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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

APPELLATE CASE No.: 2019-001159
ADMINISTRATIVE LAW COURT CASE No.: 18-ALJ-07-0100-CC

Trident Medical Center, LLC, d/b/a Trident Medical CenterRespondent,

v.

South Carolina Department of Health and Environmental Control
and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center
– Berkeley County Respondents,

Of Which Medical University Hospital Authority d/b/a MUSC Radiation
Therapy Center – Berkeley County is the.....Appellant.

**RESPONDENT TRIDENT MEDICAL CENTER LLC'S
PETITION FOR WRIT OF CERTIORARI**

David B. Summer, Jr., SC Bar #7974
William R. Thomas, SC Bar #16348
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100 (29201)
Post Office Box 1509
Columbia, South Carolina 29202
Telephone: (803) 255-8000
Facsimile: (803) 255-8017
davidsummer@parkerpoe.com
willthomas@parkerpoe.com

*Attorneys for Respondent
Trident Medical Center, LLC,
d/b/a Trident Medical Center*

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CERTIFICATION BY COUNSEL

The undersigned counsel for the Respondent Trident Medical Center, LLC d/b/a Trident Medical Center (“Trident”) certifies that a Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 10, 2023.

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Court of Appeals’ opinion disregarded the controlling law and erred in holding that the ALC lacked the subject matter jurisdiction to consider the legality of the ownership and management of the project in this Certificate of Need contested case.
- II.. Whether the Court of Appeals’ opinion disregarded the controlling law on the exhaustion of administrative remedies, the preservation of issues, the doctrine of futility, and the authority of the ALC to decide certain constitutional issues *de novo* in holding that Trident was required to raise the unconstitutional and illegal structure of MUHA’s project to the Department in order to preserve it.
- III. Whether the Court of Appeals’ opinion erred in not addressing on the merits the novel question presented by the ALC’s decision that MUHA’s proposed project involves an unlawful and unconstitutional joint venture between a state agency and a private, for profit entity and therefore does not comply with CON law.
- IV. Whether the Court of Appeals’ opinion disregarded the controlling law in reversing the decision of the ALC on procedural grounds without considering the additional sustaining ground on the merits that MUHA is not the proper licensee under the law for the project set forth in its CON application.
- V. Whether the Court of Appeals’ opinion disregarded the controlling law by reversing the decision of the ALC on procedural grounds without ordering remand of the case to the ALC as the trier of fact for a determination on the merits of the remaining CON issues presented in the contested case proceeding below.

STATEMENT OF THE CASE

At its core, this appeal presents the novel question whether an agency of the State of South Carolina can create and use a subsidiary corporation to indirectly co-own a for-profit company with a private entity when the agency’s enabling statute and the South Carolina Constitution prohibit the agency from doing so directly. This issue arises from a 2017 CON application submitted by the Medical University Hospital Authority (MUHA) to the Department of Health and

Environmental Control (Department) to establish a proposed radiation therapy center in Berkeley County (**R. pp. 1595-1817**). MUHA is an agency of the State of South Carolina created under S.C. Code Ann. § 59-123-60(E) to govern all of the hospitals, clinics, and other healthcare and related facilities of the Medical University of South Carolina (MUSC). MUSC is separate agency of the State of South Carolina charged with educating and training health professionals and conferring degrees in medicine and other health related professions. (S.C. Code Ann. § 59-123-60(A)).

In the Part A Questionnaire of the CON application form found at S.C. Code Ann. Regs. 61-15 § 202(2)(a), MUHA identified itself as the proposed licensee of the radiation therapy center. The CON application indicated that the operation and management of the proposed radiation therapy facility, however, would be vested in an entity known as “MUSC Health Cancer Care Network, LLC” (MUSC Network). (**R. pp. 1599-1600**). MUSC Network is described in MUHA’s CON application as a Delaware limited liability company licensed to do business in South Carolina, which is owned 51% by Alliance Oncology, LLC and 49% by MUSC Strategic Ventures. (**Id.**). As characterized by MUHA in its application, “Alliance Oncology, LLC strategically partnered with MUSC Strategic Ventures, a support organization for the Medical University of South Carolina, to create a Joint Venture to operate [MUSC] Network.” (**R. p. 1603**).

The CON application described Alliance Oncology, LLC (Alliance), the majority owner of MUSC Network, as a “nationwide leader in radiation oncology and radiosurgery programs.” (**R. pp. 1600-1601**). MUSC Strategic Ventures, the minority owner of MUSC Network, is described in MUHA’s application as a 501(c)(3) entity formed by MUSC for the purpose of supporting the missions and activities of MUSC and University Medical Affiliates (UMA), a 501(c)(3) entity that employs the physicians who practice in the MUSC health system. (**R. p. 1603; pp. 767, line 19 – 768, line 10; R. p. 1508**).

