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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Opinion No. 5297 (S.C. Ct. App. refiled May 6, 2015)

Case No. 09-ALJ-07-0332-CC

Trident Medical Center, LLC, d/b/a
Berkeley Medical Center ..... Petitioner,

v.

South Carolina Department of Health and
Environmental Control and Roper St. Francis
Hospital-Berkeley d/b/a Roper St. Francis Hospital ..... Respondents.

Case No. 09-ALJ-07-0333-CC

Trident Medical Center, LLC, d/b/a
Berkeley Regional Medical Center, ... Petitioner,

v.

South Carolina Department of Health and
Environmental Control, and Roper St. Francis
Hospital-Berkeley, Inc. d/b/a Roper St. Francis
Hospital-Berkeley ..... Respondents.

PETITION FOR WRIT OF CERTIORARI

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Case No. 09-ALJ-07-0336-CC

CareAlliance Health Services and Roper
St. Francis Hospital-Berkeley ..... Respondents,

v.

South Carolina Department of Health and
Environmental Control and Trident Medical Center, LLC

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

and Trident Medical Center, LLC is the ..... Petitioner.

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Certificate of Counsel

The undersigned counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 6, 2015.

Questions Presented

I. Did the Court of Appeals err in holding that the Bed Transfer Standard of the State Health Plan can be used to create a new hospital given that the plain language of the Standard allows the transfer of beds only to an existing hospital facility?

II. Did the Court of Appeals err in giving deference to DHEC's policy of using the Bed Transfer Standard to create new hospitals when such policy contravenes the plain language of the Standard and the intent of the Plan?

Introduction

This case arises from a Certificate of Need dispute between providers. This case is also one of many cases that turn on the correct application of the rules of statutory construction. Neither of these attributes warrant the consideration of this Court on certiorari. However, there is more to this case than appears on the surface. At its core, this case fits squarely and directly into the important and ongoing debate over "the proper role of the judicial branch in reviewing final administrative decisions of an executive branch agency under the Constitution of South Carolina and under the statutory law of our State." *Kiawah Dev. Partners, II, v. S.C. Dep't of Health and Envtl. Control*, 411 S.C. 16, 45, 766 S.E.2d 707, 724 (2014)(Toal, J., dissenting).

This is a case in which the agency, DHEC, acknowledged that its approval of a Certificate of Need for a new hospital contravened the plain language of its statutorily mandated and duly promulgated State Health Plan. Nevertheless, approval was given. This is a case in which the Administrative Law Court acknowledged in its order that DHEC's approval contravened the plain language of the State Health Plan. Nevertheless, the ALC deferred to DHEC as the "final arbiter" of the Plan. This is a case in which the

Court of Appeals, in spite of the admissions of DHEC and the Administrative Law Court that their actions contravened the plain language of the applicable law, nevertheless found that DHEC was entitled to deference in its disregard of the law because the court was required "to be mindful of the General Assembly's entrustment of South Carolina's health care marketplace" to it. *Trident Med. Ctr., LLC d/b/a Berkeley Reg'l Med. Ctr v. S.C. Dep't of Health & Envtl. Control*, Op. No. 5297 (S.C. Ct.App. filed May 6, 2015).

In finding that DHEC has "flexibility" to interpret the State Health Plan, the Court of Appeals ignores two fundamental principles of administrative law. Those principles are that an agency must follow its own laws and regulations and that it is the role of the courts to make it do so. *See, Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987)("DHEC must follow its own regulations and the provisions of the Administrative Procedures Act . . . in carrying out the legitimate purposes of the agency."); *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) ("The construction of a regulation is a question of law to be determined by the court.")

Rule 242, SCACR, sets forth certain circumstances which weigh in favor of this Court issuing a writ of certiorari to review a decision of the Court of Appeals. Among those circumstances are novel questions of law, dissent in the decision of the Court of Appeals, conflict with a prior decision of the Supreme Court, and the presence of substantial constitutional issues. Rule 242(b), SCACR; State v. Lyles, 381 S.C. 442, 443-44, 673 S.E.2d 811, 812 (2009) (outlining reasons for granting certiorari and standards for this Court to grant same). As the rule makes clear, the Court is not limited by the stated reasons, however, as those reasons do not fully measure this Court's discretion or power to grant review of a case.

This case meets the criteria justifying review by this Court on certiorari. The willingness of DHEC in this case to disregard the language of its duly promulgated Plan to achieve its desired result and the willingness of the ALC and Court of Appeals to ignore established rules of statutory construction in order to afford extreme deference to DHEC's actions raise significant constitutional issues under Article I, § 22 of the South Carolina Constitution. Those issues encompass the roles of the Administrative Law Court and the judicial branch in providing balance, fairness, oversight and restraint on executive branch decisions. When the Administrative Law Court and the appellate court are reluctant to act in accordance with their own interpretations of the law and, instead, feel bound by precedent to grant DHEC nearly complete discretion, persons seeking relief from a rogue agency's decisions have nowhere to turn. The Administrative Law Court system and the requirements of Article I, § 22 are rendered all but meaningless.

Trident believes that this case affords the Court an opportunity to address these fundamental issues. Accordingly, "special and important reasons" exist for this Court to issue a writ and review the Court of Appeals' decision in this matter, as more fully set forth herein. Thus, this Court should grant this petition.

