IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

St. Joseph's Hospital of Buckhannon, Inc.
d/b/a St. Joseph's Hospital,
Respondent Below, Petitioner

vs.) No. 23-ICA-265

Stonewall Jackson Memorial Hospital Company,
Petitioner Below, Respondent

and

West Virginia Health Care Authority,
Respondent Below, Respondent

REPLY BRIEF OF PETITIONER ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.

From The West Virginia Health Care Authority
CON File #23-7-12659-X

Alaina N. Crislip (WVSB #9525)[1]
Neil C. Brown (WVSB #13170)
JACKSON KELLY PLLC
1600 Laidley Tower
Post Office Box 553
Charleston, WV 25322
Phone: (304) 340-1372
alaina.crislip@jacksonkelly.com
Counsel for St. Joseph's Hospital of Buckhannon, Inc. d/b/a St. Joseph's Hospital

[1] Counsel of Record.

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ARGUMENT

In its initial brief, St. Joseph's argued that: "This is a straightforward case that can be resolved by this Court applying the first prong of the *Chevron* analysis. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed. There is no deference due to the Authority's interpretation at this point." St. Joseph's Brief, p. 8 (citations omitted). Respondents never address St. Joseph's argument. They have failed to conduct any analysis of the statutory language at issue under the first prong of *Chevron* and offer no explanation as to why the first prong of *Chevron* is not controlling. Neither Stonewall nor the Authority explains how the statutory language is unclear or ambiguous. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 4, *War Mem'l Hosp., Inc. v. W. Virginia Health Care Auth.*, 248 W. Va. 49, --, 887 S.E.2d 34, 35 (2023) (quoting Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951)). This case begins and ends with the statutory language; the Authority's interpretation is not entitled to any deference.

Respondents' failure to address the plain meaning of the statute is inexcusable. In navigating the waters of administrative law, a fundamental principle is that an administrative agency must stay true to its statutory course. "Administrative agencies and their executive officers are creatures of statute" and "they must find within the statute warrant for the exercise of any authority for which they claim." Syl. Pt. 2, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W. Va. 766, 766, 197 S.E.2d 111, 112 (1973). The Certificate of Need ("CON") law, W. Va. Code § 16-2D-1, *et. seq*., serves as the foundational framework within which the Authority operates. It is the Authority's North Star, ensuring that it acts consistently with the Legislature's intent. "So long as

a legislative enactment as law exists, the executive department has the constitutional duty to attend to its faithful execution." *Cooper v. Gwinn*, 171 W. Va. 245, 253, 298 S.E.2d 781, 789 (1981).

As explained in St. Joseph's opening brief, relocating "beds from one physical facility or site to another" means relocating "beds from one physical facility or site to another." *See* W. Va. Code § 16-2D-2(45). And "the construction. . . . of a health care facility" means "the construction . . . of a health care facility." *See* W. Va. Code §16-2D-8(a)(1). Both of these activities require an applicant to obtain a CON and Stonewall's proposal clearly contemplates both activities, neither of which are contingent on exceeding the expenditure minimum.[2] '"Courts are obligated to 'presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Freeland v. Marshall*, No. 22-0109, 2023 WL 6804937, at *5 (W. Va. Oct. 16, 2023) (quoting *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 533, 782 S.E.2d 223, 228 (2016)).

The Authority has lost sight of its statutory North Star, inventing and applying its own rules without even attempting to ground them in the statute. While offering no analysis of the statutory language and failing to cite a single case to support its conclusion, the Authority explains Stonewall's project does not require a CON because "[a]ccording to staff, for as long as they can recall, in some instances, decades, unless the capital expenditure of a complete relocation project exceeded the capital expenditure minimum, the Authority would determine the project was not reviewable." Authority's Brief, p. 10.[3] The Authority states that it "did not consider new construction or the relocation and/or change to bed capacity as urged by Petitioners because those

[2] "An obligation for a capital expenditure incurred by or on behalf of a health care facility in excess of the expenditure minimum" is a separately enumerated trigger requiring a CON pursuant to W. Va. Code § 16-2D-8(a)(3).

[3] The Authority's brief rest on hearsay statements that were never part of the record.

items are not considered on complete replacement and relocation projects." Authority's Brief, p. 10.

The statute clearly does not support the Authority's position. There is no statutory exemption for "a replacement and relocation of the same services, in the same service area, [that] does not exceed the minimum capital expenditure." (*See* D.R. 0476; D.R. 0607). Moreover, there is no principled way that the Authority can hold that capital expenditures in excess of the expenditure minimum trigger CON review, but construction of a health care facility and capital expenditures associated with substantial changes in bed capacity do not. These are distinct triggers separately enumerated by the CON statute. *Compare* W. Va. Code §§ 16-2D-8(a)(3) *with* 16-2D-8(a)(1) *and* 16-2D-8(a)(5). The Authority is not free to pick and choose what parts of the CON law it wishes to enforce; it must apply all parts of the law equally. *See Cooper*, 171 W. Va. at 253, 298 S.E.2d at 789 ("Our Constitution does not permit executive officers to pick and choose the laws they will or will not execute, for if such were the case, the executive department could, either by commission or omission, model a system of law different than that specified by the people acting through the Legislature.").

This is not the first time the Authority has veered off course and found itself in uncharted waters. On March 27, 2023, less than a month prior to the Authority's approval of Stonewall's RDOR,[4] our Supreme Court of Appeals filed a decision admonishing the Authority for "rewriting" the CON statute. *See War Memorial*, 248 W. Va. at --, 887 S.E.2d at 41. While St. Joseph's discusses *War Memorial* extensively in its opening brief, neither Stonewall nor the Authority make any attempt to distinguish it.

[4] "The Health Care Authority board of review voted during a scheduled board meeting on April 26, 2023 and the final decision in this certificate of need review was issued by the Health Care Authority on June 15, 2023." (D.R. 0508).

In *War Memorial*, the Authority held that one of the CON law's exemptions, West Virginia Code §16-2D-11(c)(27),[5] did not apply to a hospital's proposed purchase of an MRI unit because the unit would not be located at the "hospital's primary location." *Id*. at --, *Id.* at 38. On appeal, our Supreme Court noted that "[t]he well-established precedent of this Court provides that '[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect'" and that "neither the Hospital nor the [Authority] argue that the statutory exemption is ambiguous." *Id*. at --, *Id* at 38-39. Because the "clear language of West Virginia Code section 16-2D-11(c)(27) . . . contains no location-specific requirement applicable to the exemption there", the Court held that the Authority's "interpretation [] was in reality a rewriting of the statute . . ." and "its denial of the Hospital's exemption application violated the statute." *Id*. at --, *Id* at 40-41. The Authority's interpretation, the Court explained, was "entitled to no deference" because '"[i]f 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'" *Id*. at --, *Id* at 41 (quoting Syl. Pt. 3, *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 578-79, 466 S.E.2d 424, 429-30 (1995)).