According to MUHA's CON application, MUSC Strategic Ventures' is controlled by MUSC and UMA, and its function is to determine and implement strategies that enable MUSC, UMA and MUHA to "collectively collaborate" with other healthcare providers. The application further asserts that "MUSC [Strategic Ventures] functions for charitable, scientific and educational purposes in support of MUSC (including MUHA) and [UMA], and to lessen their burdens, by conducting activities that otherwise would be conducted by one or more of such entities." (**R. p. 1603-1604**). The official description set forth in MUSC's Comprehensive Annual Financial Report for the Year Ended June 30, 2018, states "MUSC Strategic Ventures ... was formed in September 2015 to allow affiliation with tax exempt entities to support the missions and programs of [MUSC], UMA, and MUHA." (**R. p. 1508, n. 7**).

On June 7, 2017, Trident timely notified the Department of its status as an affected person opposing MUHA's project. (**R. p. 1818**). On November 22, 2017, the Department staff issued its decision approving MUHA's project. (**R. pp. 1969-1972**). On December 15, 2017, Trident timely requested that the Department Board conduct a final review conference on the matter. (**R. pp. 68-72**). After the Board declined to conduct a final review conference, Trident timely petitioned the ALC for contested case review of the Department's final decision. (**R. pp. 37-89; 54-55**).

During discovery in the contested case proceeding, Trident deposed Patrick Cawley, M.D., who is the Chief Executive Officer of MUSC Strategic Ventures, the Vice-President of Health Affairs for MUSC and the Executive Director of MUHA. Contrary to the publicly-stated purpose of MUSC Strategic Ventures as a support entity that performs activities "that otherwise would be conducted by" MUSC and MUHA, Dr. Cawley testified that MUSC Strategic Ventures "predominantly joint ventures with for-profit companies that we otherwise couldn't work with as part of MUHA or MUSC." (**R. p. 2015, lines 11-18**). Thus, from the time of application to the

time of the ALC hearing, Trident’s understanding of MUSC Strategic Ventures’ role morphed from “collaboration with health care providers” to “affiliation with tax exempt entities” to “joint ventures with for-profit companies” to circumvent the limitations placed on MUHA and MUSC as governmental bodies.

In response to discovery requests, MUHA was compelled to disclose for the first time the MUSC Network Operating Agreement (“Operating Agreement”) between Alliance and “MUSC Health” and the Network Management Agreement (“Management Agreement”) by and among Alliance, MUSC Network, and “MUSC Health.”¹ (**R. p. 795, lines 1-2; R. pp. 1509 - 1521; and R. pp. 1522 – 1563**). These agreements set out in detail the specific rights, duties, and functions of the parties regarding the ownership, operation, and control of the project, as well as the broader relationships among the parties. In particular, the Operating Agreement for MUSC Network contains provisions governing the “Allocation of Income and Loss” and “Cash Distributions” between MUSC Strategic Ventures and Alliance. (**R. p. 1532**).

On March 1, 2018, the ALC conducted the contested case hearing on this matter over five nonconsecutive days beginning January 14, 2019 and ending January 24, 2019. (**R. p. 90**). On January 24, 2019, at the close of the hearing, Trident made an oral motion before the court, concurrent with submission of a written motion, requesting judgment as a matter of law on the grounds that MUHA’s project constitutes an unlawful and unconstitutional joint venture, which, by its nature cannot comply with the applicable standards and criteria under the CON laws. (**R. p. 1297, line 17 – p. 1310, line 13; R. pp. 1999-2030**). On May 14, 2019, the ALC issued its order

¹ At the hearing before the ALC, Dr. Cawley clarified that “MUSC Health” was used as a brand name for the entire MUSC health system and also as the registered name for the corporate entity that eventually was re-named MUSC Strategic Ventures. (**R. p. 769, lines 13-22**).

granting Trident's motion for judgment as a matter of law and denying MUHA's CON. (R. pp. 1-35).

MUHA filed its Notice of Appeal with the Court of Appeals on July 15, 2019. On appeal, MUHA contended, *inter alia*, that (a) the ALC lacked subject matter jurisdiction under CON law to consider the constitutional and statutory issues raised by Trident; (b) the ALC lacked the authority to hear Trident's issues because they allegedly were not presented to or considered by the Department below; (c) the ALC erred in concluding that MUSC Strategic Ventures is an *ultra vires* entity and that MUSC Network is an unlawful and unconstitutional joint venture; and (d) the ALC erred in finding as an additional sustaining ground that MUHA is not the proper licensee of the project under the CON Law.²

On December 12, 2022, the Court of Appeals reversed the order of the ALC on the procedural grounds alleged by MUHA that the ALC lacked the subject matter jurisdiction to address Trident's challenge to the legality of MUSC Network in a CON contested case proceeding and that Trident waived the issue because it was not raised before the Department. *See generally Trident Med. Ctr., LLC v. S.C. Dept. of Health & Env't'l Control*, ___ S.C. ___, 882 S.E.2d 878 (Ct.App. 2022). The Court of Appeals failed to rule on the additional sustaining ground, which could have been dispositive on the merits or, in the alternative, to remand the case to the ALC, as the fact finder, for a decision on the merits of the remaining issues regarding MUHA's compliance with the standards and criteria under the CON law. Trident petitions this Court to review the Court of Appeals' decision, reverse it, and affirm the order of the ALC denying MUHA's CON application or, alternatively, to remand this matter to the ALC for further action.

