order.

II. ARGUMENT

A. This Court has Jurisdiction to Consider the Motion to Stay/Supersedeas.

Under Rule 241, SCACR, a motion to stay must first be brought in the ALC, and the ALC must rule on it (or unreasonably delay its ruling) before the South Carolina Court of Appeals can consider it. Specifically, SCACR Rule 241(d) provides:

> (1) **Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.**
>
> (2) **After the lower court or administrative tribunal has ruled**, any party may petition the appellate court where the appeal is pending or an individual judge or justice for review of this order. The individual judge or justice may grant or deny the relief on a temporary basis, and refer the matter to the full appellate court to hear and determine the matter, or he or she may issue a final

> order. Upon the issuance of a final order by an individual judge or justice, an aggrieved party may petition the full appellate court for review of that decision....

(Emphasis added). Similarly, Rule 205, SCACR, states:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; **the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241**. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

(Emphasis added). Thus, both Rule 205 and Rule 241(d), SCACR, make it clear that the ALC has jurisdiction to consider any motion for a stay/supersedeas after a Notice of Appeal is filed, and the Court of Appeals may only consider it after the ALC has ruled or under "extraordinary circumstances," such as the ALC's "unnecessary delay" in ruling on the motion.

B. Respondent Carolinas' Motion to Stay/Supersedeas Should be Granted.

1. A stay should be granted because Respondent Carolinas has posted a bond under S.C. Code Ann. § 44-7-220(B).

In adopting 2006 South Carolina Laws Act 387 (H.B. 3285) ("Act 387"), the South Carolina General Assembly streamlined judicial review of CON cases by providing for a direct appeal from the ALC to the South Carolina Court of Appeals without resort first to the Circuit Court. Although there had been a previous bond requirement for judicial review by the Circuit Court, the changes made by Act 387 did not clearly specify whether a bond was required in the Court of Appeals.

In July 2010, the South Carolina legislature enacted 2010 South Carolina Laws Act 278 (S.B. 337) ("Act 278"), which, among other things clarified the bond requirement for CON appeals. Specifically, Act 278 amended S.C. Code Ann. § 44-7-220(B) to provide in pertinent part as follows:

> If the relief requested in the appeal is the reversal of the Administrative Law Court's decision to approve the Certificate of Need application..., the party filing the appeal 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 secured by cash or a surety authorized to do business in this State 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. If the Court of Appeals affirms the Administrative Law Court's decision or dismisses the appeal, the Court of Appeals shall award to the party whose project is the subject of the appeal all of the bond and also may award reasonable attorney's fees and costs incurred in the appeal. If a party appeals the denial of its own Certificate of Need application ... and there is no competing application involved in the appeal, the party filing the appeal is not required to deposit a bond with the Court of Appeals.

In this case, because the statutory language applies the bond requirement to any party that is requesting appellate review of "the reversal of the Administrative Law Court's decision to approve the Certificate of Need application," and because Carolinas' application and Piedmont's application were "competing," a substantial bond in the maximum statutory amount is required to pursue an appeal.

This statutory procedure is silent on whether the posting of a bond will be accompanied by a stay of the underlying judgment, but the Administrative Procedures Act ("APA") recognizes that a stay may be granted "upon appropriate terms." *See* S.C. Code Ann. § 1-23-380(2). Further, the APA incorporates by reference Rule 65, SCRCP, which contains a bond requirement. *See* S.C. Code Ann. § 1-23-380(2); see also Rule 65(c), SCRCP ("no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained"). In this case, the posting of a substantial cash bond in the sum of $1,500,000.00 clearly constitutes

"appropriate terms," and the fact that the cash bond would be forfeited if Piedmont prevails on appeal more than protects Piedmont from any damages occasioned by the delay.

While there appears to have been no South Carolina case that has addressed this precise issue, a comparable case is *Melton v. Walker*, 209 S.C. 330, 40 S.E.2d 161 (1946). In *Melton*, the South Carolina Supreme Court addressed whether an appeal from an attachment stays the underlying proceedings when the South Carolina Code is silent on such a stay and concluded that the existence of an attachment bond as a remedy justifies the stay, even where the statutes do not address the issue expressly. The Supreme Court stated:

> Apparently this court has not heretofore had to solve the precise problem now presented, to wit, whether appeal from an order dissolving an attachment stays proceedings upon the order. . . . The facts now before us do make the issue and we think that the code contemplates that the appeal stays dissolution of the attachment until it is decided, dismissed or abandoned. The immediately apparent hardship upon the defendant is not real because he had his remedy for release of the property by the filing of a replevin bond under section 544 of the Code of 1942. Moreover, his rights are protected by the bond given by the plaintiff, pursuant to section 530, in order to procure the attachment. If the law were as the respondent here insists, plaintiff's right of appeal might indeed be a hollow right and his victory a fruitless one, if meanwhile the attached property be released and dissipated.

Id. at 335, 40 S.E.2d at 163.

Here, Carolinas' rights and Piedmont's remedies would be similarly protected. Piedmont is protected by a substantial cash bond, justifying a stay. If a stay is not put in place, any victory on appeal by Carolinas will be "hollow" if Piedmont has already built a hospital and eroded Carolinas' market share and patient base, with no accompanying remedy for Carolinas (as explained further below). If the substantial bond is required without an accompanying stay, there

would be little reason for it, as there will have been no delay to Piedmont and no "damages" for which Piedmont should be entitled to recovery if it prevails on appeal.[1]

For these reasons, the posting of a substantial cash bond by Carolinas justifies a stay of this court's Amended Final Order and any further action by the agency in reliance on that Amended Final Order. *Cf.* Rule 65(c), SCRCP, *supra*.

2. In the alternative, an equitable stay should be granted under the circumstances.

In the alternative, the Court should stay the judgment by exercising its equitable power to stay under Rule 65, SCRCP, which is incorporated into the APA by S.C. Code Ann. § 1-23-380(2). Specifically, S.C. Code Ann. § 1-23-380(2) provides:

> Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the agency decision .... **The agency may grant, or the reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.**

(Emphasis added). A preliminary injunction should issue under Rule 65 if necessary to preserve the *status quo ante*, and upon a showing by the moving party that: (i) without such relief it will suffer irreparable harm; (ii) it has a likelihood of success on the merits; and (iii) there is no adequate remedy at law. *Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

Irreparable Harm and No Adequate Remedy at Law:

In the Amended Final Order, this Court found that Piedmont would increase its revenue by taking market share from Carolinas in Northern York County by the construction of a new hospital. Specifically, the Court stated:

[1] As noted in the statutory language recited above, S.C. Code Ann. § 44-7-220(B) also allows for a discretionary award of attorneys' fees and costs to the party whose project is on appeal.

