THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 2014-ALJ-07-0332-CC

Sisters of Charity Providence Hospitals, ...Respondent,

v.

South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc. d/b/a Lexington Medical Center,

Of Whom South Carolina Department of Health and Environmental Control is the .....Respondent,

and Lexington County Health Services District, Inc. d/b/a Lexington Medical Center is the .....Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT ERR IN CONCLUDING THAT PROVIDENCE'S REQUEST FOR REVIEW WAS TIMELY UNDER SECTION 44-1-60 DESPITE PROVIDENCE'S FAILURE TO FILE ITS REQUEST WITHIN 15 DAYS OF THE DATE DHEC DELIVERED NOTICE OF ITS DECISION TO LMC?

II. DID THE ADMINISTRATIVE LAW COURT ERR IN GRANTING PROVIDENCE'S MOTION FOR SUMMARY JUDGMENT AS TO LMC'S ESTOPPEL CLAIMS WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO THOSE CLAIMS?

III. DID THE ADMINISTRATIVE LAW COURT ERR IN HOLDING THAT DHEC COULD NOT BE ESTOPPED FROM ENFORCING A CERTIFICATE OF NEED REQUIREMENT FOR LMC'S SECOND OPEN HEART SURGERY SUITE NOTWITHSTANDING THE DHEC DIRECTOR'S PRIOR ASSERTIONS TO LMC THAT THE PROJECT COULD PROCEED WITHOUT CON REVIEW AND LMC'S REASONABLE RELIANCE THEREON?

STATEMENT OF THE CASE

On May 14, 2014, the Respondent Sisters of Charity Providence Hospitals ("Providence") filed a Request for Final Review under section 44-1-60 of the South Carolina Code seeking review by the Board of Health and Environmental Control ("Board") of the decision by the Respondent Department of Health and Environmental Control ("DHEC") to allow LMC's use of a second open heart operating room ("Second Open Heart Suite" or "Second OR").[1] On June 25, 2014, the Board declined to conduct a Final Review Conference on Providence's request and, on July 9, 2014, Providence filed its Request for Contested Case Hearing on the matter with the Administrative Law Court ("ALC"). (R. pp. 87–117).

On July 24, 2014, Providence filed a Motion for Summary Judgment alleging that LMC was required by law to obtain a Certificate of Need ("CON") in order to use the Second Open Heart Suite and that DHEC lacked the authority to approve such use

[1] Providence also challenged DHEC's approval of a third cardiac catheterization laboratory for LMC. LMC has not appealed the issues related to the third catheterization laboratory and those are not before the Court.

without one. (R. pp. 127–194). On July 25, 2014, LMC filed a Motion to Dismiss Providence's request for contested case review as untimely filed because Providence waited 215 days after DHEC provided LMC with notice of its final approval of the Second OR to request review by the Board.[2] (R. pp. 195–223). In its Response to Providence's Motion for Summary Judgment, LMC again asserted the ALC's lack of jurisdiction because of Providence's untimely filing and further argued that summary judgment in Providence's favor was not appropriate because genuine issues of material fact existed as to whether LMC was required to have a CON in order to utilize a Second Open Heart Suite. (R. pp. 228–251).

On September 22, 2014, the ALC issued two orders relevant to this appeal.[3] ("September 22 Orders"). In the first order, the ALC denied LMC's Motion to Dismiss, holding that Providence's request for review was timely filed and that the court had jurisdiction to consider it. (R. pp. 61–73). In its second order issued on September 22, 2014, the ALC granted partial summary judgment to Providence holding that, as a matter of law, LMC was required to have a CON prior to utilizing the third catheterization laboratory. The ALC denied summary judgment on the Second Open Heart Suite holding that a question of fact existed whether LMC had made a capital expenditure for that

[2] LMC also moved to dismiss Providence's request for review on the grounds that the ALC lacked contested case jurisdiction to hear Providence's appeal because DHEC's Report of Visit allowing use of the Second OR was not a decision that gives rise to a contested case under the law. That argument is not at issue in this appeal.