Statement of the Case

The Petitioner Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center ("Trident") entered the Tri-county Service Area market in 1972 as a result of an agreement among Trident, Dorchester and Berkeley Counties, and the Respondent South Carolina Department of Health and Environmental Control ("DHEC") to build a new hospital to replace two older, smaller county-owned hospitals. Trident opened in 1975, and the existing county hospitals closed with the understanding that Trident would assume the mission of providing care to the residents of Berkeley and Dorchester

Counties. (R. p. 541, lines 1–9; R. p. 546, lines 7–15; R. pp. 7451, 7453, and 7459–7460; R. p. 777, line 14 – p. 779, line 8). With DHEC's guidance, Trident Medical Center was located centrally in the Charleston-Berkeley-Dorchester service area ("Tri-county Service Area") in North Charleston, about one mile from the Berkeley County line and several miles from the Dorchester County line. (R. pp. 7450–7518; R. p. 4321; R. p. 778, line 10 – p. 779, line 2). Over time, Trident has come to own and operate a freestanding emergency department and outpatient center in Moncks Corner in Berkeley County and a 94-bed acute care hospital known as "Summerville Medical Center" in Dorchester County. (R. p. 550, line 18 – p. 551, line 17; R. p. 780, line 22 – p. 781, line 1).

The Respondents CareAlliance Health Services and Roper St. Francis Hospital-Berkeley, Inc. d/b/a Roper St. Francis Hospital-Berkeley ("Roper") operate three hospitals in the Tri-county Service Area, all in Charleston County: Roper Hospital, located in downtown Charleston ("Roper Downtown"), Roper St. Francis Mt. Pleasant Hospital in Mt. Pleasant, and Bon Secours St. Francis Hospital, located West of the Ashley River. (R. p. 2622, line 12 – p. 2623, line 4). Like Trident, Roper also operates a freestanding emergency department and outpatient center in Moncks Corner, Berkeley County, South Carolina. (R. p. 460, line 18 – p. 461, line 22).

On August 13, 2008, Trident filed a Certificate of Need ("CON") application with DHEC under Chapter II, Section G.1(A)(4)(d) of the 2004-2005 State Health Plan. In its CON application, Trident proposed to construct a new 50-bed acute care hospital to be known as "Berkeley Medical Center" in Moncks Corner, Berkeley County, South Carolina ("Moncks Corner Hospital"). (R. pp. 4461–4468).

Under the 2004-2005 Plan, the need for additional hospital beds is calculated on a hospital specific basis. The overall bed need for a particular health planning area is

derived by totaling the specific bed need for each of the hospitals in the area. (R. p. 1518, lines 20–24). Under the 2004-2005 Plan, a hospital with a need for additional beds is allowed to add up to 50 beds to its inventory in order to provide for a cost-effective addition. (R. p. 6679). Thus, in its CON application, Trident sought to use Trident's facility-specific need for 17 additional beds to establish a 50-bed community hospital in Moncks Corner, Berkeley County, at an estimated project cost of $115 million.[1]

On December 10, 2008, and specifically in response to Trident's application, Roper filed a CON application under the 2008-2009 State Health Plan to transfer 50 licensed hospital beds from Roper Downtown in order to create a new 50-bed community hospital at Carnes Crossroads in Goose Creek ("Carnes Crossroads Hospital"). (R. pp. 5383–5385; R. p. 1106, line 24 – p. 1107, line 8; R. p. 3117, lines 12–17). Roper proposed to locate the new Carnes Crossroads Hospital on a site just 11.8 miles from Trident's proposed Moncks Corner Hospital, 7.9 miles from Trident's existing North Charleston hospital and 10.3 miles from Trident's Summerville hospital. (R. p. 5382; R. p. 4325).

There is no existing hospital or any other medical facility at the undeveloped Carnes Crossroads site to receive the transfer of the beds from Roper Downtown. (R. p. 1159, lines 12–16). Therefore, in order to accomplish the transfer of hospital beds, Roper proposed to construct an entirely new receiving hospital facility and to create all new

[1] Trident proposed to locate its Moncks Corner Hospital on a 21-acre site adjoining Trident's existing freestanding emergency department and outpatient center. (R. p. 4468; R. p. 603, line 22 – p. 604, line 3). If built in that location, Trident's Moncks Corner Hospital will reduce the drive time to a hospital to 30 minutes or less for most residents residing above and around Lake Moultrie in Northern Berkeley County. (R. pp. 4322–4325). Quantified, approximately 30,000 residents of Berkeley County would be brought within 30 minutes' drive of a hospital by the establishment of the proposed Moncks Corner Hospital. (R. p. 1896, lines 15–23, p. 1900, lines 18–23; R. pp. 4260–4320).

ancillary services, such as operating rooms, mammography, ultrasound, nuclear medicine, and other imaging equipment and services, emergency department services, laboratory equipment and services, and outpatient functions to support the transferred beds, at a total project cost of approximately $113 million. (R. pp. 5387, 5695–5696).[2]

At the time Roper filed to create a new hospital at Carnes Crossroads, Roper had no need for beds under the 2008-2009 Plan, and, in fact, had an excess of 23 beds in its system. (R. p. 1106, lines 10-22; R. P. 1108, line 20 – p. 1009). In total, there was a 48 bed surplus in the Tri-county Service Area when Roper applied. (R. p. 6899).

