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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.

APPENDIX

(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.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Trident Medical Center, LLC, d/b/a Berkeley Regional
Medical Center, Appellant/Respondent,

v.

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

Of Whom South Carolina Department of Health and
Environmental Control is the Respondent and Roper St.
Francis Hospital is the Respondent/Appellant.

Trident Medical Center, LLC, d/b/a Berkeley Regional
Medical Center, Appellant/Respondent,

v.

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

Of whom South Carolina Department of Health and
Environmental Control is the Respondent and Roper St.
Francis Hospital is the Respondent/Appellant.

CareAlliance Health Services and Roper St. Francis
Hospital–Berkeley, Respondents/Appellants,

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 Appellant/Respondent.

Appellate Case No. 2012-213506

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5297
Heard October 7, 2014 – Filed February 18, 2015
Withdrawn, Substituted and Refiled May 6, 2015

AFFIRMED

David B. Summer Jr., William R. Thomas, and Faye A. Flowers, all of Parker Poe Adams & Bernstein LLP, of Columbia, for Appellant/Respondent.

William Marshall Taylor Jr., Ashley Caroline Biggers, and Vito Michael Wicevic, all of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

James G. Long III and Jennifer J. Hollingsworth, both of Nexsen Pruet, LLC, of Columbia, for Respondents/Appellants.

GEATHERS, J.: These cross-appeals involve a decision of the South Carolina Administrative Law Court (ALC) upholding the issuance by the South Carolina Department of Health and Environmental Control (DHEC) of a Certificate of Need (CON) for hospital construction in Berkeley County to both Roper St. Francis Hospital–Berkeley (Roper) and Trident Medical Center, LLC (Trident) pursuant to the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110 to -394 (2002 and Supp. 2014) (the CON Act). Trident challenges the

issuance of a CON to Roper, arguing the "Bed Transfer Provision" in the 2008-2009 State Health Plan prohibits DHEC from issuing a CON for the transfer of beds from Roper's hospital in downtown Charleston to a hospital that has not yet been built.

On the other hand, Roper's primary position is that the ALC's decision should be affirmed in its entirety, but if this court accepts Trident's argument and reverses the issuance of a CON to Roper, then the issuance of a CON to Trident must also be reversed. Because we affirm the ALC's decision to uphold the issuance of a CON to both Roper and Trident, we need not address Roper's appeal issue.

FACTS/PROCEDURAL HISTORY

In 2008, Berkeley County's estimated population was 158,140. However, there were (and still are) no acute care hospital beds licensed in Berkeley County. On August 13, 2008, Trident submitted an application for a CON to build a new fifty-bed acute care hospital in the Town of Moncks Corner in central Berkeley County pursuant to the 2004-2005 State Health Plan.¹ The 2004-2005 State Health Plan's inventory of general hospitals indicated that Trident's existing North Charleston facility had a need for forty-two additional beds,² and Trident sought to use this facility-specific need to obtain DHEC's approval for the proposed fifty-bed facility in Moncks Corner pursuant to a provision in the State Health Plan referred to as the "Fifty Bed Rule." This provision allows a hospital with a need for beds to add up to the greater of fifty beds or the actual projected number of needed beds to its inventory to provide for a cost-effective addition:

Should there be a need shown for additional beds for a hospital, then an increase may be approved. In order to

¹ The 2008-2009 State Health Plan did not become effective until September 12, 2008. *See* S.C. Code Ann. Regs. 61-15 § 504 (2011) (amended 2012) ("All decisions on [CON] applications shall be made based on the currently approved State Health Plan in effect at the time such application is accepted. Should a new plan be adopted during any phase of the review or appeals process, the applicant shall have the option of withdrawing the application and resubmitting under the newly adopted plan or continuing the review or appeal process under the plan in use when the application was submitted.").

² Trident explains that due to a "prior conversion of nursing home beds to hospital beds, [its North Charleston facility] actually had a bed need of [seventeen]" when it filed the CON application for the proposed hospital in Moncks Corner.

provide for a cost-effective addition, up to the greater of 50 beds or the actual projected number of additional beds may be approved, provided the hospital can document and demonstrate the need for additional beds.

Chapter II.G.1 § (A)(4)(d), 2004-2005 State Health Plan (Fifty Bed Rule).

Trident proposed to build the new hospital on a twenty-one acre site adjacent to its existing freestanding emergency department and outpatient center, Moncks Corner Medical Center. Trident indicated it planned to convert the building that houses the emergency department into a medical office building and move the emergency department into the new hospital.

A few months after Trident's CON submission, on December 10, 2008, Roper submitted an application for a CON to transfer some of its existing beds in its facility in downtown Charleston to a proposed new fifty-bed acute care hospital in the City of Goose Creek in southern Berkeley County pursuant to the Bed Transfer Provision of the 2008-2009 State Health Plan.³ The Bed Transfer Provision allows for the transfer of beds between affiliated hospitals in order to serve their patients in a more efficient manner, provided certain conditions are met. *See infra*. The new hospital is to be known as "Roper St. Francis Hospital-Berkeley."

On May 21, 2009, DHEC conducted a joint project review hearing on the two applications. On June 26, 2009, DHEC approved both applications. DHEC also determined that Trident and Roper were not "competing applicants" and, thus, it could properly grant CONs to both. The term "competing applicants" is defined in section 44-7-130(5) of the South Carolina Code (2002) as

two or more persons or health care facilities as defined in this article who apply for [CONs] to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and *whose applications, if approved, would exceed the need for services or facilities.*

(emphasis added). When DHEC is considering competing applications, it must award a CON on the basis of which applicant most fully complies with the CON

³ Chapter II.G.1 § (A)(4)(j), 2008-2009 State Health Plan (Bed Transfer Provision).

Act, the State Health Plan, project review criteria,⁴ and applicable DHEC regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010).

On July 6, 2009, Trident submitted two requests for final review conferences before DHEC's board (the Board), seeking (1) a reversal of the staff's decision to grant a CON to Roper, and (2) a determination that Trident and Roper were "competing applicants" and Trident was the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations. On July 10, 2009, Roper also filed a request for a final review conference before the Board, seeking a determination that Roper was the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations in the event the Board found Trident and Roper to be competing applicants. The Board declined to conduct final review conferences.

On August 7, 2009, Trident and Roper collectively filed three separate requests for a contested case review before the ALC. Trident sought (1) reversal of DHEC's determination that Trident and Roper were not competing applicants and (2) reversal of DHEC's issuance of a CON to Roper. Roper sought a decision either upholding DHEC's issuance of CONs to both applicants or finding that Roper was the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations.

The ALC consolidated the proceedings for trial and discovery purposes. Beginning on January 30, 2012, the ALC conducted a contested case hearing that lasted through February 16, 2012. Prior to receiving testimony, the ALC granted Roper's motion for partial summary judgment, concluding that if the applicants were found to be competing, the matter would be remanded to DHEC for identification of the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations.

On September 26, 2012, the ALC issued a written decision upholding DHEC's issuance of a CON to both Trident and Roper. In its decision, the ALC deferred to DHEC's interpretation of the Bed Transfer Provision and the Fifty Bed Rule and

⁴ There are thirty-three criteria for DHEC's review of a project. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). Each section of Chapter II of the State Health Plan designates the most important project review criteria for the particular type of facility or service addressed in that section. Chapter I.H, 2008-2009 State Health Plan; Chapter I.I, 2004-2005 State Health Plan.

found that if both applications were approved, they would not exceed the need for acute care hospital beds in the area. On October 5, 2012, Trident filed a motion for reconsideration, which was denied on November 1, 2012. These appeals followed.

ISSUES ON APPEAL

1. Did the ALC err in deferring to DHEC's interpretation of the Bed Transfer Provision?
2. Did the ALC err in concluding that Trident and Roper were not competing applicants?

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review from a decision of the ALC, allowing this court to

reverse or modify the decision 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; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2014). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Further, this court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact. *Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Assocs. of S.C., LLC*, 387 S.C. 79, 89, 690 S.E.2d 783,

788 (2010) (citing § 1-23-380(5)).⁵ In a nutshell, this court's review "is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law." *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 617 (2010).

LAW/ANALYSIS

I. Bed Transfer Provision

Trident does not challenge any of the ALC's findings of fact. Rather, Trident maintains that the ALC committed an error of law in deferring to DHEC's interpretation of the Bed Transfer Provision. Trident argues the Bed Transfer Provision prohibits DHEC from issuing a CON for the transfer of beds from an existing hospital to a hospital that has not yet been constructed. To address this argument, we will first discuss the general provisions governing CONs and then focus on the Bed Transfer Provision and the section of the 2008-2009 State Health Plan in which this provision can be found.

Background

The purpose of the CON Act is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2002). To achieve these purposes, the CON Act requires (1) the issuance of a CON before undertaking a project prescribed by the CON Act; (2) the adoption of procedures and criteria for submitting a CON application and for review before issuing a CON; (3) the preparation and publication of a State Health Plan; and (4) the licensing of health care facilities. *Id.* DHEC is designated the sole state agency for control and administration of the CON program and licensing of health facilities. S.C. Code Ann. § 44-7-140 (2002). A person or health care facility must obtain a CON before, among other things, establishing a new health care facility or changing the existing bed complement of a health care facility. S.C. Code Ann. § 44-7-160 (2002) (amended 2010).

⁵ "The ALC presides over the hearing of a contested case from DHEC's decision on a CON application and serves as the finder of fact." *Spartanburg Reg'l*, 387 S.C. at 89, 690 S.E.2d at 788.

With the advice of a health planning committee, of which most of the members are appointed by the Governor, DHEC must prepare a State Health Plan for use in administering the CON program. S.C. Code Ann. § 44-7-180(A), (B) (2002) (amended 2010). The State Health Plan must include

(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 [CON] 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 [e]ffects caused by the duplication of any existing facility, service, or equipment.

§ 44-7-180(B). The State Health Plan must also include projections and standards for certain health services and equipment having "a potential to substantially impact health care cost and accessibility." *Id.*

DHEC is required to submit the State Health Plan to the Board for final revision and adoption at least once every two years. S.C. Code Ann. § 44-7-180(C). Finalization of the State Health Plan requires a public comment period and a public hearing. *Id.* ("[DHEC] shall adopt by regulation a procedure to allow public review and comment, including regional public hearings, before adoption or revision of the plan."). Because the legislature has required these stringent requirements for the State Health Plan's implementation, it is clear the legislature intended for the State Health Plan to be an enforceable document. *Cf. Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 371, 688 S.E.2d 844, 851 (2010) (noting the stringent requirements for DHEC's enactment of the Coastal Management Program "suggest that the General Assembly did not believe it was meant to be an unenforceable document"); *id.* at 371-72, 688 S.E.2d at 851-52 (rejecting the argument that because the promulgation of the Coastal Management

Program did not comply with the Administrative Procedures Act, the Coastal Management Program was not enforceable and noting the legislature "created a separate and more rigorous procedure for promulgation of the [Coastal Management Program] and, because DHEC acted in accordance with the specified procedure, the [Coastal Management Program] is valid").

The State Health Plan has designated four regions of the state for the purpose of keeping an inventory of health facilities and services. *E.g.*, Chapter II.A, 2008-2009 State Health Plan. Each region is further divided into service areas. *Id.* In the 2008-2009 State Health Plan and the 2004-2005 State Health Plan, most service areas consist of individual counties. However, in the 2008-2009 State Health Plan, two service areas consist of multiple counties: (1) the Tri-County Service Area, consisting of Berkeley, Charleston, and Dorchester counties; and (2) the Orangeburg/Calhoun Service Area.⁶ In the 2004-2005 State Health Plan, only the Tri-County Service Area consists of multiple counties.⁷

Finally, DHEC may not issue a CON unless an application complies with the State Health Plan, project review criteria, and other regulations. § 44-7-210(C); *see also* S.C. Code Ann. Regs. 61-15 § 801.3 (2011) (amended 2012) ("[N]o project may be approved unless it is consistent with the State Health Plan."); S.C. Code Ann. Regs. 61-15 § 802.1 ("The proposal shall not be approved unless it is in compliance with the State Health Plan.").

In the present case, Trident contends Roper's proposed hospital is not consistent with the 2008-2009 State Health Plan because it does not comply with the plain language of the Bed Transfer Provision,⁸ which states:

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 or

⁶ See Chapter II.G.1 § A, 2008-2009 State Health Plan.

⁷ See Chapter II.G.1 § A, 2004-2005 State Health Plan.

⁸ It is undisputed that the Bed Transfer Provision is the only provision in the 2008-2009 State Health Plan that Roper may use to obtain a CON for a new hospital.

exchange hospital beds requires a [CON] 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 [CON] 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.

