BEFORE THE OFFICE OF JUDGES

IN RE: **STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY**
CON File No. 21-7-12157-H
APPEAL DOCKET No. 22-HC-03

RESPONSE BRIEF
ON BEHALF OF APPELLEE
ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Response Brief is submitted by St. Joseph's Hospital of Buckhannon, Inc. d/b/a St. Joseph's Hospital ("SJH") in response to the Brief submitted by Stonewall Jackson Memorial Hospital Company ("Stonewall") to the Office of Judges ("OOJ")[1] on August 15, 2022. Stonewall's Brief seeks to overturn the West Virginia Health Care Authority's (the "Authority's") decision (the "Decision") to deny Stonewall's Certificate of Need ("CON") application in the above-captioned matter (hereafter the "Application" or the "Project").

In its Application, Stonewall proposed to replace and relocate its existing hospital facility at a cost of $55.95 million to a new location near the Route 33/Interstate 79 intersection (the "Proposed Site"), approximately 4.2 miles away from its existing location. (Ex. 3, at Section C); (Ex. 23, at p. 98) It is undisputed that Stonewall's relocation to the Proposed Site will destroy SJH's status as a "critical access hospital" ("CAH") under the Medicare and Medicaid programs, a status designed to provide favorable reimbursement treatment for financially vulnerable small, rural hospitals like SJH. *See, e.g.,* Decision at p. 38, Ex. 23, at pp. 54, 168. SJH presented substantial evidence that its loss of CAH status will have a significant adverse effect on its continued financial viability by eliminating millions of dollars of enhanced Medicare, Medicaid, and PEIA reimbursement annually. Though Stonewall tried to cavalierly dismiss this outcome, SJH was in fact on the verge of financial collapse in 2013 before gaining eligibility as a CAH in 2014. (Ex. 21, Att. N)

The construction of a replacement hospital costing over $55 million is a huge

[1] When the Decision was issued, the OOJ was the statutorily-designated review agency for CON appeals pursuant to W. Va. Code § 16-2D-16. However, on or before September 30, 2022, should the OOJ not issue a final decision or otherwise dispose of any pending appeal, the appeal will be transferred to the Intermediate Court of Appeals. *See* W. Va. Code § 16-2D-16A. The parties to this appeal have been directed to submit briefs to the OOJ, and have been informed that the OOJ will transfer jurisdiction of this matter to the Intermediate Court of Appeals on or before September 30, 2022.

endeavor. The CON law imposes multiple legal standards which require thorough planning and convincing proof. The need for such planning and proof is magnified when a project alternative will financially devastate another rural, sole community hospital. But shockingly, Stonewall's Chief Administrative Officer, Kevin Stalnaker, readily testified on direct examination that over the course of more than two decades, Stonewall did not **even explore or consider** relocating its hospital to **any alternative location** in Lewis County. (Ex. 23, at pp. 54, 78-79) In fact, he twice admitted that Stonewall has purchased two properties at the Route 33/Interstate 79 intersection, first in 1998, and subsequently in 2017, without considering alternative sites:

> Q. Now again you've talked about over the years that there was – there was never any secret about Stonewall wanting to construct a new facility at one of the two of those lots, sites I'll call them. I guess they're too big for lots.
> Have you explored other, any other sites?
>
> A. No.

(Ex. 23, at p. 54)

> Q. Now you mentioned I believe in your testimony that you only considered two sites, these two sites that I've discussed with you. Correct?
>
> A. Yes, sir.
>
> Q. And so, it's always been the aim of Stonewall to locate at that location since before 2000?
>
> A. Yes, sir.

(Ex.23, at p.79)

Mr. Stalnaker's testimony was undisputed that site selection for the Stonewall Project pre-existed the Application process by over two decades, and Stonewall never made an effort to consider alternative locations. That is true even though Mr. Stalnaker readily admitted that there were other sites in Lewis County which could have been considered:

Q. Are you saying there was – there's no other available property that could be looked at in Lewis County?

A. I'm not saying that.

(Ex. 23, at p. 79)

The burden of proof was on Stonewall to demonstrate that its Application met the minimum requirements of the CON law. Critically, every applicant must demonstrate that superior alternatives to its Project in terms of cost, efficiency, and appropriateness do not exist, and that the development of alternatives is not practicable. W. Va. Code § 16-2D-12(b)(1). As the Authority properly recognized in its Decision, Stonewall's abject failure **to explore or consider** any other potential location(s) for its Project meant that it failed to satisfy these minimum statutory requirements. *Id.*; *see also* Decision at pp. 34-39.

Stonewall's Brief contains scattershot arguments aimed at excusing Stonewall's lack of planning. The vast majority of these arguments have already been considered and rejected by the Authority. Ultimately, since the Authority's determinations in the Decision are well supported by the record and consistent with the CON law – and since the Authority is the state agency armed with the health planning expertise to administer the CON program – such determinations must be accorded substantial deference on appeal. As such, the Authority's Decision to deny Stonewall's Application must be affirmed.

II. PROCEDURAL AND FACTUAL BACKGROUND

The West Virginia CON program exists by virtue of W. Va. Code § 16-2D-1, *et seq.*, and jurisdiction over this program is vested in the Authority. *See* W. Va. Code § 16-2D-3(a)(1). The CON program requires that certain "proposed health service[s]," as detailed by W. Va. Code § 16-2D-8, must be reviewed and approved by the Authority prior to the offering or development of the service. The Project is a reviewable "proposed health service" because it

constitutes the "construction, development, . . . or other establishment of a health care facility," and separately, because it constitutes "an obligation for a capital expenditure incurred by or on behalf of a health care facility in excess of the expenditure minimum."[2] W. Va. Code §§ 16-2D-8(a)(1), (a)(3)(A).

On September 3, 2021, Stonewall filed a letter of intent for the Project with the Authority. (Ex. 1) Subsequently, on September 13, 2021, Stonewall filed its Application to construct a replacement hospital at the Proposed Site. Stonewall had previously filed a substantially similar application five months earlier (identified as CON File No. 21-7-12069-H), which it withdrew when issues were raised by SJH and the Authority about Stonewall's failure to address multiple CON requirements.

On October 14, 2021, SJH requested affected person status and further requested a public hearing upon the Application. (Ex. 10). The public hearing was conducted on January 25, 2022. *See generally* (Ex. 23). Both Stonewall and SJH were present and afforded a full opportunity to offer testimony, to introduce documentary evidence, and to otherwise be heard. The Authority issued its Decision denying the Application on June 13, 2022.

On July 8, 2022, Stonewall filed a Request for Review with the OOJ. Then on July 13, 2022, SJH also filed a Request for Review with the OOJ (containing a single cross-assignment of error) asserting that the Authority improperly failed to conclude the Application was inconsistent with the Accessibility Criterion of the Renovation-Replacement State Health Plan

[2] The Authority updates and publishes the "capital expenditure minimum" on its website. *See* W. Va. Code § 16-2D-3 (providing that the Authority "[s]hall adjust the expenditure minimum annually and publish to its website the updated amount on or before December 31, of each year."). When the Application was filed in 2021, the capital expenditure minimum was $5,618,381, far less than the proposed $55.95 million cost of Stonewall's Project.

("SHP") Standards.[3]

On July 29, 2022, SJH filed a Motion to Dismiss Stonewall's appeal due to Stonewall's failure to serve a copy of the Request for Review upon the Authority and SJH *via* certified mail as required by W. Va. Code § 29A-5-4(b).

Stonewall filed its initial Brief and Response to the Motion to Dismiss with the OOJ on August 15, 2022. This Response Brief on behalf of SJH is now filed pursuant to the OOJ's Scheduling Order.

III. ISSUES PRESENTED

The issues presented for review in this appeal are the following:

A. Whether the Authority's conclusion that Stonewall failed in its burden of proof on the superior alternatives issue under W. Va. Code § 16-2D-12(b)(1) was supported by substantial evidence or a rational basis, and was consistent with applicable law?

B. Whether the Authority properly considered the Project's location in ascertaining Stonewall's compliance with W. Va. Code § 16-2D-12(b)(1)?

C. Whether the Authority's determination that Stonewall's Application was consistent with the Accessibility Criterion of the Renovation-Replacement State Health Plan Standards was in error?