Because of the lack of need for any new hospital beds by Roper specifically or in the Tri-County Service Area as a whole, Roper did not meet the criteria for, and, therefore, could not utilize, either of the two undisputed methods set forth in the *2008-2009 Plan* that would have allowed Roper to locate hospital beds away from its Roper Downtown campus.[3] Instead, Roper was allowed to submitted its CON application under a provision of the State Health Plan that, on its face, does not apply to the creation of a new facility. Chapter II, Section G.1(A)(4)(j) of the 2008-2009 State Health Plan (the "Bed Transfer Standard") was made available to Roper because of an unwritten DHEC practice[4] of applying the Bed Transfer Standard, whether or not a receiving hospital was

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[2] Given the proximity of Roper's proposed Carnes Crossroads Hospital to Trident's existing hospitals, virtually all of the population residing in the area to be served by Roper is already within 30 minutes' drive of a hospital. (R. p. 554, lines 15–23; p. 1897, line 16 – p. 1899, line 7; R. p. 4268). Quantified, only 940 additional people will be brought within 30 minutes' drive of a hospital as a result of the construction of Roper's proposed Carnes Crossroads Hospital. (R. p. 1896, lines 15–23; R. p. 1900, lines 18–23; R. pp. 4260–4320).

[3] Under the 2008-2009 Plan, an individual hospital with a facility-specific bed need could seek approval to add the needed beds at its existing facility or to place them at another site if the hospital already had a physical presence there. (R. p. 6887, § G.1(A)(4)(d)). The 2008-2009 Plan also allows a provider to use the need for additional hospital beds in the planning area as a whole to locate beds anywhere in the area, if approved by DHEC. (R. p. 6887, § G.1(A)(4)(e)).

[4] When Roper filed its CON application in December 2008, DHEC's practice was apparently informal and was applied on an *ad hoc* basis. In a written May 8, 2009 Decision on Remand from the ALC, the Board of Health and Environmental Control ("Board") was asked to address the practice and responded by allowing

in existence at the time approval for the transfer was sought. (R. p. 1158, lines 2–7; R. p. 1533, line 24 – p. 1534, line 12).

DHEC conducted a combined project review of the two proposed Berkeley County hospitals on May 21, 2009. (R. p. 1248, line 21 – p. 1249, line 2). On June 26, 2009, DHEC approved both applications, finding that Trident and Roper were not competing applicants and finding that each application met the standards and criteria of the respective State Health Plan under which it was filed. (R. pp. 5344–5359; R. pp. 6647–6659).

On July 6, 2009, Trident filed requests for final review conferences before the Board of Health and Environmental Control ("Board") seeking reversal of the DHEC staff's decision to approve Roper's application. (R. pp. 145–153). On July 10, 2009, Roper filed its own request for a final review conference with the Board. In its request, Roper supported the staff decision to approve both applications but argued that, if the Board determined that the applications were competing and only one could be approved, the Board should deny Trident's application and approve Roper's. (R. pp. 158–161). The Board declined to review the staff's decisions on Trident's and Roper's proposed projects. (R. pp. 135–136, 155–156, and 163–164).

On August 7, 2009, Trident and Roper filed three separate written requests for contested case review before the Administrative Law Court ("ALC") . Trident filed two of the requests. One sought review and reversal of DHEC's decision that Trident's and Roper's applications were not competing under the law.[5] Trident's other request sought

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a provider to use the bed transfer standard contained in the 2004-2005 State Health Plan to create a new hospital. (R. pp. 7519–7526). The ALC affirmed the Board's Decision on Remand in that case. (R. p. 1167, line 24 – p. 1168, line 9).

[5] "Competing applicants" means "two or more persons or health care facilities . . . who apply for Certificates of Need to provide similar services or facilities in the same service area within a time frame as

reversal on legal grounds of the Department's decision to approve Roper's application. (R. pp. 68–164). Roper filed a request in which it urged affirmation of the Department's decision to approve both applications, but alleged the superiority of its own application in the event the court decided that the applicants were competing. (R. pp. 165–191).

On January 7, 2010, the ALC consolidated the proceedings for trial and discovery purposes and conducted a hearing on the merits beginning January 30, 2012. On September 26, 2012, the ALC issued its Final Order and Decision upholding DHEC's decision to approve both Trident's and Roper's CON applications. On October 5, 2012, Trident timely filed its Motion to Alter or Amend (Reconsider), which was argued before the ALC on October 31, 2012, and denied on November 1, 2012. (R. pp. 501–515; R. pp. 1–2).

On November 28, 2012, Trident timely filed its appeal of the decision of the ALC with the Court of Appeals. Roper timely filed its cross-appeal on December 3, 2012. In a February 18, 2015 decision, the Court of Appeals affirmed the findings of the ALC. In response to Trident's Petition for Rehearing, the Court of Appeals withdrew, substituted and refiled its Opinion No. 5297 on May 6, 2015.

