THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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 Center ..... Petitioner/Respondent,

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.

BRIEF OF RESPONDENT TRIDENT MEDICAL CENTER, LLC

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STATEMENT OF THE CASE

On May 22, 2017, the Appellant Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County ("MUHA") submitted a Certificate of Need ("CON") application to add a sixth linear accelerator to be located in a proposed radiation therapy center in Berkeley County ("Proposed Project"). (**R. pp. 1595-1817**). On June 7, 2017, the Respondent Trident Medical Center, LLC, d/b/a Trident Medical Center ("Trident") timely notified the Respondent South Carolina Department of Health and Environmental Control ("DHEC") of its status as an affected person opposing MUHA's Proposed Project and requested that DHEC conduct a project review hearing on the matter. (**R. p. 1818**). On July 10, 2016, DHEC deemed MUHA's CON application to be complete. (**R. p. 1963-1964**).

On September 20, 2017, DHEC conducted a project review hearing on MUHA's Proposed Project. (**R. p. 1966**). On November 22, 2017, DHEC staff issued its decision approving MUHA's Proposed Project. (**R. pp. 1969-1972**). On December 15, 2017, Trident timely requested that the DHEC Board conduct a final review conference on the matter. (**R. pp. 68-72**). On January 31, 2018, the Board formally declined to conduct a final review conference, thus rendering the DHEC staff decision the final agency decision for purposes of contested case review by the Administrative Law Court ("ALC"). (**R. pp. 54-55**).

On March 1, 2018, Trident petitioned the ALC for contested case review of DHEC's decision to approve MUHA's CON application. (**R. pp. 37-89**). 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 requesting judgment as a matter of law on the grounds that MUHA's Proposed Project constitutes an unlawful and unconstitutional joint venture, which by its nature cannot comply with the standards and criteria applicable to it under the Certificate of Need laws. **(R. p. 1297, line 17 – p. 1310, line 13).** Concurrent with its oral motion on January 24, 2019, Trident submitted its written Motion for Directed Verdict and Memorandum in Support reiterating its oral motion and arguments on this issue. As relief, Trident requested that the ALC reverse DHEC's decision and deny MUHA's CON application. **(R. pp. 1999-2030)**.

On May 14, 2019, after allowing further briefing of the issues by the parties, the ALC issued its order granting Trident's motion for judgment as a matter of law[1] and denying MUHA's CON ("Final Order"). **(R. pp. 1-35)**. On May 24, 2019, MUHA moved the ALC to reconsider its Final Order. **(R. pp. 2070-2075)**. On June 3, 2019, Trident filed its Response to MUHA's Motion to Reconsider. **(R. 2076-2080)**. On June 14, 2019, the ALC denied MUHA's Motion to Reconsider. **(R. 36)**. MUHA filed its Notice of Appeal with this Court on July 15, 2019.

STATEMENT OF THE FACTS

This case arises under the Certificate of Need program for health care facilities and services. The framework of the CON program is established by the State Certification of Need and Health Facility Licensure Act found at S.C. Code Ann. §§ 44-7-110, *et seq.* (2018 and Supp. 2019) (the "CON Act"), the regulations set forth at 3 S.C. Code Ann. Regs. 61-15 (Supp. 2019), and the State Health Plan (collectively the "CON Law"). The stated goals of the CON Act are to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2018). These goals are implemented through the requirement that a provider apply for, and receive, a CON from DHEC prior to establishing a new health facility or service, adding beds, making large capital expenditures or acquiring medical equipment when the total project cost exceeds a certain threshold amount. S.C. Code Ann. §§ 44-7-120 and 44-7-160 (2018).

[1] In its Final Order, the ALC treated Trident's written Motion for Directed Verdict as a request for judgment as a matter of law, consistent with its oral motion. **(R. p. 1, n.1).**

In determining whether to grant or deny an application for a CON, DHEC must evaluate the proposed project under the project review criteria found in the CON regulations ("Project Review Criteria") and under the applicable standards of the State Health Plan in effect at the time the application is filed.[2] S.C. Code Ann. § 44-7-225 (2018).

In this case, Margaret Murdock, the Director of the CON Program, who was also the reviewer of MUHA's CON application, testified that her step-by-step process for reviewing applications is to read the entire application once from beginning to end, to make mental notes of follow up questions, to go through the State Health Plan and Regulation 61-15, considering in particular the Project Review Criteria and then to consider what criteria will be the most important in reviewing the application.[3] **(R. p. 607, lines 1-19).** Ms. Murdock testified that she followed this process for MUHA's application. **(R. p. 606, lines 5-15).**

Under the CON Act, DHEC is prohibited from granting a CON to an applicant unless the project as proposed complies with the State Health Plan, Project Review Criteria, and other regulations. S.C. Code Ann. § 44-7-210(B) (2018). The CON regulations also mandate that "no project may be approved unless it is consistent with the State Health Plan." 3 S.C. Code Ann. Regs. 61-15, § 801(3) (Supp. 2019). *See MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 9, 664 S.E.2d 471, 475 (2008) (Plan standards and Project Review Criteria are separate and distinct requirements that must be met as part of the CON application process.).

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[2] The South Carolina Health Plan enacted August 13, 2015 is applicable to this matter. **(R. p. 320, lines 1-5).**

[3] Under CON Law, DHEC can consider information from a variety of sources in making its decision. *See* 3 S.C. Code Ann. Regs. 61-15, § 310 (Supp. 2019)("On the basis of staff review of the record established by the Department, including but not limited to, the application, comments from affected persons and other persons concerning the application, data, studies, literature and other information available to the Department, the staff of the Department shall make a proposed decision to grant or deny the Certificate of Need.").

A decision by DHEC staff to grant or deny a CON is subject to an appeals process that involves the DHEC Board and ultimately the ALC. S.C. Code Ann. § 44-1-60(F) (2018). Under the CON Act, the issues considered during the contested case process are limited to the issues presented to or considered by DHEC staff. S.C. Code Ann. § 44-7-210(E) (2018). Because the ALC contested case process is *de novo*, the ALC can consider any evidence related to issues presented to or considered by DHEC. *See Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct.App. 2004) (holding 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).

This case began in May 2017 when MUHA applied to DHEC for a CON to expand its services by adding a linear accelerator to a proposed radiation therapy center in Berkeley County with a project cost of $9.8 million. (**R. pp. 1595-1817**). In response to the Part A Questionnaire[4] of the CON application form concerning the ownership and management of the Proposed Project, MUHA identifies itself as the proposed licensee of the radiation therapy center. Under the law, the "licensee" of a project is 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." 3 S.C. Code Ann. Regs. 61-15, § 202(8)(b) (Supp. 2019).

MUHA is an agency of the State of South Carolina, separate from the Medical University of South Carolina ("MUSC"), created under S.C. Code Ann. § 59-123-60(E) (2020) for the purpose of governing all of the hospitals, clinics, and other healthcare and related facilities of

[4] 3 S.C. Code Ann. Regs. 61-15 § 202(2)(a) (Supp. 2019) sets forth in its Appendix the CON application form, including Questionnaire A, which an applicant must complete as part of the CON review process.