IV. STANDARD OF REVIEW

The standard of review for an administrative appeal taken under the CON program is set forth at W. Va. Code § 29A-5-4. *See* W. Va. Code § 16-2D-16(b); *St. Mary's Hospital v. SHPDA*, 364 S.E.2d 805 (W. Va. 1987). W. Va. Code § 29A-5-4 provides in relevant part the

[3] In its Request for Review, SJH identified that the Decision's ultimate outcome – the denial of the Application – was proper and correct. SJH further identified that, while the cross-assigned error may be harmless at this stage of the proceeding, SJH intended to preserve its rights to this issue on appeal in light of Stonewall's previously filed Request for Review.

following:

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

W. Va. Code § 29A-5-4(g).

A. The standard of review with respect to the Authority's factual findings is limited.

Findings of fact by an administrative agency "are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, *Muscatell v. Cline*, 474 S.E.2d 518 (W. Va. 1996). The "clearly wrong" standard of review "[is a] deferential one[] which presume[s] an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl Pt. 2, *Stewart v. W. Virginia Bd. of Examiners for Registered Pro. Nurses*, 475 S.E.2d 478, 478 (W. Va. 1996); *see Martin v. Randolph County Bd. of Educ.*, 465 S.E.2d 399, 406 (W. Va. 1995) (a reviewing court must uphold an administrative agency's factual findings that are supported by substantial evidence, and the reviewing court owes substantial deference to inferences drawn from these facts); *see Cahill v. Mercer County Bd. of Educ.*, 539 S.E.2d 437, 440 (W. Va. 2000) (stating that "a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge . . .").

Our Supreme Court of Appeals has also held that a reviewing court cannot substitute its judgment vis-à-vis factual findings made by an administrative agency:

> [s]ince a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, [an appellate court] is not permitted to substitute its judgment for that of the [agency] with regard to factual determinations.

Syl. Pt. 4, *Frazier v. S.P.*, 838 S.E.2d 741, 743 (W. Va. 2020) (citing *Cahill v. Mercer County Board of Education*, 539 S.E.2d 437 (W. Va. 2000)). In this same vein, our Supreme Court of Appeals astutely identified that:

> [w]e cannot overlook the role that credibility places in factual determinations, a matter reserved exclusively for the trier of fact. We must defer to the [agency's] credibility determinations and inferences from the evidence, despite our perception of other, more reasonable conclusions from the evidence. ... Whether or not the [agency] came to the best conclusion, however, she was the right person to make the decision. An appellate court may not set aside the factfinder's resolution of a swearing match unless one of the witnesses testified to something physically impossible or inconsistent with contemporary documents. ... The [agency] is entitled to credit the testimony of those it finds more likely to be correct.

Frazier v. S.P., 838 S.E.2d 741, 748 (W. Va. 2020) (citing *Martin*, 465 S.E.2d at 408).

In sum, the Authority's factual determinations, and inferences drawn from such factual determinations, are accorded "substantial deference" if they are supported by "substantial evidence or a rational basis." Syl. Pt. 1, *Muscatell*, 474 S.E.2d at 518; Syl Pt. 2, *Stewart*, 475 S.E.2d at 478; *Martin*, 465 S.E.2d at 406; *Cahill*, 539 S.E.2d at 440.

B. The standard of review with respect to questions of law, though *de novo*, is limited by the concept of due deference to an administrative agency when it does not act in contradiction to the Legislature's expressed intent.

While the general standard of review of an administrative appeal under W. Va. Code § 29A-5-4(g) is considered *de novo* with respect to questions of law, it has also been held

that this review is limited to a determination of whether the agency's decision was based on a consideration of relevant factors, and whether there has been a clear error of judgment. *See Princeton Community Hospital v. SHPDA*, 328 S.E.2d 164 (W. Va. 1985); *see* Syl. Pt. 1, *Muscatell*, 474 S.E.2d at 518. In discussing the deference to be accorded to a predecessor agency of the Authority under the CON program,[4] our Supreme Court of Appeals has stated that a determination of matters within that agency's area of expertise is entitled to substantial weight. *Princeton*, 328 S.E.2d at 171. Citing the case of *Ethyl Corporation v. EPA*, 541 F.2d 1 (D.C. Cir. 1979), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 394 (1976), the Court further stated:

> But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. **To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise.** The immersion in the evidence is designed solely to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors.

Princeton, 328 S.E.2d at 171. (emphasis added)

More recently, our Supreme Court of Appeals has clarified that judicial review of an agency's decision-making authority involves two separate but interrelated questions, the second of which furnishes an occasion for agency deference. A reviewing court first must ask whether the Legislature has directly spoken to the precise question at issue. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); Syl. Pt. 3, *Appalachian Power Co. v. State Tax Department*, 466 S.E.2d 424 (W. Va. 1995); *W. Va. Health Care Cost Review Auth.*

[4] The CON program was formerly administered by the State Health Planning and Development Agency ("SHPDA") until 1983. In 1983, the SHPDA was replaced by the Health Care Cost Review Authority until 1997, at which time the agency assumed its current name.

v. Boone Mem'l Hosp., 472 S.E.2d 411, 421-422 (W. Va. 1996) *Amedisys W. Virginia, LLC v. Pers. Touch Home Care of W. Va., Inc.*, 859 S.E.2d 341, 351 (W. Va. 2021). If the intention of the Legislature is clear, that is the end of the matter, and the agency's position must be upheld if it conforms to the Legislature's expressed intent. No deference is due an agency's actions at this stage.

However, if legislative intent is not clear, a reviewing court may not simply impose its own construction in its review of a statute, legislative rule, or other rule carrying the force of law. *Chevron*, 467 U.S. at 842-43; Syl. Pt. 3, *Appalachian Power Co. v. State Tax Department*, 466 S.E.2d 424 (W. Va. 1995); *Boone*, 472 S.E.2d at 421-22; *W. Va. Consol. Pub. Ret. Bd. v. Wood*, 757 S.E.2d 752, 758 n.9 (W. Va. 2014), *citing United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Amedisys*, 859 S.E.2d at 351. Rather, if a statute, legislative rule, or rule carrying the force of law is silent or ambiguous with respect to the specific issue, the question for the reviewing court is whether the agency's answer is based upon a permissible construction of the aforementioned legal authority. *Id.* If it is, then the interpretation of the statute, legislative rule, or rule carrying the force of law by the agency charged with its administration is given great deference and weight. *Id.*

Our Supreme Court of Appeals has emphasized the importance of recognizing an administrative agency's expertise in interpreting ambiguous statutes that it is charged with administering:

> Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous . . . Of course, when there is more than one reasonable interpretation, the courts ordinarily should follow [the interpretation] of the administrative board. Adherence to the practice described above is particularly important in cases where the agency has some expertise in making these determinations.

Martin, 465 S.E.2d 399 at 415 (internal quotations omitted) (citing Syl. Pt. 2, *West Va. Dept. of*

Health and Human Resources/Welch Emergency Hosp. v. Blankenship, 431 S.E.2d 681 (W. Va. 1993); *Boley v. Miller*, S.E.2d 352 (W. Va. 1992); *Blennerhassett Historical Park Comm'n v. Public Serv. Comm'n of W. Va.*, 366 S.E.2d 758 (W. Va. 1988)).

Ultimately, to the extent that the Legislature has not "directly spoken to the precise question at issue" through a statutory or regulatory provision, the Authority's interpretation of a statute or regulation must be accorded great deference and weight, as it is the agency charged with administering the CON law and has vast expertise in such matters. *Chevron*, 467 U.S. at 842-43; *Amedisys*, 859 S.E.2d at 351; *Martin*, 465 S.E.2d 399 at 415.

V. ARGUMENT

A. The Authority's conclusion that Stonewall failed in its burden of proof on the superior alternatives issue under W. Va. Code § 16-2D-12(b)(1) was supported by substantial evidence or a rational basis, was consistent with applicable law, and must be upheld.

W. Va. Code § 16-2D-12 outlines the minimum criteria that an applicant must address under the CON law. The Authority concluded that Stonewall's application did not comply with the following statutory criterion:

> (b) The authority may not grant a certificate of need unless, after consideration of the appropriateness of the use of existing facilities within this state providing services similar to those being proposed, the authority makes each of the following findings in writing:
> (1) That superior alternatives to the services in terms of cost, efficiency and appropriateness do not exist within this state and the development of alternatives is not practicable;

W. Va. Code § 16-2D-(b)(1). Hence, Stonewall not only had the burden of proof to demonstrate that its Project was the superior alternative in terms of cost, efficiency, and appropriateness, but also that the development of such an alternative was not practicable. Both aspects of this statutory provision involve questions of fact. The vast majority of Stonewall's Brief simply implores this Court to reweigh factual evidence that was already presented to, and considered by, the Authority. But as outlined in the scope of review discussion, *infra*, this Court does not sit as an original

factfinder; its role with respect to the Authority's factual determinations, and inferences drawn from such factual determinations, is to determine whether they are supported by "substantial evidence or a rational basis." Syl. Pt. 1, *Muscatell*, 474 S.E.2d at 518; Syl Pt. 2, *Stewart*, 475 S.E.2d at 478; *Martin*, 465 S.E.2d at 406; *Cahill*, 539 S.E.2d at 440. If they are, substantial deference must be accorded to such factual determinations and inferences, and they must be upheld by this Court. *Id.*

1. Substantial evidence of record and/or a rational basis exists to support the Authority's finding that Stonewall failed to demonstrate its Project is the superior alternative in terms of cost, efficiency, and appropriateness.

