THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Case No. 18-ALJ-07-0100-CC
Appellate Case No. 2019-001159

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.

FINAL BRIEF OF APPELLANT

Daniel J. Westbrook
Travis Dayhuff
A. Mattison Bogan
William C. Wood, Jr.
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

(1) Whether the Administrative Law Court exceeded its statutory 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 by ruling upon issues that were not timely raised.

(3) Whether the Administrative Law Court erred by adjudicating the rights of nonparties.

(4) Whether the Administrative Law Court erred in determining MUSC Strategic Ventures and MUSC Health Cancer Care Network, LLC were invalid, unconstitutional, or *ultra vires* entities that must be dissolved.

(5) Whether the Administrative Law Court erred in finding the Medical University Hospital Authority is not the "actual licensee."

STATEMENT OF THE CASE

This is an appeal from a contested case hearing before the South Carolina Administrative Law Court ("ALC"). In May 2017, the Medical University Hospital Authority ("MUHA"), which operates the hospitals affiliated with the Medical University of South Carolina ("MUSC"), filed an application with the South Carolina Department of Health and Environmental Control ("DHEC") to obtain a certificate of need ("CON") to expand its radiation therapy services by adding a sixth linear accelerator,[1] which would be placed in a new facility in the Nexton development in southern Berkeley County.[2] (MUHA CON Application, R. 1595, 1606–07). Trident Medical Center, LLC d/b/a Trident Medical Center ("Trident") challenged MUHA's CON application as an affected person under the State Certification of Need and Health Facility Licensure Act. *See* (Trident Affected Person Letter, R. 57).

On November 22, 2017, DHEC issued a staff decision approving MUHA's application for a CON. (Decision Granting CON for MUHA, R. 47–50). On December 15, 2017, Trident filed a request seeking review of this DHEC staff decision by the DHEC Board. (Trident's Request for Final Review, R. 68–72). The DHEC Board declined Trident's request. (Jan. 31, 2018 DHEC Letter, R. 54–55). Trident then filed a petition for administrative review and request for a contested case hearing with the ALC. (Petition for Contested Case Hearing, R. 37–45). In January 2019, the ALC held a five-day contested case hearing. *See generally* (Trial Tr., R. 90–1312). At the close of the evidence in the contested case hearing, Trident made an oral post-trial motion

[1] A linear accelerator is a device used to provide radiation treatment to cancer patients. *See* (2015 State Health Plan at pp. IX-2 and IX-3, Joint Tr. Ex. 5, R. 1333–34).

[2] The parties generally referred to the CON applicant as "MUSC" during trial and in ALC briefing. Because MUHA is the actual applicant and it is necessary to differentiate between MUSC and MUHA based on the issues raised in this appeal, this brief refers to the applicant by the shorthand term "MUHA" as a proxy for its proper name, Medical University Hospital Authority.

requesting a directed verdict. (Trial Tr. 1208–23, R. 1297–1310). Trident then filed a written motion for directed verdict on January 23, 2019. (Motion for Directed Verdict, R. 1999–2010). On February 25, 2019, MUHA filed a memorandum in opposition to Trident's motion. (MUHA's Memo in Opp. to Directed Verdict, R. 2031–48).

The ALC treated Trident's motion as a motion for judgment as a matter of law, granted the motion, and denied MUHA's application for a CON on May 14, 2019. (ALC Or. of Judgment, R. 1–35). MUHA filed a motion to reconsider, which the ALC denied. (MUHA Motion to Reconsider, R. 2070–74; ALC Order Denying Motion to Reconsider, R. 36). MUHA appealed the ALC's order granting judgment in favor of Trident and the order denying MUHA's motion to reconsider.

STATEMENT OF FACTS

I. The Certificate of Need Process

The State Certification of Need and Health Facility Licensure Act (the "CON Act") governs the establishment of medical facilities and projects in South Carolina. *See* S.C. Code Ann. §§ 44-7-110 through -385. The General Assembly enacted the CON Act "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. The General Assembly designated DHEC as "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" the CON Act. S.C. Code Ann. § 44-7-140. The General Assembly also directed DHEC to promulgate regulations (the "CON Regulations") necessary to carry out DHEC's CON duties. S.C. Code Ann. § 44-7-150(3); S.C. Code Ann. Regs. 61-15 §§ 101 through 802.

Section 44-7-160 provides that a person or "health care facility" must obtain a CON before undertaking certain enumerated activities, such as constructing a new health care facility, changing the existing bed complement of a health care facility, making capital expenditures by or on behalf of a health care facility in excess of a certain threshold prescribed by regulation, or acquiring medical equipment that is to be used for diagnosis and treatment if the total project cost is in excess of an amount established by regulation. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 587, 743 S.E.2d 786, 792 (2013) (citing S.C. Code Ann. § 44-7-160). The CON Act defines a "health care facility" to include a radiation therapy facility such as the one at issue in this case. S.C. Code Ann. § 44-7-130(10).

To obtain a CON, a provider submits a CON application to DHEC that describes how the proposed project meets the applicable regulatory criteria. S.C. Code Ann. § 44-7-200. The applicable criteria vary according to the type of medical facility or service proposed, but generally include an analysis of several health care planning concepts, including the need for the service, adverse impact on existing providers, financial feasibility of the project, cost containment, and whether the project increases accessibility for patients. S.C. Code Ann. Regs. 61-15 § 802 (providing 33 categories of project review criteria that may be considered). The CON Act also requires DHEC to publish a State Health Plan, and CON applicants must show compliance with the State Health Plan. S.C. Code Ann. § 44-7-180; *see also* (2015 State Health Plan, Joint Tr. Ex. 5, R. 1330). In the State Health Plan, DHEC establishes standards for a CON for specific categories of healthcare services. S.C. Code Ann. Regs. 61-15 § 106. The State Health Plan also lists the project review criteria deemed most important in evaluating CON applications for each type of healthcare facility or service. *Id.* § 106(1)(d).