Here, as in *War Memorial*, the Authority has gone astray, inventing rules clearly at odds with the plain meaning of the statute. Stonewall and the Authority have failed to "heed Professor Frankfurter's timeless advice: '(1) Read the statute; (2) read the statute; (3) read the statute!"' *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 202 (1967)); *see also Wickwire Gavin, P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 594 (4th Cir. 2004) (same). Indeed, the Authority's

[5] West Virginia 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." *Id*. at 49, *Id.* at 38.

brief does not quote the statutory language at issue, attempt to explain why the statutory language is ambiguous, or otherwise explain how the statute supports its determination. Yet again, it has lost sight of its North Star and drifted into uncharted waters.

Ultimately, '"[t]he judiciary is the final authority on issues of statutory construction, and [is] obliged to reject administrative constructions that are contrary to the clear language of a statute."' Syl. Pt. 3, *War Memorial*, 248 W. Va. at --, 887 S.E.2d at 35. (quoting Syl. Pt. 5, *CNG Transmission Corp. v. Craig*, 211 W.Va. 170, 564 S.E.2d 167 (2002)). The Authority itself says as much, stating that "[t]he case is one of first impression for the Authority following legislative changes that will ultimately depend on the wisdom of this court to decide." Authority's Brief, p. 7. The Authority candidly acknowledges that "[n]one of the [Authority's] Board members are lawyers" and that its determination is primarily based on "extensive consultation with senior staff", not its interpretation of the statute. *See* Authority's Brief, pp. 2, 10. The Authority has lost its way, and is calling upon this Court for guidance. It is the duty of this Court to ensure that the Authority regains its bearings.

In the subsections that follow, St. Joseph's deals with the Respondents' arguments concerning (I) the import of Stonewall's relocation of beds, (II) the consequences of construction, (II) the validity of the Authority's Amended Decision, and (IV) the effect of decreases in Stonewall's bed capacity. Ultimately, however, this should be a simple case. The Court need only lay down the Certificate of Need Statute, W.Va. Code 16-2D-1, *et. seq*., next to the Authority's Decision and/or Amended Decision and decide if the latter squares with the former. Because the Authority's determination clearly does not square with the statute, the Authority's Decision and Amended Decision must be reversed.

I. THE PLAIN AND CLEAR MEANING OF "SUBSTANTIAL CHANGE TO THE BED CAPACITY" ENCOMPASSES THE PROPOSED RELOCATION OF STONEWALL'S BEDS FROM ITS EXISTING FACILITY TO A NEWLY CONSTRUCTED HOSPITAL FACILITY, REQUIRING A CON PURSUANT TO W. VA. CODE § 16-2D-8(A)(5).

A. Stonewall's project requires a CON pursuant to the plain language of W. Va. Code §§ 16-2D-8(a)(5) and 16-2D-2(45).

A CON is required for any project contemplating "[a] substantial change to the bed capacity of a health care facility with which a capital expenditure is associated[.]" W. Va. Code § 16-2D-8(a)(5). Stonewall readily acknowledges and does not dispute that "[t]he capital expenditure involved in the construction of the replacement facility will be approximately $56,000,000[.]" (D.R. 0004). Rather, Stonewall argues that, because its project proposes the "total relocation" of its hospital, there will not be "substantial change to the bed capacity of a health care facility." Stonewall's suggestion that it can relocate its entire hospital without a substantial change in bed capacity is nonsensical.

The CON law defines "substantial change to the bed capacity" as any change that "increases or decreases the bed capacity ***or relocates beds from one physical facility or site to another*[.]**" W. Va. Code § 16-2D-2(45) (emphasis added). "Where the legislature . . . declare[s] what a particular term 'means,' such definition is ordinarily binding upon the courts and excludes any meaning that is not stated." *In re Greg H.*, 208 W. Va. 756, 760, 542 S.E.2d 919, 923 (2000) (per curiam). Stonewall cannot relocate its beds to a new hospital facility without relocating its beds "from one physical facility or site to another[.]" *See* W. Va. Code § 16-2D-2(45). In fact, Stonewall concedes this point in its brief: "The . . . beds . . . are simply being totally relocated a few miles down the road . . . ." Stonewall's Brief, p. 18. Pursuant to the plain and clear language of W. Va. Code § 16-2D-2(45), the relocation of Stonewall's hospital, including its beds, to a new

facility a few miles down the road comprises a substantial change in bed capacity, even if there is no increase or decrease in Stonewall's total bed capacity. *See id.*

In a vain attempt to avoid the clear meaning of W. Va. Code § 16-2D-2(45), Stonewall argues that the phrase "relocates beds from one physical facility or site to another" really just encompasses "the relocation of beds from one licensed hospital to another one, or from one licensed hospital to a new site, both of which change the number of licensed beds at the original hospital." Stonewall's Brief, p. 15. This is nonsense.

First, the Legislature's choice of the words "***site***" and "***physical***" completely derails Stonewall's interpretation. "Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning." Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 527, 336 S.E.2d 171, 173 (1984). A site is "a space of ground occupied or to be occupied by a building" or "the spatial location of an actual or planned structure or set of structures." *Merriam Webster Online*, https://www.merriam-webster.com/dictionary/site (last visited Dec. 18, 2023).[6] Similarly, "Physical", when used as an adjective, serves to specify something "having material existence" or which is "perceptible especially through the senses and subject to the laws of nature." *Merriam Webster Online*, https://www.merriam-webster.com/dictionary/physical (last visited Dec. 18, 2023). A building or set of buildings is a "physical facility". Thus, the phrase "relocates beds from one physical facility or site to another" encompasses any relocation of beds from one building or group of buildings to another building or group of buildings, not just the transfer of beds from one licensed hospital to another.

[6] Black's Law Dictionary similarly defines site as "[a] place or location; esp., a piece of property set aside for a specific use." SITE, Black's Law Dictionary (11th ed. 2019).

Reading "relocates beds from one physical facility or site to another" as "relocates beds from one [licensed hospital] to another [licensed hospital]" would be rewriting the statute. As noted most recently by our Supreme Court in *War Memorial*, '"[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were not purposefully included, we are obliged not to add to statutes something the Legislature purposefully omitted.'" 248 W. Va. at --, 887 S.E.2d at 39. (quoting *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 491, 647 S.E.2d 920, 927 (2007)).

Second, Stonewall's suggestion that a "substantial change in the bed capacity" can only occur if there is a change in the total number of beds held by the health care facility renders the entire phrase "relocates beds from one physical facility or site to another" surplusage. This "conflict[s] with the established principle of statutory construction that all words within a statute are intended to have meaning and should not be construed as surplusage." *Phillips v. Stear*, 236 W. Va. 702, 712 n. 25, 783 S.E.2d 567, 577 n. 25 (2016) (quoting *United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372, 1375 (11th Cir. 1981)). W. Va. Code § 16-2D-2(45) makes clear that a "substantial change in the bed capacity" occurs when any one of three things happen: (1) an increase in bed capacity; (2) a decrease in bed capacity; "***or***" (3) "the relocation of beds from one physical facility or site to another."[7] The Legislature's inclusion of the phrase "relocates beds from one physical facility or site to another" is not surplusage. Rather, it serves to clarify that the transfer of beds "from one physical facility or site to another" constitutes a substantial change in bed capacity even if the total number of licensed beds held by the health care facility is unchanged.