[3] On September 22, 2014, the ALC also issued an order granting Providence's Motion to Enforce Automatic Stay. (R. pp. 83–86). Although LMC appeals so much of that order as reiterates the ALC's findings regarding whether LMC was required to have a CON prior to implementing its project, enforcement of the stay itself is moot and not an issue on appeal. Similarly, on November 5, 2014, the ALC denied LMC's Motion to Lift the Automatic Stay as to the Second OR. (R. pp. 18–27). That order is also appealed solely with regard to its findings on the issues on appeal and not with regard to the failure to lift the stay. To the extent that LMC has been ordered to cease utilization of the Second OR as part of the ALC's decision on the merits, LMC requests that ruling to be reversed as part of its relief in this appeal.

project.[4] Finally, in its summary judgment order, the ALC also addressed LMC's argument that, even if a CON were required, summary judgment was not appropriate because DHEC should be estopped from enforcing such a requirement in light of its prior assertions regarding the CON program and its approval of LMC's projects without CON review. (R. pp. 74–82).

On October 2, 2014, LMC filed a Motion to Alter or Amend (Reconsider) with regard to the September 22 Orders. (R. pp. 362–386). On October 23, 2014, the ALC issued three orders as follows: (a) an Order Granting in Part and Denying in Part Motion to Alter or Amend (Reconsider), in which the court addressed issues raised by LMC as to the September 22 Orders (R. pp. 28–36); (b) an Amended Order Denying LMC's Motion to Dismiss (R. pp. 47–60); and (c) an Amended Order Granting Partial Summary Judgment (R. pp. 37–46) (collectively, the "October 23 Orders"). On November 3, 2014, LMC filed a Motion to Alter or Amend (Reconsider) the Amended Order Granting Partial Summary Judgment because that Order contained a finding on an issue that had not been raised by the parties or ruled on in any previous orders and on which no evidence had been presented.[5] (R. pp. 432–434). On December 16, 2014, the ALC issued an Order Granting in Part and Denying in Part LMC's Motion to Alter or Amend (Reconsider), in which the ALC merely corrected a typographical error and did not alter the substance of its order. (R. pp. 5–7).

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[4] Under S.C.Code Ann. § 44-7-160(4), a person or health care facility is required to obtain a Certificate of Need from the department before undertaking "a capital expenditure by or on behalf of a health care facility which is associated with the addition or substantial expansion of a health service for which specific standards or criteria are prescribed in the South Carolina Health Plan."

[5] Specifically, LMC moved for reconsideration of the ALC's finding that the Director's pledge in her June 28, 2014 letter not to take enforcement action for facilities or services opened during the suspension period was "unlawful and void."

On March 16, 2015, in response to discovery propounded by Providence on the issue of whether LMC made a capital expenditure in connection with the Second Open Heart Suite and Providence's subsequent motion to compel, LMC agreed to stipulate that it made a capital expenditure in connection with its utilization of the Second OR. (R. pp. 454–455). As explained during the hearing before the ALC, the purpose of the stipulation was to resolve the one factual issue found by the court to be outstanding and to allow the case to proceed to appeal on the law. (R. p. 588, line 12 – p. 591, line 23). In making the stipulation, LMC preserved its objections to all of the ALC's other findings with regard to whether a CON was required for the Second OR. (R. p. 2).

Based on this stipulation of a capital expenditure, Providence orally moved for summary judgment, which was granted from the bench. The ALC filed its written Order Granting Motion for Summary Judgment on April 29, 2015. (R. pp. 1–4). LMC timely filed its Notice of Appeal of all of the court's orders discussed above on May 28, 2015.

STATEMENT OF FACTS

LMC was approved by DHEC to provide diagnostic catheterization services in February 2002. On June 18, 2010, LMC was awarded a Certificate of Need to establish a comprehensive cardiac services program to add open heart surgery and therapeutic catheterization services. Due to the overwhelming success of its comprehensive program, in 2013, LMC began planning for expansion to meet the critical needs of its patients. These plans included utilizing an existing operating room as a Second Open Heart Suite. (R. pp. 240–242).

Effective July 1, 2013, before LMC could begin implementing its expansion plans, however, the Director of DHEC announced to the public and all members of the

regulated community that the CON Program was suspended as a result of the failure of the House of Representatives to override Governor Haley's line-item veto of funding for the CON Program.[6] In Director Templeton's memorandum advising of the suspension of the CON program, she affirmatively stated that DHEC would not review any new or existing CON applications, but that DHEC's inspection and licensing activities would continue uninterrupted. The publicly posted memorandum notified providers that the suspension of the CON program would have "the practical effect of allowing new and expanding health care facilities to move forward without the Certificate of Need Process." (R. p. 209).