At the public hearing, SJH submitted financial expert testimony, analysis, and reports; testimony from the President of SJH; health planning expert testimony; industry articles; and host of other evidence to demonstrate the havoc that the Project will wreak on SJH and Upshur County residents. *See, e.g.*, (Ex. 23, at pp. 126-142, 164-188, 167, 283, 306), (Ex. 21, at Attachments O, T, U, W). A brief summary of this evidence and pertinent facts follows.

Originally founded in 1921, SJH is a 25-bed critical access hospital ("CAH") with 16 skilled nursing facility beds, located in Buckhannon, Upshur County.[5] (Ex. 23, at p. 164); (Ex. 21, Attachment W, at p. 1253). SJH provides a full range of hospital services, including emergency room, laboratory, diagnostic, imaging, primary care, and various specialty care services (such as surgery, cardiology, rheumatology, orthopedics, and ophthalmology).[6] (Ex. 23, at p. 163). SJH holds the same category of hospital license in West Virginia as does Stonewall. In fact, many of the services offered at SJH are identical to those offered at Stonewall. Any suggestion that SJH

[5] In the fall of 2015, the Pallottine Missionary Sisters transferred ownership of SJH to United Hospital Center, Inc., a wholly-owned subsidiary of the West Virginia United Health System, Inc.

[6] SJH primarily serves the residents of Upshur County, but also serves the residents of Lewis, Barbour, Gilmer, Braxton, Randolph, Tucker, and Webster Counties. *See, e.g.*, (Ex. 20, Attachment 15, at pp. 1119-1165); *see also* (Ex. 23, at p. 165)

does not provide "similar" services to those being proposed by Stonewall is simply false.

CAH status is a designation made by the United States Department of Health and Human Services, Centers for Medicare & Medicaid Services ("CMS"). This status enables a qualified rural hospital to be reimbursed on a cost-basis for providing services to Medicare and Medicaid patients. (Ex. 23, at p. 132). To qualify for CAH status, a hospital must, *inter alia*, not be located closer than 15 (mountainous terrain) miles from another hospital. 42 C.F.R. § 485.610(c); *see also* Ex. 23, at p. 167.[7]

The CAH program was implemented to address a rash of rural hospital closings across the county. (Ex. 23, at p. 166). Keith Seeloff, Partner at Dixon Hughes Goodman LLP[8] and an expert in health care finance, testified about the purpose and benefit of the CAH program. (Ex. 23, at pp. 133-134). Rather than being paid a pre-determined, fixed amount for hospital services under the Prospective Payment System ("PPS"), a CAH is paid primarily on the basis of the costs it incurs. *Id.* This results in a more favorable level of reimbursement for the CAH, and helps mitigate the dire financial and operational challenges that small, rural hospitals face in order to ensure the populations they serve continue to have access to care. *See id.*

SJH operated as a PPS hospital until 2014. (Ex. 23, at p. 140; Ex. 21, Att. V). From the years of 2007 through 2013, SJH's financial health struggled mightily, experiencing a negative operating margin for five out of those seven years. *Id.* Upon examining SJH's bleak financial performance during those years, Mr. Seeloff testified that SJH was on the brink of bankruptcy in 2013 with only 21 days cash on hand. (Ex. 23, at pp. 140-141). However, in April of 2014, SJH was designated as a CAH. (Ex. 23, at p. 141; Ex. 21, Att. N, at p. 001188) Since that time, its

[7] This was the method used by SJH to obtain its CAH designation. For some facilities, CAH designation may be obtained based on alternative criteria.

[8] Dixon Hughes Goodman LLP is now known as FORVIS, LLP.

financial health has made a positive turn-around. *Id.*; (Ex. 21, at Att. V)

It is critical to understand that Stonewall's Application involves more than replacing the hospital's physical plant – it also contemplates relocating the hospital to the Proposed Site, which is approximately 4.2 miles away from its existing location. (Ex. 3 , at Section C); *see* (Ex. 23, at p. 98). As detailed *infra*, Stonewall purchased both plots of land which constitute the Proposed Site in 2017, with full knowledge that SJH was designated as a CAH in 2014. (Ex. 23, at p. 141; Ex. 21, Att. N, at p. 001188); *see, e.g.*, (Ex. 23, at pp. 77-79). Stonewall's relocation to the new Proposed Site will undisputedly destroy SJH's ability to retain its CAH status because the Proposed Site is located approximately 11.8 miles away from SJH, which is closer than the 15-mile threshold necessary to qualify as a CAH. 42 C.F.R. § 485.610(c); (Ex. 23, at p. 167); Decision at p. 38. To be sure, SJH inquired with the West Virginia Office of Health Facility Licensure & Certification (OHFLAC) and CMS, and both entities confirmed that Stonewall's relocation to the Proposed Site would cause SJH to lose its CAH status. (Ex. 23, at p. 168); (Ex. 21, Attachment O, at p. 001190).

In order to quantify the impact that the loss of CAH status would have upon SJH, Mr. Seeloff and his team developed an in-depth financial feasibility report. (Ex. 23, at pp. 126, 139; Ex. 21, at Att. W). The first part of Mr. Seeloff's report involved the preparation of a six-year "base case" financial forecast for SJH (from the period of 2022 through 2027) to demonstrate SJH's projected financial performance in such years should SJH continue to operate as a CAH. (Ex. 23, at p. 127) To develop this "base case," Mr. Seeloff reviewed SJH's 2021-2026 budget, historical audited financial statements and cost reports, current strategic plan, and set of five-year financial projections prepared by SJH annually.[9] *See id.* Ultimately, Mr. Seeloff's "base case"

[9] Mr. Seeloff made certain necessary adjustments to SJH's six-year financial projections, including adjustments reflecting SJH's actual operating results during FY2021, to account for an expected return to

financial forecast projected that – should SJH maintain its CAH status – it will remain profitable through 2027. (Ex. 21, Att. W, at p. 001249; Ex. 23, at p. 130).

The second part of Mr. Seeloff's report was an "impact analysis" to determine the financial impact of losing CAH status effective July 1, 2024, and reverting back to a PPS hospital on this same date. (Ex. 21, Att. W, at p. 001279; Ex. 23, at p. 131).[10] The "impact analysis" demonstrated a total reimbursement reduction of **$14.476 million** from Medicare, Medicaid, and PEIA **in 2019 alone**, a figure which Mr. Seeloff affirmed will only increase over time. (Ex. 23, pp. 136-137) This reimbursement impact was then applied throughout the "base case" six-year forecast period from 2022 to 2027, reflecting a shift from CAH to PPS reimbursement effective July 1, 2024. (Ex. 21, Att. W, at p. 001275). Ultimately, the impact analysis demonstrated that, beginning in 2025, SJH was projected to become unprofitable as a PPS hospital, with an annual loss of almost $8.9 million by 2027. *Id.* Mr. Seeloff testified that, based on this impact analysis, losing CAH status would adversely affect the long-term viability of SJH:

> Q. So Mr. Seeloff, let me ask you, what conclusions do you draw from your own report here today?
>
> A. That losing critical access designation for Saint Joseph's Hospital would --- would significantly impact their financial performance.

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pre-COVID cost-to-charge ratios, and to encompass a five percent increase for wage inflation (which was based on SJH's experience and current trends in the health care industry). *See* (Ex. 21, Att. W, pp. 001255-001271); *see also* (Ex. 23, at pp. 129-130). Mr. Seeloff did not make any substantial changes to SJH's projected patient utilization assumptions in developing the "base case" financial forecast. *Id.*

[10] Mr. Seeloff calculated changes to SJH's reimbursement as a PPS hospital for traditional Medicare inpatients and outpatients, Medicare Advantage inpatients and outpatients, Medicare swing-bed patients, Medicaid traditional inpatients and outpatients, Medicaid managed care inpatients and outpatients, and West Virginia Public Employees Insurance Agency ("PEIA") inpatients and outpatients. (Ex. 21, Att. W, at p. 001279; Ex. 23, at pp. 135-136) Mr. Seeloff also reviewed Medicare cost reports, SJH-supplied data, as well as comparisons to peer group rural West Virginia PPS hospitals (including Wetzel County Hospital, Stonewall, Reynolds Memorial Hospital, Pleasant Valley Hospital, and Davis Memorial Hospital) to formulate the impact analysis. (Ex. 21, Att. W, at pp. 001279, 01297-1298). The report also considered other reimbursement nuances, including the 340B Drug Pricing Program and the Direct Payment Program. (Ex. 21, Att. W). Mr. Seeloff also utilized SJH's 2019 (pre-COVID) figures as a basis to measure the variance between PPS and CAH status, and as a corollary, to determine the basis of the impact on SJH's reimbursement due to loss of CAH status in future years. (Ex. 23, at p. 137).

. . .

Q. The financial projections you have done at the PPS hospital over the long term, could that result in the closure of the hospital?

