

2011 WL 145708 (Ala.Cir.Ct.) (Trial Pleading)
Circuit Court of Alabama.
Montgomery County

DANIEL SENIOR LIVING OF INVERNESS I, LLC d/b/a Danberry at Inverness, Petitioner,

v.

STATE HEALTH PLANNING AND DEVELOPMENT AGENCY; Certificate of Need Review Board, Respondents.

No. CV-2011-900047.
January 14, 2011.

Petition for Judicial Review

Respectfully submitted, One of the Attorneys for Daniel Senior Living of Inverness I, LLC d/b/a Danberry at Inverness, Of Counsel: [James F. Henry](#), [Marc James Ayers](#), Bradley Arant Boult Cummings LLP, 1819 Fifth Avenue North, One Federal Place, Birmingham, Alabama 35203, (205) 521-8696, jhenry@babbc.com, mayers@babbc.com.

Pursuant to [Ala. Code § 41-22-20](#), Daniel Senior Living of Inverness I, LLC d/b/a Danberry at Inverness (“Danberry”) hereby petitions this Court for review of the decision of the Alabama State Health Planning and Development Agency (“SHPDA” or “the Agency”), through its Certificate of Need Review Board (“CONRB”), to deny Danberry's emergency Certificate of Need (“CON”) to convert twelve (12) assisted living beds to specialty care assisted living beds.¹

On November 17, 2010, the CONRB denied Danberry's emergency CON application to convert 12 assisted living beds to specialty care assisted living beds (“SCALF”) at Danberry's campus in Shelby County. Danberry filed its emergency CON application following SHPDA's final decision to grant an emergency application to STV One Nineteen Senior Living, LLC (“Somerby”) to convert 24 assisted living beds to SCALF beds in Shelby County under similar circumstances.² As shown below, the Agency's decisions in the two cases cannot be reconciled. Accordingly, the Agency's action in denying Danberry's emergency CON application is arbitrary and capricious and due to be reversed.

JURISDICTION

A. Jurisdiction

1. This appeal is proper under Ala. Code 1975, § 40-22-20(a), as Danberry has “exhausted all administrative remedies available within the agency.” Pursuant to [Ala. Code 1975, § 41-22-20\(d\)](#), Danberry timely filed its Notice of Appeal with the Agency on December 16, 2010, which was within 30 days after the Agency's decision became final.³ Danberry is now timely filing this Petition for Judicial Review “within 30 days after the filing of the notice of appeal” as required in that provision.

B. Venue

2. Venue is proper in this Court. See [Ala. Code 1975, § 41-22-20\(b\)](#) (“A petition shall be filed either in the Circuit Court of Montgomery County or [in other venues not relevant here]”).