> *Piedmont's projected market share assumes that with the presence of FMMC in Northern York County that it could return approximately to the share it had in 2003-2004. The only material differences in the historic and projected market shares are in the three zip codes in Northern York County where Piedmont historically has not had a large market share. With the location of FMMC in Northern York County, Piedmont assumed that would change, projecting shares comparable to the market share Piedmont has in the immediate area where it is located....*
>
> *Overall, Piedmont's market share assumptions are reasonable and achievable....*

(Amended Final Order, Findings of Fact 79, 81) (internal transcript citations omitted).

Inherent in that finding is that Carolinas will lose significant revenue in Northern York County if Piedmont is allowed to proceed in establishing its new hospital because Piedmont will take market share from Carolinas in an area where Piedmont's market share has historically been low and Carolinas' market share has been high. Carolinas will feel the same effects referenced by this Court in the Amended Final Order in terms of a change in referral patterns and a loss of patient base even prior to the construction of Piedmont's new hospital as Piedmont implements its strategy of recruiting new physicians and patients while it establishes a presence in Northern York County during the time that the hospital is being built (See Finding of Fact Nos. 25-26, 74 in the Amended Final Order).

While typically economic loss alone is not considered "irreparable harm," the cases that have addressed the issue have reached that conclusion because the injury can later be remedied by a damages award. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("[I]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." (internal quotation omitted)). This administrative case does not offer that option –

Carolinas cannot sue for the recovery of its lost revenue if it is successful on appeal, and in fact it has no remedy to restore this lost revenue. Under those circumstances, courts have concluded that economic loss coupled with the lack of a remedy constitutes "irreparable harm" justifying an injunction *See Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) ("Because the Eleventh Amendment bars a legal remedy in damages . . . the court held that plaintiffs' injury was irreparable. We agree."). Here, there can be no compensation or monetary award - there is no way to compensate Carolinas for the revenue lost while Piedmont proceeds with its new hospital, and no adequate remedy at law. The lack of a remedy, coupled with the economic loss, results in irreparable harm to Carolinas if the injunction is not granted.

Likelihood of Success on the Merits:

In passing upon the "likelihood of success on the merits" in an application for an injunction, the court must satisfy itself, not that the movant certainly has the right, but that he has a fair question to raise as to the existence of such a right. *Williams v. Jones*, 92 S.C. 342, 348, 75 S.E. 705,710 (1912). It is well settled in South Carolina that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a *prima facie* showing has been made. *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969). When a *prima facie* showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate determination of the case on the merits. *Id.*

In this case, the Court of Appeals may reverse or modify the Amended Final Order if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law.

[cite]. Carolinas maintains and will contend in its appeal that the Amended Final Order should be reversed for a variety of reasons, most notably the following[2]:

Constitutional Argument – Carolinas contends that the Court applied the S.C. CON Act and regulations in a manner that violates the "as applied" dormant Commerce Clause of the U.S. Constitution by ruling in favor of an incumbent, South Carolina provider over a North Carolina-based provider and with the express purpose of interfering with the interstate commerce arising from the outmigration of patients from South Carolina to North Carolina, thereby repeating the mistakes made originally by DHEC in the prior review. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 108-109, 705 S.E.2d 28, 38-39 (2011) (ALCs are empowered to hear "as applied" constitutional challenges to statutes and regulations).

Improper Application of Regulatory Criteria – Carolinas contends that the Court erroneously elevated the importance of "adverse impact" while simultaneously holding that it was the lowest-ranked of the review criteria.

Improper Admission of Evidence – Carolinas contends that the Court erroneously allowed and relied upon the testimony of three (3) Piedmont-affiliated physicians who had been

[2] Carolinas lists the following grounds for reversal as an illustration and the following list is not intended to be a full recitation of all grounds for appeal. Carolinas specifically reserves and does not waive the right to include other grounds for appeal which are not stated in this Motion.

subject to a Motion to Strike because they were belatedly identified just prior to trial and at the very end of discovery. Additionally, the Court relied upon unreliable hearsay testimony in finding that referral patterns and admissions practices of physicians apply to an analysis of hospital utilization and projected charity care.

Carolinas has presented a sufficient *prima facie* case to establish a likelihood of success on the merits under the standard, and to permit an injunction in the form of a stay of the judgment.

Other Equitable Relief:

An equitable stay may also be invoked if justified by circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination, the court 'must weigh competing interests and maintain an even balance.' *Merritt Bros., Inc. v. Marine Midland Realty Corp.*, 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992) (citing *U.S. Central Building Supply, Inc. v. Wilke*, 685 F. Supp. 936, 938 (D. Md. 1988)); *see also Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."). Even if the Court finds that Carolinas' Motion to Stay/Supersedeas does not strictly meet the requirements outlined above, it can exercise its inherent, equitable power to stay the judgment given the fact that a substantial bond has been posted to protect Piedmont from any delay should it prevail on appeal.

III. CONCLUSION

The purpose of a supersedeas is to stay proceedings in order to preserve the *status quo* pending the determination of the appeal and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him. *Graham v. Graham*, 301 S.C. 128, 390 S.E.2d 469 (Ct. App. 1990), citing 4A C.J.S. *Appeal & Error* § 662 at 494-95, 497 (1957). As a rule, a supersedeas does not reverse, annul, or undo what has already been done, or impair the force of the judgment, order, or decision of a trial court - a supersedeas suspends a judgment but does not annul the judgment itself. *Id.* The "*status quo*" is defined in Black's Law Dictionary as, "the existing state of things at any given date." Here, the *status quo* should be preserved by staying the Amended Final Order and judgment pending Carolinas' appeal.

For the foregoing reasons, Respondent Carolinas respectfully requests that the Court grant it Motion to Stay/Supersedeas Pending Appeal.

Respectfully submitted,

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Attorneys for Respondent The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System

January 28, 2015
Charleston, South Carolina

VERIFICATION

Personally appeared before me, the undersigned, who being duly sworn, deposes and states under oath that he is the agent for the Respondent in the above-referenced action and that he has read the contents of the foregoing Motion to Stay/Supersedeas Pending Appeal and Memorandum in Support and that the matters contained therein are true to the best of his knowledge.