A. Yes, it could.

(Ex. 23, at pp. 141-142). Stonewall offered no competing or contradictory evidence to Mr. Seeloff's report. In fact, Stonewall's own financial expert identified in its prehearing list of witnesses declined to testify at the hearing.

Mr. Seeloff's conclusions are historically supported by the struggles of SJH as a PPS hospital. (Ex. 21, Att. V, at p. 001243). Skip Gjolberg, President of SJH, testified that he agreed with Mr. Seeloff's conclusions, and made the following grim prediction about what loss of CAH status will mean to SJH's continued viability:

Q. . . . Now based upon your experience in working in rural healthcare and operating critical access hospitals and working in critical access hospitals, do you agree or disagree with the --- with the analysis presented by Mr. Seeloff here today about the financial impact of the loss?

A. Absolutely. I believe it would be --- it would be disastrous for us to lose our status . . .

* * * *

A. . . . I mean we would do everything that we could do, but I think it would end up eventually leading to the closure [of SJH].

(Ex. 23, at pp. 168-169).

The conclusions of Mr. Seeloff and Mr. Gjolberg were echoed by a *Health Affairs* article titled "Minimum-Distance Requirements Could Harm High-Performing Critical-Access Hospitals And Rural Communities" submitted into evidence:

[L]oss of critical-access status and cost-based reimbursement could have

> potentially devastating financial consequences for many critical-access hospitals . . . A substantial reduction in financial support could lead to a renewal of the high rural hospital closure rates of the 1990s, with concomitant deleterious effects on the health of these communities . . . If financially vulnerable critical-access hospitals were to close, residents of many areas would experience increased travel time to a different hospital.

(Ex. 21, Att. T, at pp. SJHB001237-SJHB001238). SJH further submitted evidence demonstrating that this prospect is not some far-fetched hypothesis. In fact, in December of 2014, Pioneer Community Hospital of Newton, Mississippi closed after losing CAH status due to no longer being able to meet applicable distance requirements. (Ex. 21, Att. U). The hospital stated that losing CAH status "[made] the operation of the hospital no longer financially feasible." *Id.*

In sum, a substantial evidence was presented to demonstrate that Stonewall's selection of the Proposed Site as the location to build its replacement hospital will adversely affect the continued viability of SJH, and as testified by Mr. Seeloff and Mr. Gjolberg, could very realistically lead to SJH's closure. *See, e.g.*, (Ex. 23, at pp. 126-142, 164-188, 283, 306); (Ex. 21, Atts. O, T, U, W). SJH – an institution which has provided hospital services in Buckhannon for 101 years – could face extinction simply because Stonewall failed to consider any alternative location to Proposed Site. This, in turn, could leave Upshur County residents without a hospital.

The Authority extensively discussed the evidence detailed herein (including Mr. Seeloff's analysis) in its Decision, and explicitly relied on this evidence to make its factual finding that the Project was not the superior alternative in terms of cost, efficiency, and appropriateness:

> The Authority finds that the proposed project is not the superior alternative in terms of cost, efficiency and appropriateness . . . The Authority finds that Stonewall's proposed project would cause SJB to lose its CAH status which would have a significant detrimental financial effect on SJB. The evidence of record showed that the loss of CAH status would result in SJB suffering significant annual monetary losses.

Decision at pp. 37-38; *see also* Decision at p. 36. The Authority was imminently justified in

concluding that a bankrupted hospital would be neither cost effective nor an appropriate result for the citizens of Upshur County. Since there was "substantial evidence or a rational basis" for the Authority to find that Stonewall's relocation to the Proposed Site – and the resulting potential closure of SJH – was not the superior alternative in terms of cost, efficiency, and appropriateness, "substantial deference" must be accorded to the Authority's finding. Syl. Pt. 1, *Muscatell*, 474 S.E.2d at 518; Syl Pt. 2, *Stewart*, 475 S.E.2d at 478; *Martin*, 465 S.E.2d at 406; *Cahill*, 539 S.E.2d at 440.

2. Substantial evidence of record and/or a rational basis exists to support the Authority's finding that Stonewall failed to demonstrate that the development of alternatives is not practicable

As detailed above, W. Va. Code § 16-2D-12(b)(1) contains **two distinct** requirements that Stonewall must meet. The above analysis focused on Stonewall's failure to prove that its Project was a superior alternative in terms of cost, efficiency, and appropriateness. While Stonewall's failure to meet this requirement alone justified the Authority's denial of the Application, Stonewall further failed to prove that "the development of alternatives is not practicable," as also required by W. Va. Code § 16-2D-12(b)(1).

To demonstrate that the development of alternatives is not practicable, it is axiomatic that the applicant must first conduct some type of meaningful analysis of available alternatives. The applicant must then logically demonstrate why, after considering all such alternatives, the development of such alternatives is not practicable. While always required as a minimum standard for CON approval, this inquiry is especially imperative in the instant matter, since Stonewall's selection of the Proposed Site to develop its Project threatens the continued viability of Upshur County's sole community hospital.

But as evidenced by Mr. Stalnaker's own admissions, as detailed hereinabove,

Stonewall **never even considered** relocating its hospital to any other location other than the Route 33/Interstate 79 intersection. He confirmed this on both direct examination and cross examination. (Ex. 23, at pp. 54, 79) Mr. Stalnaker even admitted that there was other property in Lewis County that could be "looked at." *Id.* In other words, the only alternatives Stonewall considered were: (1) not implementing the Project at all; (2) renovating its existing hospital; or (3) building a new hospital **at the Proposed Site**. *Id*; *see also* Ex. 3, at Section G. This half-hearted effort failed to comply with the plain language of W. Va. Code § 16-2D-12(b)(1). The Authority specifically cited Mr. Stalnaker's admission that no other potential sites **were even considered** in its finding that Stonewall did not prove that the development of alternatives is not practicable:

> Stonewall admitted it had not explored other sites for the project other than the proposed location. (Exhibit 23, p. 54). Stonewall produced no evidence that it had completed a market analysis of the surrounding area to determine if any other suitable property might exist. The burden of proof is on the Applicant to show that the development of alternatives to the project are not practicable. Stonewall has failed to meet this burden.

Decision at pp. 38-39.

The practicability of alternatives is also a question of fact. The Authority weighed the evidence of record – including the striking admissions from Mr. Stalnaker, and the gaping omission in Stonewall's Application of any consideration of any alternative site(s) whatsoever – and concluded that Stonewall failed to demonstrate that the development of alternatives is not practicable, as required by W. Va. Code § 16-2D-12(b)(1). There was clearly "substantial evidence or a rational basis" for the Authority to make this determination, and "substantial deference" must be accorded to the Authority's finding. Syl. Pt. 1, *Muscatell*, 474 S.E.2d at 518; Syl Pt. 2, *Stewart*, 475 S.E.2d at 478; *Martin*, 465 S.E.2d at 406; *Cahill*, 539 S.E.2d at 440.

3. Stonewall's arguments pertaining to the above findings of fact are meritless.

Stonewall takes issue with the Authority's statement in the Decision that "Stonewall produced no evidence that it had completed a market analysis of the surrounding area to determine if any other suitable property might exist." Decision at p. 39. Stonewall specifically argues that there is no "statutory basis" for the Authority to require a market analysis, and that the Authority improperly required them to do so. Brief at pp. 7-8. This argument makes patently clear that Stonewall still does not understand its utter failure to analyze what would constitute a superior alternative.

First, and perhaps most fundamentally, the Authority certainly has a "statutory basis" to require an applicant to objectively establish that it has considered alternatives, and has sufficiently established that no alternatives are practicable, be that by a market analysis or otherwise. The "statutory basis" is set forth by the plain language of W. Va. Code § 16-2D-12(b)(1), which requires at least a modicum of proof. While a market analysis is one way to establish such objective proof of compliance with W. Va. Code § 16-2D-12(b)(1), the point is that Stonewall offered no objective evidence at all. Stonewall asserts that the Authority has never required such objective evidence in past decisions. *See* Brief at p. 8. Ironically, this assertion is contradicted by the UHC Decision that Stonewall repeatedly cites in its Brief. *See In re: United Hospital Center/West Virginia United Health Systems, Inc.*, CON File No. 02-6-7476-H (October 24, 2003) (hereafter the "UHC Decision"), wherein the Authority determined:

> UHC and WVUHS also presented 258 pages of documents evidencing the process and criteria that UHC used to select the site for UHC and WVUHS' proposed replacement hospital and UHC's retaining of site selection experts, architects, facility planners, construction managers, engineers, environmental experts, geotechnical experts, aeronautics experts, acoustics experts, appraisers and attorneys to assist it in its selection of a site.

See (Ex. 20, Attachment 6, at p. 69). That is 258 more pages of evidence on site selection than

Stonewall presented. In fact, as revealed by Mr. Stalnaker's testimony, it appears the reason why Stonewall did not consider any location other than the Proposed Site was simply because **it had already purchased this site in 2017**, in contravention of the CON law.[11] (Ex. 23, at pp. 77-79) And it made this illegal purchase in 2017 only after another site directly across the road from the Proposed Site, purchased back in 1998, was found to be unusable.

