THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC 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 SUPPLEMENTAL BRIEF AND AMENDMENT OF 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 Supplemental Brief and Amendment of Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of the Appeals Process filed with the Court on March 17, 2015, in accordance with the Court's Order of March 19, 2015, which directed that any amendment of the pending Motion be filed no later than ten (10) days from the date of the Court's Order .

I. *GRAND STRAND* 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. March 19, 2015), a three-judge panel denied a Petition for Supersedeas filed by appellant Carolina Regional Cancer Center ("CRCC"). As grounds for this denial, the panel found as follows:

1. Because the language of S.C. Code Ann. § 44-7-220(B) does not reference a stay, the Court cannot add language omitted by the legislature to impose a stay.

2. Supersedeas under Rule 241(c), SCACR, is not warranted because the absence of a stay is not required to preserve the Court's jurisdiction or prevent mootness.

3. If no stay is imposed, CRCC will not suffer irreparable harm because "this court will likely decide the merits of the appeal before the completion of Grand Strand's project and thus, well before area doctors begin to change their referral patterns."

4. If no stay is imposed, S.C. Code Ann. § 44-7-220(B) is not rendered unconstitutional under concepts of the right to judicial review (S.C. Constitution Art. 1, Sec. 22) or procedural due process because CRCC successfully initiated the appeal and was able to afford the appeal bond required by the statute.

5. If no stay is imposed, S.C. Code Ann. § 44-7-220(B) is not rendered unconstitutional under concepts of equal protection or substantive due process because the statute bears a "reasonable relation" and a "rational basis" to a legitimate government purpose of "reserve[ing] some funds to compensate a respondent harmed by the delay of its approved project during the pendency of an appeal."

II. DISTINGUISHING FACTS FROM *GRAND STRAND*

The following facts are different and distinguish this case from the underlying facts in *Grand Strand*:

1. Unlike CRCC in *Grand Strand*, Carolinas makes a facial challenge to the constitutionality of the bond requirement and asks for a stay/supersedeas under Rule 241(c), SCACR, independent of whether the bond requirement is constitutional.

2. In order to pursue its appeal as required by S.C. Code Ann. § 44-7-220(B), Carolinas posted a bond in the maximum amount ($1,500,000) required by the statute, which is over three times higher than the bond posted by CRCC in *Grand Strand.*

3. In the underlying contested case hearing here, DHEC's decision to award a CON to Carolinas and to deny a CON to Piedmont was reversed by the ALC, and so only one party, Piedmont, is now entitled to a CON because Carolinas and Piedmont were deemed to be competing applicants. In the *Grand Strand* case, both CRCC and Grand Strand were awarded CONs because they were deemed "not competing" by the ALC, and CRCC was not denied a CON.

4. In the underlying decision here, the ALC determined that Piedmont's hospital utilization had declined as the result of an early change in physician referral patterns based on Carolinas' plans to build a hospital in Fort Mill, well before any hospital was actually built. (See Finding of Fact Nos. 25-26 in the Amended Final Order). The ALC further found that Piedmont would reverse this trend and capture market share in Northern York County if it establishes a new hospital, where its traditional market share has been lower. (See Finding of Fact No.74 in the Amended Final Order). In *Grand*

Strand, this Court determined that the physician referral patterns would not change until after the project was completed.

III. SUPPLEMENTAL LEGAL ARGUMENT

Carolinas' facial challenge to the constitutionality of the bond requirement under S.C. Code Ann. § 44-7-220(B) raises different arguments and relies upon different authority than CRCC's petition for supersedeas in *Grand Strand.* While CRCC did advance an interpretation of the bond requirement to avoid an unconstitutional result if no stay was granted, Carolinas makes a direct challenge to the bond requirement's constitutionality regardless of whether a stay is granted. And although CRCC made its arguments under the principles of equal protection, due process, and separation of powers, Carolinas' arguments against the constitutionality of the bond requirement under the same principles raise issues that were not addressed by the Court in its Order, which are addressed below.