[7] Again, "the disjunctive 'or' in a statute connotes an alternative or option to select." *Brickstreet Mut. Ins. Co. v. Zurich Am. Ins. Co.*, 240 W. Va. 414, 423, 813 S.E.2d 67, 76 (2018) (quoting *Carper v. Kanawha Banking & Tr. Co.*, 157 W. Va. 477, 517, 207 S.E.2d 897, 921 (1974)); *see also Pajak v. Under Armour, Inc.*, 246 W. Va. 387, 395, 873 S.E.2d 918, 926 (2022) (holding that the "use of 'or' in West Virginia Code § 5-11-9(7) to refer to 'any person' *or* 'employer' indicates they are separate choices, and, therefore, an 'employer' is not the same as 'any person.'").

The Authority disregarded the relocation of beds issue entirely, explaining that it "was not a factor and did not inform their decision." Authority's Brief p. 10. That is, notwithstanding the fact that W. Va. Code § 16-2D-8(a)(5) requires a CON for "[a] substantial change to the bed capacity of a health care facility with which a capital expenditure is associated", the Authority explains that it "does not rely on changes to beds when making RDOR determinations of replacement and relocation projects." *See* Authority's Brief, pp. 9-10. Not only is that position completely unsupported by the statutory language, it is inconsistent with the clear meaning of W. Va. Code § 16-2D-2(45). The Authority offers no statutory basis to support its determination. It does not even offer its own interpretation of W. Va. Code §§ 16-2D-8(a)(5) and 16-2D-2(45). And, neither Stonewall nor the Authority suggest that W. Va. Code § 16-2D-2(45) is ambiguous. Rather, Stonewall claims this section has a "plain meaning and clear intent." Stonewall's Brief, p. 15.

Again, this is a case that can be decided under the first prong of the *Chevron* analysis:

> Judicial 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. 2, *Amedisys W. Virginia, LLC v. Pers. Touch Home Care of W.Va., Inc.*, 245 W. Va. 398, 859 S.E.2d 341, 344 (2021). Thus, where, as here, the "intent of the legislature is clear", no deference is due at all. *War Memorial*, 248 W. Va. at --, 887 S.E.2d at 41. "A statutory provision

which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." *Id.* at Syl. Pt. 4.

The second prong of the *Chevron* analysis only applies if the intent of the legislature is unclear. Syl. Pt. 3, *Amedisys*, 245 W. Va. at 398, 859 S.E.2d at 344. Stonewall never explains how or why the statute is unclear or ambiguous, but rather claims that it has a "plain meaning and clear intent." Stonewall's Brief, p. 15. Stonewall's citations to *Appalachian Power*, 195 W. Va. at 591, 466 S.E.2d at 442 and *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 257, 539 S.E.2d 757, 764 (2000) are inapposite because Stonewall completely ignores the first prong of the *Chevron* analysis. There is no deference due to the Authority's determination under prong one of *Chevron*, and Stonewall has failed to explain why prong one does not apply.

In sum, the relocation of Stonewall's hospital entails a capital expenditure and substantial change in bed capacity, and therefore, requires a CON pursuant to W. Va. Code § 16-2D-8(a)(5). Because the statute is clear and unambiguous, the Authority is not entitled to deference, and the Court's inquiry should end here. *See War Memorial*, 248 W. Va. at --, 887 S.E.2d at 41; *see also Consumer Advoc. Div. of Pub. Serv. Comm'n of W. Virginia, on Behalf of Residential & Small Com. Customers of Hope Gas, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 182 W. Va. 152, 156, 386 S.E.2d 650, 654 (1989) ("While long standing interpretation of its own rules by an administrative body is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous.").

B. Stonewall continues its attempts to sow confusion by misconstruing and misapplying the Authority's precedent.

Stonewall's analysis of *In re: Raleigh General Hospital*, CON File No. 98-1-6531-X and *In re: Columbia Raleigh General Hospital*, CON File No. 97-1-6128-X misstates the Authority's

holdings in those cases. in CON File No. 98-1-6531-X[8], the Authority found RGH could transfer all 102 licensed beds of Beckley Hospital to the RGH campus "***because there [was] no capital expenditure***" associated with the proposal, not because it was a total or complete transfer:

WEST VIRGINIA

HEALTH CARE AUTHORITY

In re: **Raleigh General Hospital,**
Petitioner.

CON File #98-1-6531-X

DECISION ON REQUEST FOR RULING ON REVIEWABILITY

By letter received August 31, 1998, Raleigh General Hospital (RGH) requested a determination of reviewability for the transfer of all 102 licensed beds of Beckley Hospital to the RGH campus. RGH states that there is no capital expenditure associated with the proposal.

The board determines that because there is no capital expenditure associated with the proposal that it does not constitute a substantial change to the bed capacity of the facilities as defined in West Virginia Code §16-2D-2(ff), and does not constitute a new institutional health service as defined in West Virginia Code §16-2D-3.

Accordingly, it is ***ORDERED*** that the proposal by Raleigh General Hospital ***IS NOT SUBJECT*** to certificate of need review.

[8] http://www.hcawv.org/vs5FileNet/DocContent.dll?LibraryName=EDMS^Oracle&SystemType=2&LogonId=zY1/x4Bz0UVVteRrsz6lNe41j5gygrqDZ8V5r6qHBingjipMmVJYr7jlXMv$jhd225HcPG0/3t391P9/Gh4lbhESkd4xxlf5cpXtxs8p1CO9hBRrHHLgc$fGC2Z$xV3H7jWPmDKCuoNnxXmvqocGKe41j5gygrqDZ8V5r6qHBinuNY$YMoK6g2fFea$qhwYp7jWPmDKCuoNnxXmvqocGKe41j5gygrqDZ8V5r6qHBinuNY$YMoK6g2fFea$qhwYp7jWPmDKCuoNnxXmvqocGKYWZPqER29ZllX7i2IfbaTHuNY$YMoK6g2fFea$qhwYpgHCvm/lr/UpOUT8XD2ECih3PN1erQkuPeYVPrcglMEopxT7pxWiC2bAslJth7/3E&DocId=003707779&Page=

Stonewall's application of this case cannot be squared with its holding:

Stonewall's Brief, pp. 15-16	***In re Raleigh General Hospital*, CON File No. 98-1-6531-X**
"In that matter, Raleigh General Hospital decided to close Beckley Hospital and transfer all 102 licensed beds at Beckley Hospital to Raleigh General. Unlike the previous case, this relocation of beds was a total relocation of all beds. The Authority found that this total relocation of beds from one facility to another 'does not constitute a substantial change to the bed capacity of the facilities as defined in W. Va. Code § 16-2D-2(ff) and does not constitute a new institutional health service as defined in West Virginia Code § 16-2D-3.'"	"The board determines that because there is no capital expenditure associated with the proposal that it does not constitute a substantial change to the bed capacity of the facilities as defined in W. Va. Code § 16-2D-2(ff) and does not constitute a new institutional health service as defined in West Virginia Code § 16-2D-3."