² On March 1, 2021, the Court of Appeals granted the Motion of MUSC and MUSC Strategic Ventures as Amici Curiae for Leave to File a Joint Amicus Brief.

ARGUMENT

I. The Court of Appeals disregarded the controlling law and erred in holding that the ALC lacked the subject matter jurisdiction to consider legality of the ownership and management of the project in this Certificate of Need contested case.

The Court of Appeals' opinion holds that the ALC lacks the subject matter jurisdiction to determine that MUSC Strategic Ventures and MUSC Network are *ultra vires* entities being used by MUHA to effectuate an unconstitutional joint venture arrangement between a state agency and a private for profit company. The basis for the court's holding was that such a determination is not related to whether the project complies with the standards and criteria set forth in the State Health Plan and CON regulations. *Trident*, 882 S.E.2d at 882 This holding by the Court of Appeals misinterprets the controlling CON law and contradicts the detailed factual findings of the ALC that the ownership and structure of the project in this case is crucial to a decision whether to grant a CON.

The CON law requires an applicant to provide certain basic information about the ownership and management of a proposed project for any entity with an ownership interest in the project and for any entity engaged to manage or operate the project. *See* S.C. Code Ann. Regs. 61-15 § 202(8). MUHA presented this basic information to the Department in its own CON application. (**R. pp. 1599 - 1604; R. pp. 1607 - 1610**). Furthermore, Project Review Criteria 13, entitled "Record of the Applicant (Owner and/or Administrator)," requires both the owner and the administrator of a project to demonstrate that they have a record of "successful operation with adequate management experience," "ability to obtain necessary capital financing," and "a record of cooperation and compliance with State and Federal regulatory programs." *See* S.C. Code Ann. Regs. 61-15 § 802(13). Indeed, ownership and control of a project is so integral to the issuance of a CON that any change of ownership prior to implementation of a CON results in the CON being

void. *See* S.C. Code Ann. Regs. 61-15 § 604. These CON requirements and review criteria directly address the ownership and management of MUHA's project, and all of them were considered by the Department and the ALC during the review process.

In addition to the Project Review Criteria and other CON requirements that specifically reference ownership and management of a project, there are other criteria and standards that are materially affected by the identity and record of the owner and the operator/manager of the project. As discussed by the ALC in its order, Project Review Criteria concerning the ability to complete the project, found at S.C. Code Ann. Regs. 61-15 § 802(14), the financial feasibility of the project, found at S.C. Code Ann. Regs. 61-15 § 802(15), and the extent to which the project will serve medically underserved groups, found at S.C. Code Ann. Regs. 61-15 § 802(31), are all dependent on the identity and nature of the entities owning and/or managing the project. (**R. p. 16**).

Finally, as found by the ALC, the identity and record of the owner and manager of a project are critical to which State Health Plan standards must be met in order to grant a CON. Under the applicable State Health Plan in this case, Standard 7 concerns the expansion of an existing service, while Standard 6 applies to an applicant who proposes to establish new services. In order to determine which standard applies, the Department and the ALC necessarily must consider the ownership of a project. (*Id.*, at 15-16).

The ALC concluded that it had subject matter jurisdiction to consider the legality of the proposed operating and managing entity, MUSC Network, for the following reasons:

[T]he determination of the legality of the project as presented to DHEC does arise from the application of the agency standards and regulations because such a determination would necessarily result in multiple changes to the Application. It could be reviewed under a different standard altogether or, at the very least, review of the project using the relevant [project review criteria] would be substantially redirected. Stated differently, [MUHA] submitted the Application for review with a constitutionally suspect joint venture company as the management entity and [MUHA] as the licensee. In doing so, the Application heavily, and inextricably,

relies on the beneficial aspects of each entity as strategically presented to DHEC to render a more favorable application of the CON standards and criteria. For this reason, and in this case, a very meaningful nexus does, in fact, exist between the determination of [MUSC Network]'s constitutionality and the agency's application of the CON standards in the State Health Plan and the [project review criteria].

Because the claim arises from the information provided by MUSC to facilitate the Department's application of the CON standards in the State Health Plan and the [project review criteria] in Regulation 61-15, the ALC does have subject matter jurisdiction. Further the remedy requested by Trident, to overturn DHEC's approval of the Application and deny the CON, is a remedy authorized to be granted by the ALC as relief.

(R. p. 16.).