In *Trident Med. Ctr., LLC d/b/a Berkeley Regional Medical Center v. S.C. Dep't of Health and Envtl. Control*, Op. No. 5297 (S.C. Ct.App. filed May 6, 2015), the Court of Appeals affirmed the ALC's decision to defer to DHEC's policy of applying the Bed Transfer Standard to the creation of new hospitals, holding that the plain language of the Standard supports such policy and that deference must be given to DHEC in its

established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities." S.C.Code Ann. § 44-7-130(5)(2002). See also 3 S.C. Code Ann. Regs. 61-15, § 103(6). Although Trident preserved this issue and argued it before both the ALC and the Court of Appeals, Trident does not appeal this issue for purposes of this Petition for Writ of Certiorari.

interpretation and application of the Plan. Trident seeks a writ of certiorari to review this amended decision of the Court of Appeals.[6]

Argument

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE BED TRANSFER STANDARD OF THE STATE HEALTH PLAN CAN BE USED TO CREATE A NEW HOSPITAL GIVEN THAT THE PLAIN LANGUAGE OF THE STANDARD ALLOWS THE TRANSFER OF BEDS ONLY TO AN EXISTING HOSPITAL FACILITY.

Throughout these proceedings, Trident has asserted as a threshold issue that, as a matter of law, Roper's proposed Carnes Crossroads Hospital fails to comply with the 2008-2009 State Health Plan and, therefore, cannot be approved. Trident contends that the Department's policy of using the Bed Transfer Standard to create a new hospital, regardless of need, contradicts the plain language of the Standard itself and the intent of the whole bed need section, which provides two explicit methods for creation of a new facility.

The Bed Transfer Standard is found in the general hospital bed need methodology section of the 2008-2009 Plan and provides:

> Changes in the delivery system due to health care reform have resulted in the ***consolidation*** of ***facilities*** and the establishment of provider networks. These consolidations and agreements may lead to situations where ***affiliated hospitals*** may wish to transfer beds ***between themselves*** in order to serve ***their patients*** in a more efficient manner. A proposal to ***transfer***

[6] Trident and Roper filed separate appeals of the ALC's order. The Court of Appeals ordered separate briefing of the issues in each appeal, but consolidated the cases for argument and decision. In the Appendix accompanying this Petition, Trident includes all briefs and the entire record before the Court of Appeals to ensure this Court has the complete record below. Much of this record, however, is not relevant to the issues raised in this Petition filed by Trident because neither Roper nor DHEC filed a petition for rehearing before the Court of Appeals to preserve the affirmative issues raised by Roper's appeal. Roper's appeal contests the approval of Trident's CON application. Because Roper has not preserved those issues for this Court's review, Trident's approved CON is the law of the case. *See Mazloom v. Mazloom*, 392 S.C. 403, 403, 709 S.E.2d 661 (2011) (holding that an issue not raised in a petition for rehearing to the Court of Appeals is unpreserved for review by the Supreme Court and is the law of the case).

or exchange hospital beds requires a Certificate of Need and must comply with the following criteria:

1. A transfer or exchange of beds may be approved only if there is no overall increase in the number of beds;

2. Such transfers may cross county lines; however, the ***applicants*** must document with patient origin data the ***historical utilization of the receiving facility*** by residents of the county giving up beds;

3. Should the response to Criterion 2 fail to show a ***historical precedence of residents of the county transferring the beds utilizing the receiving facility***, the ***applicants*** must document why it is in the best interest of these residents to transfer the beds to ***a facility with no historical affinity*** for them;

4. The ***applicants*** must explain the impact of transferring the beds on the health care delivery system of the county from which the beds are to be taken; any negative impacts must be detailed along with the perceived benefits of such an ***agreement***;

5. The ***facility receiving the beds*** must demonstrate the need for the ***additional*** capacity based on ***both historical and projected utilization patterns***;

6. The ***facility giving up the beds*** may not use the loss of these beds as justification for a subsequent request for the approval of additional beds;

7. A written contract or agreement ***between*** the ***governing bodies*** of the affected ***facilities*** approving the transfer or exchange of beds must be included in the Certificate of Need application;

8. Each facility giving up beds must acknowledge in writing that this ***exchange*** is permanent; any further transfers would be subject to this same process.

(R. pp. 6889–6890)(emphasis added).

In its decision, the Court of Appeals holds that the plain language of the Bed Transfer Standard supports DHEC's interpretation that the Standard can be used by Roper to establish a new hospital, and that no language in the Standard contradicts such interpretation. Specifically, the Court of Appeals focuses on the selected phrase in the

preamble that a transfer or exchange of beds between affiliated facilities may be needed "in order to serve their patients in a more efficient manner." The Court of Appeals views this isolated phrase as support for Roper's argument that it needs to establish a new Carnes Crossroads Hospital for the convenience of its Berkeley County patients who, for whatever reason, patronize Roper Downtown rather than Trident's closer facility. In so holding, the Court of Appeals ignores the rest of the language in the preamble, the rest of the criteria contained in the Standard, and the rest of the general bed need methodology section of the Plan in which the Standard appears.