Again, the Authority held that the project was not reviewable because there was no capital expenditure, not because there was a total or complete transfer of beds.[9]

Conversely, in CON File No. 97-2-6128-X[10], the Authority found that the relocation of the applicant's 17-bed inpatient psychiatric unit from the fourth floor of its Raleigh campus to the second floor of its Beckly campus was reviewable because it encompassed (1) a capital expenditure of less than $15,000 (well below the expenditure minimum at that time) and (2) the relocation of beds from one physical facility or site to another. Nowhere in that decision did the Authority

[9] While W. Va. Code § 16-2D-2 has been amended and renumbered, the CON-law's definition of "substantial change to the bed capacity" has remained largely unchanged. *Compare* W. Va. Code § 16-2D-2(ff) (1996) ('"Substantial change to the bed capacity' of a health care facility means any change, with which a capital expenditure is associated, that increases or decreases the bed capacity, or relocates beds from one physical facility or site to another, ...") *with* W. Va. Code § 16-2D-2(45) ('"Substantial change to the bed capacity' of a health care facility means any change, associated with a capital expenditure, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another, ...").

[10] http://www.hcawv.org/vs5FileNet/DocContent.dll?LibraryName=EDMS%5eOracle&SystemType=2&LogonId=zY1/x4Bz0UVVteRrsz6lNe41j5gygrqDZ8V5r6qHBingjipMmVJYr7jlXMv$jhd225HcPG0/3t391P9/Gh4lbhESkd4xxlf5cpXtxs8p1CO9hBRrHHLgc$fGC2Z$xV3H7jWPmDKCuoNnxXmvqocGKe41j5gygrqDZ8V5r6qHBinuNY$YMoK6g2fFea$qhwYp7jWPmDKCuoNnxXmvqocGKe41j5gygrqDZ8V5r6qHBinuNY$YMoK6g2fFea$qhwYp7jWPmDKCuoNnxXmvqocGKYWZPqER29ZllX7i2IfbaTHuNY$YMoK6g2fFea$qhwYpgHCvm/lr/UpOUT8XD2ECihb6aLDTwg6$a3RGHJL5qv8pxT7pxWiC2bAslJth7/3E&DocId=003707787&Page=

discuss the notion of a partial or incomplete transfer of beds. The point is that bed relocation triggers CON review when it is associated with a capital expenditure, however small, but does not trigger CON review when there is no capital expenditure.

These two cases are completely consistent with the statutory language. *See* W. Va. Code § 16-2D-8(a)(5) (requiring a CON for "[a] substantial change to the bed capacity of a health care facility ***with which a capital expenditure is associated***[.]") (emphasis added); *see also* W. Va. Code § 16-2D-2(45) ('"Substantial change to the bed capacity' of a health care facility means any change, ***associated with a capital expenditure***, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another[.]") (emphasis added). The relocation of beds proposed by Stonewall is indisputably associated with a capital expenditure: "[t]he capital expenditure involved in the construction of the replacement facility will be approximately $56,000,000[.]" (D.R. 0004). Thus, Stonewall's project requires a CON.

Stonewall's reliance on cases involving the relocation of long-term acute care hospitals ("LTACHs") is inapposite. *See* Stonewall's Brief, pp. 16-17 (*citing Select Specialty Hospital-Charleston, Inc.*, CON File No. 22-3-12456-X; *Select Specialty Hospital-Charleston, Inc.*, CON File No. 06-3-8441-X) (collectively, the "Select Specialty Cases")). "LTACHs are referred to as a hospital within a hospital." W. Va. Code R. 64-12-2.17. LTACHs must operate within a "host hospital", that is "[a]n existing general acute care facility that has excess acute care beds and space for the development of an LTACH." State Health Plan Standards for Addition of Acute Care Beds, pp. 9-11. Stonewall is an acute care hospital, not an LTACH. This distinction is important because an LTACH cannot move beds from one host hospital to another.

St. Joseph's is not suggesting, as Stonewall contends, that the mattresses used by an LTACH must come from its host hospital. Rather, the point is that the licensed beds at which

LTACHs provide services are borrowed from the host hospital and must be returned to the host hospital when the LTACH moves. The host hospital must "***surrender the license*** of any acute care beds used in the development of the Long Term Acute Care Hospital," and "[i]f the Long Term Acute Care Hospital ceases to exist, terminates its services, or fails to offer its services for a period of 12 months, ***any beds whose license was surrendered by the hospital to establish the Long Term Acute Care Hospital shall revert back to the hospital's licensed bed capacity***." W. Va. Code R. 64-12-17.1.2-17.1.3 (emphasis added). Because no licensed beds are moved when an LTACH relocates from one host hospital to another, the Select Specialty Cases are distinguishable.

C. W. Va. Code § 16-2D-1 does not support the Authority's determination.

Stonewall fixates on the term "duplication" and ignores the rest of W. Va. Code § 16-2D-1. *See* Stonewall's Brief, pp. 18-19. W. Va. Code § 16-2D-1 provides that the purpose of the CON law is not only to "avoid the unnecessary duplication of health services," but also "to contain or reduce increases in the cost of delivering health services" and to ensure that health services are developed in a manner that 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." W. Va. Code § 16-2D-1(1). It serves to clarify that "the general welfare and protection of the lives, health and property of the people of this state require . . . criteria as provided for in [the CON law] . . . be subject to review and evaluation before any health services are offered or developed[.]" W. Va. Code § 16-2D-1(2).

Contrary to Stonewall's assertions, W. Va. Code § 16-2D-1 does not support the Authority's determination. Both the Authority and this Court have already found that Stonewall's project is not the superior alternative as required by the CON law because Stonewall has failed to consider alternative locations for its hospital that would not compromise St. Joseph's Critical

Access Hospital ("CAH") status.[11] *Stonewall Jackson Mem'l Hosp. Co. v. St. Joseph's Hosp. of Buckhannon, Inc.*, No. 22-ICA-147, 2023 WL 4197305 (W. Va. App. June 27, 2023) (memorandum decision); (D.R. 0046-0090). Indeed, the Authority continues to acknowledge "the importance of critical access hospitals to rural communities throughout the state"[12] and notes that it previously denied "the ***exact same project*** less than a year prior for a multitude of reasons, not the least being [St. Joseph's] would lose its Critical Access Hospital status." Authority's Brief, p. 3 & n. 1 (emphasis added). Stonewall could not obtain a CON for its project, but now, without any review of the CON criteria whatsoever, the Authority has given Stonewall permission to construct a new hospital on Staunton Drive—such a result is clearly not "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 jeopardizes "the general welfare and protection of the lives, health and property of the people of this state." *See* W. Va. Code § 16-2D-1(1)-(2).

