

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

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MAR 19 2012

Opinion No. 4873 (S.C. Ct. App. Filed Aug. 17, 2011)

S.C. Supreme Court

MRI at Belfair, LLC.....Petitioner

v.

South Carolina Department of Health and
Environmental Control and Coastal Carolina Medical Center.....Respondents.

***RESPONDENT SCDHEC'S RETURN TO
PETITION FOR A WRIT CERTIORARI***

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Pursuant to Rule 242(f), SCACR, the South Carolina Department of Health and Environmental Control (“DHEC” or “Department”) offers this return to the petition for a writ of certiorari submitted by MRI at Belfair, LLC (“Belfair”).

QUESTIONS PRESENTED

1. Did the Court of Appeals properly find that the Administrative Law Court committed no legal error in considering factors from S.C. Code Ann. § 44-7-230(A) and § 802, 24A S.C. Code Ann. Regs. 61-15, when determining the changes to the MRI project to not be substantial?
2. Did the Court of Appeals properly find Petitioner’s burden of proof argument not preserved for appellate review?
3. Did the Court of Appeals properly affirm the Administrative Law Court’s decision based upon substantial evidence in the record?
4. Did the Court of Appeals properly decline to address the issue of transfer of ownership on the grounds of mootness?

STATEMENT OF THE CASE

This appeal involves a determination by DHEC that Coastal Carolina Medical Center’s (“Coastal”) changes to its MRI project, for which it previously received a Certificate of Need (“CON”), were not substantial and therefore did not constitute a new project.

Coastal applied and was approved for a CON in 2004 to acquire a new 1.4 Tesla General Electric MRI unit to be housed in an addition it planned to construct at its hospital in Jasper County, South Carolina. Coastal submitted its application pursuant to the 2003 South Carolina Health Plan (Plan), which stated that each hospital should have at least one MRI unit available for diagnosis of emergency patients, inpatients, and outpatients.

Belfair filed a contested case in November 2004 (Case 1) challenging the Department's decision to approve Coastal's CON application. Prior to the hearing, the Administrative Law Court (ALC) granted partial summary judgment in favor of Coastal, ruling that it need not prove compliance with project review criteria. The contested case proceeded to a hearing in August 2005 to determine what constitutes having an MRI "available" to a hospital pursuant to the Plan. The ALC ruled in Coastal's favor in November 2005, finding that "available" to Coastal meant having a fixed, in-house MRI unit that could be accessible twenty-four hours a day, seven days a week.

Belfair appealed the ALC's decision in Case 1 to the DHEC Board, which affirmed the ALC's decision in May 2006. In July 2006 Belfair filed an appeal with the Court of Appeals. This Court subsequently certified the appeal for review.

Since Belfair chose not to file a motion for a stay pending the appeal of Case 1, DHEC issued the CON to Coastal for the MRI project in August 2006. In June 2007, Coastal requested a determination from the Department that its plan to convert a mobile MRI unit into a fixed, on-site MRI unit on Coastal's campus, right next to the hospital, did not constitute a substantial change to the originally proposed and approved project. On June 22, 2007, the Department notified Coastal that its plan to convert a mobile MRI unit to a fixed MRI to be permanently located on-site did not constitute a substantial change to Coastal's approved CON application for a fixed, in-house MRI unit. Coastal then purchased a 1999 refurbished 1.5 Tesla General Electric MRI housed in a mobile trailer, and affixed the trailer to a concrete pad adjacent to the hospital to convert it to a fixed on-site unit. Coastal submitted a final completion report

for the project to the Department, and the Department closed its file on the CON on June 27, 2007.

Belfair requested final review of the Department's decision before the DHEC Board, which declined to conduct a final review conference. On July 26, 2007, Belfair filed a contested case at the ALC challenging the Department's determination that the change to the MRI project was not substantial (Case 2).