F. Del Murphy, Jr.
Senior Vice President
Planning & Development
CHS Management Company
Carolinas HealthCare System

Sworn to before me
This 27 day of January, 2015

Tameika Chappell
Notary Public for North Carolina
My Commission expires: 6/21/19

TAMEIKA CHAPPEL
Notary Public
Mecklenburg County
NORTH CAROLINA

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center Petitioners, v. South Carolina Department of Health and Environmental Control and The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center - Fort Mill, Respondents.	Docket No. 11-ALJ-07-0575-CC **CERTIFICATE OF SERVICE**

I hereby certify that I have, this 28 day of January 2015, served a copy of the foregoing ***Respondent The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System's Motion to Stay/Supersedeas Pending Appeal and Memorandum in Support*** upon the following by electronic mail and by regular mail addressed to:

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley & Scarborough, L.L.P.
1320 Main Street, 17th Floor
Columbia, SC 29201

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
DHEC, Office of the General Counsel
2600 Bull Street
Columbia, SC 29201-1708

MOORE & VAN ALLEN PLLC

Heather Morin

EXHIBIT D

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill, Respondents.	Docket No.: 11-ALJ-07-0575-CC **ORDER GRANTING MOTION TO STAY PENDING APPEAL**

This matter is before the court on an Application to Stay Pending Appeal filed by The Charlotte Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill (Respondent) on January 28, 2015. The Respondent seeks to stay the December 15, 2015 Amended Final Order of the South Carolina Administrative Law Court ("ALC" or "court") granting the contested Certificate of Need (CON) to Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center (Petitioner) pending the outcome of the appeal filed by the Respondent in the South Carolina Court of Appeals. As of the date of this Order, the court has received no responsive pleadings from either the Petitioner or the Department.

This CON contested case was initiated by the Petitioner on November 15, 2011. After a hearing on the merits, this court issued a Final Order dated March 31, 2014 (Final Order) which granted a CON to the Petitioner and denied a CON to the Respondent. The Respondent received written notice of the entry of the Final Order on March 31, 2014. On April 9, 2014, the Respondent timely filed a Motion to Alter or Amend the Final Order pursuant to ALC Rule 29(d) and Rule 59, South Carolina Rules of Civil Procedure (SCRCP). On May 2, 2014, the court vacated the Final Order. On December 15, 2014, the court issued an Amended Final Order. The Respondent received written notice of the entry of the Amended Final Order on December 15,

2014 and filed a Notice of Appeal with the South Carolina Court of Appeals on January 14, 2015. The Respondent subsequently filed a cash bond, pursuant to S.C. Code Ann. § 44-7-220(B), with the Clerk of the South Carolina Court of Appeals in the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), which is the maximum amount payable by statute.

The ALC has jurisdiction to rule on the Respondent's Motion to Stay pursuant to Rule 241, South Carolina Appellate Court Rules (SCAPCR). Rule 241(d) provides:

> Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

Similarly, Rule 205, SCACR, provides:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Therefore, the ALC has jurisdiction to consider any motion for a stay/supersedeas after a Notice of Appeal is filed, and the Court of Appeals may only consider it after the ALC has ruled or under "extraordinary circumstances." Pursuant to S.C. Code Ann. § 1-23-380(2), the ALC may grant a stay requested by a party "upon appropriate terms." Pursuant to S.C. Code Ann. § 44-7-220(B), a party seeking a reversal of the ALC's decision to approve a CON application must deposit a bond with the Clerk of the Court of Appeals up to a maximum of $1,500,000.00. Here, the Respondent has deposited the required bond pursuant to § 44-7-220(B).

There is no case law on point as to what constitutes "appropriate terms" forming the basis required to issue a stay in a CON case. However, in Melton v. Walker, the South Carolina Supreme Court addressed whether an appeal from an attachment stays the underlying proceedings when the South Carolina Code is silent on such a stay and concluded that the

existence of an attachment bond as a remedy justifies that stay, even where the statutes do not address the issue expressly. 209 S.C. 330, 40 S.E.2d 161 (1946). The Supreme Court held:

> Apparently this court has not heretofore had to solve the precise problem now presented, to wit, whether appeal from an order dissolving an attachment stays proceedings upon the order... The facts now before us do make the issue and we thing that the code contemplates that the appeal stays dissolution of the attachment until it is decided, dismissed or abandoned. The immediately apparent hardship upon the defendant is not real because he had his remedy for release of the property by the filing of a replevin bond under section 544 of the Code of 1942. Moreover, his rights are protected by the bond given by the plaintiff, pursuant to section 530, in order to procure the attachment. If the law were as the respondent here insists, plaintiff's right of appeal might indeed be a hollow right and his victory a fruitless one, if meanwhile the attached property be released and dissipated.

Id. at 355, 40 S.E.2d at 163.

Similarly, in this case, the Respondent's right to appeal would be hollow if the Petitioner were able to continue with its plans to build the hospital provided for in the CON. In that scenario, even if the Respondent were to prevail on appeal, a hospital serving the Fort Mill customer base would already be established by the Petitioner, therefore eroding the Respondent's market share and patient base with no adequate remedy available to the Respondent. Conversely, if the Respondent does not prevail on appeal, the Petitioner's rights have been preserved through the substantial bond posted by the Respondent. Accordingly, this court **GRANTS** the Respondent's Motion to Stay Pending Appeal.

AND IT IS SO ORDERED.

February 10, 2015
Columbia, South Carolina

S. Phillip Lenski
Administrative Law Judge

3 of 4 pgs

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

February 10, 2015
Columbia, South Carolina

414 Ges

EXHIBIT E

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill, Respondents.	Docket No.: 11-ALJ-07-0575-CC **ORDER VACATING THE COURT'S FEBRUARY 10, 2015 ORDER GRANTING MOTION TO STAY PENDING APPEAL**

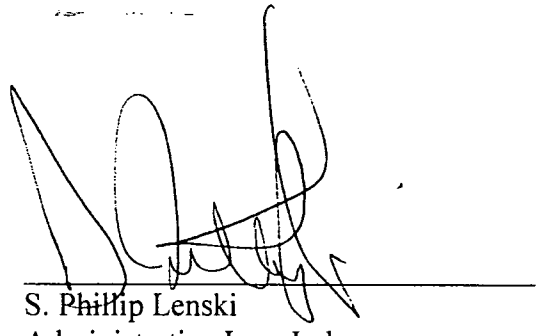
On February 10, 2015, this court issued an Order Granting Motion to Stay Pending Appeal, granting the Motion to Stay/Supersedeas Pending Appeal of the Respondent, Charlotte Mecklenburg Hospital Authority d/b/a Carolina Medical Center – Fort Mill (Respondent) in the above captioned matter. At that time, the court was acting solely on the Respondent's motion and supporting memoranda, and was not in possession of any responsive pleadings filed by the Petitioner, Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center (Petitioner).