The 2015 State Health Plan, which is the plan applicable to MUHA's CON application, provides nine standards for a radiation therapy CON. (2015 State Health Plan at pp. IX-4 through IX-5, Joint Tr. Ex. 5, R. 1334–35). Those standards address the capacity and utilization rates of linear accelerators, service areas for radiation therapy units, and personnel requirements for the provision of radiation treatments. (*Id.*). The State Health Plan also includes two separate standards applicable to CON applications for new radiation therapy services (Standard 6) and those for expanding existing radiation therapy services (Standard 7). (*Id.*). Finally, the State Health Plan specifies which project review criteria in the CON Regulations are most important in evaluating CON applications for radiation therapy services, and it provides that "[t]he benefits of improved

accessibility will be equally weighed with the adverse effects of duplication in evaluating Certificate of Need applications for this service." (*Id.* at p. IX-6, R. 1336).

Once a CON application is complete, "affected persons" are notified and may oppose the issuance of a CON. *See* S.C. Code Ann. § 44-7-210(A). An "affected person" includes a person or entity "located in the health service area in which the project is to be located and who provide[s] similar services to the proposed project." S.C. Code Ann. § 44-7-130(1) & (15). DHEC may hold a public hearing to gather additional information and obtain public comment about the proposed project. *Amisub*, 403 S.C. at 588, 743 S.E.2d at 793 (citing S.C. Code Ann. § 44–7–210(B)). After reviewing the application, DHEC staff issues a "staff decision" approving or denying the CON application and notifies the applicant and affected persons. S.C. Code Ann. § 44-7-210(C); S.C. Code Ann. § 44-1-60(C) & (D). The applicant or an affected person may make a written request for final review of the staff decision on the CON application by the DHEC Board. *Id.*; S.C. Code Ann. § 44-1-60(E). If the DHEC Board grants the request for review, the DHEC Board conducts the review and issues a final agency decision on the CON application. S.C. Code Ann. § 44-1-60(F). If the DHEC Board declines the request for review, the DHEC staff decision becomes the final agency decision on the CON application. S.C. Code Ann. § 44-7-210(C) & (D); S.C. Code Ann. § 44-1-60(E) & (F). The applicant or an affected person may then request a contested case hearing before the ALC. S.C. Code Ann. § 44-1-60(G); S.C. Code Ann. § 44-7-210(E); *see also Amisub*, 403 S.C. at 589, 743 S.E.2d at 793.

The ALC conducts a *de novo* hearing and determines whether to approve or deny the CON application. *See Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). After the ALC issues its decision, an aggrieved party may appeal to this Court. S.C. Code Ann. § 44-7-220.

II. MUHA's Application for a Certificate of Need and DHEC's Review and Decision

In May 2017, MUHA filed its CON application to increase the capacity of the radiation therapy services provided by its Hollings Cancer Center by adding a sixth linear accelerator in a freestanding medical office building in the Nexton development in Berkeley County. (MUHA CON Application at 10, R. 1604). MUHA intended the project to benefit its patients living in the service area by providing improved access to radiation therapy. (*Id.*).

A. The Entities Involved in the Proposed Project

MUSC was founded in 1824 as the Medical College of South Carolina. (MUHA CON Application at 7, R. 1601). MUSC—along with its affiliates, MUHA and University Medical Associates of the Medical University of South Carolina ("UMA")[3] (often collectively referred to as MUSC)—is both a teaching hospital and South Carolina's only academic medical center. (MUHA CON Application at 7, R. 1601). MUSC has achieved international recognition and national acclaim as a premier biomedical research, educational, and clinical institution. (*Id.*). Its mission is "to provide excellence in patient care, teaching, and research in an environment that is respectful of others, adaptive to change, and accountable for outcomes." (*Id.*). MUSC's Hollings Cancer Center is one of the leading cancer treatment centers in the Southeast and provides patients with a full range of cancer specialties. (MUHA CON Application at 8, R. 1602). It is the only National Cancer Institute-designated cancer center in South Carolina. *See Hollings Cancer Center lands its highest score, receives NCI-designation renewal*, MEDICAL UNIVERSITY OF SOUTH CAROLINA (May 9, 2019), https://web.musc.edu/about/news-center/2019/05/09/hollings-cancer-center-receives-national-cancer-institute-designation-renewal, ("NCI-Designated Cancer Centers represent the top 4% of cancer centers in the United States. . . . NCI-designated cancer centers are

[3] UMA is MUSC's physician faculty practice plan. (ALC Or. of Judgment, R. 5).

characterized by scientific excellence and the capability to integrate diverse research approaches. They play a vital role in advancing the goal of reducing morbidity and mortality from cancer through innovative clinical trials that offer patients new drugs and treatment protocols that would be unavailable to them otherwise").

The General Assembly authorized MUSC to create MUHA in 2000. S.C. Code Ann. § 59-123-60(E). The statute authorized the members of MUSC's board of trustees to separately serve as the governing body of MUHA, which is charged with constructing, operating, and maintaining the hospitals and related premises, buildings and facilities, and infrastructure that were formerly the responsibility of MUSC. S.C. Code Ann. § 59-123-60(E)(4).

MUSC Strategic Ventures ("MSV") was formed by MUSC in September 2015 to affiliate with other entities to support the missions and programs of MUSC, UMA, and MUHA. (Trial Tr. 680, 759–60, R. 769, 848–49). As MUHA advised DHEC in its CON Application, MSV was "established at the direction, and for the support and benefit," of MUSC. (MUHA CON Application at 9, R. 1603). MSV is governed by an eight-member board of directors and "functions for charitable, scientific and educational purposes in support of MUSC (including MUHA) and University Medical Associates, and to lessen their burdens, by conducting activities that otherwise would be conducted by one or more of such entities." (*Id.* at 9–10, R. 1603–04).