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

1. The Bond Requirement is a Violation of the Separation of Powers Doctrine.

Unlike CRCC, Carolinas argues that the bond requirement under § 44-7-220(B) violates the separation of powers doctrine because it conflicts with existing rules of appellate procedure promulgated by the South Carolina Supreme Court. In contrast, CRCC argued that imposing a bond requirement without a stay violated the separation of powers doctrine because the legislature was attempting to deter CON appeals and thereby make the ALC the final arbiter in CON decisions. To be clear, Carolinas does not make this argument. As detailed below, Carolinas argues that the General Assembly cannot promulgate rules of judicial practice and procedure that conflict with existing rules

promulgated by the judiciary. The Court did not address this argument in *Grand Strand*, and for the reasons discussed below, the Court should reconsider its analysis under the separation of powers doctrine.

As stated in Appellant's Motion and Petition, the South Carolina Supreme Court has promulgated rules governing appellate procedures for an appeal from an administrative tribunal, such as this case, and § 44-7-220(B) interferes with these rules by mandating certain actions required to perfect an appeal. Specifically, Rules 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.

The South Carolina Supreme Court has also established the procedure governing appeal bonds in Rule 241, SCACR. Under Rule 241(c), the appellate court has considerable discretion to determine 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. The mandatory forfeiture of the entire bond by an unsuccessful appellant serves as a penalty for filing an appeal. In other circumstances, our courts have found similar statutes that limit the court's authority invalid. *See 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).

Notably, the mandatory nature of the award of the bond and the lack of a discretionary apportionment of costs under the bond were not in previous versions of the statute, but were added in 2010. Originally, 1990 South Carolina Laws Act 471 (S.B. 927) ("Act 471") imposed a discretionary, not mandatory, award of the bond amount to the respondent if judicial review was unsuccessful. Act 471 provided in pertinent part:

> 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).

By contrast, when the South Carolina legislature enacted 2010 South Carolina Laws Act 278 (S.B. 337) ("Act 278"), the bond language of S.C. Code Ann. § 44-7-220(B) was changed to the following:

> 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.

(Emphasis added).

Although South Carolina courts have not addressed the specific issue, the most notable decision from another jurisdiction voiding a similar bond or penalty requirement is *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408 (Ky. 2005). In *Elk Horn Coal*, the statute 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. 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, the court held that 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. *Elk Horn Coal* and *Consumer Gas Co.* both 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.

Very simply, 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, thereby limiting 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.

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

Like CRCC, Carolinas argues that the bond requirement under § 44-7-220(B) violates the Equal Protection Clauses of the United States and South Carolina Constitutions, but its argument is fundamentally different than CRCC's argument. CRCC argued that the bond requirement violates the Equal Protection Clauses because "it

is an absolute bar to judicial review for appellants who cannot afford the substantial bond requirement and is a taking without any rational relation to the purposes of the CON Act." In this case, though, Carolinas argues that the bond requirement violates the Equal Protection Clauses because it treats CON appellants differently than other appellants without being rationally related to the governmental purpose that it seeks to promote. In other words, Carolinas submits that the bond requirement's unconstitutionality under the Equal Protection Clauses does not arise from the fact that it could serve as a bar to those who cannot afford an appeal but because it treats a narrow class of appellants unequally.

As discussed further below, this is an important distinction. In *Lindsey v. Normet*, 405 U.S. 56 (1971), the United States Supreme Court recognized the unconstitutionality of different bond requirements for narrow classes of appellants under the Equal Protection Clause. It does not appear that CRCC raised the equal protection principles underlying the *Lindsey* decision or that the Court considered them. As a result, the Court should reconsider whether § 44-7-220(B) violates the Equal Protection Clauses in light of *Lindsey* and its progeny.

