

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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 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.

BRIEF OF APPELLANT/RESPONDENT

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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.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT ERR IN APPLYING THE BED TRANSFER STANDARD OF THE STATE HEALTH PLAN TO THE CREATION OF A NEW HOSPITAL WHEN THE PLAIN LANGUAGE OF THE STANDARD ALLOWS A TRANSFER OF BEDS ONLY BETWEEN HOSPITALS THAT ARE ALREADY IN EXISTENCE?

II. DID THE ADMINISTRATIVE LAW COURT ERR IN DEFERRING TO THE DEPARTMENT'S INTERPRETATION OF THE BED TRANSFER STANDARD WHEN SUCH INTERPRETATION CONTRADICTS THE PLAIN LANGUAGE OF THE PLAN?

III. DID THE ADMINISTRATIVE LAW COURT ERR IN DETERMINING THAT TRIDENT AND ROPER ARE NOT COMPETING APPLICANTS BECAUSE THE NEED FOR FACILITIES AND SERVICES WOULD NOT BE EXCEEDED BY APPROVAL OF BOTH APPLICATIONS WHEN, AS A MATTER OF LAW, SUCH DETERMINATION IS INCONSISTENT WITH THE STATE HEALTH PLAN?

STATEMENT OF THE CASE

On August 13, 2008, the Appellant/Respondent Trident Medical Center, LLC d/b/a Berkeley Medical Center ("Trident") filed a Certificate of Need ("CON") application with the Department of Health and Environmental Control ("Department") pursuant to the *2004-2005 South Carolina Health Plan* ("*2004-2005 Plan*"). In its application, Trident proposed to construct a new 50-bed acute care hospital to be known as "Berkeley Medical Center" in Moncks Corner, Berkeley County, South Carolina ("Moncks Corner Hospital"). (R. pp. 4461-4468).

On December 10, 2008, the Respondent/Appellant Roper St. Francis Hospital-Berkeley, Inc. d/b/a Roper St. Francis Hospital-Berkeley ("Roper") filed a CON application under the *2008-2009 South Carolina Health Plan* ("*2008-2009 Plan*") requesting approval for the construction of a new 50-bed hospital to be known as "Roper St. Francis Hospital-Berkeley" at Carnes Crossroads in Berkeley County, South Carolina ("Carnes Crossroads Hospital"). (R. pp. 5379-5383). Both of the proposed hospitals will

be located within the Charleston-Berkeley-Dorchester health planning area (the “Tri-county Service Area”). (R. p. 1103, line 17 – p. 1104, line 6).

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

On July 6, 2009, Trident filed requests for final review conferences before the Board of Health and Environmental Control (“Board”), asking the Board to reverse on legal grounds the Department staff’s decision to approve Roper’s application, or in the alternative, asking the Board to overturn the staff’s determination and find that the applications are competing and that Trident is the better applicant. (R. pp. 145–153). On July 10, 2009, Roper filed its own request for a final review conference with the Board. In its request, Roper supported the decision of the Department to approve both applications but argued that, if the Board determined that the applications were competing, the Board should reverse the decision to approve Trident’s proposed project and declare Roper to be the applicant that most fully met the goals of the CON program. (R. pp. 158–161).

In July, 2009, the Board declined to conduct final review conferences on both Trident’s and Roper’s requests. (R. pp. 135–136, 155–156, and 163–164). On August 7, 2009, Trident and Roper filed three separate written requests for contested case review before the Administrative Law Court (“ALC” or “court”). Trident filed two requests. One sought review and reversal of the Department’s decision that Trident’s and Roper’s

applications were not competing under the law. The other sought reversal on legal grounds of the Department's decision to approve Roper's Carnes Crossroads Hospital. (R. pp. 68–164). Roper filed a request in which it urged affirmation of the Department's decision to approve both applications, but alleged the superiority of its own application in the event the court decided that the applications were competing. (R. pp. 165–191).

On January 7, 2010, the ALC ordered that the proceedings be consolidated for trial and discovery purposes and that all parties be allowed to intervene as needed to achieve commonality of litigants in the three cases. (R. pp. 62–67). The court conducted a hearing on the consolidated matters beginning January 30, 2012.

Prior to receiving testimony at trial, the court announced its rulings on certain prehearing motions made by the parties. Among its rulings, the court denied Trident's motion for summary judgment, finding that further inquiry into the facts was needed on the issue of whether the Department committed legal error in applying the bed transfer standard of the *2008-2009 Plan* to Roper's application to establish a new hospital. The court also granted Roper's motion for partial summary judgment, holding that, if the court determined that Trident's and Roper's applications were competing, the case would be remanded to the Department as only the Department could choose which was the better applicant. (R. p. 533, line 22 – p. 534, line 1; R. pp. 57–58).

At the close of its case, Trident renewed its motion for summary judgment on the issue of inapplicability of the bed transfer standard to Roper's proposed project. The court again denied the motion in favor of continuing to hear further evidence. (R. p. 2282, line 9 – p. 2319, line 15). The hearing on the merits of the consolidated cases concluded on February 16, 2012.

On September 26, 2012, the ALC issued its Final Order and Decision (“Order”) affirming the Department’s decision to approve both Trident’s and Roper’s CON applications. (R. pp. 3–54). In the Order, the court deferred to, and adopted, the Department’s interpretation of the bed transfer standard of the *2008-2009 Plan* as allowing Roper to create a new hospital facility through the transfer of beds. The court also found that the need for hospital facilities and services in the area would not be exceeded if both hospitals were approved, and that, therefore, Trident and Roper were not competing applicants. The court held that both applicants met the standards and criteria of the state health plan and CON regulations under which they were filed and that both applications should be approved.

On October 5, 2012, Trident timely filed its Motion to Alter or Amend (Reconsider), which was argued before the court on October 31, 2012, and denied on November 1, 2012. (R. pp. 501–515; R. pp. 1–2). Trident timely filed its appeal of the decisions of the ALC on November 28, 2012. Roper timely filed its cross-appeal on December 3, 2012.

STATEMENT OF FACTS

Trident entered the Tri-county Service Area in 1972, when its parent company responded to a request from Dorchester and Berkeley Counties to build a new hospital to replace two older, smaller county-owned facilities. Trident Medical Center in North Charleston opened in 1975, and the existing county hospitals closed with the understanding that Trident would assume the mission of providing care to the residents of Berkeley and Dorchester Counties. (R. p. 541, lines 1–9; R. p. 546, lines 7–15; R. pp. 7451, 7453, and 7459–7460; R. p. 777, line 14 – p. 779, line 8).

With the Department's guidance, Trident Medical Center chose to locate centrally in the Tri-county Service Area, in North Charleston, about one mile from the Berkeley County line and several miles from the Dorchester County line. (R. pp. 7450–7518; R. p. 4321; R. p. 778, line 10 – p. 779, line 2). Since its initial investment of over \$9 million, Trident has invested in excess of \$90 million to add services, modernize the facility, and take the acute care bed count up to the current 296 beds. (R. p. 544, lines 9–18; R. p. 550, line 16 – p. 551, line 17; R. p. 7453).

In addition to Trident Medical Center, Trident also owns and operates a freestanding emergency department¹ and outpatient center in Moncks Corner in Berkeley County and a 94-bed acute care hospital known as “Summerville Medical Center” in Dorchester County.² (R. p. 550, line 18 – p. 551, line 17; R. p. 780, line 22 – p. 781, line 1). All of Trident's current facilities operate under a single license issued to Trident. (R. p. 784, lines 14–20). In its CON application for the Moncks Corner Hospital, Trident proposes to operate that facility under the current license as well. (R. p. 4476).

Roper is owned jointly by the Medical Society of South Carolina, Bon Secours Health System, based in Baltimore, Maryland, and Carolinas Health System, based in Charlotte, North Carolina. (R. p. 2619, line 22 – p. 2621, line 3). Roper operates three hospitals, all located in Charleston County: the Roper Hospital, located in downtown Charleston (“Roper Downtown”), Roper St. Francis Mt. Pleasant Hospital, and Bon Secours St. Francis Hospital. (R. p. 2622, line 12 – p. 2623, line 4). Like Trident, Roper

¹ The Department allows a licensed hospital to establish a free-standing emergency department located off its hospital campus provided it meets certain requirements. *See, e.g., 2004-2005 Plan* (R. pp. 6758–6759).

² In 2010, Summerville Medical Center filed a CON application to add 30 acute care beds, which was approved by the Department. In a separate proceeding before the ALC, Roper has formally opposed this decision. (R. p. 551, lines 15–17; R. p. 3018, line 22 – p. 3019, line 12; R. pp. 7414–7449).

operates a freestanding emergency department and outpatient center in Moncks Corner. (R. p. 460, line 18 – p. 461, line 22).

On August 13, 2008, Trident filed a CON application under Chapter II, Section G.1(A)(4)(d) of the *2004-2005 State Health Plan* in which it proposed to develop a 50-bed community hospital in Moncks Corner. (R. pp. 4469 and 5344; R. p. 6679). Under the *2004-2005 Plan*, the need for additional hospital beds is calculated on a hospital specific basis. The overall bed need for a particular health planning area is derived by totaling the specific bed need for each of the hospitals in the area. (R. p. 1518, lines 20–24). Under the *2004-2005 Plan*, a hospital with a positive bed need could add up to 50 beds to its inventory in order to provide for a cost-effective addition. (R. p. 6679). Thus, in its CON application, Trident sought to use Trident’s facility-specific need for 17 additional beds to establish a 50-bed community hospital in Moncks Corner, Berkeley County, at an estimated project cost of \$115 million.³

Trident proposed to locate its Moncks Corner Hospital on a 21-acre site adjoining the site of Trident’s existing freestanding emergency department and outpatient center. Trident intends to convert the existing facility to a medical office building upon the opening of the new hospital. (R. p. 4468; R. p. 603, line 22 – p. 604, line 3). If built in that location, Trident’s Moncks Corner Hospital will reduce the drive time to a hospital to

³ The *2004-2005 Plan* showed a 42 bed need for Trident Medical Center and a 20 bed need for Summerville Medical Center. (R. p. 6689). However, because of a prior conversion of nursing home beds to hospital beds, Trident Medical Center actually had a bed need of 17 when its application was filed. (R. p. 4469).

30 minutes⁴ or less for most residents residing above and around Lake Moultrie in Northern Berkeley County. (R. pp. 4322–4325). Quantified, approximately 30,000 residents of Berkeley County will be brought within 30 minutes drive of a hospital by the establishment of the proposed Moncks Corner Hospital. (R. p. 1896, lines 15–23, p. 1900, lines 18–23; R. pp. 4260–4320).

On December 10, 2008, and specifically in response to Trident’s application, Roper filed a CON application under the *2008-2009 Plan* to transfer 50 licensed hospital beds from Roper Downtown in order to create a new 50-bed community hospital at Carnes Crossroads in Goose Creek. (R. pp. 5383–5385; R. p. 1106, line 24 – p. 1107, line 8; R. p. 3117, lines 12–17). Roper proposed to locate the new Carnes Crossroads Hospital on a site just 11.8 miles from Trident’s proposed Moncks Corner Hospital, 7.9 miles from Trident Medical Center, and 10.3 miles from Summerville Medical Center. (R. p. 5382; R. p. 4325). At the undeveloped Carnes Crossroads site, there is no existing hospital or any other medical facility to receive the transfer of the beds from Roper Downtown. (R. p. 1159, lines 12–16). Therefore, in order to accomplish the transfer of hospital beds, Roper 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. (R. pp. 5387, 5695–5696).

⁴ Both the *2004-2005* and the *2008-2009 Plans* contain the statement that “[g]eneral Hospital beds are located within approximately thirty (30) minutes travel time for the majority of residents of the State . . .” (R. p. 6681; R. p. 6891) Although witnesses for the parties disagreed whether the statement regarding 30 minutes travel time should be characterized as a standard, a goal, or a comment on the current state of affairs, the consensus was that a 30 minute time travel measure for hospital services is reasonable for health planning purposes. (R. p. 1552, lines 6–23; R. p. 1797, lines 10–22; R. p. 3767, lines 7–9). *See, also*, S.C.Code Ann. §44-7-180(B)(Supp. 2012).

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

At the time Roper filed to create a new hospital at Carnes Crossroads, Roper had no need for beds under the *2008-2009 Plan*, and, in fact, had an excess of 23 beds in its system.⁵ In total, there was a 48 bed surplus in the Tri-county Service Area when Roper applied.⁶ (R. p. 6899). Because of the lack of need for any new hospital beds by Roper or in the Tri-County Service Area as a whole, Roper could not utilize either of the two undisputed methods set forth in the *2008-2009 Plan* that would have allowed Roper to locate hospital beds away from its Roper Downtown campus.⁷

Because of existing Department practice, however, the bed transfer standard provided for in the *2008-2009 Plan* at Chapter II, Section G.1(A)(4)(j) (the “Bed Transfer Standard”) was available to Roper as the only mechanism under which Roper could seek to put hospital beds at Carnes Crossroads. (R. p. 1533, line 24 – p. 1534, line 12). Roper

⁵ Roper had an excess of six beds under the *2008-2009 Plan* at Roper Downtown/Roper St. Francis Mt. Pleasant Hospitals and an excess of 17 beds at its West Ashley Bon Secours St. Francis Hospital. (R. p. 1106, lines 10–22; R. p. 1108, line 20 – p. 1109, line 1; R. p. 6899).

⁶ Of the seven hospitals in the Tri-County Service Area, only Trident had facility-specific need for beds under the *2008-2009 State Health Plan*, with the plan showing 56 beds needed at Trident Medical Center and 24 beds needed at Summerville Medical Center. (R. pp. 6890–6891).

⁷ Under the *2008-2009 Plan*, an individual hospital with a facility-specific bed need can 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. (R. p. 6887, § G.1(A)(4)(d)). The *2008-2009 Plan* also allows a provider to use the need for additional hospital beds in the planning area as a whole and to locate those beds anywhere in the area, if approved by the Department. (R. p. 6887, § G.1(A)(4)(e)).

was allowed to use the Bed Transfer Standard in this manner because the Department had an unwritten policy of interpreting the Bed Transfer Standard to allow a hospital to transfer hospital beds even when no receiving facility existed to receive them.⁸ (R. p. 1158, lines 2–7).

Although the Administrative Law Court conceded that the plain language of the Bed Transfer Standard limits its application to cases in which both the transferring and receiving hospitals exist, the court in its Order deferred to the Department's contrary interpretation and approved Roper's application as consistent with the *2008-2009 Plan*. (R. p. 5). As its first two issues on appeal, Trident contends that this conclusion of the court is affected by error of law and is arbitrary and capricious.

⁸ In a written May 8, 2009 Decision on Remand, the Board affirmed the Department staff's use of the bed transfer standard contained in the *2004-2005 State Health Plan* to allow creation of a new satellite hospital in the case before it. (R. pp. 7519–7526). The Administrative Law Court affirmed the Board's Decision on Remand in that case. (R. p. 1167, line 24 – p. 1168, line 9).

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT ERRED IN DETERMINING THAT THE BED TRANSFER STANDARD OF THE STATE HEALTH PLAN CAN BE USED TO CREATE A NEW HOSPITAL WHEN THE PLAIN LANGUAGE OF THE STANDARD ALLOWS A TRANSFER OF BEDS ONLY BETWEEN HOSPITALS THAT ARE ALREADY IN EXISTENCE.

This case is governed by the Certificate of Need program for health care facilities and services. The framework of the CON program is established by the State Certification of Need and Health Facility Licensure Act (the "Act") (S.C.Code Ann. §§ 44-7-110, *et seq.* (2002 & Supp. 2012)), the regulations set forth at 3 S.C.Code Ann.Reg. 61-15 (Supp. 2012), and the State Health Plan.

The purpose of the CON program is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C.Code Ann. § 44-7-120 (2002). The primary means by which the goals of the Act are carried out is the requirement that a provider apply for, and receive, a CON from the Department prior to establishing a new health facility, adding beds, making large capital expenditures or acquiring medical equipment when the total project cost exceeds a certain threshold.⁹ S.C.Code Ann. §§ 44-7-120 (2002) and 44-7-160 (Supp. 2012).

⁹ David L. Dunlap, the Chief Executive Officer of Roper St. Francis Healthcare, testified that the CON program restricts competition to some degree in order to ensure the financial health of facilities and their ability to provide services to all patients, regardless of profitability. As explained by Mr. Dunlap:

I think in the absence of ...[CON]..., we see, as was my experience in Oklahoma, the entrepreneurs coming in and stripping out the more profitable services and leaving hospitals, like ours, as the provider of last resort. In effect, hospitals are a collection of a number of departments and entities, some of which lose money and some of which make money. And at the end of the day, we've got to have a margin to be able to allow us to continue to sustain our work. And if you allow people to come in unregulated – entrepreneurs to come in unregulated and pull out those profitable services, it leaves the hospital with those unprofitable services and makes it difficult for us to survive.

In determining whether to grant or deny an application for a CON, the Department must evaluate the proposed project under the project review criteria found in the CON regulations and under the applicable policies and standards of the State Health Plan in effect at the time the application is filed. S.C.Code Ann. § 44-7-210 (Supp. 2012). Project review criteria fit generally into five categories: (1) criteria related to the need for the proposed project, (2) criteria related to the economic considerations of the project, (3) criteria related to the project's impact on the resources of the health care system, (4) criteria related to the suitability of the site of the project, and (5) criteria related to other special considerations. 3 S.C. Code Ann.Reg. 61-15, §§ 801, 802 (Supp. 2012).

The State Health Plan is a health planning guide, developed by the Department and the State Health Planning Committee, and approved by the Board. By law, the State Health Plan must be promulgated at least every two years through a process which requires public notice, public hearings, and a public comment period for both the original plan and for any subsequent amendments. S.C.Code Ann. § 44-7-180(C) (Supp. 2012). The Act further requires that the Plan contain an inventory of existing health care facilities, beds, and services in South Carolina, provide projections of the need for additional facilities, beds, and services, and establish the standards to be followed by the Department and addressed by providers in applying for new or additional facilities, beds, and services. S.C.Code Ann. § 44-7-180(B) (Supp. 2012).

Finally, the CON Act provides that “The department may not issue a Certificate of Need unless an application complies with the State Health Plan, Project Review Criteria, and other regulations.” S.C.Code Ann. § 44-7-210(C)(Supp. 2012). The Department’s CON regulations also mandate that, “The proposal shall not be approved unless it is in compliance with the State Health Plan.” 3 S.C.Code Ann.Reg. 61-15, §

802 (Supp. 2012). *See, also, MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 9, 664 S.E.2d 471, 475 (2008)(“Section 44-7-210(C) and the governing regulations are clear in establishing Plan standards and project review criteria as separate and distinct requirements that must be met as part of the CON application process.”).

Roper filed its application for the Carnes Crossroads Hospital under the *2008-2009 Plan*. Therefore, the standards, findings, and policies set forth in the *2008-2009 Plan* are applicable to the review of Roper’s application. 3 S.C.Code Ann.Reg. 61-15, § 504 (Supp. 2012).

During the course of the proceedings, Trident raised as a threshold issue that, as a matter of law, Roper’s proposed Carnes Crossroads Hospital fails to comply with the *2008-2009 Plan* and, therefore, cannot be approved. Trident contends that the Department’s policy of allowing the Bed Transfer Standard to be used for the establishment of a new hospital contradicts the plain language of the Standard, which presupposes the existence of both a transferring and a receiving hospital in order for a bed transfer to occur. Because the plain language of the Bed Transfer Standard indicates that it applies only when both the hospital transferring the beds and the hospital receiving the beds are in existence, Trident argues that Roper’s attempt to create a new hospital by transferring beds pursuant to the Bed Transfer Standard does not comply with the *2008-2009 Plan* and must be denied.¹⁰

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

¹⁰ The Department acknowledges that the Bed Transfer Standard is the only provision of the *2008-2009 Plan* under which Roper could apply because of the lack of facility-specific or service area need. (R. p. 1148, lines 9–18; R. p. 1532, line 22 – p. 1534, line 12).

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:

1. A transfer or exchange of beds may be approved only if there is no overall increase in the number of beds;
2. Such transfers may cross county lines; however, the *applicants* must document with patient origin data the *historical utilization of the receiving facility* by residents of the county giving up beds;
3. Should the response to Criterion 2 fail to show a *historical precedence of residents of the county transferring the beds utilizing the receiving facility*, the *applicants* must document why it is in the best interest of these residents to transfer the beds to *a facility with no historical affinity* for them;
4. The *applicants* must explain the impact of transferring the beds on the health care delivery system of the county from which the beds are to be taken; any negative impacts must be detailed along with the perceived benefits of such an *agreement*;
5. The *facility receiving the beds* must demonstrate the need for the *additional* capacity based on *both historical and projected utilization patterns*;
6. The *facility giving up the beds* may not use the loss of these beds as justification for a subsequent request for the approval of additional beds;
7. A written contract or agreement *between* the governing *bodies* of the affected *facilities* approving the transfer or exchange of beds must be included in the Certificate of Need application;
8. Each facility giving up beds must acknowledge in writing that this *exchange* is permanent; any further transfers would be subject to this same process.

(R. pp. 6889–6890)(emphasis added).

When read as a whole, as required under the rules of construction, both the preamble, which sets forth the purpose of the Bed Transfer Standard, and the criteria,

which set forth the conditions for the transfer of beds, indicate that the facility receiving the beds must be in existence at the time of transfer. *See, 2008-2009 State Health Plan*, Chapter I(I), p. I-4 (“The criteria and standards set forth in the Plan speak for themselves, and each section of the Plan must be read as a whole.”). *See, also, Dreher v. S.C. Dep’t of Health & Envtl. Control*, 399 S.C. 259, 265, 730 S.E.2d 922, 925 (Ct.App. 2012)(“The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose.”) (quoting, *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260 626 S.E.2d 6,10 (2005)).¹¹

According to its preamble, the Bed Transfer Standard 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*”¹² 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

¹¹ Although the State Health Plan is not itself a statute or a regulation, it is incorporated into the CON Act and regulations, which make compliance with the Plan a regulatory prerequisite to CON approval. S.C.Code Ann. § 44-7-210(B)(Supp. 2012); 3 S.C.Code Ann.Reg. 61-15, § 801(3). Thus, it is appropriate to apply the rules of construction to the Plan. *See, Murphy v. S.C. Dep’t of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012)(“Regulations are interpreted using the same rules of construction as statutes.”); *MRI at Belfair, LLC v. S.C. Dep’t of Health & Envtl. Control*, 379 S.C. 1, 7 n.4, 664 S.E.2d 471, 474 n.4 (2008)(“The issue whether the Plan standards satisfy the statutory requirements is a legal conclusion based on statutory interpretation principles.”).

¹² “Affiliated hospitals” is defined in Chapter II(B) of the *2008-2009 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). Chapter II(B), which provides for the transfer of equipment and services, is the first of two references to “affiliated hospitals in the *Plan*. The second occurs in Chapter II(G), which is at issue in this case and concerns the transfer of beds. By its terms, the single definition of “affiliated hospitals” contemplates both beds and equipment and services and should be applied to both types of transfers. *See, Winters v. Fiddie*, 394 S.C. 629, 642-643, 716 S.E.2d 316, 323 (Ct.App. 2011)(holding that it is “not unreasonable” to resort to the definition of a term found in a different chapter of the same Title of the law).

resources. Hospitals cannot consolidate, they cannot be part of provider networks, they cannot transfer or exchange beds between themselves, and they cannot enter into agreements with one another when one hospital exists and the other does not.

