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IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

DOCKET NO. 21-0901

**War Memorial Hospital, Inc.,
Petitioner,**

v.

**The West Virginia Health Care Authority,
Respondent.**

**DO NOT REMOVE
FROM FILE**

**RESPONSE BRIEF ON BEHALF OF WEST VIRGINIA
HEALTH CARE AUTHORITY**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. STATEMENT OF THE CASE.....	1
II. SUMMARY OF ARGUMENT	3
III. STATEMENT REGARDING ORAL ARGUMENT	4
IV. ARGUMENT.....	5
I. Issue Presented.....	5
II. Standard of Review	5
III. The Authority Correctly Denied WMH’s Exemption Application.....	7
A. WMH does not meet the criteria outlined in W. Va. Code § 16-2D-11(c)(27).	7
B. The Authority did not create a “primary hospital location” requirement.	12
V. CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<i>Amick v. C&T Dev. Co.</i> 187 W. Va. 115, 118, 416 S.E.2d 73, 76 (1992).....	9
<i>Appalachian Power Co. v. State Tax Dep't of West Virginia</i> , 195 W. Va. 573, 466 S.E.2d 424 (1995)	6, 9
<i>Banker v. Banker</i> , 196 W. Va. 535, 543, 474 S.E.2d 465, 473 (1996).....	9, 10
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)	6
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136, 153 (1971)	6
<i>Cox v. Amick</i> , 195 W. Va. 608, 466 S.E.2d 459 (1995).....	9
<i>Farley v. Buckalew</i> , 186 W. Va. 693, 414 S.E.2d 454 (1992).....	9
<i>Frymier-Halloran v. Paige</i> , 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995).....	6
<i>Health Care Cost Review Authority v. Boone Memorial Hospital</i> , 196 W. Va. 326, 335, 472 S.E.2d 411, 420	6
<i>Metropolitan Property and Liability Ins. Co. v. Acord</i> , 195 W. Va. 444, 450, 465 S.E.2d 901, 907 (1995)	9
<i>Mildred L.M. v. John O.F.</i> , 192 W. Va. 345, 350, 452, S.E.2d 436, 441 (1994)	9
<i>Murray Energy Corp. v. Steager</i> , 241 W. Va. 629, 827 S.W.2d 417 (2019)	6
<i>Princeton Community Hospital v. State Health Planning and Development Agency</i> , 174 W. Va. 558, 328 S.E.2d 164 (1985).....	5, 7
<i>Shepherdstown Volunteer Fire Dep't. v. Human Rights Commission</i> , 172 W. Va. 627, 309 S.E.2d 342 (1983)	5
<i>Smith v. State Workmen's Compensation Comm'r</i> , 159 W. Va. 108, 219 S.E.2d 361 (1975) .	9, 12
<i>State ex rel. Fetters v. Hott</i> , 173 W. Va. 502, 318 S.E.2d 446 (1984).....	9, 12
<i>State ex rel. Morgan v. Trent</i> , 195 W. Va. 257, 263, 465 S.E.2d 257, 263 (1995)	9, 12
<i>State ex rel. Water Dev. Auth. V. Northern Wayne County Public Serv. Dist.</i> , 195 W. Va 135, 464 S.E.2d 777 (1995).....	9
<i>West Virginia Human Rights Comm'n v. Garretson</i> , 196 W. Va. 118, 468 S.E.2d 733 (1996).....	9

Statutes

W. Va. Code § 16-2D-1	1, 4, 7
W. Va. Code § 16-2D-1(1)	1, 11
W. Va. Code § 16-2D-1(8)(a) and (b).....	7
W. Va. Code § 16-2D-1(8)(b).....	8
W. Va. Code § 16-2D-10	1, 7
W. Va. Code § 16-2D-11	1, 7, 8
W. Va. Code § 16-2D-11(b)(27).....	2
W. Va. Code § 16-2D-11(c)(27)	2, 13
W. Va. Code § 16-2D-16	5
W. Va. Code § 16-2D-3(a)(1).....	1
W. Va. Code § 16-2D-8	4
W. Va. Code § 16-2D-8(a) and (b)	1
W. Va. Code § 16-2D-8(b)	3

TABLE OF AUTHORITIES
(continued)

