

2013 WL 661486 (Ala.Civ.App.) (Appellate Brief)  
Court of Civil Appeals of Alabama.

AFFINITY HOSPITAL, LLC, d/b/a Trinity Medical Center of Birmingham,

v.

STATE HEALTH PLANNING AND DEVELOPMENT AGENCY, et al.

No. 2120090.

January 14, 2013.

Appeal from Montgomery County Circuit Court Case No. CV-2010-900053

Oral Argument Requested

**Brief of Appellant Affinity Hospital, LLC, d/b/a Trinity Medical Center of Birmingham**

[Dorman Walker](#), Balch & Bingham LLP, Post Office Box 78, Montgomery, AL 36101, 334/834-6500, [dwalker@balch.com](mailto:dwalker@balch.com).

[Carey McRae](#) ([cmcrae@babco.com](mailto:cmcrae@babco.com)), [Jennifer H. Clark](#) ([jclark@babco.com](mailto:jclark@babco.com)), Bradley Arant Boult Cummings LLP, 1819 5th Avenue North, Birmingham, AL 35203, 205/521-8000.

[Ed R. Haden](#), Balch & Bingham LLP, Post Office Box 306, Birmingham, AL 35201, 205/251-8100, [ehaden@balch.com](mailto:ehaden@balch.com).

**\*iii** TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT .....	i
TABLE OF CONTENTS .....	iii
STATEMENT OF JURISDICTION .....	vi
TABLE OF AUTHORITIES .....	vii
STATEMENT OF THE CASE .....	1
The Nature Of The Case .....	1
The Proceedings Below .....	4
Brookwood Applies For A CON For A FED And Trinity And St. Vincent's Intervene .....	6
Trinity Files Its First Motion To Dismiss .....	7
Trinity Asks For A Declaratory Ruling From The CON Review Board And The ADPH States That New Licensure Regulations Will Be Required .....	8
The Circuit Court Ruling In FSQC-AL, LLC v. Noland Health Services, Inc. And Trinity's Second Motion To Dismiss .....	9
First Appellate Proceedings In The Circuit Court Of Montgomery County .....	11
First Appellate Proceedings In The Court Of Civil Appeals .....	12
Second Appellate Proceedings In The Circuit Court Of Montgomery County .....	13
STATEMENT OF THE ISSUES .....	13
STATEMENT OF THE FACTS .....	15
*iv The State Health Plan Provides What Types Of Facilities Are Approved To Receive State Funds And When They Will Meet Patient Needs .....	16
The State Requires A Specific Healthcare Facility To Obtain A CON Before It Is Built To Ensure Consistency With The State Health Plan, Thus Confirming That The Facility Is An Approved Type Of Facility And Will Meet Patient Needs .....	18
A Proposed Healthcare Facility Must Also Comply With The State Department Of Public Health Licensure Regulations So That It Can Open For Business And Treat Patients .....	23
Location, Location, Location .....	27
STATEMENT OF STANDARD OF REVIEW .....	36
SUMMARY OF THE ARGUMENT .....	39
ARGUMENT .....	40

I. Brookwood's CON For Its Proposed FED Is Not Consistent With The State Health Plan Because The State Health Plan Has Not Approved Or Even Addressed FEDs .....	40
A. SHPDA's Issuance Of A CON For A New Type Of Healthcare Facility That Is Not Addressed By The State Health Plan Effects An End-Run Around The Cost-Control Function Of That Plan .....	40
B. The Alabama Legislature Established The SHCC And The State Health Plan To Protect The State's Treasury And To Meet Patient Issues .....	50
II. The CON Review Board Could Not Have Determined That Brookwood's FED Would Meet The Department Of Public Health' s Licensure Requirements .....	62
*v III. SHPDA Was Required To Determine That The Location Of The Proposed FED Is Appropriate, But The FED Has No Location .....	65
CONCLUSION .....	68
CERTIFICATE OF SERVICE .....	69

**\*vii** TABLE OF AUTHORITIES

Cases	
<i>Alacare Home Health Servs. v. Ala. State Health Planning &amp; Development Agency</i> , 27 So. 3d 1267 .....	64
<i>Brookwood Health Servs. v. Affinity Hosp., LLC</i> , 2012 Ala. Civ. Ap. Lexis 222 (Ala. Civ. App. 2012) .....	5, 12
<i>Daniel Senior Living of Inverness I, LLC v. STV One Nineteen Senior Living, LLC</i> , 2012 Ala. Civ. App. Lexis 25 (Ala. Civ. App. 2012) .....	37
<i>Ex parte Alabama State Health Planning Agency</i> , 594 So. 2d 106 (Ala. Civ. App. 1991) .....	61
<i>Ex parte Forest Manor Inc.</i> , 739 So. 2d 20 (Ala. 1998) .....	50
<i>Ex parte Nursing Home of Dothan, Inc.</i> , 542 So. 2d 940 (Ala. 1989) .....	61
<i>Ex parte Traylor Nursing Home, Inc.</i> , 543 So. 2d 1179 (Ala. 1988) .....	47, 50
<i>FSQC-AL, LLC v. Noland Health Services, Inc.</i> , Case No. CV-2009-9008959 (Cir. Ct. Montgomery Dec. 18, 2009) .....	9
<i>Grandview Surgical Center, Inc. v. Holy Spirit Hospital of the Sisters of Christian Charity</i> , 533 A. 2d 796 (Pa. Commw. Ct. 1987) .....	57
<i>Johnson v. Hall</i> , 10 So. 2d 1032 (Ala. Civ. App. 2008) .....	48
<i>Montgomery Rehabilitation Hospital, Inc., v. State Health Planning Agency</i> [sic], 610 So. 2d 403 (Ala. Civ. App. 1992) .....	21, 55
<b>*viii</b> <i>Mount Royal Towers, Inc. v. Alabama Board of Health</i> , 388 So. 2d 1209 (Ala. 1980) .....	61
<i>State Health Planning &amp; Dev. Agency v. W, Walker Hospice, Inc.</i> , 993 So. 2d 25 (la. Civ. App. 2008) 3 .....	6, 55
<i>Surtees v. VFJ Ventures, Inc.</i> , 8 So. 3d 950 (Ala. Civ. App. 2008) .....	43
<i>The Healthcare Authority for Medical West, an affiliate of UAB Health System v. SHPDA, the Alabama CON Review Board, and Baptist Health Systems, d/b/a Princeton Baptist Medical Center</i> , 03-CV-2012-0901619.00 .....	34
<i>Virginia Dept. of Trans. v. U.S. Environmental Protection Agency</i> , 2013 U.S. Dist. Lexis 981 (E.D. Va. Jan. 3, 2013) ..	54
Constitutional Provisions	
Ala. Const. amend. 328, § 6.03(b) .....	vi
Statutes, Rules, and Regulations	
Ala. Code § 12-3-10 .....	vi
Ala. Code § 22-4-8 .....	41
Ala. Code § 22-21-33 .....	26, 63
Ala. Code § 22-21-260(6) .....	17, 59
Ala. Code § 22-21-260(8) .....	17

Ala. Code § 22-21-260 (13) .....	passim
Ala. Code § 22-21-260(15) .....	16
Ala. Code §§ 22-21-260 to 278 .....	6, 56
Ala. Code § 22-21-261 .....	2, 6, 15, 19, 45, 46
*ix Ala. Code § 22-21-263 .....	1, 20, 43
Ala. Code § 22-21-263 (a) .....	19
Ala. Code § 22-21-264 .....	1, 20, 40, 42, 46, 50
Ala. Code § 22-21-264 (4) (f) .....	2, 65
Ala. Code § 22-21-264 (4) (g) .....	1
Ala. Code § 22-21-265(a) .....	19, 41, 47
Ala. Code § 22-21-265 (d) .....	1, 20
Ala. Code § 22-21-266 .....	41
Ala. Code § 22-21-266(1) .....	1, 20, 42, 50
Ala. Code § 22-21-274 .....	1, 20
Ala. Code § 22-21-275 .....	1, 20
Ala. Code § 22-21-278 .....	1, 20
Ala. Code § 40-18-35 (b) (1) .....	43
Ala. Code § 41-22-20(k) .....	37
Ala. Code § 41-22-20 (k)(1) .....	42
ADPH rr. 420-5-2-.01 to .04 .....	24, 56
ADPH r. 420-5-2-.01 .....	24
ADPH r. 420-5-2-.01(d) .....	24
ADPH r. 420-5-7-.03(2) (a) .....	51
CON r. 410-1-2-.19 .....	19
CON r. 410-1-4-.01 .....	19
CON r. 410-1-6-.02 .....	21, 56
*x CON r. 410-1-6-.16 .....	57
CON r. 410-1-6-.16 (1) .....	23
CON r. 410-1-6-.16 (1) (a) .....	23
CON r. 410-1-6-.18 .....	56, 57
CON r. 410-1-7-.06 (1) (a) .....	11
State Health Plan rr. 410-2-1-.01 to 410-2-5-.05 .....	40
State Health Plan rr. 410-2-1-.01 to .13 .....	52
State Health Plan. r. 410-2-1-.02 .....	46
State Health Plan r. 410-2-1-. 02 (1) .....	16
State Health Plan r. 410-2-4-.02 .....	7, 67
State Health Plan r. 410-2-4-.02(1) (a) .....	51
State Health Plan r. 410-2-4-.02(2) (a) .....	18
State Health Plan r. 410-2-4-.02(3) (a) .....	17
State Health Plan r. 410-2-4-. 02 (3) (b) .....	17
State Health Plan r. 410-2-4-. 08 .....	18
State Health Plan r. 410-2-4-.10 .....	18
State Health Plan r. 410-2-4-.12(2) .....	52
State Health Plan r. 410-2-4-. 12 (3) .....	17
State Health Plan r. 410-2-5-.04 (2) (a) .....	22
State Health Plan r. 410-2-5-.04 (2) (b) .....	22
State Health Plan r. 410-2-5-.04 (2) (c) .....	22
State Health Plan r. 410-2-5-. 04 (3) .....	22
*xi State Health Plan r. 410-2-5-. 04 (3) (c) .....	48
Ala. R. App. P. 4(a) (1) .....	vi
Ala. R. Evid. 201(b) .....	48
42 U.S.C. § § 300m-3c(2) (c) .....	61

**\*i STATEMENT REGARDING ORAL ARGUMENT**

This case is about whether the State of Alabama's health care regulatory system will be enforced or not. To guard the State's Treasury and ensure access to health care across the State, the Alabama Legislature and the State's healthcare regulations require

a proposed health care facility meet to three fundamental requirements. First, the proposed healthcare facility must be consistent with the State Health Plan so that the State will not have to pay for a redundant or speculative type of facility. Second, the proposed healthcare facility must be licensed by the State Department of Public Health so that it can open its doors and provide healthcare services. Third, the proposed healthcare facility must be located in a geographic area that will allow it to meet patient needs. SHPDA issued a CON for Brookwood's proposed Freestanding Emergency Department (FED) even though the proposed facility is not consistent with the State Health Plan (it is not even addressed by the State Health Plan), has no Department of Public Health regulations to allow it to open for business, and has no known location. Oral argument is needed to \*ii address the scope of these requirements and whether they can be ignored.