Because of DHEC's refusal to review CON applications or issue CONs, LMC was not able to apply for or receive a CON for the Second Open Heart Suite despite its need for the facilities. Faced with this dilemma, LMC officials met personally with Director Templeton and her staff on September 25, 2013, and sought information regarding the exact process LMC needed to follow in order to use one of its existing operating rooms as an additional open heart surgery suite. The Director personally affirmed to LMC officials that no CON was required by DHEC to move forward with the Second OR. (R. pp. 240–242).

Therefore, in accordance with DHEC's procedures at the time, as communicated by the Director, LMC notified DHEC's Bureau of Health Licensing of its plans to utilize the Second OR. In response, on October 11, 2013, DHEC performed an inspection and issued a "Report of Visit" approving LMC's use of an existing, already-licensed

[6] For a detailed factual background of the suspension of the CON program after the Governor's veto, see *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 601, 757 S.E.2d 408, 418 (2014), reh'g denied (May 22, 2014).

operating room as a Second Open Heart Suite.[7] (R. pp. 211–212). Thus, having met every requirement possible given the Department's policies and procedures, as of October 11, 2013, LMC began serving the critical and emergent needs of its cardiac patients by utilizing the Second Open Heart Suite.[8] (R. pp. 240–242).

Despite the Director's very public June 28, 2013 notice to the provider community that projects would proceed without CON review, Providence apparently took no steps to monitor the projects of its competitors being approved by DHEC during the time DHEC was not issuing CONs.[9] For reasons not appearing in the record, Providence decided on April 9, 2014, to send DHEC a Notice of Affected persons letter with regard to any cardiac projects undertaken by LMC during the "suspension" of the CON program. (R. pp. 269–270). On that same day, Providence also filed a Freedom of Information Act request with LMC seeking information regarding any projects approved by DHEC during the suspension of the CON program. (R. p. 268). On April 29, LMC's counsel provided Providence's counsel LMC's timely response to Providence's FOIA request to Providence's counsel. (R. p. 267). On May 14, 2014, some 215 days after DHEC notified LMC of its approval of LMC's use of the Second OR, Providence filed its request for a final review conference before DHEC's Board. (R. p. 266).

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[7] A "Report of Visit" is, as its name indicates, a report issued at the end of an inspection visit pursuant to which the Department notifies the inspected facility of any observed inconsistencies with applicable licensing standards set forth in 3 S.C.Code Ann.Regs. 61-16.

[8] LMC performed open heart surgery procedures in the Second OR from October, 2013, until it was ordered by the ALC to cease utilization in its September 22, 2014 Order to Enforce Automatic Stay. (R. p. 85).

[9] As argued later in this brief, the ALC denied LMC's Motion to Dismiss and granted Providence's Motion for Summary Judgment with no factual evidence or inquiries into when Providence knew or should have known of DHEC's approval of LMC's projects. Without any such evidence, the ALC concluded that Providence did not know until April 29, 2015, when LMC timely responded to Providence's request for information under the Freedom of Information Act.

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT ERRED IN CONCLUDING THAT PROVIDENCE'S REQUEST FOR REVIEW WAS TIMELY UNDER SECTION 44-1-60 DESPITE PROVIDENCE'S FAILURE TO FILE ITS REQUEST WITHIN 15 DAYS OF THE DATE DHEC DELIVERED NOTICE OF ITS DECISION TO LMC.

This Court may reverse or modify a decision of the ALC if the substantial rights of the appellant have been prejudiced because the 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.

Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Associates of S.C., LLC, 387 S.C. 79, 90, 690 S.E.2d 783, 788-89 (2010); *see also* S.C. Code Ann. § 1-23-380(5).

The South Carolina Administrative Law Court is an agency of the executive branch. S.C. Code Ann. § 1-23-500 ("There is created the South Carolina Administrative Law Court, which is an agency and a court of record within the executive branch of the government of this State."). As such, the ALC is a creature of statute with only those powers that are expressly delineated in the South Carolina Constitution and in the statutory law. It does not operate in equity. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 601, 757 S.E.2d 408, 418 (2014), reh'g denied (May 22, 2014); *See also Mungo v. Smith*, 289 S.C. 560, 564, 347 S.E.2d 514, 517 (Ct. App. 1986) ("It is elementary law that administrative agencies are creatures of statute and their power is dependent upon statute, so that they must find within the statute warrant for the exercise of any authority which they claim.").