When construed as a whole, however, the Bed Transfer Standard contains language that can apply only if the facility receiving the beds is in existence at the time approval of the transfer is requested. When construed in the context of the entire bed need section, the Plan contains other provisions that explicitly address the creation of new hospital, unlike the Bed Transfer Standard. *See* 2008-2009 State Health Plan, Chapter I(I), p. I-4 ("The criteria and standards set forth in the Plan speak for themselves, and each section of the Plan must be read as a whole."). *See, also, Dreher v. S.C. Dep't of Health & Envtl. Control*, 399 S.C. 259, 265, 730 S.E.2d 922, 925 (Ct.App. 2012)("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose.") (*quoting*, *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260 626 S.E.2d 6,10 (2005)).[7]

For example, in considering the language of the Bed Transfer Standard, the preamble indicates that the Standard was promulgated to address and assist providers in

[7] In its decision, the Court of Appeals recognizes that the standards of statutory construction apply to the State Health Plan, with the caveat that the entire relevant section of the Plan must be construed as a whole.

their response to health care reforms that resulted in the "***consolidation of facilities***" and "***the establishment of provider networks***" where "***affiliated hospitals***"[8] might wish to exchange or transfer beds "***between themselves***" in order to serve "***their patients***" more efficiently. The plain and ordinary meaning of this language contemplates two existing, related hospitals, each with existing beds and patients, who, because of the changing health care environment, may need to swap resources. Hospitals cannot consolidate, they cannot be part of provider networks, they cannot transfer or exchange beds between themselves, they cannot have patients, and they cannot enter into agreements with one another when one hospital exists and the other does not.

Similarly, in the mandatory criteria of the Bed Transfer Standard, the concept of two existing hospital facilities continues. The Standard refers to the plural "***applicants***", "***governing bodies***", and "***facilities***" and contains numerous references to the "***facility giving up the beds***" as contrasted with the "***facility receiving the beds***."

At trial, two Department witnesses testified. Both were questioned about the plain English language meaning of the criteria of the Bed Transfer Standard. Beverly Brandt, the then Chief of the Department's Bureau of Health Facilities and Services Development, testified:

> Q. ...[L]et's try to apply this language as it's written in plain English between Roper Downtown and the greenfield or cow pasture. Okay. We can agree and you testified in your deposition that there's nothing at Carnes Crossroads right now but grass and trees, agreed?
>
> A. Yes.
>
> * * *

[8] The Court of Appeals also incorrectly determined that Roper Downtown and its nonexistent Carnes Crossroads Hospital were "affiliated hospitals" entitled to use the Bed Transfer Standard. This finding is not supported by the definition of "affiliated hospitals," which is "two or more health care facilities, whether inpatient or outpatient, owned, leased, sponsored, or who have a formal legal relationship with a central organization and whose relationship has been established for reasons other than for transferring beds, equipment or services." (Emphasis added)(Chapter II(B) of the 2008-2009 Plan).

Q. Okay. Would you agree with me that there is not affiliated hospitals, plural, in this case of Roper? If you look at J, these consolidations and agreements may lead to situations where affiliated hospitals . . .but there's no affiliation between Roper and an existing hospital at Carnes Crossroads, agreed?

A. There's no bricks and mortar facility at Carnes Crossroads, but our interpretation is that this bed transfer policy is appropriate and the receiving facility is the applicant.

Q. Okay. You can restate that policy every time and I'm fine with that. I'm just asking about the English. And I'm accepting for purposes of your testimony your statement of what your department's position is. But is hospitals a singular or plural noun?

A. In this case it does have an S, so it is plural.

Q. Plural in the English language, is it one or more than one?

A. In the English language, it's more than one.

Q. More than one.

A. But as we apply the bed transfer provision appropriately and according to-

Q. I'm willing to accept that there's DHEC language and there's the English language. My questions are just about the English language.

* * *

Q. Okay. Let's go back, not DHEC language, English language, receiving facility, that contemplates there's something there. Wouldn't you agree with me that facility means there's something there?

A. Yes.

* * *

Q. "The facility receiving the beds must demonstrate the need for the additional capacity based on both historical and projected utilization patterns." Again, we can agree because there's no physical facility existing at Carnes Crossroads, Carnes Crossroads cannot demonstrate historical and projected utilization patterns, correct?

A. Correct, but the applicant can and did.

* * *

A. Roper did in its application.

Q. Correct. But we've agreed in plain English there's no receiving facility, correct?

A. In plain English.

Q. Right. And if in plain English there's no receiving facility, it can't have historical utilization patterns? It's never delivered a baby, it's never taken an ER visit, it's never performed a surgery, correct?

A. Correct.

Q. And I'm only going to get historical utilization as a healthcare facility if I deliver services, perform surgeries, take care of inpatients, so this can't be done by a facility that does not yet exist, in the plain English language, correct?

A. In the plain English language.

(R. p. 1159, line 9 – p. 1170, line 16). The only other Department employee to testify at trial, Les Shelton, who was responsible for overseeing development of the State Health Plan, also admitted that the Department's policy of interpreting and applying the Bed Transfer Standard to cases with no existing receiving facility in order to establish a new hospital contradicts the plain English meaning of the words used in the Standard.[9] (R. p. 1534, line 17 – p. 1550, line 20).

[9] For example, Mr. Shelton testified:

A. The Department has used the historical utilization from . . . [the existing] facility to show the utilization for what's proposed to be the receiving facility.
Q. You would agree with me that there's not currently a hospital facility at the Carnes Crossroads property, correct?

