THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

APPELLATE CASE NO.: 2019-000358
ADMINISTRATIVE LAW COURT CASE NO.: 16-ALJ-07-0386-CC

Trident Medical Center, LLC, d/b/a Trident Medical Center.....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.....Respondents below,

Of Which South Carolina Department of Health and Environmental Control is a.....Respondent,

And Roper St. Francis Hospital – Berkeley, Inc., d/b/a Roper St. Francis Hospital – Berkeley is the.....Appellant.

APPELLANT'S FINAL BRIEF

James G. Long, III
Jennifer J. Hollingsworth
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.771.8900
JLong@nexsenpruet.com
JHollingsworth@nexsenpruet.com

Attorneys for Appellant

February 4, 2020
Columbia, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT ERR IN REFUSING TO GIVE DEFERENCE TO DHEC'S INTEPRETATION OF ITS HEALTH PLAN.

II. DID THE ADMINISTRATIVE LAW COURT RELY ON FINDINGS OF FACT THAT ARE IRRELEVANT, CLEARLY ERRONEOUS, AND LACKING SUBSTANTIAL EVIDENCE IN ORDER TO CONCLUDE THE DEPARTMENT'S INTERPRETATION OF ITS HEALTH PLAN WAS ARBITRARY.

III. DID THE ADMINISTRATIVE LAW COURT ERR IN CONCLUDING THAT AFFECTED PERSONS LACKED NOTICE OF THE PLANNED CLOSURE OF THE CATHETERIZATION LABORATORY.

IV. DID THE ADMINISTRATIVE LAW COURT ERR IN FAILING TO GIVE WEIGHT TO THE INCONSISTENT POSITIONS OF THE RESPONDENT DURING DHEC'S REVIEW OF THE APPLICATION.

STATEMENT OF THE CASE

This proceeding involves a single Certificate of Need ("CON") Application for the establishment of diagnostic cardiac catheterization services in Berkeley County, South Carolina. Appellant Roper St. Francis Hospital–Berkeley ("Roper Berkeley") is one of four hospitals that comprise the Roper St. Francis Healthcare System ("Roper St. Francis"). The CON Application proposing to establish diagnostic cardiac catheterization services at the 50-bed hospital being constructed at Carnes Crossroads in Berkeley County was filed on May 9, 2016. (R. p. 753) Roper Berkeley proposed that upon approval of the CON Application, the diagnostic cardiac catheterization laboratory in which cardiac catheterization services are performed at Bon Secours St. Francis Xavier Hospital ("St. Francis"), a sister facility to Roper Berkeley within the Roper St. Francis System, would be permanently closed to cardiac catheterization services.

The Department of Health and Environmental Control ("DHEC" or "the Department") reviewed Roper Berkeley's CON Application under the *2015 South Carolina Health Plan* ("2015 Health Plan"), and subsequently approved it on July 25, 2016. On August 17, 2016, Roper St. Francis notified the Department that it permanently closed the diagnostic cardiac catheterization laboratory at St. Francis effective August 1, 2016. On September 21, 2016, Respondent Trident Medical Center, LLC, d/b/a Trident Medical Center ("Trident") filed a Request for Final Review Conference with the DHEC Board, which was denied without review. Trident then requested a contested case hearing in the Administrative Law Court ("ALC") challenging the Department's decision to approve Roper Berkeley's CON Application for the establishment of diagnostic cardiac catheterization services in Berkeley County. Trident challenged the Department's decision on the grounds that Roper Berkeley's CON Application did not comply with the 2015 Health Plan. (R. p.

44) The parties filed prehearing statements in accordance with the Rules of the ALC. (R. p. 222; R. p. 238; R. p. 244)

The parties conducted discovery and prepared the matter for a hearing. Prior to the hearing, the parties entered a Stipulation of Facts that, among other things, limited the scope of the contested issues to the single issue of whether the Roper Berkeley CON Application substantially complied with the 2015 Health Plan, or more specifically, Standard 3 of the Standards for Diagnostic Cardiac Catheterization services. (R. p. 261) Prior to the commencement of the hearing, Roper Berkeley submitted a pre-trial memorandum on statutory construction and agency deference doctrine. (R. p. 248) A contested case hearing on the merits was held before the Honorable H.W. Funderburk, Jr. on July 24 and 25, 2018, for a total of two days of testimony. During the hearing, all three parties presented witnesses and offered exhibits in support of their respective positions. A total of three witnesses testified at the hearing, and the ALC admitted 18 exhibits in evidence. The following two witnesses were designated as experts in the noted areas of expertise: Daniel Sullivan in the areas of health planning and the Health Plan on behalf of Trident and Katherine Platt in the areas of health planning and the Health Plan on behalf of Roper Berkeley. (R. p. 264) In addition to these two experts, the Court heard testimony from Louis Eubank, Chief of the Bureau of Healthcare Planning and Construction for DHEC.

On December 3, 2018, Judge Funderburk issued an Order reversing the Department's decision to approve Roper Berkeley's CON Application, thereby denying Roper Berkeley's CON Application. (R. p. 1) Roper Berkeley filed a motion to alter or amend the judgment on December 13, 2018, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure ("SCRCP") and Rule 68 of the Rules of Procedure for the ALC ("SCALC"). (R. p. 153) On January 5, 2019, Trident filed a response to Roper Berkeley's motion to alter or amend. (R. p. 187) On January 14,

2019, Roper Berkeley filed a reply to Trident's response in further support of its motion to alter or amend. (R. p. 202) Thereafter on January 18, 2019, Trident submitted a "sur-reply" in opposition to Roper Berkeley's motion to alter or amend. (R. p. 215) Finally, on February 21, 2019, Judge Funderburk issued an Amended Final Order, which was stated to substitute the previous December 3, 2018, Final Order. (R. p. 20) The Amended Final Order reiterated Judge Funderburk's previous decision to reverse the Department's approval of Roper Berkeley's CON Application.

Roper Berkeley respectfully disagrees with the final decision of the ALC and strongly believes that the ALC erred in reversing the Department's approval of the CON Application, and erred in concluding that Roper Berkeley's CON Application failed to substantially comply with Standard 3 of the 2015 Health Plan. Accordingly, Roper Berkeley has filed this appeal seeking to reinstate the Department's approval of the CON Application, reversing the decision of the ALC.

STATEMENT OF FACTS

This matter arises under the regulatory program by which Certificates of Need are issued by the State of South Carolina for the development of health care facilities and services in this State. The regulatory scheme consists of the State Certification of Need and Health Facility Licensure Act ("CON Act"), S.C. Code Ann. § 44-7-110, *et seq.*; the regulations promulgated thereunder, 24A S.C. Code Ann. Regs. 61-15 ("CON Regulations"); and a Health Plan which is revised at least biannually. The purposes of the CON Act and thus the regulatory program itself are 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 high quality services are provided in health facilities in this State." *See* S.C. Code Ann. § 44-7-120. The primary vehicle by which the CON program is implemented, and its stated goals achieved, is the requirement that a healthcare provider apply for, and receive, a CON from DHEC prior to undertaking certain major projects or providing certain new services. *See* S.C.

