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## ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

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Daniel Senior Living of Inverness I, LLC, d/b/a Danberry at  
Inverness

v.

STV One Nineteen Senior Living, LLC, d/b/a Somerby at St.  
Vincent's One Nineteen; State Health Planning and  
Development Agency; and Certificate of Need Review Board

Appeal from Montgomery Circuit Court  
(CV-10-901242)

BRYAN, Judge.

Daniel Senior Living of Inverness I, LLC, d/b/a Danberry  
at Inverness ("Danberry"), appeals from a judgment of the

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Montgomery Circuit Court affirming the issuance of an emergency certificate of need ("CON") to STV One Nineteen Senior Living, LLC, d/b/a Somerby at St. Vincent's One Nineteen ("Somerby"). We reverse and remand.

Procedural History and Factual Background

On March 25, 2010, the Statewide Health Coordinating Council ("the Council"), in response to Somerby's request, voted to adjust the State Health Plan to indicate the need for 164 specialty-care assisted-living-facility ("SCALF") beds in Shelby County.<sup>1</sup> On March 31, 2010, then Governor Bob Riley approved the adjustment to the State Health Plan. The record on appeal indicates that SCALF services are special services that aid patients with dementia-related impairments. Before the Council adjusted it, the State Health Plan had indicated a need for 96 SCALF beds in Shelby County. However, evidence submitted to the Council revealed that there were actually 128

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<sup>1</sup>The State Health Plan is a comprehensive plan that "provide[s] for the development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of the state." § 22-21-260(13), Ala. Code 1975. The Council prepares, reviews, revises, and approves the State Health Plan. § 22-4-8(b)(2), Ala. Code 1975.

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SCALF beds in service in that county. Thus, the adjustment to the State Health Plan to indicate the need for 164 SCALF beds in Shelby County essentially reflected a need for an additional 36 SCALF beds above the 128 SCALF beds already in service.

After the adjustment to the State Health Plan, both Somerby and Danberry applied for a CON to convert 24 of their existing assisted-living-facility ("ALF") beds in Shelby County to SCALF beds. However, on May 28, 2010, the same day that Somerby filed its standard CON application, Somerby also applied for an emergency CON, see § 22-21-268, Ala. Code 1975, to convert 24 of its existing ALF beds in Shelby County to SCALF beds. That is, Somerby applied for both a standard, nonemergency CON and an emergency CON in an attempt to convert 24 of its ALF beds to SCALF beds. Unlike an applicant seeking a standard, nonemergency CON, an applicant seeking an emergency CON does not need to provide notice to interested parties, and the process for granting an emergency CON is considerably expedited. See Rule 410-1-10-.01(1), Ala. Admin. Code (State Health Planning and Development Agency). As we will discuss below, an emergency CON may be issued as a result

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of "unforeseen events" that "endanger the health and safety of the patients." § 22-21-268.

Danberry opposed Somerby's emergency CON application. On June 16, 2010, the Certificate of Need Review Board ("CONRB") of the State Health Planning and Development Agency ("SHPDA") considered Somerby's emergency CON application, receiving supporting evidence from Somerby and evidence in opposition from Danberry. That same day, the CONRB approved Somerby's application for an emergency CON. The CONRB issued a final, written decision granting Somerby the emergency CON on July 1, 2010, slightly more than a month after Somerby had filed its application. After exhausting its administrative challenges to the CONRB's decision, Danberry appealed to the circuit court, pursuant to § 40-22-20, Ala. Code 1975. The circuit court entered a judgment affirming the CONRB's decision to issue Somerby an emergency CON for the 24 SCALF beds. Danberry filed a timely notice of appeal to this court, and we heard oral argument on September 20, 2011.

#### Standard of Review

In reviewing an administrative agency's decision, this court's standard of review is the same as that of the circuit

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court. Alabama Dep't of Env'tl. Mgmt. v. Legal Env'tl. Assistance Found., Inc., 973 So. 2d 369, 375 (Ala. Civ. App. 2007). Section 41-22-20(k), Ala. Code 1975, governs our review and the circuit court's review of the CONRB's decision in this case. In pertinent part, it provides:

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

"(1) In violation of constitutional or statutory provisions;

"(2) In excess of the statutory authority of the agency;

"(3) In violation of any pertinent agency rule;

"(4) Made upon unlawful procedure;

"(5) Affected by other error of law;

"(6) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or

"(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."