The Authority's determination has effectively eviscerated the CON statute, allowing Stonewall, and in principle other parties, to relocate an entire hospital without any consideration of the project's need, superior alternatives to the project, the project's impact on existing facilities, the project's consistency with the State Health Plan, or any of the other criteria applicable to CON reviews. *See* W. Va. Code § 16-2D-12. The Authority's determination also all but renders obsolete various portions of the State Health Plan, which contains standards specifically applicable to the

[11] CAH status is a designation made by the Centers for Medicare & Medicaid Services ("CMS"), a federal agency within the United States Department of Health and Human Services, which enables qualified rural hospitals to be reimbursed on a cost-basis for providing services to Medicare patients, as opposed to being reimbursed under prospective payment systems. The CAH program was implemented to address a rash of closings of rural hospitals across the country. (D.R. 0256). Generally, to qualify for CAH status a hospital must, *inter alia*, be located more than 15 (mountainous terrain) miles from another hospital. *See* 42 C.F.R. § 485.610(c).

[12] Citing page 2 of Petitioner's Response Letter dated April 20, 2023 (D.R. 0442).

"Renovation-Replacement of Acute Care Facilities and Services",[13] "Operating Rooms",[14] and other services encompassed by Stonewall's project. To obtain a CON, Stonewall would have to demonstrate compliance with each of these standards in addition to the criteria for CON reviews set out in W. Va. Code § 16-2D-12. But because the Authority found that Stonewall's project is not reviewable, none of these standards and/or criteria will be evaluated. This is an absurd result which defeats the CON program's goal of maintaining an orderly and structured health system in West Virginia.

II. STONEWALL'S PROJECT REQUIRES A CON UNDER W. VA. CODE § 16-2D-8(A)(1) BECAUSE THE PROJECT CONTEMPLATES THE CONSTRUCTION OF A HEALTH CARE FACILITY.

A. Stonewall's project requires a CON pursuant to the plain language of W. Va. Code § 16-2D-8(a)(1).

Pursuant to the plain and unambiguous language of W. Va. Code § 16-2D-8(a)(1), the following is subject to CON review:

> The construction, development, acquisition, or other establishment of a health care facility;

By allowing Stonewall to construct a new hospital without CON review, the Authority has lost track of its statutory North Star, and has become completely adrift from the plain language of the law.

[13] Available at https://hca.wv.gov/certificateofneed/Documents/CON_Standards/RenovAcute.pdf.

[14] Available at https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Operating_Rooms.pdf.

The mandate of W. Va. Code § 16-2D-8(a)(1) is clear and unambiguous: if one proposes the "construction[15]" of a "health care facility[16]," a CON is required. As fully detailed in St. Joseph's Initial Brief, Stonewall is undoubtedly proposing the construction of a health care facility on Staunton Drive. The following statement contained in the Authority's Response Brief only solidifies this fact:

> "The Authority issued a Decision on Request for Ruling on Reviewability (2023 Decision) on June 15, 2023, finding that ***Stonewall's proposed construction of its new hospital*** no longer requires a CON . . .

Authority's Brief, p. 3 (emphasis added).

This Court must recognize that neither the Authority nor Stonewall even attempt to argue that the plain language of W. Va. Code § 16-2D-8(a)(1) supports their respective positions. Likewise, neither the Authority nor Stonewall attempt to argue that W. Va. Code § 16-2D-8(a)(1) is ambiguous. These omissions are especially telling given that St. Joseph's extensively addressed the plain language of W. Va. Code § 16-2D-8(a)(1)—and its applicability to the project—in its opening brief. *See* St. Joseph's Brief, pp. 21-24.

The Authority instead argues that "[a]ccording to staff . . . the Authority would determine the project was not reviewable," and that it "relied on conformance with their past practices and their past interpretation of the CON law when writing their decision." *See* Authority's Brief at pp. 8, 10. Similarly, Stonewall argues that the Authority has interpreted W. Va. Code § 16-2D-8(a)(1)

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[15] As identified in St. Joseph's Initial Brief, the Legislature did not define the term "construction." As an undefined term, it is given its "common, ordinary, and accepted meaning." Syl. Pt. 6, *Cohen*, 175 W.Va. at 525, 336 S.E.2d at 171.

[16] As also identified in St. Joseph's Initial Brief, the Legislature defined a "health care facility" broadly to be "a publicly or privately owned facility, agency or entity that offers or provides health services, whether a for-profit or nonprofit entity and whether or not licensed, or required to be licensed, in whole or in part." W.Va. Code § 16-2D-2(16). Thus, a "health care facility" can be an entity, but it can also be a brick-and-mortar building (i.e., facility) when it is constructed for the purpose of providing health services.

to generally mean that the complete relocation of an existing health care facility is not subject to CON review, even when such complete relocation involves the construction of a health care facility. *See* Stonewall's Brief, pp. 21-25.

However, the Authority and Stonewall ignore a fundamental principle of administrative law: when a statute is not ambiguous, an administrative agency does not have the occasion or ability to rewrite the statute under the guise of "interpretation." To this end, our Supreme Court of Appeals has consistently held that:

> Only when a statute is ambiguous may the Court inquire as to a statute's purpose and otherwise employ the canons of statutory construction.

Monongahela Power Co. v. Buzminsky, 243 W. Va. 686, 691, 850 S.E.2d 685, 690 (2020); ***see also Syl. Pt. 2, State v. Elder***, 152 W. Va. 571, 571, 165 S.E.2d 108, 109 (1968).

In fact, ***Stonewall itself*** identifies (but completely glosses over) this fundamental premise in its Response Brief by acknowledging that: "interpretation of statutes or rules and regulations by a court is only permitted when ambiguity exists." Stonewall's Brief, p. 25 (citing *Consumer Advoc.*, 182 W. Va. at 156, 386 S.E.2d at 654). In a similar vein, our Supreme Court of Appeals has also consistently held that:

> [a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten.

War Mem'l Hosp., Inc., 248 W. Va. at --, 887 S.E.2d at 39 (quoting Syl. Pt. 1, *Consumer Advoc.*, 182 W. Va. at 154, 386 S.E.2d at 652).

W. Va. Code § 16-2D-8(a)(1) unambiguously provides that the "construction" of a "health care facility" is subject to CON review. It contains no qualifiers, exemptions, or exceptions. By determining that the project is not subject to CON review, the Authority has rewritten W. Va. Code § 16-2D-8(a)(1) to create an entirely new exemption which exists nowhere in the law. If the

Legislature wanted to exempt the construction of replacement hospitals from review, it would have said so. To this end, the CON law contains 36 statutorily-enumerated exemptions, and none apply to the project. *See* W. Va. Code § 16-2D-10 *et seq.*; *see* W. Va. Code § 16-2D-11 *et seq.* "It is not for this Court arbitrarily to read into [a statute] that which it does not say . . . . [it is] obliged not to add to statutes something the Legislature purposely omitted."' *Phillips*, 220 W. Va. at 491, 647 S.E.2d at 927.