Code Ann. §§ 44-7-120, -160. In determining whether to grant or deny an application for a CON, the Department evaluates the proposed project under the review criteria found in the CON Regulations and under the policies and standards set forth in the applicable South Carolina Health Plan. *See id.* at § 44-7-210(C).

As part of Roper St. Francis's commitment to bring needed health services to the residents of Berkeley County and surrounding communities, Roper Berkeley sought to add diagnostic cardiac catheterization services[1] to those services slated for the hospital under construction at Carnes Crossroads. (R. p. 21) It is undisputed that the Roper St. Francis System provides cardiac catheterization services to a substantial portion of patients originating from Berkeley County. In fact, the data reflects that Roper Hospital in downtown Charleston provides cardiac catheterization services for more than a quarter of the Berkeley County residents requiring interventional cardiovascular care. (R. p. 778) Furthermore, Roper Berkeley's intention to bring health services closer to its patient base currently traveling from the Berkeley and Dorchester County areas to downtown Charleston was thoroughly litigated in Trident's challenges to DHEC's approval of the Roper Berkeley Hospital CON Application in 2008, and withstood scrutiny at multiple levels of appeal, including this Court. *Trident Med. Ctr., LLC v. S.C. Dep't of Health and Envtl. Control*, 412 S.C. 341, 355, 772 S.E.2d 177, 184 (Ct. App. 2015).

At the time Roper Berkeley's CON Application was being reviewed, the providers of cardiac catheterization services in the then-applicable service area were the Medical University of South Carolina ("MUSC"), Roper Hospital, St. Francis Hospital, and Trident.[2] (R. p. 22) MUSC

---

[1] A diagnostic catheterization is a procedure that involves threading a catheter through a vessel and using imaging equipment to photograph what is happening in those vessels. (R. p. 640, lines 2-13)

[2] Cardiac catheterizations are performed in catheterization laboratories. Laboratories may be designated as providing only diagnostic catheterization services or may be designated as a

is also the only provider in the State of South Carolina that performs pediatric catheterization services. (R. p. 1244) The Roper St. Francis System had a total of four (4) catheterization laboratories ("cath labs") – three (3) comprehensive cath labs at Roper Hospital and one (1) diagnostic cath lab at St. Francis. (R. p. 28) In 2014, St. Francis reported in its Joint Annual Report ("JAR") to the Department that 4 diagnostic catheterization procedures had been performed in its cath lab. (R. p. 28) In 2015, St. Francis reported in its JAR to the Department that 2 diagnostic catheterizations had been performed. (R. pp. 28-29) In that same time period, Roper Hospital performed 1,578 diagnostic and 896 therapeutic procedures for a total of 3,370 equivalents[3] (or 1,123 per lab) in 2014, and 1,568 diagnostic and 883 therapeutic procedures for a total of 3,334 equivalents (or 1,111 per lab) in 2015. (R. p. 776) In stark contrast, the utilization of the Roper Hospital cath labs was in excess of 90% of capacity in 2012 through 2015. (R. p. 776) The uncontroverted testimony was the underutilization of the St. Francis cath lab was a result of the close proximity between Roper Hospital and St. Francis, and the referral practices and tendencies of the treating physicians. (R. p. 683, lines 14-20) The two hospital campuses are roughly seven miles apart, both on the Charleston peninsula. (R. p. 747, line 25 – p. 748, line 6)

With the exception of the diagnostic cath lab at St. Francis Hospital, all of the providers of cardiac catheterization services in the service area reflected high utilization. (R. p. 1244) Moreover, the subsequently enacted *2017-2018 South Carolina Health Plan*, in effect as of the contested case hearing, reduced the utilization threshold for approval of new diagnostic cardiac

---

comprehensive catheterization laboratory if both diagnostic and therapeutic catheterizations are provided. Roper Berkeley's CON Application seeks to provide only diagnostic catheterizations in a diagnostic catheterization laboratory.

[3] Equivalents are used in evaluating capacity for cardiac catheterization services, with diagnostic cardiac caths weighted as 1.0 and more complex procedures weighted at greater than 1.0 (*i.e.* therapeutic cardiac caths are weighted as 2.0, pediatric diagnostic cardiac caths are 2.0, and pediatric therapeutic cardiac caths are weighted as 3.0). (R. p. 1168)

catheterization services from 500 to 350 procedures annually. (R. p. 534, line 19 – p. 535, line 14) Prior to the contested case hearing, Trident abandoned any challenge to DHEC's approval of the CON Application based on whether the cath labs at Trident, Roper Hospital, and MUSC satisfied the utilization threshold under Standard 3 of the 2015 Health Plan. (R. p. 261; R. p. 22) As a result, and as set forth in the Stipulation of Facts, there was no challenge to the Department's determination that Roper Berkeley's CON Application satisfied all other requirements of the Health Plan, including Standard 4, and satisfied all of the project review criteria applicable to the proposed project, including the community need criterion and adverse effects criterion in Regulation 61-15. (R. p. 264; R. pp. 1170-1171); S.C. Code Ann. Regs. 61-15 § 802.

Roper Berkeley's CON Application proposed to establish diagnostic cardiac catheterization services at the Roper Berkeley Hospital under construction in Goose Creek, Berkeley County. (R. p. 753) Prior to Roper Berkeley filing its CON Application, East Cooper Medical Center ("East Cooper") also filed a CON Application to establish a cath lab in Mount Pleasant. (R. p. 1012; R. p. 28) Roper Berkeley notified DHEC by letter that it was an affected person with respect to East Cooper's CON Application on April 20, 2016. (R. p. 1080); S.C. Code Ann. § 44-7-210. DHEC notified the public that the Roper Berkeley CON Application had been accepted for filing and deemed complete in the May 27, 2016 State Register in accordance with the CON Act. (R. pp. 965-976); S.C. Code Ann. §§ 44-7-200(D), -210(A). During staff review, Trident participated as an affected person with respect to Roper Berkeley's CON Application, but not to East Cooper's CON Application, even though both Applications sought to establish diagnostic catheterization services in the service area in which Trident provides similar services. (R. p. 28) Trident's expert testified that Trident was not concerned about the East Cooper CON Application. (R. p. 415, line 22 – p. 416, line 4; R. p. 420, lines 6-16)

Louis Eubank, the CON Program Director for DHEC at the time, served as the staff reviewer of East Cooper's CON Application. (R. p. 30) It was as a result of East Cooper's position in its CON Application that the cath lab at St. Francis should not be considered in DHEC's review under the 2015 Health Plan that Mr. Eubank approached Roper St. Francis regarding the underutilization of the St. Francis cath lab. (R. p. 31) Mr. Eubank requested that Roper St. Francis propose a solution in order to avoid potential enforcement proceedings against St. Francis. (R. p. 31) In response to DHEC's request for a proposal as an alternative to contested enforcement proceedings,[4] Roper St. Francis proposed to close the cath lab at St. Francis if the Department approved a CON Application to add diagnostic catheterization services at Roper-Berkeley Hospital. (R. p. 31) The net result of the proposal was that the Roper St. Francis System would still have four (4) cardiac cath labs, but one cath lab would be better distributed in Berkeley County.

