

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

RECEIVED
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SC Court of Appeals

Appellate Case No. 2019-001159
Docket 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.

**RESPONDENT SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL
CONTROL'S INITIAL BRIEF**

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STATEMENT OF ISSUES ON APPEAL¹

- (1) Whether the Administrative Law Court exceeded its authority by ruling upon the validity and constitutionality of MUSC Strategic Ventures and MUSC Health Cancer Care Network, LLC.
- (2) Whether the Administrative Law Court erred in ruling upon issues that were not raised to the Department during staff review of the Certificate of Need application.
- (3) Whether the Administrative Law Court erred in finding that the Medical University Hospital Authority was not the “actual licensee” for purposes of the Certificate of Need application.

STATEMENT OF THE CASE

Respondent South Carolina Department of Health and Environmental Control (“Department”) adopts Appellant’s Statement of the Case.

STANDARD OF REVIEW

In an appeal of a final decision of the ALC, the Court may not substitute its judgement for that of the ALC as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-610(B). However, the Court may reverse or modify a decision of the ALC if it 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

¹ The Department declines to address any issues listed in Appellant’s Statement of Issues on Appeal not listed in the Department’s Statement of Issues on Appeal.

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

FACTS

The Medical University Hospital Authority (“MUHA”) submitted a Certificate of Need (“CON”) application to the Department on May 22, 2017, for the establishment of a new radiation therapy center in Berkeley County, to be named MUSC Radiation Therapy Center – Berkeley. (DHEC Trial Ex. 1 at pp. 1, 3). The CON application listed the licensee of the proposed new center as MUHA, a state government entity which would have ownership and control over the proposed new center. (DHEC Trial Ex. 1 at pp. 3-4, 13-14).

MUHA indicated in the CON application that it proposed to utilize a management company called MUSC Cancer Care Network, LLC (“the Network”), a Delaware limited liability company licensed to do business in South Carolina. (DHEC Trial Ex. 1 at pp. 5-6). Two entities have ownership interest in the Network: Alliance Oncology, LLC (51% membership interest) and MUSC Strategic Ventures (“MSV”) (49% membership interest). (DHEC Trial Ex. 1 at p. 6).

MUSC’s CON application was submitted under South Carolina Health Plan enacted August 13, 2015. The Department identified the following project review criteria as of most relative importance to its review of the CON application: Community Need Documentation; Distribution (Accessibility); Medically Underserved Groups; and Financial Feasibility. (DHEC Trial Ex. 1 at pp. 369-370).

Trident Medical Center, LLC, d/b/a Trident Medical Center (“Trident”), submitted notice to the Department during the CON application review process that it was an affected person in opposition to the application. Trident claimed there was no need for MUHA’s proposed project

and claimed the project would result in an adverse impact upon Trident; for those reasons, Trident argued the CON application did not comply with the applicable project review criteria and should be denied. (DHEC Trial Ex. 1 at pp. 360-361). At no point during the Department's review of the CON application did Trident raise or the Department consider any issues regarding the legality or constitutionality of MSV or the Network.

Department staff issued a decision on November 22, 2017, approving MUHA's CON application on the basis that it complied with the South Carolina Health Plan and applicable project review criteria set forth in the CON Regulation. (DHEC Trial Ex. 1 at pp. 375-378). Trident filed a request for final review with the Board of Health and Environmental Control, which declined to conduct a final review conference.

Trident filed a contested case with the ALC, which presided over a five-day contested case hearing. During the contested case hearing, the parties presented numerous witnesses and evidence addressing the merits of MUHA's CON application and whether it complied with applicable standards and project review criteria for a new radiation therapy center. At the close of all evidence in the contested case hearing, Trident moved the ALC for judgment in its favor, arguing – for the first time since MUHA's CON application was filed – that the Network was an unconstitutional joint venture. By order filed May 14, 2019, the ALC granted Trident's motion, finding MSV and the Network were illegal, unconstitutional entities, and further, that MUHA was not the actual licensee for the proposed project since the Network, as management company, would be responsible for day-to-day operations of the proposed project. For those reasons, the ALC denied MUHA's CON application.

ARGUMENT

I. The ALC exceeded its authority by ruling upon the constitutionality of MSV and the Network during the contested case hearing challenging MUHA's CON application.

The CON Act and the CON Regulation address the scope of the Department's review of a CON application. The CON application "must address all applicable standards and requirements set forth in departmental regulations, Project Review Criteria of the department, and the South Carolina Health Plan." S.C. Code Ann. § 44-7-200(A). "On the basis of staff review of the application, the staff shall make a staff decision to grant or deny the Certificate of Need." S.C. Code Ann. § 44-7-210(C). "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." S.C Code Ann. Regs. 61-15 § 308.

The department may not issue a Certificate of Need unless an application complies with the South Carolina Health Plan, Project Review Criteria, and other regulations. Based on project review criteria and other regulations, which must be identified by the department, the department may refuse to issue a Certificate of Need even if an application complies with the South Carolina Health Plan.

S.C. Code Ann. § 44-7-210(B).