#### **\*vi STATEMENT OF JURISDICTION**

This is an appeal of a final order of a circuit court, which affirmed a final order of the Alabama State Health Planning and Development Agency (SHPDA). New C. 28. <sup>1</sup> The Court has jurisdiction over this appeal under Ala. Const. amend. 328, § 6.03(b), and Ala. Code § 12-3-10.

The circuit court entered the final judgment on September 6, 2012. New C. 28. Appellant Trinity timely filed its notice of appeal on October 18, 2012, which was the 42d day after entry of the final order appealed from. New C. 29-32; see Ala. R. App. P. 4(a) (1).

#### **\*1 STATEMENT OF THE CASE**

##### **The Nature Of The Case**

The State Health Planning and Development Agency (“SHPDA” or “the CON Review Board”) granted Brookwood a certificate of need (“CON”) for a free-standing emergency department (“FED”), and the circuit court affirmed that CON. This Court should reverse the circuit court for three reasons. First, before a CON can be issued, the type of facility must have been approved by the State Health Coordinating Committee (“SHCC”) and incorporated into the State Health Plan, so that the proposed facility is consistent with the State Health Plan. The SHCC has not approved and the State Health Plan does not include any reference to a FED. See e.g., §§ 22-21-260(13), 22-21-263, 22-21-264, 22-21-265(d), 22-21-266(1), 22-21-274, 22-21-275 (provisions of cha. 22, art. 9, “Control and Regulation of Development of Certain Health Care Facilities,” which require a CON to be consistent with the State Health Plan). Second, the CON regulations require that the proposed facility must be able to meet the licensure requirements of State Department of Public Health, but the Board has issued no regulations for an FED. § 22-21-264(4) (g) (requiring \*2 evidence of “[r]easonable potential of the facility to meet licensure standards.”). Third, the CON regulations require a specific location for the proposed facility to ensure that the facility will meet patient needs, but Brookwood owns no land (or an option to purchase land) for its proposed facility and has no location for it. § 22-21-264 (4) (f) (requiring “[e]vidence of the locational appropriateness of the proposed facility or service such as transportation accessibility, manpower availability, local zoning environmental health, etc.”).

Allowing SHPDA to issue CONs for projects that are not addressed by the State Health Plan, for which the Department of Public Health has not issued operating regulations, and which have no determined location, circumvents the Legislature's declared purpose of preventing “the construction of unnecessary and inappropriate health care facilities through a system of mandatory reviews of new institutional health services,” and ensuring that “only those health care services and facilities found to be in the public interest shall be offered or developed in the state.” § 22-21-261.

\*3 In this case, the CON Review Board put the cart before the horse, and issued Brookwood a FED CON even though FEDs are entirely new to Alabama, and the state completely lacks the regulatory framework for managing them, including (a) appropriate regulations in the State Health Plan which would tell the CON Review Board in which geographic areas FEDs are needed, how many are needed, and what the capacity of each should be, and (b) regulations by the Alabama Department of Public Health

for licensing FED facilities and telling providers how they must be operated. The CON Review Board also ignored the fact that at the time Brookwood was given a CON, Brookwood had nothing more than hopeful expectations that its FED could be located at the intersection of Highways 119 and 280, although being at this precise location was an essential part of Brookwood's justification for its FED project. Because the CON Review Board ignored these criteria and gave a FED CON to Brookwood, its decision was arbitrary and capricious, and should have been reversed by the Circuit Court of Montgomery County. Trinity should win this appeal because the CON Review Board, and the circuit court, failed to enforce the law.

#### **\*4 The Proceedings Below**

This is the second appeal of this case. The first appeal concerned whether SHPDA timely provided notice of its proceedings regarding Brookwood's CON application. The issues in this appeal are whether a CON may issue where the type of facility is not addressed by the State Health Plan, the regulations of the Department of Health with which the proposed facility will have to comply have not been written, and there is no location for the facility.

The CON Review Board granted Brookwood CON for a FED putatively located in Shelby County at the intersection of Highway 280 and Highway 119. C. 28. Trinity appealed this decision to the Circuit Court of Montgomery County, which reversed the CON Review Board on the sole basis that Brookwood failed to comply with SHPDA's public notice regulation. C. 28. The circuit court found that the CON Review Board correctly determined that Brookwood met all of the substantive CON criteria for issuance of a CON. C. 28.

Brookwood appealed to this Court the ruling that its failure to provide the required public notice meant that its CON was void, C. 4766-4767, and Trinity cross-appealed the ruling that the CON Review Board correctly determined \*5 that Brookwood met the substantive criteria for a FED CON. C. 4778-4779. After receiving oral argument, this Court reversed the circuit court's public notice ruling, and remanded the case for the circuit court to further consider whether Brookwood met the substantive CON criteria. *Brookwood Health Servs. v. Affinity Hosp., LLC*, 2012 Ala. Civ. App. Lexis 222, \*18 (Ala. Civ. App. Aug. 10, 2012) (“We remand the case to the circuit court for further consideration of Trinity's appeal from the decision to issue the CON to Brookwood. On remand, the circuit court should enter a judgment regarding the merits of the decision to issue Brookwood the CON.”).

On remand, Brookwood moved the circuit court to expedite its review and to issue summarily an order reaffirming the court's earlier decision. New C. 3 (motion) and New C. 16 (proposed order). Trinity opposed Brookwood's motion, and argued that the circuit court was required by this Court's remand order to “further consider” Trinity's arguments that Brookwood's CON did not meet the statutory criteria. New C. 17. The circuit court agreed with Brookwood, conducted no further review, and issued a summary affirmation of the court's June 3, 2011 decision. \*6 New C. 28; see also New T. 9 (“THE COURT: ... And I think [the Court of Civil Appeals] is due just to have an order that says, hey, I have already considered all of those other arguments and I said they had no merit, and then if they want to reverse on all of that after reading the briefs and looking at the transcript, that's their prerogative.”).

Trinity then timely brought this appeal. New C. 33.

#### **Brookwood Applies For A CON For A FED And Trinity And St. Vincent's Intervene**

On June 23, 2008, Brookwood filed with SHPDA an application for a CON<sup>2</sup> to construct and operate a freestanding emergency department, or FED,<sup>3</sup> which Brookwood \*7 claimed would be located in Shelby County at the intersection of Highway 280 and Highway 119. C. 1482-1713.

On August 28, 2008, Trinity timely intervened in Brookwood's administrative proceeding, C. 1407-1412, and two weeks later, Trinity timely asked for a contested case hearing on Brookwood's CON application. C. 4305. St. Vincent's Health System also timely intervened and asked for a contested case hearing. C. 4305.

### **Trinity Files Its First Motion To Dismiss**

On March 3, 2009, Trinity filed a motion to dismiss Brookwood's CON application. C. 1318. As grounds for Trinity's motion, it argued, among other things, that:

● *Inconsistency with the State Health Plan:* as a matter of law, a CON for a FED could not be granted because a CON must be consistent with the State Health Plan,<sup>4</sup> and the State Health Plan does not contain a chapter for FEDs (because they are new to the state), and Brookwood had taken no action to have a FED chapter added to the State Health Plan, and

\*8 • *No Department of Public Health Regulations:* as a matter of law, a FED CON could not be issued because a FED facility would have to be licensed by the Alabama Department of Public Health, and the Department had not yet promulgated licensure regulations.

C. 255.

St. Vincent's joined Trinity's motion. C. 4418-4419. Brookwood opposed the motion. C. 517-533. After receiving briefs<sup>5</sup> and oral argument, the Hearing Officer denied the motion to dismiss on April 5, 2009. C. 1152-1159.

### *Trinity Asks For A Declaratory Ruling From The CON Review Board And The ADPH States That New Licensure Regulations Will Be Required*

On May 6, 2009, Trinity petitioned the CON Review Board to declare that the Board could not grant Brookwood's CON application because, among other things, FEDs are not in the State Health Plan and Brookwood made no effort to have FEDs added to the State Health Plan. In a supplement to Trinity's petition, it filed a letter from the Alabama Department of Public Health's General Counsel which, in response to a letter from Brookwood, was adamant that a new \*9 FED must be separately licensed by the Department, and that such licensure regulations did not currently exist.

Brookwood filed a brief in opposition to Trinity's petition on May 14, 2009. C. 336-483. On May 20, 2009, the CON Review Board voted to deny Trinity's petition for a declaratory ruling, and entered an order to that effect on June 3, 2009. C. 4725-4727.

### *The Circuit Court Ruling In FSQC-AL, LLC v. Noland Health Services, Inc. And Trinity's Second Motion To Dismiss*

On January 6, 2010, Trinity renewed its motion to dismiss. C. 770-779. The basis for Trinity's renewed motion was the recent ruling of the circuit court of Montgomery County in *FSQC-AL, LLC v. Noland Health Services, Inc.*, Case No. CV-2009-9008959 (Cir. Ct. Montgomery Dec. 18, 2009). C. 22-23.

The *FSQC-AL* order addressed an issue that Trinity raised in its first motion to dismiss: whether a CON can be issued when, on its face, it is inconsistent with the State Health Plan, given the fundamental and mandatory requirement that CONs shall be consistent with the State Health Plan. This statutory requirement for CON applications to be consistent with the State Health Plan is \*10 stated and restated with meaningful insistence in the CON statutes.

In keeping with these statutory requirements, the *FSQC-AL* court held that the CON Review Board erred by failing to dismiss a CON application for additional SCALF beds (*i.e.*, beds for dementia patients) when there already were too many SCALF beds in Jefferson and Shelby County according to the State Health Plan.

Brookwood opposed Trinity's second motion to dismiss, C. 770-782, and the Hearing Officer denied the second motion to dismiss on January 13, 2010. C. 25-27.

On January 14, 2010, Trinity petitioned the circuit court of Montgomery County to review the hearing officer's denial of Trinity's motion to dismiss, C. 7, C. 14, C. 18, and moved for a stay of the administrative proceeding, pending Trinity's appeal. C. 28-31. On January 13, 2010, the circuit court denied the request for a stay. C. 677-678.

On January 19, 2010, the contested case hearing on Brookwood's CON application began. C. 1001. The hearing lasted nine days. C. 256. On June 30, 2010, the Hearing Officer recommended that Brookwood be granted a CON to \*11 construct and operate a [FED. C. 253-316](#). Trinity and St. Vincent's filed exceptions to the Hearing Officer's recommendation. C. 238-251, C. 214-217. In addition, Brookwood filed a brief with the CON Review Board in support of the Hearing Officer's recommendation. C. 219-237.