Both East Cooper and Roper Berkeley's CON Applications were reviewed under the 2015 Health Plan, which was enacted August 13, 2015. (R. p. 33) Trident opposed the Roper Berkeley CON Application during DHEC staff review, but elected not to oppose the East Cooper CON Application. (R. p. 28; R. p. 415, line 22 – p. 416, line 4; R. p. 420, lines 6-16) Trident's grounds for opposition are found in two letters to the Department, one of which was authored by Trident's health planning expert, Mr. Sullivan. (R. p. 939; R. pp. 942-953) In a decision letter dated July 25, 2016, Mr. Eubank approved Roper Berkeley's CON Application to add diagnostic catheterization services to Roper Berkeley Hospital, conditioned upon the closure of the St. Francis cath lab. (R.

[4] As reflected in the record, Roper St. Francis did not agree with the Department's belief that the cardiac catheterization program at St. Francis Hospital was in violation of any provision that would warrant enforcement proceedings. (R. p. 1081)

p. 35; R. p. 958) On the same day, Mr. Eubank also approved East Cooper's CON Application to add diagnostic catheterization services in Mount Pleasant. (R. p. 35)

In a letter dated July 26, 2016, DHEC requested confirmation from Roper St. Francis that the St. Francis cath lab would be closed no later than August 26, 2016. (R. p. 35; R. p. 978) On August 17, 2016, St. Francis notified the Department that it had closed the cath lab to diagnostic cardiac cath services as of August 1, 2016, in accordance with the proposal in the CON Application and the condition of approval. (R. p. 35; R. p. 979) Trident subsequently challenged the Department's authority to approve Roper Berkeley's CON Application in compliance with the 2015 Health Plan, but notably chose not to challenge the Department's authority to approve East Cooper's CON Application, which was approved on the same day using the same Standards in the same Health Plan. That Trident has strenuously challenged and sought to foreclose Roper St. Francis's presence in Berkeley County is a matter of widespread public knowledge, not the least of which being the 6 year legal battle to begin construction on the first hospital in Berkeley County, whose doors finally opened on October 4, 2019, albeit without diagnostic cardiac catheterization services, such services also no longer available at St. Francis Hospital because of Roper St. Francis's compliance with the Department's directives.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) establishes the standard of review for appeals from the ALC." *Abel v. S.C. Dep't of Health and Envtl. Control*, 419 S.C. 434, 437, 798 S.E.2d 445, 446 (Ct. App. 2017) (quotation omitted). The APA provides that this Court "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). "Substantial evidence is not merely a scintilla of evidence, nor is it evidence viewed blindly from one side." *Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573, 580, 595 S.E.2d 851, 855 (Ct. App. 2004). The petitioner in the contested case proceeding "bore the burden of providing that [the] requested certificate of need should be denied." *Id.* at 581, 595 S.E.2d at 855; *see also* S.C. Code Ann. § 44-7-210(E).

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT ERRED IN REFUSING TO GIVE DEFERENCE TO DHEC'S INTEPRETATION OF ITS HEALTH PLAN.

The fundamental issue in dispute and now subject to this appeal is whether Roper Berkeley's CON Application to add diagnostic cardiac cath services at the Roper Berkeley Hospital under construction in Goose Creek was in compliance with the 2015 Health Plan as determined by DHEC and, more specifically, whether DHEC's determination that the St. Francis cath lab was not an existing lab for purposes of Standard 3 in the Health Plan was entitled to deference by the ALC. The ALC's reversal of the Department and denial of the CON Application was based on the ALC's disagreement with the Department's belief that the evaluation of what are "existing labs" for purposes of planning additional diagnostic cardiac cath services can be a future point in time (*viz.* when the CON is issued to the applicant), as opposed to the ALC's acceptance of Trident's argument that it must be evaluated at the time the CON application is filed and reviewed. Roper Berkeley submits there is no evidence to support that DHEC's interpretation was

arbitrary, capricious, or manifestly contrary to the Health Plan, and as such the ALC's reversal of the Department's decision was in error.

A. The South Carolina Health Plan and Rules for Interpretation.

The South Carolina Health Plan is a planning document promulgated by DHEC in accordance with the legislative mandates found in the CON Act, which provides that DHEC "is designated the sole state agency for control and administration of the granting of Certificates of Need and licensure of health facilities and other activities necessary to be carried out under" the Act. S.C. Code Ann. § 44-7-140. Among the duties of the Department under the CON Act is preparation and promulgation of the South Carolina Health Plan with the advice of a health planning committee, which is then approved by the DHEC Board. The 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." *Id.* at § 44-7-180(B). Here, the ALC concluded that an undefined term in the South Carolina Health Plan had a meaning different than the Department's interpretation, and that the Department's interpretation was therefore arbitrary and not worthy of deference. That at-issue undefined term is found in the Standards for Diagnostic Cardiac Catheterization Services in the 2015 Health Plan. (R. pp. 1167-1171)

It is undisputed that the Health Plan is the Department's document and is subject to interpretation by the Department in carrying out the statutory responsibilities set by the General Assembly. S.C. Code Ann. §§ 44-7-140, -180; *see also* R. p. 388, line 16 – p. 389, line 5; R. p. 390, lines 2-4. As the agency charged not only with the creation of the Health Plan but the overall responsibilities for operation and control of the CON Program, it is the Department's intent that prevails in interpreting the meaning of the Health Plan. *See* S.C. Code Ann. § 44-7-140; *see also Marlboro Park Hosp.* 358 S.C. at 578-79, 595 S.E.2d at 854. As noted by the United States Supreme Court in the seminal opinion of *Chevron U.S.A., Inc. v. Natural Resources Defense*

Counsel, Inc., 467 U.S. 837 (1984), it has long been the judicial policy of this country that courts must defer to reasonable agency constructions of statutory provisions that the agency is charged with administering. *See Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.") The General Assembly has specifically instructed that the ALC "shall give consideration to the provisions of [APA] Section 1-23-330 regarding the department's specialized knowledge." S.C. Code Ann. § 44-1-60(F)(2). That provision of the APA instructs that DHEC's "experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence." S.C. Code Ann. § 1-23-330(4).