Alliance Oncology, LLC ("Alliance") is a Delaware for-profit company and is a nationwide leader in radiation oncology and radiosurgery programs. (*Id.* at 6, R. 1600). Alliance partners directly with hospitals, physicians, and other healthcare providers to offer the latest oncology technologies to their patients. (*Id.*). Alliance assists oncology service providers with "back office" business operations, such as billing, collections, and information services. (Trial Tr. 795, R. 884).

The MUSC Health Cancer Care Network, LLC (the "Network")—a for-profit Delaware limited liability company that is authorized to transact business in South Carolina—is a joint venture between MSV and Alliance. (MUHA CON Application at 10, R. 1604). The Network was "organized to form a strategic relationship between Alliance and [MSV] for the development, operation, and management of the oncology service line for certain hospitals in South Carolina, in order to extend [MUSC's] reputation for academic excellence to various communities and Alliance's operations and marketing expertise with respect to oncology services." (Network Management Agreement at 1, MUHA Trial Ex. 4, R. 1509). Alliance owns 51% of the Network, and MSV owns 49%. (Trial Tr. 763–64, R. 852–53).

B. MUHA's CON Application

DHEC requires all CON applicants to provide a comprehensive range of information needed for DHEC staff to evaluate its CON Application under the CON Act, the CON Regulations, and the standards established by DHEC in the State Health Plan. *See generally* S.C. Code Ann. Regs. 61-15 § 202. Significantly, MUHA was required to disclose, and did disclose, detailed ownership information for the proposed licensee, MUHA, *id.* §202(2)(b)(8), as well as the same level of detailed ownership information for any entity engaged by MUHA to "manage or operate the facility or service," *id.* § 202(2)(b)(8)(i). (MUHA CON Application at 5–6, 15–16, R. 1599–1600, 1609–10). Accordingly, MUHA disclosed ownership information for the Network.

In the CON Application, MUHA established, and DHEC staff correctly recognized, that MUHA was the licensee of the proposed project. (MUHA CON Application at 3, R. 1597). Importantly, as a hospital licensed under state law and Medicare-certified under federal law, MUHA structured the proposed project to be an off-campus, outpatient department of Hollings Cancer Center that is part of its main hospital. (Trial Tr. 892–93, R. 981–82). Thus, as the

proposed licensee, MUHA proposed to be the organization "with whom rests the ultimate responsibility for compliance with [Regulation 61-16, DHEC's hospital licensing regulation]," *see* S.C. Code Ann. Regs. 61-16 § 201(J), and whose license would be subject to denial, suspension, revocation, or monetary penalties for failure to comply with the CON Act or DHEC regulations, S.C. Code Ann. § 44-7-320. In addition, for purposes of obtaining Medicare certification of the proposed radiation therapy facility and thus the ability to bill Medicare and other government payers for services rendered at the facility, MUHA's proposed project was premised on meeting the stringent federal requirements for "provider-based status." *See* 42 C.F.R. § 413.65.[4] Importantly, these Medicare requirements contemplate that a licensee such as MUHA can enter into a management contract for operation of an off-campus facility as long as certain conditions are met including, but not limited to, the condition that MUHA maintains significant control over the operations of the facility and integrates the administrative functions of the facility with those of MUHA. 42 C.F.R. § 413.65(h).

As required by DHEC in the CON Application, MUHA fully disclosed the ownership structure of the Network and the Network's role as a contracted manager of the proposed project. (MUHA CON Application at 5–6, 15–16, R. 1599–1600, 1609–10). Thus, upon MUHA's filing of the CON Application in May 2017, Trident had notice of the following: (i) MSV was incorporated as a non-member South Carolina non-profit corporation seeking tax-exempt status under section 501(c)(3) of the Internal Revenue Code and was established at the direction, and for the support and benefit, of MUSC; (ii) the Network is a for-profit entity incorporated in Delaware and authorized to conduct business in South Carolina; (iii) the Network is a joint venture between

[4] DHEC is deemed to have knowledge of and familiarity with these regulations through its Bureau of Certification, which functions as the state arm of the federal government enforcing Medicare and Medicaid certification requirements.

MSV and Alliance Oncology, with MSV holding a 49% membership interest and Alliance Oncology holding a 51% membership interest; and (iv) the facility would be licensed under MUHA's hospital license and managed under a management agreement by the Network. Accordingly, for the 21-month period between MUHA's filing of the CON Application and Trident's motion for directed verdict at the end of trial, Trident had knowledge of these facts. Nonetheless, it waited until its motion for directed verdict—after MUHA had presented its evidence responding to Trident's objections—to object to MUHA's CON application based on these facts.

C. Trident's Challenge to the CON Application

Trident challenged the CON application as an affected person under the CON Act on several grounds: (1) DHEC failed to consider MUHA's application and another application submitted by Roper St. Francis Hospital – Berkeley, Inc. ("Roper")[5] as "competing applications";[6] (2) no community need for an additional linear accelerator existed in the service area; (3) the project was an unnecessary duplication of services and would not increase accessibility to services; (4) the project was not "financially feasible" because the lack of community need for additional radiation therapy services in the service area rendered MUHA's ability to meet required utilization

[5] Around the time MUHA submitted its CON application, another entity filed a CON application to establish a linear accelerator in a new hospital in Berkeley County. Trident opposed the application, but the parties settled prior to the contested case hearing.