* * *

A. No, there isn't an existing hospital at that site.
Q. Therefore, there is no historical utilization of that site, is there?
A. You can't have utilization from a facility until it's operational.

(R. p. 1540, lines 13–25).

In construing the Bed Transfer Standard, the Court must be guided first by the plain language of the section:

> When the language of a statute is plain, unambiguous, and conveys a clear and definite meaning, the application of standard rules of statutory interpretation is unwarranted. *Paschal v. State Election Comm'n,* 317 S.C. 434, 454, S.E.2d 890 (1995); *Miller v. Doe,* 312 S.C. 444, 441 S.E.2d 319 (1994). The statutory terms, therefore, must be applied according to their literal meaning. *Paschal,* 317 S.C. at 436, 454 S.E.2d at 892; *Holley v. Mount Vernon Mills, Inc.,* 312 S.C. 320, 440 S.E.2d 373 (1994). In such circumstances, this Court simply lacks the authority to look for or impose another meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. *Paschal,* 317 S.C. at 437, 454 S.E.2d at 892; *Berkebile v. Outen,* 311 S.C. 50, 426 S.E.2d 760 (1993).

Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003), *quoting, State v. Benjamin,* 341 S.C. 160, 163, 533 S.E.2d 606, 607 (Ct.App. 2000).

The plain, ordinary, and literal English language of the Bed Transfer Standard unambiguously contemplates the involvement of two, existing hospital facilities, each with its own beds and its own patients. The Standard plainly requires that the receiving hospital be able to show historic utilization and to demonstrate that the additional capacity being created by the transfer of beds from its affiliated hospital is needed. In the face of such plain language, neither the Court of Appeals nor the ALC or the Department can justify application of the Bed Transfer Standard to bed transfers involving only one existing hospital. [10]

[10] DHEC witnesses testified that, through creative reading of the requirements, DHEC allows a single existing applicant to get around the plain language of the Bed Transfer Standard. For example, subsection 2 requires that the "***applicants*** must document with patient origin data the ***historical utilization of the receiving facility*** by residents of the county giving up beds" and in subsection 5, that "[t]he ***facility receiving the beds must*** demonstrate the need for the ***additional*** capacity based on both ***historical*** and projected ***utilization patterns.***" (Emphasis added). Under DHEC's practice, the actual existing hospital, *i.e.*, the transferring facility, is allowed to submit its own utilization data in satisfaction of the requirement that both the transferring and receiving facility must demonstrate the need for additional capacity. (R. p. 1163, lines 11–25; R. p. 1169, line 13 – p. 1170, line 16; R. p. 1540, line 22 – 1541, line 4). This practice clearly contradicts the plain meaning of the Bed Transfer Standard, and the Department admits that it does. Again, a receiving facility which does not exist has no need for ***"additional"*** capacity.

Further, the purpose of the Bed Transfer Standard, which is set forth plainly and unambiguously in the preamble of the Standard, addresses the need for affiliated hospitals to exchange or transfer beds between themselves in response to consolidations and the formation of provider networks brought about by health care reform. This straightforward statement of purpose cannot be twisted to justify the construction of a brand new $113 million hospital that duplicates existing hospital services in the complete absence of need in the *Plan* and that improves timely access to hospital services for only 940 people. This is especially true given the stated goals of the CON program to "promote cost containment" and "prevent unnecessary duplication of health care facilities and services." S.C.Code Ann. § 44-7-120 (2002). *See, Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006)("A statute as a whole must receive practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers.").

Finally, when read in the context of the entire bed need methodology section of the Plan, an informal interpretation of the Bed Transfer Standard cannot be used to circumvent the two directly applicable methods for creating a new hospital facility. Both of those methods require that need exists, either in the hospital creating the new facility or in the service area as a whole. As noted, the only reason Roper did not qualify to use the accepted methods of creating a new hospital is that such need did not exist. The Court of Appeal's decision ignores the rules of construction and reaches the wrong conclusion concerning what the plain language of the Bed Transfer Standard allows.

II. THE COURT OF APPEALS ERRED IN GIVING DEFERENCE TO DHEC'S POLICY OF USING THE BED TRANSFER STANDARD TO CREATE NEW HOSPITALS BECAUSE SUCH POLICY CONTRAVENES THE PLAIN LANGUAGE OF THE STANDARD AND THE INTENT OF THE PLAN.

As set forth above, DHEC conceded that its interpretation of the Bed Transfer Standard is not in accord with the plain English language meaning of the words of the Standard. Remarkably, the Administrative Law Court in its Order also recognized and acknowledged that "[i]t cannot be denied that, on its face, Section II(G)(1)(A)(4)(j) of the 2008-2009 State Health Plan (the bed transfer provision) appears to anticipate the existence of an existing facility."

Yet, despite everyone's agreement[11] that the plain language of the *Plan* does not support DHEC's interpretation of it, both the ALC and the Court of Appeals deferred to DHEC on the issue. Such a result is contrary to established case law. *See Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("The first question of statutory interpretation is whether the statute's meaning is clear on its face...If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.") (Emphasis added).