NATURE AND HISTORY OF THE AGENCY ACTION

3. In order to be granted on an emergency basis, a CON applicant must show that the CON is to authorize: (1) an expenditure; (2) made necessary; (3) by unforeseen events; (4) which endanger health and safety; (5) of patients. [Ala. Code §22-21-268](#) (the “Emergency CON Statute”).
4. On March 25, 2010, the State Health Coordinating Council approved a modification to the State Health Plan. The modification was based upon testimony that there was a need for 36 additional SCALF beds in Shelby County, Alabama, which constituted a 71% underestimation of SCALF bed need. The 71% consisted of 32 beds that were already in service, but not accounted for in the State Health Plan, and a need for 36 new beds.
5. On April 1, 2010, SHPDA sent a letter to interested parties (including Danberry) establishing a batched review schedule for consideration of applications for the 36 additional SCALF beds that the SHCC had approved for Shelby County.
6. SHPDA required parties wishing to submit CON applications for the newly available SCALF beds in Shelby County to submit new letters of intent. SHPDA set April 30, 2010, as the deadline for submitting letters of intent and June 1st as the deadline for submitting CON applications.
7. SHPDA stated that the applications would be batched for comparative review and the CONRB would consider the applications at its September 15, 2010 meeting.
8. Four providers filed letters of intent to provide SCALF beds in Shelby County. The providers were STV One Nineteen Senior Living, LLC d/b/a Somerby at St. Vincent's One Nineteen (“Somerby”); Five Star Quality Care, Inc. (“Five Star”); Noland Health Services, Inc. (“Noland”); and Danberry.
9. Five Star, Noland, and Danberry each filed a standard CON application before the June 1, 2010 deadline.
10. On May 28, 2010, almost four weeks after the deadline, Somerby filed a letter of intent to submit an emergency CON application for SCALF beds in Shelby County.
11. On May 28, 2010, Somerby submitted both a standard CON application and a second almost identical one, but styled the second one as an “emergency” application.
12. On June 11, 2010, SHPDA acknowledged, by letter, receipt of both of Somerby's CON applications (emergency and non-emergency). In the letter, SHPDA stated that Somerby's emergency application “will be presented to the Certificate of Need Review Board on June 16, 2010 for information purposes.” (emphasis added).
13. On June 14, 2010, Danberry received a copy of a revised agenda for the June 16th CONRB meeting. The agenda noted that Somerby's “emergency” CON application would be on the agenda “pending approval of Chair and Vice-Chair.” The same day, Danberry received a letter from SHPDA establishing a timeline for review of the batched applications for SCALF beds in Shelby County.
14. On June 15, 2010, Danberry and Noland submitted letters to SHPDA opposing Somerby's emergency CON application.
15. In its emergency CON application and at the June 16, 2010 CONRB meeting, Somerby argued that the State Health Plan's 71% underestimation of need for SCALF beds in Shelby County constituted an emergency (the “71% Emergency”).
16. At the hearing on Somerby's emergency CON application, Danberry pointed out to the CONRB that SHPDA had established a batched comparative review process for consideration of CON applications for SCALF beds in Shelby County and granting Somerby's emergency CON application would be unfair to the other applicants and constitute preferential treatment in favor of Somerby.

17. Over the objection and opposition of Danberry, the CONRB granted Somerby's emergency CON application for 24 SCALF beds in Shelby County.
18. In support of its emergency CON application, Somerby presented testimony about potential residents that could have benefited from SCALF services at Somerby, but the services were not available because Somerby had no CON for SCALF services.
19. During the CONRB's deliberations regarding Somerby's emergency CON application there was never any testimony or evidence offered about whether the emergency need for SCALF beds in Shelby County could be satisfied by a number of beds less than the 36 required under the 71% Emergency.
20. On July 7, 2010, Danberry filed a motion for reconsideration of the CONRB's emergency grant of Somerby's CON application.
21. SHPDA did not put Danberry's motion for reconsideration on the July CON Review Board agenda. Because an argument could be made that Danberry's motion was denied as a matter of law based upon more than 30 days elapsing since the filing, without a ruling on the motion, the parties agreed to moot the hearing on Danberry's motion for reconsideration.
22. On August 20, 2010, Danberry timely filed a Request for Fair Hearing and Security for Costs with SHPDA to contest the emergency CON granted to Somerby.
23. SHPDA appointed a Fair Hearing Officer and the Fair Hearing took place on Friday, September 3, 2010.
24. On September 23, 2010, the Fair Hearing Officer issued his Final Order affirming the issuance of Somerby's emergency CON application.
25. Danberry appealed the Fair Hearing Officer's order, which is the final order of SHPDA. The appeal is docketed as case number CV-2010-901242 in the Circuit Court of Montgomery County.
26. On January 13, 2010, the Circuit Court of Montgomery County affirmed SHPDA's grant of an emergency CON to Somerby.
27. In granting Somerby's emergency CON application, SHPDA found that the State Health Plan's 71% underestimation of SCALF bed need in Shelby County constituted an emergency.
28. On information and belief, never before had SHPDA interpreted the Emergency CON Statute in a situation involving SCALF beds.
29. The 71% Emergency that SHPDA relied upon in granting Somerby's emergency CON application for 24 SCALF beds was composed of 32 beds that were already in service above the 96 in the earlier version of the State Health Plan, and a need for 36 new SCALF beds.
30. Based upon the 71% Emergency rationale that was proposed by Somerby and adopted by SHPDA, on October 5, 2010, Danberry filed an emergency CON application to provide the 12 remaining SCALF beds in Shelby County for which SHPDA had previously determined an emergency need existed under the 71% Emergency rationale.
31. Five Star and Noland filed letters in opposition to Danberry's emergency CON application.
32. SHPDA placed Danberry's emergency CON application on the agenda for the October 20, 2010 CONRB meeting.