By unambiguously mandating that the "construction" of a "health care facility" (the exact event contemplated by Stonewall's project) is subject to CON review, the Legislature has directly spoken that the project necessitates CON approval. W. Va. Code § 16-2D-8(a)(1). Since the Legislature has directly spoken to the precise question at issue (*i.e.* that the project is subject to CON review), the first prong of the *Chevron* analysis is determinative and the Authority's "past practices" or purported "interpretations" of W. Va. Code § 16-2D-8(a)(1) are completely immaterial. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); Syl. Pt. 2, *Amedisys*, 245 W. Va. at 398, 859 S.E.2d at 344.

The bottom line is that Stonewall proposes to "construct" a "health care facility" as part of its project. This does not end with Stonewall's hospital magically plopped down on a site 4.5 miles from where it currently exists. Stonewall is intending to construct a health care facility on Staunton Drive which will have, at the very least, "four walls and a roof" and be equipped to function as a hospital. That is "construction." *See Eggleston v. W. Virginia Dep't of Highways*, 189 W. Va. 230, 234-35, 429 S.E.2d 636, 640-41 (1993). The construction of a health care facility is still the construction of a health care facility, even though the entity currently operates an existing health care facility. Stonewall's failure to address St. Joseph's argument concerning the

plain meaning of the statute makes its entire argument on this issue meaningless to the resolution of this case.

The CON law contains various separate triggers which subject a proposed project to CON review. Some of those triggers, such as the case with the physical relocation of beds (detailed *supra*), are implicated when a capital expenditure is made. Other triggers, like W. Va. Code § 16-2D-8(a)(1), do not reference capital expenditures.

In its Response Brief, the Authority identified that it:

> . . . determined Stonewall's project was not reviewable based on two facts only 1) the move would entirely relocate Stonewall to a new location within the same service area, providing the same services, whereupon Stonewall would cease operations at the old location, and 2) the projected capital expenditure for Stonewall's project was $56M, well below the newly raised $100M minimum capital expenditure.

Authority's Brief, pp. 10-11. Similarly, Stonewall references the recent increase to the expenditure minimum within its discussion of W. Va. Code § 16-2D-8(a)(1). Since W. Va. Code § 16-2D-8(a)(1) does not reference the expenditure minimum (or indeed, even the words "capital expenditure" at all), any attempt of the Authority and Stonewall to amalgamate these two separate considerations together must fail.

Stonewall's project is unmistakably subject to CON review pursuant to the plain language of W. Va. Code § 16-2D-8(a)(1). "When [a] statute is unambiguous and legislative intent is plain, it is the duty of courts not to interpret or construe, but merely to apply [the] statute." Syl. Pt. 1, *W. Virginia Radiologic Tech. Bd. of Examiners v. Darby*, 189 W. Va. 52, 53, 427 S.E.2d 486, 487 (1993). The Authority and Stonewall's invitation for this Court to ignore the plain language of W. Va. Code § 16-2D-8(a)(1) under the guise of purported "past practices" and "interpretation" must be rejected.

B. *The Authority's past practices and interpretations are not instructive in the instant matter.*

Contrary to Stonewall's assertions, the precise issues implicated by the instant matter have not been directly addressed by the Authority's past practices or interpretations. In fact, the Authority admitted that Stonewall's RDOR left the Authority in a "quandary," and that "[t]his case is one of first impression for the Authority . . . that will ultimately depend on the wisdom of this court to decide." *See* Authority's Brief, pp. 7-8. '"In a case of first impression, there is by definition a total lack of precedent.'" CASE, CASE OF FIRST IMPRESSION, Black's Law Dictionary (11th ed. 2019) (quoting Eugene Wambaugh, The Study of Cases § 60, at 56 (2d ed. 1894)).

Neither Stonewall nor the Authority has cited one Authority decision wherein the Authority permitted the relocation of an acute care hospital, and the associated construction of a replacement hospital facility, without requiring a CON. As Stonewall and the Authority have acknowledged, "it is impossible to have relocated a hospital for less than the previous five point four million dollar ($5,400,000.00) expenditure minimum." (D.R. 0472; *see also* D.R. 0604 ("it is impossible to have relocated a hospital for less than the previous $5.4 million dollar threshold."); D.R. 0464 ("Prior to the 2023 legislative amendments to the statute that increased the expenditure minimum from approximately $5.6 million to $100 million, the relocation of a full hospital was not practical. A hospital simply cannot be constructed for $5.6 million.")); Stonewall's Brief, p. 24 ("prior to the change in the statute, the cost of relocating a hospital far exceeded the previous expenditure minimum").[17] The Authority has never before permitted the

[17] The Authority periodically adjusts the expenditure minimum for inflation. Prior to the 2023 legislative amendments, the expenditure minimum for 2023 was $6,122,996. https://web.archive.org/web/20230131000649/https://hca.wv.gov/Pages/default.aspx

construction of a replacement acute care hospital without a CON. Because such projects clearly required a CON because they exceeded the expenditure minimum, the Authority has never needed to determine whether W. Va. Code § 16-2D-8(a)(1) triggers CON review in these cases.

None of the cases cited by the Respondents involve the relocation of an acute care hospital. Rather, these cases generally concern the relocation of ambulatory health care facilities; no beds were moved in any of these cases. Moreover, it is unclear how many of the cases cited by Stonewall even involve the construction of a health care facility. As Stonewall has acknowledged, "the files were not clear on that point." (D.R. 0463). Stonewall only cites five cases that it claims to have involved the construction of a health care facility, and those cases are not very clear on that point either. *See* Stonewall's Brief, n. 12.

To the extent that the Authority has allowed applicants to construct health care facilities in relocation projects without a CON, it has done so in direct contravention of the statute. W. Va. Code § 16-2D-8(a)(1) clearly and unambiguously requires a CON for the "[t]he construction . . . of a health care facility." It cannot be squared with the interpretation urged by the Respondents. "[S]uch interpretation is impermissible where the [statutory] language is clear and unambiguous." *Consumer Advoc.*, 182 W. Va. at 156, 386 S.E.2d at 654. Because the statute is clear and controlling, the Authority is not entitled to any deference, regardless of how long standing its interpretation may be. *See id.; see also War Memorial*, 248 W. Va. at --, 887 S.E.2d at 41.

III. THE AUTHORITY'S AMENDED DECISION IS VOID AND ULTRA VIRES.

As explained in St. Joseph's opening brief, the Authority's Amended Decision is void and "ultra vires" for three reasons: (1) the Authority lacks the power, either statutorily or through regulation, to modify its final decision before judicial review; (2) even if the Authority possessed such authority before judicial review, it unequivocally lacks the power to amend a final decision

once it has been appealed to this Court; and (3) the *Chenery* doctrine mandates that this Court assess the Authority's actions solely based on the contemporaneous explanations provided in the original decision. Striving to avoid what should be a clear-cut result, Stonewall attempts to convince the Court that the Authority's Amended Decision was permitted under Rule 60(a) of the West Virginia Rules of Civil Procedure. It was not.