Prior to the contested case hearing regarding the substantial change issue in Case 2, this Court issued an opinion regarding Belfair's appeal of the original CON approval in Case 1. In an opinion filed July 14, 2008, the Court held that "substantial evidence exists to support the finding that an 'available' MRI facility for [Coastal]'s needs would require an onsite MRI facility that was accessible twenty-four hours a day, seven days a week." MRI at Belfair, LLC v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 1, 8, 664 S.E.2d 471, 475 (2008). The Court further held that it was error to find that Coastal did not have to establish compliance with project review criteria at the contested case hearing before the ALC, pursuant to S.C. Code Ann. § 44-7-210(C). Id. at 9, 664 S.E.2d at 475. The Court reversed the CON award on that basis and remanded the matter to the ALC for a determination on the sole issue of whether Coastal's application complies with the project review criteria set forth in the Plan. Id. at 10, 664 S.E.2d at 476.

The remand from this Court in Case 1 of the decision to approve the original CON application was consolidated at the ALC with Case 2, Belfair's challenge of the Department's substantial change determination. A consolidated contested case hearing

was scheduled regarding both matters for August 4, 2009. Prior to the contested case hearing, Belfair moved to voluntarily dismiss Case 1, its challenge to the 2004 decision to approve the original CON application. By Order dated July 9, 2009, the ALC, with the consent of all parties, dismissed the remanded case. The substantial change case proceeded to a contested case hearing as scheduled on August 4, 2009.

The ALC issued a final order and decision on October 23, 2009, finding that the changes to Coastal's MRI project are not substantial. Belfair filed a motion for reconsideration on November 5, 2009. The ALC issued an amended final order and decision on November 24, 2009, upholding the decision that the changes to Coastal's project are not substantial.

Belfair appealed to the Court of Appeals, which held oral arguments on June 7, 2011 and filed an opinion on August 17, 2011, affirming the ALC's decision. Belfair filed a petition for reconsideration, which the Court of Appeals denied on October 20, 2011. Belfair then petitioned this Court for a writ of certiorari.

ARGUMENTS

I. No special or important reasons exist to grant a writ of certiorari in this case.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. While not controlling, the following, in general, indicate the character of reasons which will be considered in granting certiorari: (1) Where there are novel questions of law; (2) Where there is a dissent in the decision of the Court of Appeals; (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the

Supreme Court; (4) Where substantial constitutional issues are directly involved; and (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Id.

This is an ordinary case of statutory construction that poses challenges to factual findings of an administrative law judge. There is no dissent in the Court of Appeals' decision. The Court of Appeals' decision is not in conflict with a prior decision of the Supreme Court. There are no constitutional issues or federal questions involved. There are no special or important reasons to grant the petition for a writ of certiorari in this case.

II. Petitioner failed to set forth arguments that would provide this Court grounds to reverse or modify the ALC's decision.

In an appeal of a final decision by the ALC in a contested case, the Court may only reverse or modify the ALC's decision if the Appellant'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. 2011). There are no constitutional or statutory violations in this case, nor does this case involve an unlawful procedure or other legal error. The ALC's decision is supported by substantial evidence in the record; therefore

the Court of Appeals did not err in affirming the ALC's decision, and Belfair's petition for a writ of certiorari should be denied.

III. The Court of Appeals properly found no legal error in the ALC's consideration of factors from S.C. Code Ann. § 44-7-230(A) and § 802, 24A S.C. Code Ann. Regs. 61-15, as part of its substantial change analysis.

Belfair contends the Court of Appeals erred in rejecting its argument that the ALC erroneously included an analysis of project review criteria in determining whether Coastal's changes to its MRI project were substantial. Belfair's argument is without merit.

DHEC is the 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. 2011) (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 the issuance of a CON before undertaking certain medical projects, the adoption of procedures and criteria for the submittal of applications and review by the Department, and publication of a State Health Plan. Id.