W. Va. Code § 16-2D-9	1, 7
W. Va. Code § 29A-5-4(g)	5

I. STATEMENT OF THE CASE

This appeal concerns an administrative decision issued by the West Virginia Health Care Authority (“Authority”) which denied War Memorial Hospital’s (“WMH”) application for an exemption from a Certificate of Need (“CON”). WMH sought an exemption from CON review for the acquisition of a magnetic resonance imaging (“MRI”) scanner. WMH’s exemption application indicated WMH did not intend to purchase an MRI for its own use at WMH which is located in Berkeley Springs, Morgan County, West Virginia. Rather, WMH intended to purchase the MRI for a medical office building owned by its parent corporation, which is located in Martinsburg, Berkeley County, West Virginia.

West Virginia’s CON law is found in W. Va. Code § 16-2D-1, *et seq.* This legislation creates the CON program and vests jurisdiction over the program in the Authority. *See* W. Va. Code § 16-2D-3(a)(1). The Legislative purpose in creating the CON program was to ensure that the development of health services is accomplished in an orderly, economical manner which avoids unnecessary duplication and contains the cost of delivering health services. *See* W. Va. Code § 16-2D-1(1).

W. Va. Code § 16-2D-8(a) and (b) provides that “[e]xcept as provided in § 16-2D-9, § 16-2D-10, and § 16-2D-11 of this code, the following proposed health services may not be acquired, offered, or developed within this state except upon approval of and receipt of a certificate of need as provided by this article: . . . (6) Providing fixed magnetic resonance imaging. . . . Consequently, if an entity desires to provide MRI services for the first time, it must go through the CON process and establish need for the proposed service. W. Va. Code § 16-2D-11 provides certain exemptions

from CON review. W. Va. Code § 16-2D-11(c)(27)¹ sets forth an exemption for “[t]he **acquisition and utilization** of one computed tomography scanner and/or one magnetic resonance imaging scanner with a purchase price of up to \$750,000 **by a hospital**.” (emphasis added). WMH cited this code section as the basis for its exemption application. However, WMH’s reliance on this exemption is misplaced. This statutory exemption allows a hospital to purchase an MRI scanner below a certain threshold price for use by the hospital. The exemption does not provide for utilization by a hospital’s parent corporation in a medical office building at a different location.

The facts in this appeal are few and not in dispute. WMH is a hospital located at 1 Healthy Way, Berkeley Springs, Morgan County, West Virginia. On December 18, 2019, the Authority received an application from WMH seeking an exemption from CON review for the acquisition of one MRI device to be utilized in a medical office building located at 5524 Williamsport Pike, Martinsburg, Berkeley County, West Virginia 25404. In its application, WMH asserted such an acquisition was exempt from CON review pursuant to W. Va. Code § 16-2D-11(c)(27). In a Decision dated February 3, 2020, the Authority denied WMH’s application for exemption. The Authority determined WMH intended to purchase an MRI to be utilized at a medical office building located in a separate county and owned by WMH’s parent corporation. The Authority found the statutory exemption does not apply to these facts and the purchase was subject to CON review. The Authority’s rationale for the denial was that W. Va. Code § 16-2D-11(c)(27) provides an exemption for hospitals to purchase an MRI scanner at its primary location, i.e., the hospital itself. The Authority found that in crafting the exemption the Legislature did not intend to create an exemption for hospitals to purchase and utilize MRI scanners in medical office buildings.

¹At all times relevant to this appeal, the exemption at issue was found at W. Va. Code § 16-2D-11(c)(27). The exemption is now located at W. Va. Code § 16-2D-11(b)(27), however, no changes were made to the language of the exemption.

Rather, the Legislature intended that hospitals have the capability to purchase and utilize a CT scanner and/or MRI scanner, below a certain monetary threshold, at the hospital's own location without the need for review. The Authority further held that WMH's interpretation to the contrary would lead to absurd results.

WMH filed a Request for Review with the OoJ on March 4, 2020. A briefing schedule was established, and a hearing was held on July 7, 2020. The Office of Judges issued a Decision dated August 17, 2020, affirming the Authority's Decision. WMH appealed this decision to the Circuit Court of Kanawha County. The appeal was assigned to the Honorable Jennifer F. Bailey and assigned Civil Action No. 20-AA-69. After establishing a briefing schedule and reviewing the submissions of the parties, the circuit court affirmed the Authority and the Office of Judges in an Order entered October 4, 2021.