To demonstrate the ineptitude of Stonewall's consideration of alternatives, SJH submitted a market survey conducted by Ms. Kim Licciardi, a licensed West Virginia commercial realtor. (Ex. 21, at Att. E; Ex. 23, at pp. 208-224). Though Ms. Licciardi's survey was never intended to be an exhaustive consideration of every potential site in Lewis County, she identified several potentially suitable locations for the Project which would not destroy SJH's CAH status. (Ex. 21, at Att. E; Ex. 23, at pp. 208-224). Two suitable properties are located immediately adjacent to Stonewall's existing hospital. *Id.* Several others are located adjacent to I-79, including multiple sites proximate to the West Virginia Department of Highways ("WVDOH") District Seven Headquarters, a 32,000 square foot building with sewer and water access. *See* Ex. 32, at p. 222.

Stonewall argues that there is evidence in the record demonstrating how Stonewall adequately considered potential alternatives, and that such alternatives were not practicable. *See, e.g.,* Brief at pp. 6-7. Stonewall specifically relies on *ad hoc* hearing testimony from Mr. Stalnaker whereby he summarily rejects the handful of properties identified in Ms. Licciardi's market survey

[11] Stonewall purchased the two plots of land which constitute the Proposed Site about one month from each other in September 2017 and October 2017, respectively. *See, e.g.*, Ex. 23, at pp. 77-79. Pursuant to W. Va. Code 16-2D-2(10)(C), a series of capital expenditures may be considered as a single capital expenditure subject to review if the expenditures are "for components of a system which is required to accomplish a single purpose." Both plots of land comprise the Proposed Site, and are therefore unquestionably "components of a system which is required to accomplish a single purpose" (*i.e.* the implementation of the Project). Hence, despite being purchased a month apart, Stonewall's purchase of the Proposed Site for an aggregate of $5.625 million constituted a single capital expenditure in excess of the then-current capital expenditure minimum of $5.1 million in direct violation of the CON law. (Ex. 21, Att. C).

submitted by SJH a week before the hearing. *Id.* But Stonewall's *ad hoc* rejection of these potential sites was "too little, too late." While Mr. Stalnaker alleges that certain of these sites might add to the cost of construction, he offered no architectural or engineering studies to support his speculation because Stonewall never performed such an analysis. Stonewall's Brief also made mocking, dubious generalizations about the sites (*e.g.* emphasizing that some sites purportedly "cannot even support the viability of a gas station"), but it conveniently ignored that multiple sites are proximate to the WVDOH District Seven Headquarters. *See* Brief at p. 11.

More fundamentally, the burden of proof was not on SJH to identify a suitable site for Stonewall. That was Stonewall's ultimate burden – one which it haughtily ignored for over two decades. As the factfinder, the Authority was entitled to weigh the credibility of testifying witnesses, and to give Mr. Stalnaker's testimony the weight it deserved. *Frazier v. S.P.*, 838 S.E.2d 741, 748 (W. Va. 2020) (citing *Martin*, 465 S.E.2d at 408).

To summarize, substantial evidence of record and/or a rational basis existed to support the Authority's factual determination that Stonewall did not meet its burden of proof on the superior alternatives issue as required by W. Va. Code § 16-2D-12(b)(1). The Authority's determination must be accorded "substantial deference" on appeal, and as a result, the Authority's Decision to deny Stonewall's Application must be upheld. Syl. Pt. 1, *Muscatell*, 474 S.E.2d at 518; Syl Pt. 2, *Stewart*, 475 S.E.2d at 478; *Martin*, 465 S.E.2d at 406; *Cahill*, 539 S.E.2d at 440.

4. Stonewall's attempt to otherwise discredit the Authority's rational, well-supported determination on the issue of superior alternatives is meritless.

Stonewall conveniently omitted any discussion of the deferential standard of review applicable to the Authority's factual findings in its Brief. Nonetheless, Stonewall offered a slew of arguments regarding the factual findings discussed above, each of which may be readily considered and rejected.

First, Stonewall first made much ado about the Authority's citation to W. Va. Code § 16-2D-1 in the following part of the Decision:

> While the proposed project may be the superior alternative in terms of cost, efficiency, and appropriateness as it relates to Stonewall, the review of the project does not end with the Applicant. The Authority must also determine whether the proposed project is the superior alternative as it relates to an Affected Person and the citizens of the State of West Virginia. ***See* W. Va. Code § 16-2D-1.**

Decision at p. 37 (emphasis added); Brief at p. 3-5. Stonewall specifically argued that "the Authority wrongfully relied on W. Va. Code § 16-2D-1." To this end, Stonewall argued that the "superior alternatives" inquiry is solely limited to what the "superior alternative" is for those in the Project's proposed service area, that effects on the health system in non-service area locations were not relevant under W. Va. Code § 16-2D-12(b)(1), and that W. Va. Code § 16-2D-1 provided no support to consider what a superior alternative may be for West Virginians outside of the Project's stated service area. *See* Brief at pp. 3-5.

As a preliminary matter, W. Va. Code § 16-2D-1 sets forth the legislative purpose of the CON law. The Authority did not "rely" on this legislative purpose in making its finding that Stonewall's Project was not the superior alternative in terms of cost, efficiency, and appropriateness, as Stonewall argues. The Authority instead explicitly "relied" on the vast mountain of evidence discussed above to makes its determination under W. Va. Code § 16-2D-12(b)(1). Decision at pp. 37-38; *see also* Decision at p. 36.

Regardless, an examination of W. Va. Code § 16-2D-1 confirms that it clearly supports the Authority's determination.[12] W. Va. Code §§ 16-2D-1(1), (2) provides the following

[12] The Authority cited W. Va. Code § 16-2D-1 with a "*see*" signal, which pursuant to the Bluebook citation rules, is utilized "when the proposition is not directly stated by the cited authority but obviously follows from it; there is an inferential step between the authority cited and the proposition it supports." The Bluebook: A Uniform System of Citation, Rule 1.2(a) (Columbia Law Review Ass'n et al. eds., 20th ed.)

in full:

> (1) That the offering or development of all health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the **people of this state** and to avoid unnecessary duplication of health services, and **to contain or reduce increases in the cost of delivering health services**.
>
> (2) **That the general welfare and protection of the lives, health and property of the people of this state** require that the type, level and quality of care, the feasibility of providing such care and other criteria as provided for in this article, including certificate of need standards and criteria developed by the authority pursuant to provisions of this article, **pertaining to health services within this state**, be subject to review and evaluation before any health services are offered or developed in order that appropriate and needed health services are made available for persons in the area to be served.

(emphasis added) Thus, the legislative purposes of the CON law plainly seek to protect the availability and affordability of health services for the "people of this state" and "people within this state." W. Va. Code §§ 16-2D-1(1), (2). It does not artificially limit this critically important inquiry to "people of the stated service area of a pending application," as Stonewall argued.[13]

But even more fundamentally, Stonewall's attempt to limit the applicability of its superior alternatives analysis to its service area to the exclusion of SJH violates the plain language of W. Va. Code § 16-2D-12(b)(1), which mandates "consideration of the appropriateness of the use of existing facilities **within this state** providing services similar to those proposed...." (emphasis added). This provision uses the identical phraseology found in W. Va. Code § 16-2D-1. Accordingly, the Authority would have committed clear error if it had not considered SJH under its superior alternatives analysis, The Authority's analysis was perfectly consistent with the CON law's language and legislative purposes. Stonewall's effort to stop the Authority from considering

[13] Stonewall also attempts to differentiate its service line from SJH in its argument, but both SJH and Stonewall offer a variety of the same or similar hospital services, as previously discussed herein.

the "appropriateness" of how its Project may bankrupt SJH must clearly fail.

Second, Stonewall argued that W. Va. Code § 16-2D-12(b)(1) "requires that there be evidence in the record demonstrating that 'superior alternatives do not exist within this state and the development of alternative is not practicable.' There is such evidence in the record. The Authority's conclusion otherwise is incorrect and in error." Brief at p. 7. Similarly, Stonewall dedicated several pages of its Brief to its argument that "[t]he Authority's ruling on the issue of the superior alternative in this matter did not review the facts in the record as a whole. The ruling did not review both sides of the matter. It simply found that St. Joe's would suffer economic harm and that was the end of the analysis." Brief at p. 11.