Pursuant to the CON Act, a person or health care facility is required to obtain a CON from the Department prior to proceeding with certain projects which are enumerated in the Act, including a capital expenditure by or on behalf of a health care

facility associated with the addition of a health service for which specific standards or criteria are prescribed in the South Carolina Health Plan. S.C. Code Ann. § 44-7-160(4) (2002).¹ “The department may not issue a [CON] unless an application complies with the State Health Plan, Project Review Criteria, and other regulations.” S.C. Code Ann. § 44-7-210(C) (2002).² There are 33 project review criteria identified in Regulation 61-15, Certification of Need for Health Facilities and Services (“CON Regulation”). 24A S.C. Code Ann. Regs. 61-15 § 802 (2011). “A project does not have to satisfy every criterion in order to be approved, but no project may be approved unless it is consistent with the State Health Plan.” Id. at § 801(2).

A CON, once issued, “is valid only for the project described in the application including location, beds and services to be offered, physical plant, capital or operating costs, or other factors as set forth in the application, except as may be modified in accordance with regulations.” S.C. Code Ann. § 44-7-230(A) (2002). If an applicant alters or amends a project after receipt of a CON, the Department must determine whether the changes are substantial and thereby constitute a new project. 24A S.C. Code Ann. Regs. 61-15 § 605 (2011). The term “substantial” is not defined by regulation.

The ALC held that in order to determine if Coastal’s changes were substantial, a comparison must be made between the original project as proposed in the CON application and the amended project. [R. p. 33]. In making this comparison, the ALC

¹ The 2003 South Carolina Health Plan contained standards and criteria for MRI services. The current South Carolina Health Plan does not contain standards and criteria for MRI services.

² At the time of the Department’s decision in 2007, this provision was codified at Section 44-7-210(C). Pursuant to 2010 Act No. 278, § 5, effective July 1, 2010, this provision is now codified at Section 44-7-210(B).

compared those factors noted in Section 44-7-230(A), i.e., location, services to be offered, environment and layout (physical plant), and capital costs, and also whether the proposed changes to the project had an effect on the project review criteria which staff reviewed during the CON application process. Belfair takes no issue with the ALC's application of Section 44-7-230(A), the "project statute," in its substantial change analysis. Belfair instead argues that the ALC erred in considering the project review criteria from Section 802 of Regulation 61-15 which were addressed in Coastal's CON application as part of its substantial change analysis.

It is undisputed that the project statute refers to "other factors as set forth in the application." S.C. Code Ann. § 44-7-230(A) (2002). As part of the Department's review of Coastal's CON application, it found the following project review criteria from Section 802 of Regulation 61-15 to be most relevant to Coastal's CON application: Need (Compliance with the Plan) – 1; Community Need Documentation – 2c; Distribution (Accessibility) – 3d, 3e, 3f, 3g; Acceptability – 4a; and Cost Containment – 16c. [R. p. 704-705]. These criteria were addressed by Coastal during the review process and, as such, became part and parcel of its CON application.

When analyzing whether the proposed changes in Coastal's project amounted to a substantial change, the ALC considered all of these project review criteria, as well as financial feasibility and adverse impact; and concluded that the amendments to the MRI project did not substantially change the application's compliance with project review

criteria. [R. pp. 30-31, 33].³ The ALC did not err in applying the project review criteria to determine whether the amendments to the project gave rise to a substantial change. Accordingly, the Court of Appeals properly found no legal error in the ALC's consideration of project review criteria in reaching its conclusion that the amendments to the CON project are not substantial.

IV. The Court of Appeals properly affirmed the Administrative Law Court's decision based on substantial evidence in the record.

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).

Substantial evidence in the record supports the ALC's finding that the amendments to Coastal's CON project did not substantially change the location, services to be offered, layout, capital or operating costs, or the project's compliance with applicable project review criteria.

³ When the ALC dismissed Case 1 on Belfair's motion, Belfair lost its right to further challenge the Department's issuance of the CON to Coastal. The ALC properly held that by voluntarily withdrawing Case 1, Belfair conceded the 2004 CON application's compliance with project review criteria. [R. p. 27].

a) Location

As evident from the record, the location of the MRI has not changed; it remains on site at the hospital, on Coastal's campus. [R. p. 262, lines 18-25; p. 366, lines 15-17]. In its CON application, Coastal proposed to locate the MRI in a newly constructed suite, adjacent to the hospital. [R. p. 229, lines 1-6]. The amended project proposes to locate the MRI in a permanent trailer unit affixed to a concrete pad directly beside the hospital, with a connecting walkway. [R. p. 229, lines 7-9]. The ALC found that though this minor difference "require[d] a several-minute additional walk from the emergency room, it is nevertheless built to be an integral part of the hospital." [R. p. 28].