When interpreting a regulation, the ALC and this Court 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, 732 S.E.2d 191, 195 (2012). Likewise, statutory construction principles apply to the interpretation of the Health Plan. *Trident Med. Ctr.*, 412 S.C. at 355, 772 S.E.2d at 184 ("[W]e may interpret the State Health Plan using the rules of statutory construction applied to regulation with one caveat, each section of the State Health Plan must be read as a whole.") Though interpreted using the same principles, the Health Plan is not approved by the General Assembly and the CON Act does not mandate a narrow or strict interpretation of the Health Plan. *Compare Evening Post Pub. Co. v. Berkeley County School Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011) ("FOIA is remedial in nature and should be liberally construed to carry out its purpose."); *Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("To give effect to this legislative intent, workers' compensation statutes are construed liberally in favor of coverage.") Instead, the CON Act requires that in order to be approved, an application must "comply" with the Health Plan

(Section 44-7-210(C)) and DHEC cannot approve an application that is "inconsistent" with the Health Plan (Section 44-7-180(B). Determining *consistency* and *compliance* necessarily requires the exercise of judgment by the Department in review of an application, and Trident's expert conceded there is no definition for what is "consistent with the Health Plan" or for what it means to "satisfy" the standards in the Health Plan. (R. p. 460, line 18 – p. 461, line 8) There is no requirement that an application "strictly comply" with the Health Plan. (R. p. 398, lines 4-7) Deference to agency interpretations "is all the more warranted" where "a complex and highly technical regulatory program" is involved and "the identification and classification of relevant criteria . . . entail the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotations omitted).

B. The Appropriate Analysis on Review.

1. The two-step process for agency deference.

In South Carolina, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). (reversing lower court's rejection of Board's interpretation of licensing requirements and authority to require additional examination). The matter of agency deference, and particularly the deference to DHEC with respect to its own regulations, was discussed at length in *Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) (herein "*Kiawah II*"). In *Kiawah II*, the Supreme Court detailed the two-step process for determining when agency deference is appropriate.

> First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. If the statute or regulation is silent or ambiguous with respect to the specific issue, the court must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.

Id. at 32-33, 766 S.E.2d at 717 (internal quotations omitted) (citing *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) and *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The Supreme Court reiterated, "our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations *unless there is a compelling reason to differ.*" *Kiawah II*, 411 S.C. at 34, 766 S.E.2d at 718 (internal quotation omitted) (emphasis added). Compelling reasons to differ exist only if the interpretation is "'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 36, 766 S.E.2d at 718 (quoting *Chevron*, 467 U.S. at 844).

In *Kiawah II*, the Department's interpretation of the "area" to be considered in whether to permit the construction of a bulkhead and revetment along the shoreline of Kiawah Island pursuant to a Department regulation was rejected by the ALC as being contrary to the meaning of "area" within the regulation. *Kiawah II*, 411 S.C. at 32, 766 S.E.2d at 717. In reversing the ALC, the Supreme Court held that "DHEC's interpretation is neither arbitrary, capricious, nor manifestly contrary to the statute. To the contrary, DHEC's interpretation is reasonable and consistent with its statutory authority." *Id.* at 35, 766 S.E.2d at 719. The *Kiawah II* Court considered all of the authority vested in the agency to enforce and administer the coastal zone management program, as well as the stated policies behind the empowering Act to conclude the Department's interpretation was sound. *See id.*

2. Standard 3 is silent or ambiguous as to what is an "existing lab."

In the Health Plan under which the Roper Berkeley CON Application was reviewed, Standard 3 of the Diagnostic and Mobile Cardiac Catheterization Services Standards, provides:

> New diagnostic catheterization services, including mobile services, shall be approved only if all existing labs in the service area have performed a minimum of 500 diagnostic catheterization procedures per laboratory during the most recent year.

(R. p. 1171) Relevant to the issue here is the definition of the service area in Standard 2:

> The service area for a diagnostic catheterization laboratory is defined as all facilities within 45 minutes' one way automobile travel time; for comprehensive cardiac catheterization laboratories the service area is all facilities within 60 minutes' one way automobile travel time; a pediatric cardiac program should serve a population encompassing at least 30,000 births per year, or roughly two million people.

(R. pp. 1170-1171) The Health Plan does not define what an "existing lab" is for purpose of Standard 3, nor does the Health Plan address how "existing labs" are different than "all facilities" in Standard 2. (R. p. 407, lines 2-21) The ALC concluded that "'existing' as used in Standard 3 means that a lab is open and is offering and has the capacity to provide catheterization services to patients, as Bon Secours [St. Francis] did, at the time a CON application is filed and under review." (R. p. 38) The ALC's finding that this definition of "existing" comports with the ordinary meaning references the Oxford English Dictionary, a source not previously raised in the proceedings. (R. p. 38) The evidence at the hearing referenced the Merriam Webster Dictionary definition, which comports with the Department's interpretation of the Standard, but the ALC rejected this definition. (R. pp. 39-40; R. p. 659, line 14 – p. 660, line 9)

The ALC's conclusion that the language of the Standard is clear is contrary to the substantial evidence in the record. Trident's expert testified that there is a "gap in the Standard," because not being defined, it is ambiguous whether "existing lab" would or would not include an approved but not yet operational laboratory. (R. p. 408, line 14 – p. 409, line 11) This is so because the Health Plan is a *planning* document, necessarily evaluating *future needs* for health services and facilities in South Carolina. S.C. Code Ann. § 44-7-120 (stating the purpose of the CON Act includes guiding the establishment of services that *will best serve* public needs). The CON Act mandates the Health Plan must at a minimum include "standards for distribution of . . . specified health services . . . including scope of services *to be provided* . . . other factors relating to proper placement of services, and *proper planning* of health care facilities." S.C. Code Ann. § 44-7-

180(B)(3) (emphasis added); *see also* S.C. Code Ann. Regs. 61-15 § 106(3). "[H]ealth planning is a future-looking practice." (R. p. 659, line 22 – p. 660, line 9) Given the materially different definitions used by the Department and the ALC to interpret the meaning of "existing lab," it is apparent that the regulatory term is anything but clear.

3. Deference to DHEC's interpretation.

Where DHEC's interpretation is both reasonable and consistent with the plain language of the Health Plan, the ALC has "no reason to deviate from DHEC's construction and application." *Murphy*, 396 at 640-41, 723 S.E.2d at 195. In the decision letter approving the Roper Berkeley CON Application, DHEC finds that the proposed project "is consistent with the South Carolina Health Plan enacted August 13, 2015 (Plan)." (R. p. 958) As to the CON Application's compliance with Standard 3, DHEC specifically addresses the "one notable exception" to the 500 procedure threshold and finds,

> The Department explained this inconsistency to the Applicant as agent for both Roper St. Francis Hospital – Berkeley and Bon Secours St. Francis Xavier Hospital. As such an agent, the Applicant agreed to shutter its diagnostic catheterization lab upon approval of the instant application, regardless of the timing of the new lab installation or any potential opposition to the instant application, thus allowing the department to discount the utilization figures of the lab at the Bon Secours St. Francis Xavier location. As such, the Department concludes that other diagnostic catheterization labs within the service area operate at such an equivalent capacity as to not preclude the addition of the diagnostic catheterization lab contemplated by the Applicant.

(R. p. 959)

Again in addressing Community Need Documentation and the CON Application's compliance with that Project Review Criteria in Regulation 61-15, the Department finds,

> Within the planning area, there are a total of 11 existing catheterization labs which are open and able to perform the services contemplated by the Applicant's Project. With the notable exception discussed previously, all labs within the planning area operate between 79% and nearly 94% capacity.