33. At the October 20, 2010 meeting of the CONRB, the Chairman of the CONRB urged the parties to carry over consideration of Danberry's emergency CON application until the November CONRB meeting and, in the meantime, try to settle the matter.
34. By the November 17, 2010 CONRB meeting, the parties had not reached a settlement.
35. At the November 17, 2010 CONRB meeting, The CONRB took testimony both in favor of and in opposition to Danberry's emergency application.
36. The same day, the CONRB denied Danberry's emergency CON application for 12 of the 36 SCALF beds in Shelby County for which SHPDA had earlier found an emergency need, despite having earlier granted Somerby's emergency application for 24 of the 36 SCALF beds under the 71% Emergency rationale.
37. On information and belief, the two diametrically opposed rulings - one in favor of Somerby and one adverse to Danberry - are the only rulings that SHPDA has ever made applying the Emergency CON Statute to SCALF beds.
38. On information and belief, the two diametrically opposed rulings - one in favor of Somerby and one adverse to Danberry - are the only rulings SHPDA has ever made applying the Emergency CON Statute to address an underestimation of need in the State Health Plan.
39. No applicants other than Danberry claimed to be capable of placing the 12 SCALF beds in service within the timeframe required of an emergency CON.
40. Somerby and Danberry have each had to turn away **elderly** citizens in need of SCALF services.
41. Somerby and Danberry have each had to discharge residents when the residents' situations changed.
42. Somerby and Danberry have each had to send residents out of Shelby County to find SCALF services or find SCALF services in less appropriate situations.
43. Somerby and Danberry are similarly situated providers.
44. SHPDA has provided preferential treatment to Somerby over Danberry.
45. SCALF beds in Shelby County are a limited resource under the State Health Plan.
46. Somerby has a property interest in its CON application that has been prejudiced by SHPDA's preferential treatment of Somerby over Danberry.
47. SHPDA has provided no justification or rational reason for treating Somerby and Danberry in disparate manners.

PARTICULAR AGENCY ACTION APPEALED FROM

48. Danberry appeals from the Agency's November 17, 2010 final order denying Danberry's emergency CON application.

THE GROUNDS ON WHICH RELIEF IS SOUGHT

49. Under [Ala. Code 1975, § 41-22-20\(k\)](#), the final decision of the agency is due to be reversed because the “substantial rights of [Danberry] have been prejudiced because the agency action is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and unreasonable, arbitrary, or capricious, or characterized by an **abuse** of discretion or a clearly unwarranted exercise of discretion.”

50. At issue in this case is whether the CONRB erred in denying Danberry's emergency CON application after granting the emergency CON application of a similarly situated provider (Somerby) who filed an emergency application to provide the same service, to the same type of patients, in the same county.

51. There was no finding, or even any evidence presented, that Danberry is an inferior applicant or in any way lacking in capability when compared to Somerby, yet SHPDA treated Danberry and Somerby's emergency CON applications entirely differently.

DISPARATE TREATMENT OF SIMILARLY SITUATED PROVIDERS IS ARBITRARY AND CAPRICIOUS

52. Where an agency treats similar situations differently without a reasoned explanation, its decision is due to be vacated as arbitrary and capricious.

53. Somerby's emergency CON application stated that it requested emergency approval based on its “current inability to properly care for patients suffering from dementia related conditions. Without CON approval, Somerby will be forced to relocate patients facing dementia related care.”

54. At the hearings regarding Somerby's emergency CON application and Danberry's emergency CON application, Danberry offered undisputed testimony that it had a current inability to properly care for patients suffering from dementia related conditions and, without CON approval, Danberry would be forced to relocate patients facing dementia related care.

55. At the Fair Hearing concerning Somerby's CON application, the Fair Hearing Officer found that both Somerby and Danberry had been forced to:

- a) Turn away **elderly** citizens in need of SCALF services;
- b) Discharge existing residents when their situations change; and
- c) Send residents out of Shelby County to find SCALF services or find SCALF services in less appropriate situations.

56. SHPDA provided no rational explanation for denying Danberry's emergency CON application after granting one to Somerby under similar circumstances.

57. By denying Danberry's emergency CON application, after granting that of a similarly situated provider, SHPDA has treated Danberry in an arbitrary and capricious manner.