Even a cursory read of the Decision completely refutes these arguments. The Authority extensively detailed Stonewall's arguments pertaining to the superior alternatives issue, replete with citations to the evidence relied upon by Stonewall in its summary, including the testimony of Mr. Stalnaker. Decision at pp. 35-39. Of course, just because Stonewall "submitted evidence in the record," it does not mean that it met its burden of proof.[14]

For example, despite presenting no expert testimony to refute Mr. Seeloff's impact analysis, Stonewall nonetheless theorized that the West Virginia United Health System, Inc. ("WVUHS") could keep SJH afloat even if it loses many millions of dollars each year.[15] *See* Brief

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[14] Charles H. Koch, Jr. & Richard Murphy, Admin. L. & Prac. Section 5.64 (3d.)(February 2022 Update)("As with most civil trials, the standard of proof in an administrative adjudication is usually preponderance of the evidence").

[15] Stonewall similarly argues that "[t]here was evidence in the record of the case that other hospitals in the WVUHS lost millions of dollars and did not close." Brief at p. 12. This argument was also extensively briefed below and memorialized in the Decision at p. 37. Stonewall is referring to certain historical losses incurred by Camden Clark Medical Center (CCMC) and Reynolds Memorial Hospital (RMH). *Id.* As SJH identified in its briefing to the Authority (and as reflected by the record), in the case of both CCMC and RMH, the operating results of FY2019-2020 were substantially improved over their performance in FY2017 and FY2018. (Ex. 20, Atts. 3-5 at pp.803-820; Att. 2 at pp. 284; 288). In fact, the aggregate "net operating income" for CCMC in FY2019-FY2020 was over $12 million to the good, and was almost $3 million to the good at RMH. *Id.* In contrast, and as detailed above, SJH was on the brink of bankruptcy in 2013, and was certainly on no positive financial trend. Likewise, Mr. Seeloff's detailed report offers no

at p. 12. If this sounds familiar, it is because Stonewall raised the exact same argument to the Authority, which it explicitly recognized and rejected in the Decision. Decision at pp. 36, 38. The Authority detailed Stonewall's arguments regarding this matter, and concluded that:

> Stonewall produced no evidence from WVUH that it would supplement any financial losses incurred by SJH.

Decision at pp. 38. To the contrary, SJH provided substantial evidence of record, including testimony from Mr. Gjolberg, which refuted Stonewall's baseless argument. *See, e.g.*, (Ex. 23, at 169-171). In fact, SJH's historical practice demonstrated the exact opposite – SJH never received any subsidies or loans from WVUHS[16], only a loan from United Hospital Center, Inc., an affiliate hospital. SJH paid this loan this back with fair market value interest. *Id.* Stonewall's unsupported argument in its Brief did nothing to dispel the prospect that losing CAH designation will adversely impact SJH's continued viability.

Stonewall also argued that "there is evidence in the record that [SJH] could relocate to maintain its [CAH] status and that [WVUHS] had at least discussed it, if not approved it." Brief at p. 12. Yet again, this stale argument was rejected by the Authority, as SJH submitted substantial evidence that it has no plans to uproot its existing location of 101 years, and even if it did, there would be absolutely no guarantee that CMS would confer CAH status to its new location. *See, e.g.*, (Ex. 21, at Atts. Y, Z), (Ex. 23, at pp. 173-178, 180-181, 277).[17] It is absolutely incredulous

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positive financial trending through 2027 – it is a forecast which only gets worse every year. (Ex. 21, Att. W). Stonewall's attempted "bait and switch" from one hospital to another is a failed attempt to deflect attention from the disastrous effects that its Project will have on SJH.

[16] WVUHS itself generates no revenue, and has no revenue to make the "hand-outs" that Stonewall alleges will occur to keep SJH afloat.

[17] This evidence included sworn testimony from Mr. Gjolberg that SJH had no plans to relocate SJH and an email from Albert Wright, President and Chief Executive Officer of WVUHS that "[l]oss of CAH status at SJH would be devastating," that "[SJH's] Master Facility Plan for the expansion/renovation [of SJH] on the hill [in its existing location] is the only alternative that makes sense from a cost and business standpoint," and that he "[does] not support moving SJH out of Buckhannon...." (Ex. 21, at Att. Y) While Stonewall postulated that an earlier email (which amounted to nothing more than hearsay conjecture of what Mr.

for Stonewall to suggest that an existing hospital should be required to uproot in response to another hospital's relocation decision.

Hence, Stonewall's arguments that the Authority did not "review both sides of the matter" could not be a clearer attempt to implore this Court reweigh the factual evidence – a wholly inappropriate standard of appellate review. Syl. Pt. 1, *Muscatell*, 474 S.E.2d at 518; Syl Pt. 2, *Stewart*, 475 S.E.2d at 478; *Martin*, 465 S.E.2d at 406; *Cahill*, 539 S.E.2d at 440. The Authority's rejection of these factual arguments was based on "substantial evidence or a rational basis" and are now entitled to "substantial deference." *Id.*

Stonewall next argued that "the Decision is diametrically opposed to one made in a very similar, if not identical matter decided by the Authority." Brief at p. 10. The matter Stonewall referred to is the UHC Decision previously discussed. Specifically, Stonewall argued that the UHC Decision "had the same material facts" as the instant matter, including that Fairmont General Hospital ("FGH") was closely located to the replacement hospital, and that "FGH lost special status as a part of the United Hospital Center move and that caused a loss of revenue." Brief at pp. 10, 14. Of course, none of those "material facts" were introduced by Stonewall into the record of this matter through testimony or otherwise. Pursuant to the requirements of the West Virginia Administrative Procedures Act, none of those "material facts" may be considered by either the Authority or this tribunal on appeal. *See* W. Va. Code § 16-2D-13(g)(3); § 29A-5-2(b); § 29A-5-4(f).

Similarly, neither FGH's "special status" nor "loss of revenue" was ever referenced in the UHC Decision. What is clear from the UHC Decision is that FGH was not a CAH like SJH.

Wright might think), the Authority weighed the evidence and rejected Stonewall's argument. The Authority "is entitled to credit the testimony of those it finds more likely to be correct," and its rejection of Stonewall's unsupported argument was properly within its fact-finding discretion. *Frazier v. S.P., 838 S.E.2d 741*, 748 (W. Va. 2020) (*citing Martin*, 465 S.E.2d at 408).

This profoundly distinguishes the instant appeal from the UHC Decision, the crux of which was whether UHC would violate a five-mile limitation then in existence upon the relocation of an existing hospital under the applicable SHP Standards. *See, e.g.*, UHC Decision at p. 61. Stonewall's argument that the UHC Decision was "very similar, if not identical" to the case at bar is demonstrably wrong.

Finally, Stonewall argued that – because the Authority found the Project was needed, and was consistent with the applicable SHP Standards – the Decision's separate recognition that the Project was not a superior alternative in terms of cost, efficiency, and appropriateness meant the Decision was internally inconsistent and is "in error." *See, e.g.*, Brief at pp. 6, 9. However, Stonewall's argument ignored that the "need" inquiry and "SHP Standards"[18] inquiries are addressed by completely different statutory provisions under the CON law than the "superior alternatives" inquiry. *Compare,* W. Va. Code §§ 16-2D-12(a)(1), (2) *with*, with W. Va. Code § 16-2D-12(b)(1).

Specifically, W. Va. Code § 16-2D-12 (the "Minimum Criteria for Certificate of Need Reviews") sets forth various distinct statutory criteria that an applicant must satisfy to obtain CON approval. One criterion requires an applicant to prove that the proposed project is "needed." W. Va. Code § 16-2D-12(a)(1). Another criterion requires an applicant to prove that its proposed project is "consistent with the state health plan." W. Va. Code § 16-2D-12(a)(2).[19] Yet another separate criterion is set forth by W. Va. Code § 16-2D-12(b)(1), which requires an applicant to

[18] SJH has filed a request for review to preserve its argument that the Authority's failure to determine that the Application was inconsistent with the Accessibility criterion of the SHP Standards was in error. This argument is addressed in Section C of this Brief.

[19] To demonstrate that a proposed project is "consistent with the state health plan," an applicant must address the specific SHP Standards that are applicable to their proposed projects. For example, in the instant matter, Stonewall was required to prove that its Application was consistent with two different SHP Standards – the Standards for the Renovation-Replacement of Acute Care Facilities and Services, and the Standards for Operating Rooms. *See* (Ex. 3, at Section I).

demonstrate that its proposed application is the superior alternative in terms of cost, efficiency, and appropriateness, and that the development of alternatives is not practicable. The statutory test is not "either/or." Rather, the law requires compliance with all criteria before a CON may be awarded.

Stonewall's argument amalgamated all of these distinct statutory criteria together. In doing so, Stonewall inferred that an applicant may ignore the specific requirements of W. Va. Code § 16-2D-12(b)(1) if the applicant demonstrates that its project is "needed" and is "consistent with the state health plan." However, Stonewall's attempt to conflate these separate standards renders the superior alternatives provision meaningless, and must fail under the plain language of W. Va. Code § 16-2D-12(b)(1). As our Supreme Court of Appeals has long held:

> It is always presumed that the legislature will not enact a meaningless or useless statute.