MUSC. Although MUHA has sources of funding other than the State, including revenues from its clinical operations and grants and donations from third parties, MUHA receives regular appropriations from the General Assembly and is required to prepare and submit an annual budget to the General Assembly and the Governor. S.C. Code Ann. §§ 59-123-60(E)(9) and (11) (2020); (*See, e.g.*, **R. p. 1353,** discussing MUHA's receipt of a cumulative $35 million in state funding for the planned Children's Hospital).

Although MUHA is named as the proposed licensee, the CON application indicates that the operation and management of the facility will 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.)**.

The CON application describes Alliance Oncology, LLC ("Alliance"), the majority owner of MUSC Network, simply as a "nationwide leader in radiation oncology and radiosurgery programs." **(R. pp. 1600-1601)**. As became clear during discovery for the contested case proceeding and later during the contested case hearing, Alliance is a for-profit Delaware limited liability company based in Newport Beach, California. **(R. pp. 1524 and 1529; R. p. 798, lines 7-8).** As ultimately found by the ALC, based on the evidence presented at the hearing, Alliance is actually the entity with the right of control over the operation of MUSC Network and the Proposed Project. **(R. pp. 30-31).**

MUSC Strategic Ventures, the minority owner of MUSC Network, is described in MUHA's application as a 501(c)(3) entity formed at the direction of MUSC for the purpose of

supporting the missions and activities of MUSC and University Medical Affiliates ("UMA").[5] **(R. p. 1603).** The application indicates that MUSC and UMA "control" MUSC Strategic Ventures. **(Id.).**

According to MUHA's CON application, MUSC Strategic Ventures' function is to determine and implement strategies that enable MUSC, UMA and MUHA to "collectively collaborate" with other healthcare providers. **(R. p. 1604).** According to the official description set forth in an organizational chart contained in MUSC's Comprehensive Annual Financial Report for the Year Ended June 30, 2018, "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).**

However, in his deposition, Patrick Cawley, M.D., who is the Chief Executive Officer of MUSC Strategic Ventures (as well as the Vice-President of Health Affairs for MUSC and the Executive Director of MUHA), 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)**. Dr. Cawley confirmed his understanding of MUSC Strategic Ventures' purpose in his hearing testimony. **(R. p. 769, lines 6-12).** Thus, from the time of application to the time of hearing, the understanding of MUSC Strategic Ventures' role morphed from "collaboration with health care providers" to "affiliation with tax exempt entities" to "joint venturing with for-profit companies" to circumvent the limitations placed on MUHA and MUSC, as governmental bodies.

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[5] University Medical Associates d/b/a MUSC Physicians is the 501(c)(3) entity that employs the physicians who practice in the MUSC health system. **(R. pp. 767, line 19 – 768, line 10; R. p. 1508).**

Although the application contained summary descriptions of the various entities involved in the Proposed Project, it did not contain the organizational documents for the entities involved in the project nor did it contain the management or services agreements applicable to the project. Confusingly, the application also made reference to "MUSC Health," which was not a defined term therein. (***See, e.g.*, R. pp. 1602-1604).** Furthermore, in some sections of the application, MUHA, MUSC and UMA were collectively referred to as "MUSC," making it difficult to determine from the CON application which legal entity was performing which functions with regard to the Proposed Project. (***See, e.g.*, R. p. 1601**). As found by the ALC in its Final Order, DHEC also seemed to be unsure of Alliance's exact role in the Proposed Project, citing the testimony of Ms. Murdock that, even though she was the reviewer for MUHA's CON application, she could not recall anything specific about Alliance. **(R. p. 12).** In its order, the ALC found that Alliance, in fact, had ultimate control over the Proposed Project. (***Id.*, at pp. 12-13).**

In response to discovery requests during the contested case proceeding, MUHA produced the MUSC Network Operating Agreement ("Network Operating Agreement") between Alliance and "MUSC Health" and the Network Management Agreement ("Network Management Agreement") by and among Alliance, MUSC Network, and "MUSC Health."[6] These agreements set out in detail the specific rights, duties and functions of the parties regarding the ownership, operation, and control of the Proposed Project, as well as the broader relationships among the parties. At the hearing, MUHA offered further information to explain the nature of the entities involved in the MUSC Network joint venture and the relationships among them. For example, Dr. Cawley clarified at the hearing that the name "MUSC Health" was used both as a brand

[6] These agreements were also introduced at the hearing before the ALC. **(R. p. 795, lines 1-2; R. pp. 1509 - 1521;** and **R. pp. 1522 – 1563).**

name for the entire MUSC system and as the registered name for the corporation that eventually was re-named MUSC Strategic Ventures. **(R. p. 769, lines 13-22).**

As discussed in detail in Trident's arguments below, the clarifying testimony and documents produced during discovery and at the hearing prompted Trident to move the ALC for judgment as a matter of law on the grounds that the Proposed Project, as submitted to DHEC, constitutes an unlawful joint ownership arrangement in violation of MUHA and MUSC's enabling legislation and in violation of S.C. Const. art. X, § 11. As characterized by the ALC, "Trident contends that MUSC Cancer Care Network, LLC (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." **(R. p. 2).**

Based on the testimony and evidence before it, the ALC issued its Final Order granting Trident's motion on the grounds stated by Trident and finding as a further sustaining ground that MUHA was not the proper applicant or licensee under the law because Alliance was actually the "legal entity who, or whose governing body, has the ultimate responsibility and authority for the conduct of the facility or services."[7] *See* 3 S.C. Code Ann. Regs. 61-15, § 202(8)(b) (Supp. 2019); (*See also generally* **R. pp. 1 - 35).** Because the issues raised in Trident's motion and the

[7] Although Trident did not move for judgment as a matter of law on the issue of whether MUHA was the legally appropriate licensee, Trident did present expert testimony on this issue at the hearing. **(R. p. 1246, line 11 – 1247, line 24).**

additional sustaining ground were dispositive, the ALC did not address the Proposed Project's compliance with the remaining Project Review Criteria and State Health Plan standards. [8]

In its brief, MUHA raises five grounds for its appeal of the Final Order of the ALC. MUHA contends that the ALC lacked the statutory authority to consider and make a determination on the constitutional and statutory issues raised by Trident because the issues do not arise under the CON Law and because the ALC, as an executive branch court, lacks the authority to decide constitutional issues. MUHA also contends that the ALC was without authority to hear Trident's issues because they allegedly were not presented to or considered by DHEC below. MUHA additionally argues, for the first time on appeal, that the ALC erred in allegedly determining the rights of non-parties to the contested case proceedings. MUHA also challenges the ALC's additional sustaining ground that MUHA is not the proper licensee of the Proposed Project under the CON Law. Finally, MUHA disputes the ALC's findings that MUSC Strategic Ventures is an *ultra vires* entity and that MUSC Network is an unlawful and unconstitutional joint venture. Because the findings and conclusion of the ALC are supported by the law and the substantial evidence in the record, MUHA's arguments must fail. *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.).

[8] If this Court reverses the ALC's Final Order on the legal issues presented in this case, the Court must remand the matter back to the ALC under S.C. Code Ann. § 1-23-610(B) (Supp. 2019) so that the ALC can perform its function as the trier of fact with regard to whether MUHA's CON application is consistent with the 2015 State Health Plan and the remaining Project Review Criteria.