(R. p. 959) The Department's interpretation and application of Standard 3 in the 2015 Health Plan

is consistent in the decision letter approving the East Cooper CON Application, which Trident chose not to challenge. (R. pp. 1100-1101)

The Department interpreted Standard 3's use of "existing labs" to allow for consideration of the labs providing diagnostic cardiac cath services at the point in time when the applicant would be providing the services, and to not include a lab that would no longer be providing those services. The Department's interpretation is supported by the ordinary meaning of the term "existing" as in the Merriam-Webster dictionary, which defines "existing" as "to continue to be."[5] The recognition by DHEC that the St. Francis cath lab would not "continue to be" was appropriate health planning "looking at . . . what are the needs going to be in the future and when services are going to be available to meet those needs." (R. p. 660, lines 1-4) "[T]he whole purpose is to look forward and make sure that sufficient services are going to be available and accessible to the South Carolina population in the future." (R. p. 660, lines 5-9) In contrast, the ALC adopted Trident's interpretation that "existing labs" must be evaluated "at the time a CON Application is filed and under review," imposing a temporal requirement into the Standard that is not found in the language. (R. pp. 38-39) This disagreement as to the point in time when "existing" is evaluated for purposes of planning new diagnostic cardiac cath services under Standard 3 is precisely the circumstance where our jurisprudence requires the ALC to give deference to the Department's interpretation. "[The Court's] role is to apply and interpret, not rewrite, regulations." *Kiawah II*, 411 S.C. at 39, 766 S.E.2d at 720-21 (reversing the ALC's reading of a substantiality requirement into disputed regulation).

In *Trident Medical Center v. South Carolina Department of Health and Environmental Control*, Trident challenged the Department's interpretation of the Bed Transfer Provision in the

[5] Available at https://www.merriam-webster.com/dictionary/exist (last visited Sept. 1, 2019).

2008-2009 South Carolina Health Plan and asserted that the "plain language" of the provision required that the facility receiving transferred beds must be in existence at the time the application is submitted and that the transferred beds could not be used to establish a new facility in the future. *See Trident Med. Ctr.*, 412 S.C. at 349, 772 S.E.2d at 181. This Court's reasoning for rejecting Trident's challenge and affirming the ALC's deference to the Department's interpretation is directly on point:

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

Id. at 354-55, 772 S.E.2d at 185 (emphasis in original). Roper Berkeley submits that the very same analysis is applicable here. Nothing in Standard 3 or the Cardiovascular Care section of the Health Plan requires the Department to fix the determination of "existing labs" to the point in time the application is filed. As in *Trident Medical Center*, "there is no language [in the Standards] that either expressly or impliedly *requires*" that the determination of what are the "existing labs" must be "when the CON application is submitted." *Id.* Here, the Department has the flexibility to interpret that the historical volume requirement need be satisfied only by those labs that will exist when the applicant is providing the proposed services, and not apply to a lab that will be closed and will not be offering those services.

The case of *Murphy v. South Carolina Department of Health and Environmental Control*, 396 S.C. 633, 723 S.E.2d 191 (2012), is also instructive, in that it similarly considers a DHEC regulation with an undefined material term. In *Murphy*, the Department's interpretation of the word "vicinity" in its regulation evaluating the impact of a proposed activity "in the vicinity of the project" was specifically challenged. 396 S.C. at 637-38, 723 S.E.2d at 193-94. The Department

testified that the applicable "vicinity" was determined on a case-by-case basis, taking into consideration the project at issue because every project was different. *See id.* at 640, 723 S.E.2d at 195. The opponent argued that "vicinity" meant the portion of the stream to be filled. *See id.* The word "vicinity" was not defined in the regulation. *See id.* The Supreme Court explained, "[W]e interpret an undefined term in accordance with its usual and customary meaning." *Id.* at 640, 723 S.E.2d at 195. Turning to Merriam-Webster Dictionary, the Supreme Court determined that the accepted meaning of vicinity "clearly includes more than just the project; it logically incorporates the surrounding area." *Id.*

In evaluating deference to the Department in the interpretation and application of Standard 3, the ALC should have been "mindful of the General Assembly's entrustment of South Carolina's health care marketplace to DHEC for cost containment, prevention of unnecessary duplication of services, serving public needs, and ensuring high quality of healthcare services." *Trident Med. Ctr.*, 412 S.C. at 355, 772 S.E.2d at 184 (citing S.C. Code Ann. § 44-7-120). The fact that the ALC found a different definition of "existing" and adopted Trident's contrary interpretation of the point in time at which "existing labs" is evaluated does not render the definition, nor the point in time analysis, used by the Department arbitrary or capricious. Roper Berkeley respectfully submits this was error by the ALC.

II. THE ALC RELIED ON FINDINGS OF FACT THAT ARE IRRELEVANT, CLEARLY ERRONEOUS, AND LACK SUBSTANTIAL EVIDENCE IN ORDER TO CONCLUDE THE DEPARTMENT'S INTERPRETATION OF ITS HEALTH PLAN WAS ARBITRARY.

In this case, the ALC concluded the Department's interpretation of "existing labs" in applying Standard 3 "is at odds with the plain language of Standard 3, which directs the Department to apply the utilization analysis retrospectively to measure the number of services that have been performed by all existing labs in the service area during the most recent year." (R. p.

40). Notably, there is no retrospective requirement for identifying "existing labs" in the Standard. Moreover, the ALC erroneously concluded, "Interestingly, this interpretation is also at odds with positions taken by the Department in both 2010 and February 2016 when East Cooper first submitted its CON Application." (R. p. 40) The ALC addresses two exhibits that it perceives as evidence of "different interpretations of the term 'existing;'" however, these exhibits unquestionably are not prior interpretations of "existing labs" or Standard 3.

A. The 2010 Communications are Not Prior Department Interpretations of Standard 3 and are Irrelevant.

The ALC concluded that DHEC's "application of the term 'existing' is inconsistent with the prior positions taken by the Department in 2010." (R. p. 40) The 2010 communications stem from a request by East Cooper in a string of email communications with prior DHEC staff that asks,

> Les, on the attached analysis, the St. Francis cath lab is part of the equation to arrive at the equivalent procedures per lab. If this lab is removed and the denominator moves to 10, the 90% or 960 equivalent benchmark would be achieved. Since the St. Francis lab is not operational from 2007-2009 and potentially before that date, would the requirements be met to move forward with a cath lab CON application? Thanks for your guidance.

(R. p. 1303) The email exchange does not include Roper St. Francis as a recipient, and none of the parties to the email exchange testified at the contested case hearing.