Our review of the CONRB's conclusions of law and application of the law to the facts is de novo. Ex parte Wilbanks Health Care Servs., Inc., 986 So. 2d 422, 425 (Ala. 2007).

#### Discussion

On appeal, Danberry argues that the CONRB erred in issuing an emergency CON to Somerby because, Danberry says, Somerby's emergency CON application did not present an "emergency" under § 22-21-268, Ala. Code 1975. We agree. Section 22-21-268 provides:

"Any person may apply, either independently and without notice under Section 22-21-267<sup>[2]</sup> or as a part of an application filed under Section 22-21-267, for an emergency certificate of need for the authorization of capital expenditures made necessary by unforeseen events which endanger the health and safety of the patients. Emergency capital expenditures include, but are not necessarily limited to, emergency expenditures to maintain quality care, to overcome failure of fixed equipment, including heating and air conditioning equipment, elevators, electrical transformers and switch gear, sterilization equipment, emergency generators, water supply and other utility

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<sup>2</sup>Section 22-21-267, Ala. Code 1975, concerns the CON application process.

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connections. Applications for emergency certificates of need shall include a description of the work to be done and/or equipment to be purchased, the cost thereof, justification for considering the capital expenditure as being of an emergency nature and such other information as the SHPDA may require. Emergency certificates of need issued hereunder shall be subject to such special limitations and restrictions as the duration and right of extension or renewal as may be prescribed in the rules and regulations adopted by the SHPDA."

Rule 410-1-10-.01(1), Ala. Admin. Code (SHPDA), lists the same examples of emergency capital expenditures that are contained in § 22-21-268, except that the rule also lists, as an example of an emergency capital expenditure, emergency expenditures to overcome "damage caused by natural or manmade disaster." The rule provides, in pertinent part:

"Emergency capital expenditures include, but are not necessarily limited to, emergency expenditures to maintain quality care, overcome failure of fixed equipment, including heating and air conditioning equipment, elevators, electrical transformers, and switch gear, sterilization equipment, emergency generators, water supply and other utility connections and damage caused by natural or manmade disaster."

Rule 410-1-10-.01(1) (emphasis added). Under Rule 410-1-10-.01(1)(a), an applicant for an emergency CON "must clearly demonstrate that an emergency exists."

Section 22-21-268 provides that an emergency CON may be

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issued for expenditures "made necessary by unforeseen events" that "endanger the health and safety of the patients." The statute then lists several specific examples of events, all involving the failure of hospital equipment, that would qualify for an emergency CON, provided that those events endanger the health and safety of the patients. Rule 410-1-10-.01(1) provides another specific example: "damage caused by natural or manmade disaster." Under the principle of ejusdem generis, "when general words or phrases follow or precede a specific list of classes of persons or things, the general word or phrase is interpreted to be of the same nature or class as those named in the specific list." Cocking v. City of Montgomery, 48 So. 3d 647, 650 (Ala. Civ. App. 2010). Thus, to merit an emergency CON, there must be an identifiable, unforeseen event, in the nature of or comparable to equipment failure, natural disaster, or manmade disaster, that endangers the health and safety status of patients.

None of the characteristics of an emergency discussed in § 22-21-268 and Rule 410-1-10-.01(1) are found in this case. In its emergency CON application, Somerby stated that it was seeking an emergency CON "based on its current inability to



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properly care for patients suffering from dementia related conditions." Somerby asserted that "[w]ithout CON approval Somerby will be forced to relocate patients facing dementia related care." Somerby's application also noted that the population of Shelby County is rapidly growing and that the county is medically underserved with respect to SCALF services. In its written decision granting the emergency CON to Somerby, the CONRB noted the rapid population growth in Shelby County, particularly among the elderly. The decision stated that "there is an immediate need for SCALF beds within the community to prevent the stressful and unnecessary separation of families." The decision further found that granting Somerby an emergency CON would allow Somerby "to offer a continuum of care to residents by including independent living apartments, ALF apartments and SCALF apartments all within the same facility."

In seeking an emergency CON, Somerby essentially relied on the same evidence that it relied on in its application for a standard, nonemergency CON. Somerby's application for an emergency CON was based on evidence indicating that there is a general need for SCALF beds in Shelby County, that Somerby

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could provide services that would meet this need, and that those services would be valuable and convenient. However, that application does not demonstrate an emergency as contemplated by § 22-21-268 and Rule 410-1-10-.01(1). Somerby's emergency CON application is essentially a standard CON application disguised as an emergency CON application.