Further, the established case law recognizes that an agency specifically is not entitled to the usual deference accorded it in the construction of its laws and regulations when its interpretation contravenes the plain and unambiguous language of those laws and regulations. *See, Savannah Riverkeeper v. S.C. Dep't of Health & Envtl. Control,* 400 S.C. 196, 207, 733 S.E.2d 903, 908 (2012)("An agency's interpretation of a statute or regulation that is erroneous or controlled by error of law presents a compelling reason not

[11] Roper does not agree but no one is considering or required to defer to Roper's interpretation.

to defer to the agency's interpretation."); *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 149–50, 694 S.E.2d 525, 530–31 (2010) ("An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language."). *Cf.*, *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 394 S.C. 567, 576 716 S.E.2d 111, 115 (Ct.App. 2011)("Because DHEC's interpretation in this instance was not contrary to the plain language of section 44-7-230(A) or section 802 of Regulation 61-15, we find the ALC properly deferred to DHEC . . .").

The Court of Appeals justifies its deference to DHEC's contrary "interpretation" of a plain and unambiguous provision by reciting all of the review criteria applicable to general hospital bed need and finding that those criteria and the general goals of the CON program give DHEC the "broad discretion" to evaluate and approve CON applications essentially as it sees fit.[12] The Court of Appeals found in the context of this "broad discretion" that DHEC's application of the Bed Transfer Standard in this case was "reasonable."

As it did with the language of the Bed Transfer Standard itself, however, the Court of Appeals focuses on an isolated phrase in one of the stated goals of the CON Act to support its finding. That goal is to guide the establishment of health facilities and services that "will best serve public needs." The Court of Appeals ignores the other goals of the Act, such as promoting cost containment and preventing unnecessary duplication

[12] While DHEC admittedly has the "flexibility" to evaluate CON applications under various criteria, the Court of Appeals errs in extending that flexibility to DHEC's interpretation of the law. Applying established criteria to an application is a fact finding exercise. In this case, the court allows DHEC to interpret the *law* and whether it applies from case to case as DHEC sees fit.

of health care facilities, both of which Roper's project contravenes. *See* S.C.Code Ann. §44-7-120. More importantly, the Court of Appeals' analysis also overlooks the detailed system set up by the CON Act for ensuring its goals are met, including the public promulgation of a State Health Plan with established criteria.

The Certificate of Need Act imposes a strict and detailed structure for the promulgation, amendment and content of the State Health Plan. Section 44-7-180(C), establishes a health planning process pursuant to which the State Health Planning Committee drafts the Plan, gives public notice of the contents of the draft Plan, and receives public comments on the draft Plan in writing and at mandatory regional public hearings. Under the Freedom of Information Act, all of the votes to recommend and approve the Plan by the State Health Planning Committee and the Board are taken after public notice and in open session. S.C.Code Ann. §§ 30-4-60 and 30-4-80 (2007). Any amendments to the Plan must go through the same public notice and comment process. S.C.Code Ann. § 44-7-180(C)(Supp. 2012).

In addition to specifying the process, the General Assembly also mandates that the contents of the Plan include "at a minimum": (1) an inventory of existing health care facilities, beds, specified health services, and equipment; (2) projections of need for additional health care facilities, beds, health services, and equipment; (3) standards for distribution of health care facilities, beds, specified health services, and equipment including scope of services to be provided, utilization, and occupancy rates, travel time, regionalization, other factors relating to proper placement of services, and proper planning of health care facilities; and (4) a general statement as to the project review criteria considered most important in evaluating certificate of need applications for each type of facility, service, and equipment, including a finding as to whether the benefits of

improved accessibility to each such type of facility, service, and equipment may outweigh the adverse effects caused by the duplication of any existing facility, service, or equipment. S.C.Code Ann. § 44-7-180(B)(Supp. 2012). The Act further requires that "The State Health Plan must address and include projections and standards for specified health services and equipment which have a potential to substantially impact health care cost and accessibility." S.C.Code Ann. § 44-7-180(B)(Supp. 2012).

Finally, the CON Act provides that "The department may not issue a Certificate of Need unless an application complies with the State Health Plan, Project Review Criteria, and other regulations." S.C.Code Ann. § 44-7-210(C)(Supp. 2012). The Department's CON regulations also mandate that, "The proposal shall not be approved unless it is in compliance with the State Health Plan." 3 S.C.Code Ann.Regs. 61-15, § 802 (Supp. 2012). As noted by the Court of Appeals in this case "Because the legislature has required these stringent requirements for the State Health Plan's implementation, it is clear that the legislature intended for the State Health Plan to be an enforceable document. *Trident Med. Ctr., LLC d/b/a Berkeley Reg'l Med. Ctr v. S.C. Dep't of Health & Envtl. Control*, Op. No. 5297 (S.C. Ct.App. filed May 6, 2015).