The ALC's finding is supported by testimony from Dr. Moesch, the Medical Director over Radiology for Coastal, who testified that the distance from the door of the MRI trailer to the door of the hospital is approximately 12 to 15 yards. [R. p. 235, lines 5-9]. Additionally, Mr. Grice, who approved the CON application on behalf of the Department, testified that the change in location was not substantial because the location was still "at the hospital, [operating] under the license of the hospital." [R. p. 316, line 25 – p. 317, line 5]. Ms. Tibshrary, who made the determination on behalf of the Department that the changes were not substantial, testified that "[t]he location of the project was not changing, the unit would still be located at the hospital." [R. p. 366, lines 15-17]. Finally, Ms. Platt, Coastal's expert in healthcare planning, testified that there was no change whatsoever in the location, because the MRI is still located at the physical address of the hospital as originally proposed. [R. p. 262, lines 18-25]. There is

substantial evidence in the record to support the ALC's finding that the change in location of the MRI did not give rise to a substantial change.

b) Services

The changes in the MRI project do not substantially change the services to be provided by the project. In its CON application, Coastal proposed to serve acutely ill patients at its hospital with the MRI, including emergency patients, inpatients, and outpatients; this has not changed with the CON amendments. [R. p. 260, lines 3-7]. The ALC concluded that "the MRI [would] operate in substantially the same manner, provide substantially the same services, and serve substantially the same patients." [R. p. 33].

The ALC's conclusion is supported by substantial evidence. Dr. Moesch testified that the MRI unit originally proposed, and the MRI unit actually acquired, were made by the same vendor, had the same field strength, had the same four chamber scanners, had basically the same coils, and provided the same images. [R. p. 227 lines 17-21, p. 228 lines 19-25, and p. 230 line 22 – p. 231 line 3]. Dr. Moesch testified that the two units were "basically the same scanner from a clinical standpoint," and had no significant differences in terms of their ability to perform scans. [R. p. 232, lines 4-14]. Ms. Platt testified that the MRI acquired by Coastal operates at many hospitals serving acute patients throughout the state, meeting the quality of care standards in the industry. [R. p. 279, line 9 – p. 280, line 5]. In its CON application, Coastal proposed to utilize the MRI to scan acutely ill patients. Notwithstanding the alteration to its project, Coastal continues to serve acutely ill patients. [R. p. 235, line 25 – p. 236, line 3; p. 276, line 8 – p. 278, line 21; p. 287, line 5 – p. 289, line 21]. There is substantial evidence in

the record to support the ALC's finding that Coastal's proposed changes to its MRI project do not give rise to a substantial change.

c) Layout

The differences in physical plant are not substantial. The ALC rejected Belfair's claims that changes regarding the environment and layout of the MRI were substantial, concluding that "[t]here was no persuasive evidence offered that the access to the magnet would result in substantial clinical or operational differences between these MRI units." [R. p. 28, ft. 6]. This is supported in the record by testimony from Dr. Moesch; for example, Dr. Moesch testified that the amended MRI project has code blue procedures in place, as well as a non-ferous wheelchair and a non-ferous IV, in response to unsubstantiated allegations raised by Belfair in Dr. Borelli's testimony. [R. p. 242, lines 4-8; p. 243, lines 22-224; p. 244, line 7].

d) Cost

Though the capital cost of the amended MRI project is less than that proposed in the CON application, the difference in capital cost is not substantial for purposes of Section 605 of Regulation 61-15. Belfair argues the Court should use the plain and ordinary meaning of the term "substantial" and find that the difference in cost on its face constitutes a substantial change. This argument fails to consider that the cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998).

