

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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

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Appellate Case No. 2015-001225  
Case No. 09-ALJ-07-0332-CC

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**RECEIVED**

JUL - 6 2015

**S.C. Supreme Court**

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

v.

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

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

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

v.

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

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

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

v.

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

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**RETURN OF RESPONDENTS  
TO PETITION FOR CERTIORARI  
(CareAlliance Health Services and Roper St. Francis Hospital – Berkeley)**

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## STATEMENT OF THE CASE

Perhaps the only point of agreement between Petitioner Trident Medical Center, LLC (“Trident”), and Respondents Care-Alliance Health Services and Roper St. Francis Hospital – Berkeley (collectively “Roper St. Francis”), is that the statutory construction issues heard below in the Certificate of Need dispute between Trident and Roper St. Francis do not “warrant[] the consideration of this Court on certiorari.” Pet. 1. The Administrative Law Court (“ALC”) properly held that the Certificate of Need (“CON”) applications for the establishment of two new hospitals in Berkeley County were not competing applications and that both applications should be approved. The Court of Appeals affirmed the ALC in well-reasoned opinions, carefully considered after oral argument and petition for rehearing. There are no “special and important reasons” that exist to warrant review, when in fact as admitted by Trident, not one of the character of reasons set forth in Rule 242(b)(1)-(5), SCACR, support the grant of certiorari in this case.

The “Introduction” offered by Trident in its Petition overstates the testimony and findings of the Respondent South Carolina Department of Health and Environmental Control (“DHEC” or “Department”), as well as the findings by the ALC below about the meaning of the South Carolina Health Plan. All parties below save for the Petitioner have steadfastly acknowledged that the Bed Transfer Provision of the 2008-2009 South Carolina Health Plan allows for the establishment of a satellite hospital through the transfer of existing licensed hospital beds. And further, that in light of the fact that the beds used are already licensed and contained within the existing bed inventory, the

applicant need not show facility or service area “bed need” under the Health Plan to obtain approval for the project.

These proceedings involve two CON applications for the establishment of hospital beds in Berkeley County, South Carolina. 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 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 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 ALC 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.

A fourteen-day contested case trial commenced before Judge 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. This appeal followed.

On January 31, 2014, a motion was filed in the Supreme Court to certify the appeal for review under Rule 204(b), SCACR. The Supreme Court denied the motion by Order dated March 20, 2014.

Thereafter, the Court of Appeals heard oral argument and affirmed the ALC in a unanimous well-reasoned opinion. In ruling on Trident's Petition for Rehearing, the Court of Appeals denied the Petition which had asserted all of the same arguments made on certiorari, and substituted an amended opinion that remained unanimous among the three-justice panel. *Trident Med. Ctr. v. S.C. Dept. of Health and Envtl. Control*, No. 5297, \_\_\_ S.E.2d \_\_\_, 2015 WL 2088765 (S.C. Ct. App. May 6, 2015). The substituted opinion made minor clarifications to the original opinion.

Trident now seeks certiorari. Roper St. Francis submits that this Honorable Court should deny the Petition and allow this lengthy and protracted litigation to end.