On July 21, 2010, the CON Review Board considered and accepted the Hearing Officer's recommendation. C. 3704. On August 5, 2010, the Board issued its written order granting a CON to Brookwood. C. 200.

### **First Appellate Proceedings In The Circuit Court Of Montgomery County**

On September 3, 2010, Trinity timely appealed the CON Review Board's decision. C. 132-144.

Following the submission of briefs and oral argument to the circuit court, the Honorable Tracy McCooley held that the CON Review Board's decision to issue a CON to Brookwood was "fatally flawed" by Brookwood's failure to comply with the public notice provisions required by CON r. 410-1-7.06(1) (a). C. 4726. Otherwise, Judge McCooley held, SHPDA's decision was due to be affirmed. *Id.*

Brookwood filed a motion to alter, amend, or vacate the circuit court decision, and renewed its argument that \*12 Trinity had not shown that its substantial rights had been prejudiced by Brookwood's violation of SHPDA's public notice rule. C. 4729-4744. Brookwood's motion was denied by operation of law. *See* New C. 2.

Brookwood then appealed to this Court the public notice aspect of the circuit court's decision, and Trinity cross-appealed the substantive compliance aspect of that decision. C. 4766-4770.

### **First Appellate Proceedings In The Court Of Civil Appeals**

After receiving briefs and oral argument, this Court reversed the circuit court on the public-notice issue, and held that Brookwood's failure to comply with the public notice requirement did not bar issuance of Brookwood's CON. *Brookwood Health Services*, 2012 Ala. Civ. App. Lexis 222, \*18 (Ala. Civ. App. 2012). The Court also held that the circuit court's discussion of the merits of the CON Review Board's decision to issue the CON was dicta. *Id.* The Court consequently remanded the case to the circuit court with instructions to further consider the merits of the CON Review Board's decision to issue the CON to Brookwood. *Id.*

### **\*13 Second Appellate Proceedings In The Circuit Court Of Montgomery County**

On remand, the circuit court summarily reaffirmed its earlier conclusion that the CON issued to Brookwood met the statutory and regulatory substantive criteria. New C. 28.

This appeal followed. New C. 33.

#### STATEMENT OF THE ISSUES

I. A CON can be issued only if it is consistent with the State Health Plan. The State Health Plan provides for the “development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of the state.” § 22-21-260(13). The State Health Plan contains no need methodology for FEDs, and it necessarily follows that Brookwood could not have demonstrated -- and the CON Review Board could not reasonably have found -- that Brookwood's FED CON is consistent with the State Health Plan. Did the circuit court err by sustaining the CON Review Board's decision to grant the FED CON, even though Brookwood could not possibly show that its CON application is consistent with the State Health Plan?

**\*14** II. In order to obtain a FED CON, Brookwood had to show a “reasonable potential” for its FED to meet licensure regulations set by the Alabama Department of Public Health. Licensure regulations are detailed, complex, and comprehensive, and regulate both the construction of a facility and aspects of its operations (such as staffing requirements). Licensure regulations for FEDs did not exist at the time of the contested case hearing (and still do not exist). Where Brookwood could not possibly demonstrate a reasonable potential for compliance with regulation no one had seen, was the CON Review Board's decision that Brookwood met this criteria arbitrary and capricious, and did the circuit court err by failing to reverse the Board?

III. When Brookwood filed its CON application, it claimed that its FED would be located at the intersection of Highways 119 and 280 in Shelby County. At the hearing, Brookwood admitted that it did not have an option to purchase property at that location, although it was hopeful that it would be able to acquire real estate at this intersection if it received a CON. By statute, the CON Review Board must determine that a project's **\*15** location is appropriate before it can issue a CON. The ALJ relied heavily on the suitability of the intersection of Highways 119 and 280 in making his recommendation to issue the CON Review Board, and the Board accepted his findings. Was it arbitrary and capricious for the CON Review Board to determine that the proposed FED was appropriately located where Brookwood had no property, and did the circuit err by failing to reverse the Board?

#### STATEMENT OF THE FACTS

In establishing health care planning in the State, the Legislature explained that “it is the public policy of the State of Alabama that a certificate of need program be administered in the state to assure that only those health care services and facilities found to be in the public interest shall be offered or developed in the state.” § 22-21-261.

#### **\*16 The State Health Plan Provides What Types Of Facilities Are Approved To Receive State Funds And When They Will Meet Patient Needs**

The State Health Plan was created to inform the agency about the need for health care services throughout the state so that the agency can determine whether certificates of need should be granted. A certificate of need cannot be issued if it is not consistent with the State Health Plan.

The State Health Plan is defined as

[a] *comprehensive plan* which is prepared triennially and reviewed at least annually and revised as necessary by the Statewide Health Coordinating Council<sup>6</sup> with the assistance of the State Health Planning and Development Agency *and approved by the Governor*. The State Health Plan shall provide for the development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of the State.

§ 22-21-260(13). “The State Health Plan shall be utilized by the Certificate of Need (CON) Review Board pursuant to § 22-21-264, in the CON review process, and by other entities to guide the overall health systems [sic] development and operation in Alabama.” State Health Plan r. 410-2-1-02 (1).

\*17 Need for every health care facility<sup>7</sup> or health service is determined by a need methodology contained in the State Health Plan.<sup>8</sup> For example, for acute care hospitals, need generally is determined on a county basis. State Health Plan r. 410-2-4-.02 (3) (a) . Except in counties with relatively low populations, the need methodology employs an algorithm with variables for recent utilization data, projected populations, and desired occupancy rate to determine the number of acute care beds needed in a county. State Health Plan r. 410-2-4-.02(3) (b). The purpose of this \*18 exercise is to optimize the number of acute care hospital beds “to assure the continued availability of quality hospital care for the residents of the state of Alabama.” State Health Plan r. 410-2-4-.02 (2) (a).

Other health services and facilities have different need methodologies. Planning for inpatient physical rehabilitation is done regionally, State Health Plan r. 410-2-4-.08, whereas for psychiatric services the planning area is state-wide. State Health Plan r. 410-2-4-.10.

### **The State Requires A Specific Healthcare Facility To Obtain A CON Before It Is Built To Ensure Consistency With The State Health Plan, Thus Confirming That The Facility Is An Approved Type Of Facility And Will Meet Patient Needs**

Once a type of facility (e.g., a hospital) and a need methodology are established under the State Health Plan, healthcare providers can compete through the CON application process to provide those services. The CON process is intended both “to prevent the construction of unnecessary and inappropriate health care facilities” and “to assure that only those health care services and facilities found to be in the public interest shall be offered or developed in the state” via “a system of mandatory reviews of new institutional health services.” \*19 § 22-21-261.”<sup>9</sup> A CON must be issued in order for a new institutional health service to be acquired, constructed, or operated. § 22-21-265 (a)<sup>10</sup> In order for a CON application to be approved by SHPDA, Alabama law requires that the application be consistent with the State Health Plan:

§ 22-21-260(13) - defining the “State Health Plan” as “A comprehensive plan which is prepared triennially and reviewed at least annually and revised as necessary by the Statewide Health Coordinating Council [SHCC], with the assistance of the State Health Planning and Development Agency, and approved by the Governor”, requiring the SHCC to meet at least annually to determine if revisions to the State Health Plan are necessary, and concluding with the statement that **“Nothing in \*20 this section should be construed as permitting expenditures for facilities, services, or equipment which are inconsistent with the State Health Plan.”**

§ 22-21-263 - instructing that **“No institutional health services which are subject to this article shall be permitted which are inconsistent with the State Health Plan.”**

§ 22-21-264 - listing required criteria for SHPDA's review of CON applications, including **“Consistency with the appropriate State Health Facility and services plans [i.e., State Health Plan] effective at the time the application was received by the State Agency...”**

§ 22-21-265 (d) - “The SHPDA shall maintain the Alabama State Health Plan to include separate bed need methodologies for inpatient psychiatric services, inpatient rehabilitation services, and inpatient/residential alcohol and drug **abuse** services. **The SHPDA shall utilize these methodologies in considering all certificates of need applications.”**

§ 22-21-266(1) - stating no CON can be issued for an inpatient facility or service unless SHPDA determines that **“the proposed facility or service is consistent with the latest approved revision of the appropriate state plan effective at the time the application was received by the state agency.”**

§ 22-21-274 - requiring that SHPDA, advised by the SHCC, adopt “review criteria and procedures” which are consistent with article 22; as shown here, art. 22 includes requirements that a CON must be consistent with the State Health Plan; and

§ 22-21-275 - specifying procedures for review of CON applications, and requiring that “nonsubstantive” reviews any that increase bed capacity shall be **“consistent with the State Health Plan.”**

\*21 *See also* CON r. 410-1-6-.02 (“[t]he proposed new institutional health service shall be consistent with the appropriate state health facility and services plans effective at the time the application was received by the state agency,” including the State Health Plan). These authorities, and the purpose of the State Health Plan, were summarized by this Court as follows:

The purpose of the CON process is to **prevent the construction of unnecessary and inappropriate health care facilities** within the state by disallowing health care providers from offering medical services and making capital expenditures **not sanctioned by the SHP** [State Health Plan].

*Montgomery Rehabilitation Hosp., Inc. v. State Health Planning Agency* [sic], 610 So.2d 403,405 (Ala. Civ. App. 1992) (emphasis added).

Brookwood submitted a CON application for a FED. It is undisputed that there is no provision for FEDs in the State Health Plan<sup>11</sup>. In addition, it is undisputed that Brookwood \*22 never requested that the State Health Plan be revised to provide for or allow FEDs in Alabama.

Brookwood's attempted end-run around the State Health Plan had two consequences. First, asking for rulemaking to create a FED chapter in the State Health Plan would have brought SHPDA, the Department of Public Health, the Medicaid Agency, and the SHCC together with Brookwood and other members of the health care community to author new regulations after all affected parties were given a chance to be heard. By skipping this step, Brookwood would get the jump on its competitors, and would secure without competing \*23 for it a choice location in Shelby County. Second, Brookwood also could exclude from the review process the Governor, whose approval is necessary to implement a new State Health Plan chapter. Thus Brookwood hoped to ensure that FEDs could be brought to Alabama without review by the one person in state government responsible for oversight of the state's developing health care system, and in particular is responsible for finding money to pay the State's Medicaid bill.