Chapter II.G.1 § (A)(4)(j), 2008-2009 State Health Plan (emphasis added). Trident argues this language allows DHEC to issue a CON for the transfer of beds between hospitals only when both hospitals already exist.

DHEC's Interpretation

In 2009, the Board specifically addressed the Bed Transfer Provision in the 2004-2005 State Health Plan, which is identical to the Bed Transfer Provision in the 2008-2009 State Health Plan. The interpretation of the Bed Transfer Provision was an issue in a contested case pending before the ALC, i.e., *Lexington County Health Services District, Inc. v. South Carolina Department of Health & Environmental Control*, Docket No. 07-ALJ-07-0520-CC. During the pendency of this contested case, the ALC remanded the question of whether the Bed Transfer Provision "allows the approval of a CON application for the transfer of . . . hospital beds for the purpose of establishing a new hospital facility." The Board concluded:

Read as a whole, the General Hospital section of the [State Health Plan] recognizes that changes in the health care delivery system may call for the transfer of unused beds at one facility to a new facility constructed to receive them.

Accordingly, the Board has determined that the 2004-2005 South Carolina Health Plan, which includes the [Bed] Transfer Standard, allows for approval of a CON application for the transfer of licensed general acute care hospital beds to establish a new hospital.

The Board noted that DHEC's staff had properly interpreted and applied the 2004-2005 State Health Plan in approving the transfer of seventy-six acute care hospital beds from Palmetto Health Baptist Hospital in downtown Columbia to create

Palmetto Health Baptist Parkridge, which was to be built in northwest Richland County.⁹

Deference to DHEC's Interpretation

Our supreme court has recently expounded on the application of statutes and regulations administered by an administrative agency. In *Kiawah Development Partners, II, v. South Carolina Department of Health & Environmental Control*, the court stated:

Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. If the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.

Op. No. 27065 (S.C. Sup. Ct. refiled December 10, 2014) (Shearouse Adv. Sh. No. 49 at 11) (citations and internal quotation marks omitted).

The court further stated, "We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 25 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).¹⁰ After tracing the history of South Carolina's deference doctrine, the

⁹ Although there is no conflict between the Board's interpretation of the Bed Transfer Provision and the staff's interpretation, we note that when such a conflict exists, "an agency's Appellate Panel [(here, the Board)], not its staff, is typically entitled to deference in interpreting agency regulations." *Neal v. Brown*, 383 S.C. 619, 624, 682 S.E.2d 268, 270 (2009).

¹⁰ See also *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) ("[W]e give deference to the interpretation of a regulation by the agency charged with it[s] enforcement." (citation omitted)); *S.C. Dep't of Revenue v. Anonymous Co. A*, 401 S.C. 513, 516, 678 S.E.2d 255, 257 (2009) ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent

court concluded, "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Id.* at 24.

In the present case, as we evaluate the deference given by the ALC to DHEC's interpretation of the Bed Transfer Provision, we must be mindful of the General Assembly's entrustment of South Carolina's health care marketplace to DHEC for cost containment, prevention of unnecessary duplication, serving public needs, and ensuring the high quality of healthcare services. *See* § 44-7-120 (stating the purpose of the CON Act). DHEC plays a significant role in the drafting and approval of the State Health Plan, as it does in promulgating regulations. Therefore, we may interpret the State Health Plan using the rules of statutory construction applied to regulations,¹¹ with one caveat: "[E]ach *section* of the [State Health Plan] must be read as a whole." Chapter I.I, 2008-2009 State Health Plan (emphasis added).

In *Murphy v. South Carolina Department of Health & Environmental Control*, our supreme court was presented with DHEC's interpretation of its regulation

compelling reasons." (quoting *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006)); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a *compelling* reason to differ." (emphasis added) (citations omitted)); *Spruill v. Richland Cnty. Sch. Dist. 2*, 363 S.C. 61, 65, 609 S.E.2d 524, 526 (2005) (stating that an agency's construction of its own regulation "is accorded most respectful consideration and will not be overturned absent *compelling* reasons." (emphasis added) (citation and internal quotation marks omitted)); *Dorman v. S.C. Dep't of Health & Env'tl. Control*, 350 S.C. 159, 167, 565 S.E.2d 119, 123 (Ct. App. 2002) ("[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." (citation and internal quotation marks omitted)); *Converse Power Corp. v. S.C. Dep't of Health & Env'tl. Control*, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002) ("The construction of a regulation by the agency charged with executing the regulations is entitled to the most respectful consideration and should not be overruled without cogent reasons." (citation omitted)).

¹¹ *Murphy*, 396 S.C. at 639, 723 S.E.2d at 195 (holding that regulations are interpreted using the rules of statutory construction).

concerning state water quality certifications.¹² 396 S.C. at 636-38, 723 S.E.2d at 192-94. In particular, the court examined the following language in Regulation 61-101: "Certification will be denied if (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired." *Id.* at 640, 723 S.E.2d at 195 (footnote omitted) (quoting S.C. Code Ann. Regs. 61-101.F.5(a) (Supp. 2011)). DHEC interpreted the term "vicinity," which was not defined in the regulation, to include more than the immediate project area. *Id.* DHEC's project manager for the proposed project testified that DHEC "interpreted the 'vicinity of the project' on a case by case basis according to its best professional judgment as each project is different." *Id.* The court concluded, "Because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application." *Id.* at 640-41, 723 S.E.2d at 195.

Likewise, in the present case, DHEC's interpretation of the Bed Transfer Provision is not only reasonable but also consistent with the Bed Transfer Provision's plain language. The following language from the preamble to the Bed Transfer Provision indicates a purpose of building flexibility into the State Health Plan when dealing with provider networks:

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.*

(emphasis added).

We note Trident argues that Roper's Charleston facility and its proposed new hospital in Goose Creek are not "affiliated hospitals" because the definition of "affiliated hospitals" in Chapter II.B of the 2008-2009 State Health Plan excludes two facilities whose relationship has been established for the purpose of transferring beds. However, the record shows that Roper is not attempting to

¹² A state water quality certification is required before the Army Corps of Engineers may issue a permit to fill portions of "waters of the United States" pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

establish a relationship with a legally separate entity that has its own network of existing hospitals. Rather, Roper seeks to expand its own network of hospitals with the intent to provide convenience for its existing patients residing in Berkeley County, who now travel to Roper's facility in downtown Charleston.¹³ The new hospital will be a continuation of an existing network of acute care facilities serving Roper patients in the Tri-County service area, i.e., Roper Hospital in downtown Charleston, Bon Secours St. Francis in Charleston County, Roper St. Francis Mount Pleasant Hospital, and a freestanding Emergency Department and Ambulatory Surgery Facility in Berkeley County.

The remainder of the Bed Transfer Provision consists of a list of eight criteria with which a CON applicant must comply. *See supra*. The language in this list certainly *accommodates* those CON applications for the transfer of beds to a receiving facility already in existence at the time the application is submitted. Yet, there is no language in this list that either expressly or impliedly *requires* the receiving facility to be in existence when the CON application is submitted. Therefore, the plain language of the Bed Transfer Provision can be reasonably interpreted to include a receiving facility that will be constructed after DHEC issues the CON.

In any event, the Bed Transfer Provision is not a section unto itself—it is part of Chapter II.G.1 § (A) ("General Hospitals").¹⁴ Therefore, we may not consider the language of the Bed Transfer Provision in isolation. Rather, Chapter I.I of the 2008-2009 State Health Plan states, "The criteria and standards set forth in the [State Health Plan] speak for themselves, and each *section* of the [State Health Plan] must be read *as a whole*." (emphases added). *Cf. Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the

¹³ The ALC found that twenty-three percent of those Berkeley County residents who were admitted to a hospital traveled past Trident Medical Center to seek care at Roper's facilities in downtown Charleston and west of the Ashley River.

¹⁴ *See* Chapter I.H (indicating what constitutes a "section" in Chapter II by noting, "A general statement has been added to each *section* of Chapter II stating the project review criteria considered to be the most important in reviewing [CON] applications for each type of facility, service, and equipment. . . . In addition, a finding has been made in each *section* as to whether the benefits of improved accessibility to each such type of facility, service[,] and equipment may outweigh the adverse [e]ffects caused by the duplication of any existing facility, service[,] or equipment." (emphases added)).

purpose, design, and policy of lawmakers," and "the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." (citation and internal quotation marks omitted)); *id.* at 128-29, 750 S.E.2d at 63 (holding that words in a statute must be construed in context and that the court "may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent" (citation and internal quotation marks omitted)).

Hence, we must examine all the provisions of Chapter II.G.1 § (A) ("General Hospitals") before determining whether there is a compelling reason to reject DHEC's interpretation of the Bed Transfer Provision. Section (A) includes provisions that describe how the bed capacity of a general hospital is determined, set forth an inventory of general hospitals in the state and an explanation of the inventory, explain how the need for beds in the respective service areas is calculated, list required services a general hospital must provide, set forth factors to be considered regarding modernization of facilities, and describe the relative importance of the project review criteria for general hospitals. Of particular interest is the discussion of the most important project review criteria for general hospitals. *See* Chapter II.G.1 § (A), 2008-2009 State Health Plan. Significant emphasis should be placed on these criteria in interpreting section (A) as a whole. These criteria are

- a. Compliance with the Need Outlined in [the State Health Plan];
- b. Community Need Documentation;
- c. Distribution (Accessibility);
- d. Acceptability;
- e. Financial Feasibility;
- f. Cost Containment; and
- g. Adverse Effects on Other Facilities.

Id. These criteria are not listed in order of importance. Chapter I.H, 2008-2009 State Health Plan. In fact, "[t]he relative importance assigned to each specific criterion is established by [DHEC] depending upon the importance of the criterion applied to the specific project." S.C. Code Ann. Regs. 61-15 § 801.2. Further, "[a] project does not have to satisfy every criterion in order to be approved," provided the project is consistent with the applicable State Health Plan. S.C. Code Ann. Regs. 61-15 § 801.3.

The first listed criterion, "Compliance with the Need Outlined in [the State Health Plan]," refers to the need for, or surplus of, beds at each listed hospital in the respective service areas. Notably, items (d) and (e) of Chapter II.G.1 § (A)(4), 2008-2009 State Health Plan, contemplate circumstances in which population projections that are not considered in the State Health Plan demonstrate the need for beds in a service area.¹⁵ These provisions demonstrate that the published results of the calculations for each hospital and each service area are not the final determinant of need for a particular service area. Rather, flexibility is built into the requirements for general hospitals when determining need.

The second listed criterion, "Community Need Documentation," states that the proposed project should provide services that meet a documented need of the target population and current or projected utilization should justify the expansion or implementation of the proposed service. S.C. Code Ann. Regs. 61-15 § 802.2. The third listed criterion, "Distribution (Accessibility)," provides, in pertinent part, that the proposed service "should be located so that it may serve medically underserved areas" and "allow for the delivery of necessary support services in an acceptable period of time." S.C. Code Ann. Regs. 61-15 § 802.3.

The fourth listed criterion, "Acceptability," states that the proposed project and the applicant should have the support of "affected persons,"¹⁶ including local providers

¹⁵ See Chapter II.G.1 § (A)(4)(d), 2008-2009 State Health Plan ("The hospital requesting the addition must document the need for additional beds *beyond those indicated as needed by the methodology stated above*, based on historical and projected utilization, as well as projected population growth or other factors demonstrating the need for the proposed beds." (emphasis added)); *id.* at (4)(e) ("An applicant requesting additional beds beyond those indicated as needed by the methodology stated above[] must document the need for additional beds based on historical and projected utilization, floor plan layouts, *projected population growth that has not been considered in this Plan*[,] or other factors demonstrating the need for the proposed beds." (emphasis added)).