We recognize that "[i]nterpretations of an act by the administrative agency charged with its enforcement, though not conclusive, are to be given great weight by the reviewing court." Hulcher v. Taunton, 388 So. 2d 1203, 1206 (Ala. 1980). Similarly, "an agency's interpretation of its own regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation." Ferlisi v. Alabama Medicaid Agency, 481 So. 2d 400, 403 (Ala. Civ. App. 1985). However, "[a]n administrative agency cannot usurp legislative powers or contravene a statute." Ex parte Jones Mfg. Co., 589 So. 2d 208, 210 (Ala. 1991). Insofar as the CONRB's granting Somerby an emergency CON may be viewed as demonstrating a liberal interpretation of the statutory and regulatory provisions relating to emergency CONs, that interpretation is contrary to the clear intent of those

provisions. As the Alabama Supreme Court has observed:

"'It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. ...'" Clarke v. Securities Industry Assn., 479 U.S. 388, 403-404, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987) (quoting Investment Company Institute v. Camp, 401 U.S. 617, 626-627, 91 S. Ct. 1091, 28 L. Ed. 2d 367 (1971)).

"'Under the formulation now familiar, when we confront an expert administrator's statutory exposition, we inquire first whether "the intent of Congress is clear" as to "the precise question at issue." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If so, "that is the end of the matter." Ibid. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id., at 843, 104 S. Ct., at 2782. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment "controlling weight." Id., at 844, 104 S. Ct., at 2782.'"

OCC, Inc. v. Hall, 757 So. 2d 1115, 1119 (Ala. 2000) (quoting NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995)).

By providing specific examples, the legislature clearly defined the type of situation that constitutes an emergency under § 22-21-268. The situation in this case clearly does

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not fit the "emergency" category intended by that statute and reflected in Rule 410-1-10-.01(1). The CONRB's reading of the provisions relating to emergency CONs to include Somerby's situation as an emergency is not "'reasonable in light of the legislature's revealed design.'" Hall, 757 So. 2d at 1119. Applying an interpretation as broad as the one evidenced by the CONRB would essentially nullify the statute. Under such a construction, a standard, nonemergency CON application -- one that reflects a general need for health services and the applicant's qualifications for meeting that need -- could be successfully packaged as an emergency CON application, thereby avoiding notice to interested parties and a potentially lengthy approval process. Surely the legislature did not intend such a result.

The CONRB erred by granting Somerby an emergency CON. Accordingly, we reverse the circuit court's judgment affirming the CONRB's decision, and we remand the case. On remand, the circuit court should enter an order vacating the emergency CON in its entirety; however, that order should not be written in such a manner as to require Somerby to remove its residents who are currently in SCALF beds. In its reply brief to this

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court, Danberry stipulated that, should this court reverse the circuit court's judgment, "Somerby could keep their existing SCALF residents, but could not take new ones unless [Somerby] obtain[s] SCALF bed authorization through the ordinary CON process." Danberry's reply brief at 24. Furthermore, we do not decide which, if any, party should obtain the CON for the 36 SCALF beds needed in Shelby County, a need indicated in the State Health Plan; therefore, the circuit court should avoid entering any judgment that impairs the decision-making process of the CONRB on that point.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Moore, J., concurs specially, with writing.

Thomas, J., concurs in the rationale in part and concurs in the result, with writing.

Thompson, P.J., and Pittman, J., dissent, with writings.

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MOORE, Judge, concurring specially.

As I construe § 22-21-268, Ala. Code 1975, an emergency certificate of need ("CON") can be issued based only on a finding by the Certificate of Need Review Board ("the CONRB")<sup>3</sup> that unforeseen events endangering the health or safety of the applicant's patients may be remedied only by its approval of capital expenditures on an expedited basis. The term "capital expenditure" is defined, for purposes of this case, as including "[a]n expenditure ... which ... [c]hanges the bed capacity of the facility," § 22-21-260(3)b., Ala. Code 1975, and "[a]n expenditure ... which ... [s]ubstantially changes the health services of the facility," § 22-21-260(3)c., Ala. Code 1975. Based on those definitions, an emergency CON may be issued if the CONRB determines that a facility must change its bed capacity to offer new health services in order to safeguard its patients from the danger caused by unforeseen

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<sup>3</sup>By regulation promulgated by the State Health Planning and Development Agency ("SHPDA"), the chairman and vice chairman of the CONRB are authorized to issue an emergency CON based upon their determination that "an emergency actually exists." Rule 410-1-10-.01(1)(b), Ala. Admin. Code (SHPDA). The CONRB then ratifies the emergency CON at its next regularly scheduled meeting. Rule 410-1-10-.01(1)(c), Ala. Admin. Code (SHPDA).