#### **A Proposed Healthcare Facility Must Also Comply With The Department Of Public Health Licensure Regulations So That It Can Open For Business And Treat Patients**

As a part of the comprehensive plan for health care in Alabama, Alabama law requires that all new health care facilities “shall be constructed and operated in compliance with the appropriate state licensure rules, regulations, and standards.” CON r. 410-1-6-.16 (1). In addition, an applicant seeking a CON “shall certify on the [CON] application form that he has read and understands the state licensure rules, regulations, and standards and that the facility or service complies, or will comply fully.” CON r. 410-1-6-.16(1) (a).

\*24 The Alabama State Department of Public Health's licensure regulations are comprehensive, complex, and detailed. For example, licensure regulations for ambulatory surgery centers (ASC) are at ADPH rr. 420-5-2-.01 to .04. There are four chapters in these regulations: one for general matters, and other ones for administration, patient care, and physical environment. The

general chapter deals with such matters as definitions, types of licenses, licenses and relicensing, and appeals from adverse licensing decisions. ADPH r. 420-5-2-.01. The chapter on administration details how the surgery centers must be governed, the duties of its chief executive officer, and describes the types and number of personnel who must work at the ASC (Medical Director, Director of Nursing Services, nursing staff, non-nursing staff) and their duties, and the plans and reports that the ASC must maintain (fire evacuation plan, communication facilities, records and reports that must be compiled, and maintained and patient transfer and transport). The next chapter, "Patient Care," governs inter alia admission procedures, surgical procedures that an ASC may perform, dietary and radiological services, anesthesia, post-operative services, \*25 pharmaceutical services, and infection control and sterilization procedures. The "Physical Environment" chapter requires submission of a facility plan and specifications and requires compliance with life safety code requirements, specifies such minutiae as the width of corridors and the dimensions of doors, the types of service and treatment facilities that a facility must have, and requirements for housekeeping services.

To obtain a CON, an applicant must demonstrate the reasonable potential that the facility will meet the relevant licensure standards. There is no doubt that a FED would be regulated by the Department of Public Health and would be subject to its licensure requirements. In an April 24, 2009 letter to one of Brookwood's lawyers, the General Counsel for the Department wrote:

In your letter, you informed Mr. Harris that you have concluded that "no separate license is required for the expansion of the existing emergency services presently provided by Brookwood on its main campus to another location off campus pursuant to a valid CON." Your letter does not ask for a response, and with all due respect, the tone of the letter suggests that Brookwood intends to proceed to establish an off-site emergency department separate from the Brookwood main campus, regardless of the Board of Health's licensing rules. The Department is hopeful that is not really the message you intended.

\*26 ... so that there is absolutely no misunderstanding, please be advised that the Department intends to require that any freestanding ED [emergency department], whether operated by Brookwood or another entity, be licensed by the Department of Public Health. Operation of a freestanding ED without a license would be viewed by the Department as a violation of [section 22-21-33 of the Code of Alabama](#) for which there are both civil remedies and criminal penalties.

The current thinking by the Department staff is that there will be a need to propose new rules for hospital-based freestanding EDs, which, of course, would be subject to public comment.

C. 1142-43. The Department reemphasized its intent to require licensure of FEDs in a January 19, 2010 letter from Mr. Rick Harris, who was in the Department's Bureau of Health Provider Standards:

[T]he Alabama Department of Public Health intends to require that any free-standing ED, whether operated by Brookwood or another entity, be licensed by the State Board of Health. The Department is looking closely at what specific regulatory licensing provisions are needed to protect the public and to ensure that safe and effective emergency services are provided in a free-standing ED.

C. 645.

At the contested case hearing, Brookwood's CEO, Garry Gause, under questioning from Trinity's counsel, admitted that there were no licensure regulations for FEDs:

\*27 **Trinity Attorney:** As I understand it, right now there are no licensing rules for FEDs in Alabama?

**CEO Gause:** Correct

**Trinity Attorney:** And do you know if anything has been reduced to paper yet in terms of what those licensing requirements will be?

**CEO Gause:** I do not.

**Trinity Attorney:** So you have not seen any drafts or anything like that?

**CEO Gause:** I have not.

C. 4224.

In Brookwood's CON application, it stated that:

There are no specific licensure standards for freestanding EDs in Alabama. Representatives of Brookwood Medical Center met with the Department of Public Health's Division of Licensure and Certification, and Brookwood is confident that it will meet or exceed all licensure requirements just as the Emergency Department at Brookwood Medical Center does today.

C. 1528.

### **Location, Location, Location**

Brookwood's CON application stated that the proposed FED would be located at the "Intersection of Highways 119 and 280." C. 1488. The application indicated that this location is part of the utility of the proposed FED:

The [F]ED will be located on a site near the intersection of Highways 119 and 280, which will maximize accessibility for residents of the \*28 proposed service area. Growing traffic congestion on the area makes travel for emergency services increasingly difficult and poses a health risk to area residents. Travel is particularly difficult for the **elderly** and those without adequate **financial** resources. Coupled with the growth in the hospital-based emergency in the region, generally, and high utilization of Brookwood Medical Center's Emergency Department, specifically, a freestanding ED at the proposed location can best address the needs for this service area at this time.

C. 1490, *see also* C. 1494 (map showing the proposed location of Brookwood's FED in relation to the proposed service area) and C. 1499 (map showing the proposed location of the FED in relation to existing acute care hospitals); and C. 2688 ((Brookwood Ex. 14) containing a photograph showing the proposed FED at the intersections of Highways 119 and 280, and next to Greystone Way)).

At the contested case hearing, Brookwood presented extensive testimony based on travel time studies, which was designed to show how a FED at the intersection of Highways 119 and 280 would benefit **heart attack** and **stroke** patients who stopped at the FED, instead of driving directly to an acute care hospital, despite the fact that the FED could deliver only very preliminary care to such patients. The ALJ's recommendation to issue the CON relied heavily on this testimony. *See*, C. 4645 (Recommendation, ¶¶ 19 (travel \*29 time from the 119-280 intersection to Brookwood is 20 minutes in good traffic, 30 minutes or more in bad)); C. 4651, 26 ("Although the [FED] is about 30 minutes away from its host hospital Brookwood, it is not too far away that patients will not benefit from early diagnosis and treatment at the [FED]. And then transfer to a hospital for further care.... In that regard, Dr. Johnson testified that the proposed location was the best location given the need for services in the area and the distance from Brookwood's main hospital."); C. 4654, 33 (travel from the FED to Brookwood will take 20-30 minutes, and "longer during peak traffic times"), 37, 39, 70 ("Located at the intersection of US 280 and Highway 119, the [FED] will be east of the most congested part to Highway 280, in the middle of the proposed service area and easily accessible to the residents of the service area"), 75, 88, 89, 95, 107, 124 ("The proposed location of the [FED] will also benefit minorities."), and 131. C. 304.

Contrary, however, to the testimony about the desirability and suitability of locating the FED at the 119-280 intersection was the testimony of Brookwood's CEO and President, Mr. Garry Gause, and its CFO, Doug Carter, \*30 who admitted that after Brookwood filed its CON application, it terminated its option to purchase the real estate depicted as the site of the FED in Brookwood's application. Mr. Gause testified:

**Brookwood Attorney:** Okay. And do we still have that option [to purchase the property at the 190280 intersection] today?

**CEO Gause:** We don't.

**Brookwood Attorney:** When did we let - Did we let it expire? Is that what happened?

**CEO Gause:** That's correct.

**Brookwood Attorney:** Or fail to - fail to renew it? When did that occur, generally speaking?

**CEO Gause:** 2009

C. 4207.

Brookwood's CFO, Mr. Doug Carter, confirmed that Brookwood no longer had the land for its FED project:

**ALJ Wilson:** You knew at the time - or Mister - I guess Mr. Gause knew at the time that he ceased to make payments that he was actually losing the right to purchase the property; is that correct?

**CFO Carter:** Yes, sir.

**ALJ Wilson:** And that it would be subject to whatever events in the future would take place?

CFO Carter: Yes, sir....

ALJ Wilson: At this point in time, you don't have a piece of land for this project?

\*31 CFO Carter: Correct.

C. 4039-4040 (emphasis added).

Mr. Carter explained that the loss of an option on the property at the 119-280 intersection was not worrisome to Brookwood, because if Brookwood could not purchase it on the open market, Brookwood could locate the project somewhere else:

**Trinity Lawyer:** And you decided to let go of the option [on the property at the 119-280 intersection]?

**Mr. Carter:** Yes, sir.

**Trinity Lawyer:** So now you are stuck with the whatever the market says the property is worth; is that correct?

**Mr. Carter:** Yes, sir.

**Trinity Lawyer:** And that could go up or down from what you've stated in your pro forma and in what you've reported to SHPDA; is that correct?

**Mr. Carter:** Yes, sir.

**Trinity Lawyer:** Okay. And would you expect that the knowledge that [Brookwood] has been awarded a CON would cause that price of that property to go up.

**Mr. Carter:** No, not necessarily.

**Trinity Lawyer:** No?

**Mr. Carter:** No.

**\*32 Trinity Layer:** I'm sort of surprised by that answer.

**Mr. Carter:** No. No. I would suspect that the owner of the land could foresee that if we acquired a CON and he was going to, you know, raise the price so high, that we could potentially look at other property to put the [FED] in that area.

C. 4036 (emphasis added). Mr. Carter also admitted that Brookwood owned real estate at the intersection of Interstate 65 and Valleydale Road, although no study had been conducted to see if the FED project would be viable at that intersection. C. 4040. Finally, Mr. Carter admitted that Brookwood did not know how losing the property at the 119-280 intersection would affect the feasibility of the FED project:

**Trinity Lawyer:** And if the property we are talking about at the intersection of 119 and 280 that is the proposed location is sold to someone else and is no longer available to Brookwood, do you know what it would cost you to acquire new property that you thought was suitable?

**Mr. Carter:** No, sir. We haven't studied that.

**Trinity Lawyer:** Okay, and you don't know what effect that that would have on either your pro forma or on you conclusions about the viability of the project?

**Mr. Carter:** No, sir.

C. 4041.

**\*33** Brookwood stated in its CON application that the total cost of its FED project was \$23,147,938.00. C. 233. Of this amount, \$2,868,250.00 was allocated for acquisition of the proposed FED's site. Id.

Although Brookwood denies the importance of the State Health Plan as it applies to Brookwood's FED project, Mr. Gause admitted that wherever the FED is eventually located, “[w]e have a desire to ultimately bring needed services that are identified by the State Health Plan to that location.” C. 4229.

At the hearing the Alabama Medicaid Agency testified against the FED project. Medicaid is a healthcare payor that is funded in part by the state. C. 4158. The agency testified against Brookwood's proposal because the Alabama Department of Public Health has not yet published licensure regulations, there is no need methodology established in the State Health Plan, and that given these conditions, granting Brookwood's CON application would lead to “an unregulated overdevelopment and that that could lead to additional costs to the Medicaid program.” C. 4154. As the Agency's General Counsel, Mr. Bill Butler, explained:

Of course, the Medicaid program is very cost-sensitive. We're always in a budget crisis, and \*34 still are. And so, really, a second area of concern is the - the costs there will be.