¹⁶ "Affected person" means

the applicant, a person residing within the geographic area served or to be served by the applicant, persons located in the health service area in which the project is to be located and who provide similar services to the proposed project, persons who before receipt by [DHEC] of the proposal being reviewed have formally indicated

and the target population. S.C. Code Ann. Regs. 61-15 § 802.4. The fifth listed criterion, "Financial Feasibility," requires the applicant to project the immediate and long-term financial feasibility of the proposed project. S.C. Code Ann. Regs. 61-15 § 802.15. The sixth listed criterion, "Cost Containment," requires the applicant to demonstrate that its chosen funding method is the most feasible option and the project's impact on the applicant's cost to provide services is reasonable. S.C. Code Ann. Regs. 61-15 § 802.16. Finally, the seventh listed criterion, "Adverse Effects on Other Facilities," states, "The impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services." S.C. Code Ann. Regs. 61-15 § 802.23. This criterion also provides that the staffing of the proposed service should not unnecessarily deplete the staff of existing facilities or cause an excessive rise in staffing costs. *Id.*

All of these criteria undoubtedly afford DHEC broad discretion in bringing its expertise in health care planning to the evaluation of CON applications for general hospitals. In turn, the incorporation of these criteria into the section in which the Bed Transfer Provision is located, Chapter II.G.1 § (A), signifies the intent of the State Health Planning Committee to provide flexibility in the application of section (A) to each proposed project with its own unique circumstances. Thus, it is reasonable for DHEC to interpret the Bed Transfer Provision as allowing the transfer of beds to a hospital that has not yet been built when the transfer would improve health care access for the target population. This is consistent with the plain language of the Bed Transfer Provision as well as the General Assembly's stated purpose for the CON Act: "[T]o promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] *will best serve public needs*, and ensure that high quality services are provided in health facilities in this State." § 44-7-120 (emphasis added).

an intention to provide similar services in the future, persons who pay for health services in the health service area in which the project is to be located and who have notified [DHEC] in writing of their interest in [CON] applications, the State Consumer Advocate and the State Ombudsman.

S.C. Code Ann. Regs. 61-15 § 103.1 (2011) (amended 2012).

Just as the *Murphy* court found DHEC's flexible interpretation of its water quality certification regulation reasonable and consistent with the regulation's plain language,¹⁷ we find DHEC's interpretation of the Bed Transfer Provision in the 2008-2009 State Health Plan reasonable and consistent with the plain language of that provision. Therefore, we find no compelling reason to reject DHEC's interpretation of the Bed Transfer Provision within section (A). *See S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486 ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."); *Spruill*, 363 S.C. at 65, 609 S.E.2d at 526 (holding courts traditionally defer to an executive agency's construction of its own regulation and this "construction is accorded most respectful consideration and will not be overturned absent compelling reasons" (citation and internal quotation marks omitted)).

Based on the foregoing, the ALC properly deferred to DHEC's interpretation of the Bed Transfer Provision.

II. Competing Applicants

Trident assigns error to the ALC's finding that Trident and Roper were not "competing applicants." Trident argues that as a matter of law, the approval of both CON applications would exceed the need for hospital beds in the area, and, therefore, DHEC was required to determine which applicant most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations. We disagree.

Section 44-7-130(5) defines "competing applicants" as

two or more persons or health care facilities as defined in this article who apply for [CONs] to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and *whose applications, if approved, would exceed the need for services or facilities.*

(emphasis added).¹⁸ When DHEC is faced with competing applications, it is required to award a CON, "if appropriate," based on which, if any, application

¹⁷ 396 S.C. at 640-41, 723 S.E.2d at 195.

¹⁸ Similarly, Regulation 61-15 defines "competing applicants" as

most fully complies with the CON Act, the State Health Plan, the project review criteria, and applicable DHEC regulations. § 44-7-210(C).

Here, the parties agree that (1) both Trident and Roper propose to provide similar services and facilities in the same service area; and (2) Trident's and Roper's respective CON applications were filed within the appropriate time frame for competing applications. However, Trident challenges the ALC's finding that the approval of both applications would not exceed the need for hospital facilities in the service area. Roper, on the other hand, argues substantial evidence supports the ALC's finding.

Nevertheless, Trident characterizes this issue as an issue of law, asserting that the question of whether both projects would exceed the need for hospital beds in the service area is determined solely by the indication of need set forth in the 2008-2009 State Health Plan's hospital inventory, which reflects an excess of forty-eight hospital beds for the Tri-County Service Area and an excess of six beds in Roper's inventory. Trident concludes that Roper's proposed hospital, "by itself or in conjunction with Trident's proposed hospital exceeds the need for hospital beds in the service area." We disagree. Section 44-7-130(5) clearly focuses on whether the proposed projects would *cause* an excess of services or facilities for the service area.

We agree with Trident that this issue is one of law but only because, in this case, we need not look to indicators of need outside of the 2008-2009 State Health Plan—the approval of both CONs will not exceed the need already documented in

two or more persons and/or health care facilities as defined in this regulation who apply for [CONs] to provide similar services and/or facilities in the same service area and *whose applications[,] if approved[,] would exceed the need for this facility or service*. An application shall be considered competing if it is received by [DHEC] no later than fifteen (15) days after a Notice of Affected Persons is published in the State Register for one or more applications for similar services and/or facilities in the same service area.

S.C. Code Ann. Regs. 61-15 § 103.6 (emphasis added).

the 2008-2009 State Health Plan.¹⁹ Roper is not seeking to add new beds to the service area. On the contrary, the existing hospital beds at Roper's facility in downtown Charleston were already approved for a CON. Thus, Roper is merely seeking to transfer beds that are already available for use in the service area to a location in the very same service area that will be more convenient for its existing patients residing in Berkeley County, who now travel to Roper's facility in downtown Charleston.

Further, Trident's proposed addition of beds to the service area is filling a need already documented in the State Health Plan's hospital inventory. Moreover, the number of beds added by Trident that will exceed the number designated in the hospital inventory are allowed under the Fifty Bed Rule. *See supra*.

Based on the foregoing, the ALC correctly determined that Trident and Roper are not "competing applicants."

CONCLUSION

Accordingly, the ALC's decision is

AFFIRMED.

WILLIAMS and McDONALD, JJ., concur.

¹⁹ At oral argument, Roper asserted the supreme court's opinion in *Spartanburg Reg'l*, 387 S.C. at 90-91, 690 S.E.2d at 789, established that the determination of "competing applicants" is always a factual determination. We do not read the *Spartanburg Reg'l* opinion that broadly. The determination *in that case* was factual. However, in this case, we need not go beyond the methodology set forth in the 2008-2009 State Health Plan to determine that Trident and Roper are not competing applicants.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAR 05 2015

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John D. McLeod, Administrative Law Judge

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Trident Medical Center, LLC, d/b/a
Berkeley Medical Center, ...Appellant/Respondent,

v.

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d/b/a Roper St. Francis Hospital,

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

Roper St. Francis is the Respondent/Appellant.

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PETITION FOR REHEARING OF APPELLANT/RESPONDENT

(caption continued from cover page):

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v.

South Carolina Department of Health and
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Center, LLC Respondents,

Of whom Trident Medical Center, LLC is the Appellant.

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Pursuant to Rule 221, SCACR, Appellant/Respondent Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center ("Trident") hereby petitions the Court for rehearing of the panel decision filed on February 18, 2015, in the above-captioned case.

Trident contends that the panel decision overlooks or misapprehends the following:

1. In holding that the plain language of Chapter II.G.1 § (A)(4)(j) of the *2008-2009 State Health Plan* ("Bed Transfer Provision") supports the Respondent Department of Health and Environmental Control's ("DHEC") decision that the Bed Transfer Provision can be used by the Respondent/Appellant Roper St. Francis Hospital-Berkeley d/b/a Roper St. Francis Hospital ("Roper") to establish a new hospital, the panel decision considers only selected language from the preamble to the Bed Transfer Provision and overlooks or misapprehends that the entire Provision, including the entire preamble, by its plain English language construction, requires that the receiving hospital be in existence.
2. The panel's holding that the Bed Transfer Provision contains no language that expressly or implicitly requires the receiving hospital be in existence overlooks or misapprehends the numerous references and requirements in the plain language of the Provision which can apply only if the receiving hospital is in existence.
3. The panel's holding that the plain language of the Bed Transfer Provision supports DHEC's policy of applying the Provision to new hospitals overlooks and is contrary to the uncontradicted admissions in the record by the ALC, in its order, and DHEC, in testimony before the ALC, that the policy is, in fact, contrary to the plain English language of the Bed Transfer Provision.
4. The panel's holding that the Administrative Law Court ("ALC") properly deferred to DHEC's interpretation of the Bed Transfer Provision as applying to new hospitals overlooks or misapprehends the established case law that deference to an agency's interpretation of a regulation is warranted only when the regulation is silent or ambiguous on the matter, which is not the case with the Bed Transfer Provision.
5. The panel's decision that the ALC properly deferred to DHEC's interpretation of the Bed Transfer Provision is contrary to the established law that an agency's interpretation is not entitled to deference when compelling circumstances exist to reject such interpretation, the compelling circumstances being, in this case, that DHEC's interpretation is arbitrary, capricious and manifestly contrary to the plain language of the Bed Transfer Provision.

6. The panel's conclusion that the ALC properly deferred to DHEC's *ad hoc* interpretation and application of the Bed Transfer Provision to Roper's project overlooks, undermines, and is contrary to the panel's recognition that the Legislature imposed stringent requirements for the *State Health Plan* with the intent that it be enforced according to its terms and that due process requires such enforcement.
7. The panel's construction of the Bed Transfer Provision in the context of the entire general hospitals section of the *State Health Plan* (Chapter II.G.1 § (A))("General Hospitals Section") overlooks and misapprehends that the General Hospitals Section contains two specific and explicit provisions for creating a new hospital facility, that Roper's proposed project does not qualify under either of them, and that allowing Roper to utilize the Bed Transfer Provision to create a new facility circumvents the requirements of those provisions. (See Chapter II.G.1 §§ (A)(4)(d) and (e) of the *2008-2009 State Health Plan*).
8. The panel's conclusion that the lack of beds in Berkeley County is an indication of need or that the area is "medically underserved" or is relevant to Roper's proposed project is not supported by the law or the uncontradicted evidence in the record, which indicates that the applicable service area in this case is Charleston, Berkeley and Dorchester Counties ("Tri-County Service Area"), that there is an excess of beds in the service area, and that Roper's proposed project is to be located within 7.9 miles of Trident's existing Trident Medical Center and 10.3 miles of Trident's existing Summerville Medical Center.
9. The panel's conclusion that it is "reasonable for DHEC to interpret the Bed Transfer Provision as allowing the transfer of beds to a hospital that has not yet been built when the transfer would improve health care access in a medically underserved community" overlooks or misapprehends that DHEC's interpretation is contrary to the plain language of the Provision and that the uncontradicted evidence in the record indicates that the applicable service area in this case is Charleston, Berkeley and Dorchester Counties ("Tri-County Service Area"), that there was an excess of beds in the service area, and that Roper's proposed project is to be located within 7.9 miles of Trident's existing Trident Medical Center and 10.3 miles of Trident's existing Summerville Medical Center.
10. The panel's conclusion that Trident and Roper are not competing applicants under the applicable law misapprehends that, as a matter of law, approval of both projects would exceed the need for general hospital beds in the Tri-County Service Area.

These grounds are more fully explained in Trident's Memorandum in Support of its Petition for Rehearing and are supported by Trident's detailed arguments in final briefs filed with the Court.

For the foregoing reasons, the reasons set forth in Trident's Memorandum, and for any other reason supported by the briefs and Record, Trident respectfully requests that the Court grant REHEARING of the panel decision and REVERSE the panel decision insofar as it affirms DHEC's decision to grant Roper's Certificate of Need Application.

Respectfully submitted,



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March 5, 2015
Columbia, South Carolina

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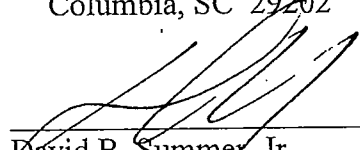
Of whom Trident Medical Center, LLC is the Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on March 5, 2015 s/he caused a copy of the Appellant/Respondent's Petition for Rehearing to be served on all parties of record by hand delivering the same, addressed as follows:

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**MEMORANDUM IN SUPPORT OF
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The Appellant/Respondent Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center (“Trident”) submits this Memorandum in Support of its Petition for Rehearing.

FACTS

For purposes of this Memorandum, the relevant facts are as follows.¹ On December 10, 2008, the Respondent/Appellant Roper St. Francis Hospital-Berkeley, Inc. d/b/a Roper St. Francis Hospital-Berkeley (“Roper”) filed a Certificate of Need (“CON”) application under the *2008-2009 South Carolina Health Plan* (“State Health Plan”) requesting approval for the construction of a new hospital to be located in Berkeley County within the Charleston-Berkeley-Dorchester health planning area (the “Tri-county Service Area”). Specifically Roper proposed to transfer 50 licensed hospital beds from its downtown Charleston hospital in order to create a new 50-bed community hospital in Goose Creek. Roper proposed to locate its new hospital on a site just 7.9 miles from Trident’s existing Trident Medical Center and 10.3 miles from Trident’s existing Summerville Medical Center.