The determination of whether or not changes to a CON project are substantial, thereby constituting a new project, must be made in light of the purposes and goals of the CON Act. See, e.g., MRI at Belfair v. S.C. Dep't of Health and Env'tl. Control, 392 S.C. 314, 321-22, 709 S.E.2d 626, 630 (2011) (holding that the Department's method of allocating costs must be consistent with the goals of the CON Act). One of the goals of the CON Act is cost containment. S.C. Code Ann. § 44-7-120 (2002). Ms. Tibshrary testified as to the Department's position that a reduction in total project cost would not be considered a substantial change pursuant to the CON Regulation, because a project with a lower total capital cost would better meet the CON goal of cost containment. [R. p. 372, line 24 – p. 373, line 10]. Ms. Platt, an expert health planner, testified that cost containment measures whether a service can be provided in the most cost effective way possible, to keep the cost to the health care system as low as possible, while still meeting the needs of the patients. [R. p. 265, lines 2-6]. Ms. Platt testified that if an applicant can implement the same project in a most cost efficient manner, this is not a substantial change in the project. [R. p. 266, lines 20-24].

The Department's interpretation of the term substantial with regard to the CON goal of cost containment is entitled to the most respectful consideration, and should not be overruled absent compelling reasons. Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 515, 560 S.E.2d 132, 133 (2002). There is substantial evidence in the record to support the ALC's finding that Coastal's ability to decrease the cost of its project does not give rise to a substantial change.

e) Project Review Criteria

The ALC's determination that the amendments to the project do not substantially change the project's compliance with project review criteria is supported by the record. Mr. Grice and Ms. Tibshrary both testified that project review criteria are relevant, in terms of whether the changes affect the issues and criteria that were deemed to be important at the time of review. [R. p. 323, line 10 – p. 324, line 2; p. 371, lines 2-14]. Ms. Tibshrary testified that the amended project still met all the same project review criteria as in the original CON application. [R. p. 376, lines 6-12]. The need for the project did not change, since the project is serving the same patients that Coastal proposed to serve in the application. [R. p. 258, line 22 – p. 259, line 22; p. 374, lines 11-18]. Accessibility and distribution did not change, since the MRI is located at the hospital as proposed in the CON application and is serving the same types of patients as proposed in the CON application. [R. p. 262, line 24 – p. 263, line 6]. The MRI is accessible twenty-four hours a day, seven days a week, as originally proposed; normal business hours for the MRI are between 7:00 a.m. and 4:00 p.m., but scans are sometimes performed in the evenings, and a technician is on call twenty-four hours a day, seven days a week, to perform scans when needed on an emergency basis. [R. p. 250, lines 10-19]. Acceptability did not change, since the MRI is being utilized by physicians to service patients and has the support of the community, including physicians, as evidenced in the CON application.. [R. p. 263, lines 17-25; p. 264, lines 18-21; p. 374, line 23 – p. 375, line 5]. As amended, the project better meets cost containment and financial feasibility. [R. p. 265, line 22 – p. 266, line 2; p. 266, lines 20-

24; p. 373, lines 3-9; p. 375, lines 12-21]. There is no adverse impact, as Belfair's scan volume has continued to grow since Coastal began operating its MRI unit. [R. p. 270, line 14 – p. 271, line 4; p. 375, line 22 – p. 376, line 5]. There is substantial evidence in the record to support the ALC's finding that Coastal's proposed changes did not amount to a substantial change in project.

The Court of Appeals properly affirmed the ALC's finding that Coastal's proposed changes to its MRI project did not give rise to a substantial change. Accordingly, the Court should not grant the petition for certiorari as to this question because there is substantial evidence in the record to support the ALC's findings that the amendments to Coastal's CON project are not substantial.

V. The Court of Appeals properly found that Petitioner failed to preserve its burden of proof argument for review.

The Court of Appeals properly found Petitioner's argument that the ALC erroneously heightened the burden of proof by including the phrase "enough to warrant voiding the CON" is not preserved for review. Accordingly, the petition for a writ of certiorari should be denied as to this question.