In the mandatory criteria of the Bed Transfer Standard, the concept of two existing hospital facilities continues. The Standard refers 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 facilities, both of which must be in existence, the Department 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. (R. p. 1160, lines 5–8). The Department then contorts the plain requirements of the Standard to allow the single hospital applicant to comply.

For example, the Bed Transfer Standard requires, in subsection 2, that the “*applicants* must document with patient origin data the *historical utilization of the receiving facility* by residents of the county giving up beds” and in subsection 5, that “[t]he *facility receiving the beds must* demonstrate the need for the *additional* capacity based on both *historical* and projected *utilization patterns*.” Under its policy of using this section for the creation of new hospitals, the Department allows the only actual existing hospital, *i.e.*, the facility transferring the beds, to submit utilization data for itself in satisfaction of the requirement that the facility receiving the beds demonstrate the need for additional capacity. (R. p. 1163, lines 11–25; R. p. 1169, line 13 – p. 1170, line 16; R. p. 1540, line 22 – 1541, line 4). This practice clearly contradicts the plain meaning of the Bed Transfer Standard, and the Department admits that it does.

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

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

A. Yes.

* * *

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

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

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

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

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

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

Q. More than one.

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

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

* * *

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

A. Yes.

* * *

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

A. Correct, but the applicant can and did.

* * *

A. Roper did in its application.

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

A. In plain English.

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

A. Correct.

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

A. In the plain English language.

(R. p. 1159, line 9 – p. 1170, line 16). The only other Department employee to testify, Les Shelton, who is responsible for overseeing development of the State Health Plan, similarly admitted that the Department's policy of interpreting and applying the Bed Transfer Standard to cases with no existing receiving facility in order to establish a new

hospital contradicts the plain English meaning of the words used in the Standard.¹³ (R. p. 1534, line 17 – p. 1550, line 20).

In construing the Bed Transfer Standard, the Court is guided first by the plain language of the section. As stated by the South Carolina Supreme Court:

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

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

The plain and ordinary English language of the Bed Transfer Standard clearly and definitely contemplates the involvement of two, existing hospital facilities, each with its own beds and its own patients. The Standard plainly requires that the receiving hospital be able to show historic utilization in order to validate the additional capacity being created by the transfer of beds from its affiliated hospital. In the face of such plain language, neither the ALC nor the Department can justify application of the Bed Transfer

¹³ For example, Mr. Shelton testified:

- A. The Department has used the historical utilization from . . . [the existing] facility to show the utilization for what's proposed to be the receiving facility.
Q. You would agree with me that there's not currently a hospital facility at the Carnes Crossroads property, correct?
* * *
A. No, there isn't an existing hospital at that site.
Q. Therefore, there is no historical utilization of that site, is there?
A. You can't have utilization from a facility until it's operational.

(R. p. 1540, lines 13–25).

Standard to transfers involving only one existing hospital. In other words, the Bed Transfer Standard, by its plain and ordinary terms, does not allow for the creation of a new hospital through the transfer of beds.

Further, the purpose of the Bed Transfer Standard, which is set forth plainly and unambiguously in the preamble of the Standard, addresses the need for affiliated hospitals to exchange or transfer beds between themselves in response to consolidations and the formation of provider networks brought about by health care reform. This straightforward statement of purpose cannot be construed and contorted to justify the construction of a brand new \$113 million hospital that duplicates existing hospital services in the complete absence of need in the *Plan* and that improves timely access to hospital services for only 940 people.¹⁴ This is especially true given the stated goals of the CON program to "promote cost containment" and "prevent unnecessary duplication of health care facilities and services." S.C.Code Ann. § 44-7-120 (2002). *See, Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006)("A statute as a whole must receive practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers.").

¹⁴ At trial, Roper argued that access to hospital services would be improved for those Berkeley County residents that utilized Roper Downtown. Trident argued that the improvement in convenience for persons who choose to patronize a distant provider over a closer one does not translate into improving "access" to hospital services under the *Plan*. (R. p. 1745, line 8 – p. 1746, line 2; R. p. 1867, line 9 – p.1868, line 8). The law requires the Department to establish an objective time travel standard for those services in the *Plan*. As noted, the *Plan* in this case indicates 30 minutes as a reasonable goal. (R. p. 6899).

II. THE ADMINISTRATIVE LAW JUDGE ERRED IN DEFERRING TO THE DEPARTMENT'S INTERPRETATION OF THE BED TRANSFER STANDARD BECAUSE SUCH INTERPRETATION CONTRADICTS THE PLAIN LANGUAGE OF THE PLAN.

As noted above in Argument I, the Department concedes that its interpretation of the Bed Transfer Standard is not in accord with the plain meaning of the words of the Standard. Remarkably, the ALC in its Order also recognizes and acknowledges 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, the ALC nevertheless deferred to the Department’s interpretation that the Bed Transfer Standard could be applied to create a new hospital. Such holding is illogical, arbitrary, capricious, and contrary to established case law. *See Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (“The first question of statutory interpretation is whether the statute’s meaning is clear on its face...If a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.”) (Emphasis added).

The Department and Roper assert that the ALC is required to give deference to the Department’s interpretation regarding the transfer of beds and to the Board’s affirmation of that interpretation because the Department is the agency charged with administration of the CON program. This argument is contrary to the law.

The courts recognize that an agency specifically is not entitled to the usual deference accorded in the construction of its laws and regulations when such construction contravenes the plain and unambiguous language of those laws and regulations. *See, Savannah Riverkeeper v. S.C. Dep’t of Health & Env’tl. 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."); *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 149–50, 694 S.E.2d 525, 530–31 (2010) ("An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language."). *Cf.*, *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 394 S.C. 567, 576 716 S.E.2d 111, 115 (Ct.App. 2011) ("Because DHEC's interpretation in this instance was not contrary to the plain language of section 44-7-230(A) or section 802 of Regulation 61-15, we find the ALC properly deferred to DHEC . . ."). Both the Department and the ALC acknowledge that the Department's interpretation and application of the Bed Transfer Standard to create new hospitals contravenes the plain meaning of the Standard. Therefore, as a matter of law, deference to the Department's interpretation in this case is improper.

The Department and Roper also point to the Department's prior history of applying the Bed Transfer Standard to the creation of new hospitals as justification for deference in this case. Again, this position is contrary to the established law. In *Monroe v. Livingston*, 251 S.C. 214, 217, 161 S.E.2d 243, 244 (1968), the South Carolina Supreme Court refused to adopt an agency's repeated mistaken application of the law, holding that, "It is argued that the defendant Tax Commission has construed [the law] over a long period of time as inapplicable . . . and that its interpretation should be given controlling effect in this case. Such administrative construction however affords no basis for the perpetuation of a patently erroneous application of the statute." *Accord Richland County Sch. Dist. Two v. South Carolina Dep't of Educ.*, 335 S.C. 491, 517 S.E.2d 444 (Ct.App. 1999) (declining to defer to the agency's past interpretation of a proviso

concerning teacher's salaries because the plain meaning of the proviso provided a compelling reason to reject such interpretation).

In its Order, the ALC rejects *Monroe* and attempts to distinguish it by searching for "a tipping point after which the rule on deference to agency interpretation no longer applies." (R. pp. 27–28). The holding of *Monroe* is that an agency's construction of a law is not entitled to deference if it is contrary to the plain meaning of the law, no matter how long or how consistently the agency has followed its construction. Any discussion of a "tipping point" after which, presumably, an agency's erroneous construction would be accepted is arbitrary, capricious and affected by error of law.

Finally, the ALC in its Order finds that deference is warranted because the Department is the "final arbiter" of the State Health Plan. The court concludes that the Department is the "final arbiter" because the CON Act does not require the submission of the Plan to the Legislature for final approval and, therefore, legislative intent must be what the Department says it is. (R. pp. 27–28). From this erroneous conclusion regarding the Department's status, the court draws the further erroneous conclusion that the ALC must therefore defer to the Department's interpretation whether or not, as the court admits, that interpretation is inconsistent with the plain words that the Department chose to use in the Plan.

Under the ALC's erroneous premise, the Department could change its interpretation at will, and the ALC would be forced to defer to the new interpretation because the Department is the "final arbiter" of the intent of the Plan. This holding is offensive to the laws governing the authority of the Department with regard to development of the Plan and to the laws governing oversight by the ALC and the courts. *See, Triska v. Dep't of Health & Env'tl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533

(1987)(“DHEC is a state administrative agency and can only exercise those powers which have been conferred upon it by the South Carolina General Assembly . . . DHEC must follow its own regulations and the provisions of the Administrative Procedures Act . . . in carrying out the legitimate purposes of the agency. . . . Any action taken by DHEC outside of its statutory and regulatory authority is null and void.” [Citations omitted]).

Although the CON Act does not require that the State Health Plan be submitted to the General Assembly for review and approval, the General Assembly in the Act does impose a strict and detailed structure for the promulgation, amendment and content of the Plan. The CON Act, at S.C.Code Ann. § 44-7-180(C), establishes a health planning process pursuant to which the State Health Planning Committee drafts the Plan, gives public notice of the contents of the draft Plan, and receives public comments on the draft Plan in writing and at mandatory regional public hearings. Under the Freedom of Information Act, all of the votes to recommend and approve the Plan by the State Health Planning Committee and the Board are taken after public notice and in open session. S.C.Code Ann. §§ 30-4-60 and 30-4-80 (2007). Any amendments to the Plan must go through the same public notice and comment process. S.C.Code Ann. § 44-7-180(C)(Supp. 2012).

In addition to specifying the process, the General Assembly also mandates that the contents of the Plan include “at a minimum”: (1) an inventory of existing health care facilities, beds, specified health services, and equipment; (2) projections of need for additional health care facilities, beds, health services, and equipment; (3) standards for distribution of health care facilities, beds, specified health services, and equipment including scope of services to be provided, utilization, and occupancy rates, travel time, regionalization, other factors relating to proper placement of services, and proper

planning of health care facilities; and (4) a general statement as to the project review criteria considered most important in evaluating certificate of need applications for each type of facility, service, and equipment, including a finding as to whether the benefits of improved accessibility to each such type of facility, service, and equipment may outweigh the adverse affects caused by the duplication of any existing facility, service, or equipment. S.C.Code Ann. § 44-7-180(B)(Supp. 2012). The Act further requires that “The State Health Plan must address and include projections and standards for specified health services and equipment which have a potential to substantially impact health care cost and accessibility.” S.C.Code Ann. § 44-7-180(B)(Supp. 2012). Thus, the law requires that the Plan contain specific, detailed standards for the establishment of new hospital facilities.

Far from giving the Department the sole and unbridled discretion to interpret the Plan at will, the Act 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.¹⁵ The very purpose of the State Health Plan is to create a blueprint for health planning upon which both the regulators and the regulated providers can rely. *Spartanburg Reg’l Medical Center v. Oncology and Hemotology Associates of South Carolina, LLC*, 387 S.C. 79, 83, 690 S.E.2d 783,785 (2010)(“The purpose of the Health Plan is to outline the need for medical facilities and services in the State. The Health Plan is used as one of the criteria for reviewing projects under the CON program.”). Allowing the Department to create nebulous standards for the establishment of new hospitals by

¹⁵ Prior to the change in the law that prohibits approval of an application unless it complies with the State Health Plan, the Board was not bound by the standards set forth in the Plan and could approve applications that were not consistent with the Plan. (R. p. 1498, lines 5–13).

“interpreting” portions of the Plan contrary to their plain meaning violates both the statutory process and the purpose of the State Health Plan.¹⁶

In this case, Trident is the only hospital with a need for hospital beds in the Tri-county Service Area. Yet, through the device of “interpreting” the Bed Transfer Standard, the Department allows Roper, which has no bed need, to construct a \$113 million new hospital within several miles of Trident’s existing hospitals. It is the intent of the CON Act that all providers, including Trident, be allowed to rely on the plain meaning of the State Health Plan in making decisions regarding the development and allocation of health care resources.¹⁷ Giving the Department the authority to ignore the plain meaning of its own Plan, as the ALC’s decision in this case does, undermines this intent.

Finally, the approach of deferring to the Department as the “final arbiter” of the plain meaning of the Plan provisions is an unwarranted and overbroad construction of the Department’s role as the sole administrator of the CON program. Such an approach would permit no effective legal oversight, which is contrary to the law and to the role of the ALC and the courts in the process. *See* S.C. Code Ann. § 44-1-60(G); S.C. Code Ann. §1-23-600(Supp. 2012); *S.C. Dep’t of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) (“The construction of a regulation is a question of law to be determined by the court.”). *See, also, MRI at Belfair, LLC v. S.C. Dep’t of Health & Envtl. Control*, 379 S.C. 1, 7 n. 4, 664 S.E.2d 471, 474 n. 4 (2008) (“The issue

¹⁶ The issue before the Court is not whether the Board or the Department has the authority to formally adopt a policy which allows the establishment of a new hospital through the transfer of beds. Trident contends that the Department, having adopted the Bed Transfer Standard through the formal public notice and comment process mandated for amendments to the State Health Plan, must follow the same process with regard to any further amendments or expansion of the Standard. *See* S.C. Code Ann. § 44-7-180(C) (Supp. 2012).

¹⁷ Trident management testified before the ALC that the Moncks Corner Hospital will not be built if the Carnes Crossroads Hospital is allowed to proceed. (R. p. 627, lines 13–24; R. p. 823, line 20 – p. 824, line 2).

whether the Plan standards satisfy the statutory requirements is a legal conclusion based on statutory interpretation principles.”).

As a matter of law the Bed Transfer Standard in the *2008-2009 State Health Plan* cannot be used to create a new hospital because it does not allow for the transfer of beds to a facility that does not exist. As a matter of law the Department cannot approve a CON application that is not in compliance with the *State Health Plan*. Because Roper proposed to establish its new Carnes Crossroads Hospital through the use of the Bed Transfer Standard, which does not permit this action, and because the Department granted Roper’s application solely under the “authority” of the Bed Transfer Standard, as a matter of law, the Order of the ALC must be reversed and Roper’s application must be denied.

III. THE ADMINISTRATIVE LAW COURT ERRED IN DETERMINING THAT TRIDENT AND ROPER ARE NOT COMPETING APPLICANTS BECAUSE THE NEED FOR FACILITIES AND SERVICES WOULD NOT BE EXCEEDED BY APPROVAL OF BOTH APPLICATIONS BECAUSE, AS A MATTER OF LAW, SUCH DETERMINATION IS INCONSISTENT WITH THE STATE HEALTH PLAN.

As an alternative ground for reversing the decision of the ALC, Trident contends that, even if the Bed Transfer Standard applies, the Department and the ALC committed errors of law in holding that Trident and Roper were not competing applicants under the CON Act. Under the law of the case, this matter must therefore be remanded back to the Department for evaluation and determination of which applicant should be awarded a Certificate of Need to construct a new 50-bed hospital in the Tri-county Service Area.¹⁸

In certain circumstances, the Department is required to evaluate one or more applications pending before it and to choose which one to approve. 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) Similarly, the Department’s regulations provide:

Competing applicants means two or more persons and/or health care facilities . . . who apply for Certificates of Need 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 the Department not 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. All applications received by the Department within fifteen (15) days of publication of the Notice of Affected Persons in the State Register for the first application(s) will be

¹⁸ The ALC granted Roper’s motion for partial summary judgment holding that only the Department can determine which is the better applicant in the case of competing applications. (R. pp. 57–58). Trident has not appealed this conclusion. Therefore, the ALC’s finding on this issue is law of the case. *See, Transportation Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (“An unappealed ruling is the law of the case and requires affirmance.”).

considered to be competing. Any applications received by the Department later than the fifteenth day following publication of the Notice of Affected Persons in the State Register for the first application(s) will not be considered to be competing with the(se) application(s).

3 S.C. Code Ann. Regs. 61-15, § 103(6)(Emphasis added).

The parties agree that the applications propose to provide similar services and facilities in the same service area and that they were filed within the appropriate time frame for competing applications. (R. p. 1102, line 6 – p. 1103, line 22; R. p. 1381, line 25 – p. 1382, line 5; R. p. 1864, lines 16–22; R. p. 3012, line 22 – p. 3013, line 6; R. p. 3827, line 22 – p. 3828, line 1; R. p. 3861, line 23 – p. 3862, line 20). Trident disputes, however, the Department’s and the ALC’s determination that the approval of both proposed hospitals would not exceed the need for hospital facilities and services in the area.

In reaching the conclusion regarding whether the need for hospital beds and services would be exceeded by the approval of both Trident and Roper’s projects, both the Department and the ALC determined that, because Roper proposed to transfer existing licensed beds, the need for those services would not be exceeded. (R. pp. 5344–5359; R. pp. 6647–6659; R. pp. 10-11, 21-22). The Department viewed Roper’s application to construct a brand new \$113 million hospital 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.¹⁹ The ALC affirmed this approach by the Department. (R. pp. 21-22).

¹⁹ Specifically, the Department determined in its June 26, 2009 decision letter that “. . .the applications are not competing because the beds used for the Roper St. Francis Hospital-Berkeley project are a permanent bed transfer, not a bed increase; therefore, the bed need will not be exceeded. The proposed project is basically a re-positioning of currently licensed acute care beds from an area of limited growth to an area of strong growth and will have no impact on the Tri-County’s bed count or bed need.” (R. p. 6647).

Again, the ALC and the Department ignore the plain language of the Bed Transfer Standard. As discussed earlier in Argument I, the Bed Transfer Standard of the *2008-2009 Plan* provides, in part:

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

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

* * *

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

2008-2009 Plan at Chapter II, Section G.1(A)(4)(j).

When read as a whole, the Bed Transfer Standard by its terms applies only when no beds are added, *i.e.*, only when the transfer or exchange of beds does not result in an increase of beds in the overall service area inventory. Despite the Bed Transfer Standard's limitation to cases in which beds are simply being "repositioned", the Standard nevertheless requires that the receiving facility demonstrate the need for the additional capacity being created through the bed transfer. Thus, the ALC's and the Department's conclusions that Roper did not have to demonstrate need because it was not proposing to add beds contravenes the plain language of the Bed Transfer Standard.

Furthermore, had the need for Roper's proposed new hospital been appropriately considered by the Department, Trident contends that, as a matter of law, the Department was required to conclude that the need for hospital beds in the service area would be exceeded by the approval of both Trident and Roper's applications. When Roper applied to construct a new \$113 million hospital at Carnes Crossroads, the *2008-2009 Plan* showed that Roper's inventory of beds exceeded Roper's need for hospital beds by six.

The 2008-2009 Plan also showed a 48 bed surplus in the Tri-county Service Area. (R. p. 6899).

Trident proposed using its facility specific need for 17 new beds by Trident Medical Center to justify establishment of the Moncks Corner Hospital. With the filing of Trident's application to establish the 50-bed Moncks Corner Hospital and Summerville Medical Center's application to add 30 beds to its facility, all of the stated, facility-specific need for beds under the *2008-2009 Plan* was applied for by the facilities that actually had a bed need.²⁰ (R. p. 4145, lines 13–23).

At the time it applied, Roper did not have a positive, or even a neutral, bed need. Roper had an excess of beds. Thus, before the approval of the Carnes Crossroads project, Roper had an excess need for hospital beds and, after Carnes Crossroads Hospital was approved, Roper had an excess need for hospital beds. Similarly, before approval of the Carnes Crossroads Hospital, the Tri-county Service Area had an excess need for beds and after approval of Carnes Crossroads Hospital, the Tri-county Service Area had an excess need for beds. Both the ALC and the Department accepted this static bed count as a sufficient showing that the need for hospital services would not be exceeded by the approval of two new 50-bed hospitals in Berkeley County. (R. p. 1110, lines 18–23)

Under the competing applications 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 the approval of both projects would *exceed* the need for the services or facilities. Because the *2008-2009 Plan* reflects that there is an aggregate excess of beds in the Tri-County Service Area and that each of Roper's existing hospitals has an excess of beds, as a matter of law, the Department and

²⁰ As acknowledged by the Department, Roper could not have successfully applied to use any of Trident's facility specific need. (R. p. 1532, lines 9–17).

the ALC were required to conclude 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.²¹ To draw any other conclusion is inconsistent with the *2008-2009 State Health Plan*.

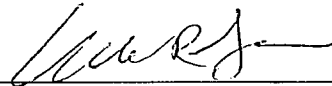
Thus, even if the Bed Transfer Standard is determined to apply to Roper's proposed hospital, the ALC's finding that Roper and Trident were not competing applicants is an error of law that requires remand to the Department for determination of which applicant "most fully complies with the requirements, goals, and purposes of this article and the State Health Plan, Project Review Criteria, and the regulations adopted by the department." S.C.Code Ann. § 44-7-210(B)(Supp. 2012).

²¹ In its January 28, 2011 Order, the ALC denied Trident's motion for summary judgment on this issue, holding, erroneously, that whether need was exceeded requires further inquiry into the facts. In this order, the court cited *Spartanburg Reg'l Medical Center v. Oncology and Hematology Associates of South Carolina, LLC*, 387 S.C. 79, 690 S.E.2d 783 (2010) in support of its ruling. In *Spartanburg*, which also concerned the issue of competing applications, the South Carolina Supreme Court upheld the ALC's determination that need would not be exceeded by the approval of both applications, finding substantial evidence to support the ALC's conclusion. *Spartanburg*, however, concerned radiation therapy services, the need for which was calculated and projected by the applicants under a mathematical formula set forth in the Plan. (387 S.C. 79 at 86-87, 690 S.E.2d 783, at 787). In the case of hospital beds, the Department performs the calculation of need and states it empirically in the Plan. (R. p. 1518, line 9 – p. 1527, line 12). Thus, whether there is a need for beds or an excess of beds in a specific facility or in the service area is established in the Plan itself without resort to any calculations or facts outside the Plan.

CONCLUSION

For the reasons stated herein, Trident respectfully requests that the Court hold that the Bed Transfer Standard, set forth in the *2008-2009 State Health Plan*, Chapter II, Section G.1.(A)(4)(j), is not applicable to the establishment of a new hospital and that the Order of the ALC granting Roper's Certificate of Need Application for the Carnes Crossroads Hospital must be reversed. In the alternative, Trident requests that the Court hold that Trident and Roper are competing applicants under the law, reverse the Order of the ALC to the contrary, and remand this case to the Department for a determination of which applicant best meets the goals and standards of the CON program.

Respectfully submitted,



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August 6, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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 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

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellant/Respondent complies with
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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

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

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Berkeley Medical Center, ...Appellant/Respondent,

v.

South Carolina Department of Health and
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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.

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SC Court of Appeals

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

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

v.

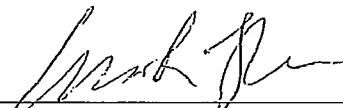
South Carolina Department of Health and
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Of whom Trident Medical Center, LLC is the Appellant.

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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.

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SOUTH CAROLINA

Case No. 09-AIJ-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.