Because the inquiry into the legality of MUSC Network was integral to the ALC's consideration of the applicable criteria and standards under CON law, the ALC had the statutory authority and, indeed, the obligation to address these issues in deciding the ultimate question whether MUHA should be granted a CON. In concluding otherwise, the Court of Appeals improperly interpreted the CON statutes and regulations and the State Health Plan and ignored the ALC's findings of fact, supported by the substantial evidence in the record, that consideration of the structure, management, and ownership of the project in this case is critical to deciding whether it complies with the State Health Plan and the Project Review Criteria.

II. The Court of Appeals disregarded the controlling law on the exhaustion of administrative remedies, the preservation of issues, the doctrine of futility, and the authority of the ALC to decide certain constitutional issues *de novo* in holding that Trident was required to raise the unconstitutional and illegal structure of MUHA's project to the Department in order to preserve it.

The Court of Appeals also held that the ALC lacked the authority to consider the constitutionality and validity of MUSC Network because this specific aspect of ownership and control of the project was allegedly not presented to or considered by the Department. *Trident*, 882 S.E.2d at 883. The Court of Appeal's holding is based on its interpretation of S.C. Code Ann. § 44-7-210(E), which provides, "The issues considered at the contested case hearing considering a

Certificate of Need are limited to those presented or considered during the staff review.” The Court of Appeals’ opinion, however, misapprehends the nature of the ALC’s *de novo* review authority as articulated in § 44-7-210(E) and misapplies *Marlboro Park Hospital v. S.C. Department of Health and Environmental Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct.App. 2004), which holds that the law limits a contested case hearing to the *issues* presented or considered by DHEC staff but does not limit *evidence* concerning those issues.

In its opinion, the Court of Appeals treats the later-discovered *evidence* of the true roles and structure of Network as an *issue* separate and distinct from the issue of ownership and control of the project. As found by the ALC, however, the later-discovered evidence was a fundamental and omitted component of the ownership issue, which was presented in MUHA’s application and considered by the Department. As noted, MUHA addressed in its CON application the ownership of the project to include the Questionnaire A discussion of the manager and operator of the facility; the record of the applicant, including the record of both the owner and the manager of the facility; the ability of the applicant to complete the project; and the financial feasibility of the project. In doing so, MUHA designated MUSC Network as the operator and manager of its proposed radiation therapy facility.

Thus, for purposes of § 44-7-210(E) and *Marlboro Park Hospital*, the issue of ownership and management of the project and its effect on the project’s ability to comply with CON criteria and standards was presented to and considered by the Department. As confirmed by the Department’s witness, the Department considered all information included in MUHA’s CON application and all project review criteria and State Health Plan requirements in evaluating the proposed project. **(R. p. 606, lines 5 - 15; p. 607, lines 1 - 19).**

Additionally, the ALC found, based on the substantial evidence in the record, that neither Trident nor the Department had a complete picture of MUSC Network's structure and its integral role in the operation and financing of the project until the completion of discovery and the testimony presented by MUHA during the hearing. (**R. pp. 18-19**). Furthermore, as found by the ALC, even if Trident had the knowledge to bring to the Department's attention the evidence of MUSC Network's unconstitutional role in the project, asking the Department to consider the constitutionality and/or illegality of the ownership of the manager/operator of the project would have been futile. (**Id.**) See, e.g., *Ward v. State*, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000) ("Requiring a party to go before an agency or the ALJ who cannot rule on the constitutionality of a statute would be a futile act."). In its opinion, the Court of Appeals recognizes the Department's position that it had no authority to rule on the constitutionality of MUSC Network. See *Trident*, 882 S.E.2d at 883, n. 3 & n. 4. The ALC is the only forum in which the required factual findings in this case could be determined because most of the evidence on the legality of the project was not available until after the Department's review was complete and because the appellate courts cannot be fact finders under the law. See *Todd's Ice Cream, Inc. v. S.C. Employment Sec. Comm'n.*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984)("The substantial evidence standard does not allow judicial fact-finding.").

The ALC, therefore, found that issue preservation requirements and judicial economy favored the ALC's exercise of its authority under *Marlboro Park* to consider the evidence concerning the validity of MUSC Network and MUSC Strategic Ventures even if such information was not specifically presented to the Department.³ See *Stanton v. Town of Pawley's Island*, 309

³ Trident argued before the ALC and before the Court of Appeals and reasserts its argument here that § 44-7-210(E) is not jurisdictional but rather is an exhaustion of administrative remedies requirement, which can be waived. (**R. p. 2064, n. 5; Brief of the Respondent, p. 22, n. 17**). See *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 100-102, 674 S.E.2d 524, 529 (2009) (Subject

S.C. 126, 128, 420 S.E.2d 502, 503 (1992)(Question whether to require the plaintiff to exhaust administrative remedies was a matter within the sound discretion of the trial judge, which will not be disturbed on appeal absent an abuse of discretion.); *See also Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 39 (2011) (Preservation and exhaustion of remedies rules apply before the ALC and other administrative tribunals with respect to an as applied constitutional challenge.). The Court of Appeals improperly interpreted the controlling law on the preservation of issues, the exhaustion of administrative remedies and the doctrine of futility, and the authority of the ALC to decide certain constitutional issues *de novo* in holding that Trident was required to raise the unconstitutional and illegal structure of MUHA's project to the Department in order to preserve it.