The response by former DHEC staff states, in pertinent part, "We do not have the ability to 'close' the lab and remove it from the inventory. However, given that it has been out of operation for more than 3 years, it is certainly a fair question to ask whether it should be considered in the need calculations. We don't want to create a scenario where stockpiling an unused service unduly impacts the service area." (R. p. 1302) These discussions continue with an exchange of correspondence, again without copy to or involvement of Roper St. Francis, whereby East Cooper asks Beverly Brandt, a former Chief of the Bureau of Health Facilities and Services Development,

for "a determination of this catheterization laboratory to identify if it should be included in the equivalent calculation." (R. p. 1307) The response by Ms. Brandt, again without copy to Roper St. Francis, states,

> Based on our review of the standards in the 2008-2009 South Carolina Health Plan and the CON law and regulations, we have determined that we do not currently have a mechanism in place that would allow the Department to discount the existence of the St. Francis cardiac cath lab when computing the average utilization for the service area.

(R. p. 1309) Ms. Brandt did not testify at the contested case hearing.

Nowhere in these communications between East Cooper and former DHEC personnel is there a discussion of whether the St. Francis diagnostic cardiac cath program could be subject to enforcement proceedings, nor is there any evidence that Roper St. Francis was approached by DHEC to address a possible enforcement action. Instead, the exchange asks only whether the program at St. Francis could be "discounted" in the utilization formula but otherwise be unaffected by the approval of a new program. (*See* R. p. 1309) At the hearing, Mr. Eubank testified that he was aware of these 2010 communications, although they predated his employment by five years, as they were included in the materials submitted by Roper St. Francis with its affected person letter in the East Cooper CON Application. (R. p. 539, lines 3-25) He further testified that he disagreed with the determination by Ms. Brandt that there was no "mechanism" to address the St. Francis cath lab, because of his belief with regard to enforcement powers – an issue nowhere raised or addressed in the offered communications. (R. p. 549, line 5 – p. 550, line 23) Most significantly, Mr. Eubank did not consider these communications to be a "DHEC interpretation regarding the phrase, existing labs for purposes of Standard 3." (R. p. 552, lines 17-22)

At pages 9 through 11 of the Amended Final Order, the ALC makes a number of factual findings regarding the 2010 communications, despite not having any witness or affidavit testimony from any of the parties to the communications. It is clear that the question posed in 2010 was not

the question here; namely, whether a CON application for new diagnostic cardiac cath services can be approved in that service area if the St. Francis cath lab would be closed at the time the applicant proposed to provide the services. In fact, it is apparent from the communications that the "ask" was different and the testimony that the ALC did receive included Mr. Sullivan's agreement "that there is a difference between discounting the existence of a lab and allowing it to continue versus taking enforcement action in closing a lab." (R. p. 499, lines 3-7) Ms. Platt also testified that in 2010, "Ms. Brandt is saying basically I can't discount the existence or just ignore it," whereas in 2016, "Mr. Eubank is saying I'm not going to ignore it, I'm going to actually take action and I'm going to bring an enforcement action against them." (R. p. 679, line 20 – p. 680, line 18; R. p. 681, lines 9-18) And yet, the ALC arbitrarily determined these 2010 communications represented a "prior position" of the term "existing" despite having almost no similarity to the circumstances before the Department in 2016. Roper Berkeley submits that the ALC's findings regarding these 2010 communications and conclusion that they serve as precedent for an interpretation of "existing labs" for purposes of Standard 3 in the Health Plan is clearly erroneous and not supported by the evidence in the record. Moreover, the ALC's rejection of DHEC's interpretation on this basis wholly disregards that DHEC "is not estopped from changing a view [he] believes to have been grounded upon a mistaken legal interpretation." *Thomas Jefferson Univ.*, 512 U.S. at 516.

B. The 2016 Communications are Misconstrued or Misstated.

It is apparent the ALC takes a negative view of the communications initiated by DHEC to Roper St. Francis for a proposal to avoid possible enforcement action, describing the communications as, "a plan was devised in which the Department and Roper St. Francis **agreed** to the closure of the Bon Secours catheterization lab contingent upon and following approval of the CON Application for Roper Berkeley." (R. p. 34) (emphasis in original). Roper Berkeley

submits that this mischaracterization of both the documents and the testimony reflects a prejudicially negative view of the evidence by the ALC. In fact, there is no evidence that there was a "plan" between Roper St. Francis and DHEC of any sort; to the contrary, Trident acknowledged there was no evidence of an agreement in advance regarding the outcome of the CON Application's review between DHEC and Roper St. Francis. (R. p. 480, lines 5-24) Mr. Eubank testified clearly that there was no "agreement" between DHEC and Roper St. Francis "regarding the outcome of Roper's CON Application." (R. p. 558, lines 5-12; *see also* R. p. 725, line 25 – p. 726, line 7)

In addition to the negative connotations ascribed to the communications, the Amended Final Order clearly derives a "position" on the issue of whether the cath lab at St. Francis is "an existing lab" from the communications that address only whether the cath lab could be subject to DHEC's enforcement powers and make no mention of the Health Plan Standards at all. (R. pp. 34, 40-41) This illogical connection evidences the legal error of the ALC's analysis. Grasping at places within the record for use or insinuation of the word "existing" in contexts other than health planning review under the 2015 Health Plan Standards reflects a desire to disagree with the Department as to the outcome, as opposed to the necessary interpretive framework required on contested case review. Here, the Department addressed what an "existing lab" was for purposes of Standard 3 in the 2015 Health Plan, a phrase used in the health planning document that is not otherwise defined in the Health Plan, the CON Regulations or the CON Act. In the underlying decision, DHEC interpreted "existing labs" so as to consider cath labs that would "continue to be" offering the services the applicant proposed to serve, an interpretation consistent with the ordinary meaning of "existing" in the Merriam-Webster Dictionary and entirely consistent with the purpose of the Health Plan to "guide the establishment of health facilities and services." S.C. Code Ann. §

44-7-120. In fact, in response to what his expectation was regarding the future of the St. Francis cath lab at the time of the DHEC decision, Mr. Eubank testified, "[T]hey would no longer be operating or providing that service at that location." (R. p. 634, lines 4-9)

Rather than consider the Department's interpretation in light of the ordinary meaning of "existing" found in the Merriam-Webster Dictionary definition (a source repeatedly used by the appellate courts for similar purposes[6]), the ALC adopted Trident's argument that the determination of "existing labs" under Standard 3 must be made at the time the CON application is filed, not at the time the applicant would be providing services, and supported this conclusion by using a definition of "existing" from the Oxford English Dictionary, which defined "existing" as "in existence or operation at the current time."[7] (R. p. 38)

The ALC does not explain why the Merriam-Website definition is rejected to instead cite a source not previously offered in the record. As noted by the United States Supreme Court in *Thomas Jefferson University v. Shalala*, "[The Court's] task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." 512 U.S. 503, 512 (1994). In *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000), the South Carolina Supreme Court explained, "Courts should consider not merely the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *See also Chevron* at

---

[6] *E.g. Murphy, supra*; *Doe v. S.C. Dep't of Health and Envtl. Control*, 407 S.C. 623, 634-35, 757 S.E.2d 712, 718 (2014) (turning to Merriam-Webster for ordinary meaning of "impair" in accordance with the Omnibus Adult Protection Act); *Perry v. Bullock*, 409 S.C. 137, 141, 761 S.E.2d 251, 253 (2014) (turning to Merriam-Webster for ordinary meaning of "medical records" in accordance with the Freedom of Information Act).