Subsequent to the issuance of its February 10, 2015 Order, the court became aware that the Petitioner had filed a responsive pleading in a timely manner, which was apparently misrouted to another judge on the Administrative Law Court. Additionally, the Respondent has now submitted a Reply Memorandum responding to Petitioner's Memorandum in Opposition. None of these pleadings were in the possession of or considered by the court when it issued its February 10, 2015 Order Granting Motion to Stay Pending Appeal. Therefore,

IT IS HEREBY ORDERED that this court's Order Granting Motion to Stay Pending Appeal, dated February 10, 2015, is hereby vacated pending the court's review of the Petitioner's

Memorandum in Opposition and the Respondent's Reply Memorandum.

AND IT IS SO ORDERED.



S. Phillip Lenski
Administrative Law Judge

February 12, 2015

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

February 12, 2015
Columbia, South Carolina

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EXHIBIT F

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill, Respondents.	Docket No.: 11-ALJ-07-0575-CC **ORDER DENYING RESPONDENT'S MOTION TO STAY/SUPERSEDEAS PENDING APPEAL**

This matter is before the court on the Respondent's, The Charlotte Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill (Respondent or CHS), Motion to Stay/Supersedeas Pending Appeal and Memorandum in Support filed on January 28, 2015. The Respondent seeks to stay the December 15, 2015 Amended Final Order of the South Carolina Administrative Law Court ("ALC" or "court") granting the contested Certificate of Need (CON) to Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center (Petitioner or Piedmont) pending the outcome of the appeal filed by the Respondent in the South Carolina Court of Appeals. The court issued an Order Granting Motion to Stay Pending Appeal on February 10, 2015. However, the court vacated that Order on February 12, 2015 when it became aware that responsive pleadings that had been submitted by the Petitioner, had been misrouted to another judge on the ALC and had not been considered when the court issued its February 10, 2015 Order. Having reviewed the Petitioner's Memorandum in Opposition to Respondent's Motion to Stay/Supersedeas Pending Appeal, as well as the Respondent's Reply Memorandum, the court denies the Respondent's Motion to Stay/Supersedeas Pending Appeal.

This CON contested case was initiated by the Petitioner on November 15, 2011. After a hearing on the merits, this court issued a Final Order dated March 31, 2014 (Final Order) which granted a CON to the Petitioner and denied a CON to the Respondent. The Respondent received written notice of the entry of the Final Order on March 31, 2014. On April 9, 2014, the Respondent timely filed a Motion to Alter or Amend the Final Order pursuant to ALC Rule 29(d) and Rule 59, South Carolina Rules of Civil Procedure (SCRCP). On May 2, 2014, the court vacated the Final Order. On December 15, 2014, the court issued an Amended Final Order. The Respondent received written notice of the entry of the Amended Final Order on December 15, 2014 and filed a Notice of Appeal with the South Carolina Court of Appeals on January 14, 2015. The Respondent subsequently filed a cash bond, pursuant to S.C. Code Ann. § 44-7-220(B), with the Clerk of the South Carolina Court of Appeals in the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), which is the maximum amount payable by statute.

JURISDICTION

The ALC has jurisdiction to rule on the Respondent's Motion to Stay pursuant to Rule 241, South Carolina Appellate Court Rules (SCAPCR). Rule 241(d) provides:

> Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

Similarly, Rule 205, SCACR, provides:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Therefore, the ALC has jurisdiction to consider any motion for a stay/supersedeas after a Notice of Appeal is filed, and the Court of Appeals may only consider it after the ALC has ruled or under "extraordinary circumstances." Pursuant to S.C. Code Ann. § 1-23-380(2), the ALC may grant a stay requested by a party "upon appropriate terms." Pursuant to S.C. Code Ann. § 44-7-220(B), a party seeking a reversal of the ALC's decision to approve a CON application must deposit a bond with the Clerk of the Court of Appeals up to a maximum of $1,500,000.00. Here, the Respondent has deposited the required bond pursuant to § 44-7-220(B).

DISCUSSION

The Respondent argues that it this court should grant a stay as a result of posting the bond pursuant to S.C. Code Ann. §44-7-220(B) (Supp. 2012). Alternatively, the Respondent argues that an equitable stay should be granted pursuant to S.C. Code Ann. § 1-23-380(2) (Supp. 2013) regarding the ability of an agency or reviewing court to grant a stay pending appeal. The court will address each argument in turn.

S.C. Code Ann. § 44-7-220(B)

In its motion filed on January 28, 2015, the Respondent asserts that on January 14, 2015, it posted a cash bond with the Clerk of the South Carolina Court of Appeals in the amount of $1,500,000.00, which is the maximum amount payable pursuant to S.C. Code Ann. § 44-7-220(B). As acknowledged in the Respondent's motion, the statute is silent on whether the posting of a bond will be accompanied by a stay of the underlying judgment. The Respondent asks the court to adopt the rationale in Melton v. Walker, 209 S.C. 330, 40 S.E.2d 161 (1946) and find that the posting of the bond justifies this court issuing a stay. However, the court finds this case unpersuasive. Furthermore, in a much more recent case, the South Carolina Court of Appeals addressed this exact issue and denied a party's request for a stay based on arguments similar to those proposed by the Respondent. In Grand Strand Regional Medical Center v. S.C. Department of Health and Environmental Control, App. Case No. 22014-000973 (S.C. Ct. App., Dec 16, 2014), the South Carolina Court of Appeals denied the petition for a stay of Carolina Regional Cancer Center (CRCC). In that case, two applicants (CRCC and Grand Strand Regional Medical Center) were seeking certificates of need to provide radiation therapy services in the Myrtle Beach area. The

Administrative Law Court ruled that the applications were not competing and approved both. CRCC appealed the decision to the Court of Appeals, posting a bond pursuant to S.C. Code Ann. §44-70220(B). CRCC then filed a petition for supersedeas to stay implementation of Grand Stand's radiation therapy project.