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events.

In this case, STV One Nineteen Senior Living, LLC, d/b/a Somerby at St. Vincent's One Nineteen ("Somerby"), filed an application for an emergency CON in order to expend funds to change some of its existing beds at its Shelby County facility from standard assisted-living-facility ("ALF") beds to specialty-care assisted-living-facility ("SCALF") beds, so that Somerby could provide, for the first time, "proper[] care for patients suffering from dementia related conditions." Pursuant to § 22-21-268, an applicant for an emergency CON must include "justification for considering the capital expenditure as being of an emergency nature." In its application, Somerby pointed out that Shelby County was rapidly growing in population, causing an immediate need for additional SCALF beds to care for dementia-impaired residents and that, without the emergency CON, it could not meet that need and would have to "relocate patients" with SCALF needs. Reviewing the content of the order approving the emergency CON, it appears that the CONRB accepted those facts as its only basis for finding that an emergency existed that required immediate approval of Somerby's proposed capital expenditures.

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I agree with the main opinion that the rapid growth of an aging population in a certain area may not be considered an "unforeseen event" within the meaning of § 22-21-268. \_\_\_ So. 3d at \_\_\_. Assuming that it could, however, Somerby still did not state in its application that the health or safety of any of its residents was presently in danger, and its application, by maintaining that those residents who become impaired by dementia must be relocated, implied that other facilities existed that could immediately respond to any such danger without additional capital expenditures.<sup>4</sup> As the main opinion correctly notes, Somerby's application and the order approving the emergency CON cited only matters of convenience to support its decision. \_\_\_ So. 3d at \_\_\_. The legislature did not create emergency CONs to redress matters of convenience; rather, ordinary CONs are specifically designed for such concerns.<sup>5</sup>

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<sup>4</sup>Indeed, at oral argument, Somerby clarified that the record showed that such facilities were within a relatively short driving distance from its Shelby County facility and that the emergency CON would only make it more convenient for its residents to obtain SCALF services.

<sup>5</sup>When questioned on this point at oral argument, counsel for the parties acknowledged that the CONRB had never in its history issued an emergency CON on the basis that the State



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Because I do not believe that the legislature would consider the rapid growth of an aging population to be an "unforeseen event," and because I do not believe that the legislature would equate a desire to provide a more convenient location for health-care services with a need for emergency capital expenditures in order to safeguard existing patients, I conclude that the CONRB lacked any rational basis for issuing the emergency CON to Somerby. Accordingly, I agree with the main opinion that the circuit court erred in affirming the CONRB's actions and that that judgment is therefore due to be reversed.

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Health Plan had underestimated a need for certain beds in a particular area.

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THOMAS, Judge, concurring in the rationale in part and concurring in the result.

I agree that the circuit court's judgment affirming the decision of the Certificate of Need Review Board ("CONRB") to grant an emergency certificate of need ("CON") to STV One Nineteen Senior Living, LLC, d/b/a Somerby at St. Vincent's One Nineteen ("Somerby"), for 24 specialty-care assisted-living-facility ("SCALF") beds must be reversed. However, I would not go so far as to completely limit the discretion of the CONRB in determining when an emergency situation exists based on a change in the State Health Plan in all circumstances similar to the present case. I can foresee instances in which a change in the State Health Plan would require immediate and emergency action by the CONRB to provide necessary expenditures to prevent danger to the health and safety of patients.

Regarding the present case, the March 2010 change to the State Health Plan identified an underserved need in Shelby County for SCALF beds. At the time that Somerby sought its emergency CON, it was fairly certain that it was likely to be able to fill at least a few of those beds almost immediately upon their availability. In fact, Somerby was able to fill 4

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of the 24 SCALF beds within the first few weeks after it was granted the emergency CON. Thus, I believe that, had Somerby limited its emergency CON request to only those beds for which it had an immediate need and a reasonable likelihood of immediately filling, it could have qualified for an emergency CON for that limited number of SCALF beds. However, I agree that an emergency requiring the addition of 24 SCALF beds at Somerby did not exist, that the circuit court's judgment affirming the grant of the emergency CON for those beds is due to be reversed, and that, upon remand, the circuit court should craft its judgment so as to prevent the removal of existing SCALF residents from Somerby, consistent with the stipulation in the reply brief filed by Daniel Senior Living of Inverness I, LLC, d/b/a Danberry at Inverness.