First, West Virginia Code § 16-29B-12(g) does not, as Stonewall suggests, allow the Authority to issue amended decisions; it rather expressly forecloses the Authority's ability to do so. This section plainly provides that "[a] decision of the board ***is final*** unless reversed, vacated or modified upon judicial review thereof." W. Va. Code § 16-29B-12 (emphasis added). The Authority, therefore, does not have the power to alter or amend its decisions. *See id; see also Reed v. Thompson*, 235 W. Va. 211, 214–15, 772 S.E.2d 617, 620–21 (2015) ("[a]n administrative agency's reconsideration of its own final order before judicial review is not valid unless the agency was given the authority under a statute or administrative rule to do so.").

Contrary to Stonewall's assertions, W. Va. Code § 16-29B-13 does not apply the West Virginia Rules of Civil Procedure to proceedings before the Authority. Rather, it clarifies that the Rules of Civil Procedure apply to the "administrative review of board decisions" when such reviews were conducted by the Office of Judges, "the review agency":

> ***For the purpose of administrative review of board decisions, the review agency shall conduct its proceedings in conformance with the West Virginia rules of civil procedure*** for trial courts of record and the local rules for use in the civil courts of Kanawha County and shall review appeals in accordance with the provisions governing the judicial review of contested administrative cases in section four, article five, chapter twenty-nine-A of this Code, notwithstanding the exceptions to section five, article five, chapter twenty-nine-A of this Code.

W. Va. Code § 16-29B-13(b) (emphasis added). Apart from the discovery process, the West Virginia Rules of Civil Procedure do not apply to proceedings before the Authority. *See* W. Va. Code R. 65-32-8.25.[18] Nothing in the CON-law or the Authority's regulations gives it the power to amend its decisions, pursuant to Rule 60(a) or otherwise.

Second, contrary to Stonewall's assertions, the Authority's Amended Decision does not serve merely to correct clerical mistakes. While the Authority does state that the Amended Decision corrected "a few typographical errors", it also acknowledges that "there were two significant non-topographical areas of change." Authority's Brief, p. 9. The Authority further explains that it "removed the discussion relating to beds and a tie in to RDOR's because not only was it confusing, but it was also wrong-the Authority does not rely on changes to beds when making RDOR determinations of replacement and relocation projects." Authority's Brief, pp. 9-10. The Authority's Amended Decision was not issued until after St. Joseph's filed its Notice of Appeal and Motion to Stay and Stonewall filed its response to St. Joseph's Motion to Stay and appears to incorporate changes intended to meet St. Joseph's arguments regarding, among other things, decreases in Stonewall's bed capacity.

These changes are not clerical and are not permissible under Rule 60(a). "Rule 60(a) of the West Virginia Rules of Civil Procedure applies to clerical errors made through oversight or omission which are part of the record and is not intended to adversely affect the rights of the parties or alter the substance of the order, judgment or record beyond what was intended." *Quicken Loans, Inc. v. Brown*, 230 W. Va. 306, 333, 737 S.E.2d 640, 667 (2012) (quoting Syl. Pt. 3, *Savage v. Booth*, 196 W. Va. 65, 66, 468 S.E.2d 318, 319 (1996)). Our Supreme Court of Appeals has

[18] W. Va. Code R. 65-32-8.25 provides in relevant part that "[t]he affected parties may engage in discovery as provided by the West Virginia Rules of Civil Procedure. The scope of discovery is limited to relevant and admissible evidence."

explained that a "clerical mistake" is "a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination[.]" *Barber v. Barber*, 195 W. Va. 38, 43, 464 S.E.2d 358, 363 (1995) (quoting *Stephenson v. Ashburn*, 137 W. Va. 141, 146, 70 S.E.2d 585, 588 (1952)).

Here, the Authority exercised its judgement and determined that Stonewall "proposes a reduction from 70 to 29 beds[.]" (D.R. 0475 (see footnote 6, finding of fact number 7)). And, removing that finding from the Authority's Decision adversely affects St. Joseph's decrease in bed capacity argument. *See* Section IV, *infra*. The Authority's finding that Stonewall "proposes a reduction from 70 to 29 beds" cannot be fairly characterized as a clerical mistake.

The Authority also improperly amended page 4 of its Decision. Whereas the Authority's original Decision states that "Stonewall supplied a list of cases where the Authority did not trigger CON review when ambulatory health care facility services were relocated from one off campus location to another and points out it never involved hospitals before because it is impossible to have relocated a hospital for less than the previous five point four million dollar ($5,400,000.00) expenditure minimum," the Amended Decision states that Stonewall "provided two cases [the Select Specialty Cases] involving the relocation of hospitals where the capital expenditure was less than the expenditure minimum that were found not to be subject to CON Review." (*Compare* D.R. 0472 *with* D.R. 0603). As explained above, the Select Specialty Cases involved LTACHs not hospitals, and did not involve the relocation of any beds. *See* Section I.B *supra*. At any rate, the changes made to page 4 of the Authority's Decision were made to strengthen the Authority's position, not to correct "clerical mistakes."

Finally, even if Rule 60(a) applied (it does not), the second sentence of Rule 60(a) provides that "[d]uring the pendency of an appeal, such mistakes may be so corrected before the appeal is

docketed in the appellate court, and thereafter ***while the appeal is pending may be so corrected with leave of the appellate court***." W. Va. R. Civ. P. 60 (emphasis added); *see also* § 2856 Relief After Appeal Taken, 11 Fed. Prac. & Proc. Civ. § 2856 (3d ed.) ("during the pendency of the appeal after it has been docketed with the appellate court, the district court can correct clerical errors only with leave of the appellate court."). Here, the Authority did not seek leave of this Court to amend its decision, and therefore did not have jurisdiction to do so. *See e.g.*, Syl. Pt. 3, *Fenton v. Miller*, 182 W. Va. 731, 732, 391 S.E.2d 744, 745 (1990) ("Once this Court takes jurisdiction of a matter pending before a circuit court, the circuit court is without jurisdiction to enter further orders in the matter except by specific leave of this Court."); *Bartles v. Hinkle*, 196 W. Va. 381, 388, 472 S.E.2d 827, 834 (1996) ("A trial court is deprived of jurisdiction [] when it has entered a 'final' order within the contemplation of W. Va. Code, 58–5–1 (1925), and the final order has been appealed properly to this Court."); *Antero Res. Corp. v. Irby*, No. 21-0119, 2022 WL 1682290, at *2 (W. Va. May 26, 2022) (memorandum decision) (holding that the circuit court did not have jurisdiction to decide Rule 60 motion because "circuit courts lack jurisdiction to issue rulings while a proper appeal is pending before this Court.").

The Court should not, as Stonewall requests, grant the Authority leave to amend its Decision. The Authority never asked for leave to amend its Decision and permitting it to do so at this stage would only serve to condone the Authority's flagrant disregard for the rules. Allowing administrative agencies to amend their decision mid appeal without first seeking leave of this Court disrupts the orderly review process, forcing appellants to chase a moving target and file additional appeals to preserve their rights. It is inefficient and unfair. The Court should not allow the Authority to amend its Decision at the 11th hour.