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STATEMENT OF ISSUES ON APPEAL

- I. THIS COURT MUST AFFIRM THE DECISION OF THE ALC BECAUSE TRIDENT CANNOT OVERCOME THE HIGH BURDEN UNDER THE APPLICABLE STANDARD OF REVIEW FOR APPEALS FROM THE ALC OF A DECISION BY DHEC.
- II. THE ALC CORRECTLY HELD THAT THE BED TRANSFER PROVISION OF THE STATE HEALTH PLAN ALLOWS ROPER ST. FRANCIS TO TRANSFER BEDS TO CONSTRUCT A NEW HOSPITAL IN THE SERVICE AREA.
- III. THE ALC PROPERLY CONSIDERED DHEC'S INTERPRETATION AND APPLICATION OF THE BED TRANSFER PROVISION IN REACHING ITS DECISION TO AFFIRM DHEC'S APPROVAL OF THE ROPER ST. FRANCIS – BERKELEY CON APPLICATION.
- IV. THE ALC CORRECTLY DETERMINED THAT THE TWO CON APPLICATIONS ARE NOT "COMPETING APPLICATIONS" BECAUSE THE APPROVAL OF BOTH APPLICATIONS DOES NOT EXCEED THE NEED IN THE SERVICE AREA.
- V. TRIDENT HAS ABANDONED ITS CONTENTION THAT THE ROPER ST. FRANCIS CON APPLICATION DOES NOT OTHERWISE COMPLY WITH THE STATE HEALTH PLAN, PROJECT REVIEW CRITERIA OR OTHER REGULATIONS.

STATEMENT OF THE CASE

These proceedings involve two certificate of need (“CON”) applications for the establishment of hospital beds in Berkeley County, South Carolina. Trident Medical Center, LLC (“Trident”) filed an application on August 12, 2008, to construct a 50-bed hospital on vacant land adjacent to its Moncks Corner Medical Center in North/Central Berkeley County, using facility-specific bed need assigned to its North Charleston facility. (R. pp. 4461-5378). Roper St. Francis Hospital – Berkeley (“Roper St. Francis”) filed its CON Application on December 9, 2008, to transfer 50 existing beds from its Roper St. Francis Downtown facility in Charleston to Carnes Crossroads, located in Southern Berkeley County in the community of Goose Creek. (R. pp. 5379-6662).

As the Department of Health and Environmental Control (“DHEC” or “the Department”) was reviewing the Applications, Trident argued that the projects were competing applications as defined by the CON Act and Regulations, and as competing applications, only one could be approved. DHEC disagreed and approved both Applications on June 26, 2009, finding that the CON Applications were not competing. (R. pp. 5344-5359, 6647-6659). On August 7, 2009, Trident filed two, separate contested case proceedings in the Administrative Law Court challenging the Department’s decision to grant a CON to Roper St. Francis. On that same day, August 7, 2009, Roper St. Francis filed a contested case proceeding supporting the decision of DHEC. (R. pp. 68, 120, 165). At the parties’ request, The Honorable John D. McLeod consolidated all three of these cases on January 7, 2010. (R. pp. 62-67).

Prior to the contested case hearing, the Administrative Law Court (“ALC”) heard several pre-trial motions, including motions for summary judgment filed by both Trident and Roper St. Francis. In Trident’s first motion for summary judgment, which it filed on

December 15, 2010, Trident argued that the two CON applications were competing applications as a matter of law and that the ALC should remand the applications to DHEC to determine which application best meets the applicable law. The ALC denied this motion on January 28, 2011. (R. pp. 59-61).

Trident filed a second motion for summary judgment on December 9, 2011, arguing that DHEC erred as a matter of law when it (1) allowed Roper St. Francis to use the “bed transfer” section of the State Health Plan to create a new hospital; and (2) when it approved Roper St. Francis’s application to build a new hospital that would use those transferred beds. The same day Trident filed its second motion for summary judgment, Roper St. Francis also filed a motion for partial summary judgment, asking the ALC to rule that, as a matter of law, if the Court found the applications to be competing, the only remedy available was a remand to the Department to choose between the applications. The ALC denied Trident’s motion, and granted Roper St. Francis’s motion for partial summary judgment by Order dated February 10, 2012. (R. pp. 55-58).

A fourteen-day contested case trial commenced before The Honorable John D. McLeod on January 30, 2012. On September 26, 2012, Judge McLeod issued a 52-page decision sustaining DHEC’s decision to approve both CON applications. (R. pp. 3-54). Trident filed a motion to alter or amend the judgment on October 5, 2012, which was heard on October 31, 2012, and denied on November 1, 2012. (R. pp. 1-2).

Roper St. Francis agrees with the final decision of the ALC; however, Trident has appealed the ALC’s order, arguing that Roper St. Francis’s CON should not have been approved. Roper St. Francis submits this brief in response to Trident’s Initial Brief appealing the final decision of the ALC. Trident contends that the “plain language” of

the bed transfer provision of the State Health Plan requires that the facilities transferring and receiving acute care beds must be in existence for the provision to be used, that the Department's interpretation of the bed transfer provision contradicts the "plain language" of the State Health Plan, and that the applications are competing and only one may be approved. Roper St. Francis disagrees with each issue on appeal and for the reasons shown herein, supports the ALC's final decision and requests denial of Trident's appeal.

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STATEMENT OF THE FACTS

Prior to these CON applications, Berkeley County was one of four counties in South Carolina with zero hospital beds.¹ (R. pp. 4336-4374). This was so even though Berkeley County is the ninth largest county in the State of South Carolina and has had a population explosion. In 2008 (when the applications were filed), Berkeley County had an estimated population of 158,140 citizens and in 2010, it had exceeded growth projections and its population had increased to 177,843. (R. pp. 4353 and 4108 lines 13-14 and 4111 lines 2-11). Forty years ago when Trident Medical Center was constructed, Berkeley County had a population of 56,199. (R. pp. 4359-4365). The other counties in South Carolina without a hospital have populations of less than 20,000 people. (R. pp. 4366 and 4374). There are eight counties in South Carolina with 100 hospital beds and a population of less than 100,000 and seven counties with a similar population size to Berkeley County and well over 100 beds, including Florence with 831 beds for 177,843 people, Sumter with 283 beds for 107,456 people, and Aiken with 183 beds for 160,099 people. (R. pp. 4367-4368).

Recognizing Berkeley County's size, its growing population, and its lack of hospital beds, both Trident and Roper St. Francis sought to construct hospitals there. Each applicant proposes to construct a small 50 bed acute care hospital in one of the two population centers in Berkeley County: Trident in Moncks Corner and Roper St. Francis in Goose Creek. An acute care hospital refers to a community hospital that treats patients from the community for general medical conditions such as surgery, obstetrics,

¹ The South Carolina State Health Plan identifies four Inventory Regions for hospitals, and each region is further divided into service areas. Berkeley County is part of the Tri-County Service Area, which also includes Charleston and Dorchester Counties. (R. pp. 6669-6670 and 6689 and 6682 and 6898-6900).

emergency care, and general diseases. An acute care hospital does not treat complex diagnoses or procedures such as open heart surgery or neurosurgery. (R. pp. 747 lines 3-22 and 2964 lines 7-14). Tertiary care hospitals provide care for those complex procedures. (R. p. 2957 lines 7-14).

It is important to note that a hospital is not like a hotel. Patients do not have a regular check in or check out and because a high percentage of patients admitted to an acute care hospital are admitted through the emergency department, hospitals must maintain flexibility to handle variations and spikes with inpatient admissions. (R. pp. 10 and 2002 line 19 – 2003 line 4 and 3265 line 22 – 3267 line 18). Further, a hospital census is affected by the season and the day of the week, as utilization is higher in the winter than the summer and higher during the week as compared to the weekend. The impact of these variations in admissions is much more significant on a smaller acute care hospital and as a result, optimal capacity for a 50 bed acute care hospital is 65% occupancy. In other words, a 50 bed hospital is at full capacity with 32.5 patients or heads on a pillow. (R. pp. 12-13). Therefore, both of the proposed hospitals are at full capacity with a total of 65 inpatients – 32.5 patients each.

Trident filed its CON Application on August 12, 2008, seeking to construct a 50-bed acute care hospital on vacant land adjacent to its existing free-standing Emergency Department in Moncks Corner. Trident's application is governed by the 2004-2005 South Carolina State Health Plan. (R. pp. 6663-6872). Currently, Trident Health System is comprised of the following facilities: Trident Medical Center, a 296-bed tertiary care facility in Charleston County; Summerville Medical Center, a 94-bed acute care facility in Dorchester County; and Moncks Corner Medical Center, a freestanding emergency

department (with no overnight beds) in Berkeley County.² (R. pp. 550 line 16 – 551 line 17). Pursuant to the 2004-2005 State Health Plan, Trident Medical Center (located in North Charleston) had a facility-specific bed need of 42 beds. (R. pp. 1670 line 22 – 1671 line 4 and 6689). Using the CON process, Trident had successfully converted 25 skilled nursing beds into general acute beds, leaving a need of 17 beds under the Plan. (*Id.* and R. p. 7048). In its CON Application for a new hospital in Moncks Corner, Trident sought to transfer this facility-specific bed need of 17 beds and to increase this need to 50 beds to allow for the construction of its new hospital in Berkeley County. (R. pp. 6679, 6689). In other words, Trident proposed to transfer *future bed need* allocated to Trident from its facility in North Charleston to construct a hospital in Moncks Corner.

When Trident filed its CON application, it was fully aware that Roper St. Francis had purchased 66 acres of land at Carnes Crossroads in Goose Creek for the purpose of constructing its own hospital in Berkeley County. (R. pp. 16 and 651 lines 5-8 and 4381 and 4384). The timeline of each applicant's actions clearly established that Trident's CON Application was a reaction to Roper St. Francis' decision to purchase a large parcel of land in Goose Creek. Thus, it was no surprise to Trident when, approximately four months after Trident filed its CON Application, Roper St. Francis filed a CON Application proposing to construct a 50-bed acute care hospital in Berkeley County on the land it had previously purchased. To establish its new hospital, Roper St. Francis proposed to transfer 50 *existing* licensed acute care beds from its Roper St. Francis Hospital facility in Downtown Charleston to Goose Creek. (R. pp. 6889-90 and 1607

² A hospital must have, *inter alia*, inpatient medical services, commonly referred to as beds. (R. p. 6670). Moncks Corner Medical Center is not an existing hospital facility.

lines 10-21). Roper St. Francis's CON Application is governed by the 2008-2009 State Health Plan. (R. pp. 6873-7050).

Roper St. Francis is a non-profit healthcare system with three inpatient facilities: Roper Hospital Downtown, a 316-bed tertiary hospital located on the peninsula in downtown Charleston; Bon Secours St. Francis, a 204-bed acute facility in Charleston County; and Roper St. Francis Mt. Pleasant Hospital, an 85-bed acute care facility in Charleston County. (R. p. 6). Roper St. Francis operates a freestanding Emergency Department and an ambulatory surgery facility in Berkeley County. (R. pp. 6 and 4335). Roper St. Francis has a significant market share in Berkeley County. At the time of these Applications, nearly one in four Berkeley County residents traveled past Trident Medical Center to seek care at Roper St. Francis facilities in downtown Charleston and west of the Ashley River. (R. p. 4352). In its CON Application for a new hospital at Carnes Crossroads in Goose Creek, Roper St. Francis proposed primarily to serve this large existing patient population. (R. p. 5395).

It is important to remember that the Roper St. Francis – Berkeley Hospital is a repositioning of existing licensed beds and will not add any new beds to the Tri-County Service Area. Currently, 95% of all the hospital beds in the Tri-County Service Area are physically located in Charleston County while only 53% of the tri-county population resides in Charleston County. (R. p. 4369). The ALC relied on expert testimony to conclude that there exists a maldistribution of beds in the service area. (R. pp. 15-16). In other words, population growth over the past few decades has created new population centers requiring healthcare facilities like Roper St. Francis to move acute care services closer to the population. (R. pp. 2959 line 25 – 2961 line 8 and 4375-4378). Each

applicant will rely heavily on its Berkeley County patients to support these small hospitals and each hospital system has the existing market share to accomplish that goal. (R. p. 16 and 1289 line 19 – 1290 line 8). Relying on expert testimony, the ALC found more than a sufficient number of patients in Berkeley County to support each 50 bed hospital at capacity with no significant change in market share. (R. p. 23). In conclusion of addressing the need for the hospitals, the ALC stated “I find by the greater weight of the evidence that both hospitals will be well-utilized and financially successful and the approval of both hospitals will not exceed the need.” (R. p. 26).

By way of background, the Certificate of Need (“CON”) program is a comprehensive statutory scheme found at S.C. Code Ann § 44-7-110 *et seq.* (Rev. 2002) (the “CON Act”) that has been in existence for decades. The CON Act vests the South Carolina Department of Health and Environmental Control (“DHEC” or “Department”) with the control and administration of the CON program. DHEC publishes a State Health Plan every two years, and in addition has adopted Project Review Criteria to evaluate CON Applications, and promulgated a host of other regulations to support the statutory requirements. The CON Act identifies its four purposes and the types of projects or services covered under the Act. S.C. Code Ann. § 44-7-160. The State Health Plan identifies the specific services and equipment requiring a CON and includes an inventory, projections, standards and a statement of the most important project review criteria. S.C. Code Ann § 44-7-180. Before the Department may grant a CON, the application must comply with the applicable State Health Plan and the Project Review Criteria found at Section 802 of Regulation 61-15. S.C. Code Ann. § 44-7-210(C). As discussed below, Trident has abandoned its claim below that the Roper St. Francis CON Application fails

to comply with the Project Review Criteria but continues to contend that the Roper St. Francis CON Application does not comply with the bed transfer provision of the State Health Plan.

The construction of a hospital requires a CON. The State Health Plan provides three methods to obtain a CON to establish a hospital: transfer of existing licensed beds, facility-specific bed need, and service area bed need. (R. pp. 6887-6890). When addressing the methods based on bed need, the State Health Plan focuses on the occupancy of a hospital bed. This is primarily because bed occupancy is a rational way to measure when and if to construct new hospitals and because the overnight stay in a hospital bed is what makes a hospital unique from other healthcare facilities. (R. p. 10). To determine need for additional hospital beds under a facility-specific bed need or service area need method, the State Health Plan utilizes a bed need formula.

Both Trident's and Roper St. Francis' CON Applications rely on different methods to support their project under the State Health Plan. Trident relies on the bed need formula for its North Charleston facility and proposes to utilize future facility-specific bed need for Trident Medical Center to construct a hospital in Monck's Corner. Roper St. Francis does not propose to add any new licensed beds to the service area and, therefore, need not rely on the bed need formula. Roper St. Francis proposes to transfer existing licensed beds located at Roper Hospital Downtown to Goose Creek under the bed transfer provision of the State Health Plan. This provision in the State Health Plan has been used by hospital systems to construct satellite hospitals in Anderson, Charleston, Georgetown, Greenville, Spartanburg and Richland Counties. (R. pp. 26-27 and 7519-7526 and 1157 line 20 – 1158 line 7 and 1268 line 22 – 1269 line 15 and 1597 line 16 –

1599 line 20). Despite its frequent use to construct satellite hospitals, Trident contends that the bed transfer provision prohibits the transfer of existing licensed beds to a hospital that is not already existing.³ The ALC rejected Trident's interpretation of the bed transfer provision in the State Health Plan as being overly narrow, incorrect and in opposition to the intent of DHEC, the drafter of the provision. (R. pp. 26-30).

In addition to challenging on appeal Roper St. Francis' compliance with the bed transfer provision of the State Health Plan, Trident appeals the ALC's decision that the two CON Applications are not "competing applications." If two or more CON applications are deemed "competing applications" as defined by the CON Act and the CON Regulations, only one of the CON applications may be approved. S.C. Code Ann. § 44-7-210(C); S.C. Code Ann. Regs. 61-15 § 307(2). The key question for the ALC below to determine whether these Applications are "competing applications" is whether the approval of both would exceed the need for the services or facilities. At trial, DHEC's witness testified to at least six important facts that supported their decision that the Applications were not competing applications. (R. pp. 1097 lines 1-6 and 1288 line 12 – 1292 line 9). Roper St. Francis submitted abundant evidence through expert and factual testimony, as well as documentary evidence, establishing that the approval of both Applications would not exceed the need. The ALC adopted these findings with a detailed discussion, determining that there was abundant factual evidence to support the

³ Trident's position remains interesting and inconsistent since Trident transferred existing beds and future bed need to obtain a CON to construct a satellite hospital in Summerville and, with this Application, Trident has proposed to transfer future bed need – not existing beds – to construct a hospital, despite that the applicable State Health Plan does not expressly authorize it. (R. pp. 1607 line 10 -1608 line 24 and 32).

decision that the approval of both hospitals would not exceed the need for the facilities or services. (R. p. 21).

The ALC, as the tribunal authorized to hear and decide contested cases challenging a CON decision, conducted a 14-day trial and issued a 52-page Final Order and Decision affirming the decision of the Department to grant both CON Applications. Trident has filed this appeal from that Final Order. For the reasons set forth below, Roper St. Francis respectfully requests that this Court affirm the decision below.

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ARGUMENTS

I. THIS COURT MUST AFFIRM THE DECISION OF THE ALC BECAUSE TRIDENT CANNOT OVERCOME THE HIGH BURDEN UNDER THE APPLICABLE STANDARD OF REVIEW FOR APPEALS FROM THE ALC OF A DECISION BY DHEC.

This matter before the Court is an appeal of an Administrative Law Court's decision regarding the action of an administrative agency. The Administrative Procedures Act ("APA") governs appeals of such decisions of the ALC. The ALC presides over all contested cases challenging the Department's decision on a CON application and is the fact finder authorized to hear evidence and adjudicate the agency decision. S.C. Code Ann. § 1-23-600(A) (Supp. 2011). Specifically, Section 1-23-610(B) of the APA articulates the applicable standard of review for the Appellate Court:

The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (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. § 1-23-610(B).

"The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d

674, 676 (Ct. App. 2008) (citing *Olson v. S.C. Dep't of Health and Env'tl. Control*, 379 S.C. 57, 63, 663 S.E.2d 500, 501 (Ct. App. 2008)). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the ALC reached." *Bailey v. S.C. Dep't of Health and Env'tl. Control*, 388 S.C. 1, 6, 693 S.E.2d 426, 429 (Ct. App. 2010) (citing *Leventis v. S.C. Dep't of Health & Env'tl. Control*, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000)). In the seminal case of *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981), the Supreme Court described the substantial evidence rule as something less than the weight of the evidence and specifically stated that "a judgment upon which reasonable men might differ will not be set aside." *Id.* at 136, 276 S.E.2d at 307. Further, it is clear that under the APA, judicial intervention is limited to cases with a gross or manifest error of law by the administrative agency. *Id.*; see also *Nat'l Health Corp. v. S.C. Dep't of Health and Env'tl. Control*, 298 S.C. 373, 378; 380 S.E.2d 841, 843 (Ct. App. 1989).

In light of this standard of review, Trident bears a heavy and high burden in this appeal. In the 52-page Final Order and Decision, the ALC made 94 Findings of Fact and 39 Conclusions of Law. Each finding and conclusion cites to a supporting exhibit, exact page of trial testimony, or relevant case or statute. Simply identifying conflicting evidence does not prevent the findings of the ALC from being supported by substantial evidence. See *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env'tl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005). To overturn the ALC decision based on an error of law, the error must be manifest. As explained more fully herein, the Court must give deference to the agency interpretation of its regulations unless there is a

compelling reason otherwise. “Substantial evidence,” “manifest error of law,” and “compelling reason to differ” are all high and difficult burdens that Trident has failed to overcome.

Notwithstanding the lengthy trial and large and complicated Record on Appeal, Trident has focused its appeal on three areas, thereby electing to abandon many issues raised in the ALC below. None of the three areas raised by Trident constitutes a manifest or clear error of law and substantial evidence exists to support the ALC’s findings and conclusions for all three areas as will be established hereinbelow

While Trident’s failure to satisfy this high burden is alone sufficient to deny the appeal, nonetheless other reasons exist for this Court to affirm the ALC decision. As shown herein, Roper St. Francis will establish that the ALC reached the correct decision with a thorough, detailed and deliberate analysis of the State Health Plan, the applicable law, and review of the testimony and evidence presented below. Accordingly, the Court should affirm the decision of the ALC.

II. THE ALC CORRECTLY HELD THAT THE BED TRANSFER PROVISION OF THE STATE HEALTH PLAN ALLOWS ROPER ST. FRANCIS TO TRANSFER BEDS TO CONSTRUCT A NEW HOSPITAL IN THE SERVICE AREA.

The 2008-2009 South Carolina State Health Plan is applicable to the Roper St. Francis CON Application seeking to transfer 50 existing licensed acute care beds from Roper Hospital Downtown to construct Roper St. Francis – Berkeley near Goose Creek, South Carolina. As with its predecessor Plans, the 2008-2009 State Health Plan has a multi-page section that sets forth the definitions, requirements, inventory and bed need calculations for hospitals and hospital beds. (R. pp. 6886-6901). Roper St. Francis and Trident both agree that the pertinent section of the State Health Plan for the Roper St.

Francis CON Application is Section II(G)(1)(A)(4)(j)(1)-(8), which is commonly referred to as the bed transfer provision.⁴ (R. pp. 6889-6890). DHEC staff and the DHEC Board have consistently interpreted the bed transfer provision to allow a hospital to transfer hospital beds from an existing facility to construct a new hospital in a new location provided subsections (j)(1)-(8) are satisfied by the applicant. (R. pp. 1265 line 11 – 1269 line 6). In such circumstances, the hospital transferring the beds is the transferring facility and the hospital to be constructed is the receiving facility. (R. p. 1269 lines 12-18). In this case, the ALC clearly determined that Roper St Francis – Berkeley is the receiving facility and Roper Hospital Downtown is the transferring facility. (R. p. 30). Trident continues to contend that the bed transfer provision prohibits the transfer of existing beds to construct a new facility because, according to Trident, the receiving facility must be an already existing facility. In the Final Order and Decision, the ALC rejected Trident’s position, agreed with Roper St. Francis and DHEC, and concluded that the transfer proposed by Roper St. Francis is permitted by the State Health Plan. (R. p. 29). Therefore, the crux of the case below was whether the Roper St. Francis CON Application complied with the State Health Plan. The crux of this appeal, however, is whether the ALC’s determination in the affirmative is a clear error of law or whether substantial evidence exists to support the ALC Decision.

A. *The 2008-2009 State Health Plan does not prohibit the transfer of existing licensed beds to construct a new hospital.*

No matter how many times Trident attempts to say otherwise, the 2008-2009 State Health Plan bed transfer provision does not require that the facility receiving the

⁴ Trident refers to this section in its Initial Brief as the Bed Transfer Standard. The ALC’s Final Order used bed transfer section and bed transfer provision. Roper St. Francis uses the term bed transfer provision.

transferred beds be an already existing facility. Neither the word existing nor any iteration thereof is contained in the language of the bed transfer provision. The ALC made 11 Findings of Fact related to the bed transfer provision and stated: “I find that the plain language of the [State Health] Plan does not require that the facility receiving the beds be an existing facility.” (R. p. 28). The ALC unequivocally stated that “the [bed transfer] language allows a facility to transfer beds to establish a new hospital provided the bed transfer criteria are satisfied.” (R. p. 29). These factual findings are clear and critical to the analysis of the State Health Plan because the findings confirm that the Plan does not prohibit a hospital from transferring its own beds to construct a new hospital that does not yet exist.