[6] "Competing applicants" are defined as two or more persons "who apply for Certificates of Need to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities." S.C. Code Ann. § 44-7-130(5). When DHEC receives multiple applications that qualify as "competing applications," it may grant only one application—the one that "most fully complies with the requirements, goals, and purposes of [the CON Act] and the State Health Plan, Project Review Criteria, and the regulations adopted by the department." S.C. Code Ann. § 44-7-210(B).

projections "questionable"; and (5) the project would substantially adversely impact other area providers, particularly Trident. *See generally* (Trident's Request for Final Review, R. 68–72). Trident raised no other grounds.

The DHEC staff approved MUHA's CON application. (Decision Granting CON for MUHA, R. 47–50). Trident filed a request for final review by the DHEC Board, but the DHEC Board declined the request. (Trident's Request for Final Review, R. 68–72; Jan. 31, 2018 DHEC Letter, R. 55–55).

III. The Contested Case Hearing Before the ALC

Trident filed a petition for a contested case hearing with the ALC. (Petition for Contested Case Hearing, R. 37–45). In its petition, Trident challenged DHEC's issuance of a CON to MUHA on the same five grounds it raised in its request to the DHEC Board for final review. (*Id.* at 7–8, R. 43–44). Trident then filed a prehearing brief raising the same arguments. (Trident's Prehearing Brief, R. 1981–85).

Over the course of a five-day trial, the parties presented evidence and argument addressing Trident's challenge to MUHA's CON application. Trident focused its opening statements and case-in-chief primarily on the theory that the proposed project would not accomplish the goals of the CON Act "given what's already available in the service area." (Trial Tr. 20, R. 109). Trident made several specific assertions: lack of community need; the proposed project would duplicate services; the proposed project would not improve access to services; the proposed project would not benefit medically underserved groups; and the proposed project did not satisfy the criteria in the State Health Plan. (Trial Tr. 18–22, R. 107–11). Trident also presented evidence and argument attempting to show MUHA failed to prove that its linear accelerator utilization over the previous

two years exceeded 80%, as required by Standard 7 of the State Health Plan. (Trial Tr. 23–29, R. 112–18; 2015 State Health Plan, Joint Tr. Ex. 5, R. 1335).

At the end of the contested case hearing, in a purported rebuttal to MUHA's case-in-chief, Trident recalled its expert witness. (Trial Tr. 1104, R. 1193). With the expert's testimony, Trident raised for the first time that MUHA was not the real owner of the proposed facility and therefore was not the proper CON applicant. (Trial Tr. 1158, R. 1247). At the close of all the evidence, Trident moved for judgment in its favor and argued—for the first time since MUHA filed its CON application—that MUHA's application should be denied because the Network was an unconstitutional joint venture. (Trial Tr. 1208–23, R. 1297–1312). Trident then filed a written motion raising the same argument. (Motion for Directed Verdict, R. 2005–10). Trident argued MUSC did not have authority to create "subsidiary or affiliated corporations" and neither MUSC nor MUHA may legally hold ownership interests "in a private, for-profit corporation (MUSC Network) that is majority owned and controlled by another private, for-profit company." (*Id.* at 8, 11, R. 2006, 2009). Trident claimed the Network is an unconstitutional joint venture and requested the ALC deny MUHA's CON application on that basis. (*Id.* at 11–12, R. 2009–10).

MUHA filed a memorandum in opposition to Trident's motion, arguing (1) the ALC does not have subject matter jurisdiction over Trident's claims that MSV and the Network are illegal; (2) Trident's claims that MSV and the Network are illegal were not as-applied constitutional claims arising from the application of the standards in the CON Act and CON Regulations; (3) Trident failed to raise the issue during the DHEC review process; and (4) Trident's claim that MSV and the Network are illegal fails on the merits. *See generally* (MUHA's Memo in Opp. to Directed Verdict, R. 2031–48).

The ALC granted Trident's motion. *See generally* (ALC Or. of Judgment, R. 1–35). It rejected MUHA's arguments in opposition, (*Id.* at 14–19, R. 14–19), and held MSV and the Network were "illegal or *ultra vires*" because MUSC had no authority "to create subsidiary or affiliated entities" and neither MUSC nor MUHA have the authority to create a joint venture with a private, for-profit company or to hold an ownership interest in a private, for-profit company. (*Id.* at 22–24, R. 22–24) (citing S.C. CONST. art. X, § 11). Consequently, the ALC found MSV and the Network must be dissolved. (*Id.* at 26, R. 26). According to the ALC, the "ultimate dissolution" of the Network required a "second inquiry" into whether MUHA's CON application complied with the CON Act and CON Regulations. (*Id.* at 27, R. 27). The ALC found "that upon the necessary dissolution of The Network, the project's ability to satisfy the [requirement] of Financial Feasibility, as submitted to, reviewed, and approved by DHEC through the attestations in the CON Application, is no longer present." (*Id.* at 28, R. 28).

Finally, the ALC interpreted the *de novo* review standard to allow it to consider another issue—not raised before DHEC or in Trident's motion—and found MUHA was "not the actual licensee of the proposed project as represented in the Application." (*Id.* at 29, R. 29). The ALC found that because the Network, as the management company, would control certain of the day-to-day administrative operations of the project, the Network was the owner of the project and, because Alliance owns 51% of the Network, *Alliance* is the actual "owner" of the proposed facility. (*Id.* at 33–34, R. 33–34). Based on these multi-layered findings on issues not timely raised, the ALC improperly concluded that MUHA did not hold the controlling interest in the project and was not the "actual licensee." (*Id.* at 34, R. 34). On that basis, the ALC denied MUHA's application for a CON. (*Id.* at 35, R. 35).