III. The Court of Appeals erred in not addressing on the merits the novel question presented by the ALC's decision that MUHA's proposed project involves an unlawful and unconstitutional joint venture between a state agency and a private entity and therefore does not comply with CON law.

As summarized by the ALC in its order, at the close of the hearing before the ALC Trident moved for judgment as a matter of law on the following grounds:

Trident contends that [MUSC Network] (the entity identified in the application as the manager/operator of the proposed project) is an unlawful joint venture and, therefore, the CON Application as presented to DHEC does not comply with the CON standards and criteria and must be denied. Trident asserts that the management company is unlawful because the state constitution prohibits political subdivisions from being joint owners or stockholders of companies and because the enabling statutes of MUSC and MUHA do not permit either to form or own for-profit entities.

(R. p. 2). The ALC granted Trident's motion finding in favor of Trident on each of the grounds raised therein. **(R. pp. 1 - 35).** As noted, because it disregarded controlling law and accepted

matter jurisdiction is distinct from the doctrine of exhaustion of administrative remedies, which is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional.).

MUHA's procedural arguments, the Court of Appeals' opinion did not reach Trident's issues regarding the legality of MUHA's proposed project.

As a first step, Trident challenged the statutory authority of MUSC to create MUSC Strategic Ventures, the 501(c)(3) corporation whose purpose was to joint venture with other providers in place of MUSC and MUHA. Under well-established case law, MUSC, as a creature of statute, has only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged. *See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991).

In 1913, the South Carolina General Assembly accepted the transfer of property from the private Medical College of South Carolina and established the renamed "Medical University of South Carolina" as a state agency. (Act No. 126, 1913 S.C. Acts 188). MUSC's current enabling legislation gives its governing board the authority to: (a) elect officers and to appoint professors and to fix their compensation (S.C. Code Ann. § 59-123-60(A)); (b) make bylaws and regulations and confer degrees in medicine and other health related professions (S.C. Code Ann. § 59-123-60); (c) grant rights-of-way and easements for widening streets (S.C. Code Ann. § 59-123-60); (d) utilize eminent domain (S. C. Code Ann. § 59-123-90); (e) borrow for purchase of diagnostic and therapeutic equipment (S.C. Code Ann. § 59-123-95); (f) acquire and renovate student and faculty housing (S.C. Code Ann. § 59-123-210); and (g) issue revenue bonds (S.C. Code Ann. §§ 59-123-220 and -310). To date, MUSC has been granted no express authority to create other corporations.

In a 2000 amendment to MUSC's enabling legislation, the General Assembly established MUHA as a separate state agency to be governed by a board composed of the same persons who sit on the MUSC board. As conceived by the General Assembly "Whenever the board functions in its capacity as the governing body of the hospital, the board of trustees is constituted and

designated as the Medical University Hospital Authority, an agency of the State of South Carolina (hereinafter called authority).” S.C. Code Ann. § 59-123-60(E). In its enabling legislation, MUHA is granted the sole authority to manage, regulate and operate the healthcare (as opposed to the educational) functions of MUSC, including the power to “establish such not-for-profit corporations as the board considers necessary to assist the authority in carrying out its functions; provided, that any entity created pursuant to this subsection is considered to be an entity of the authority and subject to all laws and regulations applicable to the authority under this section.” S.C. Code Ann. § 59-123-60(E)(13). This provision further provides that “[t]he formation of for-profit corporations by the authority is strictly prohibited.” *Id.*

Under the controlling law, a state agency, such as MUSC, has no implied power except that which is necessary to carry out the express authority that is granted in its enabling legislation. *See City of Rock Hill v. S.C. Dep’t. of Health & Env’tl. Control*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) (“By necessity ... a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied to effectively carry out the duties for which it is charged.”). MUSC has no expressly conferred statutory authority to create a subsidiary or affiliated corporation to perform the educational functions it is charged with performing. MUHA alone is granted the express authority to establish not-for-profit entities to carry out its functions, with the limitation that any such nonprofit entities are subject to all laws and regulations applicable to MUHA. Neither MUSC nor MUHA is given any authority to form for-profit corporations and, in fact, MUHA is expressly prohibited from doing so.