## ARGUMENTS

### I. TRIDENT'S MANUFACTURED CONSTRUCTION OF THE BED TRANSFER PROVISION DOES NOT WARRANT REVIEW BY THIS COURT.

Trident's first argument raised in support of certiorari is the overused and oft-repeated "plain English language" challenges made by it throughout these proceedings and on appeal. Trident at every level of review simply ignores and fails to concede that its construction of the Bed Transfer Provision requires that the word "existing" be read into what it asserts the plain language *means*. Pet. 11. The Court of Appeals correctly held, "there is no language in [the Bed Transfer Provision] list that either expressly or impliedly *requires* the receiving facility to be in existence when the CON application is submitted." *Trident Med. Ctr.*, 2015 WL 2088765 \*8 (emphasis in original). Trident asserts that the Court of Appeals "focuses on the selected phrase in the preamble that a transfer or exchange of beds between affiliated facilities may be needed 'in order to serve their patients in a more efficient manner,'" when, in fact, the Court engaged in a *thorough* analysis of the *entire* General Hospital Section of the 2008-2009 South Carolina Health Plan in reaching its correct decision. *Id.* \*8-9; Pet. 10-11. Trident's assertion that "the Bed Transfer Provision contains language that *can apply only if* the facility receiving the beds is in existence at the time approval of the transfer is requested" exemplifies how Trident's analysis of the provision contorts the language of the South Carolina Health Plan. Pet. 11. Later in its Petition, Trident asserts that the Bed Transfer Provision "unambiguously contemplates" that a second hospital already be in existence. Pet. 15. Roper St. Francis submits once again that plain language does not require an inference or contemplation – if the receiving facility must be an existing facility, the Bed Transfer Provision would plainly state so. That Trident asserts that the Court must make an

interpretation or contemplate what the Bed Transfer Provision *means*, is the best evidence that the language is not clear or exact.

In reviewing the Bed Transfer Provision, the Department (the sole agency charged with control and administration of the CON program) determined that existing licensed hospital beds could be transferred to establish a satellite facility. R. p. 1157, l. 20 – p. 1158, l. 12; S.C. Code Ann. § 44-7-140. In multiple instances, the DHEC staff has approved applications transferring existing licensed beds to construct a new facility. The DHEC Board had the opportunity to review this specific question and issued a specific order interpreting the Health Plan to allow a transfer of beds to construct a new hospital, just as Roper St. Francis proposes here. R. 7519.

Trident incorrectly argues that the Court of Appeals “ignores the rules of construction and reaches the wrong conclusion” solely because the Court’s reasoned conclusion fairly and properly applies the law to this case. Trident’s use of bolding and italics in recitation of the Bed Transfer Provision fails to overcome the complete reading of the Provision, within the greater context of the General Hospital Section, which properly allows for the transfer of existing licensed beds to establish a satellite facility as proposed by Roper St. Francis. “The words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation. Furthermore, the regulation must be construed as a whole rather than read in its component parts in isolation.” *S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012). In *Blue Moon*, this Court rejected the Department of Revenue’s construction of a regulation that “would prove utterly unworkable” and held that the interpretation was an “improper narrowing” based

on a notion of what the regulation “*should* be, not what the regulation actually provides.” *Id.* at 264, 725 S.E.2d at 485 (emphasis in original). Similarly here, Trident’s grammatical exercise offered in support of its reading of the Bed Transfer Provision is the exactly the type of forced construction seeking to limit the Provision’s operation that this Court’s jurisprudence rejects.

The Department has reasonably interpreted the provision in this case as with other applications to allow a transfer of existing licensed beds to construct a facility. This interpretation was reviewed and affirmed by the DHEC Board and has now been affirmed at the ALC and affirmed by the Court of Appeals. This argument seeking certiorari is unavailing.

Trident’s reference to the goals of the CON Act as not being supportive of the repeatedly affirmed decision of the Department in allowing two small community hospitals to build in one of the largest and fastest growing counties in the State with *zero* hospital beds is misplaced. The Court of Appeals held as follows as to DHEC’s interpretation of the Bed Transfer Provision:

This is consistent with the plain language of the Bed Transfer Provision as well as the General Assembly’s stated purpose for the CON Act: “[T]o promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] *will best serve public needs*, and ensure that high quality service are provided in health facilities in this State.”

*Trident Med. Ctr.* at \*10 (emphasis in original). Trident’s refusal to accept this reasoned analysis does not afford a basis for certiorari to this Honorable Court. Roper St. Francis clearly documented the historical utilization of Berkeley County residents of its Charleston County facilities, and it is a proper basis to support the deployment of underused resources on the landlocked Charleston Peninsula to the booming and growing

populations in Southern Berkeley County. DHEC agreed with Roper St. Francis, as did the ALC and the Court of Appeals. This Court should feel assured that the law has been properly applied and no special or important reason exists to grant certiorari.