STANDARD OF REVIEW

The ALC heard this matter and issued its Final Order containing its findings of fact and conclusions of law pursuant to the contested case review authority granted by S.C. Code Ann. § 1-23-600 (Supp. 2019). Under that authority, the ALC sits as the fact finder in a *de novo* hearing with the presentation of evidence and testimony and is free to draw its own conclusions therefrom. *See Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 207-208, 712 S.E.2d 428, 433 (2011) (The ALC is the ultimate fact finder in a contested case proceeding.).

As the ultimate fact finder, the ALC has the discretion to determine the weight and credibility to be assigned to the evidence before it, including assessing the weight and credibility of expert witness testimony. Thus, the ALC can accept all or part of any witness' testimony and can accept the testimony of one witness over that of another witness, including expert witnesses. *Maull v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 349, 359, 768 S.E.2d 402, 408 (2015).

In recognition of the ALC's role as the ultimate administrative fact finder in a contested case, the law limits the judicial review of an ALC's final decision as follows:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2019). As summarized by the South Carolina Supreme Court, the following standard of review on appeal from a decision by the ALC applies:

> In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, looking at the entire record on appeal, that evidence from which reasonable minds could reach the same conclusion as the ALC. *Hill v. S.C. Dept. of Health & Envtl. Control,* 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010). However, the Court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 316, 731 S.E.2d 869, 870-71 (2012).

Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014).

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT CORRECTLY EXERCISED ITS STATUTORY AUTHORITY IN DETERMINING THAT MUHA'S CON APPLICATION SHOULD BE DENIED BECAUSE THE PROPOSED PROJECT IS AN UNLAWFUL AND UNCONSTITUTIONAL JOINT VENTURE BETWEEN A STATE AGENCY AND A PRIVATE ENTITY.

As its first argument, MUHA contends that the ALC lacked the authority to determine the constitutionality of the Proposed Project because the issue of whether MUSC Network constitutes an unlawful joint venture under S.C. Const. art. X, § 11 and MUSC's enabling statutes allegedly does not arise from the application of the CON Law.[9] **(Brief of Appellant, pp. 16 - 21)**. As part of this argument, MUHA also contends that, in general, the ALC does not have the authority as an executive branch court to rule on constitutional issues such as whether the joint venture between Alliance and MUSC violates S.C. Const. art. X, § 11. Both of these

[9] The ALC plainly has subject matter jurisdiction over this matter as it arises from the grant of a CON under S.C. Code Ann. § 44-7-210 (2018). *See Brown v. S.C. Dep't of Health & Human. Servs.*, 393 S.C. 11; 16-17, 709 S.E.2d 701, 704 (Ct. App. 2011) ("Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. It refers to a tribunal's constitutional or statutory power to decide a case...The jurisdiction of any tribunal is determined by the allegations, not by the answer to the questions raised by the allegations.") (internal citations omitted).

argument lack merit and misapprehend the findings of the ALC and the relief granted in the Final Order.

Trident moved for judgment as a matter of law on the grounds that the Proposed Project as presented to DHEC in MUHA's CON application did not comply with the standards and criteria established by the CON Law because MUHA identified as the facility's operator an entity which is unlawfully owned jointly by a state agency and a private for-profit corporation in violation of the agency's enabling statutes and the South Carolina Constitution. As relief, Trident requested that the ALC reverse DHEC's decision to approve MUHA's Certificate of Need application because of the defective ownership and management structure of the project as proposed. **(R. p. 2010)**. Upon granting Trident's motion, the ALC did not order the dissolution of MUSC Network or any other entity. In keeping with the relief requested by Trident, the ALC ordered only that the decision of DHEC to grant a CON for the Proposed Project be reversed and that MUHA's CON application be denied. **(R. p. 35)**.

Basic information concerning the ownership and management of the Proposed Project was presented to DHEC in MUHA's own CON application. **(R. pp. 1599 - 1604; R. pp. 1607 - 1610).** Indeed, the CON Law requires an applicant to provide such information for any entity with an ownership interest in the Proposed Project or any entity engaged to manage or operate the facility. *See* 3 S.C. Code Ann. Regs. 61-15 § 202(8) (Supp. 2019). Furthermore, the Section 202 Part D Assurances contained in the CON application required MUHA to affirm that "the facility will be operated and maintained in accordance with the standards prescribed by law and regulations for the maintenance and operation of such facilities." 3 S.C. Code Ann. Regs. 61-15 § 202(2)(d) (Supp. 2019). **(*See* R. p. 1637)**. Finally, Project Review Criteria 13, entitled "Record of the Applicant (Owner and/or Administrator)" provides:

a. The applicant's record should be one of successful operation with adequate management experience.
b. The applicant should have a demonstrated ability to obtain necessary capital financing.
c. If the applicant has no prior experience, sources of assistance should be specified (i.e. technical assistance from specific individuals or organizations).
d. The applicant's record or his representative's record of cooperation and compliance with State and Federal regulatory programs will be considered.

3 S.C. Code Ann. Regs. 61-15 § 802(13) (Supp. 2019).[10] All of these CON requirements and review criteria directly address the ownership and management of the Proposed Project and were before DHEC staff during the review process in this case.

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 manager of the project. As discussed by the ALC in its Final Order, Project Review Criteria concerning the ability to complete the project,[11] the financial feasibility of the project, [12] and the extent to which the project will serve medically underserved groups[13] are all dependent on the identity and nature of the ownership and management of the project. (**R. p. 16**).

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[10] The law considers ownership and control of a project to be integral to the issuance of a CON such that any change of ownership prior to implementation of a CON results in the CON being void. See 3 S.C. Code Ann. Regs. 61-15 § 604 (Supp. 2019). ("A Certificate of Need is nontransferable. A Certificate of Need or rights there under may not be sold, assigned, leased, transferred, mortgaged, pledged, or hypothecated, and any actual transfer or attempt to make a transfer of this sort results in the immediate voidance of the Certificate of Need. Any of the aforementioned transactions involving an entity directly or indirectly holding a Certificate of Need before fulfillment of the Certificate of Need results in the transfer and the subsequent voidance of the Certificate of Need.").

[11] 3 S.C. Code Ann. Regs. 61-15 § 802(14) (Supp. 2019).

[12] 3 S.C. Code Ann. Regs. 61-15 § 802(15) (Supp. 2019).

[13] 3 S.C. Code Ann. Regs. 61-15 § 802(31)(Supp. 2019).

The ALC also notes as an example of the importance of the identity and record of the owner of a project that, under the State Health Plan, Standard 7 concerns the expansion of an existing service while Standard 6 applies to applicants who are proposing to establish new services. In order to determine which standard applies, DHEC necessarily must consider the ownership of a project. ***(Id.*, at 15-16)**. As explained by the ALC in its Final Order:

> [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, MUSC submitted the Application for review with a constitutionally suspect joint venture company as the management entity and MUSC 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.

(Id.). As demonstrated by the above discussion, the ALC considered the issue of the constitutionality of MUSC Network, arrived at its conclusions thereon, applied the conclusion to the CON application before it, and granted relief limited to denial of the CON application, all of which occurred within the confines and context of the CON Law.