In its October 23, 2009 final order and decision, the ALC concluded that "Belfair must prove by a preponderance of the evidence that changes to [Coastal]'s MRI project are substantial enough to warrant voiding the CON." [R. p. 19]. Belfair failed to raise a challenge to the language in its motion for reconsideration filed November 5, 2009. [R. pp. 75-82]. The ALC's amended final order and decision, filed November 24, 2009, contained the same language regarding the burden of proof. [R. p. 32]. Again, Belfair did not contest this finding. In order to preserve an issue for review on appeal, it must

be raised to and ruled on by the ALC. S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007) (Issues not raised to and ruled upon by the trial court will not be considered on appeal); Knight v. Waggoner, 359 S.C. 492, 597 S.E.2d 894 (Ct. App. 2004) (arguments made for first time on appeal are not preserved for review). By failing to raise its objection to the burden of proof language to the ALC, Belfair failed to preserve the argument for appellate review. Accordingly, the petition for a writ of certiorari should be denied as to this issue because it is not preserved for this Court to review.

VI. The Court of Appeals did not err in finding the issue of transfer of ownership moot.

Petitioner's argument that Coastal failed to fully implement its CON project before its sale to Tenet Health System Medical, Inc. (Tenet) on July 1, 2007 is without merit. Accordingly, the petition for a writ of certiorari should be denied as to this issue.

Pursuant to the CON Act and Regulation, a CON is non-transferable, and any actual transfer or attempt to make a transfer results in the immediate voidance of the CON. S.C. Code Ann. § 44-7-230(E) (2002); 24A S.C. Code Ann. Regs. 61-15 § 604 (2011). The sale of an entity holding a CON results in the transfer and voidance of the CON. Id.

On June 26, 2007, Coastal fully implemented its CON and submitted a project completion report to the Department. [R. p. 367, lines 9-10; p. 1381]. On June 27, 2007, the Department determined the MRI project to be complete and closed the file on Coastal's CON. [R. p. 367, lines 13-15; p. 962]. On July 1, 2007, three days after the MRI project was fully implemented, Coastal was sold to Tenet. [R. p. 34].

An issue becomes moot when judgment, if rendered, would have no practical effect upon the existing controversy. Mathis v. S.C. State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). Any judgment rendered regarding Belfair's transfer of ownership argument would have no practical effect upon the case. The ALC determined Coastal's changes to its CON project were not substantial and that Coastal's CON was fully implemented prior to its sale to Tenet. [R. p. 34]. The ALC's determination is supported by substantial evidence in the record. Ms. Tibshrary testified that there would be no reason for the July 1, 2007 change of ownership to affect Coastal's CON, because the project was complete, the CON fulfilled, and the CON file closed; at the time the project was deemed fully implemented, the CON essentially no longer existed. [R. p. 368, lines 3-9]. The ALC's finding that the changes were not substantial rendered the issue of transfer of ownership moot.

Moreover, even if the changes to the CON project were substantial, then the changes would not have been permitted under the CON issued by the Department. See S.C. Code Ann. § 44-7-230(A) (2002) (A CON is valid only for the project described in the CON application); 24A S.C. Code Ann. Regs. 61-15 § 605 (2011) (If an applicant makes changes to their CON, the Department shall determine if those changes are substantial and thereby constitute a new project). If Coastal's changes were invalid under the CON, which has long since expired, then the CON is void, regardless of the transfer of ownership. Either way, the issue of transfer of ownership is moot.

CONCLUSION

Based on the foregoing arguments, the Department respectfully requests that the Court deny Belfair's petition for a writ of certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jaimie Presley, Paralegal for the South Carolina Department of Health and Environmental Control, do hereby certify that I have on this 19th day of March, 2012, served a copy of **RESPONDENT SCDHEC'S RETURN TO PETITION FOR A WRIT CERTIORARI** upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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S.C. Supreme Court

SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL

By: Jaimie Presley
Jaimie Presley, Paralegal

Date: March 19th, 2012