Trident’s Initial Brief attempts to gloss over this important distinction. As a result, Trident’s own description of the “plain language” of the bed transfer provision evidences the fallacy of its argument. According to Trident’s Initial Brief, “the plain language of the Bed Transfer Standard *indicates* that it applies only when both the hospital transferring the beds and the hospital receiving the beds are in existence” (Trident Initial Br. 12). Language purportedly so “plain,” would not need to “indicate” but would state expressly that the receiving hospital must be already existing. “We cannot construe a statute without regard to its plain and ordinary meaning, and we will not resort to subtle or forced construction in an attempt to limit or expand the scope of a statute.” *Berkebile v. Outen*, 311 S.C. 50, 55, 426 S.E.2d 760, 763 (1993). In *Berkebile*, the Supreme Court considered the interpretation of Code Section 32-1-10 (1991). The statute allows a person to seek recovery for a gambling loss over a certain threshold. The crux of the appeal was whether the statute required that the gambling loss arise from an

“illegal” game. The Supreme Court held that it did not for the basic reason that the statutory language did not include language limiting it to an illegal game. Thus, the Supreme Court stated it will “not judicially engraft extra requirements to legislation which is clear on its face.” *Id.* at 55-56, 426 S.E.2d at 763. Likewise to the *Berkebile* opinion, the word “existing” or any similar word is not contained anywhere within the bed transfer provision of the State Health Plan. Nowhere does the provision require that the receiving facility be an existing bricks and mortar establishment. Trident’s construction of the bed transfer provision is exactly the type of forced construction rejected by courts. If DHEC intended that the State Health Plan prohibit the transfer of beds to construct a new hospital, the addition of a few words or sentences would have accomplished the result. This Court should not adopt the forced construction presented by Trident and as a result “judicially engraft extra requirements” that are absent from the State Health Plan.

B. *Principles of statutory construction support the ALC’s interpretation of the State Health Plan.*

When interpreting a regulation, this Court and the ALC employ the same rules that govern the construction of statutes. *See Murphy v. S.C. Dep’t of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). However, the State Health Plan is not a regulation or a statute, it is a document prepared by DHEC staff and presented for approval by the DHEC Board every two years. *See* S.C. Code Ann. § 44-7-180. While the State Certification of Need and Health Facility Licensure Act (“CON Act”), codified at S.C. Code Ann. § 44-7-110 *et seq.*, requires the issuance of the State Health Plan, the CON Act merely requires that the Plan include an inventory, projections of need, standards for distribution, and a statement as to the most important project review

criteria. *See* S.C. Code Ann. § 44-7-180(B). Unlike a regulation or statute, the State Health Plan is not approved by the Legislature but is an agency-promulgated document approved by the agency's Board.⁵ Thus, it is important to realize that the CON Act does not mandate a narrow or strict interpretation of the State Health Plan. Section 44-7-210(C) merely states that "[t]he Department may not issue a Certificate of Need unless an application complies with the State Health Plan, Project Review Criteria, and other regulations." S.C. Code Ann. § 44-7-210(C). Section 44-7-180(B) states that "nothing in this provision shall be construed as requiring the department to approve any project which is inconsistent with the South Carolina Health Plan." *Id.* at -180(B). Therefore, the question for the Department and the ALC below was whether the application complies with the State Health Plan or is inconsistent with the Plan. Determining compliance requires judgment from the Department in its review of the application. Accordingly, unless the State Health Plan specifically prohibits the approval of the application through the use of unmet standards or criteria, the Department retains the ability to find that the application complies with the State Health Plan.

In *MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 379 S.C. 1, 664 S.E.2d 471 (2008), the Supreme Court interpreted whether the MRI standards contained in the State Health Plan satisfied the CON Act based on statutory interpretation principles.⁶ "The primary rule of statutory construction is to ascertain and give effect to

⁵ Though challenged at trial, Trident did not appeal the ALC's findings and conclusions that the State Health Plan as promulgated by the Department satisfies the statutory mandate of the CON Act. Therefore, as an issue raised below but not included on appeal, the ALC's conclusions numbered 16 through 20 are the law of the case. *See S.C. Coastal Conservation League*, 363 S.C. at 76, 610 S.E.2d at 487 ("A ruling not challenged on appeal is the law of the case, regardless of the correctness of the ruling.")

⁶ Because the State Health Plan is neither a statute nor a regulation, this Court may

the intent of the legislature.” *Tempel v. S.C. State Election Comm’n*, 400 S.C. 374, 377-78, 735 S.E.2d 453, 455 (2012). Furthermore, the words of the statute must be given their plain and ordinary meaning. And, when interpreting regulations, courts also give deference to the interpretation of a regulation by the agency charged with its enforcement. *Murphy*, 396 S.C. at 640, 723 S.E.2d at 195. “Where a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The most clear and definite fact about the bed transfer provision is that it does not state that the receiving facility must be an already existing hospital.

“The canon of construction ‘*expressio unius est exclusion alterius*’ or ‘*inclusio unius est exclusion alterius*’ holds that ‘to express or include one thing implies the exclusion of another, or of the alternative.’” *Hodges* at 86, 533 S.E.2d at 581 (*citing Black’s Law Dictionary* 602 (7th ed. 1999)). The DHEC Board had many opportunities over the years to state that the receiving facility must be an existing facility. It never did. The Board’s failure to include that the receiving facility must be “existing” is strong evidence that the intent of the DHEC Board is not to narrowly constrict the bed transfer

conclude that *MRI at Belfair* is limited to whether the State Health Plan satisfies the requirements of the CON Act and, therefore, statutory construction principles do not apply when simply interpreting the meaning of the State Health Plan. If statutory construction principles do not apply, the Board’s clear statement on the meaning of the bed transfer provision (discussed *infra*) must be the guiding principle of the Board’s intent and therefore, the DHEC Board’s recent ruling on this exact question ends this matter in favor of Roper St. Francis. (R. pp. 7519-7526). In its 52-page opinion, the ALC relied upon *Murphy* and *MRI at Belfair* as the basis to utilize statutory construction principles to interpret the State Health Plan.

provision, allowing flexibility for the Department to approve the construction of satellite hospitals by way of bed transfer. (R. pp. 7519-7526).

Most importantly, “[a]ll rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *Taylor v. Aiken County Assessor*, ___ S.C. ___, 741 S.E.2d 31, 34 (Ct. App. Mar. 27, 2013). In interpreting the State Health Plan, the ALC considered the legislative intent of the CON Act and noted that one of the primary goals of enacting the Certificate of Need program was to “guide the establishment of health facilities and services which will best serve public needs” S.C. Code Ann. § 44-7-120. (R. pp. 27-28). The ALC went on to examine the plain and ordinary meaning of the State Health Plan, recognizing that “[t]he word ‘existing’ or a similar iteration is not contained in the language of the bed transfer provision” and that “the plain language of the Plan does not require that the facility receiving the transfer of beds be an existing facility.” (R. p. 28). Further bolstering its decision, the ALC explained that such an interpretation was consistent with “the long-standing policy of the Department . . . that allows the construction of new hospitals throughout the transfer of existing licensed beds from affiliated entities.” (R. pp. 28-29 and 7519-7526 and 1157 line 20 – 1158 line 7 and 1267 line 4 – 1269 line 18 and 1597 line 16 – 1599 line 20). Further, the Department’s witness testified as to how allowing flexibility for hospitals to redistribute beds was good healthcare planning. (R. pp. 1619 line 8 – 1620 line 3).

C. *Substantial evidence supports the ALC's decision that the Roper St. Francis CON Application complies with the State Health Plan and the purposes of the CON Act.*

The ALC found that the Roper St. Francis' CON Application complies with the State Health Plan and specifically with the bed transfer provision, which would include the introductory paragraph and the applicable subsections (j)(1)-(8). (R. p. 30). On appeal, Trident's sole objection to the approval of the Roper St. Francis CON Application is Trident's contention that the 2008-2009 State Health Plan prohibits the transfer of beds to construct a satellite hospital. As shown with detailed facts and conclusions in the Decision below and highlighted herein, substantial evidence was introduced at trial to support the ALC's decision that the Application was correctly approved and the bed transfer criteria were satisfied.

The bed transfer provision introductory paragraph states that the provision addresses the increasing need for facilities to create arrangements "in order to serve their patients in a more efficient manner." (R. p. 6889). The provision specifically states that affiliated hospitals may wish to transfer beds as a means to accomplish this greater efficiency. (*Id.*) The clearly documented purpose of the acute care hospital Roper St. Francis seeks to establish in Berkeley County is to "bring enhanced access to Roper St. Francis aligned patients residing in the Goose Creek / Berkeley County area who currently travel out of the local area for inpatient care;" as well as to "provide a significant positive impact to the residents of the Goose Creek and Berkeley County area by establishing a community-based, not-for-profit hospital in Goose Creek, thereby significantly enhancing access to hospital services in Berkeley County." (R. pp. 5393-5394).

In the CON Application and at trial, Roper St. Francis demonstrated a significant historical presence in the Berkeley County market – serving 23%, or nearly 1 in 4 inpatient hospital admissions for non-tertiary, non-specialty diagnoses. (R. pp. 17 and 5404). Even without an inpatient facility in the county, Berkeley County residents choose to travel significant distances to Downtown Charleston and West Ashley to obtain their inpatient care at a Roper St. Francis facility. (*Id.*) Roper St. Francis’ project distributes existing service area beds to an area of growth located where its existing patients work and live, thereby advancing the very purposes of the CON Act. (R. pp. 27-28). Currently, there are 1,739 existing licensed beds in the Tri-County Service Area, 95% of which are located on the Charleston Peninsula, while only 53% of the service area population resides in Charleston County. (R. pp. 15-16 and 4369). Given the obvious geographic limitations to growth on the Peninsula, the population is understandably growing to the north and west of downtown. (R. pp. 2934 line 15 – 2935 line 16). In the words of Trident’s witness, longtime resident and former Mayor of Moncks Corner, John West, the population growth north from the south through Berkeley County is coming “[l]ike a freight train.” (R. p. 1442 lines 2-6). As a result, there is a maldistribution of beds in the Tri-County Service Area. (R. pp. 15-16 and 3575 line 16 – 3577 line 1). Roper St. Francis more than demonstrated the historical utilization in Berkeley County at Roper St. Francis Hospitals and the projected utilization at Roper St. Francis – Berkeley. As a result, the transfer of 50 existing licensed beds from an area of limited growth on the Peninsula to an area of explosive growth in neighboring Berkeley County shows why there is such a great need for this project. Obviously, the use of these

beds in Berkeley County is both reasonable and an appropriate use of existing resources and inventory.

It cannot be disputed and the ALC confirmed that the remaining criteria set forth in the bed transfer provision were satisfied by Roper St. Francis. The transfer of beds from Roper Hospital Downtown to Roper St. Francis – Berkeley will not increase the number of beds in the service area. (R. pp. 21-22). Further, Roper St. Francis presented evidence and the ALC found that the redistribution of patients to Berkeley County will more than offset the loss of beds at Roper Hospital Downtown, thereby adequately explaining the impact of the transfer on the transferring facility. (R. p. 30). Finally, the transfer is permanent. (R. p. 29).

Beyond the documented and appropriate purpose of the expansion to Roper St. Francis – Berkeley and repositioning of existing beds from Roper Hospital Downtown, Roper Hospital Downtown and Roper St. Francis – Berkeley have a “formal legal relationship with a central organization” as contemplated by the “affiliated hospitals” definition in the State Health Plan. The phrase is defined as “two or more health care facilities . . . 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.” (R. p. 6882). Roper St. Francis – Berkeley clearly has more than a cursory and potentially limited relationship with Roper Hospital Downtown. Roper St. Francis – Berkeley is an extension of the Roper St. Francis Healthcare System and is a continuation of the strong network of acute care facilities serving Roper St. Francis patients throughout the Tri-County Service Area. (R. p. 6). While one could imagine a circumstance where two unrelated hospitals enter into a sham affiliation merely to sell or

transfer beds or services with the intention to quickly unaffiliate after the transfer, but that is clearly not the case here. The relationship of Roper St. Francis – Berkeley with the Roper St. Francis Healthcare System and Roper Hospital Downtown are thoroughly discussed throughout the CON application. Significantly, Roper St. Francis – Berkeley is being established to provide needed acute care services to the residents of Berkeley County, including a very substantial number of patients who currently travel significant distances to obtain their care on the crowded Charleston peninsula at Roper Hospital Downtown. As explained in the Department’s letter approving the application, the project is a “re-positioning of currently licensed acute care beds from an area of limited growth to an area of strong growth” (R. p. 6647). The project is a furtherance of Roper St. Francis’ mission to provide excellent quality of care to the residents of the Tri-County Service Area. As a result, Trident’s contention that Roper St. Francis’ CON Application does not meet the definition of “affiliated hospitals” is misplaced. The record is replete with documentary and testimonial evidence that the relationship between Roper Hospital Downtown, the transferring facility, and Roper St. Francis – Berkeley, the receiving facility, is far more than simply transferring beds, equipment or services.

Trident’s Initial Brief is brimming with references to “existing” hospitals in its discussion of the bed transfer provision, despite the complete absence of that word from the bed transfer provision or any of its criteria. The ALC’s Final Order specifically found that “the plain language of the Plan does not require that the facility receiving the transfer of beds be an existing facility.” (R. p. 28). Contrary to Trident’s assertion in its Initial Brief, the Department did not deem that a single hospital would be both the transferring and the receiving facility, but instead the testimony in the record is that the Department

considers the applicant (Roper St. Francis – Berkeley) to be the receiving facility, while in this case Roper Hospital Downtown is the transferring facility. (R. p. 1269 lines 12-18). To argue differently is a misrepresentation of the record.

Likewise, Trident cites to trial testimony where the attorney led the witness through a ridiculous vocabulary game of “English language” versus “Department language” to justify its position completely glossing over (or ignoring) the testimony establishing the longstanding policy of the Department’s interpretation, its purpose and application, as well as the affirmance of the policy and reasoning by the Department Board. Despite Trident’s contention otherwise, the ALC heard and considered the evidence and clearly found that the Roper St. Francis CON Application satisfied the bed transfer provision and that the Application complied with the State Health Plan. The ALC’s Final Order properly considered the entirety of the record and evidence before it, including on the issue of the Department’s interpretation and application of the bed transfer provision, and properly upheld the Department’s decision to approve the Roper St. Francis – Berkeley CON application. Roper St. Francis respectfully requests that this Court do the same and deny this appeal by Trident.

III. THE ALC PROPERLY CONSIDERED DHEC’S INTERPRETATION AND APPLICATION OF THE BED TRANSFER PROVISION IN REACHING ITS DECISION TO AFFIRM DHEC’S APPROVAL OF THE ROPER ST. FRANCIS – BERKELEY CON APPLICATION.

It is undisputed that DHEC has consistently and over a long number of years approved CON applications to transfer existing licensed beds from one hospital to construct a satellite hospital that does not yet exist. At least six new hospitals have been created by the transfer of existing licensed beds or bed need in Anderson, Charleston, Georgetown, Greenville, Spartanburg and Richland Counties. (R. pp. 28-29 and 7519-

7526 and 1268 line 22 – 1269 line 18). As the ALC was informed through testimony and documentary evidence, the Department has a long history of allowing satellite hospitals to be constructed by way of the bed transfer provision, which has been upheld both by the Department Board and the ALC. Ms. Brandt, who at the time of the decision and at trial was the Chief for the Division of Health Licensing, testified that, regarding the bed transfer provision:

My knowledge is that historically that's been allowed for the creation of new hospitals. In other words, an existing hospital can transfer their existing beds for the creation of a new hospital, and that's been done in a lot of cases. And also while I was at the Department was when we went before the Board and I was present when there was -- based on Parkridge case, the same bed transfer provision was brought up before the Board and then before the ALC. So I was present at the time to have knowledge of the 2008-2009 Health Plan, even if I wasn't present when it was effective.

(R. pp. 1265 line 11 – 1266 line 1). Mr. Les Shelton, a longtime employee of the Department with no role in the decisions on appeal, testified to a number of satellite hospitals created through the bed transfer provision, where the receiving facility was the applicant not yet constructed and the transferring facility was an existing affiliate, including Providence Northeast Hospital, Anderson Area Medical Center, Village Healthcare, Palmetto Parkridge, Waccamaw Neck Hospital, and Roper St. Francis – Mount Pleasant. (R. pp. 1597 line 16 – 1599 line 20).

In addition, the DHEC Board addressed this very question in a dispute over the Parkridge Hospital in Richland County and clearly stated that the bed transfer provision allows the transfer of existing licensed beds to establish a new hospital. (R. pp. 7519-7526). Despite the ALC's Finding that the bed transfer provision does not require that the receiving facility to be an already existing hospital, Trident challenges the ALC's consideration of the Department's interpretation and application of the bed transfer

provision for prior projects. Trident's challenge requires acceptance of its unsupported proposition that allowing for the creation of a satellite hospital through the transfer of existing service area beds "contradicts the plain language of the Plan." (Trident Initial Br. 20.) Again, according to Trident, the "plain language" of the bed transfer provision "definitely contemplates" a bricks and mortar receiving facility. How "plain language" can "definitely contemplate" remains a mystery of Trident's arguments on appeal.

As shown in Section II herein, the ALC thoroughly analyzed the bed transfer provision of the State Health Plan with a statutory construction analysis and found that the State Health Plan allows the transfer of existing licensed beds to construct a new hospital, independent of deference to the Department or consideration of the Department's prior and current interpretation of the Plan. Therefore, while Trident posits the Final Order in the context that the ALC deferred to the Department in spite of contrary language in the State Health Plan, Trident's position misrepresents the ALC's Final Order. The ALC clearly finds that "the language of the *2008-2009 State Health Plan* does not require that the receiving facility be an existing facility when the application to transfer beds is made, and that the language allows a facility to transfer beds to establish a new hospital provided the bed transfer criteria are satisfied." (R. p. 29).

A. *No compelling reason exists to reject the Department's interpretation.*

It is well settled that courts will give deference to the agency's interpretation of its own regulations. *Brown v. S.C. Dep't of Health and Env'tl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 581 S.E.2d 836 (2003). The Supreme Court has clarified the well-settled provision to require that there must be a compelling reason to differ with the agency's interpretation of its regulation. *S.C.*

Coastal Conservation League, 363 S.C. at 75, 610 S.E.2d at 486; *see also*, *Murphy v. S.C. Dep't of Health and Env'tl. Control*, 396 S.C. 633, 640-41, 723 S.E.2d 191, 195 (2012) (affirming deference to DHEC with no reason to deviate from its construction and application where interpretation was reasonable and consistent with regulation). The most common, if only, circumstance when our courts have refused to defer to the interpretation or application of the agency is when the agency interpretation was refuted by the plain language of the statute or regulation. *Savannah Riverkeeper v. S.C. Dep't of Health and Env'tl. Control*, 400 S.C. 196, 206, 733 S.E.2d 903, 908 (2012) (J. Toal, concurring).

The most generous interpretation of the 2008-2009 State Health Plan for Trident would be that the Plan is silent as to whether beds may be transferred to construct a new hospital. Similar to the Legislature in the enactment of legislation, the Department should be presumed to be aware of its earlier State Health Plans and judicial decisions interpreting its provisions. *See e.g., Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (reciting this presumption as applied to the legislature in review of rules of statutory construction). The Department's consistent interpretation of the bed transfer provision to allow the creation of new satellite hospitals through bed transfers, and the continuation of the bed transfer provision without any prohibition of or modification to this practice, results in the conclusion that the State Health Plan allows such transfers.

In *S.C. Coastal Conservation League*, the dispute in part stemmed from whether DHEC's Office of Ocean and Coastal Resource Management ("OCRM") should apply the "small island" regulation or the "transportation-projects" regulation to a permit request. During the review process, OCRM staff applied the small island regulation and

issued the permit. The ALC applied both regulations and approved the permit, and on appeal the OCRM Panel affirmed the ALC decision using the transportation-projects regulation. *S.C. Coastal Conservation League*, 363 S.C. at 71, 610 S.E.2d at 484. The circuit court reversed the Panel and vacated the permit. *Id.* at 72, 610 S.E.2d at 484-85. The Supreme Court reversed the circuit court, finding that there was no compelling reason to overturn the Panel's decision that the transportation regulation governed. *Id.* at 75, 610 S.E.2d at 486. Specifically, the Supreme Court noted that it was the Panel's decision that was entitled to deference, not the staff decision. *See id.*

A second recent case with a similar result is *Murphy v. S.C. Dep't of Health and Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012). Ms. Murphy opposed the issuance of a water quality certification related to the renovations of Chapin High School that would fill in 727 feet of stream. The crux of the parties' dispute was the interpretation and application of the phrase "vicinity of the project" within the water quality certification regulations. *Id.* at 636-37, 723 S.E.2d at 193. The Supreme Court's opinion affirmed that DHEC should receive deference for its interpretation of "vicinity of the project," despite that the Department's interpretation of regulation allowed the Department to determine vicinity on a case by case basis – and in this instance the 'vicinity' was more than just the 727 feet of stream impacted by the project and could include many miles. *See Id.* at 640, 723 S.E.2d at 195. Thus, the Supreme Court gave deference to a DHEC decision that allowed the Department to exercise discretion in its interpretation of the regulation. Since the issuance of the *Murphy* opinion just last year, the Supreme Court expounded on its decision in *Murphy* and cited to *Comm'rs of Public Works v. S.C. Dep't of Health and Envtl. Control*, 372 S.C. 351, 641 S.E.2d 763 (Ct.

App. 2007), for the proposition that if the statute is ambiguous, the Court should defer to the Board's interpretation. *Kiawah Dev. Partners v. S.C. Dep't of Health and Envtl. Control*, 401 S.C. 570, ___, 738 S.E.2d 455, 466 (Feb. 27, 2013).

An analysis of the few cases in which the Supreme Court has concluded that the agency was not entitled to deference, the consistent factor is a determination that the regulation or statute was absolutely clear and plain. If there is any doubt about the interpretation, DHEC's longstanding interpretation should be followed.

B. *Only the interpretation of the DHEC Board is entitled to deference.*

In its Brief, Trident spends many pages improperly pitting the DHEC staff witnesses through leading testimony elicited by Trident about "English language" and "DHEC language." Trident's reliance on the trial testimony of the DHEC witnesses to attempt to circumvent the proper deference afforded to the Department Board's interpretation of the bed transfer provision is misplaced. The DHEC Board has clearly interpreted this very provision to allow the transfer of existing beds to construct a new hospital just as Roper St. Francis proposes in its Application. The evidence before the ALC and on appeal includes the Decision on Remand of the DHEC Board in the matter of Palmetto Health Baptist Parkridge ("Parkridge"). (R. pp. 7519-7526). In the Parkridge matter, Palmetto Health in downtown Columbia sought to create a satellite hospital in northwest Richland County through the transfer of 76 licensed acute care beds. (R. p. 7519). The Department Board was asked by the ALC to "determine the narrow issue of whether the transfer of licensed acute care beds from an existing hospital to create a new hospital is consistent with the 2004-2005 South Carolina Health Plan, including the 'Plan Transfer Standard.'" (*Id.*) In an 8-page Decision issued May 8, 2009, the DHEC Board concluded that the bed transfer provision "allows for approval of a

CON application for the transfer of licensed general acute care hospital beds to establish a new hospital.” (R. p. 7526).