In August, 2008, Trident filed its own CON application to construct a 50-bed community hospital in Berkeley County. Trident proposed to located its hospital on a site adjacent to a freestanding emergency department that Trident operated in Moncks Corner. Because Trident believed that there was not enough need in the Tri-county Service Area for two new hospitals, a belief supported by the statements of need in the State Health Plan, Trident took the position that Roper was a competing applicant to Trident and its proposed facility.

¹ Trident respectfully refers the Court to its briefs previously filed with the Court for a detailed discussion of the facts.

In its application, Roper indicated that no hospital or other medical facility existed at Roper's proposed site to receive the transfer of the beds from Roper's downtown hospital. In order to accomplish the transfer of hospital beds, Roper proposed to construct an entirely new receiving hospital and to create all new 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.

Given the proximity of Roper's proposed 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 time of a hospital. Quantified, only 940 additional persons will be brought within 30 minutes' drive of a hospital as a result of the construction of Roper's proposed new hospital. The State Health Plan contains the statement that "[g]eneral Hospital beds are located within approximately thirty (30) minutes travel time for the majority of residents of the State . . ." (Relative Importance of Project Review Criteria, p. II-11). The consensus of the experts presented at trial was that a 30-minute time travel measure for hospital services is reasonable for health planning purposes.

Under the State Health 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 has a physical presence there. (Chapter G.1 § (A)(4)(d)). The State Health Plan also allowed a provider to use a stated need for additional hospital beds in the planning area as a whole to create a new hospital anywhere in the planning area, if approved by DHEC. (Chapter G.1 § (A)(4)(e)). Thus, the only two

provisions of the State Health Plan that expressly allowed new hospitals required as a prerequisite that need exist ("New Hospital Provisions").

At the time Roper filed its CON, Roper had no need for beds under the State Health Plan, and, in fact, had an excess of 6 beds at its downtown hospital. There was a 48 bed surplus in the Tri-county Service Area as a whole when Roper applied. Because of the lack of need for any new hospital beds for Roper or in the Tri-County Service Area as a whole, Roper could not utilize either of the New Hospital Provisions. Instead, Roper was allowed to submit its CON application under a provision of the State Health Plan that does not on its face apply to the creation of a new facility. Chapter II, Section G.1(A)(4)(j) of the State Health Plan (the "Bed Transfer Provision") was made available to Roper because DHEC apparently had an unwritten policy of interpreting the Bed Transfer Provision to allow a hospital to transfer beds from a licensed facility even when no licensed receiving facility existed to receive them.²

On June 26, 2009, DHEC approved both Trident's and Roper's applications, finding that the projects were not competing. Trident appealed the approval of Roper's application and the finding that the projects were not competing to the Board of Health and Environmental Control ("Board"). The Board declined to conduct a final review and Trident requested contested case review on those issues before the Administrative Law Court ("ALC").

On September 26, 2012, the ALC issued its Final Order and Decision ("Order") affirming DHEC's decision to approve both Trident's and Roper's CON applications. Although the ALC conceded in its Order that the plain language of the Bed Transfer

² After Roper filed its application, the unwritten policy was affirmed by the Board of Health and Environmental Control in a May 8, 2009 written decision in an unrelated case.

Provision limited its application to cases in which both the transferring and receiving hospitals exist, the ALC nevertheless deferred to the Department's contrary interpretation and approved Roper's application as consistent with the State Health Plan. The ALC also found that Trident and Roper were not competing applicants because the need for hospital facilities and services in the area would not be exceeded if both hospitals were approved.

In its February 18, 2015 Opinion No. 5297, the Court of Appeals panel affirmed the ALC's decision to defer to DHEC's interpretation of the Bed Transfer Provision, holding that the plain language of the Provision supported such action. The panel also determined, as a matter of law, that the need for new hospital services was not exceeded by approval of both Trident and Roper's CON applications.

Trident has filed herewith a Petition for Rehearing asserting numerous grounds on which the panel decision misapprehends or overlooks important evidentiary and legal matters in reaching the above conclusions. Trident submits this memorandum in support of its Petition for Rehearing.

ISSUES 1 – 3

Plain Language Interpretation

In holding that the plain language of the Bed Transfer Provision supports DHEC's interpretation that the Provision can be used by Roper to establish a new hospital and that no language in the Provision contradicts such interpretation, the panel decision considers only selected language from the preamble to the Bed Transfer Provision and overlooks or misapprehends that the entire Provision, including the entire preamble, by its plain English language construction, requires that the receiving hospital be in existence.

For example, the preamble to the Bed Transfer Provision provides in its entirety that “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 or exchange* hospital beds requires a Certificate of Need and must comply with the following criteria. . . .” (Emphasis added). The panel decision focuses on only one statement of purpose in the preamble, that a bed transfer between affiliated hospitals might be used “in order to serve their patients in a more efficient manner.”

The panel uses this language as dispositive proof that the Bed Transfer Provision supports Roper’s stated goal to move closer to the small percentage of its patients at Roper Downtown who come from Berkeley County. This narrow and selective reading of the Bed Transfer Provision ignores the remainder of the Provision and its many requirements, which must be met before a transfer can be made, all of which indicate that the hospital receiving the beds must be in existence. In other words, the plain language of the Bed Transfer Provision indicates that it cannot be used to create a new hospital. (*See 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)).

According to its entire preamble, the Bed Transfer Provision was promulgated to address and assist providers in their response to health care reforms that resulted in the “consolidation of facilities” and “the establishment of provider networks” where “affiliated hospitals”³ 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 or reallocate resources. Hospitals cannot consolidate, cannot be affiliated or part of provider networks, cannot transfer or exchange beds between themselves, and cannot enter into agreements with one another when one hospital exists and the other does not.

The remainder of the Bed Transfer Provision requirements contain references to the plural “applicants,” “bodies,” and “facilities” and contains numerous references to the “facility giving up the beds” as contrasted with “the facility receiving the beds.” To work around these plain English references to two extant facilities, DHEC deems a single hospital, *i.e.*, the one transferring the beds, to be both the facility transferring the beds and the facility receiving the beds. DHEC must then ignore or contort the remaining requirements of the Provision to fit this scenario.

For example, the Bed Transfer Provision requires that the “applicants must document with patient origin data the historical utilization of the receiving facility by

³ Trident contends that the finding of the panel that Roper’s yet-to-be-created hospital is an “affiliated hospital” overlooks or misapprehends the applicable definition of “affiliated hospitals” set forth in Chapter II(B) of the State Health Plan as “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). Roper intends to create its Goose Creek hospital for the purpose of receiving the transfer of beds from its downtown campus. It is true that once the bed transfer occurs, Roper will operate the new hospital to serve patients. However, if no bed transfer can occur, there will be no Goose Creek hospital, as that is the reason for its creation.

residents of the county giving up beds” and that “[t]he facility receiving the beds must demonstrate the need for the additional capacity based on both historical and projected utilization patterns.” Only if the receiving facility exists can it demonstrate that it is being utilized by residents of the county giving up the beds, in this case, Charleston. Only if the receiving facility exists can it demonstrate historical utilization to support its need for “additional” capacity at its site.

The only way to find support for DHEC’s interpretation in the words of the Bed Transfer Provision is to ignore or alter these plain English requirements. The panel decision does just that because it misapprehends or overlooks the plain language of the entire Bed Transfer Provision.

The panel also overlooks the acknowledgment by the DHEC witnesses at trial that DHEC’s interpretation of the Bed Transfer Provision is not in accord with the plain meaning of the words of the Provision. Likewise, the panel decision misapprehends or overlooks that the ALC 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.”

Despite this finding regarding the plain language of the Bed Transfer Provision, the ALC nevertheless deferred to DHEC’s interpretation that the Provision could be applied to create a new hospital. The panel decision upholds the ALC’s deference to DHEC. Such holding is illogical, arbitrary, capricious, and overlooks or misapprehends established case law. *See Kiawah Development Partners, II, v. South Carolina Department of Health and Environmental Control*, Op. No. 27065 (S.C. Sup. Ct. refiled December 10, 2014)(Shearouse Adv. Sh. No. 49 at 11) (Setting forth the two step process

for analyzing regulations administered by agencies and requiring adherence to the clear meaning of the regulation); *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 to defer to the agency’s interpretation.”); *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.”).

Issues 4 – 6

Deference to the Agency

The panel’s holding that the ALC properly deferred to DHEC’s interpretation of the Bed Transfer Provision as applying to new hospitals overlooks or misapprehends the established case law that deference to an agency’s interpretation of a regulation is warranted only when the regulation is silent or ambiguous on the matter, which is not the case with the Bed Transfer Provision. Further it is established law that an agency’s interpretation is not entitled to deference when compelling circumstances exist to reject such interpretation, the compelling circumstances being, in this case, that DHEC’s interpretation is arbitrary, capricious and manifestly contrary to the plain language of the Bed Transfer Provision. (See Argument I. above).

Further, the panel’s conclusion that the ALC properly deferred to DHEC’s interpretation of the Bed Transfer Provision, when the plain language requires otherwise,

overlooks, undermines, and is contrary to the panel's recognition in its decision that the Legislature imposed stringent requirements for the State Health Plan with the intent that the Plan be enforced according to its terms and that due process requires such enforcement. Granting DHEC the broad deference to interpret the Plan contrary to its plain meaning is contrary to the laws governing the authority of DHEC to develop and administer the State Health Plan and to the laws governing administrative and judicial oversight of DHEC by the ALC and the courts.

As the panel decision implicitly recognizes in holding that the State Health Plan is intended to be enforceable, far from giving the Department the sole and unbridled discretion to interpret the Plan at will, the law imposes a strict statutory structure, requiring both public notice and public comment, which is designed to result in the consistency of health planning in the State. Allowing the Department to create ad hoc standards for the establishment of new hospitals by "interpreting" portions of the Plan contrary to their plain meaning violates both the statutory process and the purpose of the State Health Plan." See *Triska v. S.C. 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."). See also 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.").

Issues 7 – 9

State Health Plan Requirements

In its decision, the panel appropriately concludes from the established case law and from the language of the State Health Plan itself that the Bed Transfer Provision must be construed in light of the entire general hospitals section of the Plan (Chapter II.G.1 § (A)) (“General Hospitals Section”). The panel’s decision, however, overlooks and misapprehends that the General Hospitals Section contains two specific and explicit provisions setting forth the requirements for creating a new hospital and that Roper’s proposed project does not qualify under either of them.

As discussed earlier, the New Hospital Provisions of the State Health Plan both require that need exist before a new hospital can be created. One obvious reason for the requirement of need prior to creating a new hospital is illustrated by Roper’s proposed project.

Roper does not simply propose to transfer beds from an existing hospital. It proposes to construct an entirely new receiving hospital facility and to create all new 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. All of this cost and duplication of services is to be added to the health care system so that Roper can make itself more convenient to the small percentage of its patients residing in Berkeley County that choose, for whatever reason, to utilize Roper’s downtown Charleston hospital. The

record shows that the location Roper chose for its project improves timely access to hospital services for only 940 people.

Under the New Hospital Provisions of the State Health Plan, which specifically address the creation of new hospitals, Roper cannot justify its project because no need exists. Nevertheless, the panel's decision affirms DHEC's "interpretation" of the Bed Transfer Provision, which does not expressly relate to the creation of new hospitals, to allow Roper's project to be approved. This holding undermines and overlooks the New Hospital Provisions of the State Health Plan and 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.").

Further, the panel's conclusion that the lack of beds in Berkeley County is an indication of need and that the area is "medically underserved"⁴ is not supported by the law and is contrary to the uncontradicted evidence in the record. The applicable service area in this case, as set forth in the State Health Plan is the Tri-county area composed of Charleston, Berkeley and Dorchester Counties. Allocation and distribution of hospital services must be determined for the service area, not just Berkeley County. As the uncontradicted evidence in the record shows there was a surplus of beds in the service

⁴ Regulation 61-15 defines "medically underserved groups" as "groups which have traditionally experienced difficulties in obtaining equal access to health services (e.g. low income persons, racial and ethnic minorities, women, the elderly, and handicapped persons), particularly those needs identified in the applicable South Carolina Health Plan as deserving of 'priority.'" (3 S.C. Code Ann. Regs. 61-15, § 802(31)).

area when Roper filed its application and Roper's proposed project was to be located within 7.9 miles of Trident's existing Trident Medical Center and 10.3 miles of Trident's existing Summerville Medical Center.

Even assuming that parts of Berkeley County are "medically underserved", Roper's project will not alleviate that condition. Therefore, the panel's conclusion that it is "reasonable for DHEC to interpret the Bed Transfer Provision as allowing the transfer of beds to a hospital that has not yet been built when the transfer would improve health care access in a medically underserved community" is contrary to the State Health Plan and the uncontradicted evidence in the record.