Further, "[t]he General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the

ALC's powers." *Amisub of S.C. Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 585; 743 S.E.2d 786, 709 (2013). In section 1-23-600(A), the General Assembly sets forth the relevant parameters of the ALC's jurisdictional powers as follows:

> An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases. . . .

DHEC is a department of the executive branch whose decisions are subject to contested case review by the ALC in accordance with laws and regulations governing DHEC decisions.

S.C.Code Ann. § 44-1-60(A) provides with regard to DHEC that "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." Section 44-1-60(E)(1) provides that:

> Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified. Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail. Notice of staff decisions for which a department decision is not required pursuant to subsection (D) must be provided by mail, delivery, or other appropriate means to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified.

Section 44-1-60(E)(2) provides that:

> The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person.

Thus, under section 44-1-60(E), in order to receive notice with regard to a DHEC decision, a person must request to be notified as an affected person and in order to timely appeal such decision, a person must file its request for review by the Board within fifteen days of receipt of such notice.

In this case, Providence failed to timely file its Request for Final Review to the Board within the time provided by the only applicable law for making the request. The ALC erroneously found that it could exercise jurisdiction over Providence's challenge, even though (1) Providence did not request notification as an affected person until months after the Department issued its decision approving LMC's Second OR and (2) Providence did not file its Request for Review within the statutory timeframe. Further, the ALC found Providence's Request for Review to be timely, notwithstanding (1) and (2) above, based on facts not in evidence.

Despite wide-spread knowledge in the provider community of the suspension of the CON program and despite Director Templeton's publicly-posted memorandum indicating that new projects would be moving forward without CONs, Providence did not request to be notified of any licensing or construction decisions regarding LMC projects until April 9, 2014, when it served a letter indicating affected person status on DHEC. (R. pp. 269–270). The Report of Visit was issued to LMC on October 11, 2013—nearly six months ***before*** Providence requested notification. (R. pp. 211–212). Under § 44-1-60(E), a party must request to be notified as an affected person prior to a decision in order to be entitled to receive notice from DHEC of the decision. Thus, Providence was not entitled to notice from DHEC when the Report of Visit was issued and delivered to the LMC.

In holding that Providence timely filed its request for review in this case, the ALC excused Providence's failure to request notice on the grounds that neither LMC nor DHEC published notice specifically indicating the LMC was seeking use of the Second OR.[10] (R. p. 53; R. pp. 29–30). In making this conclusion, the ALC ignores that no public notice is required with regard to Reports of Visit. The ALC also ignores that Providence, along with every other healthcare provider in the State, had notice from the Director's June 28, 2013 memorandum that no CON filings would be accepted and, consequently, no notices regarding CONs would be published. As stated in the memorandum, suspension of the CON program would have "the practical effect of allowing new and expanding health care facilities to move forward without the Certificate of Need Process." (R. p. 209).

Because DHEC provided public notice that projects would proceed outside the usual CON process, Providence was required to take certain basic steps to preserve its rights. Those steps were to place DHEC on notice of its interest in its competitors projects and to request that DHEC provide Providence with notice of any decisions regarding such projects.

In *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 390 S.C. 418, 702 S.E.2d 246 (2010), the South Carolina Supreme Court was asked to decide whether the petitioner had timely filed its request for review with the DHEC Board. In that case, the petitioner did not receive notice of the DHEC decision at issue until more than fifteen days had elapsed from the

[10] Section 44-1-60(B) provides that "the department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings.

date of notice to the applicant. *Id.* at 422–23, 702 S.E.2d at 248–49. The petitioner relied on *Hamm v. South Carolina Public Service Commission*, 287 S.C. 180, 336 S.E.2d 470 (1985), and argued that the statutory fifteen days cannot begin to run until a party receives actual notice of the decision. *South Carolina Coastal Conservation League* at 426, 702 S.E.2d at 250. The Supreme Court disagreed, strictly construing the fifteen day timeframe and holding that section 44-1-60(E) "clearly and unambiguously provides that the decision is final fifteen days after notice is mailed to the applicant." *Id.* at 427, 702 S.E.2d at 251.