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. In this case, the bond requirement is particularly onerous on Carolinas because the underlying administrative agency, DHEC, finally awarded the CON to Carolinas after a multi-year legal battle, only to have the ALC reverse that decision and award the CON to Piedmont. Moreover, § 44-7-220(B) mandates that the entire bond be forfeited to the respondent if the appellant is unsuccessful regardless of the 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. In *Lindsey*, 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. This law required a tenant appealing an adverse decision under the FED statute 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 was to deter frivolous appeals. *Id.* The U.S. Supreme Court ruled that the double bond was unconstitutional under the Equal Protection Clause because no other appellant was subject to the automatic assessment of unproved damages. *Id.* at 77-78. Although the Court acknowledged that rules to safeguard litigated property and discourage insubstantial appeals are legitimate state interests, it concluded that the double bond was not rationally related to either of those purposes because it was automatically forfeited and not limited to costs incurred or damaged suffered by the prevailing respondent. *Id.*

In another case, *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 subject appeal penalty under the separation of powers doctrine, it also ruled that the penalty violated the Equal Protection Clause under *Lindsey*. *See Elk Horn Coal*, 163 S.W.3d at 421 (quoting *Lindsey*, 405 U.S. at 77). In so doing, the court, quoting directly from *Lindsey*, held that procedural provisions that do not discriminate between frivolous and non-frivolous appeals are arbitrary and irrational. *Elk Horn*, 163 S.W. 2d at 421-22.

The reasoning underlying these cases applies just as forcefully in this case even if the legislature's purpose in enacting the bond requirement under § 44-7-220(B) is legitimate as the Court found in *Grand Strand*. The Court in *Grand Strand* described the legitimate governmental purpose of § 44-7-220(B) as intending "to preserve some funds to compensate a respondent harmed by the delay of its approved project during the pendency of an appeal," but that purpose is defeated when the funds are automatically awarded to the successful respondent without bearing any rational relationship to the harm actually sustained. In other words, the forfeiture of the bond is not reasonably tailored to promote the purpose of compensating for harm resulting from delay if it automatically compensates a successful appellant even in the absence of any harm. As a result, *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.

Moreover, even if the bond requirement's purpose of reserving funds to compensate a respondent for delay caused by an appeal is legitimate, it nevertheless

violates the Equal Protection Clauses because it is not rationally related to that purpose by virtue that it discriminatorily applies to only a narrow class of appellants - CON appellants in cases involving competing applicants. CON appellants involved in competing applicant cases are not unique from other appellants insofar as they may suffer harm from the delay caused by an appeal, but they are the only appellants that are required to post a mandatory bond that is automatically forfeited. The Equal Protection Clauses, however, do not permit this type of discrimination. As the Supreme Court stated in *Lindsey*, "reasonable procedural provisions to safeguard litigated property . . . or to discourage patently insubstantial appeals" are permissible as long as "these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." *Id.*, 405 U.S. at 78 (emphasis added). *See also*, *Elk Horn Coal*, 163 S.W.3d at 421 ("Distinguishing between defendant money judgment creditors and other money judgment creditors, or judgment creditors, the value whose judgments can be quantified, is arbitrary and capricious. As such, by focusing on such a narrow class, the statute is the sort of arbitrary statutes covered by *Lindsey's* understanding of 'rational basis.'") As the bond requirement under § 44-7-220(B) is neither reasonably tailored to compensate litigants from harm caused by the delay of an appeal nor nondiscriminatorily applied to all appellants, it violates the Equal Protection Clauses.

3. A Party's Ability to Afford the Bond Does Not Alter the Constitutional Analysis.

In *Grand Strand*, the Court found that the refusal to implement a stay did not render the bond requirement unconstitutional, in part, because of CRCC's ability to "afford" the appeal bond, thereby suggesting that a litigant's right to challenge the constitutionality of a statute may depend upon its economic status. Carolinas respectfully

submits that a party's ability to afford an appeal bond does not preclude or resolve a constitutional challenge to such a bond.

The Supreme Court's decision in *Lindsey* indicates that a party's ability to afford the bond and thereby seek judicial review does not affect the analysis of whether the bond requirement is unconstitutional under Equal Protection or the separation of powers doctrine. Although the Court noted in *Lindsey* that the double bond invalidated in that case was discriminatory against the poor because they could not post the double-bond, the Court made clear that the unconstitutionality of the bond was not premised solely on its effects on those who could not afford to post it. Significantly, the Supreme Court made clear that the double-bond statute was no less discriminatory because it also applied to nonindigent parties. According to the Court, the "nonindigent FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon." *Lindsey*, 405 U.S. at 79.