Issue 10

Competing Applicants

The panel's conclusion that Trident and Roper are not competing applicants under the applicable law misapprehends that, as a matter of law, approval of both projects would exceed the need for hospital services in the Tri-County Service Area. Under the law, "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 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).

In reaching the conclusion that the need for hospital services would not be exceeded by the approval of both Trident and Roper's projects, the panel decision defers to DHEC's finding that, because Roper proposed to transfer existing licensed beds, the need for those services would not be exceeded. DHEC viewed Roper's application to

construct a brand new \$113 million hospital with its substantial duplication in ancillary services at a location over 25 miles from Roper Downtown as a simple “repositioning” of a portion of Roper Downtown’s licensed bed complement, for which no further analysis of need was required. The panel decision concurs and interprets the law to require that the approval of both applications actually “cause” the need for the services to be exceeded. Neither of these positions is supported by the law.

At the time it applied, Roper did not have a positive, or even a neutral, bed need. Roper had an excess of beds. Likewise the Tri-county Service Area had an excess need for beds. The panel decision accepts the notion that, because the excess need bed count did not change as result of Roper’s being allowed to move its excess beds, the need for hospital services will not be exceeded by the approval of two new 50-bed hospitals in Berkeley County.

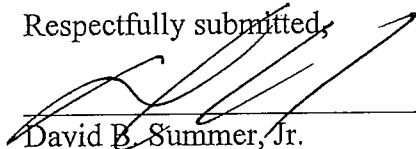
Under the competing applicants law, however, the test is not whether the bed count for the facility or for the service area remains unchanged or unaffected. Under the competing applications law, the test is whether two or more projects can be approved when those projects will exceed the need for the services or facilities. The law does not require that the approval of both projects be the cause of the excess. Because the State Health Plan reflects an aggregate excess of beds in the Tri-county Service Area and because Roper’s existing hospitals show an excess of beds, as a matter of law, DHEC was required to conclude that Roper’s proposed hospital by itself or in conjunction with Trident’s proposed hospital exceeded the need for hospital services in the service area

and that, therefore, Trident and Roper were competing applicants.⁵ To draw any other conclusion is inconsistent with the State Health Plan.

CONCLUSION

For the foregoing reasons, the reasons set forth in Trident's Petition for Rehearing, and for any other reason supported by the briefs and Record, Trident respectfully requests that the Court grant REHEARING of the panel decision and REVERSE the panel decision insofar as it affirms DHEC's decision to grant Roper's Certificate of Need Application.

Respectfully submitted,



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March 5, 2015
Columbia, South Carolina

⁵ Unlike Roper, Trident did show a need for additional hospital beds under the Plan. Once Trident's project was approved, that need was met and no further need existed for Roper to justify its project.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SC Court of Appeals

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

Case No. 2012-213506

Trident Medical Center, LLC, d/b/a
Berkeley Medical Center, ...Appellant/Respondent,

v.

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

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

Roper St. Francis is the Respondent/Appellant.

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

v.

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

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

Roper St. Francis is the Respondent/Appellant.

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MAR 05 2015

SC Court of Appeals

(caption continued from cover page):

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

v.

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

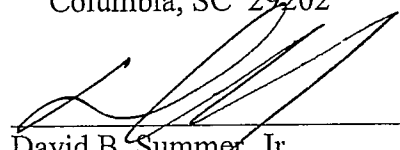
Of whom Trident Medical Center, LLC is the Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on March 5, 2015 s/he has caused a copy of the Memorandum in Support of Petition for Rehearing of Appellant/Respondent to be served on all parties of record by hand delivering the same, addressed as follows:

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APPENDIX.00046

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2012-213506
Case No. 09-ALJ-07-0332-CC

Trident Medical Center, LLC, d/b/a Berkeley
Medical Center, ...Appellant/Respondent,

v.

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

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

Roper St. Francis is the Respondent/Appellant.

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

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

v.

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

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

Roper St. Francis is the Respondent/Appellant.

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

Care Alliance Health Services and Roper St. Francis
Hospital Berkeley, ...Respondents/Appellants,

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 Appellant/Respondent.

RESPONDENT’S RETURN TO PETITION FOR REHEARING

Pursuant to Rule 240(e), SCACR, Respondent South Carolina Department of Health and Environmental Control (“Department”) hereby submits this return to Appellant/Respondent Trident Medical Center, LLC d/b/a Berkeley Medical Center’s (“Trident”) petition for rehearing. Pursuant to Rule 221(A), SCACR, a petition for rehearing must set forth with particularity the points alleged to have been overlooked or misapprehended by the Court. Trident has not met this bar, and its petition for rehearing should be denied.

Interpretation of the Bed Transfer Provision

The South Carolina Health Plan (“SHP”) contains a rule allowing for the establishment of a new hospital through the transfer of hospital beds from an existing licensed hospital to a new location within the same service area. Trident’s first argument in its petition for rehearing is a challenge to this rule. Trident argued that rules of statutory construction should convince the Court to reject the Department’s interpretation of its own rules in the SHP. The Court properly rejected Trident’s argument, and Trident has presented no grounds justifying reversal of the Court’s opinion.

Courts will defer to an agency’s interpretation unless it is “arbitrary, capricious, or manifestly contrary to the statute.” *Kiawah Development Partners, II, v. S.C. Dep’t of Health and Envtl. Control*, 411 S.C. 16, 766 S.E.2d. 707 (2014). The DHEC Board interpreted the bed transfer provision to say that the receiving facility need not be an existing facility in order to receive beds. (R. pp. 7519-26). There is no compelling reason to overturn the Board’s

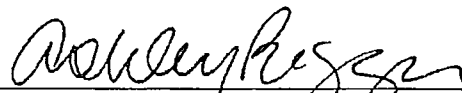
interpretation. Trident's petition for rehearing as to the interpretation of the bed transfer provision in the SHP should be denied.

Competing Applicants

The Court properly considered the definition of "competing applicants" set forth in S.C. Code Ann. §44-7-130(5) (Supp. 2002) and 3 S.C. Code Regs. Ann. 61-15 § 103(6) (Supp. 2014) in determining that Trident's and Roper's applications could both be approved without exceeding the need for hospital beds in the service area. It is undisputed that Trident and Roper both seek to provide similar services in the same service area. It is also undisputed that Trident seeks fill a need documented in the SHP, while Roper seeks to transfer existing beds from one location within the service area to another location in the service area. The addition of the beds at the proposed Trident facility and the relocation of Roper's beds will not, together, exceed the indicated need in the SHP for beds in the service area. The Court properly considered and decided all facts and provisions of law applicable to the determination of "competing applicants." Therefore, Trident's petition for rehearing as to the "competing applicants" issue should be denied.

Conclusion

For the foregoing reasons, the Department respectfully requests that Trident's petition for rehearing.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2012-213506

Trident Medical Center, LLC, d/b/a
Berkeley Medical Center, ...Appellant/Respondent,

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

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

Roper St. Francis is the Respondent/Appellant.

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

Of Whom South Carolina Department of Health and
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Roper St. Francis is the Respondent/Appellant.

Care Alliance Health Services and Roper
St. Francis Hospital-Berkeley, ...Respondents/Appellants,

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

Respondents, and

Trident Medical Center, LLC is the Appellant/Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on March 16, 2015 she has caused a copy of *Respondent's Return to Petition for Rehearing* to be served on all parties of record by Electronic Mail, U.S Mail, First Class, postage prepaid and FED-X Mail by overnight delivery addressed as follows:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2012-213506
Case No. 09-ALJ-07-0332-CC

Trident Medical Center, LLC, d/b/a
Berkeley Medical Center, ...Appellant/Respondent,
v.

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

Of Whom SCDHEC is the Respondent, and
Roper St. Francis is the Respondent/Appellant.

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

Trident Medical Center, LLC, d/b/a Berkeley
Regional Medical Center, ...Appellant/Respondent,
v.

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

Of Whom SCDHEC is the Respondent, and
Roper St. Francis is the Respondent/Appellant.

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

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

v.

South Carolina Department of Health and
Environmental Control and Trident Medical Center, LLC..... Respondents,
Of Whom Trident Medical Center, LLC, is the..... Appellant.

**RETURN OF RESPONDENTS-APPELLANTS
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INTRODUCTION

At the request of the Court and pursuant to Rule 240(e), SCACR, CareAlliance Health Services and Roper St. Francis Hospital – Berkeley (hereinafter collectively “Roper St. Francis”) submit this response to the Petition for Rehearing filed by Trident Medical Center, LLC (“Trident”). Trident sets forth 10 numbered arguments grouped by Trident into three general issues objecting to the holdings of this Court in the Order issued February 18, 2015. For the reasons set forth herein, Roper St. Francis submits to the Court that the request for rehearing should be denied and the Order affirmed in all respects.

Roper St. Francis objects to and requests that this Court disregard the argumentative matters contained in the “Facts” portion of the Petition and further asks the Court to disregard the overreaching statements made therein as being inappropriate matter for inclusion in the Petition. The Facts of this matter are well known to this Court, having been fully briefed and carefully considered prior to the Court’s Order issued February 18, 2015.

ARGUMENTS

I. TRIDENT OFFERS NO NEW ARGUMENT IN SUPPORT OF ITS TORTURED CONSTRUCTION OF THE BED TRANSFER PROVISION.

Trident's first three issues raised in pursuit of rehearing are the overused and oft-repeated "plain English language" challenges made by it throughout these proceedings. Only now, Trident asserts that this Honorable Court has not properly read the "plain English language" of the Bed Transfer Provision and has therefore overlooked or misapprehended the requirements of the Provision. Trident has been and continues to be incorrect in this position.

As this Honorable Court correctly held, "there is no language in [the Bed Transfer Provision] list that either expressly or impliedly *requires* the receiving facility to be in existence when the CON application is submitted." Order, p.14 (emphasis in original). Trident challenges that the Court only engaged in a "narrow and selective reading of the Bed Transfer Provision" when, in fact, this Court engaged in a *thorough* analysis of the *entire* General Hospital Section of the 2008-2009 South Carolina Health Plan in reaching its correct decision. Trident then absurdly, once again, claims that the *plain* language of the Provision "indicate[s]" that the receiving hospital be in existence. Roper St. Francis submits once again that plain language wouldn't 'indicate' – it would state. That Trident asserts an interpretation must be made of what the Bed Transfer Provision *means*, is the best evidence that the Department similarly concluded that fact and a reasonable interpretation ensued, which has been affirmed by the DHEC Board and now upheld at the ALC and on appeal. This argument seeking rehearing is unavailing.

Finally, Trident's argument that the ALC purportedly acknowledged that the Bed Transfer Provision "appears to anticipate the existence of an existing facility" provides

undue weight and significance to the ALC's isolated sentence within numerous findings of fact regarding the Provision. In fact, this Court did consider the ALC's entire Order and properly concluded that the language of the Bed Transfer Provision "certainly *accommodates* those CON applications for the transfer of beds to a receiving facility already in existence at the time the application is submitted." Order, p.14 (emphasis in original). But the Order goes on to expressly acknowledge that the prior existence of the receiving facility is not "expressly or impliedly" required. *See id.* As briefed by Roper St. Francis in its briefing as Appellant, Trident's demand for a strict and narrow interpretation of the Bed Transfer Provision directly contradicts the interpretation Trident requires of the Fifty Bed Rule in the 2004-2005 South Carolina Health Plan to allow for the construction of its new hospital on a vacant field in Moncks Corner. *See e.g.* Roper St. Francis' Reply Br. 2-4.

Put simply, nothing in Trident's Petition for Rehearing raises an issue or matter overlooked or misapprehended by this Court in the review of the Bed Transfer Provision so as to warrant further review. The arguments made in the Petition are simply regurgitations of the prior briefing by Trident and are not sufficient under the Rules to warrant further review of this Court.

II. TRIDENT FAILS TO IDENTIFY ANY COMPELLING REASON TO REJECT THE DEPARTMENT'S INTERPRETATION OF THE BED TRANSFER PROVISION.