In support of its arguments, MUHA cites *SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 662 S.E.2d 487 (Ct. App. 2008) as an illustration of a case in which this Court approved of the ALC's decision to refrain from considering an issue. In *SGM-Moonglo*, the appellant sold a tract of land that eventually became the site of a truck stop operated by the respondent Moonglo. The original deed conveying the property contained a restrictive covenant against the sale of alcohol on the premises. The appellant intervened in the licensing proceeding initiated by Moonglo in order to enforce the restrictive covenant by contesting the issuance of a retail beer and wine permit to Moonglo on the grounds that the existence of the covenant made that location unsuitable for the sale of beer and wine. The ALC permitted the appellant to testify at the hearing about the restrictive covenant but, in its decision, the ALC determined that it lacked the authority to enforce the restrictive covenant in the context of a licensing case. Accordingly, the ALC approved the issuance of the beer and wine permit. *Id.* at 294, 662 S.E.2d at 488.

In affirming the decision of the ALC to decline consideration of the restrictive covenant, the Court found that, although S.C. Code Ann. § 61-4-520 (2009) required the ALC to determine whether a location is suitable for the sale of beer and wine, the presence of a restrictive covenant on the property was not germane to that determination. *Id.* at 295, 662 S.E.2d at 488. In its opinion, the Court cited several cases from other jurisdictions for the proposition that a restrictive covenant does not render an alcohol license invalid and that restrictive covenants can be enforced by the grantor in proceedings outside the licensing process. Id. at 295, n. 6; 662 S.E.2d at 488, n. 6.

SGM-Moonglo is easily distinguishable from this case. In *SGM-Moonglo* the issue before the ALC concerned an unrelated private contract right that did not affect the validity of the

license being sought. It is of no import to the State's exercise of its police powers regarding safety and welfare of the public whether a business licensed to sell beer and wine might not be able to do so if a court enforces a restrictive covenant on the property being used by the licensee. Therefore, the retail beer and wine permit requirements do not address title defects; rather, they concern the age, residency and moral character of the applicant and whether the proposed location of the retail outlet is a "proper one," considering a number of factors related to community impact. *See* S.C. Code Ann. § 61-4-520 (2009).[14] In other words, the purpose of the alcohol licensing provisions – to allow the sale and consumption of alcohol under certain conditions designed to protect the public safety and welfare – is not aided by an inquiry into whether there is private contractual restriction on the title to the premises being used by the retailer.

On the other hand, the CON Act regulates the establishment of healthcare facilities and services in a manner that seeks to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2018). The issue of the ownership and administration of a project and the ability of the designated operator and manager of the project to meet all the requirements of the CON Law is a crucial determination for the ALC in a CON contested case proceeding. As such, the CON Law requires that an applicant address ownership of the project and the record of the applicant in its CON application. The Project Review Criteria also make

[14] "The department may consider, among other factors, as indications of unsuitable location, the proximity to residences, schools, playgrounds, and churches." S.C. Code Ann. § 61-4-520 (6)(2009). *See also Kan Enters. v. S.C. Dep't of Revenue,* 420 S.C. 596, 604, 803 S.E.2d 882, 886 (Ct.App. 2017) (Suitability is not solely a function of geography but involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact upon the community, including the burden on law enforcement.).

ownership and the record of the applicant a factor to be considered when awarding a CON. In its Final Order, the ALC discussed in detail how the legality of MUSC Network directly implicates the Proposed Project's ability to comply with these and other critical standards and criteria that must be met in order to obtain a Certificate of Need under the CON law. **(R. p. 16)**. Because the inquiry into the legality of MUSC Network does further the ALC's consideration of the applicable criteria and standards under the CON Law, the ALC has the statutory authority, and, indeed, the obligation to address these issues in deciding the ultimate question of whether MUHA's CON application should be denied. [15]

MUHA also argues that the ALC cannot rule on the constitutionality of a statute or regulation because it is an executive branch court. In making this argument, MUHA appears to be referencing Trident's original assertion in its motion for judgment as a matter of law that Trident's claims were in the nature of "as-applied" constitutional claims that are within the authority of the ALC to decide under *Travelscape, LLC v. S.C. Dep't of Revenue,* 391 S.C. 89, 705 S.E.2d 28 (2011).[16] In its Final Order, however, the ALC rejected Trident's "as applied" argument and found that *Travelscape* is not implicated at all in this matter because the ALC did

[15] MUHA also cites one other case in which this Court affirmed the ALC's refusal to enforce private contract rights during a licensing proceeding. In *Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C. 290, 299-300, 758 S.E.2d 737, 742 (Ct.App. 2014), the ALC concluded that a dispute between a homeowner's association and a bar over alleged noncompliance with the Master Deed was by law required to be resolved by the filing of a suit in circuit court and, given that such action had already been filed and decided against the homeowner's association, the issue of whether the bar could use common area seating to meet the requirements of the licensing statute was not properly before it. On its facts, this case has no application to Trident's assertions concerning the legality of an operator of a facility in the CON context.

[16] In *Travelscape,* the South Carolina Supreme Court held that, while the ALC, as part of the executive branch, is without power to pass on the constitutional validity of a statute or regulation, the ALC is empowered to make factual determinations and find a statute or regulation unconstitutional as applied to a specific party. Id. at 108-109, 705 S.E.2d at 38-39 (2011).

not address or determine the constitutionality of any statute or regulation. Instead, the ALC applied the facts of the case before it to the provisions of S.C. Const. art. X, § 11 and determined that the operating entity of the Proposed Project, MUSC Network, existed in violation of the prohibition against joint ownership found in that section of the constitution. **(R. p. 17).** Accordingly, the ALC properly exercised its statutory authority in considering the issues presented to it and found that the Proposed Project as presented to DHEC did not comply with the criteria and standards of the CON Law.

II. THE ADMINISTRATIVE LAW COURT CORRECTLY CONCLUDED THAT THE ISSUE OF OWNERSHIP OF THE PROPOSED PROJECT WAS TIMELY RAISED AND PROPERLY BEFORE THE COURT.

As its second ground of appeal, MUHA argues that, even if the ALC had subject matter jurisdiction over this matter, the ALC lacked the "procedural jurisdiction" to consider the issues raised by Trident in its Motion, because Trident did not challenge the constitutionality of MUSC Network and the validity of MUSC Strategic Ventures before DHEC staff. As support for its argument, MUHA points to S.C. Code Ann. § 44-7-210(E) (2018), which limits the issues considered in a CON contested case proceeding to "those presented or considered during the staff review." MUHA's argument misconstrues the nature of the ALC's *de novo* review authority as articulated in § 44-7-210(E) and as interpreted by the Court of Appeals in *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct.App. 2004) (holding 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).

MUHA was required to, and did, address in its CON application the ownership of the Proposed 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 Proposed Project, and the financial feasibility of the Proposed Project. *See* 3 S.C. Code Ann. Regs. 61-15 § 202 and § 802 (Supp. 2019). MUHA also was required to, and did, assure DHEC that the facility would be operated in accordance with the law. *Id.* at § 202(2)(d). Thus, the ownership of the Proposed Project and its effect on the Project's ability to comply with CON criteria and standards were presented to the DHEC staff. Further, because such ownership information was part of MUHA's CON application, it was considered by DHEC in evaluating the Proposed Project. As Ms. Murdock testified, she reviewed the entire CON Application and all of the applicable regulatory requirements and State Health Plan criteria as part of her review and decision-making process in this case. **(R. p. 606, lines 5 - 15; p. 607, lines 1 - 19)**. Under S.C. Code Ann. § 44-7-210(E), the ALC had the authority to consider and determine the issues raised by Trident because they were both presented to and considered by DHEC.