The Court of Appeals denied CRCC's petition. In its opinion, the Court of Appeals held:

> Appeals from administrative tribunals are exceptions to the automatic stay requirement of Rule 241(a) of the South Carolina Appellate Court Rules. Rule 241(b)(11), SCAR. However, a supersedeas may be ordered pursuant to Rule 241(c), SCAR. The rule provides that "[i]n determining 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), SCAR. We find there is no danger the court will lose jurisdiction or the issues on appeal become moot if Grand Strand is allowed to proceed with its project. See S.C. Ret. Sys. Inv. Comm'n v. Loftis, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A case is moot where a judgment rendered by the [c]ourt will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the [c]ourt."). Grand Strand acknowledges it would have to cease operations at its facility if this court reverses the ALC's decision approving its CON. Therefore, whether Grand Strand proceeds with construction and operation of its facility will not moot the issues on appeal or strip this court of jurisdiction.

This court finds the holding in Grand Strand to be dispositive of this issue. The Court of Appeals will not lose jurisdiction of this matter irrespective of whether the Petitioner is permitted to begin construction of its facility. Furthermore, in its Motion in Opposition, the Petitioner acknowledges, as did Grand Strand, that it would have to cease operations at Fort Mill Medical Center if the Court of Appeals were to reverse this court's decision approving its CON.

Equitable Stay

In the alternative, the Respondent argues that this court should grant an equitable stay to the Respondent during the pendency of its appeal under S.C. Code Ann. § 1-23-380(2). Section 1-23-380(2) provides that "serving and filing of the notice of appeal does not itself stay enforcement of the agency decision. . ." However, the ALC may, "upon appropriate terms," order a stay "upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.," Although the Respondent has not filed a petition under Rule 65, SCRCP, it argues that Rule 65 is incorporated into the Administrative Procedures Act (APA) by § 1-23-380(2) and that this court should issue a preliminary injunction to preserve the *status quo ante* and because

the Respondent (1) will suffer irreparable harm without such relief; (2) has a likelihood on the merits; and (3) there is no adequate remedy at law. Poynter Invs. V. Century Builders of Piedmont, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

1. Irreparable Harm

The Respondent asserts that it will lose significant revenue in Northern York County if the Petitioner is permitted to begin constructing its hospital because it will take market share from the Respondent. The court disagrees.

First, the court disagrees with the Respondent's assertion that it would lose market share to the Petitioner if the Petitioner were to be permitted to build its hospital. This court's decision to award the CON to the Petitioner was in part based on its finding that the Petitioner was consistently losing market share to the Respondent because of the Respondent's practices that ensured that patients seen by physicians within the Respondent's CPN network who needed hospital services were being referred exclusively to the Respondent's network of hospitals located outside of York County, and not to the Petitioner's existing hospital located within the county. Permitting the Respondent to build a hospital in Northern York County would accelerate the Petitioner's loss of market share, erode its payor mix, and would put at risk the quality of medical care available to York County residents, especially in the area of tertiary services, as the Respondent would continue to refer patients needing tertiary care to its out of county hospital network, and not to the Petitioner's Rock Hill hospital.

Additionally, the court finds it curious that the Respondent is now asserting that it will lose market share to the Petitioner if it is permitted to build its hospital in Northern York County. During the trial in this matter, it was the Respondent's position that its proposed Northern York County hospital's function would primarily be to relieve the high patient volume at its other hospitals and accommodate existing patients that were currently receiving care at those other CHS facilities outside of the county. The Respondent's position was that building its proposed hospital in Northern York County would allow it to manage its existing York County patient base better. Therefore, this court fails to understand how permitting the Petitioner to build its hospital will have any effect on the Respondent's existing market share which is currently being cared for at the Respondent's other hospitals.

Furthermore, even if the Respondent could establish that the construction of the Petitioner's hospital would cause some immediate economic loss, it would not rise to the level of

irreparable harm. Pure economic loss is generally insufficient to satisfy the irreparable harm prong of the test for obtaining a stay where an adequate remedy is available at law. Professional Wiring Installers, Inc. v. Sims, 2008 WL 9840409 (S.C. App. 2008) (Unpublished), citing MailSource, LLC v. M.A. Bailey and Associates, 356 S.C. 363, 370, 588 S.E.2d 635, 639 (Ct. App. 2003). The only exception to this general rule is when the economic loss would cause a complete loss of the business. Peck v. Spartanburg Regional Healthcare Systems, 3678 S.C. 450-455, 626 S.E.2d 34, 37 (Ct. App. 2005); Levine v. Spartanburg Regional Services District, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005); District of Columbia v. E. Trans-Waste of Maryland, Inc., 758 A.2d 1, 15 (D.C. 2000); Campbell Inns, Inc. v. Banholzer, Turnure and Company, 148 Vt. 1, 527 A.2d 1142, 1146 (1987). As was demonstrated at the hearing, the Respondent is a large hospital system with forty-two (42) hospitals and other healthcare facilities, as well as a significant physician network. The economic loss posed by the Petitioner's One Hundred (100) bed hospital in Northern York County cannot be said to threaten the existence of the Respondent's business, and therefore, cannot be said to pose irreparable harm to the Respondent.

Finally, any change in referral patterns that may occur because of the construction and operation of the Petitioner's hospital would revert to the Respondent if it is successful on appeal.

2. Likelihood of Success on the Merits

The court disagrees with the Respondent that it only needs to raise a fair question as to its likelihood of success on appeal. Both cases cited by the Respondent in support of its position, Transcontinental Gas Pipe Line Corporation v. Porter, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969), and Williams v. Jones, 92 S.C. 342, 348, 75 S.E. 705, 710 (1912), involves preliminary injunctions issued by a court before the trial occurred. In those cases, the court held that simply a prima facie showing in the complaint was all that was required to establish the likelihood of success prong of the test for injunctive relief. The court finds the holdings in those cases to be inapplicable here, where this case was in litigation for years, was subjected to a fifteen day trial, and where the court issued a detailed Amended Final Order.

Furthermore, the court respectfully disagrees, for reasons set forth in its Amended Final Order, that the Respondent is likely to succeed in its appeal on any of the grounds set forth in its motion.