Trident's issues four through six challenge the Court's affirmance of the ALC's deference to the agency interpretation of the Bed Transfer Provision. As this Court properly concluded, no compelling reason exists to overturn the Department's interpretation of its own South Carolina Health Plan. *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006) ("The construction of a

statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons.”) The well-developed line of cases addressing the deference owed to the agency refers to the Department’s construction of statutes for which it is charged with administering, *i.e.* the CON Act. *See* S.C. Code Ann. § 44-7-140; *see also* *Byerly Hosp. v. S.C. State Health and Human Svcs. Fin. Comm’n*, 319 S.C. 225, 229, 460 S.C.2d 383, 385-6 (1995) (“We must affirm if the decision of the agency is supported by substantial evidence, and we may not substitute our judgment for that of the agency upon questions as to which there is room for a difference of intelligent opinion. Moreover, because the Commission has been designated as the single state agency for implementation of Medicaid, great deference must be accorded its interpretations of Medicaid laws and regulations.”) In this instance, the deference is even more appropriate given the construction or interpretation at issue is of the Departments *own document* and not a statute – the South Carolina Health Plan is not a legislatively enacted document, but instead is drafted, approved and promulgated solely by DHEC and its governing Board. S.C. Code Ann. § 44-7-180(B)-(C). There can be no other meaning of the Bed Transfer Provision than the meaning ascribed by the DHEC Board, which addressed and confirmed the construction of the Bed Transfer Provision as applied to allow for the transfer of licensed beds to a new facility.

Other than its status as a disgruntled competitor, Trident cannot show that the Department’s construction of the Bed Transfer Provision was arbitrary or capricious, much less point to a compelling reason warranting reversal of the Department’s construction. Trident submits no evidence or factual allegation to support that the 2008-2009 South Carolina Health Plan was not properly promulgated by the Department, or

that due process was not afforded prior to its enactment. Other than displeasure at the result, Trident cannot articulate an argument to support that the Department's interpretation of the Fifty Bed Rule under the 2004-2005 South Carolina Health Plan supporting its project should be affirmed, but the Department's interpretation of the Bed Transfer Provision under the 2008-2009 South Carolina Health Plan must be rejected. The argument is inconsistent and without merit. Having failed to raise or identify any compelling reason to reject the Department staff's reasonable interpretation of the Bed Transfer Provision, that was since affirmed by the Department Board and the ALC, Trident's Petition for Rehearing should be denied.

III. TRIDENT'S NARROW READING OF THE GENERAL HOSPITAL SECTION OF THE SOUTH CAROLINA HEALTH PLAN SHOULD BE REJECTED.

Trident summarizes points 7 through 9 of its Petition as alleging that the South Carolina Health Plan does not support the reasoning of the Court. Trident cannot deny that Roper St. Francis serves a substantial patient base in Berkeley County, and that every person in Berkeley County requiring inpatient hospital care must travel outside of the County to obtain treatment. Roper St. Francis' project is clearly in furtherance of the purposes of the CON Act as well as the South Carolina Health Plan and the Bed Transfer Provision itself – to establish a facility and services to best meet the public's needs. As the Court noted, the project allows for already licensed beds to be transferred to a large populated area with no access to inpatient hospital beds, to “improve health care access in a medically underserved community.” Order, p.17. The Bed Transfer Provision specifically acknowledges that a hospital may transfer beds “in order to serve their patients in a more efficient manner.” Roper St. Francis' CON Application comports with this plain language of the Bed Transfer Provision and Trident has failed to identify any

matter overlooked or misapprehended by this Court in the Order evaluating the South Carolina Health Plan that warrants rehearing.

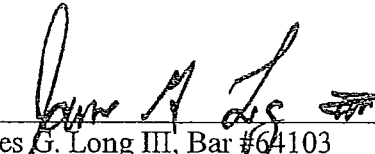
IV. THE APPLICATIONS ARE NOT COMPETING APPLICATIONS

Trident's final argument in support of rehearing is no more than the same argument made on appeal. Trident wrongly asserts that Roper St. Francis was required to show a bed need existed for its project, when in fact the need for the beds had previously been addressed and approved – Roper St. Francis is transferring licensed beds and has no impact on the bed need formula set forth in the South Carolina Health Plan's bed inventory. Trident offers no law in support of its position to obtain rehearing and does no more than disagree with the learned decision of this Court. Having no basis on which to determine that this Court has overlooked or misapprehended any matter before it, the Petition should be denied.

CONCLUSION

Roper St. Francis respectfully urges this Court to deny the Petition for Rehearing.

Respectfully submitted,



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Attorneys for Respondents-Appellants
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St. Francis Hospital-Berkeley

April 10, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

Trident Medical Center, LLC, d/b/a
Berkeley Medical Center, ... Appellant-Respondent,
v.

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

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

Roper St. Francis Hospital - Berkeley d/b/a Roper
St. Francis Hospital is the Respondent-Appellant.

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

Trident Medical Center, LLC, d/b/a Berkeley
Regional Medical Center, ... Appellant-Respondent,
v.

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

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

Roper St. Francis Hospital - Berkeley d/b/a Roper
St. Francis Hospital is the Respondent-Appellant.

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

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

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.....Appellant-Respondent.

PROOF OF SERVICE

I, James G. Long III, hereby certify that on April 10, 2015, I caused a copy of Respondents-Appellants CareAlliance Health Services and Roper St. Francis Hospital – Berkeley’s Return to Petition for Rehearing to be served on the following by hand delivery addressed as follows:

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The South Carolina Court of Appeals

Trident Medical Center, LLC, d/b/a Berkeley Regional
Medical Center, Appellant/Respondent,

RECEIVED

MAY 07 2015

v.

Proctor, Poe, Adams
& Bernstein, L.L.P.

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

Of Whom South Carolina Department of Health and
Environmental Control is the Respondent and Roper St.
Francis Hospital is the Respondent/Appellant.

Trident Medical Center, LLC, d/b/a Berkeley Regional
Medical Center, Appellant/Respondent,

v.

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

Of whom South Carolina Department of Health and
Environmental Control is the Respondent and Roper St.
Francis Hospital is the Respondent/Appellant.

CareAlliance Health Services and Roper St. Francis
Hospital–Berkeley, Respondents/Appellants,

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 Appellant/Respondent.

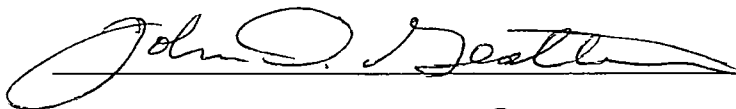
Appellate Case No. 2012-213506

ORDER

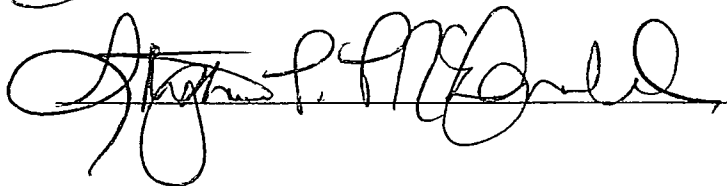
After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. However, we withdraw Opinion No. 5297 and substitute the attached amended opinion.



J.



J.



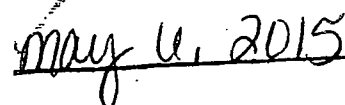
J.

Columbia, South Carolina

cc:

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Faye Anne Flowers, Esquire
James Grant Long, III, Esquire
Jennifer Joan Hollingsworth, Esquire
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William Marshall Taylor, Jr., Esquire

FILED



APPENDIX.00065

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Trident Medical Center, LLC, d/b/a Berkeley Regional
Medical Center, Appellant/Respondent,

v.

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

Of Whom South Carolina Department of Health and
Environmental Control is the Respondent and Roper St.
Francis Hospital is the Respondent/Appellant.

Trident Medical Center, LLC, d/b/a Berkeley Regional
Medical Center, Appellant/Respondent,

v.

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

Of whom South Carolina Department of Health and
Environmental Control is the Respondent and Roper St.
Francis Hospital is the Respondent/Appellant.

CareAlliance Health Services and Roper St. Francis
Hospital–Berkeley, Respondents/Appellants,

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 Appellant/Respondent.

Appellate Case No. 2012-213506

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5297
Heard October 7, 2014 – Filed February 18, 2015
Withdrawn, Substituted and Refiled May 6, 2015

AFFIRMED

David B. Summer Jr., William R. Thomas, and Faye A. Flowers, all of Parker Poe Adams & Bernstein LLP, of Columbia, for Appellant/Respondent.

William Marshall Taylor Jr., Ashley Caroline Biggers, and Vito Michael Wicevic, all of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

James G. Long III and Jennifer J. Hollingsworth, both of Nexsen Pruet, LLC, of Columbia, for Respondents/Appellants.

GEATHERS, J.: These cross-appeals involve a decision of the South Carolina Administrative Law Court (ALC) upholding the issuance by the South Carolina Department of Health and Environmental Control (DHEC) of a Certificate of Need (CON) for hospital construction in Berkeley County to both Roper St. Francis Hospital–Berkeley (Roper) and Trident Medical Center, LLC (Trident) pursuant to the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110 to -394 (2002 and Supp. 2014) (the CON Act). Trident challenges the

issuance of a CON to Roper, arguing the "Bed Transfer Provision" in the 2008-2009 State Health Plan prohibits DHEC from issuing a CON for the transfer of beds from Roper's hospital in downtown Charleston to a hospital that has not yet been built.

On the other hand, Roper's primary position is that the ALC's decision should be affirmed in its entirety, but if this court accepts Trident's argument and reverses the issuance of a CON to Roper, then the issuance of a CON to Trident must also be reversed. Because we affirm the ALC's decision to uphold the issuance of a CON to both Roper and Trident, we need not address Roper's appeal issue.

FACTS/PROCEDURAL HISTORY

In 2008, Berkeley County's estimated population was 158,140. However, there were (and still are) no acute care hospital beds licensed in Berkeley County. On August 13, 2008, Trident submitted an application for a CON to build a new fifty-bed acute care hospital in the Town of Moncks Corner in central Berkeley County pursuant to the 2004-2005 State Health Plan.¹ The 2004-2005 State Health Plan's inventory of general hospitals indicated that Trident's existing North Charleston facility had a need for forty-two additional beds,² and Trident sought to use this facility-specific need to obtain DHEC's approval for the proposed fifty-bed facility in Moncks Corner pursuant to a provision in the State Health Plan referred to as the "Fifty Bed Rule." This provision allows a hospital with a need for beds to add up to the greater of fifty beds or the actual projected number of needed beds to its inventory to provide for a cost-effective addition:

Should there be a need shown for additional beds for a hospital, then an increase may be approved. In order to

¹ The 2008-2009 State Health Plan did not become effective until September 12, 2008. *See* S.C. Code Ann. Regs. 61-15 § 504 (2011) (amended 2012) ("All decisions on [CON] applications shall be made based on the currently approved State Health Plan in effect at the time such application is accepted. Should a new plan be adopted during any phase of the review or appeals process, the applicant shall have the option of withdrawing the application and resubmitting under the newly adopted plan or continuing the review or appeal process under the plan in use when the application was submitted.").

² Trident explains that due to a "prior conversion of nursing home beds to hospital beds, [its North Charleston facility] actually had a bed need of [seventeen]" when it filed the CON application for the proposed hospital in Moncks Corner.

provide for a cost-effective addition, up to the greater of 50 beds or the actual projected number of additional beds may be approved, provided the hospital can document and demonstrate the need for additional beds.

Chapter II.G.1 § (A)(4)(d), 2004-2005 State Health Plan (Fifty Bed Rule).

Trident proposed to build the new hospital on a twenty-one acre site adjacent to its existing freestanding emergency department and outpatient center, Moncks Corner Medical Center. Trident indicated it planned to convert the building that houses the emergency department into a medical office building and move the emergency department into the new hospital.

A few months after Trident's CON submission, on December 10, 2008, Roper submitted an application for a CON to transfer some of its existing beds in its facility in downtown Charleston to a proposed new fifty-bed acute care hospital in the City of Goose Creek in southern Berkeley County pursuant to the Bed Transfer Provision of the 2008-2009 State Health Plan.³ The Bed Transfer Provision allows for the transfer of beds between affiliated hospitals in order to serve their patients in a more efficient manner, provided certain conditions are met. *See infra*. The new hospital is to be known as "Roper St. Francis Hospital–Berkeley."

On May 21, 2009, DHEC conducted a joint project review hearing on the two applications. On June 26, 2009, DHEC approved both applications. DHEC also determined that Trident and Roper were not "competing applicants" and, thus, it could properly grant CONs to both. The term "competing applicants" is defined in section 44-7-130(5) of the South Carolina Code (2002) as

two or more persons or health care facilities as defined in this article who apply for [CONs] to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and *whose applications, if approved, would exceed the need for services or facilities.*

(emphasis added). When DHEC is considering competing applications, it must award a CON on the basis of which applicant most fully complies with the CON

³ Chapter II.G.1 § (A)(4)(j), 2008-2009 State Health Plan (Bed Transfer Provision).

Act, the State Health Plan, project review criteria,⁴ and applicable DHEC regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010).