ARGUMENT

The ALC's decision must be reversed because the ALC exceeded its statutory authority by ruling on legal and constitutional issues that are not within its limited statutory authority, by considering issues not raised to DHEC nor timely raised in the contested case proceedings, and by purporting to adjudicate the rights of nonparties without providing them an opportunity to be heard. The ALC also erred by purporting to invalidate and order the dissolution of entities that have been authorized to transact business in South Carolina by another executive branch department. Finally, even if the ALC properly considered the legality or validity of MSV or the Network, it erred in finding the entities are illegal and in finding MUHA was not the proper CON applicant.

The Administrative Procedures Act governs appeals from the ALC. *Amisub*, 403 S.C. at 584, 743 S.E.2d at 791. In reviewing an ALC decision, this court may not substitute its judgment for the judgment of the ALC as to the weight of evidence on questions of fact, but it must reverse the ALC's ruling if the substantive rights of the appellant have been prejudiced because the ALC's ruling 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. § 1-23-380(5); *see also* S.C. Code Ann. § 1-23-610(B). However, the scope of the power of the ALC is a question of law, which this court reviews *de novo*. *S.C. Dep't of*

Consumer Affairs v. Foreclosure Specialists, Inc., 390 S.C. 182, 184, 700 S.E.2d 468, 469 (Ct. App. 2010).

I. The ALC exceeded its statutory authority by ruling on the validity of MSV and the Network.

The ALC's denial of MUHA's CON application must be reversed because the ALC exceeded its statutory authority by ruling on the constitutionality and validity of MSV and the Network.

A. The ALC is an executive branch court of limited jurisdiction.

The ALC is an executive branch department created by the General Assembly, and it operates as a court of limited jurisdiction. *Amisub*, 403 S.C. at 585, 743 S.E.2d at 791 (citing *Howard v. S.C. Dep't of Corrs.*, 399 S.C. 618, 733 S.E.2d 211 (2012)); S.C. Code Ann. § 1-23-500. It has only the authority granted to it by the General Assembly, and it cannot exceed that authority. *Id.*; *Foreclosure Specialists*, 390 S.C. at 186, 700 S.E.2d at 470. The Administrative Procedures Act authorizes the ALC to conduct contested case hearings regarding agency decisions and hear appeals of agency decisions. S.C. Code Ann. §§ 1-23-380, -505(3), & -600. The ALC's contested case jurisdiction allows it to conduct *de novo* hearings to determine whether parties should receive licenses, permits, and other approvals from state agencies. S.C. Code Ann. § 1-23-505(3); *Marlboro Park Hosp.*, 358 S.C. at 579, 595 S.E.2d at 854. Although the ALC conducts a *de novo* review, its review is confined to the issues raised to and considered by the agency. S.C. Code Ann. § 44-7-210(E) ("The issues considered at the contested case hearing considering a Certificate of Need are limited to those presented or considered during the staff review.").

The ALC does not have the power to rule on the constitutionality or validity of a law or regulation. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 38 (2011) (explaining the ALC cannot "decide facial challenges to a statute or regulation; those are

legal questions that are properly raised for the first time on appeal or in a declaratory judgment action before the circuit court"); *Drummond v. State*, 378 S.C. 362, 370, 662 S.E.2d 587, 591 (2008) ("Although appellant is not challenging the constitutionality of the regulation, he is challenging its validity under state law. Because the Administrative Law Court is part of the executive branch . . . it has no authority to rule on the facial validity of [a regulation]."). The ALC may determine only whether a statute or regulation, as applied to a particular party, violates that party's constitutional rights. *Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38 ("While it is true that AL[C]s cannot rule on a facial challenge to the constitutionality of a regulation or a statute, AL[C]s can rule on whether a law as applied violates constitutional rights." (alterations in original) (quoting *Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002))).

In a contested case hearing addressing DHEC's approval or denial of a CON application, the ALC's *de novo* review requires it to determine whether the CON application complies with the State Health Plan, the CON Act, and the project review criteria enumerated in the CON Regulations. *See* S.C. Code Ann. § 44-7-210(B) & (E). The ALC does not have authority to consider matters outside the criteria established by the General Assembly and DHEC (with the General Assembly's express authorization) or outside the CON application and arguments raised by an affected person challenging the CON application. S.C. Code Ann. § 44-7-210(E). Moreover, the purpose of the CON Act—and the ALC's role—is to ensure that health care facilities are needed, are financially viable, and avoid unnecessary cost and duplication. *See* S.C. Code Ann. § 44-7-120 ("The purpose of this article is 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."); *see also* S.C. Code Ann. Regs. 61-15 § 802 (providing project review criteria, including financial information). The ALC must review a CON application with that purpose in mind and make a decision that effectuates that purpose.

B. The ALC exceeded its statutory authority in this case.

The ALC lacked statutory authority to find MSV or the Network unconstitutional. First, the ALC did not engage in an "as applied" constitutional analysis. *See Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38. The ALC did not determine—and Trident did not argue—that the CON Act, the State Health Plan, or the project review criteria were unconstitutionally applied to Trident. Therefore, the ALC did not consider whether the application of a particular law violated Trident's constitutional rights. *Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38. Instead, the ALC determined the mere existence of MSV and the Network is illegal or unconstitutional as a matter of law. (ALC Or. of Judgment at 22, R. 22). The ALC, as part of the executive branch, did not have the power to rule on the legal question of whether either entity is constitutional or allowed by state law. *See* S.C. Code Ann. § 1-23-500 (stating that the Administrative Law Court "is an agency and a court of record within the executive branch of the government of this State"); *Breeland v. Henderson*, 2016 WL 6471907, at *2 (D.S.C. Oct. 3, 2016), *report and recommendation adopted*, 2016 WL 6433466 (D.S.C. Oct. 31, 2016) ("The Administrative Law Court is an executive branch court, not a judicial tribunal"). The ALC cannot make such a determination. *See Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38; *Drummond*, 378 S.C. at 370, 662 S.E.2d at 591.

