# The South Carolina Court of Appeals

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center, Respondent,

v.

South Carolina Department of Health and Environmental Control and the Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill, Respondents,

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

Appellate Case No. 2015-000056

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ORDER

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The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill (CHS), appeals the Administrative Law Court's order directing the South Carolina Department of Health and Environmental Control (DHEC) to issue a Certificate of Need (CON) to Amisub of South Carolina, d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center (Piedmont) approving the building of a hospital in Fort Mill. The ALC's order reversed a 2011 decision by DHEC denying Piedmont's CON application and granting CHS a CON to build a hospital in Fort Mill.

Pursuant to section 44-7-220(B) of the South Carolina Code (Supp. 2014), CHS was required to post a $1.5 million bond to perfect its appeal. CHS posted the bond and filed a motion with this court seeking relief from the appeal bond, arguing the bond requirement is unconstitutional because it violates the separation of powers doctrine and its equal protection and due process rights. Additionally, CHS asks this court to stay the ALC's order because CHS would be irreparably

harmed if Piedmont were allowed to proceed with the project approved in its CON. After careful consideration, we deny CHS's motion.

I. Appeal Bond

CHS seeks relief from the appeal bond, arguing the appeal bond requirement in section 44-7-220(B) is unconstitutional because (1) it is a violation of separation of powers because the General Assembly cannot promulgate rules of procedure that conflict with existing rules of procedure promulgated by the judiciary; (2) the bond requirement violates the Equal Protection Clause because it treats CON appellants differently than all other appellants; and (3) the bond requirement violates the Due Process Clause because the requirement that CHS post a $1.5 million bond significantly burdens its right to judicial review. We disagree.

1. Separation of Powers

The appeal bond requirement set forth in 44-7-220(B) does not infringe on the constitutional mandate of separation of powers. *See* S.C. Const. art. V, § 4 ("The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts."). Our supreme court has interpreted Article V, Section 4, as "establish[ing] the intent to subordinate to the General Assembly the Court's rulemaking power in regard to practice and procedure." *Stokes v. Denmark Emergency Med. Serv.*, 315 S.C. 263, 267, 433 S.E.2d 850, 852 (1993). The fact that Article V, Section 4A, requires all court rules promulgated by the supreme court to be submitted to a General Assembly committee further demonstrates the General Assembly's primacy in such matters. Additionally, we find CHS's reliance on *In re Circuit Court Rule 102*[1] misplaced because that order recognizes the limits on the court's rule making power in relation to substantive statutory law and *In re Circuit Court Rule 102* predates the adoption of Article V, Section 4A.

2. Equal Protection Clause

We hold the bond requirement does not violate the Equal Protection Clause. *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs.*, 370 S.C. 452, 480, 636 S.E.2d 598, 613 (2006) ("To satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2)

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[1] *In re Circuit Court Rule 102*, S.C. Sup. Ct. Order dated August 31, 1982.

members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis."); *see also Bodman v. State*, 403 S.C. 60, 70, 742 S.E.2d 363, 368 (2013) (stating that in an equal protection analysis, "[t]he classification also does not need to completely achieve its purpose to withstand constitutional scrutiny," nor does "[t]he fact that the classification may result in some inequity" render the classification unconstitutional (internal quotation marks omitted)). Here, the bond requirement represents the Legislature's attempt to hold funds to compensate a respondent harmed by the delay of its approved project during the adjudication of a CON appeal. The fact that section 44-7-220(B) initially sets the bond based on the total cost of the project being appealed suggests that the bond is intended to protect the party whose CON project has been approved. *See* § 44-7-220(B) ("The bond must be . . . in an amount equal to five percent of the total cost of the project or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars."). We find further support for this intent in section 44-7-220(C)(1), which focuses on frivolous appeals and allows the court to "award damages incurred *as a result of the delay*, as well as reasonable attorney's fees and costs, to the party whose project is the subject of the contested case or judicial review." S.C. Code Ann. § 44-7-220(C)(1) (Supp. 2014) (emphasis added). Thus, there is a rational basis for the statute's provision awarding a respondent the appeal bond if the ALC's decision is upheld, and this provision was related to a legitimate government interest of compensating a party whose CON had been approved by the ALC and who incurred delay costs as a result of the appeal.

CHS's reliance on *Lindsey v. Normet*, 405 U.S. 56 (1971), is misplaced. In *Lindsey*, the United States Supreme Court held unconstitutional an Oregon statute requiring defendants in forceful entry and detainer (FED) cases to post an appeal bond equal to twice the rental value of the premises in addition to the bond all civil appellants were required to post. 405 U.S. at 74-77. Under the statutory scheme, if the tenant lost the appeal, the landlord was automatically entitled to double the accrued rent without proof of actual damages. *Id.* at 63-64.