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THOMPSON, Presiding Judge, dissenting.

I disagree with the main opinion's narrow reading of § 22-21-268, Ala. Code 1975. That reading appears to limit the granting of an emergency certificate of need ("CON") for capital expenditures to an "emergency" situation arising from an equipment failure or from equipment damaged in a manmade or natural disaster. However, § 22-21-268 also provides for authorization of "capital expenditures made necessary by unforeseen events which endanger the health and safety of the patients." The statute states that authorization of capital expenditures may be granted pursuant to an emergency CON application if those expenditures are necessary to "maintain quality care." Id. In listing examples of situations that qualify for authorization of capital expenditures pursuant to an emergency CON, the statute explicitly states that such expenditures "include, but are not necessarily limited to," the enumerated examples. Id. I believe that that language gives wide latitude to the Certificate of Need Review Board ("CONRB") in determining when to authorize capital expenditures pursuant to an emergency CON.

Furthermore, as the main opinion recognizes,

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"it is well established that in interpreting a statute, a court accepts an administrative interpretation of the statute by the agency charged with its administration, if the interpretation is reasonable. ... Absent a compelling reason not to do so, a court will give great weight to an agency's interpretations of a statute and will consider them persuasive."

Ex parte State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996); see also, e.g., Hulcher v. Taunton, 388 So. 2d 1203, 1206 (Ala. 1980). "'[A]n agency's interpretation of its own rule or regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation.' See Sylacauga Health Care Ctr., Inc. v. Alabama State Health Planning Agency], 662 So. 2d [265] at 268 [(Ala. Civ. App. 1994)]; see also Ferlisi v. Alabama Medicaid Agency, 481 So. 2d 400, 403 (Ala. Civ. App. 1985)." State Health Planning & Dev. Agency v. West Walker Hospice, Inc., 993 So. 2d 25, 29 (Ala. Civ. App. 2008).

I believe the question whether the rapidly growing population of Shelby County, including the rapidly growing population of people in Shelby County over the age of 65, constitutes an unforeseen event warranting authorization of capital expenditures pursuant to an emergency CON is a decision best left to the CONRB, not this court. When the

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deference this court must apply to the CONRB's interpretations of § 22-21-268 and the regulations accompanying that statute are coupled with the wide latitude § 22-21-268 appears to give to the CONRB, I must conclude that the CONRB's decision to grant the request of STV One Nineteen Senior Living, LLC, d/b/a Somerby at St. Vincent's One Nineteen, for an emergency CON based on the "current inability to properly care for patients suffering from dementia related conditions" was reasonable. Accordingly, I believe that this court must uphold the CONRB's decision. Because I would affirm the circuit court's judgment affirming the CONRB's decision, I respectfully dissent.

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PITTMAN, Judge, dissenting.

I respectfully dissent. The ejusdem generis doctrine applied by the main opinion is but an "aid in ascertaining and giving effect to the legislative intent where there is uncertainty"; conversely, if "it is apparent that the Legislature intended the general words to go beyond the class specifically designated, the rule does not apply." Moore v. City of Mobile, 248 Ala. 436, 440, 28 So. 2d 203, 206 (1946). Here, the legislature has defined "[e]mergency capital expenditures" such that the term "include[s], but [is] not necessarily limited to," various enumerated situations involving the failure of medical equipment. Ala. Code 1975, § 22-21-268 (emphasis added). When a statute or instrument uses the verb "include" in this manner, it may properly be said to do so not as a word of limitation, but as a word of enlargement. See Prince v. Higgins, 572 So. 2d 1217, 1219 (Ala. 1990); Achelis v. Musgrove, 212 Ala. 47, 50, 101 So. 670, 672 (1924). In my view, the Certificate of Need Review Board (the "CONRB") has the discretion, when circumstances warrant, to classify what it determined in this case to be "an immediate need for {specialty-care-assisted-living-facility}

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SCALF beds within the community to prevent the stressful and unnecessary separation of families" as an "unforeseen event" that "endanger[s] the health and safety of ... patients" in this context (§ 22-21-268); further, the record reflects that the CONRB did so in a manner that was consistent with literally dozens of similar emergency certificate-of-need ("CON") grants by that body. I would affirm the judgment of the circuit court upholding the grant of the emergency CON.