Furthermore, the ALC found that, in terms of Trident bringing to DHEC's attention the evidence ultimately relied upon by the ALC in making its decision, Trident did not have a complete picture of MUSC Network's structure and its integral role in the operation and financing of the Proposed Project until the completion of discovery and completion of the testimony presented by MUHA during the hearing. **(R. pp. 18-19).** In discovery, MUHA produced for the first time organizational and operational documents that fully described MUSC Network's ownership and its interests and responsibilities with regard to the Proposed Project. In discovery, Trident was able to take the deposition of Dr. Patrick Cawley, who elaborated on MUSC Network's role in the Proposed Project.

Additional evidence on the ownership issue was revealed in the hearing testimony of Dr. Cawley. As is obvious from its motion, Trident relied extensively on this evidence and testimony

in seeking a determination from the ALC that the Proposed Project did not meet the criteria and standards of the CON law because its proposed manager/operator is an unconstitutional, illegal entity. **(R. p. 1297, line 22 – p. 1310, line 13; R. pp. 1999 - 2030).**

Under the *Marlboro Park* doctrine, the ALC has the authority to consider evidence on the issues even when such evidence is first revealed after the completion of the DHEC staff review. *Marlboro Park*, 358 S.C. at 578, n. 2, 595 S.E.2d at 853, n.2. In this case, Trident asked the ALC to consider the evidence of MUSC Network's unconstitutional ownership contained in the Network Operating Agreement and the Management Agreement and, in addition, the testimony of Dr. Cawley, presented in MUHA's case-in-chief. All of this evidence, though produced after DHEC staff review, pertained to the ownership and management of the Proposed Project and the court's consideration of whether MUHA's CON application met the requirements of the applicable CON Law. As found by the ALC, "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]." **(R. p. 16).** Consideration of the evidence and issues raised in Trident's motion is consistent with the law as interpreted by the Court in *Marlboro Park.*

Finally, in its Final Order, the ALC finds that, even if Trident had had the knowledge to call DHEC's attention to the evidence of MUSC Network's unconstitutional role in the Proposed Project, asking DHEC to consider the constitutionality and/or illegality of the ownership of the manager/operator of the Proposed 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.") Further, the ALC notes that Trident must raise the constitutionality of MUSC Network before the ALC or its

arguments thereon would be considered waived.[17] **(R. p. 19).** The ALC is the only entity that could have made the required factual findings in this case because most of the evidence on the constitutionality of the Proposed Project was not available until after the DHEC review and because this Court is not the fact-finder under the law. ***(Id.)*** The ALC, therefore, found that procedural requirements and judicial economy favored the ALC's exercise of its authority under *Marlboro Park* to consider the evidence and issues concerning the validity of MUSC Network and MUSC Strategic Ventures.

III. THE ADMINISTRATIVE LAW COURT PROPERLY ADJUDICATED THE RIGHTS OF NONPARTIES IN DETERMINING THAT MUHA'S CON APPLICATION SHOULD BE DENIED AND APPELLANT FAILED TO PRESERVE THIS ISSUE BELOW.

MUHA asserts for the first time on appeal that the findings of the ALC with regard to MUSC Network, MUSC Strategic Ventures, and Alliance violated those entities' due process rights because these entities were not parties to the contested case proceeding. **(Brief of Appellant, pp. 26 - 28)**. MUHA did not raise this issue in its Motion to Reconsider the Final Order of the ALC filed with the court on May 24, 2019, which motion was denied on June 14,

[17] See *Travelscape,* 391 S.C. at 109, 705 S.E.2d at 39 (Preservation and exhaustion of remedies rules apply before the ALC and other administrative tribunals with respect to an as applied constitutional challenge.). Trident argued before the ALC and reasserts its argument here that S.C. Code Ann. § 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).** *See also Capital City Ins. Co. v. BP Staff, Inc.,* 382 S.C. 92, 100, 674 S.E.2d 524, 528-529 (2009) ([Subject 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. Additionally, the doctrine of exhaustion of administrative remedies is often leveraged "to avoid interference with the orderly performance of administrative functions." Consequently, a "failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." (internal quotations and citations omitted)). A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body. *Id.* at 102, 674 S.E.2d at 529.

2019. **(R. pp. 2070 - 2075; R. p. 36)**. Consequently, the ALC has not ruled on this issue. Under the law, MUHA has failed to preserve the issue for review by this Court. *See Brown v. S. C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (Issues not raised to and ruled on by the ALJ are not preserved for appellate consideration.); *See also In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct.App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.").

Further, the ALC's findings regarding MUSC Strategic Ventures, MUSC Network and Alliance do not constitute improper "adjudications of a non-party's rights", as characterized by MUHA. The named entities were identified by MUHA in its CON Application as entities involved in the ownership and management of the Proposed Project. In order to consider whether to grant or deny MUHA's CON application, the ALC by necessity had to consider issues related to those entities.

Contrary to MUHA's assertions, the ALC did not order any relief, including dissolution, against MUSC Strategic Ventures, MUSC Network, or Alliance. The sole relief granted by the ALC was to reverse the decision of DHEC and to deny MUHA's CON application.[18] **(R. pp. 34-35)**. This ultimate conclusion of the ALC, that MUHA's CON application must be denied, does not affect any entity with regard to any matter outside of the MUHA CON matter in this case.

[18] Although, in some parts of its Order, the ALC refers to the "necessary dissolution" of MUSC Network, these references occur in the context of responding to MUHA's argument that it could cure any defects with MUSC Network with no effect on its application by entering into a management agreement with Alliance. The ALC rejects this argument and finds that the dissolution of MUSC Network and substitution of Alliance would materially affect many aspects of the Proposed Project and DHEC's review thereof. **(R. pp. 15 and 28)**. In any event, the ALC specifically limits the relief granted to denial of a CON for the Proposed Project. **(Id., at p. 35)**.

The effect of the Final Order of the ALC is to adjudicate MUHA's CON application *in this case* and to prohibit MUHA from receiving a CON for the Proposed Project as presented to DHEC *in this case*. MUHA alone is the subject of the court's relief. It is hard to conceive how the order of the ALC could be more limited with regard to "non-parties" and still adequately consider the issues before it.

IV. THE ADMINISTRATIVE LAW COURT CORRECTLY DETERMINED THAT THE PROPOSED PROJECT IS AN UNLAWFUL AND UNCONSTITUTIONAL JOINT VENTURE BETWEEN A STATE AGENCY AND A PRIVATE ENTITY AND THEREFORE DOES NOT COMPLY WITH CERTIFICATE OF NEED LAW.

In its motion for judgment as a matter of law, Trident moved the ALC for an order denying MUHA's CON application on the following grounds: (a) MUSC Strategic Ventures is an *ultra vires* corporation created by MUSC in violation of its enabling statute found at S.C. Code Ann. § 59-123-60 (2020); and (b) MUSC Network, which has MUSC Strategic Ventures as a minority owner, is an illegal and unconstitutional joint venture formed in violation of S.C. Const. art. X, § 11. Trident contended that, because MUSC Network, the designated operator of the Proposed Project is an unlawful entity, MUHA's CON application does not comply with the standards and criteria of the CON Law. **(R. pp. 1999 - 2030).** The ALC granted Trident's motion finding in favor of Trident on each of the grounds raised therein. **(R. pp. 1 - 35).**

A. Authority Under Enabling Statutes

The first issue raised by Trident and addressed by the ALC concerned 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

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).