Syl. Pt. 4, *State ex rel. Hardesty v. Aracoma*, 129 S.E.2d 921 (W. Va. 1963); Syl. Pt. 12, *Barber v. Camden Clark Mem'l Hosp. Corp.*, 815 S.E.2d 474 (W. Va. 2018).

If the Legislature intended W. Va. Code § 16-2D-12(b)(1) to be inapplicable to a project otherwise found to be "needed" and "consistent with the state health plan," it would have crafted the law in such a manner. Alternatively, the Legislature could have simply removed W. Va. Code § 16-2D-12(b)(1) if it believed that this requirement was subsumed by an applicant's showing of "need" or "consisten[cy] with the state health plan." Instead, the Legislature included W. Va. Code § 16-2D-12(b)(1) as a completely distinct minimum requirement for all CON approvals, and thereby clearly intended this statutory criterion to unconditionally and separately apply to every application. Hence, Stonewall's conflation of separate statutory standard must be rejected. Syl. Pt. 12, *Barber,* 815 S.E.2d at 474.

In sum, none of Stonewall's arguments are winners. They cannot salvage

Stonewall's failure to satisfy both prongs of the superior alternatives issue set forth in W. Va. Code § 16-2D-12(b)(1). Because the Authority's determination was supported by substantial evidence and/or a rational basis, it must be accorded "substantial deference" on appeal. The Authority's Decision to deny Stonewall's Application must accordingly be upheld. Syl. Pt. 1, *Muscatell*, 474 S.E.2d at 518; Syl Pt. 2, *Stewart*, 475 S.E.2d at 478; *Martin*, 465 S.E.2d at 406; *Cahill*, 539 S.E.2d at 440.

B. The Authority properly considered the Project's location in ascertaining Stonewall's compliance with W. Va. Code § 16-2D-12(b)(1).

Stonewall's final argument erroneously contended that the Authority did not have the ability to interpret W. Va. Code § 16-2D-12(b)(1) in a manner which considered the Project's location and its effect on SJH and the residents of Upshur County. *See* Brief at pp. 14-19. However, in making its tortured legal argument, Stonewall not only misapplied the applicable standard of review, but also interpreted the CON law in an irrational manner

Under the applicable standard of review for an administrative appeal, Stonewall correctly acknowledged that when considering a question of law, a court must first ask whether the Legislature has directly spoken to the precise question at issue. *Chevron*, 467 U.S. at 842-43; *Boone*, 472 S.E.2d at 421-22; *Amedisys*, 859 S.E.2d at 351. After this acknowledgment, Stonewall's analysis went completely haywire.

Stonewall argued that the Legislature has directly spoken to the precise question at issue – and that the Authority cannot consider the location of a proposed health care facility (and its impact on the existing health care landscape) in the context of determining whether a proposed project complies with the issue of superior alternatives under W. Va. Code § 16-2D-12(b)(1). *See* Brief at pp. 14-19. Stonewall specifically argues that W. Va. Code § 16-2D-12(b)(1) is only limited to whether the **health services** (not the location where the services will be offered) proposed by

its Application are a superior alternative in terms of cost, efficiency, and appropriateness, and that the development of alternatives **to the health services** (and not the location where the services will be offered) is not practicable. *Id.*

However, an analysis of the CON law clearly reveals that the Legislature has not "directly spoken to the precise question" of whether the Authority is precluded from considering the location at which services will be offered in determining whether an applicant complies with W. Va. Code § 16-2D-12(b)(1). To repeat, W. Va. Code § 16-2D-12(b)(1) provides the following in full:

> (b) The authority may not grant a certificate of need unless, **after consideration of the appropriateness of the use of existing facilities within this state** providing **services** similar to those being proposed, the authority makes each of the following findings in writing:
> (1) That superior alternatives to the **services** in terms of cost, efficiency and appropriateness do not exist within this state and the development of alternatives is not practicable;

(emphasis added).

First, it must be noted that the Legislature chose to use the word "services" instead of the term "health services" in W. Va. Code § 16-2D-12(b)(1). To this end, "[i]t is a well-known rule of statutory construction that . . . every word used in a statute has a specific purpose and meaning." *State ex rel. Johnson v. Robinson*, 251 S.E.2d 505, 508 (W. Va. 1979). While "health services" is defined by the CON law, the term "services" is not. W. Va. Code § 16-2D-2 *et seq.* A well-established principle of statutory construction provides that:

> [i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.

Syl. pt. 1, *Miners in Gen. Group v. Hix*, 17 S.E.2d 810 (W. Va. 1941); *accord* Syl. pt. 6, in part, *State ex rel. Cohen v. Manchin*, 336 S.E.2d 171 (W. Va. 1984); *see also* Syl. pt. 4, *State v. General*

Daniel Morgan Post No. 548, V.F.W., 107 S.E.2d 353 (W. Va. 1959).

The common and ordinary meaning of the word "services" in the context of W. Va. Code § 16-2D-12(b)(1) logically includes an inquiry into where those "services" will be offered. How can an agency conduct health planning if it is not permitted to consider geography? Services are not offered in a vacuum, nor do they fall out of the sky. This Project is about a hospital, a brick and mortar building, seeking to occupy a location to which Stonewall has clung for over two decades. This is not a project about telemedicine, where location is not a relevant factor.

W. Va. Code § 16-2D-12(b)(1) specifically requires "**consideration of the appropriateness of the use of existing facilities** within this state **providing services similar to those being proposed**." (emphasis added) Consideration of what potential effect the proposed "services" will have on "the appropriateness of the use of existing facilities within this state" must necessarily include how location will impact "appropriateness of the use." For example, services offered in Martinsburg may have less of an effect on "the use of existing facilities" in Mingo County than the Project's effect on SJH, which is only located only 11.8 miles from the Proposed Site (Ex. 23, at p. 167). Location of where the "services" will be offered is therefore an inherently integral factor to consider when determining compliance with W. Va. Code § 16-2D-12(b)(1).

Even though the Legislature may not have "directly spoken to the precise question" of location under the superior alternatives issue, the Authority's interpretation of W. Va. Code § 16-2D-12(b)(1) is permissible, because as noted above, the determination of whether an applicant's proposed offering of services is a superior alternative must logically include where those services will be offered. Indeed, this inquiry is absolutely essential to ensuring that health services are offered to West Virginians in an orderly and economical manner, as well as ensuring that necessary and adequate health services are available to West Virginians – both fundamental

purposes of the CON law. *See* W. Va. Code §§ 16-2D-1(1), (2).

While Stonewall believes that the Authority should don a blindfold when considering whether an applicant has complied with W. Va. Code § 16-2D-12(b)(1) – and be wholly precluded from even considering where proposed "services" will be offered – Stonewall's interpretation would lead to absolutely absurd results. How can the superior alternatives of proposed "services" be analyzed without considering the location of the services, the location of existing providers who offer similar services, and the resulting impact on the existing facilities? Why would the Legislature wholly preclude the Authority from considering this critical factor while also charging the agency with ensuring that "appropriate and needed health services are made available for persons in the area to be served." See W. Va. Code § 16-2D-1(2)? As our Supreme Court of Appeals has held:

> Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made."

Syl. Pt. 9, *Vanderpool v. Hunt*, 241 W. Va. 254, 823 S.E.2d 526 (2019).

Finally, Stonewall argued that the repeal of the former W. Va. Code §§ 16-2D-6(a)(6) (2015)[20] and 16-2D-6(a)(12) (2015)[21] meant the Legislature has "directly spoken to the precise question" at issue, and has removed the Authority's ability to consider the issue of where services will be provided. This is nonsense. The issue of location was and remains a relevant factor to evaluate when considering multiple criteria under current W. Va. Code § 16-2D-12, including

[20] The 2015 version of this subsection stated: (a)(6) The relationship of the services proposed to the existing health care system of the area in which the services are proposed to be provided;

[21] The 2015 version of this subsection stated: (a)(12) In the case of a construction project: (A) The cost and methods of the proposed construction, including the costs and methods of energy provision; and (B) the probable impact of the construction project reviewed on the costs of providing health services by the person proposing the construction project and on the costs and charges to the public of providing health services by other persons;

but not limited to, need (W. Va. Code § 16-2D-12(a)(1); consistency with the SHP (W. Va. Code § 16-2D-12(a)(2); whether the project is the superior alternative (W. Va. Code § 16-2D-2(b)(1); whether patients will experience serious problems obtaining care in the absence the project (W. Va. Code § 16-2D-12(b)(4); and whether the project will meet the needs of the medically underserved (W. Va. Code § 16-2D-12(c). As Stonewall acknowledges, the former W. Va. Code § 16-2D-6(e)(1) (2015) is substantially similar to the current W. Va. Code § 16-2D-12(b)(1), and the streamlining of former W. Va. Code § 16-2D-6 (2015) in no way tied the hands of the Authority on the issue of location.