The Supreme Court has specifically stated in at least two prior opinions that deference is afforded to the Board, not the staff. As discussed earlier, in *S.C. Coastal Conservation League*, the OCRM staff contended that the small island regulation applied. The Panel affirmed the ALC determination that the transportation regulation applied, thus disagreeing with its staff decision. The Supreme Court gave deference to the Panel decision. *S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486. In *Neal v. S.C. Dep’t of Health and Env’tl. Control*, 383 S.C. 619, 682 S.E.2d 268 (2009), the Supreme Court reversed the Court of Appeals decision that relied heavily and gave deference to the testimony of an OCRM employee about the interpretation of the regulation. *See id.* at 270. The employee drafted the regulation and testified to the interpretation of the word “plat” in the regulation and concluded that a survey did not constitute a plat under the regulation. The Panel disagreed with his interpretation. In its opinion, the Supreme Court stated that an agency’s appellate panel, not its staff, is entitled to deference in interpreting agency regulations. *See id.* Similarly, the DHEC Board functions as the OCRM Panel and the DHEC Board’s statements on this issue are entitled to deference from the Court.

C. *The ALC’s reliance on Monroe was appropriate.*

Trident contends that the ALC’s reliance on *Monroe v. Livingston*, 251 S.C 214, 161 S.E.2d 243 (1968), along with the ALC’s discussion of a “tipping point,” resulted in the ALC ignoring the purportedly plain language of the bed transfer provision. (Trident Initial Br. 21.) A complete reading of the Final Order and the pertinent paragraphs show that Trident’s contention has no merit. (R. pp. 27-29). Neither the ALC nor the DHEC

Board state that the plain language of the bed transfer provision is contrary to the ALC decision. In fact, in numerous instances, the ALC holds the opposite. *Monroe* is an opinion from over 40 years ago wherein the Supreme Court rejected the longstanding practice of the Tax Commission regarding the collection of poultry taxes. The Supreme Court found that the Tax Commission's application of the statute was "patently erroneous" and should be rejected, even if it had been interpreted that way over a long period of time. *See id.* at 217, 161 S.E.2d at 244. As Roper St. Francis has explained *infra*, *Monroe* and more recent cases have held that an interpretation of a statute or regulation that was at odds with its plain language was a compelling reason to ignore the deference typically afforded the agency.⁷ The ALC's discussion of a 'tipping point' is consistent with the case law. There is no pendulum or balancing to determine how much deference to provide the agency. The cases hold that the agency is provided deference unless the decision clearly and unambiguously violates the plain language of the regulation or statute at issue. Without doubt, Trident's "definite contemplation" of the purportedly plain Plan language is not clear or unambiguous.

Trident also focuses on the ALC's acknowledgement that DHEC is the final arbiter of the State Health Plan. The rules of statutory construction always begin with the cardinal rule that the Court must ascertain and effectuate the intent of the legislature. *Media Gen. Comm. Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 694 S.E.2d 525 (2010); *Marlboro Park Hosp. v. S.C. Dep't of Health and Env'tl. Control*, 358 S.C. 573, 595

⁷ It is important to note that *Monroe* is a case brought by a taxpayer against the tax commission (the predecessor of the Department of Revenue) and revenue laws are generally construed against the taxing authority. *See Taylor*, 741 S.E.2d at 33. Unlike a revenue case, in this CON appeal, the Department is entitled to deference in the interpretation of its regulations.

S.E.2d 851 (Ct. App. 2004). The ALC correctly noted that as to the State Health Plan, the Department, not the Legislature or any other body, was the entity that drafts and approves the Plan and, therefore, it is the intent of the Department Board that governs. The DHEC Board's decisions and rulings are the most persuasive evidence of the intent of the State Health Plan. Thus, a compelling reason exists to consider the Board's interpretation of the Plan, particularly so where the Board has been asked and answered the very question of interpretation at issue here with the bed transfer provision. (R. pp. 7519-7526).

D. *The Record contains substantial evidence necessary to support the approval of the Roper St. Francis CON Application.*

The ALC's decision is clearly supported by substantial evidence, including the precedent of the Department in approving similar applications, the Department Board's approval of the staff's interpretation, and the ALC's related ruling affirming the Department Board's interpretation. Regardless of how the DHEC witnesses may have characterized language, both Ms. Brandt and Mr. Shelton unequivocally testified that the bed transfer provision allowed a hospital to transfer existing beds to construct a satellite hospital and that DHEC's longstanding interpretation of this provision was consistent with the purposes of the CON Act.

This Court's review asks only whether the ALC's decision is supported by substantial evidence. "[T]his Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALJ reached. 'The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.'" *Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010)

(quoting *DuRant v. S.C. Dep't of Health & Env'tl. Control*, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004)). The ALC determined that, upon review of the State Health Plan, the rules of statutory construction, the prior practice of the Department, and the decisions of the Department Board and ALC, the bed transfer provision does not require that the receiving facility be an existing facility. The ALC's Final Order quoted from this Court's ruling in *Marlboro Park Hosp. v. S.C. Dep't of Health and Env'tl. Control*, 358 S.C. 573, 578-79, 595 S.E.2d 851, 854 (Ct. App. 2004):

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that the language must be constructed in the light of the intended purpose of the statute. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.

Id. (internal citations omitted). Trident argues that because the Department and the ALC do not agree with its convoluted analysis of the bed transfer provision, which in its recitation to this Court requires a grammatical exercise in bolding and italics to isolate words and phrases, that somehow the refusal to accept their "plain language" interpretation of the State Health Plan is in error and should be reversed. Trident's very interpretation violates a basic tenet of statutory construction – "words in a statute must be construed in context." *Sparks v. Palmetto Hardwood, Inc.*, __ S.C. __, __ S.E.2d __, No. 27229, 2013 WL 812501 *2 (March 6, 2013) (citing *S. Mut. Church Ins. Co. v. S.C. Windstorm and Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991)). Trident seeks to highlight the plurality of isolated words at the expense of reading the provision as a whole within the context of the purposes of the CON Act.

Regardless of the convoluted nature of Trident's reasoning, or the exercise in language isolation the argument requires, this proceeding is not an opportunity for Trident to reargue *yet again* its interpretation of the bed transfer provision. So long as there is substantial evidence in the record to support the ALC's Final Order, this appeal fails. And in fact, substantial evidence does exist to support the ALC's holding that the bed transfer provision does not require a receiving facility to be *existing* in order to satisfy its criteria. This holding is substantially supported not only by the facts in the record of this proceeding, but also by the precedent of the Department in approving similar satellite hospitals, and the decisions of the Department Board and Administrative Law Court in this case that a facility need not be existing to receive transferred beds.

Substantial evidence is evidence which allows reasonable minds to reach the same conclusion as the ALC when considering the record as a whole. *See e.g., Friends of Earth v. Public Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the ALC's finding from being supported by substantial evidence." *Leventis v. S.C. Dep't of Health and Envtl. Control*, 340 S.C. 118, 130-31, 530 S.E.2d 643, 650 (Ct. App. 2000). While Trident may not agree with the interpretation of the bed transfer provision by the Court below, the Department staff, the DHEC Board, and Roper St. Francis, nonetheless it is apparent that substantial evidence exists in the record to support the propriety of the Roper St. Francis – Berkeley CON Application under its terms and therefore warrant affirmance of the ALC Final Order by this Court on appeal.

IV. THE ALC CORRECTLY DETERMINED THAT THE TWO CON APPLICATIONS ARE NOT “COMPETING APPLICATIONS” BECAUSE THE APPROVAL OF BOTH APPLICATIONS DOES NOT EXCEED THE NEED IN THE SERVICE AREA.

Trident’s final argument on appeal is that the ALC’s decision finding the applications were not competing is “inconsistent with the State Health Plan.” The CON Act specifically defines “competing applicants” as follows:

[T]wo or more . . . 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). The parties below agreed that the two applications satisfied the first few elements of the definition; namely that each is a health care facility applying to provide similar services or facilities in the same service area in the time frame established by the Department. In cases where competing applications are at issue, the critical element is the final element: “whose applications, if approved *would exceed the need for services or facilities.*” *Id.* (emphasis added). Therefore, the question for ALC was whether the approval of both CON Applications would exceed the need for services or facilities and the ALC concluded that the approval of both would not exceed the need. The question for this Court on appeal is whether the ALC decision is supported by substantial evidence. As shown in the Final Order and as set forth herein, the substantial evidence standard is easily satisfied by Roper St. Francis.

Trident simply misreads or misrepresents the content of the ALC’s Final Order in its argument that the applications are competing, and also attempts by way of footnote to render irrelevant the very important decision of the South Carolina Supreme Court on the exact issue of whether CON applications were competing where the record contained substantial evidence showing that the need would not be exceeded with approval of both

applications. *See Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC*, 387 S.C. 79, 690 S.E.2d 783 (2010).

As to Trident's analysis of the ALC's Final Order, it is inaccurate to represent to this Court that the ALC simply affirmed the Department's decision on the issue of competing applications, without reference to the numerous Findings of Fact and Conclusions of Law made thereon. Rather than merely accepting at face value that the relocation of existing beds by Roper St. Francis obviated any requirement to analyze need further, the ALC undertook substantial inquiry into the testimony and voluminous data presented at trial and determined that there was sufficient need in the service area, as proposed by both applicants, to support both projects.

As the party appealing the decision of the Department, Trident had the burden at trial of proving by a preponderance of the evidence that the approval of both facilities would exceed the need for the facilities in the service area. (R. pp. 20-21). As explained in the *Spartanburg* Opinion, this Court's role is to determine whether factual evidence exists in the record supporting the ALC's conclusion that the need for the facilities will not be exceeded with the approval of both applications. *See Spartanburg*, 387 S.C. at 91, 690 S.E.2d at 789. While the fact that Roper St. Francis was repositioning existing beds rather than adding new beds to the inventory was an important fact supporting the ALC decision, the ALC was also persuaded by the great amount of evidence and testimony surrounding the large geographic size of Berkeley County, the distribution of the Berkeley County population, the location of the proposed facilities within the service area, and the financial feasibility of both systems' projects as abundant factual evidence

supporting the approval of both applications and evidencing that the need would not be exceeded. (R. pp. 21-26 and 49-50).

Trident's own trial witness, longtime resident and former mayor of Moncks Corner, John West, testified at length regarding the population explosion in Berkeley County, the distinctions between the Goose Creek and southern Berkeley County communities versus the Moncks Corner and northern Berkeley County communities, as well as the significant economic development in the area. (R. pp. 1435 line 24 – 1443 line 7). Moreover, both applicants projected capacity within their respective 50-bed acute care facilities primarily from their existing patient bases only – that is, without significant or material changes in the market shares of the existing providers.⁸ For Trident to continue to argue to this Court that approval of both applications exceeds the need for the facilities, particularly without having met its burden below, flies in the face of the substantial evidence in the record and is wholly without merit.

As part of Trident's final argument, by way of footnote it attempts to eviscerate and render irrelevant the important recent Supreme Court decision on competing CON applications - *Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC*, 387 S.C. 79, 690 S.E.2d 783 (2010). Positing that because the health service under review was linear accelerators as opposed to acute care hospitals, Trident claims that the opinion is therefore not relevant to the issues before this Court. Trident could not be more wrong.

⁸ Specifically, Trident's application is based solely on its existing patient base in Berkeley County and assumes *no* change in market shares. (R. pp. 4495-4496). Roper St. Francis-Berkeley assumed half of its patient base would be redirected from existing aligned patients and only 40% would originate from non-Roper St. Francis-aligned patients, a number completely offset by Berkeley County population growth. (R. pp. 5406-5407 and 4361-4365).

In *Spartanburg*, the ALC was faced with applications that were for similar services (linear accelerators), in the same service area (Cherokee/Spartanburg/Union Service Area), filed within the statutory time frame, and which the Department determined were competing on the belief that approval of both would have exceeded the need for linear accelerator services in the service area. *See Spartanburg*, 387 S.C. at 81-82, 690 S.E.2d at 784. Under the applicable State Health Plan, in order for a new linear accelerator to be approved, certain threshold volumes must be met by existing providers and the applicant(s). *See id.* at 83, 690 S.E.2d at 785. After a five day hearing following months of discovery, the ALC concluded that the approval of both applications would not exceed the need. In its review, the Supreme Court was persuaded by the abundant factual evidence in the record to support the ALC decision that the CON applications were not competing. *Id.* at 91, 690 S.E.2d at 789. Just as was found in *Spartanburg*, there is abundant factual evidence to support the ALC decision that the CON Applications in this matter are not competing applications as defined by the CON Act. (R. p. 21).

Trident argues that because the need for linear accelerator services is calculated differently than for acute care hospital beds, somehow the entire analysis and learned reasoning of the Supreme Court in reviewing the ALC's decision in *Spartanburg* should be ignored. In fact, the opposite is true. The Scope of Review contained in the *Spartanburg* opinion is verbatim what applies to this appeal. Trident's focus on the *method* of calculating "need" being different for acute care hospitals and linear accelerators as distinguishing the analysis is misplaced. Not only is it irrelevant to the importance of the Supreme Court's analysis of the competing applications issue and the review of the ALC's decision in *Spartanburg*, but in fact in this case the bed need

calculation and existing inventory does not prohibit the approval of both Applications. As has been established repeatedly both at trial and in the Final Order, Roper St. Francis is not *adding* any new licensed beds to the inventory, so the lack of a bed need for Roper St. Francis or the Tri-County Service Area under the 2008-2009 State Health Plan is wholly irrelevant to the issues before the Court. The “Roper St. Francis’ project is a repositioning of existing licensed beds within the service area.” (R. pp. 21-22) Roper St. Francis is “bringing the services to the population, enhancing access.” (R. pp. 3584 line 12 – 3585 line 5). Trident’s lengthy discussion of the bed need inventory has no bearing on the analysis of need for the projects.

In reviewing the evidence in the record supporting the existence of need for the beds that will be located in Berkeley County, there is substantial evidence supporting the ALC’s conclusion that Trident failed to meet its burden on this issue. Again in striking similarity to the issues facing the ALC and Supreme Court in the *Spartanburg* matter, the population and geographic circumstances facing Cherokee County and Spartanburg County are those same circumstances revealed by the record for Berkeley County – the growing population of the more urban Goose Creek area and the need for greater access for the more rural Moncks Corner area and surrounding communities. It should not be forgotten that what these applications propose are not massive tertiary care facilities with hundreds of beds to fill. Rather, the affirmance of the ALC’s Final Order results in 50 general acute care beds being placed in Goose Creek, with a 2010 Census population of 35,936, and 50 general acute care beds being placed in Moncks Corner, with a 2010 Census population of 7,885. (R. p. 4359). These small community hospitals require an average daily census of only 35 patients to be considered full. (R. p. 25). With a

projected total discharges of 18,470 in Berkeley County alone in 2017, 327 beds could be supported solely by that patient volume. (R. p. 4360).

There is clearly substantial evidence supporting the decision of the ALC that the positioning of 50 additional beds and 50 transferred beds in Berkeley County, for a total of 100 beds serving a 2010 population of 177,843, will *not* exceed the need for the services or facilities. Because of the abundance of evidence to support this conclusion, the ALC's Final Decision should be affirmed and this appeal by Trident denied. *See Spartanburg*, 387 S.C. at 91, 690 S.E.2d at 789.

V. TRIDENT HAS ABANDONED ITS CONTENTION THAT THE ROPER ST. FRANCIS CON APPLICATION DOES NOT OTHERWISE COMPLY WITH THE STATE HEALTH PLAN, PROJECT REVIEW CRITERIA OR OTHER REGULATIONS.

The CON Act states that DHEC may not issue a CON unless the application complies with the applicable State Health Plan, project review criteria, and other regulations. *See* S.C. Code Ann. § 44-7-210(B). The ALC and DHEC correctly determined that the 2008-2009 State Health Plan does not prohibit the transfer of beds to construct a satellite hospital. Once it is established that the action applied for is not prohibited, the question becomes whether the application complies with the State Health Plan, Project Review Criteria, or other regulations.

At the trial below, Trident contended that the Roper St. Francis CON Application should be denied for the following reasons other than compliance with the bed transfer provision: (1) adverse impact of the project outweighs access improvement; (2) failure to identify the served communities; (3) errors on the financial pro formas resulting in the project's failure to meet the feasibility test by year three; and (4) lack of acceptability from competing hospitals. (R. pp. 32-33). The ALC rejected all of these arguments and

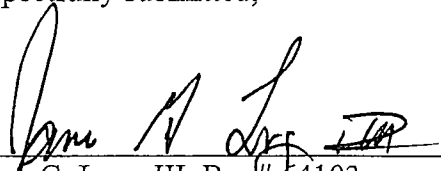
Trident has not raised any of these issues on appeal. As a result of its failure to raise these issues, Trident has abandoned its objection to Roper St. Francis' compliance with the Project Review Criteria and other regulations, and Roper St. Francis' compliance is the law of the case. *See S.C. Coastal Conservation League*, 363 S.C. at 76, 610 S.E.2d at 487 ("A ruling not challenged on appeal is the law of the case, regardless of the correctness of the ruling."); *see also Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (reiterating that even "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.")

While Trident addresses the bed transfer criteria in its brief, its discussion of the State Health Plan focuses solely on whether the receiving facility must be an existing facility. Trident makes no effort or argument to show that Roper St. Francis has failed to comply with the State Health Plan in any other particular other than its contention about the bed transfer provision requiring two existing hospitals. As a result, Trident has waived any other objection to whether the Roper St. Francis CON Application complies with the State Health Plan. In its Final Order, the ALC made significant detailed Findings as to how the proposed Roper St. Francis hospital at Carnes Crossroads satisfies each of the bed transfer criteria and the State Health Plan itself. (R. pp. 29-30 and 40 and 50-54). Therefore, the ALC's rulings on these matters are the law of the case.

CONCLUSION

For the reasons set forth herein, Roper St. Francis respectfully requests that this Court deny the Petition of the Appellant/Respondent Trident Medical Center, LLC, and affirm the Final Order and Decision of the Administrative Law Court in its entirety.

Respectfully submitted,



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August 6, 2013
Columbia, South Carolina

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.

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AUG 06 2013

SC Court of Appeals

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.

PROOF OF SERVICE

I, James G. Long III, hereby certify that on August 6, 2013, I caused a copy of the Final Appellant Brief of Respondents-Appellants to be served on the following by hand delivery addressed as follows:

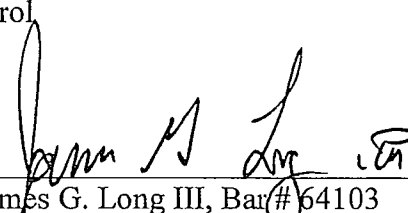
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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.

REPLY BRIEF OF APPELLANT/RESPONDENT

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SC Court of Appeals

(caption continued from cover page):

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.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT ERR IN APPLYING THE BED TRANSFER STANDARD OF THE STATE HEALTH PLAN TO THE CREATION OF A NEW HOSPITAL WHEN THE PLAIN LANGUAGE OF THE STANDARD ALLOWS A TRANSFER OF BEDS ONLY BETWEEN HOSPITALS THAT ARE ALREADY IN EXISTENCE?

II. DID THE ADMINISTRATIVE LAW COURT ERR IN DEFERRING TO THE DEPARTMENT'S INTERPRETATION OF THE BED TRANSFER STANDARD WHEN SUCH INTERPRETATION CONTRADICTS THE PLAIN LANGUAGE OF THE PLAN?

III. DID THE ADMINISTRATIVE LAW COURT ERR IN DETERMINING THAT TRIDENT AND ROPER ARE NOT COMPETING APPLICANTS BECAUSE THE NEED FOR FACILITIES AND SERVICES WOULD NOT BE EXCEEDED BY APPROVAL OF BOTH APPLICATIONS WHEN, AS A MATTER OF LAW, SUCH DETERMINATION IS INCONSISTENT WITH THE STATE HEALTH PLAN?

ARGUMENT

INTRODUCTION

Appellant/Respondent Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center ("Trident") replies herein to the two separate briefs of the Respondent Department of Health and Environmental Control ("Department") and the Respondent/Appellant Roper St. Francis Hospital-Berkeley, Inc. d/b/a Roper St. Francis Hospital-Berkeley ("Roper") by addressing their specific arguments in the context of the issues as framed by Trident in its main brief.¹ As a preliminary matter applicable to all of the Respondents' arguments, Trident disputes the efforts of the Respondents to apply an inapplicable standard of review to this appeal.

In this appeal, Trident raises three issues, all of which allege that the Administrative Law Court's ("ALC") decision is affected by errors of law. Trident does

¹ Although the Respondents in their briefs do not retain the wording and numbering of Trident's issues, for ease of reference, Trident replies to the Respondents' arguments using this framework. Further, in offering this Reply to selected arguments of the Respondents, Trident incorporates and reiterates all of its arguments on all of the issues as set forth in its main brief.

not raise any issues or assert any arguments regarding the factual findings of the ALC. Despite Trident's limitation of the issues on appeal to errors of law, both Respondents devote a significant amount of argument to whether Trident has shown that the decision of the ALC is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Because Trident raises only questions of law, this standard is not applicable to Trident's appeal.²

In *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 5, 664 S.E.2d 471, 473 (2008), which involved a provider's challenge to the *State Health Plan*, the Court set forth the applicable standards for reviewing decisions of administrative bodies under the Administrative Procedures Act ("APA"):

This appeal is governed by the Administrative Procedures Act ("APA"), S.C.Code Ann §§ 1-23-310, *et seq.* (Supp. 2005). We may reverse or modify the Board's order if appellant's substantial rights have been prejudiced because the administrative 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). As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence. *Roper Hosp. v. Bd. of S.C. DHEC*, 306 S.C. 138, 140, 410 S.E.2d 558, 559 (1991).

See also *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260-261, 725 S.E.2d 480, 483 (2012) ("The construction of a regulation is a question of law to be determined by the court." 2 Am.Jur.2d *Administrative Law* § 245. We will correct the decision of the ALC if it is affected by an error of law, S.C.Code Ann. § 1-23-380(5)(d)

² In its brief, Roper contends that the applicable standard of review requires the appellate court to find a "manifest or gross error of law" before the decision of an administrative agency can be overturned. This contention is not supported by the Administrative Procedures Act or by the cases cited by Roper in support of this proposition, which concern application of the substantial evidence standard applicable to the review of the factual findings of the agency. See S.C.Code Ann. § 1-23-380(5)(d) (Supp. 2012) (Court can reverse or modify if decision is "affected by other error of law.").

(Supp. 2010), and questions of law are reviewed de novo, *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 100, 662 S.E.2d 40, 41 (2008).”).

In its first two issues, Trident alleges that the ALC ignored the plain language of the *State Health Plan* Bed Transfer Standard when it affirmed the Department’s practice of allowing providers to use this provision to create new hospitals. In its third issue, Trident argues that, because the *2008-2009 State Health Plan* showed that the applicable service area had an excess of hospital beds in the service area, as a matter of law, Trident and Roper should have been reviewed as competing applicants. Trident does not challenge any factual findings of the ALC in support of its arguments on any of these issues.

Because these issues raise questions of law, the “substantial evidence” standard of the APA does not apply. Under the correct standard of review, the Court may reverse or modify the decision of the ALC based on its own review and interpretation of the law without deference to the lower court. S.C.Code Ann. § 1-23-380(5)(a)-(d) (Supp. 2012). *See, e.g., CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011) (“Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.”) (quoting *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)).

To the extent that Respondents argue and seek to apply the substantial evidence standard to any of Trident’s issues in this appeal, their arguments should be rejected.³ Trident addresses Respondent’s other arguments below.