On July 6, 2009, Trident submitted two requests for final review conferences before DHEC's board (the Board), seeking (1) a reversal of the staff's decision to grant a CON to Roper, and (2) a determination that Trident and Roper were "competing applicants" and Trident was the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations. On July 10, 2009, Roper also filed a request for a final review conference before the Board, seeking a determination that Roper was the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations in the event the Board found Trident and Roper to be competing applicants. The Board declined to conduct final review conferences.

On August 7, 2009, Trident and Roper collectively filed three separate requests for a contested case review before the ALC. Trident sought (1) reversal of DHEC's determination that Trident and Roper were not competing applicants and (2) reversal of DHEC's issuance of a CON to Roper. Roper sought a decision either upholding DHEC's issuance of CONs to both applicants or finding that Roper was the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations.

The ALC consolidated the proceedings for trial and discovery purposes. Beginning on January 30, 2012, the ALC conducted a contested case hearing that lasted through February 16, 2012. Prior to receiving testimony, the ALC granted Roper's motion for partial summary judgment, concluding that if the applicants were found to be competing, the matter would be remanded to DHEC for identification of the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations.

On September 26, 2012, the ALC issued a written decision upholding DHEC's issuance of a CON to both Trident and Roper. In its decision, the ALC deferred to DHEC's interpretation of the Bed Transfer Provision and the Fifty Bed Rule and

⁴ There are thirty-three criteria for DHEC's review of a project. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). Each section of Chapter II of the State Health Plan designates the most important project review criteria for the particular type of facility or service addressed in that section. Chapter I.H, 2008-2009 State Health Plan; Chapter I.I, 2004-2005 State Health Plan.

found that if both applications were approved, they would not exceed the need for acute care hospital beds in the area. On October 5, 2012, Trident filed a motion for reconsideration, which was denied on November 1, 2012. These appeals followed.

ISSUES ON APPEAL

1. Did the ALC err in deferring to DHEC's interpretation of the Bed Transfer Provision?
2. Did the ALC err in concluding that Trident and Roper were not competing applicants?

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review from a decision of the ALC, allowing this court to

reverse or modify the decision 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; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2014). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Further, this court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact. *Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Assocs. of S.C., LLC*, 387 S.C. 79, 89, 690 S.E.2d 783,

788 (2010) (citing § 1-23-380(5)).⁵ In a nutshell, this court's review "is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law." *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 617 (2010).

LAW/ANALYSIS

I. Bed Transfer Provision

Trident does not challenge any of the ALC's findings of fact. Rather, Trident maintains that the ALC committed an error of law in deferring to DHEC's interpretation of the Bed Transfer Provision. Trident argues the Bed Transfer Provision prohibits DHEC from issuing a CON for the transfer of beds from an existing hospital to a hospital that has not yet been constructed. To address this argument, we will first discuss the general provisions governing CONs and then focus on the Bed Transfer Provision and the section of the 2008-2009 State Health Plan in which this provision can be found.

Background

The purpose of the CON Act is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2002). To achieve these purposes, the CON Act requires (1) the issuance of a CON before undertaking a project prescribed by the CON Act; (2) the adoption of procedures and criteria for submitting a CON application and for review before issuing a CON; (3) the preparation and publication of a State Health Plan; and (4) the licensing of health care facilities. *Id.* DHEC is designated the sole state agency for control and administration of the CON program and licensing of health facilities. S.C. Code Ann. § 44-7-140 (2002). A person or health care facility must obtain a CON before, among other things, establishing a new health care facility or changing the existing bed complement of a health care facility. S.C. Code Ann. § 44-7-160 (2002) (amended 2010).

⁵ "The ALC presides over the hearing of a contested case from DHEC's decision on a CON application and serves as the finder of fact." *Spartanburg Reg'l*, 387 S.C. at 89, 690 S.E.2d at 788.

With the advice of a health planning committee, of which most of the members are appointed by the Governor, DHEC must prepare a State Health Plan for use in administering the CON program. S.C. Code Ann. § 44-7-180(A), (B) (2002) (amended 2010). The State Health Plan must include

(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 [CON] 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 [e]ffects caused by the duplication of any existing facility, service, or equipment.

§ 44-7-180(B). The State Health Plan must also include projections and standards for certain health services and equipment having "a potential to substantially impact health care cost and accessibility." *Id.*

DHEC is required to submit the State Health Plan to the Board for final revision and adoption at least once every two years. S.C. Code Ann. § 44-7-180(C). Finalization of the State Health Plan requires a public comment period and a public hearing. *Id.* ("[DHEC] shall adopt by regulation a procedure to allow public review and comment, including regional public hearings, before adoption or revision of the plan."). Because the legislature has required these stringent requirements for the State Health Plan's implementation, it is clear the legislature intended for the State Health Plan to be an enforceable document. *Cf. Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 371, 688 S.E.2d 844, 851 (2010) (noting the stringent requirements for DHEC's enactment of the Coastal Management Program "suggest that the General Assembly did not believe it was meant to be an unenforceable document"); *id.* at 371-72, 688 S.E.2d at 851-52 (rejecting the argument that because the promulgation of the Coastal Management

Program did not comply with the Administrative Procedures Act, the Coastal Management Program was not enforceable and noting the legislature "created a separate and more rigorous procedure for promulgation of the [Coastal Management Program] and, because DHEC acted in accordance with the specified procedure, the [Coastal Management Program] is valid").

The State Health Plan has designated four regions of the state for the purpose of keeping an inventory of health facilities and services. *E.g.*, Chapter II.A, 2008-2009 State Health Plan. Each region is further divided into service areas. *Id.* In the 2008-2009 State Health Plan and the 2004-2005 State Health Plan, most service areas consist of individual counties. However, in the 2008-2009 State Health Plan, two service areas consist of multiple counties: (1) the Tri-County Service Area, consisting of Berkeley, Charleston, and Dorchester counties; and (2) the Orangeburg/Calhoun Service Area.⁶ In the 2004-2005 State Health Plan, only the Tri-County Service Area consists of multiple counties.⁷

Finally, DHEC may not issue a CON unless an application complies with the State Health Plan, project review criteria, and other regulations. § 44-7-210(C); *see also* S.C. Code Ann. Regs. 61-15 § 801.3 (2011) (amended 2012) ("[N]o project may be approved unless it is consistent with the State Health Plan."); S.C. Code Ann. Regs. 61-15 § 802.1 ("The proposal shall not be approved unless it is in compliance with the State Health Plan.").

In the present case, Trident contends Roper's proposed hospital is not consistent with the 2008-2009 State Health Plan because it does not comply with the plain language of the Bed Transfer Provision,⁸ which states:

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 or

⁶ See Chapter II.G.1 § A, 2008-2009 State Health Plan.

⁷ See Chapter II.G.1 § A, 2004-2005 State Health Plan.

⁸ It is undisputed that the Bed Transfer Provision is the only provision in the 2008-2009 State Health Plan that Roper may use to obtain a CON for a new hospital.

exchange hospital beds requires a [CON] 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 [CON] 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.

Chapter II.G.1 § (A)(4)(j), 2008-2009 State Health Plan (emphasis added). Trident argues this language allows DHEC to issue a CON for the transfer of beds between hospitals only when both hospitals already exist.

DHEC's Interpretation

In 2009, the Board specifically addressed the Bed Transfer Provision in the 2004-2005 State Health Plan, which is identical to the Bed Transfer Provision in the 2008-2009 State Health Plan. The interpretation of the Bed Transfer Provision was an issue in a contested case pending before the ALC, i.e., *Lexington County Health Services District, Inc. v. South Carolina Department of Health & Environmental Control*, Docket No. 07-ALJ-07-0520-CC. During the pendency of this contested case, the ALC remanded the question of whether the Bed Transfer Provision "allows the approval of a CON application for the transfer of . . . hospital beds for the purpose of establishing a new hospital facility." The Board concluded:

Read as a whole, the General Hospital section of the [State Health Plan] recognizes that changes in the health care delivery system may call for the transfer of unused beds at one facility to a new facility constructed to receive them.

Accordingly, the Board has determined that the 2004-2005 South Carolina Health Plan, which includes the [Bed] Transfer Standard, allows for approval of a CON application for the transfer of licensed general acute care hospital beds to establish a new hospital.

The Board noted that DHEC's staff had properly interpreted and applied the 2004-2005 State Health Plan in approving the transfer of seventy-six acute care hospital beds from Palmetto Health Baptist Hospital in downtown Columbia to create

Palmetto Health Baptist Parkridge, which was to be built in northwest Richland County.⁹

Deference to DHEC's Interpretation

Our supreme court has recently expounded on the application of statutes and regulations administered by an administrative agency. In *Kiawah Development Partners, II, v. South Carolina Department of Health & Environmental Control*, the court stated:

Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. If the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.

Op. No. 27065 (S.C. Sup. Ct. refiled December 10, 2014) (Shearouse Adv. Sh. No. 49 at 11) (citations and internal quotation marks omitted).

The court further stated, "We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 25 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).¹⁰ After tracing the history of South Carolina's deference doctrine, the

⁹ Although there is no conflict between the Board's interpretation of the Bed Transfer Provision and the staff's interpretation, we note that when such a conflict exists, "an agency's Appellate Panel [(here, the Board)], not its staff, is typically entitled to deference in interpreting agency regulations." *Neal v. Brown*, 383 S.C. 619, 624, 682 S.E.2d 268, 270 (2009).

¹⁰ See also *Murphy v. S.C. Dep't of Health & Env'tl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) ("[W]e give deference to the interpretation of a regulation by the agency charged with it[s] enforcement." (citation omitted)); *S.C. Dep't of Revenue v. Anonymous Co. A*, 401 S.C. 513, 516, 678 S.E.2d 255, 257 (2009) ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent

court concluded, "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Id.* at 24.

In the present case, as we evaluate the deference given by the ALC to DHEC's interpretation of the Bed Transfer Provision, we must be mindful of the General Assembly's entrustment of South Carolina's health care marketplace to DHEC for cost containment, prevention of unnecessary duplication, serving public needs, and ensuring the high quality of healthcare services. *See* § 44-7-120 (stating the purpose of the CON Act). DHEC plays a significant role in the drafting and approval of the State Health Plan, as it does in promulgating regulations. Therefore, we may interpret the State Health Plan using the rules of statutory construction applied to regulations,¹¹ with one caveat: "[E]ach *section* of the [State Health Plan] must be read as a whole." Chapter I.I, 2008-2009 State Health Plan (emphasis added).

In *Murphy v. South Carolina Department of Health & Environmental Control*, our supreme court was presented with DHEC's interpretation of its regulation

compelling reasons." (quoting *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006)); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a *compelling* reason to differ." (emphasis added) (citations omitted)); *Spruill v. Richland Cnty. Sch. Dist. 2*, 363 S.C. 61, 65, 609 S.E.2d 524, 526 (2005) (stating that an agency's construction of its own regulation "is accorded most respectful consideration and will not be overturned absent *compelling* reasons." (emphasis added) (citation and internal quotation marks omitted)); *Dorman v. S.C. Dep't of Health & Env'tl. Control*, 350 S.C. 159, 167, 565 S.E.2d 119, 123 (Ct. App. 2002) ("[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." (citation and internal quotation marks omitted)); *Converse Power Corp. v. S.C. Dep't of Health & Env'tl. Control*, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002) ("The construction of a regulation by the agency charged with executing the regulations is entitled to the most respectful consideration and should not be overruled without cogent reasons." (citation omitted)).

¹¹ *Murphy*, 396 S.C. at 639, 723 S.E.2d at 195 (holding that regulations are interpreted using the rules of statutory construction).

concerning state water quality certifications.¹² 396 S.C. at 636-38, 723 S.E.2d at 192-94. In particular, the court examined the following language in Regulation 61-101: "Certification will be denied if (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired." *Id.* at 640, 723 S.E.2d at 195 (footnote omitted) (quoting S.C. Code Ann. Regs. 61-101.F.5(a) (Supp. 2011)). DHEC interpreted the term "vicinity," which was not defined in the regulation, to include more than the immediate project area. *Id.* DHEC's project manager for the proposed project testified that DHEC "interpreted the 'vicinity of the project' on a case by case basis according to its best professional judgment as each project is different." *Id.* The court concluded, "Because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application." *Id.* at 640-41, 723 S.E.2d at 195.

Likewise, in the present case, DHEC's interpretation of the Bed Transfer Provision is not only reasonable but also consistent with the Bed Transfer Provision's plain language. The following language from the preamble to the Bed Transfer Provision indicates a purpose of building flexibility into the State Health Plan when dealing with provider networks:

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.*

(emphasis added).