In distinguishing *Hamm*, the Supreme Court noted that, in *Hamm*, the Court was required to read a notice requirement into § 1-23-380(b) to avoid the absurd result that an agency could avoid review of its decisions simply by failing to send notices of the decisions to interested persons. *Id.* The Court found that § 44-1-60(E) does not suffer from the same infirmity as did § 1-23-380(b) because § 44-1-60(E) contains a requirement that the Department send notices of its decision to the applicant and to affected persons who have asked to be notified. *Id.*

In *South Carolina Coastal Conservation League,* the Court found that, because the petitioner had requested to be notified of the DHEC decision at issue, the Court found that the petitioner had a right to notice of the decision simultaneous with the applicant's notice. *Id.* at 428–429, 702 S.E.2d at 251-252. The Court found that such simultaneous notification would give all parties possessing a right to challenge the decision an equal opportunity to do so within the statutory time period. *Id.* at 429, 702 S.E.2d at 252. The petitioner in *South Carolina Coastal Conservation League* did not receive the simultaneous notice as required even though it had properly requested to be provided

notice. The Court found that, under those facts, it was appropriate to count the fifteen day time period as running from the time the petitioner received notice of the decision, not the applicant. *Id.* Key to the Supreme Court's holding was that the petitioner properly had requested to be notified of DHEC's decision. *Id.* at 431, 702 S.E.2d at 253. If the petitioner had not raised its hand at the appropriate time and declared itself an affected person entitled to notice, the petitioner would not have had a statutory right to be notified and the DHEC decision would have become final fifteen days after delivery to the applicant. *Id.*

The Supreme Court's decision in *South Carolina Coastal Conservation League* provides two critical points of law that determine the outcome of the issue at hand: (1) a person must request to be notified in order to have a right to simultaneous notification, and (2) by operation of the statute, a DHEC decision becomes final fifteen days after the last notification required by the statute is given.

Providence did not request to be notified of DHEC decisions approving its competitors projects when DHEC publicly announced on June 28, 2013, that it intended to approve such projects without regard to the CON program and the requirements regarding publication of the filing of CON applications. (R. pp. 48–49; R. p. 38). Instead, Providence waited until April 9, 2014, to notify DHEC of its status as an affected person with regard to any LMC cardiac projects. (R. pp. 269–270). Furthermore, despite both LMC and DHEC being government agencies subject to the Freedom of Information Act, Providence did not attempt to obtain information concerning DHEC's approvals of LMC projects until April 9, 2014, when it served such a request on LMC. (R. p. 268).

Providence offered no evidence as to why it waited over seven months to inquire about DHEC's activities with regard to LMC, nor did Providence explain what eventually prompted it to attempt to preserve its rights when it did.[11] The only evidence before the ALC was that Providence failed to request that it be provided notice of DHEC decisions and that it failed to request review of a DHEC decision it was allegedly aggrieved by within the time period required by statute for such requests.

Because Providence failed to timely file its Request for Review of DHEC staff's approval of LMC's Second OR, that decision became final and was no longer subject to review by the Board or by the ALC. The ALC erred in finding otherwise. Because the ALC lacked jurisdiction to hear Providence's case, all of the Orders appealed from must be vacated.

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[11] The decision of the ALC that Providence timely filed its request for review is also affected by error of law because a genuine issue of material fact exists as to when Providence knew of DHEC's decision. *See* Rule 56(c),SCRCP (stating that a motion for summary judgment may be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); *see also Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008) ("Summary judgment is inappropriate where further inquiry into the facts of the case is necessary to clarify the application of law.").

In its April 9, 2014, letter to DHEC asking for notification as an affected person, Providence specifically referred to LMC's development of a third cardiac catheterization lab and new or renovated operating rooms. (R. p. 269). The specificity of this letter indicates that Providence had some knowledge of DHEC's approval of the projects mentioned at LMC. Providence did not offer any affidavits or testimony establishing when it received notice despite LMC's having met its *prima facie* burden of demonstrating that Providence's request for review was not timely filed under the law. Absolutely no evidence in the records supports the ALC's finding that Providence did not receive notice of DHEC's decision until LMC provided the decision to it on April 29, 2015.

II. THE ADMINISTRATIVE LAW COURT ERRED IN GRANTING PROVIDENCE'S MOTION FOR SUMMARY JUDGMENT AS TO LMC'S ESTOPPEL CLAIMS WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO THOSE CLAIMS.