Far from giving DHEC the sole and unbridled discretion to interpret the Plan in order to "best serve the public needs", the Act imposes a strict statutory structure, requiring both public notice and public comment. This structure is designed to result in the consistency of health planning in the State and ensure that the needs of the public are met. Indeed, the very purpose of the State Health Plan is to create a blueprint for health planning upon which both the regulators and the regulated providers can rely. *Spartanburg Reg'l Medical Center v. Oncology and Hemotology Associates of South Carolina, LLC*, 387 S.C. 79, 83, 690 S.E.2d 783,785 (2010)("The purpose of the Health

Plan is to outline the need for medical facilities and services in the State. The Health Plan is used as one of the criteria for reviewing projects under the CON program."). It is a violation of both the statutory process and the purpose of the State Health Plan to allow DHEC to go outside of the Plan's stated methodology for new hospitals in order to create additional nebulous standards for their establishment through "interpretation" of a portion of the Plan contrary to its plain meaning. [13]

In this case, Trident is the only hospital with a need for hospital beds in the Tri-county Service Area. Yet, through the device of "interpreting" the Bed Transfer Standard, DHEC intends to allow Roper, which has no bed need, to construct a $113 million new hospital within several miles of Trident's existing hospitals. It is the intent of the CON Act that all providers, including Trident, be allowed to rely on the plain meaning of the State Health Plan in making decisions regarding the development and allocation of health care resources. Giving DHEC the authority to ignore the plain meaning of its own Plan, as the Court of Appeals' decision in this case does, undermines this intent.

Under the established case law, DHEC must follow its own regulations and laws. *See, Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987)("DHEC is a state administrative agency and can only exercise those powers which have been conferred upon it by the South Carolina General Assembly . . . DHEC must follow its own regulations and the provisions of the Administrative Procedures Act . . . in

[13] The issue before the Court is not whether the Board or the Department has the authority to formally adopt a policy which allows the establishment of a new hospital through the transfer of beds. Trident contends that the Department, having adopted the Bed Transfer Standard through the formal public notice and comment process mandated for amendments to the State Health Plan, must follow the same process with regard to any further amendments or expansion of the Standard. *See* S.C. Code Ann. § 44-7-180(C) (Supp. 2012). There is nothing in the record to illuminate why DHEC could not have followed the law and issued a Plan that specifically allowed the creation of a new hospital when no need exists. Of course, such a provision would have subject to public scrutiny and comment.

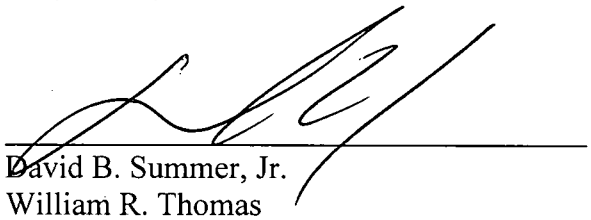
carrying out the legitimate purposes of the agency. . . . Any action taken by DHEC outside of its statutory and regulatory authority is null and void." [Citations omitted]).

Both the ALC and the Court of Appeals are charged with review of DHEC's decisions. It is the function of these courts to ensure that DHEC follows the law. Allowing DHEC broad discretion to interpret or ignore laws as it sees fit and affording DHEC virtually unlimited deference for its decisions permits no effective legal oversight, which is contrary to the law and to the role of the ALC and the courts in the CON process. *See* S.C. Code Ann. § 44-1-60(G); S.C. Code Ann. §1-23-600(Supp. 2012); *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) ("The construction of a regulation is a question of law to be determined by the court."). *See, also*, *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 7 n. 4, 664 S.E.2d 471, 474 n. 4 (2008) ("The issue whether the Plan standards satisfy the statutory requirements is a legal conclusion based on statutory interpretation principles.")

CONCLUSION

For the reasons stated, Trident respectfully urges that certiorari be granted in this case, that the matter reviewed by this Court, and that the Court of Appeals' opinion be reversed insofar as it upholds the approval of Roper's Certificate of Need application.

Respectfully submitted,



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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Opinion No. 5297 (S.C. Ct. App. refiled May 6, 2015)

Case No. 09-ALJ-07-0332-CC

Trident Medical Center, LLC, d/b/a
Berkeley Medical Center, ... Petitioner,

v.

South Carolina Department of Health and
Environmental Control and Roper St. Francis
Hospital-Berkeley d/b/a Roper St. Francis Hospital, ... Respondents.

Case No. 09-ALJ-07-0333-CC

Trident Medical Center, LLC, d/b/a
Berkeley Regional Medical Center, ... Petitioner,

v.

South Carolina Department of Health and
Environmental Control, and Roper St. Francis
Hospital-Berkeley, Inc. d/b/a Roper St. Francis
Hospital-Berkeley, ... Respondents.

PROOF OF SERVICE

(caption continued from cover page):

Case No. 09-ALJ-07-0336-CC

CareAlliance Health Services and Roper
St. Francis Hospital-Berkeley, ... Respondents,

v.

South Carolina Department of Health and
Environmental Control and Trident Medical Center, LLC,

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

and Trident Medical Center, LLC is the ..... Petitioner.

The undersigned hereby certifies that on June 5, 2015 s/he has caused a copy of the **Petition for Writ of Certiorari** to be filed with the Clerk of the Appellate Court and served upon all counsel of record by hand delivering a copy of the same, addressed as follows:

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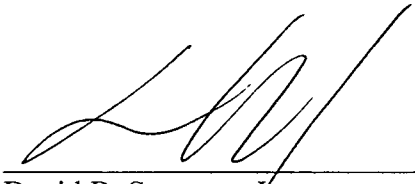

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