II. SUMMARY OF ARGUMENT

The Circuit Court of Kanawha County correctly affirmed the Office of Judges' and the Authority's Decisions denying WMH's application for an exemption from CON review. W. Va. Code § 16-2D-8(b) provides that a hospital which seeks to provide fixed magnetic resonance imaging must go through CON review and establish need for the proposed service. *See* W. Va. Code § 16-2D-8(b). However, the Legislature has provided for certain exemptions from CON review. W. Va. Code § 16-2D-11(c)(27) provided an exemption for "[t]he **acquisition and utilization** of one computed tomography scanner and/or one magnetic resonance imaging scanner with a purchase price of up to \$750,000 **by a hospital.**" (emphasis added).

WMH submitted an application to the Authority seeking an exemption from review based upon W. Va. Code § 16-2D-11(c)(27). WMH submitted it intended to purchase an MRI machine and utilize it at a medical office building owned by its parent corporation and located 20 miles

away from WMH. The medical office building is also located in the vicinity of Berkeley Medical Center which also offers MRI services.

The plain language of W. Va. Code § 16-2D-11(c)(27) provided that in order to qualify for the exemption the hospital must acquire and utilize the MRI scanner at its hospital. The intent of the exemption was to save hospitals the time and expense of going through CON review to purchase and utilize an MRI scanner at their hospital. WMH does not qualify for this exemption because it does not intend to utilize the MRI scanner at its hospital. Rather, WMH intends to acquire an MRI and locate it in a medical office building 20 miles away and owned by its parent corporation. WMH argues that the exemption statute does not expressly state that a hospital must utilize the MRI at its hospital. However, when read *in pari materia*, with W. Va. Code § 16-2D-1, *et seq.*, specifically, W. Va. Code § 16-2D-8, it is clear that that the Legislative intent was to provide an exemption for hospitals to acquire and utilize MRI machines below a certain threshold expense at their hospital without undergoing the time and expense associated with full CON review.

The Authority asserts the statutory exemption is plain on its face. However, if there is an ambiguity in the statute, a reviewing court must give deference to an agency's interpretation of a statute it is charged with maintaining so long as that interpretation is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. The Authority has provided an interpretation of the statute that is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

For these reasons, and the reasons discussed more fully below, the decision of the Kanawha County Circuit Court should be affirmed by this Court.

III. STATEMENT REGARDING ORAL ARGUMENT

Respondent concurs with Petitioner that oral argument is unnecessary in this case and asserts the matter can be adequately decided on briefs.

IV. ARGUMENT

I. Issue Presented

Does the plain language of former W. Va. Code § 16-2D-11(c)(27) explicitly require a hospital to acquire and utilize an MRI scanner at the hospital, and, if it does not, is the Authority's interpretation that the exemption requires a hospital to acquire and utilize an MRI scanner at its facility, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law?

II. Standard of Review

The standard of review for decisions appealed from the Authority is set forth in W. Va. Code § 16-2D-16 which provides, in pertinent part, that an appeal be processed "in accordance with the provisions governing the judicial review of contested administrative cases in article five, chapter twenty-nine-a of this code." *See also Princeton Community Hospital v. State Health Planning and Development Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). The specific standard of review is found at W. Va. Code § 29A-5-4(g), which provides:

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are

- (1) In violation of the constitutional or statutory provision; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence of the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See Syl. Pt. 2 Shepherdstown Volunteer Fire Dep't. v. Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983). Under the Administrative Procedures Act, "the task of the circuit court is to determine whether the [agency's] decision was based on a consideration of the relevant factors and whether there is a clear error of judgment." *See Frymier-Halloran v. Paige*, 193 W.

Va. 687, 695, 458 S.E.2d 780, 788 (1995) quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136, 153 (1971). Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review. This Court has held that

“‘[j]udicial review of an agency’s legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency’s position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent. No deference is due the agency’s interpretation at this stage.’ Syl. Pt. 3., *Appalachian Power Co. v. State Tax Dep’t of W. Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995).”