Similarly, in *Elk Horn Coal*, the Kentucky Supreme Court's analysis of whether the penalty involved in that case violated the separation of powers doctrine was not affected by the fact that the appellant paid the penalty to the respondent prior to challenging the constitutionality of the penalty in the appellate courts. Rather, the court's decision was driven by whether the legislature's adoption of an appeal penalty interfered with the judiciary's authority to prescribe rules of practice and procedure. *Id.* at 423. Although the appeal penalty did not have the effect of denying the appellant its right to judicial review in that case, the court nevertheless recognized that the appeal penalty interfered with the appellate courts' ability to exercise its jurisdiction to review cases from lower courts. *Id.* at 424.

Therefore, the fact that Carolinas posted the bond in this case should not be a factor in deciding whether § 44-7-220(B)'s bond requirement is unconstitutional.

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

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

Section § 44-7-220(B) interferes with the right to judicial review and due process 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. 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 to afford posting the bond and the risk of losing the money. Although Carolinas posted the bond in this case, it cannot be denied that posting a $1.5 million bond significantly burdens its right to judicial review. Furthermore, the bond requirement will certainly deter other applicants who cannot afford the bond from seeking judicial review. 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.

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. 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." 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)).

Here, the Court may exercise 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, the ALC found that Piedmont's utilization had declined as the result of a change in physician referral patterns precipitated by Carolinas' intent to build a new hospital. (See Finding of Fact Nos. 25-26 in the Amended Final Order). Here, Carolinas will feel the same effects referenced by the ALC in the Amended Final Order in terms of a change in referral patterns and lost patients 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 as it builds its hospital. (See Finding of Fact No. 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 because Carolinas cannot sue for the recovery of its lost revenue if it is successful on appeal. In fact, it has no remedy

to restore this lost revenue. Under these 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.

<u>Likelihood of Success on the Merits</u>:

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 insofar 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 in violation of

constitutional or statutory provisions; in excess of the statutory authority of the agency; or made upon unlawful procedure. *See* S.C. Code Ann. § 1-23-380(5).

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: (1) Carolinas contends that the ALC applied the 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 its original review in 2005. *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); and (2) Carolinas further contends that the ALC erroneously applied "adverse impact" review criteria by elevating it and failing to balance it with other review criteria. Carolinas has presented a sufficient *prima facie* case to establish a likelihood of success on the merits under the standard, which supports an injunction in the form of a stay of the judgment.

Alternatively, the Court may stay the judgment by exercising its power under Rule 241, SCACR, as previously described. Notably, Rule 241(c) states that the Court "should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot," but the Rule does not make this an exclusive list. Otherwise, the rule would be written as "shall only consider."

While there appears to have been no South Carolina case that addresses this precise issue of whether a stay 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.

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.

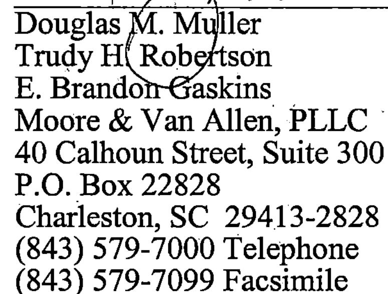
To the extent that the Court finds it appropriate to protect Piedmont from any delay caused by a stay should it prevail on appeal, it can exercise its inherent, equitable power to stay the judgment subject to the bond posted by Carolinas under § 44-7-220(B). In such case, the Court may use all or part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

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.

IV. 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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March 27, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC 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,

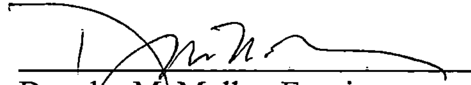
Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is .... Appellant.

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 Supplemental Brief and Amendment of Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of Appeals Process*** by first class mail with proper postage affixed, addressed as follows:

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



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

March 27, 2015

Charleston, South Carolina

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March 27, 2015

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 Supplemental Brief and Amendment of 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.

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.

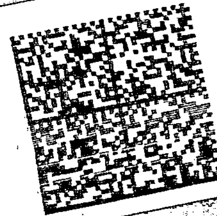
Sincerely,

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.



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The Honorable Jenny Abbott Kitchings
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Columbia, South Carolina 29201

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