The double bond scheme found in *Lindsey* is distinguishable from the appeal bond in this case. First, the *Lindsey* court found "nothing in the special purposes of the FED statute or in the special characteristics of the landlord tenant relationship to warrant" treating FED appellants differently than all other appellants. *Id.* at 77. In the present case, the imposition of the appeal bond promotes the CON Act's purpose of providing for the efficient regulation and construction of healthcare facilities. *See* S.C. Code Ann. § 44-7-120 (2002) (stating some of the purposes of the CON Act are to "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").

Moreover, the posting of the bond and automatic awarding of the bond to the respondent upon affirmance of the CON award is meant to protect the respondent from any delay caused by the appeal process. This, too, serves the CON Act's purpose of guiding the establishment of health facilities and providing needed healthcare services to the citizens of the state. And, although an automatic awarding of the appeal bond could result in a windfall for a party that continued with its project and suffered no delay costs, we recognize the amount of the appeal bond could also constitute a shortfall to the party who chose to delay and incurred more delay costs than provided for in the appeal bond. Therefore, the appeal bond, though imperfect and imprecise, provides some balance to these two potentially unfair outcomes and is related to a rational government purpose. *See O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 859-60 (9th Cir. 1976) ("Legislative categories need not be drawn with mathematical nicety . . . for classification necessarily involves approximation; but legislative classifications which are not only imprecise, but lack rational relationship to their avowed purpose, are invalid." (internal citation and quotation marks omitted)); *see also Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992) ("The classification does not need to completely accomplish the legislative purpose with delicate precision in order to survive a constitutional challenge."). For these reasons, we conclude the appeal bond provision satisfies the requirements of equal protection.[2]

3. Due Process Clause

We find there has been no violation of CHS's right to due process. *See Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009) ("The fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review.").

CHS has successfully initiated its appeal of the ALC's decision, and this court will adjudicate the appeal. Even if CHS is correct that a party's ability to afford the appeal bond should not be considered, a party must still demonstrate or provide

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[2] We find CHS's reliance on *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 422 (Ky. 2005), inapplicable because *Elk Horn Coal* concerns a penalty bond, and the purpose of the appeal bond in section 44-7-220(B) is not to penalize CON appellants.

some evidence the appeal bond requirement *actually denies* access to judicial review in order to claim a due process violation. *See Olson v. SCDHEC*, 379 S.C. 57, 69, 663 S.E.2d 497, 504 (Ct. App. 2008) ("To prevail on a claim of denial of due process, there must be a showing of substantial prejudice."). CHS has not demonstrated it has been denied the right to judicial review. Rather, CHS asserts the appeal bond "significantly burdens their access to judicial review." However, the *Lindsey* court recognized the propriety of "reasonable procedural provisions to safeguard litigated property . . . or to discourage patently insubstantial appeals" if such rules were not arbitrary and irrational. 405 U.S. at 78. As discussed above, we find requiring certain CON appellants to post an appeal bond is not arbitrary and irrational but instead is rationally based on a legitimate government purpose. For these reasons, we find no due process violation.

II. Request to Stay the ALC's Order

CHS is not entitled to a stay of the ALC's order. Initially, we note there is no danger this issue will become moot or this court will lose jurisdiction because Piedmont will have to cease development of its hospital if we were to find error in the ALC's approval of Piedmont's CON. *See* Rule 241(c)(2), SCACR (requiring courts to consider whether an order for supersedeas "is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot"); *S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A case is moot where a judgment rendered by the [c]ourt will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the [c]ourt."). Furthermore, CHS cannot show that without the stay, it will suffer irreparable harm. Our courts typically require something more than economic loss in order to find irreparable harm. *See Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455 n.2, 626 S.E.2d 34, 37 n.2 (Ct. App. 2005) ("'While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business.'" (quoting *District of Columbia v. E. Trans–Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C. 2000))). Here, the alleged changes in referral patterns would directly impact market share and thus, constitute a purely economic harm. Moreover, the ALC's order documents CHS's effort, beginning in 2005 and continuing into 2011, to change referral patterns by adding physicians into its network, who were then required by contract to refer patients to other CHS facilities and doctors. *See* Amended Order, Findings of Fact Nos. 23-26. Further, the ALC noted when it denied CHS's request for a stay that CHS argued during trial that its Fort Mill hospital would function primarily to relieve high patient volume at its other hospitals, rather than provide it new revenue streams. *See*

ALC's Order Denying CHS's Motion to Stay, pg. 5. Therefore, it is not clear that allowing Piedmont to begin its project would cause physicians to immediately flee CHS's network in favor of Piedmont or otherwise threaten CHS's existence. Thus, CHS's arguments fail, and CHS's request for a stay is denied.

C.J.

J.

J.

Columbia, South Carolina

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