Syl. Pt. 5, *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 827 S.W.2d 417 (2019). If the intention of the Legislature is not clear, or if the Legislature has not spoken to the specific issue, this Court will then turn to the second of the two interrelated *Chevron* questions.

“If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982)’ Syl. Pt. 4, *Appalachian Power Co. v. State Tax Dep’t of West Virginia*, 195 W. Va. 573, 466 S.E.2d. 424 (1995).

Syl. Pt. 6, *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 827 S.E.2d 417 (2019).

Health Care Cost Review Authority v. Boone Memorial Hospital, 196 W. Va. 326, 335, 472 S.E.2d 411, 420. “An inquiring court – even a court empowered to conduct *de novo* review – must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.” *Appalachian Power Co.* at 195 W. Va. 582, 466 S.E.2d 433.

An agency's determination of matters within its area of expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning Development Agency*, 174 W.Va. 558, 564, 328 S.E.2d 164, 171 (1985).

III. The Authority Correctly Denied WMH's Exemption Application.

A. WMH does not meet the criteria outlined in W. Va. Code § 16-2D-11(c)(27).

The Authority correctly denied WMH's application for an exemption from certificate of need review. WMH first asserts its application for exemption should have been approved because it meets all the criteria contained in W. Va. Code § 16-2D-11(c)(27). Contrary to WMH's assertions, the plain language of the exemption statute clearly supports the Authority's Decision below. The plain language of the exemption provides that an MRI scanner must be acquired and **utilized by a hospital** in order to be exempt from CON review. Moreover, to hold otherwise and adopt WMH's interpretation of the statute would lead to absurd results. The exemption does not provide that a hospital can acquire an MRI to be utilized by its parent corporation, placed in any location of the hospital's choosing, ignoring whether need exists for MRI services in this second location or whether the addition of this MRI to the service area would have a significant impact on existing facilities already providing MRI services in this area. Such an interpretation of the statute is the antithesis of the express purpose of CON law.

The CON law in West Virginia is found at W. Va. Code § 16-2D-1, *et seq.* W. Va. Code § 16-2D-1 provides the mission of the Authority is to ensure that health services are developed and offered in a manner that is "orderly, economical and consistent" and to "avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services." Specifically, W. Va. Code § 16-2D-1(8)(a) and (b) provides that "[e]xcept as provided in § 16-2D-9, § 16-2D-10, and § 16-2D-11 of this code, the following proposed health services may not be acquired, offered, or developed within this state except upon approval of and receipt

of a certificate of need as provided by this article: . . . (6) Providing fixed magnetic resonance imaging. . . . Consequently, if an entity desires to provide MRI services for the first time, it must go through CON review and establish that there is a need for the proposed service unless it qualifies for the exemption. Additionally, the review process provides other entities located in the same service area and providing the same services the opportunity to challenge such an application through the administrative hearing process.

In W. Va. Code § 16-2D-11, the Legislature provided certain exemptions from CON review. At all times relevant to these proceedings, applications for exemption from review required approval from the Authority.² One of the exemptions provided for in this section is W. Va. Code § 16-2D-11(c)(27) which exempts “[t]he **acquisition and utilization** of one computed tomography scanner and/or one magnetic resonance imaging scanner with a purchase price of up to \$750,000 **by a hospital**.” (emphasis added). WMH relies on this exemption to seek its exemption.

WMH’s reliance on this exemption, however, is misplaced. When the MRI exemption section found at W. Va. Code § 16-2D-11(c)(27) is read *in pari materia* with W. Va. Code § 16-2D-1(8)(b), it is clear the Legislative intent was to require CON review for MRI services unless a hospital acquired and utilized an MRI scanner below the threshold price found in the exemption.

²WMH correctly asserts that the Legislature revised W. Va. Code § 16-2D-11. The title of the section was changed from “Exemptions from certificate of need which require approval from the authority” to “Exemptions from certificate of need which require the submission of information to the Authority.” However, the revised code section still provides that to obtain an exemption one must file an application for exemption along with a statement detailing which statement applies and the circumstances justifying the exemption. *See* W. Va. Code § 16-2D-11(a) and (b). The code section does not provide that the Authority’s role in whether to approve or deny exemption applications has been removed entirely.