III. THE ADMINISTRATIVE LAW COURT ERRED IN HOLDING THAT DHEC COULD NOT BE ESTOPPED FROM ENFORCING A CERTIFICATE OF NEED REQUIREMENT FOR LMC'S SECOND OPEN HEART SURGERY SUITE NOTWITHSTANDING THE DHEC DIRECTOR'S PRIOR ASSERTIONS TO LMC THAT THE PROJECT COULD PROCEED WITHOUT CON REVIEW AND LMC'S REASONABLE RELIANCE THEREON.

DHEC has been designated by the General Assembly as the sole state agency for control and administration of the granting of Certificates of Need (CON) and the licensure of health facilities. S.C. Code Ann. § 44-7-140 (2002); *Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc. of S.C., LLC*, 387 S.C. 79, 83, 690 S.E.2d 783, 785 (2010). As such, the Department has the exclusive subject matter jurisdiction to determine whether a violation of the CON Act has occurred. *Dema v. Tenet Physician Serv. – Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 433 (2009); *Inmed Diagnostic Serv., LLC v. MedQuest Assoc., Inc.*, 358 S.C. 270, 594 S.E.2d 552 (2004). There is no private right of enforcement for alleged violations of the CON and licensing laws. *Dema*, 383 S.C. at 122, 678 S.E.2d at 434.

In responding to Providence's Motion for Summary Judgment, LMC argued that consideration of such a motion was premature because material questions of fact remained with regard to whether LMC could continue to operate its Second OR as approved by DHEC without the need for CON review. LMC asserted as part of this argument that, even if the ALC determined that a CON was required prior to DHEC's approval of LMC's Second OR, DHEC should be estopped from enforcing that requirement because of the statements of the Director that no CON would be required and

because of DHEC's actions in approving LMC's Second OR and allowing its development and use without regard to CON requirements. (R. pp. 228–251).

The ALC rejected LMC's assertion of the need for factual development of this issue and determined that, as a matter of law, DHEC could not be estopped in this case. This determination by the ALC is affected by error of law and should be reversed.

Under the law, "[a] governmental body is not immune from the application of the doctrine of estoppel where its officers or agents act within the scope of their authority." *Oswald v. Aiken County*, 281 S.C. 298, 302, 315 S.E.2d 146, 149 (1984). To prove estoppel against the government, one must show: (1) lack of knowledge and lack of means to obtain the knowledge of the truth as to the facts in question; (2) justifiable reliance on the government's conduct; and (3) a prejudicial change in position. *Bishop v. City of Columbia*, 401 S.C. 651, 664, 738 S.E.2d 255, 261 (2013).

LMC received the June 28, 2013 memorandum of the Director addressed to the regulated community of which LMC is a part that communicated DHEC's intention to suspend operation of the CON program effective July 1, 2013. In light of this directive from DHEC and before developing its Second Open Heart Suite, LMC met with the Director and members of her staff to determine exactly what steps LMC needed to take in order to meet DHEC's requirements for approval of a Second OR. (R. pp. 240–242; R. pp. 211–212). At that meeting, the Director affirmed to LMC that no CON would be required in order for LMC to utilize its Second OR. LMC was advised of the actions it needed to take to gain DHEC approval and LMC followed those instructions and took those actions.

DHEC should be estopped from enforcing a CON requirement for the Second Open Heart Suite because (1) Director Templeton acted within the scope of her authority when she issued the June 28, 2013 letter that stated the Department's intention to temporarily suspend operation of the CON program due to lack of appropriated funds; (2) LMC lacked knowledge that the Director of the sole agency charged with administering the CON program was wrong in her interpretation of the effect of the failure of the General Assembly to override the Governor's veto of funds to administer the CON program and the Supreme Court would later require DHEC to fund the program with other appropriated funds; (3) because DHEC is the sole agency charged with CON administration, LMC reasonably relied upon Director Templeton's directive regarding CON requirements and, in particular, regarding LMC's authority to develop and use a Second OR without CON review; and (4) LMC suffered a prejudicial change in position when it made capital expenditures and began using the Second Open Heart Suite in reliance on Director Templeton's statements and assurances. At a minimum, genuine issues of material fact exist as to the above elements, and the ALC erred in granting summary judgment to Providence and denying LMC the opportunity to develop the facts necessary to advance its estoppel argument.[12]