**II. TRIDENT FAILS TO ESTABLISH THAT DEFERENCE TO THE DEPARTMENT BY THE ALC AND THE COURT OF APPEALS WAS NOT APPROPRIATE.**

The Court of Appeals properly concluded that no compelling reason exists to overturn the Department's interpretation of its own South Carolina Health Plan. *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006) ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons.") The well-developed line of cases addressing the deference owed to the agency refers to the Department's construction of statutes for which it is charged with administering, *i.e.* the CON Act. *See* S.C. Code Ann. § 44-7-140; *see also Byerly Hosp. v. S.C. State Health and Human Svcs. Fin. Comm'n*, 319 S.C. 225, 229, 460 S.C.2d 383, 385-6 (1995) ("We must affirm if the decision of the agency is supported by substantial evidence, and we may not substitute our judgment for that of the agency upon questions as to which there is room for a difference of intelligent opinion. Moreover, because the Commission has been designated as the single state agency for implementation of Medicaid, great deference must be accorded its interpretations of Medicaid laws and regulations.") In this instance, the deference is even more appropriate given the construction or interpretation at issue is of the Departments *own document* and not a statute – the South Carolina Health Plan is not a legislatively enacted document, but instead is drafted, approved and promulgated solely by DHEC and its governing Board. S.C. Code Ann. § 44-7-180(B)-(C). There can be no other meaning of the Bed Transfer

Provision than the meaning ascribed by the DHEC Board, which addressed and confirmed the construction of the Bed Transfer Provision as applied to allow for the transfer of existing licensed beds to a new facility. *See* R. 7521.

Trident's assertion of "agreement" as to the plain language of the Bed Transfer Provision is illogical for several reasons. Primarily, Trident claims "everyone" (other than Roper St. Francis of course) agrees that the plain language provides for an existing receiving facility – when in fact *everyone* other than Trident (to whom no one is required to defer to Trident's interpretation) has agreed that the Bed Transfer Provision allows for the creation of a satellite facility using existing licensed beds. Point of fact, no one agrees with Trident. Moreover, Trident's own application to transfer bed need to construct a satellite hospital in a green field is inconsistent with its position for Roper St. Francis hospitals. Such inconsistent positions must be rejected.

The best evidence that the Bed Transfer Provision is not plain and unambiguous is the procedural posture of this case – Trident has unsuccessfully attempted to convince the agency, the ALC, and the Court of Appeals that the Provision means something other than DHEC's interpretation here and in prior applications. Ironically, Trident's Petition begins with reference to *Kiawah Development Partners II* and the opinion of the Honorable Chief Justice Toal in dissent. As Chief Toal explained, "an agency's well-established and consistent interpretation of statutes and regulations that the agency is charged with administering are entitled to deference." *Kiawah Dev. Partners II v. S.C. Dept. of Health and Env'tl. Control*, 411 S.C. 16, 56, 766 S.E.2d 707, 729 (2014) (Toal, C.J., dissenting). The procedural posture of *Kiawah II* is ignored by Trident because unlike this instance, in *Kiawah II* the majority reverses the ALC for, *inter alia*, failing to

give deference to DHEC's interpretation of its regulation. *See id.* at 32, 766 S.E.2d at 717. Though Chief Justice Toal's dissent speaks for itself, Roper St. Francis submits that a primary concern was the majority's reversal of the ALC based in part on the deference doctrine and the importance of the ALC review in administrative proceedings.

In this case, the ALC affirmed the Department's interpretation of the South Carolina Health Plan after a trial *de novo*, with an Amended Final Order containing detailed and specific findings of fact in support of its decision. In this case, in multiple layers of review, the DHEC Staff, ALC and the Court of Appeals consistently determined that "DHEC's interpretation [of the Bed Transfer Provision] is reasonable and consistent with its statutory authority." *Kiawah Dev. Partners II* at 35, 766 S.E.2d at 719. As such, the Court of Appeal's decision below is consistent with *Kiawah Development Partners II* and Trident's Petition offers no special or important reasons to grant certiorari. Rule 242(b), SCACR.