³ Roper’s brief is replete with references and arguments concerning the substantial evidence standard, including the entirety of three sections of the brief. (Roper’s Brief, pp. 13-15, 21-26, and 34-36). The Department also argues the substantial evidence standard, though not to the extent of Roper. (Department’s Brief, p. 13).

I. THE ADMINISTRATIVE LAW COURT ERRED IN DETERMINING THAT THE BED TRANSFER STANDARD OF THE STATE HEALTH PLAN CAN BE USED TO CREATE A NEW HOSPITAL WHEN THE PLAIN LANGUAGE OF THE STANDARD ALLOWS A TRANSFER OF BEDS ONLY BETWEEN HOSPITALS THAT ARE ALREADY IN EXISTENCE.

In its main brief, Trident argues, as a matter of law⁴, that Roper's proposed Carnes Crossroads Hospital fails to comply with the *2008-2009 Plan* and, therefore, cannot be approved.⁵ Trident contends that the Department's policy of allowing the Bed Transfer Standard to be used for the establishment of a new hospital contradicts the plain language of the Standard, which presupposes the existence of both a transferring and a receiving hospital in order for a bed transfer to occur. In its main brief, Trident discusses these plain language requirements in detail, including the requirement that the receiving facility demonstrate its historical utilization in order to justify the transfer of beds. Trident's argument is that a receiving hospital which does not physically exist cannot by its nature comply with the plain language requirements of the Bed Transfer Standard.

In its brief, Roper claims that Trident misrepresents the record in stating that the Department allows a single facility to act as both the transferring and the receiving facility under the Department's interpretation of the Bed Transfer Standard. Roper claims that the Department actually considers the non-existing applicant facility to be the receiving facility and the existing facility with the beds to be the transferring facility. This assertion ignores the Department's admissions at trial that, because the receiving facility does not exist, the only way the applicant can comply with the requirement

⁴ The only fact needed for this analysis is the undisputed fact that Roper's Carnes Crossroads Hospital exists only on paper and not as a bricks and mortar operating facility.

⁵ "The department may not issue a Certificate of Need unless an application complies with the State Health Plan, Project Review Criteria, and other regulations." S.C.Code Ann. § 44-7-210(C) (Supp. 2012). "The proposal shall not be approved unless it is in compliance with the State Health Plan." 3 S.C.Code Ann.Reg. 61-15, § 802 (Supp. 2012).

concerning historical utilization is to submit the utilization data of the existing hospital. This assertion also ignores the acknowledgment of the Chief of the Department's Bureau of Health Facilities and Services Development that the applicant hospital and the transferring hospital are the same licensed legal entity. (R. p. 1161, lines 14-15).

In its brief, Roper also argues that Trident admits that the applicability of the Bed Transfer Standard only to existing hospitals is not "plain" because Trident uses the word "indicates" when describing the requirements.⁶ Similarly, Roper points to Trident's focus on certain requirements of the Bed Transfer Standard to illustrate its limited application to existing hospitals as being further evidence that the Standard is not plain.⁷ Both of these arguments are specious.

Trident sets forth the entire Bed Transfer Standard, including the preamble which states its purpose, and asks the Court to read the entire provision as a whole and in context, giving the words their ordinary and common meanings. *See Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct.App. 2002) ("When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand the regulation's operation."). *See also 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."). Trident believes that such a reading leads to the

⁶ Roper argues that "Language purportedly so 'plain,' would not need to 'indicate' but would state expressly that the receiving hospital must be already existing." Roper's Brief, p. 17.

⁷ Roper claims "Trident argues that because the Department and the ALC do not agree with its convoluted analysis of the bed transfer provision, which in its recitation to this Court requires a grammatical exercise in bolding and italics to isolate words and phrases, that somehow the refusal to accept their 'plain language' interpretation of the State Health Plan is in error and should be reversed." (Roper's Brief, p. 35).

inevitable conclusion that an entity that exists only on paper cannot meet the requirements placed on the receiving facility in order to effectuate a transfer of beds under the Standard.

Both Respondents argue that, because the Bed Transfer Standard does not contain the word “existing”, the Court is unable to conclude that the requirements of the Standard can only be met by an existing receiving facility. In support of this contention, Roper cites the case of *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993), in which the South Carolina Supreme Court declined to read into a 1712 statute allowing a gambler to recoup his losses the requirement that the gambling activity be illegal. In *Berkebile*, the defendant video poker operator urged this interpretation based on the argument that the age of the statute and the social climate in which it was adopted indicated that the law was meant to apply only to illegal gambling activities.⁸

Trident’s argument in this appeal is not based on external factors outside the four corners of the Standard nor is it based on determining the extrinsic intent of the Board when it approved the Plan as written. Again, Trident simply urges the Court to read the entire Bed Transfer Standard, applying plain and ordinary meanings to the words, to determine whether it can be applied to a non-existing hospital. In that regard, Trident would assert that, instead of *Berkebile*, the Court should draw a comparison with the decision in *Converse Power Corp. v. S.C. Dep’t of Health & Envtl. Control*, 350 S.C. 39, 564 S.E.2d 341 (Ct.App. 2002).

In *Converse*, the Court considered the application of the Department’s regulation concerning the permitting of shellfish operations. The plaintiff in *Converse* attempted to

⁸ As noted by the Court, one glaring problem with the defendant’s argument was that all gambling was not illegal even in the eighteenth century when the law was passed. *Berkebile*, 311 S.C. at 54, 426 S.E.2d at 762.

apply for a permit to operate a facility to distribute shellfish to the public. The Department informed the plaintiff that, before an inspection could be conducted and a permit issued, the plaintiff had to first construct and begin operation of the facility. The plaintiff maintained that nothing in the regulation required that the facility be in existence in order to receive a permit. The Department contended that, even though the regulation did not use the term “existing”, the plain requirements of the regulation concerning inspection of a facility prior to permitting could apply only when the facility was in fact in existence.

The Court agreed, holding, “We find DHEC’s interpretation of the regulations is reasonable and not arbitrary or capricious. [The regulation] requires DHEC to inspect ‘an operation’ prior to issuing a permit. The language requiring inspections prior to issuance clearly anticipates an operating facility at the time of inspection.” *Id.* at 48, 564 S.E.2d at 346.

In this case, Trident argues that the plain language of the requirements of the Bed Transfer Standard anticipates that the receiving hospital must physically exist in order for the Department to approve a bed transfer to it. As in *Converse*, the law does not need to contain the actual word “existing” for the requirement to be there.⁹

Roper also contends that, because the State Health Plan is drafted by the Department, without the approval of the Legislature, it is not a regulation or a statute so the usual rules of statutory construction do not apply. Roper contends further that nothing

⁹ Respondents contend that Trident takes inconsistent positions with regard to the Department’s authority to approve Roper’s application versus the Department’s authority to approve Trident’s own application. Trident refers to its Brief as Respondent/Appellant in response to Roper’s appeal for its actual argument in this regard. However, Trident points out that, in that brief, Trident agrees that “to the extent that the Court determines that the 50-Bed Rule of the *2004-2005 Plan* does not expressly allow for the establishment of a new hospital through the use of an applicant’s need, the Court must reverse the ALC and Department’s decisions approving Trident’s application in the same manner as the Court must reverse Roper’s approval as being inconsistent with the applicable *Plan*.” Trident Brief as Respondent/Appellant, p. 6.

in the CON Act requires that the Plan be construed narrowly or strictly. Roper argues that, as a result, the Department has the discretion to decide when projects are consistent with the Plan, apparently without regard to the plain language of the Plan.

As for the contention that the rules of statutory construction do not apply, the ALC adopted those rules in its Final Order and Decision and applied them to its construction of the Bed Transfer Standard. (R. p. 27). Roper did not move to reconsider the Court's application of the rules of statutory construction to the issues before it and that issue is, therefore, not preserved for review. *See ESA Servs., LLC v. S.C. Dept. of Revenue*, 392 S.C. 11, 707 S.E.2d 431 (Ct.App. 2011) (Because the ALC was unable to clarify discrepancies in its order through reconsideration, issues were not properly before the Court).

Further, although the CON Act does not speak to construction of the *Plan*, the *Plan* itself provides that "the criteria and standards set forth in the Plan speak for themselves, and each section of the Plan must be read as a whole." (R. p. 6880).

Finally, as argued by Trident in Issue II of its main brief, "Far from giving the Department the sole and unbridled discretion to interpret the Plan at will, the [CON] Act 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 nebulous 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." (Trident Brief of Appellant/Respondent, p. 24). *See, also, Triska v. Dep't of Health & Env'tl. 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.”).

II. THE ADMINISTRATIVE LAW JUDGE ERRED IN DEFERRING TO THE DEPARTMENT’S INTERPRETATION OF THE BED TRANSFER STANDARD BECAUSE SUCH INTERPRETATION CONTRADICTS THE PLAIN LANGUAGE OF THE PLAN.

Both the Department and Roper argue that the Department’s consistent and long term application of the Bed Transfer Standard to allow the creation of new hospitals compels deference to, and adoption of, the Department’s practice in that regard. As argued fully in Trident’s main brief, the courts recognize that an agency specifically is not entitled to the usual deference accorded in the construction of its laws and regulations when its construction contravenes the plain and unambiguous language of those laws and regulations. *See Savannah Riverkeeper v. S.C. Dep’t of Health & Env’tl. 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.”).

The Respondents also attempt to discount the testimony of the Department witnesses conceding that the Department’s interpretation does not comport with the plain English meaning of the words of the Bed Transfer Standard. Roper argues in particular that this testimony should be disregarded because the Board of Health and Environmental Control is the body which is entitled to deference and not the staff. In support of this contention Roper cites *Neal v. S.C. Dep’t of Health & Env’tl. Control*, 383 S.C. 619, 682 S.E.2d 268 (2009). In this case, unlike in *Neal*, however, there is no disagreement between staff and the Board on the manner in which the Bed Transfer Standard is to be applied. As evidenced by the Order on Remand (R. pp. 7519-7526) of the Board in another matter, the Board simply affirmed the staff’s interpretation and application of the

Standard to the project under consideration. Ultimately, whether Department staff or the Board agree, it is for the Court to apply the rules of construction and to determine what the plain English meaning of the Standard is based on the face of the provision itself.

III. THE ADMINISTRATIVE LAW COURT ERRED IN DETERMINING THAT TRIDENT AND ROPER ARE NOT COMPETING APPLICANTS BECAUSE THE NEED FOR FACILITIES AND SERVICES WOULD NOT BE EXCEEDED BY APPROVAL OF BOTH APPLICATIONS BECAUSE, AS A MATTER OF LAW, SUCH DETERMINATION IS INCONSISTENT WITH THE STATE HEALTH PLAN.

In response to this issue, Respondents argue that the substantial evidence in the record supports the ALC's determination that the approval of both projects would not exceed the need for hospital beds in the service area. Again, Trident does not raise this issue as a question of fact to which the substantial evidence rule applies. Trident contends, as an alternative ground for reversing the decision of the ALC, that, even if the Bed Transfer Standard applies, the ALC erred as a matter of law in holding that Trident and Roper were not competing applicants under the Certificate of Need Act.¹⁰

Trident argues that the Department was required to conclude that the need for hospital beds in the service area would be exceeded by the approval of both Trident and Roper's applications because when Roper applied to construct a new \$113 million hospital at Carnes Crossroads, the *2008-2009 Plan* showed that Roper's inventory of beds exceeded Roper's need for hospital beds by six and that there was a 48 bed surplus in the Tri-County Service Area. (R. p. 6899). What the *Plan* shows as need in the service area is not a disputed fact. The *Plan* shows an excess of beds in the service area.

Trident makes the legal argument that, under the competing applications law, the test for determining competing applicants is not whether the bed count for the facility or

¹⁰ The Department also argues at page 12 of its brief that lack of need in the *Plan* does not prohibit a transfer of beds by Roper. In this issue, however, Trident argues only that excess need in the service area requires that Roper's application be reviewed and judged as competing with Trident's.

for the service area remains unchanged or unaffected, as the Department found in the case of Roper's transfer of beds. Under the competing applications law, the test is whether the approval of both projects would *exceed* the need for the services or facilities. Because the *2008-2009 Plan* reflects that there is an aggregate excess of beds in the Tri-County Service Area and that each of Roper's existing hospitals has an excess of beds, as a matter of law, Trident argues that the ALC was required to conclude that Roper's proposed hospital *by itself or in conjunction with Trident's proposed hospital* exceeded the need for hospital beds in the service area. To draw any other conclusion is inconsistent with the *2008-2009 State Health Plan*.

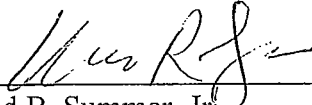
Roper asserts that, in making this argument, Trident attempts to "eviscerate" the holding of the Court in *Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assocs. of South Carolina, LLC*, 387 S.C. 79, 83, 690 S.E.2d 783, 785 (2010) by pointing out the legal differences in the posture of that case versus the case at bar. As noted in Trident's main brief, *Spartanburg* did not concern services for which the need is specifically calculated in the Plan. Thus, in the *Spartanburg* case, the parties had to present factual evidence concerning the need. In this case, *as a matter of law*, Trident contends that approval of both applications exceeds the need set forth in the *Plan*.

CONCLUSION

For all of the reasons stated above and in Trident's main brief, Trident respectfully requests that the Court hold that the Bed Transfer Standard, set forth in the *2008-2009 State Health Plan*, Chapter II, Section G.1.(A)(4)(j), is not applicable to the establishment of a new hospital and that the Order of the ALC granting Roper's Certificate of Need Application for the Carnes Crossroads Hospital must be reversed. In the alternative, Trident requests that the Court hold that Trident and Roper are competing

applicants under the law, reverse the Order of the ALC to the contrary, and remand this case to the Department for a determination of which applicant best meets the goals and standards of the CON program.

Respectfully submitted,



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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

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
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Hospital-Berkeley, Inc. d/b/a Roper St. Francis
Hospital-Berkeley,

Of Whom South Carolina Department of Health and
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Case No. 09-ALJ-07-0336-CC

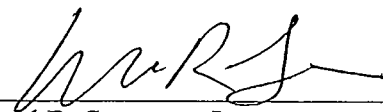
CareAlliance Health Services and Roper
St. Francis Hospital-Berkeley, ... Respondents/Appellants,

v.

South Carolina Department of Health and
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Of whom Trident Medical Center, LLC is the Appellant.

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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.

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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

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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
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Trident Medical Center, LLC, is the Appellant-Respondent.

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STATEMENT OF ISSUE ON APPEAL

IF THIS COURT REVERSES THE ALC'S AFFIRMANCE OF DHEC'S INTERPRETATION OF THE STATE HEALTH PLAN TO ALLOW ROPER ST. FRANCIS HOSPITAL TO TRANSFER EXISTING BEDS TO A NEW SITE TO CONSTRUCT A NEW HOSPITAL, THEN THIS COURT MUST ALSO REVERSE DHEC'S INTERPRETATION OF THE STATE HEALTH PLAN TO ALLOW TRIDENT MEDICAL CENTER TO TRANSFER FACILITY-SPECIFIC BED NEED TO A NEW SITE TO CONSTRUCT A NEW HOSPITAL.

STATEMENT OF THE CASE

These proceedings involve two certificate of need (“CON”) applications for the establishment of hospital beds in Berkeley County, South Carolina. Trident Medical Center, LLC (“Trident”) filed an application on August 12, 2008, to establish a fifty-bed hospital on vacant land adjacent to its Moncks Corner Medical Center in North/Central Berkeley County, using bed need assigned to its North Charleston facility. (R. pp. 4461-5378). Roper St. Francis Hospital–Berkeley (“Roper St. Francis”) filed its CON application on December 9, 2008, to transfer fifty existing beds from its Roper St. Francis Downtown facility in Charleston to Carnes Crossroads, located in Southern Berkeley County in the community of Goose Creek. (R. pp. 5379-6662).

As the Department of Health and Environmental Control (“DHEC” or “the Department”) was reviewing the applications, Trident argued that the projects were competing applications as defined by the CON Act and Regulations, and as competing applications, only one could be approved. DHEC disagreed and approved both applications on June 26, 2009, finding that the CON applications were not competing. (R. pp. 5344-5359 and 6647-6659). On August 7, 2009, Trident filed two, separate contested case proceedings challenging the Department’s decision to grant a CON to Roper St. Francis. On that same day, August 7, 2009, Roper St. Francis filed a contested case proceeding supporting the decision of DHEC. (R. pp. 68 and 120 and 165). At the parties’ request, The Honorable John D. McLeod consolidated all three of these cases on January 7, 2010. (R. pp. 62-67).

Prior to the contested case hearing, the Administrative Law Court (“ALC”) heard several pre-trial motions, including motions for summary judgment filed by both Trident

and Roper St. Francis. In Trident's first motion for summary judgment, which it filed on December 15, 2010, Trident argued that the two CON applications were competing applications as a matter of law and that the ALC should remand the applications to DHEC to determine which application best meets the applicable law. (R. pp. 59-61). The ALC denied this motion on January 28, 2011. (*Id.*)

Trident filed a second motion for summary judgment on December 9, 2011, arguing that DHEC erred as a matter of law when it (1) allowed Roper St. Francis to use the "bed transfer" section of the State Health Plan to create a new hospital; and (2) when it approved Roper St. Francis's application to build a new hospital that would use those transferred beds. The same day Trident filed its second motion for summary judgment, Roper St. Francis also filed a motion for partial summary judgment, asking the ALC to rule that, as a matter of law, if the Court found the applications to be competing, the only remedy available was a remand to the Department to choose between the applications. The ALC denied Trident's motion, and granted Roper St. Francis's motion for partial summary judgment by Order dated February 10, 2012. (R. pp. 55-58).

A fourteen-day contested case trial commenced before The Honorable John D. McLeod on January 30, 2012. On September 26, 2012, Judge McLeod issued an order sustaining DHEC's decision to approve both CON applications. (R. pp. 3-54). Trident filed a motion to alter or amend the judgment on October 5, 2012, which was heard on October 31, 2012, and denied on November 1, 2012. (R. pp. 1-2).

Roper St. Francis agrees with final decision of the Administrative Law Court; however, Trident has appealed the ALC's order, arguing that Roper St. Francis's CON should not have been approved. While Roper St. Francis steadfastly believes the logic

behind Trident's arguments is flawed, if this Court were to agree with Trident's position, then the same logic must be applied to Trident, and its CON should be denied as well. Accordingly, Roper St. Francis has filed this cross-appeal to ensure that Trident's argument, if successful, cuts both ways.

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FACTS

Prior to these CON applications, Berkeley County was one of four counties in South Carolina with zero hospital beds.¹ (R. pp. 4366-4374). This was so even though Berkeley is the ninth largest county in the State of South Carolina. In 2008 (when the applications were filed), Berkeley County had an estimated 158,140 citizens, and in 2010, it had exceeded growth projections and its population had increased to 177,843 citizens. (R. pp. 4353 and 4108 lines 13-14 and 4111 lines 2-11).

Recognizing Berkeley County's size, its growing population, and its lack of hospital beds, both Trident and Roper St. Francis sought to construct hospitals there. Trident filed an application on August 12, 2008, seeking to construct a 50-bed acute care hospital on vacant land adjacent to its existing free-standing Emergency Department in Moncks Corner.² (R. pp. 4461-5378). Trident's application is governed by the 2004-2005 South Carolina State Health Plan. (R. pp. 6663-6872).

Currently, Trident Health System is comprised of the following facilities: Trident Medical Center, a 296-bed tertiary care facility in Charleston County; Summerville Medical Center, a 94-bed acute care facility in Dorchester County; and Moncks Corner Medical Center, a freestanding emergency department (with no overnight beds) in

¹ The State Health Plan identifies four Inventory Regions for hospitals, and each region is further divided into service areas. Berkeley County is part of the Tri-County Service Area, which also includes Charleston and Dorchester Counties. (R. pp. 6675-6676 and 6689 and 6882 and 6898-6900).

² An acute care hospital refers to a community hospital that treats patients from the community for general medical conditions such as surgery, obstetrics, emergency care, and general diseases, but not complex diagnoses or procedures such as open heart surgery or neurosurgery. (R. p. 747 lines 3-22 and 2964 lines 1-6). Tertiary care hospitals provide care for those complex procedures. (R. p. 2957 lines 7-14).

Berkeley County.³ (R. pp. 550 line 16 - 551 line 17). Pursuant to the 2004-2005 State Health Plan, Trident Medical Center (located in North Charleston) had a facility-specific bed need of 42 beds. (R. pp. 1670 line 22 - 1671 line 4 and 6689). Using the CON process, Trident had successfully converted 25 skilled nursing beds into general acute beds, leaving a need of 17 beds under the Plan. (*Id.*; R. p. 7048). In its CON application for a new hospital in Moncks Corner, Trident sought to transfer these 17 facility-specific beds and to increase this need to 50 beds to allow for the construction of its new hospital in Berkeley County. (R. pp. 6679 and 6689). In other words, Trident proposed to transfer *future bed need* to Moncks Corner, not existing, licensed beds.

Although Trident was the first to file a CON application, at the time it filed its application, Trident was aware that Roper St. Francis had purchased 66 acres of land at Carnes Crossroads in Goose Creek for the purpose of constructing its own hospital in Berkeley County. (R. pp. 651, lines 5-8 and 4381 and 4384). Thus, it was no surprise to Trident when, approximately four months after Trident filed its CON application, Roper St. Francis filed a CON application proposing to construct a 50-bed acute care hospital in Berkeley County. To establish its new hospital, Roper St. Francis proposed to transfer 50 *existing* licensed acute care beds from its Roper St. Francis Hospital facility in Downtown Charleston to Goose Creek. (R. pp. 6889-6890 and 1607 lines 10-21). Roper St. Francis's CON application is governed by the 2008-2009 State Health Plan. (R. pp. 6873-7050).

Upon reviewing the CON applications submitted by both Roper St. Francis and Trident, DHEC found they were not competing applications, explaining: "The

³ A hospital must have, *inter alia*, inpatient medical services, commonly referred to as beds. (R. p. 6676). Moncks Corner Medical Center is not an existing hospital facility.

Department has determined the applications are not competing because the beds used for the Roper St. Francis Hospital-Berkeley project are a permanent bed transfer, not a bed increase; therefore, the bed need will not be exceeded. The proposed project [is] basically a re-positioning of currently licensed acute care beds from an area of limited growth to an area of strong growth and will have no impact on the Tri-County's bed count or bed need." (R. p. 6647). DHEC went on to approve both applications, finding they satisfied the State Health Plan, the Project Review Criteria, and the purposes of the CON Act.

Trident disagreed with the Department's decision and filed contested cases with the Administrative Law Court, arguing, among other things, that the State Health Plan does not allow an applicant to transfer beds to establish a hospital. Because Trident made this argument, Roper St. Francis was compelled to file a prophylactic action in order to protect its rights should Trident prevail. In the event the ALC were to find DHEC erred in allowing Roper St. Francis to transfer beds, Roper St. Francis argued that Trident would also be precluded from transferring facility-specific bed need to construct a new hospital in Berkeley County.

The Administrative Law Court sustained DHEC's decision to approve the CON applications filed by both Trident and Roper St. Francis. (R. pp. 3-54). Roper St. Francis believes this decision is correct but has filed this cross-appeal to ensure that Trident would also be bound if this Court were to reverse DHEC's interpretation of the State Health Plan with regard to the transfer of beds.