[12] In its Amended Order Granting Partial Summary Judgment, the ALC relied upon *Amisub* to support its finding that Director Templeton exceeded the scope of her authority in issuing the June 28, 2013 letter and that LMC had no right to rely upon the letter. (R. pp. 43–44). *Amisub* does not support the ALC's reasoning. The Supreme Court addressed three issues in *Amisub*: (1) whether the Governor's line item veto nullified the CON program or just the funding for the CON program; (2) whether the General Assembly's failure to override the veto evidenced an intent to suspend the CON program; and (3) whether the Department was required to fund the CON program in the absence of funding from general appropriations. 407 S.C. at 411–18, 757 S.E.2d at 592–602. The Court did not address the scope of the Director's authority, whether any person could rely upon the Director's statement, or what effect the *Amisub* ruling had on any projects that had been implemented during the time DHEC was not operating the program. Furthermore, LMC was personally advised by the Director with regard to the establishment of its Second OR. *Amisub* is certainly not dispositive of that portion of LMC's estoppel claim.

A. Director Templeton Acted Within the Scope of Her Authority.

The Department is by law the sole agency designated to control and administer the granting of Certificates of Need. S.C. Code Ann. § 44-7-140 ("The department is designated the sole state agency for control and administration of the granting of Certificates of Need and licensure of health facilities and other activities necessary to be carried out under this article."). The Director of the Department is the governing authority of the Department. *See* S.C. Code Ann. § 1-30-10(B)(1)(i) ("The governing authority of each department shall be: (i) a director or a secretary, who must be appointed by the Governor with the advice and consent of the Senate . . . ."). "The governing authority of a department is vested with the duty of ***overseeing, managing, and controlling the operation, administration, and organization of the department.***" S.C. Code Ann. § 1-30-10(D) (emphasis added).

In this case, DHEC's decision to interpret the failure of the General Assembly to override the Governor's veto of funding for the CON program as a "suspension" of the program was made and communicated to LMC by the DHEC Director. (R. p. 209). The DHEC Director clearly is authorized by statute to speak for DHEC and to determine the control and operation of the agency. No other agency, and, therefore, no person in the executive branch other than Director Templeton, was authorized to determine how the CON program would be administered in the absence of funding. Therefore, Director Templeton was acting wholly within the scope of her authority when she issued the June 28, 2013 memorandum. *See* S.C. Code Ann. §§ 1-30-10(B)(1)(i) and (D). *See also County of Charleston v. Nat'l Advert. Co.*, 292 S.C. 416, 418, 357 S.E.2d 9, 10 (1987) (applying estoppel against the county to prevent it from revoking permits issued in

contravention of the zoning ordinance because "[t]he interpretation given by Simmons was clearly within the scope of his authority since he is the Building Inspector and is designated in the ordinance as the official charged with its enforcement.") *See also Oswald v. Aiken County*, 281 S.C. 298, 303, 315 S.E.2d 146, 150 (Ct. App. 1984)(Because the county had the authority to pay employees for compensatory time, such action was not an *ultra vires* act and; therefore, the county could be estopped from denying an employee payment for compensatory time).

As noted, at a minimum, a genuine issue of material fact exists as to whether the Director was acting within the scope of her authority when she issued the June 28, 2013 letter and discussed the requirements for the Second Open Heart Suite with LMC. In *Bishop v. City of Columbia*, 401 S.C. 651, 738 S.E.2d 255 (Ct. App. 2013), the Court of Appeals found that whether a governmental employee's statements were made outside of the scope of his authority and whether a person reasonably relied upon those assertions are questions of fact. In *Bishop*, the retirees claimed they relied upon representations made by city employees that they were entitled to free health insurance benefits after retirement when making employment decisions. The City countered that argument, stating that the employees' representations could not be relied upon as they were contrary to the plan documents. Importantly, the Court refused to hold that the retirees were charged with "knowledge of the extent to which the City's employees were incorrect," and instead found that a question of fact existed as to "whether these explanations were authorized and reasonably relied upon." *Id.* at 667, 738 S.E.2d at 262.

B. LMC Justifiably Relied to Its Detriment Upon Director Templeton's Statements and Lacked Knowledge that Such Statement were Incorrect.

LMC was justified in relying upon the Director's statements because the Director is empowered by statute as the governing authority for DHEC. *See* S.C. Code Ann. § 1-30-10(D). Despite the ALC's erroneous ruling, LMC could not have been "on 'notice' that the Department's interpretation of the state of the CON program was incorrect." (R. p. 44). The ALC's assertion that a reading of the CON Act would have been sufficient to know that the Department's interpretation was incorrect is overly simplistic.