IV. STONEWALL'S PROJECT REQUIRES A CON PURSUANT TO W. VA. CODE § 16-2D-8(A)(5) BECAUSE THE PROJECT ENCOMPASSES A SUBSTANTIAL CHANGE TO STONEWALL'S BED CAPACITY DUE TO THE REDUCTION OF STONEWALL'S HOSPITAL BEDS.

As explained in St. Joseph's opening brief, both Stonewall's RDOR and the project proposed by Stonewall's 2021 CON application contemplate the construction of a new hospital to be located on Staunton Drive at a capital cost of $56,000,000. (*Compare* D.R. 0004 *with* D.R. 0048). The precise match of capital expenditures between the RDOR project and the project in Stonewall's CON application objectively evidences that both proposals are essentially the same. Thus, the Authority's Decision reasonably concluded that Stonewall's RDOR, like its 2021 CON application, "proposes a reduction from 70 to 29 beds[.]" (D.R. 0475 (see footnote 6, finding of fact number 7)). And while the Authority's Amended Decision states that Stonewall "proposes no such reduction in the RDOR" (D.R. 0606), the Authority clearly realizes that the project proposed by Stonewall's RDOR and that proposed in its September 2021 CON application are, for all intents and purposes, "identical." Authority's Brief, p. 7 ("The Authority denied an application for a CON for the ***identical*** project being proposed by Stonewall in their RDOR.") (emphasis added); Authority's Brief p. 1 ("this is true even when the ***identical*** project was denied a CON less than a year ago . . .") (emphasis added).

The Authority explains that "[l]anguage related to the discussion of bed capacity and relocation was removed in the amended Decision because, while it was a topic of discussion by the board, it ultimately did not inform their final decision and should not have been included." Authority's Brief, pp. 8-9; *see also* Authority's Brief, p. 10 ("although the Board did discuss the number of beds that could be affected by this RDOR, ultimately a change to the number of beds was not a factor and did not inform their decision."). Thus, while the Authority was not thoroughly

convinced that Stonewall's project did not encompass a decrease in its bed capacity, the Authority believed that it did not need to resolve this issue because "the Authority does not rely on changes to beds when making RDOR determinations of replacement and relocation projects". *See id.* In doing so, the Authority effectively ignored the plain language of W. Va. Code § 16-2D-8(a)(5), which provides that a CON is required for any project contemplating "[a] substantial change to the bed capacity of a health care facility with which a capital expenditure is associated[.]" As explained above, a "substantial change to the bed capacity" includes any change that "increases or ***decreases*** the bed capacity or relocates beds from one physical facility or site to another[.]" *See* W. Va. Code § 16-2D-2(45) (emphasis added). Accordingly, the Authority needed to consider whether Stonewall's project would reduce its bed capacity, and the Authority's failure to do so constitutes reversible error.

Moreover, Stonewall had the burden of proving that its project was not subject to CON review. *See PNGI Charles Town Gaming, LLC v. W. Virginia Racing Comm'n*, 234 W. Va. 352, 361, 765 S.E.2d 241, 250 (2014) ("the general practice in administrative proceedings is that 'an applicant for relief . . . has the burden of proof."') (quoting 73A C.J.S. *Public Administrative Law & Procedure* § 296 (2014)). To meet that burden, Stonewall should have, at a minimum, attested that it would be building a hospital that could house all of its existing beds. As Stonewall acknowledges "the record is completely silent on this point." Stonewall's Brief, p. 12 at n 9. As the party with the burden of proof, that silence must be counted against Stonewall, not St. Joseph's. A Determination of Reviewability ("DOR") is not a blank check. Stonewall needed to clarify whether it intended to build a 70-bed hospital or not because it matters; any reduction in the number of Stonewall's beds, however small, constitutes a "substantial change in the bed capacity" triggering the need for a CON under W. Va. Code § 16-2D-8(a)(5).

Nonetheless, Stonewall still fails to clarify what kind of hospital it intends to build: "***If Stonewall wants***, it ***can*** easily re-configure its hospital to have 29 rooms each with two hospital beds and it would immediately have a hospital with 58 hospital beds with no additional expense" and "***can*** add rooms to the extent that it does not exceed its expenditure minimum." Stonewall's Brief, p. 12 at n 9 (emphasis added). Stonewall's lack of clarity is intentional—it knows what kind of hospital it wants to build and there is no legitimate reason for Stonewall to be coy with this Court. If anything, Stonewall's continued equivocation amounts to a tacit admission that its RDOR does not contemplate the construction of a 70-bed hospital. As Stonewall acknowledges, adding additional rooms will create an additional cost. Stonewall's Brief, p. 12 at n 9. And, given the state of inflation over the past two years, it is very unlikely that Stonewall could even still build a 29-room hospital for $56,000,000. *See* St. Joseph's Brief, n. 15.

In sum, the parallels between Stonewall's RDOR and its 2021 CON application make clear that Stonewall's RDOR does not contemplate the construction of a 70-bed hospital. Any decrease in bed capacity, however small, is a "substantial change in the bed capacity" and, when associated with a capital expenditure, triggers CON review under W. Va. Code § 16-2D-8(a)(5). It was Stonewall's burden as the applicant to provide enough details about its project to support a finding that it would not be decreasing its bed capacity. A DOR is not a blank check, and the silence of the record must be counted against Stonewall.

CONCLUSION

For the reasons set forth above, St. Joseph's respectfully requests that the Court reverse and vacate the Authority's Decision and Amended Decision and remand the case to the Authority with directions to enter a decision finding Stonewall's construction of a hospital at Staunton Drive, Weston, West Virginia is subject to CON review.

ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.
D/B/A ST. JOSEPH'S HOSPITAL
By Counsel

/s/Alaina N. Crislip
ALAINA N. CRISLIP (WVSB #9525)
NEIL C. BROWN (WVSB #13170)
JACKSON KELLY PLLC
500 Lee St., E., Suite 1600
Post Office Box 553
Charleston, WV 25322
(304) 340-1372

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

St. Joseph's Hospital of Buckhannon, Inc.
d/b/a St. Joseph's Hospital,
Respondent Below, Petitioner

vs.) No. 23-ICA-265

Stonewall Jackson Memorial Hospital Company,
Petitioner Below, Respondent

and

West Virginia Health Care Authority,
Respondent Below, Respondent

CERTIFICATE OF SERVICE

I, Alaina N. Crislip, do hereby certify that I have served the foregoing ***Reply Brief of Petitioner St. Joseph's Hospital of Buckhannon, Inc.*** on this 19th day of December, 2023, via the Court's electronic filing system, which caused a true and exact copy of the same to be served upon counsel of record:

Thomas G. Casto, Esq.
Lewis Gianola PLLC
300 Summers Street, Suite 700
Charleston, WV 25301
tcasto@lewisgianola.com
Counsel for Stonewall Jackson Memorial Hospital Company

Heather A. Connolly, Esq.
Assistant Attorney General
Certificate of Need Division
West Virginia Health Care Authority
100 Dee Drive
Charleston, WV, 25311-1692
Phone: 304-558-7000
heather.a.connolly@wv.gov

/s/Alaina N. Crislip
ALAINA N. CRISLIP