### **III. ROPER ST. FRANCIS HAS NOT WAIVED ITS CROSS-APPEAL AS TO TRIDENT'S APPLICATION.**

Trident asserts in the Petition for Certiorari that Roper St. Francis has not preserved its cross-appeal of Trident's Petition. Pet. n.6. Roper St. Francis submits that the procedural posture of this appeal is such that Roper St. Francis had no mechanism by which to "appeal" the Court of Appeals' ruling as to the issue of Trident's CON application, such issue being the argument that should Trident's reasoning as to Roper St. Francis' application prevail, such reasoning would require denial of its own application. In its Order, the Court of Appeals determines that it need not address Roper St. Francis' appeal issue in light of the affirmance of the ALC's decision. *Trident Med. Ctr.* at \*1. Rule 221(a), SCACR, provides that a Petition for Rehearing is directed to "points

supposed to have been overlooked or misapprehended by the court.” Roper St. Francis’ appeal asserted only that *in the event that* the Court of Appeals agreed with Trident that DHEC’s interpretation of the Bed Transfer Provision was in error, then similarly the interpretation allowing the Fifty Bed Rule to support the construction of a satellite hospital as proposed by Trident must also be reversed. Because the Court of Appeals did not agree with Trident, but instead supported Roper St. Francis’ position on the issue, there was no matter “overlooked or misapprehended” by the Court of Appeals for which Roper St. Francis was required to petition for rehearing. Roper St. Francis submits that this circumstance is similar to that addressed in *I’On, LLC v. Town of Mt. Pleasant* in discussing preservation of additional sustaining grounds by a respondent. 338 S.C.-406, 417-23, 526 S.E.2d 716, 721-25 (2000). In *I’On*, this Court explains that as a respondent that continues to ‘win’ in the appellate review, to return to the Court of Appeals asking for reconsideration of a question unnecessary to the ruling would “violate the principle that a court usually should refrain from deciding unnecessary questions.” *Id.* at 419, 526 S.E.2d at 723. As such, the assertion that Roper St. Francis has waived the corollary argument as to the approvability of Trident’s CON application is in error.

Therefore, if and only if this Court grants Trident’s Petition for Certiorari, Roper St. Francis requests that the Court also grant Certiorari to hear the statement at issue on Appeal raised by Roper St. Francis in its brief below. This statement is as follows: “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.”

**IV. TRIDENT HAS ABANDONED ITS ARGUMENT THAT THE APPLICATIONS ARE COMPETING.**

It is worth noting that Trident has abandoned its earlier challenge on appeal that the underlying applications are competing applications, as the issue has not been raised or addressed in the Petition for Certiorari.

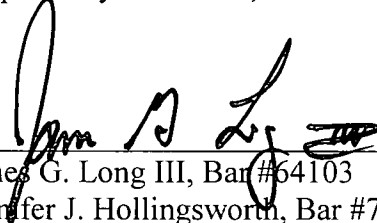
**V. THE STANDARD OF REVIEW IS LIMITED TO ERRORS OF LAW.**

In its appeal of the ALC’s Amended Final Order, Trident chose not to appeal the ALC’s Findings of Fact. *Trident* \*3. As a result, all of the Findings of Fact set forth below are the law of the case and the Court’s standard of review is limited to whether the ALC committed an error of law in its interpretation of the Bed Transfer Provision. As shown herein, the ALC and the Court of Appeals affirmed that the South Carolina Health Plan allows a provider to transfer existing licensed beds to construct a satellite facility. No error of law was committed and no basis exists to grant certiorari.

**CONCLUSION**

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

Respectfully submitted,



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Of Whom Trident Medical Center, LLC, is the ..... Petitioner.

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**PROOF OF SERVICE**

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I, James G. Long III, hereby certify that on July 6, 2015, I caused a copy of Respondents CareAlliance Health Services and Roper St. Francis Hospital – Berkeley’s Return to Petition for Certiorari to be served on the following by hand delivery addressed as follows:

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