We -- we struggle with -- with unnecessary emergency room visits. We try to keep those down and have had some success lately in getting recipients not to unnecessarily utilize the emergency room when they could go to a doctor, which is cheaper. **So we have a concern that the establishment of a freestanding emergency room would encourage that inappropriate usage and reverse some of the trend and efforts that we've made to -- to cut down on those kind of visits and save Medicaid dollars.**

C. 4154 (emphasis added).

In addition to the instant appeal, there now is another FED appeal in process in the Circuit Court of Montgomery County: *The Healthcare Authority for Medical West, an affiliate of UAB Health System, v. SHPDA, the Alabama CON Review Board, and Baptist Health Systems, d/b/a Princeton Baptist Medical Center*, 03-CV-20120901619.00 (Dec. 3, 2012). UAB West's petition for judicial review reveals that in September 2013 the CON Review Board granted CONs to two more Jefferson County Hospitals, UAB West and Princeton Baptist. The new FED sites are across from each other in Birmingham at the intersection of Highway 150 and I-459. Petition for Appeal, ¶ 15. One of UAB West's grounds for appeal is that the Princeton Baptist FED will be closer to UAB West's hospital than to Princeton Baptist's own campus. \*35 *Id.* at ¶ 23. Another ground of appeal is that in granting the CON to Princeton West, the CON Review Board failed to consider the effect it would have on UAB West's FED. *Id.* at ¶ 24.

At the hearing on these two FED CON applications, two CON Review Board members discussed the possible consequences of locating the two FED across the street from each other:

**CON Review Board Member 1:** If both facilities were allowed to operate, I heard you say earlier that it would dilute your capacity. But if we had two freestanding emergency departments in the same locality, could both survive, or would the market determine that one would and one wouldn't?

**CON Review Board Member 2:** ... My opinion is a little different here. I think the free market is better than we ever give it credit for. And I think you're probably right, that one of you will fail if you have two facilities; but central planning agencies do not have a good track record of guessing who the survivor is going to be and, therefore the best outcome is going to be for the people. So my opinion is, is that you both need a facility.

*SHPDA Hearing, Sept. 19, 2012, Agenda Item E, Transcript 56.10-16 & 57.21-58.7.*

\*36 These two CON projects are budgeted to cost \$19,000,000 (UAB West) and \$10,000,000 (Princeton Baptist). Transcript 14.22-15.7.

## STANDARD OF REVIEW

This Court “reviews a trial court's judgment regarding the decision of an administrative agency without any presumption of its correctness, since the [trial court] was in no better position to review the [agency's decision]” than the Court of Civil Appeals. *State Health Planning & Dev. Agency v. W. Walker Hospice, Inc.*, 993 So. 2d 25, 28 (Ala. Civ. App. 2008) (internal quotation marks and citation omitted).

A reviewing court may not “substitute its judgment for that of the administrative agency as fact-finder; the judiciary is required to give the agency's factual findings due deference.” *W. Walker Hospice*, 993 So. 2d at 29.

An agency is entitled to a presumption of correctness in its interpretation and application of its own rules, provided that the interpretation is reasonable, and even if the interpretation “may not appear as reasonable as some other interpretation.” *W.*

*Walker Hospice*, 993 So. 2d at 29. An agency's interpretation of a rule that would nullify a \*37 statute, however, will not be upheld. See *Daniel Senior Living of Inverness I, LLC v. STV One Nineteen Senior Living, LLC*, 2012 Ala. Civ. App. Lexis 25, \*12-\*13 (Ala. Civ. App. 2012) (on rehearing) (“Applying an interpretation as broad as the one evidenced by the CONRB would essentially nullify the statute. Under such a construction, a standard, nonemergency CON application ... could be successfully packaged as an emergency CON application, thereby avoiding notice to interested parties and a potentially lengthy approval process. Surely the Legislature did not intend such a result.”).

A decision of the CON Review Board can be reversed for the reasons stated in § 41-22-20 (k):

(k) Except where judicial review is by trial de novo the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been \*38 prejudiced because the agency action is any one or more of the following:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) In violation of any pertinent agency rule;
- (4) Made upon unlawful procedure;
- (5) Affected by other error of law;
- (6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (7) Unreasonable, arbitrary, or capricious, or characterized by an **abuse** of discretion or a clearly unwarranted exercise of discretion.

### **\*39 SUMMARY OF THE ARGUMENT**

This Court should reverse the circuit court's affirmance of Brookwood's CON for a proposed FED for three reasons:

1. *The Proposed FED Is Not Consistent With The State Health Plan* -- The State Health Plan contains no chapter or need methodology for FEDs, which means that Brookwood's FED CON application could not have met the essential requirement that it be consistent with the State Health Plan;
2. *There Are No Department Of Public Health Regulations for FEDs* -- SHPDA was required to determine that Brookwood's FED had a reasonable potential to meet Department of Public Health licensure standards, but at the time of the contested case hearing, there were no licensure regulations and SHPDA could not have reasonably determined whether Brookwood's facility could meet licensure regulations that would promulgated in the future; and
3. *Brookwood Has No Location For Its Proposed FED* -- SHPDA was required to determine the locational appropriateness of the proposed facility, but SHPDA could not have determined that the proposed FED's location is appropriate because at the hearing Brookwood testified that it did not have a location for the proposed facility.

**\*40 ARGUMENT****I. Brookwood's CON For Its Proposed FED Is Not Consistent With The State Health Plan Because The State Health Plan Has Not Approved Or Even Addressed FEDs****A. SHPDA's Issuance Of A CON For A New Type Of Healthcare Facility That Is Not Addressed By The State Health Plan Effects An End-Run Around The Cost-Control Function Of That Plan**

Alabama's Legislature created a healthcare system with (1) a State Health Plan that determines what type of healthcare facilities and services will receive funding from the State, *see* § 22-21-260(13), and (2) a CON requirement to ensure that only healthcare facilities and services that follow the State Health Plan can operate and bill the State, *see* § 22-21-264. The Legislature mandated use of the State Health Plan (a body of rules and regulations)<sup>12</sup> as a cost-control measure for Alabama's healthcare system by requiring that a proposed facility or service be consistent with the State Health Plan before a CON allowing its operation can issue. *See, e.g.*, § 22-21-264 (requiring SHPDA to find “[c]onsistency with the \*41 appropriate State Health Facility and services plans [*i.e.*, State Health Plan]” before issuing a CON).

The Legislature vested the Statewide Health Coordinating Council (SHCC) and the Governor with the power to review and revise the State Health Plan. *See* §§ 22-4-8; 22-21-260(13).<sup>13</sup> The Legislature vested SHPDA with the power to issue CONs for new healthcare facilities and services and limited that power by requiring that any proposed facility or service for which a CON is issued be consistent with the State Health Plan. *See* §§ 22-21-265(a); 22-21-266.<sup>14</sup> The Legislature also provided that if SHPDA acts in “violation of ... statutory provisions,” a \*42 “court may reverse” that agency action. *See* § 41-22-20 (k) (1).

SHCC has not approved and Alabama's State Health Plan does not address Freestanding Emergency Departments (FEDs). By issuing a CON for a FED, SHPDA acted “in violation of [the] statutory provisions” requiring consistency with the State Health Plan, *see, e.g.*, § 22-21-264, and vesting the power to revise the State Health Plan in the SHCC and the Governor, not in SHPDA. *See* § 22-21-260(13).

Brookwood and SHPDA<sup>15</sup> read the statutory requirement for a FED to be “consistent with” the State Health Plan to mean that SHPDA can issue a CON for a FED as long as it is not inconsistent with an express provision of the State Health Plan. This reading fails for several reasons. First, the Legislature described the relationship of a proposed healthcare project to the State Health Plan using both “consistent with” (*i.e.*, following an express provision). *See* § 22-21-264 (requiring “[c]onsistency with the appropriate State Health Facility and services plans”), and 22-21-266(1) (requiring that “the proposed facility or \*43 service is **consistent** with the latest approved revision of the appropriate State health plan”) and not “inconsistent with” (*i.e.*, not contradicting an express provision), *see* § 22-21-260(13) (“Nothing in this section should be construed as permitting expenditures for facilities, services, or equipment which are inconsistent with the State Health Plan”), and § 22-21-263 (No institutional health services which are subject to this article shall be permitted which are inconsistent with the State Health Plan.”). When the Legislature uses different terms in a statutory scheme, this Court presumes the terms of different meanings that are not redundant. *See, e.g., Surtees v. VFJ Ventures, Inc.*, 8 So. 3d 950, 975 (Ala. Civ. App. 2008) (“[T]he legislature specified that for items of income to be ‘subject to... tax,’ they must be both ‘reported and included in income for purposes of a tax on net income.’ § 40-18-35(b) (1) (emphasis added). Therefore, this court must assume that the Legislature intended that the terms ‘reported’ and ‘included’ have different meanings. The courts must presume that in enacting the add-back statute, the Legislature intended that each word of the statute have effect, and we must also presume that the Legislature did \*44 not include meaningless language or redundancies in the statute.”).

The different meaning of the terms “consistent with” and not “inconsistent with” make a functional difference. The basic function of the State Health Plan -- to control costs -- cannot be performed if any and all new healthcare facilities and services can obtain CONs and start billing the State even though they have never been considered, never studied, and never approved by SHCC and the Governor for inclusion in the State Health Plans. *See generally* § 22-21-260(13) (providing that the State Health

Plan shall include the “development of health programs and resources to assure that quality health services will be available in an accessible manner which assures continuity of care, at reasonable costs, for all residents of the state”). Instead, the State Health Plan would simply be an outdated document that SPDA could effectively revise by granting or denying CONs without the bother of obtaining approval from SHCC and the Governor.<sup>16</sup>

**\*45** But the Legislature has expressed its policy choice that the SHCC and the Governor should make their finding that a new type of healthcare service or facility is appropriate and should be included in the State Health Plan *before* SHPDA grants a CON for such a facility. The Legislature has stated:

The Legislature of the State of Alabama declares that it is the public policy of the State of Alabama that a *certificate of need program be administered in the state to assure that only those health care services and facilities found to be in the public interest shall be offered or developed in the state*. It is the purpose of the Legislature in enacting this article to prevent the construction of unnecessary and inappropriate health care facilities through a system of mandatory reviews of new institutional health services, as the same are defined in this article.”