[7] Available at https://en.oxforddictionaries.com/definition/existing.

865 (explaining that an agency may interpret a term flexibly – "not in a sterile textual vacuum"). "In interpreting a statute, the language of the statue must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 343, 713 S.E.2d 278, 283 (2011). As addressed herein, the Health Plan is instrumental in guiding the establishment of health facilities and services that best serve public needs, and DHEC's interpretation of Standard 3 clearly accords with this statutory purpose.

C. The Health Plan Provides Substantial Evidence to Support DHEC's Interpretation in its Decision Letter.

The ALC entirely ignores the Health Plan's definition of the applicable service area in Standard 2, and as a result overlooks the significance of the Standard which does not include the word "existing" and instead uses "all facilities" to define the scope, a different measurement than the historical utilization in Standard 3, which is limited to that of "all existing labs." (R. pp. 1170-1171) To determine the plain language and meaning of "existing labs" in Standard 3, the ALC was required to consider all of the Standards in the Cardiovascular Care section of the Health Plan, which includes Standard 2. *Trident Med. Ctr.*, 412 S.C. at 355, 772 S.E.2d at 184. This consideration was required in addition to the obligation to consider "the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *Branch*, 340 S.C. at 410, 532 S.E.2d at 292; *see also Town of Mt. Pleasant*, 393 S.C. at 342-43, 713 S.E.2d at 283. Roper Berkeley submits that the intentional distinction between Standard 2 and Standard 3 necessarily empowers the Department with the flexibility to determine what is existing for purposes of planning additional diagnostic cardiac cath services in a service area.

Instead, the ALC adopted an interpretation of Standard 3 that ignores and renders meaningless the word existing, in effect concluding that all labs in the service area are existing labs, even though this interpretation is clearly inconsistent with the difference in the use of "all

facilities" in Standard 2 and "existing labs" in Standard 3. Roper Berkeley believes that the ALC's interpretation is improper because the court is expected to reject a definition that renders a term meaningless or futile. *See Murphy*, 396 S.C. at 640, 723 S.E.2d at 195; *see also CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating that a statute must be read "so that no word, clause, sentence, provision or part shall be rendered suplusage, or superfluous"). The inclusion of the word "existing" in Standard 3 must preclude a reading of the Standard that the plain language means "all labs" with no flexibility to interpret what is existing for planning health care services in the future. Roper Berkeley submits that the ALC's refusal to give deference to the health planning interpretation by DHEC of Standard 3 in the 2015 Health Plan is in error, not supported by the substantial evidence in the record, and must be reversed.

III. THE ALC ERRED IN CONCLUDING PROVIDERS LACKED NOTICE OF THE PLANNED CLOSURE OF THE CATHETERIZATION LABORATORY.

The Amended Final Order's conclusion that other providers would not be able to submit competing CON applications based on a lack of "knowledge that one problematic outlier lab was about to [be] removed from the State Health Plan inventory" is in error and contrary to the substantial evidence before the ALC. (R. p. 42) The CON Act defines "competing applicants" as "two or more persons or health care facilities as defined in this article who apply for [CONs] to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities." S.C. Code Ann. § 44-7-130(5). Regulation 61-15 provides, "An application shall be considered competing if it is received by the Department no later than fifteen (15) calendar days after a Notice of Affected Persons is published in the State Register for one or more applications for similar services and/or facilities in the same service area." S.C. Code Ann. Regs. 61-15 §

103(6). In contrast, the Health Plan is a planning document that is only required to be published "at least once every two years" according to the CON Act. S.C. Code Ann. § 44-7-180(C).

The record evidences that the Roper Berkeley CON Application was published as required in the State Register. (R. pp. 973-974) The CON Act provides nothing more than this publication to trigger a competing application submission. In fact, any suggestion that applications cannot be filed unless the last published Health Plan reflected a change in the inventory would fly in the face of the purposes of the CON Act and render meaningless mechanisms like the very one identified by the ALC – the filing of a competing application with just 15 days' notice of a proposed project. S.C. Code Ann. § 44-7-130(5); S.C. Code Ann. Regs. 61-15 § 103(6). Regardless, here any interested provider knew from multiple public notices that new cardiac catheterization services were being proposed in the service area and would know of the proposed closure of the St. Francis cath lab because both of these facts were laid out in multiple public documents, including DHEC's Record for the East Cooper CON Application and the Roper Berkeley CON Application. "One cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it." *Zaman v. S.C. Bd. of Medical Exam'rs*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991).

It was Trident who raised this issue of public knowledge as if an impropriety in DHEC's approval, yet Trident obviously fully participated during DHEC staff review and was well aware of the proposed closure of the St. Francis lab. (R. p. 447, line 1 – p. 448, line 4; R. p. 449, line 12 – p. 450, line 7) In fact, Mr. Sullivan acknowledged there was public notice of the proposal regarding the St. Francis cath lab as early as April 2016. (R. p. 450, lines 14-19) Trident cannot assert alleged injuries to unidentified third parties and the ALC's inclusion of the unwarranted conclusion in the Amended Final Order was improper. *Carnival Corp. v. Historic Ansonborough*

Neighborhood Ass'n, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014) ("Courts are not bodies for the resolution of public policy and generalized grievances. Harms suffered by the public at large . . . are to be remedied by the legislative and executive branches.") The fact that the ALC made this conclusion is even more prejudicial given that all of the providers of similar services in the applicable service area were involved and thus necessarily aware of the proposed handling of the underutilized St. Francis cath lab. (R. p. 1020 (explaining that the East Cooper proposed project was developed "with support from" MUSC); R. p. 782) "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Trident Med. Ctr.*, 412 S.C. at 348, 772 S.E.2d at 181 (quotation omitted). Roper Berkeley submits that the ALC's conclusion is entirely devoid of any evidentiary support in this contested case proceeding and is clearly contrary to the CON Act and the CON Regulations.

IV. THE ALC ERRED IN FAILING TO GIVE WEIGHT TO TRIDENT'S INCONSISTENT POSITION DURING DHEC STAFF REVIEW.

It is inequitable and unfair to Roper Berkeley to ignore and disregard the materially different position taken by Trident during DHEC staff review of Roper Berkeley's CON Application as compared to the argument asserted during the contested case hearing. The record reflects that Trident's expert advised DHEC that Roper Berkeley could not be approved for an additional cath lab in the Roper St. Francis System under the transfer standard because the first criterion required that a "transfer . . . of services may be approved only if there is no overall increase in the number . . . of such services." (R. p. 950) To foreclose such consideration by DHEC staff, Mr. Sullivan opined that transferring the diagnostic cardiac cath services from St. Francis to Roper Berkeley would be "an overall increase in the number of diagnostic cath services in the service area," and quoted the requirement of Standard 3 to then explain that the Department's staff "should not recognize BSSFH's diagnostic catheterization program as an existing service merely

because (3) diagnostic caths are performed on average each year, which is not indicative of an actual program." (R. p. 951; *see also* R. p. 1133) The result of this analysis is that the cath lab at St. Francis cannot be transferred because nothing "exists" to transfer and it would be an increase in the number of such services in the service area. Very clearly, Trident informed DHEC the proposed closure was "of little consequence" and "[t]he proposed closure" of the St. Francis cath lab "contingent on the approval of the Roper-Berkeley proposal, has no relevance from a health planning standpoint." (R. pp. 942, 952)