ARGUMENT

IF ROPER ST. FRANCIS IS NOT ALLOWED TO TRANSFER EXISTING BEDS TO A NEW SITE TO CONSTRUCT A NEW HOSPITAL, THEN TRIDENT MUST ALSO BE PROHIBITED FROM TRANSFERRING FACILITY-SPECIFIC BED NEED TO A NEW SITE TO CONSTRUCT A NEW HOSPITAL.

To establish their new facilities, both Trident and Roper St. Francis seek to transfer beds assigned to a different facility. Roper St. Francis seeks to transfer existing beds, and Trident seeks to transfer bed need. Trident opposes Roper St. Francis's application, arguing that the plain language of the bed transfer provision found in the State Health Plan does not specifically allow a facility to transfer beds to establish a hospital at a new location. (R. pp. 6889-6890 and 1858 lines 8-25). Yet, in Trident's application, it seeks to transfer facility-specific bed need from one location in North Charleston to a vacant lot in Moncks Corner. Thus, if Trident prevails in its argument against Roper St. Francis, this Court should find that Trident is also bound by it and prohibited from transferring its facility-specific bed need to establish a new hospital at a new location.

In making its argument against Roper St. Francis, Trident relies on the silence in the State Health Plan regarding the transfer of beds to establish a hospital. Roper St. Francis and DHEC joined together to combat this argument, explaining that the 2008-2009 State Health Plan allows affiliated hospitals "to transfer beds between themselves in order to serve their patients in a more efficient manner." (R. pp. 6889-6890).

When interpreting a regulation, this Court and the ALC employ the same rules that govern the construction of statutes. *See Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Tempel v. S.C.*

State Election Comm'n, 400 S.C. 374, 377-78, 735 S.E.2d 453, 455 (2012). Furthermore, the words of the statute must be given their plain and ordinary meaning. And, when interpreting regulations, courts also give deference to the interpretation of a regulation by the agency charged with its enforcement. *Murphy*, 396 S.C. at 640, 723 S.E.2d at 195.

In finding the State Health Plan allowed existing beds and bed need to be transferred to construct a new hospital, the ALC first ascertained legislative intent and noted that one of the primary goals of enacting the Certificate of Need program was to “guide the establishment of health facilities and services which will best serve public needs” S.C. Code Ann. § 44-7-120 (emphasis added). (R. p. 28). The ALC went on to examine the plain and ordinary meaning of the State Health Plan, recognizing that “[t]he word ‘existing’ or a similar iteration is not contained in the language of the bed transfer provision” and that “the plain language of the Plan does not require that the facility receiving the transfer of beds be an existing facility.” (*Id.*) Further bolstering its decision, the ALC explained that such an interpretation was consistent with “the long-standing policy of the Department . . . that allows the construction of new hospitals throughout the transfer of existing licensed beds from affiliated entities.” (R. pp. 28 and 7519-7526 and 1157 line 20 – 1158 line 7 and 1597 line 16 – 1599 line 20).

In approving both CON applications, the ALC recognized that “[t]he positions taken by Trident in its interpretations of the State Health Plans applicable to these applications have been inconsistent.” (R. p. 32). This is so because at the same time that Trident argues the plain language of the 2008-2009 State Health Plan does not specifically allow a facility to transfer existing beds to establish a new location, “Trident seeks to transfer facility-specific bed need . . . to vacant land to establish a new hospital

in Berkeley County, despite the fact that the applicable provision at Chapter II.G.1(A)(4)(d) of the *2004-2005 State Health Plan* is silent about whether facility-specific bed need can be transferred to a new site.” (*Id.*) In allowing Trident to transfer bed need, the ALC used the same reasoning it used in its analysis allowing Roper St. Francis to transfer beds, and specifically stated that its decision with regard to Trident’s transfer was “consistent with [its] finding as to the bed transfer provision” as it applied to Roper St. Francis. (*Id.*)

Under the 2004-2005 State Health Plan, the transfer provision upon which Trident relies is silent as to whether the facility to which the bed need is being transferred must be a brick and mortar building already in existence, just as the 2008-2009 transfer provision upon which Roper St. Francis relies is silent. The 2004-2005 provision states:

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

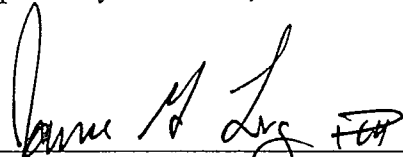
(R. p. 6679).

Roper St. Francis agrees with the ALC’s reasoning and believes the State Health Plan allows both parties to transfer beds to create new hospitals. However, if the Court were to agree with Trident and find that the State Health Plan prohibits the Roper St. Francis project, then Roper St. Francis asks this Court to apply that ruling to Trident’s new hospital as well.

CONCLUSION

Roper St. Francis urges this Court to affirm the order of the ALC in its entirety. However, if this Court were to reverse the ALC's finding that hospitals can transfer beds and bed need between facilities, then this finding should apply to Roper St. Francis and Trident equally such that both CON applications would be denied. In other words, what's good for Goose Creek is good for the gander (in this case, Moncks Corner).

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SC Court of Appeals

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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.

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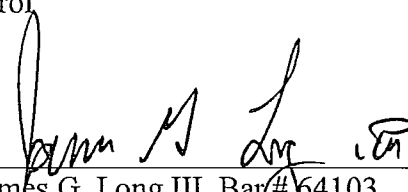
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APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

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 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.

BRIEF OF APPELLANT/RESPONDENT

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SC Court of Appeals

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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.

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT CORRECTLY DETERMINE THAT TRIDENT'S PROPOSED MONCK'S CORNER HOSPITAL IS CONSISTENT WITH THE NEED METHODOLOGY OF THE 2004-2005 STATE HEALTH PLAN?
- II. MUST THE COURT REVERSE THE ADMINISTRATIVE LAW COURT'S DECISION APPROVING TRIDENT'S APPLICATION TO THE EXTENT THAT THE COURT FINDS THAT THE NEED METHODOLOGY OF THE 2004-2005 STATE HEALTH PLAN DOES NOT EXPRESSLY ALLOW TRIDENT TO UTILIZE ITS NEED AT ITS EXISTING MONCK'S CORNER LOCATION?

STATEMENT OF THE CASE

On November 28, 2012, Trident Medical Center, LLC d/b/a Berkeley Medical Center ("Trident") timely filed its appeal of the September 26, 2012 Final Order and Decision ("Order") of the Administrative Law Court ("ALC") upholding the decision of the Department of Health and Environmental Control ("Department") to approve the Certificate of Need ("CON") applications of both Trident and Roper St. Francis Hospital-Berkeley, Inc. d/b/a Roper St. Francis Hospital-Berkeley ("Roper") to construct new hospitals in Berkeley County. On December 3, 2012, Roper timely filed its cross-appeal of the ALC's Order.

One of the issues raised by Trident in its appeal is that the ALC committed legal error when it deferred to the Department's decision to apply the Bed Transfer Standard found in the *2008-2009 South Carolina Health Plan* ("2008-2009 Plan") to Roper's CON application to establish a new hospital at Carnes Crossroads in Berkeley County¹ ("Carnes Crossroads Hospital"). In order to create the new 50-bed Carnes Crossroads Hospital, Roper requested a CON to transfer 50 existing licensed hospital beds from its

¹ The Department acknowledges that the Bed Transfer Standard is the only provision of the *2008-2009 Plan* under which the Department would consider Roper's application because at the time Roper applied, Roper had no need for additional hospital beds and the Charleston-Berkeley-Dorchester planning region ("Tri-county Service Area") as a whole had an excess of hospital beds. (R. p. 1148, lines 9-18; R. p. 1532, line 22 - p. 1534, line 12).

Roper Downtown hospital to the Carnes Crossroads site, on which Roper proposed to construct an entirely new receiving hospital with all new ancillary services and equipment, including operating rooms, imaging equipment, emergency department and laboratory services, and outpatient functions to support the transferred beds. (R. pp. 5383–5385, 5387, 5695–5696; R. p. 1106, line 24 – p. 1107, line 8; R. p. 3117, lines 12–17).

At the undeveloped Carnes Crossroads site, there currently is no existing hospital or any other medical facility affiliated with Roper to receive the transfer of the beds. (R. p. 1159, lines 12–16). In its main brief on this issue, Trident argues that, because the plain language of the Bed Transfer Standard requires that both hospitals be in existence in order to transfer beds between themselves², the ALC erred as a matter of law in deferring to the Department’s interpretation of the *2008-2009 Plan* in a manner that allows Roper to use the Bed Transfer Standard to construct a new hospital at the undeveloped Carnes Crossroads site.³

In its cross-appeal of the ALC’s Order, Roper asserts the false equivalence argument that, if this Court reverses the Department’s erroneous decision to approve Roper’s CON application under the Bed Transfer Standard of the *2008-2009 Plan*, the Court must also reverse the Department’s decision to approve Trident’s CON application to establish a new hospital in Moncks Corner, Berkeley County (“Moncks Corner Hospital”), even though Trident’s approval was made under a different provision of a

² For example, the Bed Transfer Standard states as its purpose in its preamble: “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.” (R. pp. 6889–6890)(emphasis added).

³ Trident continues to assert as an alternate grounds for reversal of the ALC’s Order that Trident and Roper are competing applicants under the law, and this case should be reversed and remanded to the Department for a comparison review.

different State Health Plan and in recognition of Trident's actual need for the additional hospital beds at a location where Trident already had an existing hospital department. For the following reasons, Trident urges the Court to reject Roper's flawed logic and to affirm the ALC's Order insofar as it approves Trident's proposed Moncks Corner Hospital as consistent with the *2004-2005 Plan* under which it was filed.

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT CORRECTLY DETERMINED THAT TRIDENT'S PROPOSED MONCK'S CORNER HOSPITAL IS CONSISTENT WITH THE NEED METHODOLOGY OF THE 2004-2005 STATE HEALTH PLAN.

In the Tri-county Service Area, Trident owns and operates Trident Medical Center, a 296-bed tertiary care hospital located in North Charleston, Summerville Medical Center, a 94-bed acute care hospital located in Dorchester County, and a freestanding emergency department located in Moncks Corner in Berkeley County. (R. p. 550, line 18 – p. 551, line 17; R. p. 780, line 22 – p. 781, line 1). All of Trident's current facilities operate under a single hospital license issued to Trident. (R. p. 784, lines 14–20).

On August 13, 2008, Trident filed a CON application to develop the Moncks Corner Hospital by using Trident's specific bed need pursuant to Chapter II, Section G.1(A)(4)(d) of the *2004-2005 State Health Plan*. (R. pp. 4469 and 5344; R. p. 6679). This section of the *2004-2005 Plan*, known as the "50 Bed Rule", provides:

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

In its CON application, Trident applied to use its own need for 17 new hospital beds to add 50 new hospital beds in Moncks Corner at the site of its existing freestanding

emergency department.⁴ Trident plans to relocate and incorporate the existing emergency services into the new hospital building and to convert the existing emergency department building into a medical office building upon the opening of the new hospital. (R. p. 4468). The new Moncks Corner Hospital would be operated under the single Trident hospital license. (R. p. 4476).

In its cross-appeal, Roper argues that the language of the 50 Bed Rule is silent on where a hospital with need can locate its new beds and, therefore, Trident's CON application is the same as Roper's application with regard to the Department's "interpretation" allowing a new hospital facility. Roper's argument is flawed both as to its premise and its reasoning.

First, the 50 Bed Rule is not silent as to where new hospital beds awarded under the Rule can be located. Under the Rule as stated in the *2004-2005 Plan*, a hospital which has a demonstrated need for additional beds can apply to add those beds (and more, up to 50) in the form of a "cost effective addition" for a hospital that needs the beds. In this case, Trident Medical Center is the hospital that needed the beds. Trident proposed to add its needed beds at the site of its existing freestanding emergency department, which, under the Plan, is considered to be "an extension of the existing hospital's emergency services." (R. pp. 6758-6759). Thus, Trident's proposal to use its need at a site where it already had an existing presence is entirely consistent with the language of the 50 Bed Rule without the need for further Department interpretation.

Second, even assuming that the 50 Bed Rule can be considered "silent" on the ability of Trident to use its need at its own facility, this silence does not equate Trident's case to Roper's. As Trident argues in its main brief in support of its appeal, the

⁴ Trident proposed to locate its Moncks Corner Hospital on a 21-acre site adjoining the site of Trident's existing freestanding emergency department and outpatient center. (R. p. 4468).

Department is not simply “filling in the details” of the Bed Transfer Standard when it allows Roper to transfer beds to a non-existent hospital because the Bed Transfer Standard is not silent on when beds can be transferred.⁵ Rather, the Department, in Roper’s case, is interpreting and applying the Bed Transfer Standard *in contravention of* the clearly expressed language of the provision.

The Bed Transfer Standard plainly states its purpose and the criteria for its use. As set forth in detail in Trident’s main brief, an attempt to transfer beds to a receiving hospital that does not exist and has no historical utilization requires the Department to ignore the explicit requirements of the Standard and to “make up” other requirements not found in the Standard.⁶ To the extent that the 50 Bed Rule is silent because it does not explicitly state that the facility with need can use the need where-ever the facility with need exists, the Department can reasonably interpret the Rule in this manner consistent with its intent and without ignoring explicit requirements and making up new ones.

Thus, no legal equivalence exists between the Department’s application of the 50 Bed Rule to Trident’s proposed project in a manner consistent with the meaning of the Rule and the Department’s application of the Bed Transfer Standard to Roper’s proposed project in plain contradiction of the meaning and the words of the Standard. In the former case, the Department is entitled to apply the 50 Bed Rule and is entitled to deference in its decision. In the latter case, the Department is not entitled to deference and must be

⁵ Cf., *Young v. S.C. Dep’t of Highways & Pub. Transp.*, 287 S.C. 108, 113, 336 S.E.2d 879, 882 (Ct.App. 1985)(“Administrative agencies may be authorized ‘to fill up the details’ by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.”).

⁶ For example, in its main brief Trident points to the Department’s practice of allowing the facility transferring the beds to submit historical utilization data for itself because no receiving facility exists to comply with the stated requirements of the Bed Transfer Standard that “the *“applicants* must document with patient origin data the *historical utilization of the receiving facility* by residents of the county giving up beds” and “[t]he *facility receiving the beds* must demonstrate the need for the *additional* capacity based on both *historical* and projected *utilization patterns*.” (R. p. 1163, lines 11–25; R. p. 1169, line 13 – p. 1170, line 16; R. p. 1540, line 22 – p. 1541, line 4).

reversed. *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 149–50, 694 S.E.2d 525, 530–31 (2010) (“An agency’s long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute’s plain language.”).

Trident contends, for all of the reasons stated above, that the differences between the proposed projects justify the approval of Trident’s CON application and the denial of Roper’s. Therefore, the Administrative Law Court’s decision granting approval of Trident’s proposed Moncks Corner Hospital should be affirmed.

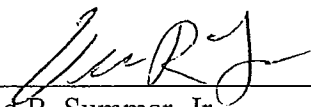
II. TO THE EXTENT THAT THE COURT FINDS THAT THE NEED METHODOLOGY OF THE 2004-2005 STATE HEALTH PLAN DOES NOT EXPRESSLY ALLOW TRIDENT TO UTILIZE ITS NEED AT ITS EXISTING MONCKS CORNER LOCATION, THE COURT MUST REVERSE THE ADMINISTRATIVE LAW COURT’S DECISION APPROVING TRIDENT’S APPLICATION.

As argued above, the plain and express language of the 50 Bed Rule allows Trident to utilize its need stated in the *2004-2005 State Health Plan* at its existing Moncks Corner location. However, Trident agrees that, to the extent that the Court determines that the 50-Bed Rule of the *2004-2005 Plan* does not expressly allow for the establishment of a new hospital through the use of an applicant’s need, the Court must reverse the ALC and Department’s decisions approving Trident’s application in the same manner as the Court must reverse Roper’s approval as being inconsistent with the applicable *Plan*. Trident’s position in this matter was and is that the Department lacks the authority to “interpret” the *Plan* in a way that materially adds to or amends the Plan’s duly promulgated provisions.

CONCLUSION

For the reasons stated herein, Trident respectfully requests that the Court hold that Trident's proposed Moncks Corner Hospital is consistent with the 50 Bed Rule set forth in the *2004-2005 State Health Plan* as determined by the Department and the ALC. In the alternative, Trident requests that, if this Court determines that the 50 Bed Rule does not expressly allow Trident to utilize its facility specific need to create a new hospital at its current Moncks Corner location, Trident's application be denied in order to be logically consistent with the Court's decision to deny Roper's application.

Respectfully submitted,



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August 6, 2013
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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

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

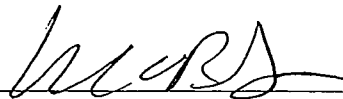
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Of whom Trident Medical Center, LLC is the Appellant.

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The undersigned certifies that this Brief of Appellant/Respondent complies with
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August 6, 2013
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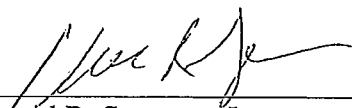
South Carolina Department of Health and
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Center, LLC Respondents,
Of whom Trident Medical Center, LLC is the Appellant.

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SC Court of Appeals

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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
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Hospital - Berkeley d/b/a Roper St. Francis Hospital,

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

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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.

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INTRODUCTION

CareAlliance Health Services and Roper St. Francis Hospital – Berkeley (hereinafter collectively “Roper St. Francis”) submit this reply brief to address the argument raised by Trident Medical Center, LLC (“Trident”) in response to the Initial Appellants’ Brief of Roper St. Francis. Trident’s argument that the Department of Health and Environmental Control’s (“DHEC” or “Department”) interpretation of the *2004-2005 State Health Plan* approving Trident’s CON Application is “reasonable” and entitled to deference but the Department’s interpretation of the *2008-2009 State Health Plan* in favor of Roper St. Francis’s CON Application is in “plain contradiction of the meaning and the words” of the Plan is nonsensical and should be rejected. Roper St. Francis reiterates to the Court in this cross-appeal that the Administrative Law Court’s (“ALC”) decision to affirm DHEC’s approval of both CON Applications is correct; however, if the Court reverses the decision to approve the Roper St. Francis CON Application, it must similarly reverse the DHEC decision approving the Trident CON Application.

ARGUMENTS

I. THE 2004-2005 STATE HEALTH PLAN DOES NOT EXPRESSLY ALLOW THE TRANSFER OF FACILITY-SPECIFIC BED NEED TO A GREEN FIELD.

As explained in Roper St. Francis' Initial Brief, Trident's CON Application to build a new hospital in Moncks Corner uses facility-specific bed need of 17 beds assigned to its tertiary hospital facility in North Charleston under the *2004-2005 State Health Plan* to place 50 new beds in a to-be-constructed hospital, slated for building on a vacant lot adjacent to its Moncks Corner Medical Center, an emergency department owned by Trident. Trident's reference to its emergency department as "an existing hospital department" is misleading. It is undisputed that Trident's emergency department in Moncks Corner is not a hospital. A hospital requires beds because by definition it must accommodate the "diagnosis, treatment and care of such persons over a period exceeding 24 hours" S.C. Code Ann. Regs. § 61-15.103(15). The emergency department in Moncks Corner does not have hospital beds. (R. p. 6689). The provision of the *2004-2005 State Health Plan* under which Trident applied for its 50-bed hospital in Moncks Corner provides:

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

(R. p. 6679) (emphasis added). Trident contends that the Department can "reasonably interpret" this provision to allow the transfer of facility-specific bed need to construct a new hospital on a vacant field. Trident continues to challenge, however, the Department's reasonable interpretation of the bed transfer provision to allow the transfer of existing licensed beds to construct a new hospital on vacant land. Nowhere does

Trident explain how the words “cost-effective addition” or how the construction of a new facility on vacant land is consistent with an *addition* to the hospital showing the facility-specific need.¹ It is simply inconsistent for Trident to argue that the Department’s interpretation of the bed transfer provision is a “plain contradiction of the meaning and words” of the provision, and yet ignore the “plain language” of the Plan and assert that the 50-bed hospital at Moncks Corner is a cost-effective addition to the hospital in North Charleston forecasting bed need. (R. p. 32).

The only consistent position in these appeals is the position of Roper St. Francis that neither Application contradicts the plain language of the State Health Plan and, therefore, the Applications are consistent with the intent of the Plan as shown by the Department’s consistent interpretation, which is entitled to deference. It remains the position of Roper St. Francis that the ALC correctly affirmed the decisions of the Department in finding both Applications satisfied the applicable State Health Plans. This Court, as the ALC, will not read parts of the State Health Plan in isolation as encouraged by Trident, but instead must “construe the regulation as a whole.” *Spruill v. Richland Cty. Sch. Dist. 2*, 363 S.C. 61, 64-65, 609 S.E.2d 524, 526 (2005) (holding that even in

¹ In fact, the Department subsequently revised the very provision under which Trident applies in the *2008-2009 State Health Plan* to explicitly state that the facility-specific bed need “may be approved for that hospital to allow for the construction of an economical unit at either the existing hospital site *or another site*.” (R. p. 6887) (emphasis added). Unlike the bed transfer provision, which has been consistently interpreted to allow for the construction of satellite facilities as proposed by Roper St. Francis, and which has not been revised in subsequent Health Plans, the proposal made by Trident was explicitly *added* to the subsequently enacted State Health Plan, thus making its absence from the *2004-2005 State Health Plan* even more obvious. “In interpreting a regulatory amendment, [the Court will] presume a regulatory agency, in adopting an amendment to a regulation, intended to make a change in the existing law.” *Converse Power Corp. v. S.C. Dep’t of Health and Envtl. Control*, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002).

the presence of an ambiguous regulation, the court will defer to the agency's interpretation representing a sound policy decision absent a compelling reason).

Neither with regard to the Department's interpretation of the facility-specific bed need provision nor the bed transfer provision, does a compelling reason exist to overturn the Department's interpretation of its own State 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.") Other than its status as a disgruntled provider, Trident cannot show that the Department's interpretation was arbitrary or capricious. "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Converse Power Corp.*, 350 S.C. at 47, 564 S.E.2d at 345. As to both CON Applications at issue on appeal, the Department correctly interpreted and applied the applicable provisions of the State Health Plan using the principles, rules and standards found therein.

II. TRIDENT CONCEDES THAT IN THE EVENT THE COURT CONCLUDES THAT THE 2004-2005 STATE HEALTH PLAN DOES NOT ALLOW THE TRANSFER OF FACILITY-SPECIFIC BED NEED TO CONSTRUCT A NEW HOSPITAL, THE ALC'S DECISION MUST BE REVERSED AND TRIDENT'S APPLICATION MUST BE DENIED.