Second, the ALC lacked statutory authority to consider issues not contemplated by the CON Act, the CON Regulations, or the State Health Plan. The ALC's review is limited to a narrow inquiry: whether the CON application meets the regulatory requirements. *See* S.C. Code Ann. § 44-7-210(B) & (E). The regulatory requirements focus on need, cost, duplication, and other issues

relevant to a determination whether the proposed health care facility serves public healthcare needs. Determining the validity or constitutionality of the mere existence of the management company named in a CON application is outside the purview of the regulations. Nothing in the CON Act, CON Regulations, or the State Health Plan empowers either DHEC or the ALC to evaluate whether an entity which is licensed to transact business in South Carolina—particularly a management company that is not the CON applicant and is not a party to the case—lawfully exists and operates. Moreover, no South Carolina authority empowers the ALC to find that a foreign LLC authorized to transact business in South Carolina—which is also not a party to the case—must be dissolved.

The State Health Plan identifies seven criteria as the most important in evaluating a CON application for radiation therapy services: (1) compliance with the need outlined by the State Health Plan, (2) community need documentation, (3) distribution and accessibility of services, (4) projected revenues, (5) projected expenses, (6) financial feasibility, and (7) cost containment. (2015 State Health Plan at p. IX-6, Joint Tr. Ex. 5, R. 1336). The purpose of the State Health Plan criteria is clear—to ensure that health care facilities are financially viable and effectively distributed to meet community needs. None of the criteria mandate or permit an inquiry into the legal existence or formation of any entity.

The ALC's attempts to fit its ruling into the project review criteria are unavailing. Its ruling is comprised only of hypotheticals: whether MUHA can still satisfy the project review criteria and State Health Plan *if* the Network is unconstitutional, the Network cannot serve as the management company, and the Network cannot invest in the project. The project review criteria and State Health Plan do not authorize the ALC to engage in such an inquiry in the first instance. The ALC

is limited to considering whether the application as submitted to DHEC satisfies the regulatory criteria. It cannot expand its own statutory authority to rule on other potential legal questions.

This Court has previously approved of ALC decisions rejecting invitations to expand its inquiry beyond the applicable regulatory criteria. For example, in *SGM-Moonglo, Inc. v. South Carolina Department of Revenue*, this Court reviewed an ALC's decision to approve an off-premises beer and wine permit. 378 S.C. 293, 294–95, 662 S.E.2d 487, 488 (Ct. App. 2008). The ALC's statutory obligation in *SGM-Moonglo* was to determine whether the proposed location for the business was "proper and suitable prior to granting the permit." *Id.* at 295, 662 S.E.2d at 488. A party challenging the issuance of the permit argued the ALC erred in granting the permit because a restrictive covenant applicable to the property on which the business would be located prohibited the sale of alcoholic beverages on the property. *Id.* at 294, 662 S.E.2d at 488. The ALC held it did not have statutory authority to enforce the restrictive covenant; its statutory authority was limited to whether the proposed location meets the criteria established by statute and case law. *Id.* The Court of Appeals held the ALC properly confined its decision to its limited authority:

> *An administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose.* Pursuant to section 61-4-520 of the South Carolina Code . . . , the ALC must determine whether a proposed location is proper and suitable prior to granting an off-premises beer and wine permit. *Restrictions in the chain of title of a proposed location, however, are not a legitimate concern of the ALC in determining whether the location is suitable. Accordingly, the ALC did not err in refusing to consider the existence of the restrictive covenant.*

Id. at 294–95, 662 S.E.2d at 488 (emphases added).

In *Be Mi, Inc. v. South Carolina Department of Revenue*, this Court found the ALC properly declined to consider whether a restaurant and bar applying for a liquor-by-the-drink license had a right to use the space it identified as part of its seating space. 408 S.C. 290, 299–

300, 758 S.E.2d 737, 742 (Ct. App. 2014). This Court held "[t]he proper court for the [party objecting to the liquor license] to litigate whether [the applicant] has a right to use the deck for the seating of its restaurant is in the circuit court." *Id.* In each of those cases, the ALC properly acted within its limited role—to apply the regulatory criteria in light of the regulatory purpose and determine whether the application is compliant. Similarly, in this case, the ALC's statutory authority is limited to determining whether the CON application meets the statutory and regulatory criteria. Unlike the ALC in *SGM-Moonglo* and *Be-Mi*, however, the ALC in this case accepted an invitation to stray from its role and consider issues that defeat the underlying purpose of the CON Act, CON Regulations, and State Health Plan.

Because the ALC lacked statutory authority to deny MUHA's CON application on grounds related to the legal status of third parties, the judgment is a nullity and must be reversed. *See Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) ("A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity . . . .").[7]

[7] The ALC also cannot find MSV or the Network to be invalid after another executive branch department authorized both entities to transact business in South Carolina. The Network is a Delaware LLC authorized by the South Carolina Secretary of State to transact business in South Carolina. (MUHA CON Application at 10, R. 1604). MSV is an authorized non-membership South Carolina nonprofit corporation. (*Id.* at 9, R. 1603). Despite both entities' compliance with the requirements for formation in their respective states of incorporation and with the requirements to obtain authorization from the South Carolina Secretary of State to transact business in South Carolina, the ALC ruled that neither entity is valid and both must be dissolved. (*Id.* at 22, R. 22). Regardless of whether the ALC had jurisdiction to order the dissolution of a corporation or LLC in general, it could not order the dissolution of either entity under the United States Supreme Court's holding in *Raley v. Ohio*, 360 U.S. 423, 425–26 (1959) (finding state courts had engaged in "the most indefensible sort of entrapment by the State" by "convicting a citizen for exercising a privilege which another state body clearly had told him was available to him"). Moreover, even if the Secretary of State's act in authorizing the Network to transact business in South Carolina does not, as a matter of law, prevent another executive branch agency from invalidating MUSC SV or the Network, the ALC does not have the power to make that determination. *See* S.C. Code Ann. § 33-1-300 cmt.