**\*46** § 22-21-261 (emphasis added).<sup>17</sup>

Because the State Health Plan has not addressed FEDs, SHCC and the Governor have not found FEDs “to be in the public interest.”<sup>18</sup> The State Health Plan embodies the SHCC's and the Governor's findings of which facilities and services are necessary “for the development of health programs and resources to assure that quality health services will be available and accessible in a manner which **\*47** assures continuity of care, at reasonable costs, for all residents of the state” -- the public interest. See § 22-21-260(13); *Ex parte Traylor Nursing Home, Inc.*, 543 So. 2d 1179, 1183 (Ala. 1988) (“[T]he SHP also prescribes, implements, and describes state policy...”).

In addition, the Legislature expressly divided the delegated power to revise the body of rules and regulations that comprise the State Health Plan which is the SHCC's and the Governor's job, from the delegated power of following the State Health Plan, which is SHPDA's job. Compare § 22-21-260(13) (stating that the State Health plan shall be “revised as necessary by the *Statewide Health Coordinating Council* with the assistance of the State Health Planning and Development Agency and *approved by the Governor*”) (emphasis added), with §22-21-265(a) (“[N]o person shall acquire, construct, or operate anew institutional health service,... unless the person shall first *obtain from the SHPDA a certificate of need* therefor.”)(emphasis added.)

Brookwood and SHPDA's amendment-by-CON argument makes irrelevant the Legislature's requirements that SHCC review the State Health Plan “at least annually” and that the plan **\*48** be “revised as necessary” by SHCC and the Governor. See §22-21-260(13). Under the law as written, if the SHCC and the Governor study a new type of healthcare facility brought to their attention by SHPDA or a provider, and they decide to revise the State Health Plan to include it, only then does SHPDA have the power to issue a CON for that new type of facility. See § 22-21-260(13); State Health Plan r. 410-2-5-.04(3)(c) (“Any person may propose an amendment to the State Health Plan by submitting a detailed description of the proposal to the SHPDA....”).

And that is the process that the SHCC now is following with respect to FEDs. The SHCC is currently studying whether to allow the expenditure of state healthcare funds for FEDs, as opposed to relying on traditional emergency rooms in hospitals.<sup>19</sup> Under Brookwood's amendment-by-CON argument, the SHCC's study is irrelevant because SHPDA has already issued a CON for a FED. If the SHCC later **\*49** determines, like Alabama's Medicaid administrator, that funding FEDs is not a prudent use of Alabama's healthcare dollars, it's too late. SHPDA has issued the CONs, the providers will have built them, and they will bill Alabama Medicaid for the services rendered.<sup>20</sup>

When a state agency fails to follow statutory procedural requirements (*e.g.*, consistency with the State **\*50** Health Plan under §§ 22-21-264, 22-21-266(1), and revision of the State Health Plan by SHCC and the Governor under § 22-21-260(13)), this

Court should reverse to allow the agency to follow the applicable statutes. *See, e.g., Ex parte Forest Manor Inc.*, 739 So. 2d 20, 24 (Ala. 1998) (reversing and remanding SHPDA decision for failing to follow statutory procedure under § 41-22-12 for providing notice of a hearing); *Ex parte Traylor Nursing Home, Inc.*, 543 So. 2d 1179, 1187 (Ala. 1988) (reversing and remanding amendment to State Health Plan when SHCC failed to follow the AAPA's notice and comment procedures). If, after this litigation, SHCC and the Governor approve FEDs for state funding, SHPDA could then in accordance with state law find that Brookwood's proposed FED facility is consistent with the State Health Plan.

## **B. The Alabama Legislature Established The SHCC And The State Health Plan To Protect The State's Treasury And To Meet Patient Needs**

As explained in the Statement of the Facts, the Alabama Legislature mandated the development of a state health system that protects both the physical and fiscal health of Alabama residents through a two-step process. First, the SHCC, with final approval by the Governor, establishes in \*51 the State Health Plan each type of healthcare facility or service that shall be allowed, and the appropriate need methodology for determining if that facility or service is appropriate for a given location. Second, the CON Review Board grants CONs only to the healthcare provider best suited to provide that type of facility or service, consistent with the State Health Plan.

Instead of seeking an amendment of the State Health Plan from SHCC and the Governor, Brookwood applied for a CON and SHPDA granted it. By allowing Brookwood to skip the first step of the Legislature's mandatory two-step process<sup>21</sup>, the CON Review Board excluded the SHCC and the \*52 Governor from their respective statutory roles, eviscerated \*53 the cost-control function of the State Health Plan, and violated the Legislature's plainly expressed intent. This point is made by the following map, which depicts as orange dots the putative locations of the state's three proposed FEDs within a short distance of each other (with the intersection of Highway 150 and 1-459 on the left, and the intersection of Highways 119 and 280 on the right).

### TABLE

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

In addition, there seems to be agreement -- even among members of the CON Review Board -- that at least one of these FEDs is unnecessary and will fail, with the attendant waste of at least \$19,000,000.00 or \$10,000,000.00 in healthcare dollars, and the CON Review Board has set a \*54 precedent for allowing hospitals to build FEDs both across the street from each other, and closer to another hospital than to the parent hospital. If this trend continues, it will be only a short while before big well-funded hospitals like Brookwood establish predatory FEDs across the streets from smaller rural hospitals, which could signal the beginning of the end for rural hospitals in Alabama.

These consequences arise all because there was no FED need methodology in the State Health Plan to guide the CON Review Board's decision making, and they foretell the future of FEDs in Alabama -- unregulated development -- if this Court does not enforce the Legislature's plainly expressed intent that every CON must be consistent with the State Health Plan. *See Virginia Dept. of Trans. v. U.S. Environmental Protection Agency*, 2013 U.S. Dist. Lexis 981, \*9 (E.D. Va. Jan. 3, 2013) (reversing EPA's attempt to regulate beyond the statutory framework established by Congress; "The question is whether the statute grants the authority [EPA] is claiming, not whether the statute explicitly withholds that authority.").

Of course, Brookwood argues that its CON is consistent with the State Health Plan because there is nothing in the \*55 State Health Plan about FEDs. If this argument prevails, and "consistent with" the State Health Plan is read to mean "not directly inconsistent with an express provision" of the State Health Plan, then the cost control function of the State Health Plan will be lost. Instead, this Court should read "consistent with" the State Health Plan to mean what it says: consistent with a provision of the State Health Plan, and therefore a service or facility that has been appropriately debated through the mechanism of public rule making, duly considered by the SHCC and the Governor, given a need methodology, and determined to be an cost-

efficient addition to Alabama health care system. See *Montgomery Rehabilitation Hospital*, 610 So. 2d at 405 (“The purpose of the CON process is to prevent the construction of unnecessary and inappropriate health care facilities within the state by disallowing health care providers from offering medical services and making capital expenditures not sanctioned by the SHP [State Health Plan].”); *State Health Planning & Dev. Agency v. W. Walker Hospice, Inc.*, 993 So. 2d 25, 26-27 (Ala. Civ. App. 2008) (“Pursuant to legislative act, the CONRB reviews all CON applications to determine whether proposed health-care facilities or \*56 changes thereto are consistent with the State Health Plan”); see also §§ 22-21-260 to -278 (multiple statutes in art. 9. requiring consistency with the State Health Plan).

The purpose of the State Health Plan, as declared by the Legislature, is to

provide for the development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of the state. Nothing in this section should be construed as permitting expenditures for facilities, services, or equipment which are inconsistent with the State Health Plan.

§ 22-21-260(13) (defining the State Health Plan).

Brookwood's proposed freestanding emergency facility and freestanding emergency services are not a part of the health programs and services in the State Health Plan. Consequently, when the Board granted Brookwood a FED CON, the Board circumvented the State Health Plan's function of assuring continuity of care, at reasonable costs, for all residents of the state, and violated state law, e.g. § 22-21-278, and the Board's own regulations. CON r. 410-1-6.02 (requiring the proposed institutional health service to be consistent with the State Health Plan in effect at the time the application is received by SHPDA); CON r. 410-1-6 \*57 .18 (prohibiting issuance of a CON for new facilities or services that are not consistent with the latest approved revision of the State Health Plan effective at the time the application was received); and CON r. 410-1-6-.16 (requiring the proposed facility to be constructed and operated in compliance with the appropriate state licensure rules, regulations, and standards).

This is a problem of Brookwood's own making. By filing its application for a CON to construct a freestanding emergency facility and provide freestanding emergency services, Brookwood asked the Board to do nothing less than abandon the very reason for which the Board exists. Instead of determining the need for healthcare facilities and services in accordance with the State Health Plan, and in accordance with the Board's own rules, Brookwood invited the Board to adopt an ad hoc, arbitrary and capricious freewheeling approach to healthcare planning which would result in no planning at all. The Board accepted Brookwood's invitation, and for this reason its decision to grant Brookwood's CON must be reversed. \*58 See *Grandview Surgical Center, Inc. v. Holy Spirit Hospital of the Sisters of Christian Charity*, 533 A. 2d 769 (Pa. Commw. Ct. 1987)(holding that ambulatory surgery centers that were not addressed in Pennsylvania's State Health Plan were not consistent with the State Health Plan, but allowing a CON anyway under a statutory exception that does not exist in Alabama).

What Brookwood should have done, and what Brookwood could do at any time, is ask the SHCC to amend the State Health Plan to include a chapter on FEDs.

Amending the State Health Plan is required, because that document is the “comprehensive” guide to health care planning in the State of Alabama. Section 22-21-260(13) defines the State Health Plan as a **comprehensive plan**” for:

the development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of the state. **Nothing in this section should be construed as permitting expenditures for facilities, services, or equipment which are inconsistent with the State Health Plan.**

*Id.* (emphasis added). A “comprehensive” plan necessarily includes FEDs, if FEDs are going to exist in Alabama. The word “comprehensive” means “covering completely or broadly,<sup>22</sup> or “inclusive, including much or all.<sup>23</sup>” It’s no \*59 surprise therefore that the plan is comprehensive, and regulates all manner of health care facilities, including

[g]eneral and specialized hospitals, including tuberculosis, psychiatric, long-term care, and other types of hospitals, and *related facilities such as*, laboratories, *out-patient clinics*, and *central service facilities operated in connection with hospitals*; skilled nursing facilities, intermediate care facilities;... rehabilitations centers, public health centers, *facilities for surgical treatment of patients not requiring hospitalization*, kidney disease treatment centers, including free-standing hemodialysis units; community mental health centers and related facilities; alcohol and drug abuse facilities; facilities for the developmentally disabled, hospice service providers; and home health agencies and health maintenance organizations.

§ 22-21-260 (6) (defining “health care facility”)(italics added).

This definition easily includes FEDs, which are *hospital-related*, and share a common nature with *out-patient clinics*, *central service facilities operated in connection with hospitals*, and *facilities for surgical treatment of patients not requiring hospitalization*.