We note Trident argues that Roper's Charleston facility and its proposed new hospital in Goose Creek are not "affiliated hospitals" because the definition of "affiliated hospitals" in Chapter II.B of the 2008-2009 State Health Plan excludes two facilities whose relationship has been established for the purpose of transferring beds. However, the record shows that Roper is not attempting to

¹² A state water quality certification is required before the Army Corps of Engineers may issue a permit to fill portions of "waters of the United States" pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

establish a relationship with a legally separate entity that has its own network of existing hospitals. Rather, Roper seeks to expand its own network of hospitals with the intent to provide convenience for its existing patients residing in Berkeley County, who now travel to Roper's facility in downtown Charleston.¹³ The new hospital will be a continuation of an existing network of acute care facilities serving Roper patients in the Tri-County service area, i.e., Roper Hospital in downtown Charleston, Bon Secours St. Francis in Charleston County, Roper St. Francis Mount Pleasant Hospital, and a freestanding Emergency Department and Ambulatory Surgery Facility in Berkeley County.

The remainder of the Bed Transfer Provision consists of a list of eight criteria with which a CON applicant must comply. *See supra*. The language in this list certainly *accommodates* those CON applications for the transfer of beds to a receiving facility already in existence at the time the application is submitted. Yet, there is no language in this list that either expressly or impliedly *requires* the receiving facility to be in existence when the CON application is submitted. Therefore, the plain language of the Bed Transfer Provision can be reasonably interpreted to include a receiving facility that will be constructed after DHEC issues the CON.

In any event, the Bed Transfer Provision is not a section unto itself—it is part of Chapter II.G.1 § (A) ("General Hospitals").¹⁴ Therefore, we may not consider the language of the Bed Transfer Provision in isolation. Rather, Chapter I.I of the 2008-2009 State Health Plan states, "The criteria and standards set forth in the [State Health Plan] speak for themselves, and each *section* of the [State Health Plan] must be read *as a whole*." (emphases added). *Cf. Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the

¹³ The ALC found that twenty-three percent of those Berkeley County residents who were admitted to a hospital traveled past Trident Medical Center to seek care at Roper's facilities in downtown Charleston and west of the Ashley River.

¹⁴ *See* Chapter I.H (indicating what constitutes a "section" in Chapter II by noting, "A general statement has been added to each *section* of Chapter II stating the project review criteria considered to be the most important in reviewing [CON] applications for each type of facility, service, and equipment. . . . In addition, a finding has been made in each *section* as to whether the benefits of improved accessibility to each such type of facility, service[,] and equipment may outweigh the adverse [e]ffects caused by the duplication of any existing facility, service[,] or equipment." (emphases added)).

purpose, design, and policy of lawmakers," and "the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." (citation and internal quotation marks omitted)); *id.* at 128-29, 750 S.E.2d at 63 (holding that words in a statute must be construed in context and that the court "may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent" (citation and internal quotation marks omitted)).

Hence, we must examine all the provisions of Chapter II.G.1 § (A) ("General Hospitals") before determining whether there is a compelling reason to reject DHEC's interpretation of the Bed Transfer Provision. Section (A) includes provisions that describe how the bed capacity of a general hospital is determined, set forth an inventory of general hospitals in the state and an explanation of the inventory, explain how the need for beds in the respective service areas is calculated, list required services a general hospital must provide, set forth factors to be considered regarding modernization of facilities, and describe the relative importance of the project review criteria for general hospitals. Of particular interest is the discussion of the most important project review criteria for general hospitals. *See* Chapter II.G.1 § (A), 2008-2009 State Health Plan. Significant emphasis should be placed on these criteria in interpreting section (A) as a whole. These criteria are

- a. Compliance with the Need Outlined in [the State Health Plan];
- b. Community Need Documentation;
- c. Distribution (Accessibility);
- d. Acceptability;
- e. Financial Feasibility;
- f. Cost Containment; and
- g. Adverse Effects on Other Facilities.

Id. These criteria are not listed in order of importance. Chapter I.H, 2008-2009 State Health Plan. In fact, "[t]he relative importance assigned to each specific criterion is established by [DHEC] depending upon the importance of the criterion applied to the specific project." S.C. Code Ann. Regs. 61-15 § 801.2. Further, "[a] project does not have to satisfy every criterion in order to be approved," provided the project is consistent with the applicable State Health Plan. S.C. Code Ann. Regs. 61-15 § 801.3.

The first listed criterion, "Compliance with the Need Outlined in [the State Health Plan]," refers to the need for, or surplus of, beds at each listed hospital in the respective service areas. Notably, items (d) and (e) of Chapter II.G.1 § (A)(4), 2008-2009 State Health Plan, contemplate circumstances in which population projections that are not considered in the State Health Plan demonstrate the need for beds in a service area.¹⁵ These provisions demonstrate that the published results of the calculations for each hospital and each service area are not the final determinant of need for a particular service area. Rather, flexibility is built into the requirements for general hospitals when determining need.

The second listed criterion, "Community Need Documentation," states that the proposed project should provide services that meet a documented need of the target population and current or projected utilization should justify the expansion or implementation of the proposed service. S.C. Code Ann. Regs. 61-15 § 802.2. The third listed criterion, "Distribution (Accessibility)," provides, in pertinent part, that the proposed service "should be located so that it may serve medically underserved areas" and "allow for the delivery of necessary support services in an acceptable period of time." S.C. Code Ann. Regs. 61-15 § 802.3.

The fourth listed criterion, "Acceptability," states that the proposed project and the applicant should have the support of "affected persons,"¹⁶ including local providers

¹⁵ See Chapter II.G.1 § (A)(4)(d), 2008-2009 State Health Plan ("The hospital requesting the addition must document the need for additional beds *beyond those indicated as needed by the methodology stated above*, based on historical and projected utilization, as well as projected population growth or other factors demonstrating the need for the proposed beds." (emphasis added)); *id.* at (4)(e) ("An applicant requesting additional beds beyond those indicated as needed by the methodology stated above[] must document the need for additional beds based on historical and projected utilization, floor plan layouts, *projected population growth that has not been considered in this Plan*[,] or other factors demonstrating the need for the proposed beds." (emphasis added)).

¹⁶ "Affected person" means

the applicant, a person residing within the geographic area served or to be served by the applicant, persons located in the health service area in which the project is to be located and who provide similar services to the proposed project, persons who before receipt by [DHEC] of the proposal being reviewed have formally indicated

and the target population. S.C. Code Ann. Regs. 61-15 § 802.4. The fifth listed criterion, "Financial Feasibility," requires the applicant to project the immediate and long-term financial feasibility of the proposed project. S.C. Code Ann. Regs. 61-15 § 802.15. The sixth listed criterion, "Cost Containment," requires the applicant to demonstrate that its chosen funding method is the most feasible option and the project's impact on the applicant's cost to provide services is reasonable. S.C. Code Ann. Regs. 61-15 § 802.16. Finally, the seventh listed criterion, "Adverse Effects on Other Facilities," states, "The impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services." S.C. Code Ann. Regs. 61-15 § 802.23. This criterion also provides that the staffing of the proposed service should not unnecessarily deplete the staff of existing facilities or cause an excessive rise in staffing costs. *Id.*

All of these criteria undoubtedly afford DHEC broad discretion in bringing its expertise in health care planning to the evaluation of CON applications for general hospitals. In turn, the incorporation of these criteria into the section in which the Bed Transfer Provision is located, Chapter II.G.1 § (A), signifies the intent of the State Health Planning Committee to provide flexibility in the application of section (A) to each proposed project with its own unique circumstances. Thus, it is reasonable for DHEC to interpret the Bed Transfer Provision as allowing the transfer of beds to a hospital that has not yet been built when the transfer would improve health care access for the target population. This is consistent with the plain language of the Bed Transfer Provision as well as the General Assembly's stated purpose for the CON Act: "[T]o promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] *will best serve public needs*, and ensure that high quality services are provided in health facilities in this State." § 44-7-120 (emphasis added).

an intention to provide similar services in the future, persons who pay for health services in the health service area in which the project is to be located and who have notified [DHEC] in writing of their interest in [CON] applications, the State Consumer Advocate and the State Ombudsman.

S.C. Code Ann. Regs. 61-15 § 103.1 (2011) (amended 2012).

Just as the *Murphy* court found DHEC's flexible interpretation of its water quality certification regulation reasonable and consistent with the regulation's plain language,¹⁷ we find DHEC's interpretation of the Bed Transfer Provision in the 2008-2009 State Health Plan reasonable and consistent with the plain language of that provision. Therefore, we find no compelling reason to reject DHEC's interpretation of the Bed Transfer Provision within section (A). *See S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486 ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."); *Spruill*, 363 S.C. at 65, 609 S.E.2d at 526 (holding courts traditionally defer to an executive agency's construction of its own regulation and this "construction is accorded most respectful consideration and will not be overturned absent compelling reasons" (citation and internal quotation marks omitted)).

Based on the foregoing, the ALC properly deferred to DHEC's interpretation of the Bed Transfer Provision.

II. Competing Applicants

Trident assigns error to the ALC's finding that Trident and Roper were not "competing applicants." Trident argues that as a matter of law, the approval of both CON applications would exceed the need for hospital beds in the area, and, therefore, DHEC was required to determine which applicant most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations. We disagree.

Section 44-7-130(5) defines "competing applicants" as

two or more persons or health care facilities as defined in this article who apply for [CONs] to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and *whose applications, if approved, would exceed the need for services or facilities.*

(emphasis added).¹⁸ When DHEC is faced with competing applications, it is required to award a CON, "if appropriate," based on which, if any, application

¹⁷ 396 S.C. at 640-41, 723 S.E.2d at 195.

¹⁸ Similarly, Regulation 61-15 defines "competing applicants" as

most fully complies with the CON Act, the State Health Plan, the project review criteria, and applicable DHEC regulations. § 44-7-210(C).

Here, the parties agree that (1) both Trident and Roper propose to provide similar services and facilities in the same service area; and (2) Trident's and Roper's respective CON applications were filed within the appropriate time frame for competing applications. However, Trident challenges the ALC's finding that the approval of both applications would not exceed the need for hospital facilities in the service area. Roper, on the other hand, argues substantial evidence supports the ALC's finding.

Nevertheless, Trident characterizes this issue as an issue of law, asserting that the question of whether both projects would exceed the need for hospital beds in the service area is determined solely by the indication of need set forth in the 2008-2009 State Health Plan's hospital inventory, which reflects an excess of forty-eight hospital beds for the Tri-County Service Area and an excess of six beds in Roper's inventory. Trident concludes that Roper's proposed hospital, "by itself or in conjunction with Trident's proposed hospital exceeds the need for hospital beds in the service area." We disagree. Section 44-7-130(5) clearly focuses on whether the proposed projects would *cause* an excess of services or facilities for the service area.

We agree with Trident that this issue is one of law but only because, in this case, we need not look to indicators of need outside of the 2008-2009 State Health Plan—the approval of both CONs will not exceed the need already documented in

two or more persons and/or health care facilities as defined in this regulation who apply for [CONs] to provide similar services and/or facilities in the same service area and *whose applications[,] if approved[,] would exceed the need for this facility or service*. An application shall be considered competing if it is received by [DHEC] no later than fifteen (15) days after a Notice of Affected Persons is published in the State Register for one or more applications for similar services and/or facilities in the same service area.

S.C. Code Ann. Regs. 61-15 § 103.6 (emphasis added).

the 2008-2009 State Health Plan.¹⁹ Roper is not seeking to add new beds to the service area. On the contrary, the existing hospital beds at Roper's facility in downtown Charleston were already approved for a CON. Thus, Roper is merely seeking to transfer beds that are already available for use in the service area to a location in the very same service area that will be more convenient for its existing patients residing in Berkeley County, who now travel to Roper's facility in downtown Charleston.

Further, Trident's proposed addition of beds to the service area is filling a need already documented in the State Health Plan's hospital inventory. Moreover, the number of beds added by Trident that will exceed the number designated in the hospital inventory are allowed under the Fifty Bed Rule. *See supra*.

Based on the foregoing, the ALC correctly determined that Trident and Roper are not "competing applicants."

CONCLUSION

Accordingly, the ALC's decision is

AFFIRMED.

WILLIAMS and McDONALD, JJ., concur.

¹⁹ At oral argument, Roper asserted the supreme court's opinion in *Spartanburg Reg'l*, 387 S.C. at 90-91, 690 S.E.2d at 789, established that the determination of "competing applicants" is always a factual determination. We do not read the *Spartanburg Reg'l* opinion that broadly. The determination *in that case* was factual. However, in this case, we need not go beyond the methodology set forth in the 2008-2009 State Health Plan to determine that Trident and Roper are not competing applicants.