II. The ALC erred in ruling on issues that Trident did not raise until the end of the contested case hearing.

The ALC improperly applied its *de novo* standard of review by considering issues never raised to DHEC and denying the CON application based solely on those new issues. Despite having knowledge of the ownership structure of the Network and its role as a contracted manager of the proposed project upon MUHA's original filing of the CON Application, Trident did not raise the purported invalidity or unconstitutionality of the Network or MSV to DHEC during the staff review, to DHEC in its request for final review, to the ALC in its petition for a contested case hearing, to the ALC in its prehearing brief, or to the ALC in its opening statement describing the issues for trial. Instead, Trident waited to raise the issue until the close of the contested case hearing, when it made an oral post-trial motion—and subsequent written motion—arguing the ALC should deny the CON based on purported issues with the validity of MSV and the Network. (Trial Tr. 1208–23, R. 1297–1312). Trident also never raised the issue of whether MUHA was the proper applicant or licensee until it recalled its expert witness to testify in "rebuttal" after the close of MUHA's evidence. (Trial Tr. 1156, R. 1245).

Although the ALC conducts a *de novo* review of the CON application during the contested case hearing, "[t]he issues considered at the contested case hearing are limited to those presented or considered during the staff review and decision process." S.C. Code Ann. § 44-7-210(E); *see also Engaging & Guarding Laurens Cty.'s Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 345, 755 S.E.2d 444, 450 (2014). In *EAGLE*, the Supreme Court considered a regulation allowing DHEC "to consider additional factors" in determining whether to issue a landfill permit. 407 S.C. at 345, 755 S.E.2d at 450. Although the ALC denied the permit on a ground other than those expressly cited by DHEC, the Supreme Court affirmed the ALC's decision "because *it was a matter at issue that had been litigated from the time the Landfill Permit was first*

contested" and the ALC therefore "did not conceive a new factor, *nor did it consider evidence outside of the existing record.*" *Id.* (emphases added). "Instead, in determining the Landfill was not needed, the ALC considered and utilized in its decision *a factor that was discussed during the public comment period* and tried at the ALC hearing." *Id.* (emphasis added). Unlike the ALC in *EAGLE*, the ALC in this case considered additional grounds not litigated before DHEC.

Throughout the CON process prior to the contested case hearing, Trident raised slight variations of the same five grounds in support of its claim that the application must be denied: (1) DHEC failed to consider MUHA's application as a "competing application"; (2) "there is no community need for an additional linear accelerator in the service area;" (3) the project "is an unnecessary duplication of services which does nothing to increase accessibility to services"; (4) the project "is not financially feasible" because the lack of community need for additional radiation therapy services in the service area renders MUHA's ability to meet its utilization projections "questionable"; and (5) the project "will substantially adversely impact other area providers, including Trident." *See generally* (Trident Affected Person Status Letter, R. 57; Trident Letter Responding After Public Review Meeting, R. 63–66; Trident's Request for Final Review, R. 68–72; Petition for Contested Case Hearing, R. 37–45; Trident's Prehearing Brief, R. 1978–87). Despite having knowledge of the facts it used to make its post-trial motion for almost two years, Trident had never argued MSV or the Network were invalid or unconstitutional, nor did it ever argue that MUHA was not the correct applicant or that any legal barrier existed to any of the entities applying for a CON.

The ALC incorrectly interpreted the *de novo* standard as allowing it to consider matters not raised until the end of the contested case hearing. (ALC Or. of Judgment at 16, R. 16). The ALC not only considered issues never raised to DHEC, it considered issues not even encompassed by

MUHA's CON application. In fact, the ALC even acknowledged that it considered whether MUHA was the actual licensee *sua sponte* based on its interpretation of the *de novo* standard. (ALC Or. of Judgment at 13, R. 13). The ALC's erroneous interpretation of the *de novo* standard is an error of law and must be reversed. *See Marlboro Park Hosp.*, 358 S.C. at 579, 595 S.E.2d at 854 (noting an ALC applying a *de novo* standard may receive new evidence, but repeating the statutory limitation that "the *issues* considered at the contested case hearing are limited to those presented or considered during the staff review and decision process" (emphasis added) (citing S.C. Code Ann. § 44-7-210(E))). The *issues* of whether MSV and the Network are invalid and whether MUHA is the actual licensee were not presented to DHEC. Therefore, those *issues* do not fall within the ALC's *de novo* review of the CON application.

The ALC also erred in accepting Trident's argument that it could not have raised the issue to DHEC because it only discovered the purported problems in discovery during the ALC proceedings. (ALC Or. of Judgment at 18–19, R. 18–19). Trident knew from MUHA's application the nature of MSV and the Network, the ownership of the Network, and the manner in which the facility would be licensed and managed. *See* (MUHA CON Application at 5–10, 15–16, R. 1599–1604, 1609–10). The ALC's finding is not supported by substantial evidence, and section 44-7-210(E) does not provide exceptions allowing a party to raise new *issues*—rather than new evidence pertaining to issues litigated before DHEC—after discovery in a contested case hearing. *See* S.C. Code Ann. § 44-7-210(E).