Under the doctrine of statutory construction “*expressio unius est exclusio alterius*,” the express grant of authority to MUHA to create nonprofit subsidiaries compels the conclusion that the absence of such grant of authority to MUSC in the same statutory provision means that the

General Assembly did not intend for MUSC to have such authority. Therefore, no such authority can be implied. (See, e.g., *Nelson v. Ozmint*, 390 S.C. 432, 702 S.E.2d 369 (2010) (holding that inclusion of an early release provision for second offenders but not including such provision for third offenders in the same statute compelled the conclusion that the General Assembly intended that no early release would apply for third offenses). It is not disputed that MUSC created and controls MUSC Strategic Ventures, the non-profit corporation that ultimately became the minority owner of the for-profit entity designated as the manager of the project, MUSC Network. **(R. p. 1603)**. Because MUSC lacks the authority to create subsidiary and affiliate entities, MUSC Strategic Ventures is an *ultra vires* unlawful entity.

Trident's second issue before the ALC was, even assuming that MUSC Strategic Ventures is lawfully created, under the controlling law, it cannot be used by either MUSC or MUHA to jointly own a for-profit business with a private entity. S.C. Const. art. X, § 11 provides in relevant part that "neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation." In *Nichols v. South Carolina Research Authority*, 290 S.C. 415, 421, 351 S.E.2d 155, 158 (1986), this Court considered whether the South Carolina Research Authority, which it determined was an agency of the state, could engage in joint ventures "by receiving some degree of ownership in high technology firms" as part of its mission. The Court answered in the negative and found that "[t]he Constitution clearly prohibits public agencies, such as the Authority, from engaging in joint ownership with private parties." *Id.* The Court's holding in *Nichols* was based on the absence of any express enabling legislation allowing such ownership and on the plain language of S.C. Const. art. X, § 11.

Nichols involved the direct ownership by a state agency. In this case, neither MUHA nor MUSC will be direct owners of MUSC Network, the entity that will operate and manage the

proposed MUHA radiation therapy center. Instead, MUHA and MUSC have chosen to use MUSC Strategic Ventures, a corporation created and controlled by MUSC, to jointly own MUSC Network, a private, for profit company. (*See R. pp. 1507 – 1508 and R. 1594*). As Dr. Cawley indicated MUSC Strategic Venture’s purpose is that it “predominantly joint ventures with for-profit companies that we otherwise couldn’t work with as part of MUHA or MUSC.” (**R. p. 2015, lines 11 - 18**). In other words, with respect to the proposed project, MUSC Strategic Ventures is being used by MUHA and MUSC to joint venture with a private, for-profit company (Alliance) to hold an ownership interest in another private, for-profit company (MUSC Network) because MUHA and MUSC, as state agencies, recognize that they are prohibited under the law and the South Carolina Constitution from holding these interests directly.

As found by the ALC, the structure of MUHA’s project is fundamentally different from the contractual arrangements approved by South Carolina courts in cases such as *Johnson v. Piedmont Municipal Power Agency*, 277 S.C. 345, 287 S.E.2d 476 (1982) and *Gilbert v. Bath*, 267 S.C. 171, 227 S.E.2d 177 (1976), which involved long-term leases of assets and management arrangements between government entities and private companies. *See also Taylor v. Richland Mem’l Hosp.*, 329 S.C. 47, 495 S.E.3d 431, 432 (1998) (approving a joint venture between Richland Memorial and Baptist Hospital because in part all parties were governmental and/or nonprofits). (**R. p. 24, n. 19**).

The attempt by MUSC and MUHA to circumvent the restrictions placed on them as governmental bodies by doing indirectly what cannot be done directly is exactly the type of conduct condemned by this Court in *O’Brien v. S.C. ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008). In the *ORBIT* case, the Court examined whether the City of Charleston’s investment of retirement benefits in a newly created trust that included equity securities violated the prohibition against

joint ownership. In holding that the City's indirect investments violated the constitutional prohibition of S.C. Const. art. X, §11, the *ORBIT* Court recognized that the City's actions were "laudable and well-intended" but nonetheless held that "[i]t is abundantly clear from the record that the City's investment in ORBIT is for the expressed purpose of circumventing the constitution." *Id.* at 43, 668 S.E.2d at 398-399. The *ORBIT* decision is this Court's expression of its intent to uphold strictly the constitutional prohibition against joint ownership, even when there are "laudable" goals involved and even when such ownership is indirect. *See also Parrott v. Gourdin*, 205 S.C. 364, 32 S.E.2d 14, 18 (1944)(Rejecting a legislative scheme that would permit the General Assembly to use the "simple device of creating a commission" to do indirectly that which the Constitution forbids to be done directly.).

In this case, MUHA and MUSC are using MUSC Strategic Ventures to joint venture with a for-profit, private entity to establish a radiation therapy center that MUHA, by its own admission, cannot adequately finance alone. **(R. p. 794, lines 6 - 23)**. As part of the joint venture, MUSC Strategic Ventures will have a 49% ownership interest in a private, for-profit corporation (MUSC Network) that is majority owned and controlled by another private, for-profit company (Alliance). Under S.C. Const. art. X, §11 neither MUHA nor MUSC could hold such ownership interests themselves. Under the *ORBIT* case, neither can MUSC Strategic Ventures.