MUSC can trace its origins to The Medical College of South Carolina, a private institution that was incorporated by the Legislature in 1832. In that year, the Legislature passed 1832 Act No. 2580 (VIII *Statutes at Large* 379 (McCord 1840)), which established a corporate body to be known as "The President, Trustees and Faculty of the Medical College of the State of South Carolina." **(*See* R. pp. 2027 - 2030).** This Act is considered to be the original charter for what later became MUSC. (*See Med. Soc'y of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 276, 513 S.E.2d 352, 355 (1999)).

Under its Charter, the board of trustees and faculty were granted the right of perpetual succession and were empowered to "make all lawful and proper rules and by-laws, for the government and regulation of themselves and of the said College; and the said corporation is declared capable of receiving and holding real and personal estate, not exceeding sixty thousand dollars, whether acquired by gift, demise, bequest or purchase, for the benefit of the said College." (1832 Act No. 2580 (VIII *Statutes at Large* 379, ¶ V (McCord 1840)). The College was also empowered to appoint faculty and confer medical degrees with licenses to practice medicine and surgery. *Id.*, at 379 ¶¶ VI and VII.

By its terms, the Charter of The Medical College expired after twenty-one years unless renewed. (*Id.* at ¶ IX). As described by the Court in the *Medical Society* case, the Charter was

renewed periodically thereafter[19] but expired on December 24, 1899. Thereafter, on January 25, 1900, the Medical College applied for the renewal of its Charter under Act No. 45, 1896 S.C. Acts 92, which allowed for the incorporation of private entities. *Med. Soc'y,* 334 S.C. at 276, 513 S.E.2d at 355. In *Medical Society*, MUSC claimed that, in the last iteration of its Charter, MUSC acquired all of the enumerated powers of a corporation under Act. No. 45, including the power to sell or lease its real property.[20] The Court rejected this argument, noting that under Act 45, MUSC's certificate of renewal issued in 1900 for its expired charter only vested MUSC with the powers, rights and privileges it had at the expiration of the charter. *Id.* at 276-277, 513 S.E.2d at 356.

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). In its current form, MUSC is governed by S.C. Code Ann. §§ 59-123-10 *et seq.* (2020). In its enabling legislation, MUSC's governing board is given the authority to elect officers and to appoint professors and to fix their compensation and to exercise the following enumerated powers:

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[19] The Charter was renewed by Act No. 4200, 1854 S.C. Acts 362, 363 and by Act No. 706, 1878 S.C. Acts 817. Each of these renewals was granted "with all the rights, powers, privileges heretofore granted." Neither of these renewals extended any additional authority to MUSC.

[20] The Court in *Medical Society* found in 1999 that MUSC had only the following enumerated powers: to make bylaws and regulations and confer degrees in medicine and other health related professions (S.C. Code Ann. § 59-123-60); to grant rights-of-way and easements for widening streets (§ 59-123-60); to utilize eminent domain (§ 59-123-90); to borrow for purchase of diagnostic and therapeutic equipment (§ 59-123-95); to acquire and renovate student and faculty housing (§ 59-123-210); and to issue revenue bonds (§§ 59-123-220 and -310). *Id.* at 280, n.1, 513 S.E.2d at 358, n.1. In the *Medical Society* decision, the Court upheld the constitutionality of S.C. Code Ann. § 44-7-3110 (2018), which granted MUSC the limited authority to lease its facilities to HCA. *Id.* at 280, 513 S.E.2d at 358. To date, MUSC has been granted no express authority to create other corporations.

> (1) to make bylaws and regulations considered expedient for the management of its affairs and its own operations not inconsistent with the constitution and laws of this State or of the United States;
>
> (2) to confer the appropriate degrees in medicine, dental medicine, pharmacy, nursing, health-related professions, and graduate studies in related health fields upon students and other persons as in the opinion of the board of trustees may be qualified to receive them; and
>
> (3) to make contracts and to have, to hold, to purchase, and to lease real estate and personal property for corporate purposes; and to sell and dispose of personal property and any buildings that are considered by it as surplus property or no longer needed and any buildings that it may need to do away with for the purpose of making room for other construction. These powers must be exercised in a manner consistent with the provisions of Chapter 35 of Title 11 [the South Carolina Procurement Code].

S.C. Code Ann. § 59-123-60(A) (2020). Finally, S.C. Code Ann. §59-123-30 (2020) confirms MUSC's original 1832 charter and recognizes all of the rights and privileges granted therein. The law specifically requires all revenue earned by MUSC to be expended for a public purpose and makes MUSC subject to the Freedom of information Act and to State ethics laws. S.C. Code Ann. § 59-123-60(B), (C), and (D) (2020).

In a 2000 amendment to the same legislation, the General Assembly established MUHA as a separate state agency to be governed by a board composed of the same persons as 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[21], 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)(2020). In its enabling

[21] "Hospital" is defined in the enabling legislation to mean "the Medical University hospitals, clinics, and other health care and related facilities." S.C. Code Ann. § 59-123-60(E) (2020). Under S.C. Code Ann. § 59-123-60(L), all real and personal property, tangible and intangible, relating to the hospital is deemed to be the property of MUHA.

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. The formation of for-profit corporations by the authority is strictly prohibited.

S.C. Code Ann. § 59-123-60(E)(13) (2020).

MUHA argues in its brief that, notwithstanding the carefully enumerated powers given to MUSC in S.C. Code Ann. § 59-123-60, MUSC has the implied authority to create corporations, such as MUSC Strategic Ventures, because such authority allegedly is impliedly granted in MUSC's Charter. **(Brief of Appellant, pp. 29 - 33)**. In creating MUSC as a state agency, the General Assembly provided that:

> The charter of The Medical University of South Carolina is hereby confirmed and extended with all the rights and privileges granted heretofore by the original act of incorporation or by any subsequent extension of its charter.

S.C. Code Ann. § 59-123-30 (2020). MUHA contends that the 1832 Charter bestowed on MUSC all of the express rights contained therein and, in addition, all of the rights and powers of a corporation available at the time. In claiming that such implied rights include the power to create other corporations, MUHA cites early commentaries, none of which indicate that corporations are inherently empowered to create other corporations.

Blackstone in his commentaries discusses the five inherent powers of corporations as follows: (1) to have perpetual succession, (2) to sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may; (3) to purchase lands and hold them for the benefit of themselves and their successors; (4) to have a common seal; and (5) to make by-laws or private statutes for the better government of the corporation,

which are binding upon themselves, unless contrary to the laws of the land, and then they are void. 1 BLACKSTONE'S COMMENTARIES 475 (S. Tucker Ed. 1803). MUHA seizes on Blackstone's reference "to do all other acts as natural persons may" as supporting its position that its 1832 Charter impliedly granted it the authority to form other corporate entities and that such authority allegedly given in 1832 carried over to its conversion into a state agency. This argument is woefully misplaced.