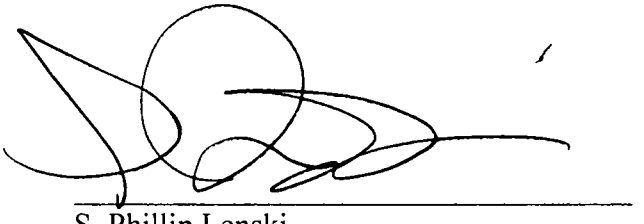
3. Adequate Remedy at Law

The last prong of the test for obtaining a stay requires the party to demonstrate that it has no adequate remedy at law. The Respondent's Motion to Stay/Supersedeas Pending Appeal fails to establish this. The Respondent's remedy at law is the appeal it has already filed. If it prevails, then the Petitioner will be required to stop the construction or the operation of its hospital.

ORDER

IT IS THEREFORE ORDERED that the Respondent's Motion to Stay/Supersedeas Pending Appeal is **DENIED**.

AND IT IS SO ORDERED.



S. Phillip Lenski
Administrative Law Judge

February 20, 2015
Columbia, South Carolina

7 9 8 JES

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

February 20, 2015
Columbia, South Carolina

8 of 8 pgs

EXHIBIT G

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center - Fort Mill, Respondent.	)	Civil Action No. 11-ALJ-07-0575-CC

PETITIONER'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO STAY/SUPERSEDEAS PENDING APPEAL

I. INTRODUCTION

Petitioner Amisub of South Carolina, Inc. ("Piedmont") files this Memorandum in Opposition to Respondent Charlotte Mecklenburg Hospital Authority's ("CHS") Motion to Stay/Supersedeas ("CHS Motion").

A decade has passed since Piedmont first applied for a CON to build a hospital in Fort Mill. For a decade the citizens of the Fort Mill area have waited for a needed hospital. This process has involved two agency reviews, two lengthy trials, and now an appeal. In its current motion, CHS argues that it is entitled to stay Piedmont from proceeding with its project, even though Piedmont acknowledges that it would have to cease operations should CHS win on appeal.

II. ARGUMENT

A. S.C. Code §44-7-220(B) Does Not Authorize a Stay

CHS argues that because S.C. Code §44-7-220(B) required it to file an appeal bond, the implementation of Piedmont's hospital project must be stayed. The South Carolina Court of Appeals squarely rejected the same argument in a recent opinion. *Grand Strand Reg. Med. Ctr. v. S.C. Dep't of Health and Env. Control*, App. Case No. 2014-000973 (S.C. Ct. App., Dec. 16, 2014) (Ex. A); *see Grand Strand Reg. Med. Ctr. v. S.C.Dep't. of Health and Env. Control*, Docket No. 2012-ALJ-07-0090-CC (S.C. Admin. Law Ct., Sept. 26, 2014) (Ex. B).

Grand Strand involved two applications to provide radiation therapy services in Myrtle Beach. The applicants were Grand Strand Regional Medical Center ("Grand Strand") and Carolina Regional Cancer Center ("CRCC"). The Administrative Law Court ruled that the applications were not competing and approved both. CRCC appealed, posting a bond under S.C. Code Ann §44-7-220(B). Like CHS in the present case, CRCC filed a petition for supersedeas to stay implementation of Grand Strand's radiation therapy project.

The Court of Appeals denied CRCC's petition. The Court noted that although Rule 241(a), SCACR, generally requires an automatic stay upon appeal, an exception exists for appeals of ALC decisions under Rule 241(b)(11), SCACR. Ex. A at 2. Nevertheless, a supersedeas may be ordered pursuant to Rule 241(c), SCACR. *Id.* Rule 241(c) provides that "[i]n determining whether [a supersedeas] should issue . . . [the court] should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested case from becoming moot." The Court of Appeals found there was "no danger the court will lose jurisdiction or the issues on appeal will become moot if Grand Strand is allowed to proceed

with its project." Ex. A at 2, *citing S.C. Ret. Sup. Inv. Comm'n v. Loftis,* 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A case is moot where a judgment rendered by the [c]ourt will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the [c]ourt.").

> Grand Strand acknowledges it would have to cease operations at its facility if this court reverses the ALC's decision approving its CON. Therefore, whether Grand Strand proceeds with construction and operation of its facility will not moot the issues on appeal or strip this court of jurisdiction.

Ex. A at 2.

Similarly, Piedmont acknowledges that it would have to cease operations at Fort Mill Medical Center if the Court of Appeals reverses the ALC's decision approving its CON. Just as in *Grand Strand,* Piedmont's proceeding with its project will neither moot issues on appeal nor strip the Court of Appeals of jurisdiction.

In *Grand Strand,* CRCC further argued that it would be adversely impacted and suffer "severe consequences" if Grand Strand were allowed to implement its project during the appeal. Ex. A at 2. Similarly, in the present case CHS argues that any victory it wins on appeal will be "'hollow' if Piedmont has already built a hospital and eroded [CHS's] market share and patient base. . . ." CHS Motion at 5. The Court of Appeals rejected CRCC's argument, just as this Court should reject CHS's.

> 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. To the extent Grand Strand was wrongfully granted a CON, as Appellant asserts, this Court's ruling on the merits in Appellant's favor – not a stay – will protect Appellant's competitive interests.

Ex. A at 3.

Finally, CHS, like CRCC before it, argues simply that the bond it posted under S.C. Code §4407-220(B) requires a stay. "If the substantial bond is required without an accompanying stay, there would be little reason for it. . . ." CHS Motion at 5-6. As the Court of Appeals noted in *Grand Strand*, however, section 44-7-220(B) does not contain a stay provision, and "our rules of statutory construction do not allow courts to add language to statutes." Ex. A at 3, *citing Consumer Advocate for the State of S.C. v. S. C. Dep't of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012); *Kinard v. Moore*, 220 S.C. 376, 388, 68 S.E. 2d 321, 325 (1951). "Accordingly this court will not read into section 44-7-220(B) a requirement that supersedeas must be granted in exchange for Appellant posting a substantial bond." Ex. A at 3.[1]

B. <u>The Court Should Not Grant an Equitable Stay.</u>

In the alternative, CHS argues this Court should preliminarily enjoin Piedmont from starting work on its Fort Mill hospital during the appeal, pursuant to S.C. Code §1-23-380(2) and SCRCP 65. Section 1-23-380(1) of the South Carolina Administrative Procedures Act provides that "[p]roceedings for review are instituted by filing a petition . . . ." Section 1-23-380(2) then adds: "The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure."