Nothing in the CON Act, CON Regulation, or South Carolina Health Plan authorizes the Department to rule upon the constitutionality of a legal entity listed in a CON application. The Department's review of MUHA's CON application was limited to whether it complied with the State Health Plan and regulatory criteria. While the identity of the proposed license and proposed management company, and the identities of individuals and/or legal entities with ownership interest in them, are relevant to the CON application, questions regarding the constitutionality of any such legal entities are not a legitimate part of the CON review process. *See SGM-Moonglo,*

Inc. v. S.C. Dep't of Revenue, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008) (The ALC properly declined to consider a restrictive covenant prohibiting the sale of alcoholic beverages on the property where a proposed business would be located in granting a beer and wine permit; administrative agencies only have the powers conferred on them by law, and restrictions in the chain of title of a proposed location “are not a legitimate concern of the ALC in determining whether the location is suitable” for a permit under the Alcohol and Beverage Control laws.).

II. The ALC erred in ruling upon issues that were not raised to the Department during staff review of the CON application.

The CON Act sets forth the procedures to be used in the review of a CON application and in a contested case challenging a decision on a CON application. S.C. Code Ann. § 44-7-210. Per statute, “a person may not file a request for final review in opposition to the staff decision on a Certificate of Need unless the person provided written notice to the department during the staff review that he is an affected person and *specifically states his opposition to the application under review.*” S.C. Code Ann. § 44-7-210(C) (emphasis added). Further, [t]he issues considered at the contested case hearing considering a Certificate of Need are *limited to those presented or considered during the staff review.*” S.C. Code Ann. § 44-7-210(E).

Trident did not raise the legality or constitutionality of MSV or the Network to staff as part of its specific opposition to MUHA’s CON application. The Department did not consider the legality or constitutionality of either entity during staff review of the CON application. Therefore, the ALC erred as a matter of law in ruling on the issues of the legality and constitutionality of MSV and the Network in its final order in the contested case. S.C. Code Ann. §§ 44-7-210(C) and (E).

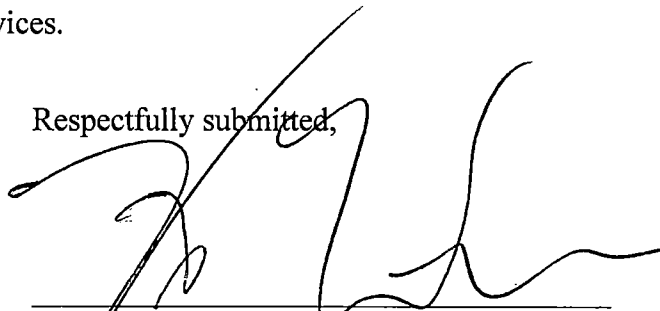
III. The ALC erred in finding that MUHA was not the “actual licensee” for purposes of the CON application.

The CON application form requires the applicant to identify the licensee or prospective licensee, which is the entity to whom the CON will be issued and the legal entity with ultimate responsibility and authority for the conduct of the facility or service; the owner of the business. S.C. Code Ann. Regs. 61-15 § 202.2.b.(8)(b). MUHA’s CON application for the proposed new radiation therapy center identified MUHA as the licensee. (DHEC Trial Ex. 1 at pp. 3, 13-14). It further identified the governing body of the licensee as the MUHA Board of Trustees. (DHEC Trial Ex. 1 at p. 14). The ALC erred in finding that MUHA was not the “actual” licensee simply because MUHA intended to utilize a management company, as identified in the CON application.

CONCLUSION

For the reasons stated, the Court should reverse the ALC’s decision denying MUHA’s CON application for radiation therapy services.

Respectfully submitted,



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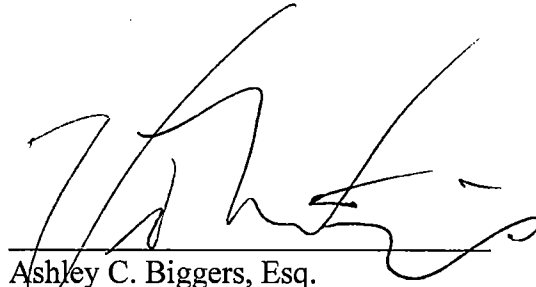
Appellant.

PROOF OF SERVICE

I hereby certify that on January 13, 2020, I served *Respondent South Carolina Department of Health and Environmental Control's Initial Brief* on all parties of record via U.S. Mail, with proper postage affixed and addressed as follows:

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VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
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Columbia, SC 29201

Re: Trident Medical Center, LLC, d/b/a Trident Medical Center vs. South Carolina
Department of Health and Environmental Control and Medical University Hospital
Authority, d/b/a MUSC Radiation Therapy Center - Berkeley
Appellate Case No.: 2019-001159

Dear Ms. Kitchings:

Enclosed please find for filing the original and two copies of ***Respondent South Carolina Department of Health and Environmental Control's Initial Brief***. It would be appreciated if your office would file the original and copies in accordance with the Court's procedures and return one filed copy to me.

By copy of this letter and as evidenced in the enclosed ***Proof of Service***, I am hereby serving a copy of the same on all counsel of record. Should you have any questions please do not hesitate to contact the undersigned.

With kindest regards, I am

Sincerely,

A handwritten signature in black ink, appearing to read "Vito M. Wicevic", is written over a horizontal line.

Vito M. Wicevic

Enclosures

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