As found by the ALC, the participation of MUSC Strategic Ventures in MUSC Network in violation of the law and the Constitution renders MUSC Network an illegal entity. **(R. p. 35)**. As such, MUSC Network cannot manage and operate the project as presented in MUHA's CON application. It cannot lease the facility space, employ all of the technical and administrative staff of the facility, provide or procure the financing for the facility, or own all of the equipment, including the linear accelerator, to be used at the facility. The ALC correctly determined that

MUHA's CON application did not comply with the CON Law and properly ordered that the application be denied for the reasons stated.

IV. The Court of Appeals' opinion disregarded the controlling law in reversing the decision of the ALC on procedural grounds without considering the additional sustaining ground on the merits that MUHA is not the proper licensee under the law for the project set forth in its CON application.

Assuming the Court of Appeals' opinion correctly decided the procedural issues with regard to the legality of MUSC Strategic Ventures and MUSC Network, the favorable ruling on these issues does not resolve or address the merits of Trident's challenge to MUHA's project under the CON statutes, regulations, and the State Health Plan. The ALC found as an additional sustaining ground that MUHA was not the proper licensee of the project and, therefore, was not entitled to a CON under the law. This conclusion was based on facts supported by the substantial evidence in the record. (**R. pp. 12 - 13** and **R. pp. 29 - 33**). After discussing the relevant facts at length, the ALC concluded, "[H]aving reviewed the information provided by MUSC in the CON Application and having considered all of the testimony along with the evidence presented in the Operating and Management agreements of The Network, the Court finds that MUHA is not the actual licensee of the proposed project as represented in the Application." (**R. pp. 12-13**). As decided by the ALC, this additional sustaining ground is dispositive of the merits of this matter and should have been addressed in the Court of Appeal's opinion once the Court reversed the ALC's findings on the legality of MUSC Network..

"Licensee" is defined in the CON regulations as the "legal entity who, or whose governing body, has the ultimate responsibility and authority for the conduct of the facility or services; the owner of the business. The licensee must be the entity to whom the Certificate of Need is issued." S.C. Code Ann. Regs. 61-15, § 202(8)(b). In this case, the question of the proper licensee was unequivocally presented to and considered by the Department when MUHA identified itself as the

licensee and offered its own information in response to criteria aimed at the licensee. The issue of who is the proper licensee able to receive a CON is integral to the CON review process, and the ALC had the statutory authority to consider and rule on this issue.

Furthermore, at the hearing, MUHA presented the testimony of its CEO, Dr. Cawley, and of its healthcare expert about each of the entities named in the CON application, describing each entity's respective role and responsibility regarding the project. **(R. p. 765, line 4 – p. 776, line 9; R. p. 791, line 22 – p. 804, line 12; p. 883, line 21 – p. 889, line 23)**. In response, Trident presented rebuttal testimony from its healthcare expert that, based on the evidence presented during MUHA's case-in-chief, in his opinion, MUHA was not the owner of the Project and that, based on its roles and responsibilities, Alliance Oncology was the proper licensee. **(R. p. 1243, line 22 – p. 1247, line 24)**. Neither MUHA nor the Department objected to the presentation of this testimony. *(Id.)*.

In addressing this issue, the ALC describes in detail the roles and functions of the entities named in MUHA's CON application. For example, MUHA's CON application contains documentation, such as a Letter of Intent to Lease the space required to house the project **(R. pp. 1641 - 1642)** and various quotes from vendors for medical and office equipment. **(R. pp. 1647 – 1678; R. pp. 1679 - 1687)**. Both the Intent to Lease letter and the quotes for medical and office equipment are addressed to MUSC Network or to Alliance and not to MUHA. In response to the requirement that the applicant prove financial feasibility, MUHA submitted a letter from Alliance, as the managing member of MUSC Network, indicating that the project would be financed by an affiliate or by an external third party. **(R. p. 1754)**.

As noted by the ALC, this documentation in the application is consistent with the obligations of Alliance under the Network Management Agreement to (a) assist MUSC Network in procuring and obtaining financing for all equipment and office space associated with a particular

facility site; (b) employ all administrative and technical personnel for each site; (c) provide marketing services to each site; (d) provide billing and collection services to each site, if requested; and (e) provide, in its discretion, working capital advances (capped at \$500,000 for each advance) to MUSC Network to be repaid with interest. **(R. pp. 1510-1511)**. Under the agreement, all personnel, to include physicists, dosimetrists, anyone operating equipment, and any necessary administrative staff will be employed by Alliance and all are to be selected by Alliance. **(R. p. 1510)**. As further found by the ALC, the Network Operating Agreement “fully spells out the company’s intention to own – not just manage – this and other radiation therapy centers under the [MUSC] licensed name “Hollings Cancer Center.” **(R. p. 31)**.