As noted by Blackstone, in his time and place, the power to create a corporation resided only with the king, who could give consent expressly or impliedly, through the force of common law. *Id.* at 473. In *State v. Heyward*, 37 S.C.L. (3 Rich.) 389, 411 (1832), the Court of Appeals for Law and Equity of South Carolina, while discussing Blackstone's commentaries observed, "In England, the creation of a corporation is within the King's prerogative. [In a republic], the right to grant a corporate franchise belongs to Legislative power, as being, in this respect, the entire representative of the sovereignty of the people." In 1832, no right existed in natural persons to form corporations outside of the process which the board of trustees and faculty of the Medical College of South Carolina used to established the predecessor to MUSC, *i.e.*, petitioning the Legislature to recognize that group of persons as a body politic and corporate. *See* 1832 Act No. 2580 (VIII *Statutes at Large* 379 (McCord 1840)).

Under current 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 & Envtl. 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.") As noted, MUSC's Charter *expressly* gives it the right to make

by-laws and rules for self-governance, to receive and hold personal and real property, to appoint faculty, and to confer degrees. MUSC's enabling legislation *expressly* gives it the right to make bylaws and regulations and confer degrees in medicine and other health related professions, to grant rights-of-way and easements for widening streets, to utilize eminent domain, to borrow for the purchase of diagnostic and therapeutic equipment, to acquire and renovate student and faculty housing, and to issue revenue bonds. MUSC does not need to create other corporations to carry out these duties.[22] Thus, no implied authority to create corporations exists.

MUHA points to no laws existing in 1832 that allowed a private corporation to create other corporations and, MUSC's original Charter gives it no express or implied authority to do so.[23] Further, MUSC has no statutory authority to create a subsidiary or affiliated corporation to perform the educational functions it is charged with performing. MUHA alone is granted the authority to establish not-for-profit entities to carry out its functions with regard to the healthcare operations of MUSC, 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.

Under the doctrine of statutory construction "*expressio unius est exclusio alterius,*" the grant of authority to MUHA to create nonprofit subsidiaries and affiliates compels the

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[22] MUHA argues that MUSC, as an institution of higher learning, is required to collaborate with the business community. **(Brief of Appellant, p. 35 - 36)**. However, one does not need to form separate corporations to "collaborate" with individuals and entities.

[23] MUHA does cite several recent statutes which it claims grant, or at the least recognize, MUSC's authority to create corporations. None of these statutes support MUHA's claims. For example, S.C. Code Ann. § 44-7-3110 (2018), which granted MUSC the limited authority to lease its facilities to HCA, provides that the "name and logo of the Medical University of South Carolina and its affiliates shall not be used by any private operator to market and promote health care services." MUHA claims that the reference to "affiliates" gives MUSC the power to create corporations. MUSC can have any number of "affiliates", including MUHA, that are not corporations created by it. This argument is specious on its face.

conclusion that the absence of such grant of authority to MUSC in the same statute 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). In any event, even if MUSC Strategic Ventures were lawfully created, MUHA and MUSC cannot use it to circumvent the constitution.

B. Constitutional Prohibition Against Joint Ownership

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 Auth.*, 290 S.C. 415, 421, 351 S.E.2d 155, 158 (1986) the 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 to promote research and development and enhance the research capacities of the state's public and private universities. In invalidating the joint venture transactions entered into by the Research Authority, the Court found that "[t]he Constitution clearly prohibits public agencies, such as the Authority, from engaging in joint ownership with private parties." *Id.* In *Nichols*, the Court held that the Research Authority was prohibited from entering into any joint venture with a private business based on the absence of any express enabling legislation allowing such and on the plain language of Article X, § 11.

Nichols involved the direct participation by a state agency in joint ventures in which the agency itself would have an ownership interest in a private company. In this case, neither MUHA nor MUSC will be direct owners of MUSC Network, the entity that will lease the facility space, employ all of the administrative and technical clinical staff, own all of the equipment, and manage and operate the proposed radiation therapy center. Instead, MUHA and MUSC have chosen to utilize 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 specifically acknowledged by Dr. Cawley, 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) and to hold an ownership interest in another private for-profit company (MUSC Network) because MUHA and MUSC, as state agencies, are prohibited under the law and the South Carolina Constitution from holding these interests directly.[24]

[24] As found by the ALC, the structure of the Proposed Project is fundamentally different from the arrangements approved by the courts in cases such as *Johnson v. Piedmont Mun. 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 governmental 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, reasoning in part that all parties were governmental and/or nonprofit alleviating concerns that any interest in profits would supersede the public mission or even incidentally benefit a private party). **(R. p. 24, n. 19).** MUHA cites *Taylor* as supporting MUSC's joint venture with Alliance, contending that Trident produced no evidence that the public was at risk because of the arrangement. *Taylor* is inapposite to this case, however, because MUSC Network is a for-profit entity and MUSC Ventures/MUSC as the minority member shares in its profits *and losses*. (*See generally* **R. p. 1522 - 1563**).

This attempt by MUHA and MUSC to circumvent the restrictions placed on it as a governmental entity and to do indirectly what it cannot do directly is exactly the type of conduct condemned by the South Carolina Supreme 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 any company, association, or corporation. In *ORBIT*, the Court recognized that the City's actions were "laudable and well-intended" but nonetheless held:

> It is troubling that the City attempted to avoid the constitutional prohibition on investing in equity securities, thereby using government funds to jointly own a company with other investors, by merely setting up a trust. Although ORBIT is set up as a trust, it functions as an investment manager for the City and, as such, is no different than any other investment house (Merrill Lynch, Oppenheimer, etc.). The veneer of a trust does not change that. More importantly, the status of ORBIT as a trust is irrelevant. Article X, § 11 concerns the *investing* of government funds. The investment takes place when the City transfers money to the trust to be used for the expressed purchase of equity securities. It is abundantly clear from the record that the City's investment in ORBIT is for the expressed purpose of circumventing the constitution. The City's investments violated the constitutional prohibition.

Id. at 43, 668 S.E.2d at 398-399. The *ORBIT* decision is the 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 attempted through indirect means or entities.

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. 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 can hold such ownership interests themselves. Under the *ORBIT* case, neither can MUSC Strategic Ventures.

In the case of both MUHA and MUSC, the General Assembly has expressly prohibited the type of circumvention present in the Proposed Project. As noted above, MUSC has no authority to create affiliated entities, whether non-profit or for-profit. MUHA is expressly permitted to form only non-profit entities on the condition 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) (2020). This section concludes with "the formation of for-profit corporations by the authority is strictly prohibited." *Id.* Under the law, MUHA can utilize non-profit entities to carry out its functions but those entities are subject to all laws and regulations applicable to MUHA, including the constitutional prohibition against joint ownership in private companies and the prohibition against the creation of for-profit companies. MUHA and MUSC's attempt to do indirectly what they cannot do directly must fail under *ORBIT*.

As found by the ALC in this case, 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 Proposed 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. As noted by the ALC, "because of the nature of the Application as submitted to DHEC, a change in the management company is not just an administrative adjustment." **(*Id.*, at 27)**. The ALC properly concluded that, given its significant role in the Proposed Project, the absence of MUSC Network

meant "the project's ability to satisfy the Project Review Criteria of Financial Feasibility, as submitted to, reviewed by, and approved by DHEC through attestations in the CON application, is no longer present." ***(Id.)*** Therefore, the ALC correctly determined that MUHA's CON application did not comply with the CON Law and properly ordered that the application be denied.

V. THE ADMINISTRATIVE LAW COURT CORRECTLY DETERMINED THAT MUHA WAS NOT THE PROPER LICENSEE OF THE PROPOSED PROJECT UNDER THE LAW.