Piedmont is unaware of any case in which Rule 65 has been applied to a petition for supersedeas, filed pursuant to SCACR 241(c), during the pendency of an appeal, following a

[1] The $1.5 million bond posted by CHS would be grossly insufficient to justify a stay against Piedmont proceeding with its project, the cost of which is estimated at $119,808,964 - $146,522-042. Am. Final Order, Finding of Fact 10, p.7.

final evidentiary hearing. Moreover, CHS has not filed a petition under Rule 65. *See* Ex. B at 3, 5 (noting that CRCC had not filed a Rule 65 petition). Rule 65(c) requires security "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65, in other words, requires a bond separate from the appeal bond in an appropriate amount. CHS has not filed a Rule 65 petition and has provided no support for its assertion that the appeal bond it paid is sufficient for purposes of Rule 65. In fact, the $1.5 million bond CHS has posted is grossly insufficient to cover Piedmont's costs and damages should a stay be imposed and Piedmont prevail on appeal.

Even if Rule 65 were to apply to a petition for supersedeas, one should not be granted to CHS. Issuance of a preliminary injunction requires the movant to demonstrate three criteria: irreparable harm, a likelihood of success on the merits, and no adequate remedy at law. *Poyntner Investments, Inc. v. Century Builders of Piedmont, Inc.* 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

1. **Irreparable Harm**

CHS contends that allowing Piedmont to build its hospital will cause CHS to "lose significant revenue in Northern York County." CHS Motion at 7, *citing* Am. Final Order, Findings of Fact 79, 81.

The Amended Final Order found that the establishment of Fort Mill Medical Center "could" restore Piedmont's market share in the Fort Mill area to what it had been in 2003-2004, before CHS changed its network physician strategies, which resulted in CHS taking significant market share from Piedmont. *Id.*, Findings of Fact 20-26, 79. It is unreasonable to believe, however, that the restoration of Piedmont's market share will occur overnight.

Even after the new hospital is constructed, it could take years for Piedmont to recapture the market share it lost to CHS from 2005-2012. *See id.*

Even if CHS could demonstrate that Fort Mill Medical Center were likely to cause it some immediate economic loss, such a loss would be insufficient to constitute irreparable harm. "Generally, pure economic loss is not sufficient to satisfy the requirement of showing an irreparable harm where an adequate an adequate remedy is available at law." *Professional Wiring Installers, Inc. v. Sims*, 2008 WL 9840409 (S.C. App. 2008) (UNPUBLISHED), *citing MailSource, LLC v. M.A. Bailey & Assocs.* 356 S.C. 363, 370, 588 S.E.2d 635, 639 (Ct. App. 2003). The exception to the general rule is that pure economic loss may constitute irreparable harm when it causes the "complete loss" of a business. *Peck v. Spartanburg Reg. Healthcare Syst.*, 367 S.C. 450-455, 626 S.E.2d 34, 37 (Ct. App. 2005) ("The complete loss of a professional practice can be an irreparable harm"); *Levine v. Spartanburg Reg. Servs. Dist.*, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005) ("loss of . . . professional practice and career . . . can be an irreparable harm."); *Dist. of Columbia v. E. Trans-Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C. 2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business."); *Campbell Inns, Inc. v. Banholzer, Turnure & Co.*, 148 Vt.1, 527 A.2d 1142, 1146 (1987) ("The potential loss of a business satisfies the irreparable harm requirement . . . .").

CHS is a public hospital system based in Charlotte that owns or manages 42 hospitals, in addition to various other healthcare facilities and a large physician network. Am. Final Order, Finding of Fact 4, 23. It is undisputed that CHS was doing well financially prior to 2005, when it began taking significant market share from Piedmont. It is undisputed that CHS

is doing well financially today. There is absolutely no risk that a 100-bed hospital in Fort Mill could threaten CHS's existence or, therefore, cause it irreparable harm.

Any change in referral patterns generated by operation of Fort Mill Medical Center would revert back if CHS were successful on appeal. *See* Ex. B at 5. It will take months for Piedmont even to build a hospital. If the Court imposes a stay and Piedmont prevails, months will be added to the time necessary for the appeals process, depriving citizens in the service area even longer of a new hospital. *See id.*

2. **Likelihood of Success on the Merits**

CHS cites *Williams v. Jones*, 92 S.C. 342, 348, 75 S.E. 705, 710 (1912) for the proposition that CHS need only raise a "fair question" as to its likelihood of success. It further cites *Transcontinental Gas Pipe Line Corp v. Porter*, 252 S.C. 478, 481, 167 S.E. 2d 313, 315 (1969) for the principle that simply a prima facie showing in the complaint of entitlement to injunctive relief is all that is required to show a likelihood of success. CHS Motion at 8.

Both *Williams* and *Transcontinental* involved preliminary injunctions issued by a trial court before a trial was held. At such an early stage of litigation, before any evidence has been submitted or even before any discovery has been conducted, it would be inappropriate for the court to consider the merits of the case. At that stage of litigation, the only way to demonstrate a likelihood of success is by establishing a prima facie case in the complaint.

That, however, is not the situation in the present case. A fifteen-day trial has been held, following years of litigation. This Court has issued a Final Order and an Amended Final Order. CHS asks the Court to don blinders and ignore the findings and conclusions of its 53-page Amended Final Order, which meticulously analyzes the merits of CHS's case and finds it lacking. CHS offers no authority to support its argument that in a petition for supersedeas in a

post-trial appeal, the likelihood of success on the merits should be analyzed by whether the Appellant established a prima facie case in its initial pleading.

CHS offers three principal issues on which it contends it will likely prevail on the merits: the dormant Commerce Clause, an allegedly improper application of the adverse impact regulatory criterion, and an allegedly improper admission of evidence.

a. The Dormant Commerce Clause

The Amended Final Order addresses CHS's dormant Commerce Clause argument in a lengthy footnote. *Id.* at 2, n.2. The Court observes that the same State Health Plan, project review criteria and analysis would have been used in the Amended Final Order "regardless of whether competing applicants were out-of-state or in-state providers." *Id.*

> In fact, the same plan, criterion and analysis have been applied in similar cases in which CHS has been awarded a CON in South Carolina. The decision of the court has been the result of an extended process commencing prior to 2006 when DHEC issued its first Decision. The court was permitted to make its own findings of fact by a preponderance based on the evidence presented. Because the court chose to accept or reject certain testimony and assign different weight and credibility to the evidence presented by the parties in the *de novo* hearing does not mean that its decision violates the Dormant Commerce Clause or the Commerce Clause. Similarly, merely because CHS disagrees with the court's ruling, does not render its analysis in violation of the Dormant Commerce Clause.