In fact, the UHC Decision relied upon by Stonewall explicitly considered the issue of site selection as part of its superior alternatives analysis. In determining whether the UHC replacement hospital facility constituted the superior alternative under former W. Va. Code § 16-2D-6(e)(1) (2015), the Authority's Decision delved into the site chosen by the applicant, noting the extensive 258 pages of evidence authored by "site selection experts, architects, facility planners, construction managers, engineers, environmental experts, geotechnical experts, aeronautics experts, acoustics experts, appraisers, and attorneys to assist in its selection of a site." (Ex. 20, Att. 6, p. 00890) In addition, the UHC Decision referenced the President of UHC who "testified at extraordinary length and in extraordinary detail at the public hearing regarding all of the alternatives that UHC and WVUHS considered."[22] (Ex. 20, Att. 6, p. 00890) In short, the Authority has always considered site location as an integral factor in its analysis of the superior alternatives issue.

This consideration of location under the superior alternatives issue continues up to the present time, not only in the instant matter, but in another recent CON decision. *See, e.g., In*

[22] A total of 112 pages of testimony was cited by the Authority in the UHC Decision.

re: Roane General Hospital, CON File No. 21-5-12124-P April 29, 2022). For example, the Authority considered the location of a proposed new ambulatory health care facility in its determination that an applicant complied with W. Va. Code § 16-2D-12(b)(1). *Id.* at pp. 45-48. Instead of blindfolding itself to the relevant location(s) of services, the Authority explicitly considered the location of an ambulatory care facility project and potential existing providers. Ultimately, the Authority determined that the project was a superior alternative because, *inter alia*, there were no existing providers within 20-40 minutes of the proposed ambulatory care facility. *See id* at pp. 47-48.

Simply put, the Authority's interpretation of W. Va. Code § 16-2D-12(b)(1) encompassing location as a relevant factor when considering the "appropriateness of the use of existing facilities" is not only permissible, but is mandated. The Authority cannot do its job otherwise. It has substantial expertise in matters involving health planning, and is the agency charged with administering the CON program. Therefore, it is particularly important to accord deference to the Authority's rational interpretation of W. Va. Code § 16-2D-12(b)(1). *Martin*, 465 S.E.2d 399 at 415. Because the Authority's interpretation is entitled to great deference and weight, it must be upheld. *Chevron*, 467 U.S. at 842-43; *Boone*, 472 S.E.2d at 421-22; *Amedisys*, 859 S.E.2d at 351.

C. The Authority improperly failed to determine that the Application was inconsistent with the Accessibility Criterion of the Renovation-Replacement SHP Standards.

While the Decision's ultimate outcome – the denial of the Application – was proper and correct, it must be noted that the Decision erroneously determined that the Application was consistent with the Accessibility Criterion set forth in the Renovation-Replacement SHP Standards

(the "Accessibility Criterion").[23] The Accessibility Criterion states the following in its entirety:

> The proposal shall not adversely affect the continued viability of an existing hospital or health care services that serves a population of at least 10,000 not having 30-minute access to another hospital or critical access hospitals (CAH).

Renovation-Replacement SHP Standards at Section VIII.

Careful analysis demonstrates that the Accessibility Criterion seeks to protect two distinct classes of facilities: (1) an existing hospital or health care service provider which serve a population of at least 10,000 not having 30-minute access to another hospital; and (2) critical access hospitals.

However, in its Decision, the Authority found the phrase "critical access hospitals" as used in this criterion means "30-minute access to a critical access hospital." Decision at p. 26. The Authority therefore failed to recognize these two distinct and protected classes in the Accessibility Criterion, and instead lumped "critical access hospitals" into the same category of every other "hospital." This construction of the Accessibility Criterion is irrational. Simply put, a "critical access hospital" is a "hospital." If a "critical access hospital" is always necessarily a "hospital," why would the Accessibility Criterion specifically reference CAHs at the very end of the paragraph unless it intended to confer a special protection upon them? Absent such special protection, the addition of the term "critical access hospitals" at the end of the sentence is rendered wholly unnecessary, redundant, duplicative, and superfluous.

Because the framers of the Accessibility Criterion added a second prong applicable only to CAHs at the end of the provision, the only rational construction must properly be read as follows:

> The proposal shall not adversely affect the continued viability of . . .critical

[23] As noted in the procedural and factual background section of this Brief, SJH cross-assigned this error in its Request for Review filed with the OOJ on July 13, 2022.

access hospitals (CAH).

The SHP Standards have the force and effect of law, and they must be interpreted like any other statutory or regulatory text. *See* Syl. Pt. 5, *Amedisys*, 859 S.E.2d at 344. To this end, "[i]t is a well-known rule of statutory construction that . . . every word used in a statute has a specific purpose and meaning." *State ex rel. Johnson v. Robinson*, 251 S.E.2d 505, 508 (W. Va. 1979). As such, "[a] cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the [SHP Standards]." Syl. Pt. 3, *Meadows v. Wal–Mart Stores, Inc.*, 530 S.E.2d 676 (W. Va. 1999); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"). The separate reference to CAHs in the Accessibility Criterion must therefore be accorded "significance and effect" to specifically protect them as their own class, since any other reading would render the CAH reference completely "superfluous," redundant, and meaningless. *Id.*

This construction not only gives meaning and significance to all of the words in the Accessibility Criterion, it also is consistent with the West Virginia's longstanding policy to support the existence of CAHs. Specifically, SJH's health planning expert, Raymona Kinneberg, testified as follows:

> Q. Has long been the policy of the State of West Virginia to support the development of critical access hospitals?
>
> A. Absolutely.
>
> Q. How many are there now?
>
> A. Twenty-one (21).
>
> Q. That's 30 percent of all the hospitals in the state, is it not?

A. It is, it is.

Q. Do you believe that from a health planning standpoint the closure - - the loss of critical access hospital status for a rural hospital in West Virginia is a good idea?

A. It's not a good idea. It's not a logical idea, and it's not in the best interests of the residents of West Virginia.

(Ex. 23, p. 308)

Since SJH is a CAH, it must be accorded categorical and unqualified protection under the second prong of the Accessibility Criterion. The Authority's failure to do so ignored the plain language of this criterion and improperly rendered a portion of it meaningless. As the Stonewall Project will destroy SJH's ability to retain its CAH status, and will therefore adversely affect the continued viability of SJH, the Project was not consistent with the Accessibility Criterion, and the Authority should have so ruled under W. Va. Code § 16-2D-12(a)(2).[24]

VI. CONCLUSION

The Authority's denial of CON approval for the Project was rational, was well supported by substantial evidence in the record, and was made in accordance with applicable laws and regulations. The Authority thoroughly detailed the extensive factual record presented at the public hearing, including the substantial evidence of record which demonstrated that Stonewall's selection of the Proposed Site to implement its Project will eliminate SJH's CAH status, and adversely affect SJH's continued viability.

[24] SJH also submitted substantial evidence of record which demonstrated that – even if a CAH was considered just like every other type of hospital for purposes of the Accessibility Criterion – SJH serves a population of at least 10,000 not having 30-minute access to another hospital. *See, e.g.*, (Ex. 23, at pp. 284-289, 293-294; Ex.21, Atts. R, P) SJH identified, *inter alia*, that "access" is not synonymous with "drive time," and access to a hospital must account for factors such as ambulance response times. *Id.* Therefore, even assuming the Authority's improper reading of the Accessibility Criterion was correct, it also erred by failed to determine that the Accessibility Criterion protects the continued viability of SJH by virtue of SJH's service of a population of at least 10,000 not having 30-minute access to another hospital. *Id.*

Substantial evidence and/or a rational basis also existed to demonstrate that – despite being fully aware that relocating its hospital to this specific location would result in SJH's loss of CAH status – Stonewall nonetheless purchased the Proposed Site without requisite CON approval in 2017, and stubbornly maintained "tunnel vision" on this course of action ever since. This substantial evidence of record proved Stonewall's unwillingness to analyze the practicability of potential alternatives for its replacement hospital as required under the CON law.

As astutely recognized by the Authority, the CON program is not designed to solely consider what is best for the applicant. Instead, it contemplates a balanced analysis of a proposal's effects on the existing health system and all impacted West Virginians. Stonewall disregarded the disastrous effects that will befall SJH and Upshur County through SJH's loss of CAH status. As such, its Project was not a superior alternative as contemplated by W. Va. Code § 16-2D-12(b)(1). SJH respectfully requests that this Court reject Stonewall's appeal, and affirm the Authority's Decision to deny CON approval for the Project.

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BEFORE THE OFFICE OF JUDGES

IN RE: STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY
CON File No. 21-7-12157-H
APPEAL DOCKET No. 22-HC-03

CERTIFICATE OF SERVICE

I, James W. Thomas, do hereby certify that I have served the foregoing *Response Brief on Behalf of Appellee St. Joseph's Hospital of Buckhannon, Inc.* on this 15th day of September, 2022, to counsel of record as addressed below via hand delivery and electronic mail:

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