This exemption allowed certain hospitals to provide MRI services at their facility without the necessity and expense of CON review.

The West Virginia Supreme Court held in *Banker v. Banker*, 196 W. Va. 535, 543, 474 S.E.2d 465, 473 (1996), that “‘interpreting a statute . . . presents a purely legal question for the Court.’ Syl. Pt. 1, *West Virginia Human Rights Comm’n v. Garretson*, 196 W. Va. 118, 468 S.E.2d 733 (1996); Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dept.* 195 W. Va. 573, 466 S.E.2d 424 (1995); *Mildred L.M. v. John O.F.*, 192 W. Va. 345, 350, 452, S.E.2d 436, 441 (1994). We previously ‘recognized that generally the words of a statute are to be given their ordinary and familial significance and meaning[.]’ *Metropolitan Property and Liability Ins. Co. v. Acord*, 195 W. Va. 444, 450, 465 S.E.2d 901, 907 (1995) citing *Amick v. C&T Dev. Co.* 187 W. Va. 115, 118, 416 S.E.2d 73, 76 (1992). On a pure question of statutory construction, we must try to determine legislative intent using traditional tools of statutory construction. Syl. Pt. 11, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995), citing Syl. Pt. 2, *State ex rel. Water Dev. Auth. V. Northern Wayne County Public Serv. Dist.*, 195 W. Va. 135, 464 S.E.2d 777 (1995); Syl. Pt. 2, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992); Syl. Pt. 1, *Smith v. State Workmen’s Compensation Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). ‘In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.’ *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 263, 465 S.E.2d 257, 263 (1995), citing Syl. Pt. 3, *State ex rel. Feters v. Hott*, 173 W. Va. 502, 318 S.E.2d 446 (1984); Syl. Pt. 2, *Smith v. State Workmen’s Compensation Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975).”

The Court further stated “[w]hile our starting point is the language of the statute, we note that in interpreting [the statutes] specifically, we, in the past, have taken care not to undermine the

statutes' fundamental goals. Recognizing the statutes' varied uniqueness, we consistently have turned back neat legal maneuvers attempted by litigants that were not in keeping with overarching duties, responsibilities, and rights that the West Virginia Legislature intended. *Banker* at 196 W. Va. 543,544, 474 S.E.2d 473,474.

WMH asserts its application for exemption should have been approved because it “meets all the criteria in the statutory exemption.” However, when one examines the criteria provided for by the exemption, WMH does not meet the criteria enumerated in the plain language of the statute. To qualify for an exemption under this code section the MRI must be acquired and utilized by a hospital. It is inherent to the exemption that the **hospital** will acquire and utilize the MRI scanner.

WMH is a hospital located at 1 Healthy Way, Berkeley Springs, Morgan County, West Virginia. WMH made clear in its application that it does not intend to acquire and utilize an MRI at its facility located at 1 Healthy Way, Berkeley Springs, Morgan County, West Virginia. Rather, WMH intends to acquire the MRI device to be used at a medical office building neither owned nor operated by WMH. This medical office building is located at 5524 Williamsport Pike, Martinsburg, Berkeley County, West Virginia. The Authority notes it granted a CON to East Mountain Health Advantage, Inc. on September 5, 2018, to develop a commercial office building at 5524 Williamsport Pike, Martinsburg, Berkeley County. East Mountain Health Advantage, Inc. is a West Virginia non-profit and subsidiary of Valley Health System, a Virginia non-stock, non-profit corporation. If East Mountain Health Advantage, Inc. or Valley Health System seek to provide MRI services in their medical office building, one of these entities would need to submit a CON application and show there was a need for proposed services in the service area and that no other entities already providing these services would be significantly impacted by the addition of these services.

Adoption of WMH's interpretation of the exemption is antithetical to the purpose of the Authority, CON review, and the Legislative intent found in W. Va. Code § 16-2D-1(1). If the Court were to adopt WMH's interpretation of the code hospitals could acquire and "utilize" them in any location they like without regard to whether there is a need for the service or whether the offering of these services would have a significant impact on other providers in the service area.