As its last grounds for appeal, MUHA contends that the ALC erred in finding as a sustaining ground that MUHA does not own or control the Proposed Project and, therefore, does not qualify as the proper licensee under the law. **(Brief of Appellant, pp. 37 - 38)**. To the contrary, the ALC's conclusion that MUHA is not the proper licensee under the law is supported by the substantial evidence in the record and a correct application of the law. (**R. pp. 12 - 13** and **R. pp. 29 - 33).**

CON regulations define the "licensee" of a project 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." 3 S.C. Code Ann. Regs. 61-15, § 202(8)(b) (Supp. 2019).

At the hearing, MUHA presented the testimony of its CEO Dr. Cawley concerning each of the entities named in the CON application, describing each entity's respective role and responsibility regarding the Proposed Project. **(R. p. 765, line 4 – p. 776, line 9; R. p. 791, line 22 – p. 804, line 12).** MUHA also presented testimony from its expert witness, David Levitt, concerning the organization and responsibilities of the entities participating in the Proposed Project. **(R. p. 883, line 21 – p. 889, line 23).** In response, Trident presented rebuttal testimony

from its expert, Daniel Sullivan, that, based on the evidence presented during MUHA's case in chief, he did not believe that MUHA was the owner of the Proposed Project and that Alliance would be the proper licensee. (**R. p. 1243, line 22 – p. 1247, line 24**). Neither MUHA nor DHEC objected to this testimony by Mr. Sullivan. (***Id.***). Thus, the issue of the correct licensee was properly before the ALC because the ownership of the Proposed Project, including the identity of the licensee, was an issue that was presented to DHEC and considered by DHEC in reviewing MUHA's CON application and because evidence, in the form of the testimony of the witnesses described above, was presented for the court's consideration at the hearing.

In its Final Order, the ALC describes in detail the roles and functions of the entities named by MUHA as the owner and operator of the Proposed Project. 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 Alliance Oncology and not to MUHA. In response to the requirement that the applicant prove financial feasibility, MUHA submitted a letter from Mr. Greg Spurlock of Alliance Oncology, as the managing member of MUSC Network, indicating that, depending on the interest rates available, the proposed project would be financed by an affiliate of MUSC Network 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[25]:

> The Network Management Agreement provides that Alliance agrees to (a) assist the Network in procuring and obtaining financing for all equipment and office

[25] The Network Management Agreement contemplates that the agreement will govern the parties' relationship as they develop, operate and manage the "oncology service line" for multiple facilities, not just the Proposed Project. (**R. p. 1509**).

> 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, subject to the parties' choice that the hospital entity at that site may choose to perform such services itself; and (e) provide, in its discretion, working capital advances (capped at $500,000 for each advance) to the Network to be repaid with interest. [MUSC Tr. Ex. 4, p. 2-3]. 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. *Id.* at 2. They are to report to MUSC with respect to quality assurance. *Id.* These undertakings by Alliance as the majority owner of the Network constitute more than just managerial or operational logistics within the proposed facility.

(**R. pp. 30-31**). 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 Strategic Ventures] licensed name "Hollings Cancer Center." (***Id.* at 31**) (emphasis in original). (***See also* R. p. 1523** and **R. p. 1529).**

The ALC's understanding and characterization of Alliance's role in the Proposed Project is further supported by the testimony of Dr. Cawley at the hearing. Dr. Cawley indicated that MUHA's relationship with Alliance began about six years prior to the 2019 hearing and that, "as part of the evolution of that relationship is when we had put Strategic Ventures together, we developed a joint venture with Alliance Oncology to operate other radiation therapy centers." (**R. p. 792, lines 10-19).** Dr. Cawley acknowledged that the joint venture with Alliance Oncology 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 Oncology will be the entity purchasing all of the equipment and other items going into the Proposed Project, with the result that neither the assets nor debt liabilities associated with those assets will appear on MUHA balance sheets. (**R. p. 853, line 9 – p. 854, line 11**).

In concluding that Alliance, and not MUHA, is the owner with the ultimate responsibility and authority for the conduct of the facility, the ALC also examined Alliance's authority as the majority owner of the Network to control the operations of the facility. Under the Operating Agreement, Alliance appoints three members to serve as its representatives on the board of MUSC Network, while MUSC Strategic Ventures appoints two. **(R. p. 1535)**. In its Final Order, the ALC points to the testimony of MUHA's expert, David Levitt, who summarized the organizational structure of MUSC Network as being that Alliance has the majority vote on business matters while MUSC Strategic Ventures has the majority vote on clinical issues, with some matters, such as relocation of the facility or changing or expanding the business or purpose of the facility requiring a supermajority vote. **(R. p. 32)**. **(*See, also,* R. p. 1537)**. As found by the ALC:

> 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 [MUSC Network]. In essence, Levitt implied that a supermajority of [MUSC 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).

Similarly, the ALC noted that MUHA's CON application contains as evidence of the required corporate approvals for the Proposed Project the 2014 meeting minutes of the MUHA Operations, Finance and Quality Committee approving the submission of a CON for a radiation therapy center and the minutes of a 2017 meeting of the MUSC Network Board evidencing the

Board's approval "to move forward" with the CON Application for the Berkeley County Linac Project. (*Id.*). (***See* R. pp. 1813 - 1817**). As found by the ALC:

> [O]ne of the documents in the CON Application used to verify approval of the project by the licensee's governing body was submitted in the form of the record of [MUSC Network's] Board meeting minutes from March 7, 2017, roughly 2.5 months before the Application was submitted. It simply does not follow logically that the management company hired only to run or operate the facility would be the entity to vote to move forward in the application process to establish the facility in the first place.

(**R. p. 32**). The ALC also point outs as confounding that the MUHA Board committee approval submitted appears to be related to a prior project, *i.e.*, the 2015 CON application of MUHA for a radiation center that was denied by DHEC. (***Id.*).**

In its brief, MUHA argues that, because MUSC Strategic Ventures/MUSC is responsible for the clinical standards of the facility, MUHA and not Alliance is the proper licensee under the law. **(Brief of Appellant, pp. 37 - 38)**. As found by the ALC, "While the Management Agreement is replete with references of 'with input from MUSC,' it is also clear from the details of the Operating Agreement that, in almost every respect, Alliance is in control of this operation, carries the rights of first refusals, owns 51% of the company and will carry away 51% of the profits from this joint venture." (**R. p. 30**).

Based on the substantial evidence in the record and the correct application of the law, the ALC found that "MUSC is to control Quality Assurance and provide Telemedicine from its doctors to the sites. Alliance has sole control over every other aspect of the business." (**Id.**). The ALC's conclusion that Alliance, not MUHA, is the proper licensee of the Proposed Project under the law and, therefore, is the only entity to which a CON can be issued, is proper and must be upheld under the applicable standard of review. This additional sustaining ground alone supports the ALC's reversal of DHEC's decision and denial of MUHA's CON application.

CONCLUSION

The Administrative Law Court's decision reversing DHEC's approval of MUHA's CON application is supported by the substantial evidence in the whole record and is not affected by error of law. Therefore, Trident respectfully requests that the Court uphold the decision of the Administrative Law Court.

Respectfully submitted,

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March 19, 2020
Columbia, South Carolina

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 Center ..... Petitioner/Respondent,

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of the Respondent Trident Medical Center, LLC in the above-referenced matter complies with Rule 211(b), SCACR.

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