Mr. Eubank testified that he considered the opposition arguments laid out by Mr. Sullivan in Trident's opposition letter. (R. p. 566, lines 9-22) Mr. Eubank testified that he was aware of Mr. Sullivan's position that there is "currently no legitimate cath lab program" at St. Francis, which Mr. Eubank considered to comport with East Cooper's health planner's analysis. (R. p. 567, lines 5-18) At no time prior to DHEC's decision did Trident assert that DHEC lacked the authority to approve the CON Application with the condition that the St. Francis cath lab be closed. (R. p. 568, lines 3-11) In fact, in Trident's Request for Contested Case Hearing to the ALC, Trident explained "Bon Secours' [St. Francis] cardiac cath lab *existed in name only*." (R. p. 52) Realizing that the opposition as presented to DHEC staff was unlikely to prevail on appeal, Trident implemented a new strategy to focus on the closure of the St. Francis lab as the error in the Department's approval, inconsistent and entirely dissimilar to the arguments made during DHEC staff review.

"When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997). Trident's opposition during staff review as expressed by the opinions of Mr. Sullivan represented a health planning analysis that Trident now challenges as arbitrary and capricious (*viz.* St. Francis did not have an existing diagnostic

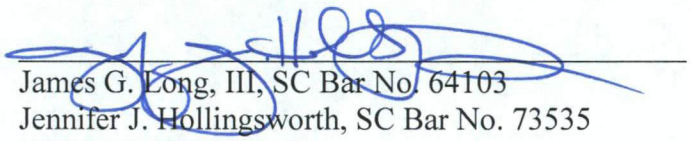
cardiac cath service). What is particularly egregious is that Trident, despite having actual notice of the proposal to close the St. Francis cath lab if approved for services at Roper Berkeley, made no mention to DHEC staff of this challenge to DHEC's authority, and thus long after Roper St. Francis closed the diagnostic cardiac cath program at St. Francis. Such a strategy runs in direct contravention to S.C. Code Ann. § 44-7-210(E), which states that "[t]he issues considered at the contested case hearing considering a Certificate of Need are limited to those presented or considered during the staff review." S.C. Code Ann. § 44-7-210(E). This obligation to present issues during staff review is to prevent exactly the type of injustice that has happened here. *See So. Dev. Land and Golf Co. v. S.C. Public Service Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993) ("Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel.") Roper St. Francis submits that the refusal of the ALC to give weight to the contrary position taken by Trident during DHEC staff review, which DHEC considered prior to approving the Roper Berkeley CON Application with the condition that the St. Francis cath lab be closed, was clearly erroneous and arbitrary.

CONCLUSION

Roper Berkeley urges this Court to reverse the decision of the ALC in its entirety. The substantial evidence at the contested case hearing did not support by a preponderance of the evidence that the Department erred in approving Roper Berkeley's CON Application. *See Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375 496 S.E.2d 17, 19 (1998) (holding that the standard of proof in an administrative proceeding is generally the preponderance of the evidence); *Nat'l Health Corp. v. S.C. Dep't of Health and Envtl. Control*, 298 S.C. 373, 379, 380

S.E.2d 841, 844 (Ct. App. 1989) (holding that the preponderance of the evidence standard applies in CON disputes). As such, the Department's reasonable interpretation of "existing labs" for purposes of planning additional diagnostic cardiac cath services under the 2015 Health Plan Standards is entitled to deference in the contested case proceeding. Therefore, this Court should find that Roper Berkeley's CON Application substantially complied with Standard 3 of the Health Plan and approval of the CON Application is not inconsistent with the Health Plan. Roper Berkeley respectfully requests this Court reinstate the Department's decision, thereby enabling Roper Berkeley to establish diagnostic catheterization services at its new hospital in Berkeley County.

Respectfully submitted,



James G. Long, III, SC Bar No. 64103
Jennifer J. Hollingsworth, SC Bar No. 73535
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426
Columbia, SC 29202
JLong@nexsenpruet.com
JHollingsworth@nexsenpruet.com

Attorneys for Appellant
Roper St. Francis Hospital – Berkeley, Inc.,
d/b/a Roper St. Francis Hospital – Berkeley

February 4, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

APPELLATE CASE NO.: 2019-000358
ADMINISTRATIVE LAW COURT CASE NO.: 16-ALJ-07-0386-CC

Trident Medical Center, LLC, d/b/a Trident Medical Center,.....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,.....Respondents below,

Of Which South Carolina Department of Health and Environmental Control is a.....Respondent,

And Roper St. Francis Hospital – Berkeley, Inc., d/b/a Roper St. Francis Hospital – Berkeley is the.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the *Final Brief of Appellant* complies with Rule 211, SCACR.

James G. Long, III, Bar #64103
Jennifer J. Hollingsworth, Bar #73535
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426
Columbia, SC 29202
Telephone: 803.540.2112
JLong@nexsenpruet.com
JHollingsworth@nexsenpruet.com

Attorneys for Appellant

February 4, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

APPELLATE CASE NO.: 2019-000358
ADMINISTRATIVE LAW COURT CASE NO.: 16-ALJ-07-0386-CC

Trident Medical Center, LLC, d/b/a Trident Medical Center,.....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,.....Respondents below,

Of Which South Carolina Department of Health and Environmental Control is a.....Respondent,

And Roper St. Francis Hospital – Berkeley, Inc., d/b/a Roper St. Francis Hospital – Berkeley is the.....Appellant.

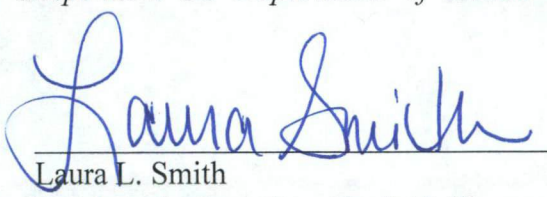
PROOF OF SERVICE

I hereby certify that I have served a copy of the *Appellant's Final Brief* on all parties of record by hand-delivering a copy of the same, addressed as follows, on this 4th day of February, 2020:

William R. Thomas, Esquire
Walter H. Cartin, Esquire
Parker Poe, LLC
1221 Main Street, Suite 1100
Columbia, SC 29202
Attorneys for Respondent, Trident Medical Center, LLC, d/b/a Trident Medical Center

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
South Carolina Department of Health
& Environmental Control
2600 Bull Street
Columbia, SC 29078

Attorneys for Respondent SC Department of Health & Environmental Control



Laura L. Smith
Legal Assistant to Jennifer J. Hollingsworth
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426
Columbia, SC 29202
Telephone: 803.540.2063
LSmith@nexsenpruet.com