Not only does the comprehensive definition of “health care facility” indicate that FEDs are the sort of facility the Legislature intended to be regulated by the State \*60 Health Plan, but also the per-unit cost of FEDs, as indicated by Brookwood’s application, is so high that any comprehensive plan intended to guide the development of health programs and resources in the state must include FEDs. Brookwood’s proposed FED had a projected total costs in 2008 of \$23,147,938.00. C. 291-292. This amount includes site acquisition, construction, major medical equipment, professional fees, and first year annual operating costs of \$4,012,095.00.<sup>24</sup> *Id.* It simply makes no sense to think that the Legislature would (a) be so concerned about containing the costs of medical services that (b) it would establish a mandatory plan in order to optimize the uses of limited health care dollars before large-ticket costs may be incurred, and that nevertheless (c) it would be consistent with the Legislature’s intent to exclude from the plan a new type of facility and service, which for a single location cost almost \$25,000,000.00 to construct and \*61 operate for a year. Such a conclusion is neither logically sound nor consistent with the case law in this state, which holds that the costs of medical services are unique and should be considered in development of the state’s medical resources. *Ex parte Alabama State Health Planning Agency*, 594 So. 2d 106, 108 (Ala. Civ. App. 1991) (citing *Mount Royal Towers, Inc. v. Alabama Board of Health*, 388 So. 2d 1209)(Ala.1980)(“extensive regulation of the medical profession is needed, because the hospital industry has huge fixed costs devoted to property that cannot be converted to other uses and where oversupply occurs, substantial waste stands to take place”); see also *Ex parte Nursing Home of Dothan, Inc.*, 542 So. 2d 940, 943 (Ala. 1989) (“In this case, cost is a valid consideration, and to not consider the cost effectiveness of a proposed amendment [to the State Health Plan] would be in contravention of the policy consideration underlying 42 U.S.C. § 300m-3c(2) (C), which is to provide citizens with access to health care in the most cost-efficient manner.”).

The State Health Plan is intended to comprehensively cover all hospital-related facilities that provide health services, which means that before the CON Review Board can \*62 grant a CON for a FED, the State Health Plan must be amended to provide the regulatory structure needed to guide the CON Review Board’s decision about the appropriateness of any applicant for a FED CON and the appropriateness of the location and capabilities of the proposed FED.

## **II. The CON Review Board Could Not Have Determined That Brookwood’s FED Would Meet The Department of Public Health’s Licensure Requirements**

Similarly, the Board cannot issue a CON for a health care facility without a showing that the proposed facility can be licensed by the Alabama Department of Public Health. But just as there is no FED chapter in the State Health Plan, there are not licensure regulations at ADPH. How, then, could the CON Review Board lawfully have issued the CON if it was impossible to know what the ADPH’s final regulations would require for Brookwood’s new facility?<sup>25</sup>

\*63 Brookwood, the CON Review Board, and the circuit court were not troubled by this requirement, which apparently was satisfied by nothing more than Brookwood's claim in its CON application that "Brookwood is confident that it will meet or exceed all licensure requirements just as the Emergency Department at Brookwood Medical Center does today."<sup>26</sup> If the Legislature intended the requirement to demonstrate a "reasonable potential" to have regulatory effect, this statutory provision must require considerably more as proof than a confident assertion that all is well. For example, \*64 if there had been licensure regulations in place when the contested case hearing was held, Trinity could have asked Brookwood about specific requirements, and could have cross-examined witnesses on Brookwood's willingness and ability to meet particular regulatory requirements. Assuming the final ADPH licensure regulations might require every FED to have a heliport, Trinity could have used the hearing to determine whether there are appropriate and clear helicopter approaches to the 119-280 intersection, whether there was space for a helipad at any site identified by Brookwood, and how the addition of a helipad (and other possible requirements, such as the very expensive requirement to keep an ambulance on station) would have affected Brookwood's estimated costs, operating expenses, and the fiscal viability of a FED. However, without knowing what the licensure standards are, Trinity could not ask about them,<sup>27</sup> and Brookwood could not establish that it would meet them. Consequently, it was \*65 arbitrary and capricious for the CON Review Board grant a FED CON to Brookwood, and the circuit court erred by affirming the Board on this point.

### III. SHPDA Was Required To Determine That The location Of The Proposed FED Is Appropriate, But The FED Has No Location

"Locational appropriateness" is another criteria which must be met before a CON may be issued. § 22-21-264 (4) (f) ("evidence of the locational appropriateness of the proposed facility or service such as transportation accessibility, manpower availability, local zoning, environmental health, etc."). Although Brookwood stated in its CON application that the FED would be at the intersection of Highways 119 and 280, and built much of its justification for the FED on this very location, it has no arrangement which will allow it to purchase the real property where it indicated the FED would be located. When Brookwood dropped the option to purchase this property, which it did before the contested case hearing, it ceased to have a location for its project, as Mr. Gause admitted:

**ALJ Wilson:** At this point in time. **You don't have a piece of land for this project?**

**CFO Carter:** Correct.

\*66 C. 4040 (emphasis added). In other words, there's no telling where the FED will be located, and there's no way the CON Review Board or the circuit court could have determined that the unknown location for Brookwood's FED was appropriate.

For example, Brookwood's architect testified that the FED would meet all zoning requirements, C. 4271, but which zoning requirements was he talking about, given the lack of a specific location? And how could anyone reasonably have found that this testimony met Brookwood's regulatory burden?

In the same manner, if the location for Brookwood's FED is unknown, and if for example a FED is required to have a heliport, how could a determination have been made as to the effect of a helicopter flights over adjoining residential areas, or the effects of ambulance traffic on surrounding businesses? In other words, how could location appropriateness have been determined?

In addition, perhaps uniquely among medical facilities and services, location is a defining element of the utility of a FED: too close to the parent hospital (or any other hospital), and the FED has less utility, because it would \*67 be better to go directly to an emergency department located in an acute care hospital which could provide all of the services of such a hospital. Too close to another hospital, and the FED becomes a means of poaching another hospital's service area. Too close to another FED, and it could be that one or both FEDs will fail. Because the State Health Plan addresses location for other health facilities, a FED need methodology in the State Health Plan presumably would provide guidance about where FEDs should be located, and

how many should be located in a given area. See, e.g., State Health Plan r. 410-2-4-.02 (Acute Care (Hospitals)) (establishing the county as the planning and area for most acute care hospitals, and specifying desired occupancy rates for various services, and the number of beds a hospital may have). Thus, even if Brookwood had maintained its option to purchase real estate at the intersection of Highways 119 and 280, that location would have been selected by Brookwood for its own needs, and without a FED chapter in the State Health Plan, there is no way to know whether Brookwood's decision is congruent with the needs of the state's health system as a whole.

### \*68 CONCLUSION<sup>28</sup>

For the reasons shown above, the Court should reverse the circuit court's judgment and render judgment for Trinity.

#### Footnotes

- 1 This appeal is No. 2120090. The 25-volume record in *the prior appeal*, No. 2110160, has been incorporated into the record of this appeal. Citations to the 25-volume record use this format: "C. record page number," e.g. "C. 231." Citations to the record of the current appeal (*i.e.*, proceedings that occurred after this Court's remand) use this format: "New C. record page number" or e.g. "New C. 24." Citations to the transcript similarly are to "T. page line no.," e.g., New T. 9."
- 2 A CON is part of Alabama's comprehensive system of health care planning, *See generally*, §§ 22-21-260 to -278, C. 9. The CON process is intended both "to prevent the construction of unnecessary and inappropriate health care facilities" and "to assure that only those health care services and facilities found to be in the public interest shall be offered or developed in the state" via "a system of mandatory reviews of new institutional health services." § 22-21-261.
- 3 A FED would be a new health care facility, so Brookwood's proposal was subject to CON review. C. 4356. As described by Brookwood, its FED would be a fully equipped emergency department located in Shelby County, and thus physically separate from Brookwood's campus in Jefferson County. C. 57.
- 4 The State Health Plan is a "comprehensive plan" "for the development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of the state. § 22-21-260(13). The State Health Plan describes how much of a particular healthcare service is needed in a defined service area. *See, e.g.*, State Health Plan r. 410-2-4-.02 (the State Health Plan chapter for acute care hospitals)
- 5 In addition to Trinity's initial motion and brief, C. 1318, it filed a reply, C. 1165-1173, to Brookwood's brief in opposition. C. 1175-1191.
- 6 The SHCC, or "Statewide Health Coordinating Council" is the agency responsible for developing and maintaining the State Health Plan. § 22-21-260(15).
- 7 "Health care facility" and "health service" are terms of art defined at 22-21-260 (6) and 22-21-260(8), respectively.
- 8 Ambulatory service centers [ASCs] are the exception to this statement. As discussed at the last oral argument on this matter, in the 1980s, the CON Review Board issued CONs for four ASCs, even though there was no provision for ASCs in the State Health Plan. When eventually an ASC chapter was added, instead of a need methodology, it contained this statement: "Before meaningful planning policies can be developed [for ASCs], the SHCC must have at its disposal outpatient surgical utilization data for both licensed acute care hospitals and ambulatory surgery centers. SHPDA shall survey annually all licensed and/or Medicare certified hospitals and ambulatory surgery centers, as defined herein, regarding outpatient surgical utilization.... The SHCC, upon receipt of meaningful utilization data from all licensed hospitals and ambulatory surgery centers, shall amend this section to include further definitions and planning policies as appropriate and applicable." State Health Plan r. 410-2-4-.12 (3). For whatever reason, the State Health Plan has never been so amended.
- 9 *See* CON r. 410-1-2-.19 (defining CON as "[a] permit required by law before which no person, except as exempted by statute, shall acquire, construct or operate a new institutional health service or acquire major medical equipment, or furnish or offer, or purport to furnish a new institutional health service, or make arrangement or commitment for **financing** the offering of the new institutional health service or acquiring the major medical equipment").
- 10 CON r. 410-1-4-.01 (all "new institutional health services" subject to the CON statutes "which are proposed to be offered or developed within the state shall be subject to Certificate of Need review"); *see also* § 22-21-263(a). "New institutional health services which are subject to review shall include: (1) [t]he construction, development, acquisition through lease or purchase, or other establishment of a new health care facility or health maintenance organization."