The "incorrectness" of the Department's interpretation of the status of the Certificate of Need program in light of the veto by the Governor and the House of Representative's failure to override the veto was not *obviously* contrary to the law[13] and, therefore, could not be determined by a simple reading of the statute. When LMC acted in reliance on the authorized statements of the Director of the agency charged with issuing Certificates of Need, the Supreme Court had not yet issued its decision in *Amisub*.[14] LMC, in an effort to meet the needs of its patients, took the Director at her word and then initiated discussions with the Director and her staff to ensure that it was proceeding in the legally appropriate manner. LMC was not on notice that DHEC's interpretation of the state of the CON program was incorrect. See *Southern Development Land and Golf Company, Ltd. v. South Carolina Public Service Authority*, 311 S.C. 29, 34, 426 S.E.2d 748, 750 (1993)(South Carolina Public Service Authority was estopped from condemning a portion of plaintiff's property for the construction of a high voltage

[13] *See Jackson v. Sanford*, 398 S.C. 580, 731 S.E.2d 722 (2011).

[14] *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control,* 407 S.C. 583, 757 S.E.2d 408 (2014), reh'g denied (May 22, 2014).

electric transmission lines after plaintiff was held to have reasonably relied on the legally nonbinding assurances of the Authority's Executive Vice President that plaintiff's property would not be obstructed by the Authority's overhead transmission lines.)

Further, because LMC has justifiably relied to its detriment on Director Templeton's assurance in making capital expenditures to develop its Second OR, it would be inequitable to allow DHEC to reverse its approvals. In *Kerr v. City of Columbia*, 232 S.C. 405, 102 S.E.2d 364 (1958), a property owner was advised by the city that her property was zoned for business, but she later was denied a building permit on the basis that the property was zoned for residential use. The master and circuit court found that the property owner was entitled to the permit. On appeal, the Supreme Court agreed, holding:

> The official of Eau Claire had previously told the interested inquirers concerning the property that it was zoned for business. Upon the ordinance and those assurances, they acted. ***Repudiation would be unconscionable.*** Equity must intervene and treat the permit as having been issued.

Kerr v. City of Columbia, 232 S.C. 405, 412, 102 S.E.2d 364, 367 (1958) (emphasis added). *See also Landing Development Corporation v. City of Myrtle Beach*, 285 S.C. 216, 329 S.E.2d 423 (1985) ("To allow the City to repudiate its former interpretation of permissible rentals and the statements of its zoning director, based upon the re-assessment of the meaning of an undefined term in the ordinance, would be unconscionable.").

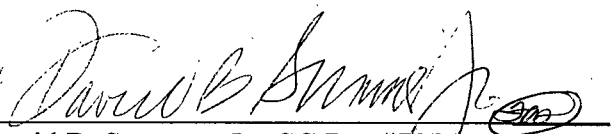
In this case, LMC justifiably relied upon the statements of Director Templeton and took extra actions to ensure that it was complying with the law as DHEC was interpreting and enforcing it at the time. It would be inequitable to find that LMC's

Second Open Heart Suite may not be operated even though it complied with the law at the time it was implemented.

CONCLUSION

For the reasons stated above, the orders of the ALC appealed from in this case should be vacated for lack of jurisdiction, or, alternatively, reversed and remanded to the ALC to allow LMC the opportunity to proceed with discovery and develop the necessary facts. Further, if the Court determines that no factual findings are necessary on the issue of estoppel, then LMC requests this Court find that the ALC erred in not finding the Department is estopped and remand the case to the ALC for entry of the appropriate order.

Respectfully submitted,



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February 17, 2016

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 2014-ALJ-07-0332-CC

Sisters of Charity Providence Hospitals, ...Respondent,

v.

South Carolina Department of Health and Environmental Control and Lexington County Health Services District, Inc. d/b/a Lexington Medical Center,

Of Whom South Carolina Department of Health and Environmental Control is the .....Respondent,

and Lexington County Health Services District, Inc. d/b/a Lexington Medical Center is the .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

The undersigned hereby certifies that on February 17, 2016 s/he has caused a copy of the **BRIEF OF APPELLANT** to be served upon all counsel of record by hand delivering a copy of the same addressed as follows:

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