Finally, Dr. Cawley testified at the hearing that the joint venture with Alliance began because MUHA needed Alliance to finance MUSC’s radiation therapy projects and to purchase “cutting edge” equipment. **(R. p. 794, lines 6 - 23)**. Dr. Cawley confirmed that Alliance will be the entity purchasing all of the equipment and other items going into the project, with the result that neither the assets nor debt liabilities associated with those assets will appear on MUHA’s balance sheets. **(R. p. 853, line 9 – p. 854, line 11)**.

The ALC also examined the evidence revealing Alliance’s authority as the majority owner of MUSC Network to control, rather than merely manage, the operations of the project:

If MUHA were the actual licensee/owner of the proposed project as stated in the Application, then it would be the MUHA board voting on the regular business and clinical matters of the facility. MUHA would decide on a relocation or a material change to the business, not the supermajority of [Network]. [MUHA’s expert] implied that a supermajority of [Network’s] board could change the purpose or mission of the proposed project from the MUSC/MUHA mission to something else entirely. Thus, it is completely conceivable that even the basic mission of a cancer treatment center located in South Carolina, operating through a Certificate of Need issued to a public hospital in South Carolina, could be changed by the supermajority vote of the California-based board of a company registered in Delaware.

(R. p. 32).

The ALC's conclusion that MUHA is not the proper licensee of the Project and, therefore, under the law, cannot be issued a CON, is supported by the substantial evidence in the record and by the correct application of the law to that evidence. Therefore, the ALC's additional sustaining ground must be upheld under the applicable standard of review. *See Dreher v. S. C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 249, 772 S.E.2d 505, 508 (2015)(Appellate courts reviewing decisions of the ALC are limited to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law.)

V. The Court of Appeals' opinion disregarded the controlling law by reversing the decision of the ALC on procedural grounds without ordering remand of the case to the ALC as the trier of fact for a determination on the merits of the remaining CON issues presented in the contested case proceeding below.

Assuming that the Court of Appeals correctly decided the procedural issues and correctly ignored the additional sustaining ground concerning the proper licensee, its opinion still does not resolve or address the merits of Trident's challenge to MUHA's project under the CON statutes, regulations, and the State Health Plan. Because the issues raised in Trident's motion and the additional sustaining ground were dispositive below, by agreement of the parties, the ALC did not address the project's compliance with the remaining Project Review Criteria and State Health Plan standards, although the parties presented their complete cases on those issues during the five-day hearing before the ALC.⁴ Both MUHA and Trident argued in their briefs before the Court of

⁴ As noted by the ALC in its Order, "The hearing was scheduled, and conducted, to resolve several other matters raised by [Trident] with respect to the approval of the CON applications. However, because the assertion set forth in the Motion could be dispositive in either reversing DHEC or denying the CON or resolving the issue in favor of MUSC, which would then leave the Court to decide the remaining matters set forth during the hearing, the Court and the parties agreed post-hearing to initially address and brief only the issue set forth in the Motion in the interest of judicial economy." (R. p. 1, n. 3).

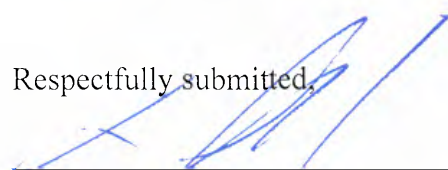
Appeals that remand would be necessary to determine the merits depending on the ruling of the court. (Brief of Appellant, p. 13, n. 7; Brief of Respondent, p. 10, n. 8).

Under the required standard of review applicable to decisions of the ALC, appellate courts cannot make independent findings of fact. *Todd's Ice Cream*, 315 S.E.2d at 375. In this case, the Court of Appeal's opinion reverses the ALC's order on the legal procedural issues presented by Trident's motion. Under the controlling law, this matter must be remanded to the ALC for a determination of the remaining dispositive issues whether Appellant's CON application is consistent with the 2015 State Health Plan and the Project Review Criteria such that a CON must be granted or denied, as appropriate.

CONCLUSION

For the reasons stated above, this Court should grant Trident's Petition for a Writ of Certiorari, reverse the Court of Appeals' opinion, and affirm the decision of the ALC or, in the alternative, remand the matter to the ALC for findings of fact and conclusions of law on the remaining dispositive issues.

Respectfully submitted,



David B. Summer, Jr., SC Bar #7974
William R. Thomas, SC Bar #16348
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100 (29201)
Post Office Box 1509
Columbia, South Carolina 29202
Telephone: (803) 255-8000
Facsimile: (803) 255-8017
davidsummer@parkerpoe.com
willthomas@parkerpoe.com

*Attorneys for Respondent Trident Medical Center,
LLC, d/b/a Trident Medical Center*

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