Id.

b. Application of the Adverse Impact Criterion

Conclusions of Law 15-50 (pp. 44-52) of the Amended Final Order analyze how CHS and Piedmont comply with the relevant regulatory criteria. The Court concluded that of the 29 project review criteria identified by DHEC as most significant, the applicants complied equally

with eighteen,[2] Piedmont complied more fully than CHS with ten[3], and CHS complied more fully than Piedmont with none. The Court found that one criterion, 2(d), applied only to Piedmont and that Piedmont complied with it. Am. Final Order, Conclusions of Law 15-50, pp. 44-52. It is clear that Piedmont's application was superior to CHS's, even without taking adverse impact into account.

Of the priority criteria addressing adverse impact, the Court concluded that Piedmont better complied with 16(c), 22, and 23(a), but that both applicants complied equally with 23(b). CHS argues that the Court gave 16(c), 22, and 23(a) undue weight, along with 3(h), an adverse impact criterion not identified by DHEC in its March 27, 2006 letter as among those most significant. The Court squarely refuted this contention in the Amended Final Order:

> At trial, Piedmont's witnesses objected to DHEC's exclusion of Criteria 3h and the relative low ranking that DHEC gave Criteria 23a and 23b. S.C. Code Ann. §44-7-210(E) limits the issues to be considered at the contested case hearing to those presented to or considered by DHEC during the staff review and decision-making process. By failing to raise the issues related to the exclusion and importance of certain Project Review Criteria to DHEC prior to the contested case, Piedmont cannot raise these objections in the contested case. Accordingly, the court rejects Piedmont's arguments that DHEC erred in failing to consider Criterion 3h and in ranking Criteria 23a and 23b as among the least important criteria in its review. *As a result, the court will consider these criteria according to the ranking established by DHEC in its letter of March 27, 2006.* This does not require the court to ignore Criterion 3h but rather, that the court should give no greater weight to this criterion than it does to any of the other criteria that were not specifically listed in DHEC's ranking.

Amended Final Order, Conclusion of Law 31, pp. 47-48. (emphasis added).

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[2] The Court concluded that Piedmont and CHS equally complied with criteria 1, 3(a)(b)(c)(e) and (g), 4(a)(b)(c), 6(a)(b), 7, 9, 13(a)(b) and (d), 15, and 23(b).

[3] The Court concluded that Piedmont complied more fully than CHS with criteria 2(a)(b)(c) and (e), 3(f), 16(c), 17, 22, and 23(a).

In a footnote, the Court explains that any criteria not listed by DHEC in its March 27, 2006 letter, but nonetheless relevant – such as criterion 3(h) would be given equal importance. *Id.*, at 48, n. 14.

c. Admission of Physician Testimony

The third of the issues CHS considers most notable as grounds for reversal is the Court's admission of testimony from three physicians. The Court directly addressed this issue in the first footnote to its Amended Final Order.

> In their Petition for Rehearing as to the original Final Order and decision issued on March 31, 2014 and subsequently vacated on May 2, 2014, CHS argued that the three (3) physicians that testified were not "independent" as they were affiliated with Piedmont. The use of the word, "independent" has been removed. CHS also argues also argues that the court erred in allowing these physicians to testify at the contested case haring on the basis that they testified beyond the scope of their deposition testimony. The admission of testimony and the weight and credibility assigned to the same is within the purview of the court. The court does not believe that there was any abuse of discretion in allowing the admission of such testimony. Hill v S.C. Carolina Dept. of Health & Envtl. Control, 389 S.C. 1, 698 S.E.2d 612 (2010). CHS also had a full and fair opportunity to cross-examine these witnesses at the contested case hearing and did not request additional time to prepare for further examination during the course of the hearing.

Am. Final Order at 1, n.1.

3. Adequate Remedy at Law

CHS clearly has an adequate remedy at law – the appeal it has just filed. If CHS wins the appeal, Piedmont will have to cease development of its hospital project. The purpose of a temporary injunction is to preserve the status quo. *Peck*, 367 S.C. at 456, 626 S.E.2d at 37. If Piedmont ceases construction or operation of Fort Mill Medical Center, the status quo will be preserved.

III. CONCLUSION

CHS has delayed construction of a new hospital in Fort Mill for over a decade. Section 44-7-220(B) does not authorize or even suggest a stay. CHS has not filed a petition pursuant to SCRCP 65. To the extent Rule 65 applies to an appeal, CHS cannot show irreparable harm, since its only purported loss would be purely economic and could not come close to destroying its business. CHS cannot show a likelihood of success on the merits, all of which this Court has issued a final ruling on. CHS's appeal is an adequate remedy at law; since a victory would return matters to the status quo.

For all these reasons, CHS's motion should be denied.

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Columbia, South Carolina

Feb. 9, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

PROOF OF SERVICE

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of the foregoing ***Appellant's Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of Appeals Process*** by overnight mail with proper postage affixed, addressed as follows:

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Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley &
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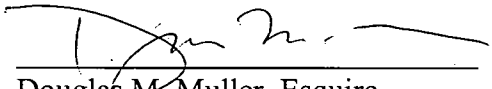

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March 16, 2015

Charleston, South Carolina

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March 16, 2015

VIA OVERNIGHT MAIL

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

Re: Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center v. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill
Appellate Case No. 2015-000056

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of **Appellant's Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of Appeals Process** and a **Proof of Service** in the above referenced case. I have also enclosed a check in the amount of $25.00 for the requisite filing fee.

Please file the originals and return a date-stamped copy to me in the enclosed self-addressed stamped envelope provided.

By copy of this letter, I am serving all counsel of record with a copy of the same.

Thank you for your assistance in this matter.

Sincerely,

Moore & Van Allen PLLC

Douglas M. Muller

DMM/hm
Enclosures: as stated

cc: Stuart M. Andrews, Esq.
Daniel J. Westbrook, Esq.
Ashley C. Biggers, Esq.
Vito Wicevic, Esq.