Following WMH's interpretation of the statute to its ultimate conclusion, any hospital could acquire an MRI scanner and "utilize" the scanner in a medical office building as an "outpatient department" next to an existing hospital without regard to the need for the devices. Under this scenario, WVU Hospitals could acquire and utilize MRI scanners and operate them without limitation in medical office buildings adjacent to Charleston Area Medical Center, Cabell Huntington Hospital, Raleigh General Hospital, etc. without going through review or giving the existing hospital an opportunity to challenge the proposed services. Such an interpretation would allow the purchasing hospital to seriously impact the financial condition of an existing hospital and deny the existing hospital any opportunity to challenge the provision of the services.

In the instant case, the proposed location for the MRI scanner in WMH's application is in the vicinity of Berkeley Medical Center. If WMH's interpretation were to be adopted, not only could WMH locate an MRI next to Berkeley Medical Center, but so could any other hospital in the state. Following WMH's interpretation to its logical end, WMH's interpretation could create a profusion of MRI devices without regard to the impact on existing services. It is not plausible that this was the Legislature's intent in developing this exemption. Rather, as the circuit court correctly held, the more plausible interpretation is the Legislature intended hospitals to be able to purchase and utilize MRI scanners in their own facilities without the necessity of having to go through CON review.

B. The Authority did not create a “primary hospital location” requirement.

WMH next argues that the Authority improperly created a “primary hospital location” requirement in the statutory exemption. This argument also must fail. Contrary to WMH’s assertions, the Authority did not add a “primary hospital location” requirement to the exemption statute. Rather, the Authority stated the plain language of the statute provides that in order for a hospital to qualify for this statutory exemption to CON review, an MRI must be acquired and utilized by a hospital. Inherent to that exemption is the intention that a hospital would be utilizing the MRI at its location, not at a facility owned by a hospital’s parent corporation, located 20 miles away, and located near another existing hospital. “In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.” *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 263, 465 S.E.2d 257, 263 (1995), citing Syl. Pt. 3, *State ex rel. Fetters v. Hott*, 173 W. Va. 502, 318 S.E.2d 446 (1984); Syl. Pt. 2, *Smith v. State Workmen’s Compensation Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

The Authority asserts the plain language of the exemption provides that a hospital must utilize an MRI scanner at its facility to qualify for the exemption. However, even if one assumes, *arguendo*, that the statutory exemption is not clear, *Chevron* provides that a reviewing court must give deference to an agency’s interpretation of the statute so long as the interpretation is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Authority has presented a rational basis for its interpretation of the exemption statute, which is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Consequently, WMH does not qualify for the exemption because it does not intend to acquire and utilize the MRI scanner at its hospital. WMH intends to acquire an MRI device and place it in a medical office building in another county that is owned by its parent corporation.

Although, WMH asserts it intended that the location “would have been staffed by WMH employees and treated as an outpatient department of WMH,” this is not what the exemption statute requires. It requires the MRI device to be acquired and utilized by the hospital. The hospital is 20 miles away in a different county. Moreover, even if WMH staffed the “outpatient department” at the facility 20 miles away, such an arrangement would be impermissible because it would constitute the establishment of an ambulatory health care facility which requires CON review.

V. CONCLUSION

The Authority correctly denied WMH’s application for an exemption from CON review to acquire and utilize an MRI machine at a medical office building owned by its parent corporation and located 20 miles away from WMH. The plain language of the statutory exemption found in former W. Va. Code § 16-2D-11-(c)(27) provides an exemption for hospitals to purchase and utilize an MRI scanner at their hospital without having to undergo the time and expense of CON review. The exemption was not intended for hospitals to be able to avoid CON review and place MRI scanners in any location without regard to determining a need for such services or the impact the addition of those services would have on existing providers.

WHEREFORE, for the reasons stated more fully above, the West Virginia Health Care Authority respectfully requests the October 4, 2021, decision of the Circuit Court of Kanawha County be AFFIRMED.

Respectfully Submitted,

WEST VIRGINIA HEALTH CARE
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IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST
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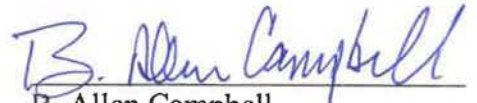
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CERTIFICATE OF SERVICE

I, B. Allen Campbell, counsel for the West Virginia Health Care Authority, do
hereby certify that on March 24, 2022, the above was served on all parties:

Robert L. Coffield, Esquire
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