SHPDA'S INTERPRETATION OF THE EMERGENCY CON STATUTE HAS BEEN ARBITRARY AND CAPRICIOUS AND AS SUCH IS NOT ENTITLED TO DEFERENCE

58. Deference can be given only when “the agency interpretation is not in conflict with the plain language of the statute,” and “a reviewing court need not accept an interpretation which is unreasonable”. [National R.R. Passenger Corp. v. Boston & Maine Corp.](#), 503 U.S. 407, 417-18 (1992). An agency's decision is arbitrary and capricious where the agency treats similar situations differently without a reasoned explanation. [Alabama Dept. of Human Resources v. Dye](#), 921 So. 2d 421, 427 (Ala. Civ. App.

2005). A reviewing court “may not supply a reasoned basis for the agency's decision that the agency itself has not given.” *Alabama Dept. of Human Resources v. Dye*, 921 So. 2d at 426 (internal citations omitted).

59. In cases 2010-167E and 2010-198E, SHPDA issued emergency Certificates of Need to hospice providers who missed the filing deadline for non-substantive CON review. In contrast, in case 2011-009, SHPDA denied an emergency Certificate of Need to a hospice provider who missed the filing deadline for non-substantive CON review. SHPDA provided no rational explanation for the disparate treatment of the three hospice providers under the Emergency CON Statute.

60. SHPDA has treated two similarly situated providers (Danberry and Somerby) in disparate fashion.

61. SHPDA has failed to offer any rational explanation for treating Danberry and Somerby in disparate fashion.

62. SHPDA's interpretation of the Emergency CON Statute has been arbitrary and capricious in the past.

63. SHPDA's interpretation of the Emergency CON Statute is not entitled to deference.

64. SHPDA's action in denying Danberry's emergency CON application is arbitrary and capricious.

***SHPDA'S INTERPRETATION OF THE EMERGENCY CON STATUTE HAS
NOT BEEN REASONABLE AND HAS INSTEAD BEEN CLEARLY ERRONEOUS***

65. Where an agency's interpretation of its statutes and regulations is not reasonable or clearly erroneous, it is not entitled to deference.

66. SHPDA's interpretation of the Emergency CON statute has not been reasonable because the CON Review Board has not adhered to the language or requirements of the Emergency CON Statute in applying it.

67. In November 2010, in case 2011-006E, SHPDA used the Emergency CON Statute to issue an emergency CON for a medical school project, after admitting that the project was not even subject to CON review.

68. Despite the determination in the State Health Plan that hospice services were already available in all 67 Alabama counties, along with the provision in State Health Plan that there would be no need for additional hospice services for 3 years following the rule's effective date of March 8, 2010, SHPDA later used the Emergency CON Statute to issue emergency CONs to two hospice providers simply because the providers failed to comply with the non-substantive review filing deadline.

69. The CON Review Board has admitted that it has not adhered to the language or requirements of the Emergency CON Statute in applying the statute.

70. At the November, 2010 CONRB meeting, members of the CON Review Board stated on the record that:

- a) The Emergency CON Statute has been interpreted in an “imaginative” manner by the CONRB;
- b) Some members of the CONRB did not understand the Emergency CON Statute;
- c) Not many of the emergency CON applications the CONRB has considered (and presumably granted) involved threats to patient health as required by the Emergency CON Statute; and
- d) The CONRB has gone “outside of the definition” of an emergency in interpreting the Emergency CON Statute “a few times.”

71. SHPDA's interpretation of the Emergency CON Statute has not been reasonable.

72. SHPDA's interpretation of the Emergency CON Statute has been clearly erroneous.

73. SHPDA's interpretation of the Emergency CON Statute is entitled to no deference.

74. SHPDA's interpretation of the Emergency CON Statute and action in denying Danberry's Emergency CON application is clearly erroneous.

THE RELIEF SOUGHT

Based on the above, Danberry respectfully requests that this Court reverse SHPDA's final decision denying Danberry's application for an emergency CON, because SHPDA's decision was clearly erroneous and arbitrary and capricious.

Respectfully submitted,

s/James F. Henry

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Footnotes

¹ Before the Agency, this was Project AL-2011-002-E.

² The Agency's decision in favor of Somerby is on appeal in case CV-2010-901242, which is pending in the Circuit Court for Montgomery County. Before the Agency, Somerby's emergency CON application was project AL-2010-189-E.

³ The Agency's decision became final when Danberry's CON application was denied on November 17, 2010. See [Ala. Code 1975, § 41-22-17](#).