- 11 The State Health Plan is a constantly evolving document that can be modified to respond to the needs of the citizens of the states, new technology or methods of providing services, or any other issues raised. Should a party wish to have the State Health Plan revised to provide for a type of service that is not included and establish an appropriate need methodology for that service, a CON application is not the proper method by which to seek such a revision. Revisions to the State Health Plan may be accomplished in three ways: (1) by a plan adjustment, which is “[a] requested modification or exception, to the State Health Plan, of limited duration, to permit additional facilities, beds, services, or equipment to address circumstances and meet the identified needs of a specific county, or part thereof, or another specific planning region that is less than statewide and identified in the State Health Plan,” *see* State Health Plan r. 410-2-5-.04(2) (a); (2) by a statistical update, which is “[a]n update of a specific section of the State Health Plan to reflect more current population, utilization, or other statistical data,” *see* State Health Plan r. 410-2-5-.04(2) (b); or (3) by a plan amendment, which is “[t]he alteration or adoption of rules, policies, methodologies, or any other plan revision that does not meet the plan adjustment or statistical update definition,” *see* CON r. 410-2-5-.04(2) (c) -- all of which are accomplished by making an application to SHPDA for consideration by the SHCC, *see* State Health Plan r. 410-2-5-. 04(3).
- 12 The current SHP is codified in Chapter 410 of the Alabama Administrative Code. State Health Plan r. 410-2-1-.01 through 410-2-5-.05 (2007).
- 13 *See* § 22-4-8 (stating that SHCC “shall perform the following functions: ... (2) Prepare, review and revise as necessary, with the assistance of the State Health Planning and Development Agency, and approve or disapprove, the State Health Plan”); § 22-21-260(13) (stating that the State Health plan “is prepared triennially and reviewed at least annually and revised as necessary by the Statewide Health Coordinating Council with the assistance of the State Health Planning and Development Agency and approved by the Governor.”).
- 14 *See* § 22-21-265(a) (“[N]o person shall acquire, construct, or operate a new institutional health service ... unless the person shall first obtain from the SHPDA a certificate of need therefor.”); § 22-21-266 (“No certificate of need for new inpatient facilities or services shall be issued unless the SHPDA makes each of the following findings: (1) That the proposed facility or service is consistent with the latest approved revision of the appropriate state plan... ).
- 15 Neither SHPDA nor SHCC have appeared in this appeal. *See Ala. R. App. P. 29* (noting that an appellate court may request an amicus brief).
- 16 As the Court knows from the previous argument of this case, in the 1980s SHPDA issued four CONS for Ambulatory Surgery Centers (ASCs), even though there was not then a chapter on FEDs in the State Health Plan. Brookwood asserts these CONS from three decades ago are precedent for issuing Brookwood's FED CON without a FED chapter in the State Health Plan. This argument fails for two reasons. First, the fact that those CONS were issued in the 1980s does not mean SHPDA did not violate the law; it just means the CONS were not challenged by the argument Trinity is making here. Second, the long-standing practice of SHPDA, to which the Court should defer, is issuing CONS only when there is a relevant chapter in the State Health Plan. Issuing a CON for a FED when there is no FED regulation in the State Health Plan is an anomaly, which SHP has not committed since the 1980s. However wrong the CONS issued to ASCs in the 1980s, ruling for Trinity on this appeal would not effectively revoke those ASC CONS. CON rule 410-1-11-.05 states that “[u]pon completion of the construction project the Certificate of Need shall be considered fully vested and not subject to revocation, modification, or further review by the State Agency...”).
- 17 Similarly, State Health Plan r. 410-2-1-.02 provides: “The State Health Plan shall be utilized by the Certificate of Need (CON) Review Board pursuant to § 22-21-264, *Code of Alabama, 1975*, in the CON review process, and by other entities to guide the overall health systems development and operation in Alabama.”
- 18 Even Brookwood's healthcare planning expert testified at the contested case hearing that the CON Review Board acted too quickly:  
**Trinity lawyer:** Well, before a state such as Alabama, which has no experience with FEDs, decides to allow them, would you, as a healthcare planner, think, that it's a good idea for the state to engage in some sort of overall systematic examination of what effect FEDs, in all locations or under a variety of circumstances might have on the healthcare system, whether they're a good or bad thing, what the parameters should be, that sort of analysis?  
**Planning Expert:** Well, certainly I think that, you know, there ought to be a rulemaking process if they're going to allow these things where they take in information from various parties about the relative merits of freestanding EDs.  
C. 4108.
- 19 The SHCC has given public notice that “Chairman Dr. James Walburn has called a meeting of The Study Committee on Free Standing Emergency Departments for Friday, January 29, 2013....” This Court may take judicial notice of the public records of state agencies posted on its website. *See Rule 201(b), Ala. R. Evid.* (allowing appellate courts to take judicial notice); *Johnson v. Hall*, 10 So. 3d 1031, 1034 (Ala. Civ. App. 2008) (“This court may take judicial notice of public records.”).
- 20 Which just point out how reasonable is Medicaid's fear that this approach will lead to “unregulated overdevelopment” of FEDS -- for which SHPDA has issued three CONS in the same area -- which in turn will lead to greater Medicaid costs. C. 4154, *see also* C. 4154 (“A. ...We -- We struggle with -- with unnecessary emergency room visits. We try to keep those down and have had some success

lately in getting recipients not to unnecessarily utilize the emergency room when they could go to a doctor, which is cheaper. So we have a concern that the establishment of a freestanding emergency room would encourage that inappropriate usage and reverse some of the trend and efforts that we've made to -- to cut down on those kind of visits and save Medicaid dollars.”); C. 4257 (“A....And our concern with -- with a freestanding emergency department is just that that's one more entity sitting out there that may draw Medicaid recipients unnecessarily; that they may decide, well, I don't know -- I don't -- I shouldn't go to the emergency room, but here's this FED over here or that -- We're concerned whether they even know what that is but they just maybe see it as a -- like an urgent care center and -- and -- and go there when -- when a doctor's office would cost Medicaid less.”); C. 4160-61 (“Because part of the concern here is that the recipient will view this FED as -- as something other than an emergency room and feel like they could go to that, whereas, they may not go to an emergency room but they may think they're basically going to a doctor's office or an urgent care center when they -- when they go there.”).

21 By allowing a new healthcare animal into the state without any prior planning or approval, one is left to wonder what kind of animal it is. The State Health Plan regulates “hospitals,” but a FED does not meet the definition of an acute care hospital. An acute care hospital must have “facilities and **beds.**” State Health Plan r. 410-2-4-. 02 (1) (a) (defining “hospital”) (emphasis added). “Beds” define a hospital; indeed, the Board regulates hospitals on the basis of “bed need.” *Id.* at 3 (describing the “bed need” methodology used to evaluate hospital CONs). In addition, the licensure requirements for an acute care hospital require “at least 25 beds for the care and treatment of patients.” ADPH r. 420-5-7.03(2) (a) (stating basic requirements for acute care hospitals). The proposed FED has no beds at all (other than observation beds, which are a different animal), so it cannot be a hospital. In this context, it is significant that, as Brookwood admits in its CON application, “[t]he Alabama State Health Plan does not currently permit the development of a new acute care hospital in Shelby County, where Brookwood claims the FED would be built. C. 1503. In other words, the State Health Plan forbids the Board from giving Brookwood a CON for a new hospital in Shelby County. What then could be the authority for the Board to give Brookwood a CON for a free-standing department of a hospital in Shelby County? In granting Brookwood's application, the Board did not answer this question. The State Health Plan also contains provisions for ambulatory surgery centers (ASCs), but the proposed FED does not meet the definition of an ASC. The “primary purpose” of an ASC is “providing medically necessary or elective surgical care.” State Health Plan r. 410-2-4-. 12 (2) (emphasis added); see also ADPH r. 420-5-2-.01(d) (defining “Ambulatory Surgical Center” in relevant part as “any health care facility with the primary purpose of providing medically necessary or elective surgical care”). In contrast to an ASC, the primary purpose of Brookwood's proposed FED is to provide a wide variety of medical services, some of which may involve minor surgery but most of which do not, including lab, CT, MRI, and ultrasound services, and treatments for cardio-respiratory arrest, acute MI, stroke, epiglottitis and acute upper airway obstruction, asthma, anaphylaxis, hemorrhagic and other hemovolemic shock, septic shock, meningitis, status eileticus, community acquired pneumonia, increased intracranial pressure, adrenal crisis, poisoning, envenomation, immersion, burns, head injury, major trauma, child at risk, and pediatric drug dosing. C. 1502-1504. It also is self-evident that Brookwood's proposed FED does not fall within the definition of one of the other facilities that the State Health Plan regulates: nursing homes, limited care facilities (SCALFs), assisted living facilities, adult day care programs, home health, inpatient physical rehabilitation, swing beds, psychiatric care, or substance **abuse**. State Health Plan Rules 410-2-4-.01 to -.13. Consequently, EDs and freestanding emergency services do not exist under the State Health Plan. *Accord*, C. 772 (observing that the concept of a FED is new to Alabama, and that Brookwood is proposing the first one).

22 <http://www.merriam-webster.com/dictionary/comprehen-sive>.

23 Oxford American Dictionary (1980).

24 The cost of a facility is a part of CON review. [Section 22-21-264](#) required SHPDA to evaluate, in addition to consistency with the State Health Plan, the “availability of alternative, less costly or more effective methods of providing such services,” the “**financial** feasibility of the proposed service or facility,” and the “probable impact of the construction project reviewed on the costs of providing health services.”

25 On April 24, 2009, ADPH's Deputy General Counsel wrote to one of Brookwood's counsel in response to a letter from him about Brookwood's proposed FED, the gist of which is this: “[T]he tone of [Brookwood's] letter suggests that Brookwood intends to proceed to establish an off-site emergency department separate from the Brookwood main campus, regardless of the Board of Health's licensing rules. The Department hopes that is not the message you intended.... [S]o there is absolutely no misunderstanding, please be advised that the Department intends to require that any free standing emergency department ... be licensed by the Department of Public Health. Operation of a free standing emergency department without a license would be viewed by the Department as a violation of [section 22-21-33 of the Code of Alabama](#), for which there are both civil and criminal penalties. ... The current thinking by Department staff is that [it] will need to propose new rules for hospital-based free standing emergency departments, which, of course, would be subject to public comment.” C. 1142-1143

26 Brookwood's architect gamely tried to carry this torch, testifying that: “I have no reason to believe that it [the FED facility] will not comply” with ADPH requirements. T. 4271. However, he also testified that he did not know if APDH had adopted rules for FEDs (“I have no knowledge if that [regulations], specific for a freestanding emergency department have been adopted (T. 4272) and that

neither he nor anyone in his office had discussed with ADPH the plans they had drawn for Brookwood's FED. (“Have you had any discussions with members of the Alabama Department of Public Health about your plans? No. Well, has anyone in your office? No.” T. 4274.). Given his second and third statements, how could he have made his first statement, and how could the ALJ, the CON Review Board, and the circuit court have found him reliable?

- 27 The burden of proof was on Brookwood. See *Alacare Home Health Servs. v. Ala. State Health Planning & Development Agency*, 27 So. 3d 1267, 1276 (“The FHO [Fair Hearing Officer] determined that [the applicant] had ‘fail [ed] to establish’ that there existed a substantially unmet need....”)
- 28 Trinity adopts and incorporates each argument in each section of this Brief for every section of this Brief.

---

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.