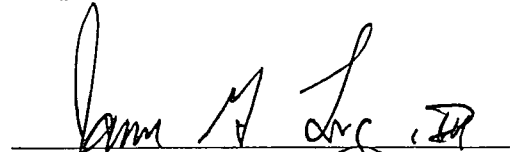
Trident concedes in its Initial Respondent's Brief that in the event this Court concludes that the *2004-2005 State Health Plan* does not allow the transfer of facility-specific bed need to a green field, then its Application must be denied. Trident postures this concession by stating that if the State Health Plan does not "expressly" allow the creation of its satellite hospital through transfer of facility-specific bed need, the decision

must be reversed. It is interesting that that the plain text of the provision under which Trident filed its Application does not *expressly* allow the transfer of facility-specific bed need to a green field. Trident, however, encouraged the Department to make a reasonable interpretation of the facility-specific bed need provision to allow the creation of the Moncks Corner hospital, but rejects that same agency's reasonable interpretation of the bed transfer provision (affirmed by the Department's Board) to allow the creation of a satellite hospital through the bed transfer provision. Trident has no basis for this distinction beyond its manipulative word play to argue in opposition Roper St. Francis' CON Application. The inclusion once again of the bolding and italics to set forth the bed transfer provision within its most recent brief evidences the fact that Trident cannot support its own argument without ignoring the Department Board's stated interpretation of the bed transfer provision and violating basic tenants of statutory construction, including the use of a forced construction to limit the bed transfer provision's application. *See Converse Power*, 350 S.C. at 48, 564 S.E.2d at 346. In the event, however, that this Court disapproves of the Department's interpretation and the ALC's affirmance with regard to the bed transfer provision and Roper St. Francis' CON Application, that same disapproval must apply to the CON Application filed by Trident.

CONCLUSION

Roper St. Francis respectfully urges this Court to find that the ALC's Final Order affirming the Department's approval of both CON Applications was proper and dismiss the appeal of Trident. In the event the Court determines that the Department and the ALC were incorrect in the construction and application of the bed transfer provision, that same logic must apply to the facility-specific bed need provision and Trident's CON Application must be denied.

Respectfully submitted,



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August 6, 2013
Columbia, South Carolina

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.

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SC Court of Appeals

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

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

v.

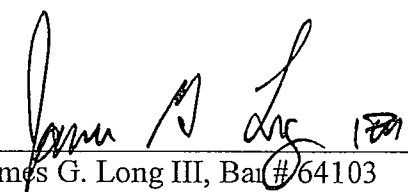
South Carolina Department of Health and
Environmental Control and Trident Medical Center, LLC..... Respondents,
Of Whom Trident Medical Center, LLC, is the..... Appellant.

PROOF OF SERVICE

I, James G. Long III, hereby certify that on August 6, 2013, I caused a copy of the Final Reply Brief of Respondents-Appellants to be served on the following by hand 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

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

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.

**BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT
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STATEMENT OF ISSUES ON APPEAL

- I. The Department properly interpreted the *2004-2005 South Carolina Health Plan* in approving Roper St. Francis – Berkeley’s Certificate of Need application, and the Administrative Law Court did not err in giving deference to the Department’s interpretation.
- II. The Administrative Law Court properly determined both Trident’s and Roper’s CON applications could be approved without exceeding the need for hospital beds in Berkeley County; thus, the applications are not competing.

FACTS

Berkeley County is experiencing one of the highest population growth rates in South Carolina, yet it is one of only five counties in South Carolina without a hospital within its borders. (R. p. 14; p. 1228, lines 1-12; p. 1252, line 22-p. 1253, line 10; p. 3581, lines 16-21; p. 4366; p. 4368; p. 5393). In 2008, Trident Medical Center, LLC (“Trident”), which operates hospitals in nearby Charleston and Dorchester Counties, and Roper St. Francis – Berkeley, part of the CareAlliance Health Services system (collectively “Roper”), each submitted a Certificate of Need (“CON”) application to the South Carolina Department of Health and Environmental Control to establish a fifty-bed hospital in Berkeley County. (R. pp. 4461-6662). Trident submitted its CON application under the *2004-2005 South Carolina Health Plan* (“*2004-2005 Plan*”), using the need indicated for Trident’s existing hospital in Charleston County to establish a satellite hospital in Berkeley County. (R. p. 4469; p. 4489). Roper, which operates several hospitals in nearby Charleston County, filed its application under the *2008-2009 South Carolina Health Plan* (“*2008-2009 Plan*”), utilizing the bed transfer methodology to relocate fifty (50) existing hospital beds from its hospital in downtown Charleston in order to establish a satellite hospital in Berkeley County. (R. p. 5383; pp. 5387-88; pp. 5393-5416).

During the Department's review of the two applications, Trident took the position that the two applications were competing, and that the Department could only approve one of the applications. The Department disagreed. By two separate decision letters dated June 26, 2009, the Department issued a formal determination that Roper's and Trident's CON applications were not competing. (R. pp. 5344-59; pp. 6647-59). The Department concluded that both applications complied with the applicable South Carolina Health Plan, both established a need for their proposed hospitals, and approval of both would not exceed the need for hospital beds in Berkeley County. *Id.*

A contested case hearing ensued at the Administrative Law Court ("ALC"). Trident maintained that the applications were competing and that Roper's application did not comply with the *2008-2009 Plan*. Roper agreed with the Department's decision that the applications were not competing and requested that the Department's decision be upheld. By order filed September 26, 2012, the ALC also agreed, finding the applications were not competing and granting both applications. (R. pp. 3-54). This appeal followed.

STANDARD OF REVIEW

This appeal is governed by the South Carolina Administrative Procedures Act (APA), S.C. Code Ann. §§ 1-23-310 *et seq.* (2005 & Supp. 2012). *See Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012). Pursuant to the APA, an appellate court may only reverse or modify a final decision of the ALC if the petitioner's substantive rights have been prejudiced because the ALC's decision is:

- (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. § 1-23-610(B) (Supp. 2012).

The ALC is the sole finder of fact in contested cases pursuant to the APA, and this Court may not alter the ALC's findings or make new findings of fact on appeal. *Brown v. S.C. Dep't of Health & Env'tl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002). Further, this Court may not substitute its judgment for that of the ALC as to the weight of the evidence on questions of fact. *Id.*

In reviewing a final decision of an administrative agency, "[t]he findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." *Kearse v. State Health and Human Servs. Finance Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *S.C. Dep't of Mental Retardation v. Glenn*, 291 S.C. 279, 281, 353 S.E.2d 284, 286 (1987). It "is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Converse Power Corp. v. S.C. Dep't of Health & Env'tl. Control*, 350 S.C. 39, 46, 564 S.E.2d 341, 345 (Ct. App. 2002).

ARGUMENT

I. The Department properly interpreted the 2004-2005 Plan in approving Roper's CON application, and the ALC did not err in giving deference to the Department's interpretation.

DHEC is the sole state agency charged with the administration of the State Certificate of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110, *et*

seq. (2002 & Supp. 2012) (“CON Act”). S.C. Code Ann. § 44-7-140 (2002). The purpose of the CON Act is to promote cost containment, to prevent the unnecessary duplication of health care facilities and services in the state, to guide the establishment of health facilities and services in such a way as will best serve public needs, and to ensure that high quality services are provided in health facilities in the state. S.C. Code Ann. § 44-7-120 (2002). “To achieve these purposes, [the CON Act] requires: (1) the issuance of a Certificate of Need before undertaking a project prescribed by this article; (2) adoption of procedures and criteria for submittal of an application and appropriate review before issuance of a Certificate of Need; (3) preparation and publication of a State Health Plan; and (4) the licensure of facilities rendering medical, nursing, and other health care.” *Id.*

The State Health Plan is developed by Department staff with the advice of the health planning committee. S.C. Code Ann. § 44-7-180(B) (Supp. 2012). The health planning committee is comprised of fourteen members, most of whom are appointed by the Governor. S.C. Code Ann. § 44-7-180(A) (Supp. 2012). The committee members represent a variety of groups with an interest in the CON program, including health care consumers, health care financiers (including business and insurance), and health care providers. *Id.* The purpose of the State Health Plan is to outline the need for health facilities and services in the State. S.C. Code Ann. § 44-7-180 (Supp. 2012); S.C. Code Ann. Regs. 61-15 § 802.1 (Supp. 2012). It contains an inventory of existing health care facilities, beds, specified health services, and equipment; projections of need for additional health care facilities, beds, services, and equipment; standards for distribution of health care facilities, beds, specified health services, and equipment; and a general

statement as to which project review criteria are considered most important for evaluating CON applications for each type of facility, bed, service, or equipment. S.C. Code Ann. § 44-7-180(B) (Supp. 2012). Once approved by the health planning committee, the State Health Plan is submitted to the Board of Health and Environmental Control (“Board”) for final revision and adoption, which must occur at least once every two years. S.C. Code Ann. § 44-7-180(C) (Supp. 2012). The State Health Plan is the starting point for review of a CON application; no CON application can be approved unless it complies with the State Health Plan. S.C. Code Ann. § 44-7-210(B) (Supp. 2012); *see also* S.C. Code Ann. Regs. 61-15 § 802.1 (Supp. 2012) (“The proposal shall not be approved unless it is in compliance with the South Carolina Health Plan.”).

Trident maintains that Roper’s CON application cannot pass the starting point for review because it does not comply with the *2008-2009 Plan*. In particular, Trident argues DHEC improperly interpreted the provision that allows for the transfer of hospital beds between facilities, and the ALC improperly deferred to DHEC’s interpretation. This provision, commonly referred to as the “bed transfer provision,” 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 exchange hospital beds requires a Certificate of Need and must comply with the following criteria:

1. A transfer or exchange of beds may be approved only if there is no overall increase in the number of beds;
2. Such transfers may cross county lines; however, the applicants must document with patient origin data the historical utilization of the receiving facility by residents of the county giving up beds;

3. Should the response to Criterion 2 fail to show a historical precedence of residents of the county transferring the beds utilizing the receiving facility, the applicants must document why it is in the best interest of these residents to transfer the beds to a facility with no historical affinity for them;
4. The applicants must explain the impact of transferring the beds on the health care delivery system of the county from which the beds are to be taken; any negative impacts must be detailed along with the perceived benefits of such an agreement;
5. The facility receiving the beds must demonstrate the need for the additional capacity based on both historical and projected utilization patterns;
6. The facility giving up the beds may not use the loss of these beds as justification for a subsequent request for the approval of additional beds;
7. A written contract or agreement between the governing bodies of the affected facilities approving the transfer or exchange of beds must be included in the Certificate of Need application;
8. Each facility giving up beds must acknowledge in writing that this exchange is permanent; any further transfers would be subject to this same process.

2008-2009 Plan at § II(G)(1)(A)(4)(j), pp. II-9 – II-10. (R. pp. 6889-90).

Trident alleges DHEC erred in interpreting the bed transfer provision, and that the ALC erred in giving deference to DHEC's interpretation, based upon the plain language of the statute. Trident's arguments lack credibility.

Trident contends that the plain language of the bed transfer provision prohibits the transfer of hospital beds from an existing facility in order to establish a new satellite hospital, because there is no existing bricks-and-mortar facility on the receiving end of the transfer. The plain language argument Trident urges is nonsensical. Trident insists that the references to facility in the bed transfer section mean an "existing" facility, yet the word "existing" does not appear in the bed transfer provision. (R. pp. 6889-90). To accept Trident's position, the Court would have to suppose that the State Health Plan

meant to limit the use of the bed transfer provision to facilities already in existence, thus excluding new facilities going through the CON review process. Such a meaning is not plain on the face of the Plan. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.”).

Further, the ALC found Trident’s positions on interpreting the Plan language to be “inconsistent” in this case. (R. p. 32). Trident urged the ALC to find that the “plain language” of the bed transfer section in the *2008-2009 Plan* prohibited the transfer of beds to a facility that has not yet been built, yet Trident argues there is no error in the interpretation of the bed need section in the *2004-2005 Plan* to allow Trident to transfer its facility-specific bed need for Trident Medical Center in Charleston County to a facility in Berkeley County that has not yet been built, and therefore does not “exist.”

Having rejected Trident’s argument that the plain language of the bed transfer position restricted the transfer to already-existing facilities, the ALC properly sought to determine the intent of the agency responsible for drafting and adopting the language in question.

Les Shelton, who has been extensively involved in the drafting of the State Health Plan for over two decades, testified as to the intent in drafting the bed transfer provision:

Our intent was it, was to make it as broad as possible because, at the time, there was this whole discussion of new service delivery systems, new models, mergers, acquisitions, and so we wrote it as broadly as we could, and hopefully as flexible as you could, with that our goal was to prevent the Plan from prohibiting what otherwise might be a good idea.

(R. p. 1619, lines 11-19).

The Board of DHEC issued a ruling in a separate CON matter on its interpretation of the bed transfer provision. In a written Order on Remand dated May 8, 2009, the Board held that the receiving facility need not be an existing facility in order to receive beds under the bed transfer provision, based on its interpretation of the bed transfer provision.¹ (R. pp. 7519-26). The ALC affirmed the Board's Order on Remand, and its interpretation of the bed transfer provision, in a contested case hearing.

DHEC's interpretation of the bed transfer position has been consistent over time. DHEC has routinely and consistently interpreted the bed transfer standard to authorize the transfer of licensed beds from an existing hospital to create a new system hospital, or "satellite" hospital. (R. pp. 267-68; p. 1157, line 20-p. 1158, line 7; p. 1268, line 22-p. 1269, line 18; p. 1597, line 16-p. 1599, line 20). The Department has issued CON decisions allowing hospitals with excess capacity to establish new satellite hospitals. (R. p. 267). Examples of such previous CON decisions include Waccamaw Neck Hospital in Georgetown County, Anderson Area Women and Children's Hospital in Anderson County, Village Health Care Center in Spartanburg County, and Palmetto Health Parkridge in Richland County. *Id.*

An agency's interpretation of its own regulations deserves considerable deference, and the court will not set it aside unless it is an abuse of discretion or otherwise not in accordance with the law. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003); *Brown v. S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002). "The delegation of authority to an administrative agency is construed liberally

¹ The Order on Remand examined the bed transfer provision in the 2004-2005 Plan. (R. pp. 1719-26). The language in the bed transfer provision in the 2004-2005 Plan is identical to the language in the 2008-2009 Plan, but the section was renumbered. The bed transfer provision in the 2004-2005 Plan is located at § II(G)(1)(A)(4)(h); in the 2008-2009 Plan it is located at § II(G)(1)(A)(4)(j). (R. pp. 6680-81; pp. 6889-90).

when the agency is concerned with the protection of the health and welfare of the public.” *City of Columbia v. Bd. of Health & Envtl. Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987). As the agency charged by statute with developing and adopting the State Health Plan for use in the administration of the CON program, DHEC is in the best position to interpret the State Health Plan, and is entitled to considerable deference in its interpretation.

Substantial evidence in the record establishes: (1) staff’s intent in drafting the bed transfer language, to make it as flexible as possible so that as health care systems change and develop over time the Plan will not prohibit what would otherwise be a good idea; (2) staff’s long history of approving CON applications for the establishment of a new satellite hospital within a health system by transferring beds from an existing hospital; and (3) the Board’s written ruling interpreting the bed transfer provision to allow the transfer of beds to create a new satellite hospital.

Trident has presented no compelling reason to overturn DHEC’s interpretation. The record contains ample evidence of the Department’s intent when drafting the bed transfer provision, the Board’s ruling on its interpretation, and a history of consistent application of that interpretation. (R. pp. 267-68; p. 1265, line 11-p. 1269, line 6; p. 1593, line 21-p. 1599, line 20; p. 1619, line 8-p. 1620, line 3; p. 1622, line 19-p. 1624, line 6; pp. 7519-26). In fact, Trident has used the Department’s similar interpretation of the hospital bed need provision in the *2004-2005 Plan* to transfer the bed need indicated in the Plan for its North Charleston hospital to Berkeley County to create a new satellite hospital where none currently exists. (R. p. 1607, line 21-p. 1608, line 3). The Department’s interpretation and application of the bed transfer provision is consistent

with the Department's interpretation and application of the bed need provision, and equally benefits both Roper and Trident. No compelling reasons exist to overturn DHEC's interpretation. *See Converse Power Corp. v. S.C. Dep't of Health & Envtl. 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"). The ALC properly gave deference to the Department's interpretation, and no legal reason exists to overturn that interpretation.

II. The Administrative Law Court properly determined both Trident's and Roper's CON applications could be approved without exceeding the need for hospital beds in Berkeley County; thus, the applications are not competing.

Trident argues the ALC erred as a matter of law in concluding that both Trident's and Roper's CON applications for fifty-bed hospitals in Berkeley County could be approved without exceeding the need in the State Health Plan. There is no error.

"Competing applicants" is defined as "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). Trident argues approving both applications would exceed the need for hospital beds indicated in the State Health Plan. Since Trident is adding new beds to the existing inventory of general hospital beds, and Roper is transferring existing beds from one location to another without adding to the bed inventory, Trident's and Roper's CON applications will not exceed the State Health Plan's projections of need for general hospital beds in the service area, and Trident and

Roper do not meet the statutory definition of “competing applicants.” (R. p. 1282, line 3-p. 1287, line 20; pp. 6647-48).

Trident applied pursuant to the *2004-2005 Plan* to **add** new beds in Moncks Corner, based upon the Plan’s facility-specific projection of need for an additional forty-two (42) general hospital beds. *See 2004-2005 Plan*, at p. II-17. (R. p. 6689). The *2004-2005 Plan* allowed Trident to apply for up to fifty (50) hospital beds, even though the Plan specified a need for Trident of only forty-two (42) beds. *Id.* at § II(G)(1)(A)(4)(d), p. II-7 (“Should there be a need shown for additional beds for a hospital, then an increase may be approved. In order to 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.”). (R. p. 6679). According to the methodology utilized by Trident in its CON application for a Berkeley County hospital – that is, the **addition** of new beds to the area – the *2004-2005 Plan* only required Trident to show that it had a positive bed need in order for it to comply with the State Health Plan’s bed need projections. *Id.* Because the *2004-2005 Plan* showed a positive bed need for Trident for forty-two **additional** beds, Trident’s CON application complies with the need projections of the *2004-2005 Plan*. (R. p. 6689). Granting Trident’s CON application will not exceed the State Health Plan’s need projections for general hospital beds in Berkeley County.

Roper applied under the *2008-2009 Plan* for a **transfer** of fifty (50) of its existing general hospital beds from its downtown Charleston facility to Goose Creek. (R. p. 5380). The *2008-2009 Plan* allowed Roper to **transfer** existing hospital beds across the county line from Charleston to Berkeley County, providing that the transfer would not

increase Roper's overall number of hospital beds. *See 2008-2009 Plan* at § II(G)(1)(A)(4)(j), pp. II-9 – II-10. (R. pp. 6889-90). According to the methodology utilized by Roper in its CON application for a Berkeley County hospital – that is, the **transfer** of existing beds – the *2008-2009 Plan* required Roper to show that it had existing beds in Charleston County that could be transferred, that the beds would be transferred within Roper's own healthcare system, and that the transfer would not increase Roper's overall bed count. *Id.* Because Roper met these requirements, its CON application complies with the bed **transfer** provisions of the *2008-2009 Plan*. (R. p. 1269, line 7-p. 1276, line 15).

The fact that Roper's overall existing hospital bed inventory results in a showing in the State Health Plan that Roper has six excess beds in the general Berkeley/Charleston/Dorchester Tri-County area, *see 2008-2009 Plan* at p. II-19, does not preclude Roper from transferring some of its existing beds from Charleston to Berkeley County. (R. 6899). The *2008-2009 Plan* contemplates that a hospital may not show a need, but that transfer of licensed hospital beds may be justified as to more efficiently allocate health care resources. (R. p. 1625, line 2-p. 1626, line 1). As stated in the Department's June 26, 2009, decision letter granting Roper's CON application, Roper's project, which is "basically a re-positioning of currently licensed acute care beds from an area of limited growth to an area of strong growth, ... will have no impact on the Tri-County's bed count or bed need." (R. p. 6647). The Department has approved similar hospital bed transfers from one location to another in the past, even though the State Health Plan indicated that the applying hospital system had an excess of hospital beds. (R. p. 267). The Department affirmed in its answers to Trident's interrogatories in

this matter that it “does not consider the two approved CON applications ‘competing’ because the beds used for the Roper St. Francis Hospital – Berkeley project will be a permanent bed transfer, not a bed increase.” (R. p. 263). While Trident “utilized the projected bed need in the *2004-2005 State Health Plan* to create a satellite hospital in Berkeley County, ... propos[ing] to add fifty (50) new beds to the service area,” Roper “was relocating beds, rather than adding more beds to the service area, [and] it was not impacted by the bed need projection in the *2008-2009 State Health Plan*.” *Id.* Since Roper is not adding any new hospital beds, granting Roper’s CON application will not exceed the State Health Plan’s need projections for general hospital beds in Berkeley County.² (R. p. 1284, lines 5-15).

Furthermore, substantial evidence in the record supports the need for the transfer of beds from Roper’s downtown Charleston hospital to the Carnes Crossroad site in Berkeley County. (R. pp. 13-18; pp. 5393-5420). Roper presented reliable, credible evidence to support the ALC’s finding that the transfer of Roper’s beds to Berkeley County, along with the addition of Trident’s beds in Berkeley County, could both be approved without exceeding the need for beds in Berkeley County. (R. p. 50; p. 3545, line 11-p. 3716, line 3). In *Spartanburg Reg’l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC*, 387 S.C. 79, 90, 690 S.E.2d 783, 789 (2010), the Supreme Court affirmed the ALC’s determination that two CON applications for linear accelerators in the same service area were not competing, finding that “[f]rom a factual perspective,

² Additionally, Roper had to satisfy the requirements of Section II(G)(1)(A)(4)(f) of the *2008-2009 Plan*, which requires any new hospital to provide certain services, including: (1) a 24-hour emergency department; (2) inpatient services to both surgical and non-surgical patients; and (3) medical and surgical services within at least 6 of the major diagnostic categories recognized by the Centers for Medicare and Medicaid Services (“CMS”). (R. pp. 6888-89). The *2004-2005 Plan*, pursuant to which Trident’s CON application was filed, had no similar requirements. (R. p. 268; pp. 6678-81).

there is abundant evidence in the record to support" that both applications would not exceed the need. Similarly, the ALC concluded that an abundance of evidence in the record, including from both parties' experts in healthcare planning, established that there was a need for both fifty-bed hospitals in Berkeley County. (R. pp. 10-26; pp. 49-50).

Granting both Trident's and Roper's CON applications, filed under two different State Health Plans using two different methodologies, will not result in exceeding the State Health Plan's projections of need for additional hospital beds in Berkeley County. Further, substantial evidence in the record supports the ALC's conclusion that both applications can be approved without exceeding the need in Berkeley County. Thus, Trident and Roper are not "competing applications."

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the September 26, 2012 Final Order and Decision of the ALC be affirmed.

Respectfully submitted,


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August 6, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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 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

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

v.

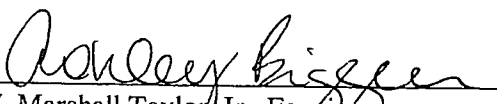
South Carolina Department of Health and
Environmental Control and Trident Medical
Center, LLC,

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

Trident Medical Center, LLC is the Appellant/Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the final Brief of Respondent South
Carolina Department of Health and Environmental Control complies with Rule 211(b),
SCACR, and the South Carolina Supreme Court Order of August 13, 2007.


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v.

South Carolina Department of Health and
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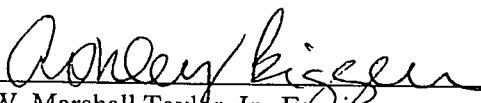
Trident Medical Center, LLC is the Appellant/Respondent.

PROOF OF SERVICE

I, Ashley Biggers, hereby certify that on August 6, 2013, I caused a copy of the final *Brief of Respondent South Carolina Department of Health and Environmental Control* to be served on all parties of record via hand delivery addressed as follows:

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