Even if Trident's argument had merit, however, Trident is not relieved of its obligation to raise the issue in a timely manner. S.C. Code Ann. § 1-23-320(B) (requiring a party requesting a contested case hearing must give notice including a "short and plain statement of the matters asserted" and providing, "If the agency or other party is unable to state the matters in detail at the

time the notice is served, *the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement must be furnished.*" (emphasis added)). Trident neither identified these issues in its petition or prehearing brief nor made any "more definite and detailed statement" after "discovering" the issues. The ALC therefore lacked statutory authority to consider the issues. *See* S.C. Code Ann. § 1-23-320(I) ("Findings of fact must be based exclusively on the evidence *and on matters officially noticed.*" (emphasis added)); *Solomon v. W.B. Easton, Inc.*, 307 S.C. 518, 522, 415 S.E.2d 841, 844 (Ct. App. 1992) ("A petition for review of [an agency's] rulings pursuant to the Administrative Procedures Act *must direct the court's attention to the abuse allegedly committed below including a distinct and specific statement of the rulings of which the appellant complains.* The circuit court lacks jurisdiction of the appeal if the notice is insufficient.").

Discovery closed before the contested case hearing, and Trident thus had all pertinent information in its possession prior to the hearing. Rather than raise the issue, Trident chose to lie in wait until MUHA finished presenting its evidence—which it tailored to defending the issues Trident had identified—and spring the new issues on MUHA and the ALC at the end of the hearing. Preservation rules exist for situations like this. A party cannot keep an "ace card up his sleeve" hoping to obtain a surprise victory or a second chance from an appellate court. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011). Trident had multiple opportunities to raise the issue, but it waited until it was too late for MUHA to present countervailing evidence before springing its trap. *See* S.C. Code Ann. § 1-23-320(E) ("Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved."). The ALC should have rejected Trident's argument as untimely and declined

to rule on the issue because it lacked statutory authority to do so, and its failure to do so is error requiring reversal.[8]

III. The ALC improperly adjudicated the rights of nonparties.

The ALC erred by adjudicating the rights of entities which were not parties to this case. The only parties to the contested case hearing before the ALC were Trident, DHEC, and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County. (Petition for Contested Case Hearing at 1, R. 37). However, the ALC did not confine its review to adjudicate the rights of only the parties to the case. Instead, the ALC adjudicated the validity and constitutionality of MSV and the Network, despite the fact that neither entity was a party. (ALC Or. of Judgment at 22, R. 22). The ALC's rulings violated the due process rights of MSV and the Network because neither party received an opportunity to be heard. *See Murdock v. Murdock*, 338 S.C. 322, 334, 526 S.E.2d 241, 248 (Ct. App. 1999) ("It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights."). Moreover, the ALC's finding that the Network is illegal and must be dissolved because the ALC believes it "is the beginning of a for-profit cancer treatment franchise that is majority-owned, financed, and run by Alliance in exchange for the patients and reputation of MUSC" adjudicates the rights of Alliance without allowing Alliance an opportunity to be heard on the issue. (ALC Or. of Judgment at 34–35, R. 34–35).

[8] The ALC also erred in finding MUHA's failure to object to one argument on the ground that it had not been presented to DHEC precluded it from objecting to *any* argument on that ground. *See* (ALC Or. of Judgment at 19, R. 19).

The ALC's decision is analogous to a declaratory judgment: despite the lack of an actual dispute between Trident and MSV, the Network, or Alliance, the ALC declared the rights of the entities. (ALC Or. of Judgment at 22, R. 22). In doing so, the ALC violated a basic requirement of the Declaratory Judgments Act—all persons or entities whose rights may be affected *must* be joined as parties to the action. *See* S.C. Code Ann. § 15-53-80 ("When declaratory relief is sought *all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.*" (emphasis added)). The ALC's declaration of the rights of MSV, the Network, and Alliance is therefore unlawful and must be vacated. *See id.*

The ALC's ruling also failed to comply with the South Carolina Rules of Civil Procedure because MSV, Alliance, and the Network were necessary parties under Rule 19. *See* Rule 19(a), SCRCP. Rule 19 provides that a person

> *shall* be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) *he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may* (i) *as a practical matter impair or impede his ability to protect that interest* or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Id. (emphases added). MUSC, MSV, Alliance, and the Network all have an interest in the subject matter of this action—if the subject matter includes the validity of MSV and the Network, although MUHA argues it does not—and the ALC's disposition of the action in their absence will impair or impede their ability to protect that interest. *Id.* The ALC therefore committed an error of law and deprived several entities of their due process rights by adjudicating the rights of nonparties, and its decision must be reversed.

IV. MSV is a valid affiliate of MUSC, and the Network is a lawful joint venture.

In the alternative, even if the ALC properly considered the validity of MSV and the Network, it erred in finding both MSV and the Network are unlawful, *ultra vires* entities that must be dissolved. MSV is a valid affiliate of MUSC, created pursuant to MUSC's longstanding powers, and the Network is a joint venture, formed without violation of any constitutional limitation, by MSV to assist MUSC in carrying out its duties and purpose.

A. The ALC erred in finding MSV is invalid and *ultra vires*.

i. MUSC's original charter granted it the powers of a private corporation.

MUSC has the power to create affiliates. The charter of the Medical College of the State of South Carolina was initially granted in 1832; established the Medical College "as a corporate body," granted the board of trustees and the faculty the "power to make all lawful and proper rules and by-laws, for the government and regulation of themselves and of the said College"; and gave the Medical College the power to "receiv[e] and hold[] real and personal estate, . . . for the benefit of said College." 1832 Act No. 2580, VIII McCord, *Statutes at Large* 349 (1840). The Medical College operated as a private corporation until 1913, when the General Assembly accepted the transfer of the property of the private Medical College to the State and established a state medical college, which it later named the Medical University of South Carolina. 1913 Act No. 126, XXVIII *Statutes at Large* 188 (1913); *see also* 1969 Act No. 349, *Acts and Joint Resolutions* 444 (changing the name of the Medical College to the Medical University of South Carolina).

As a corporation, the Medical College had the power under the law in effect at the time of its charter to establish another corporation. *See* Joseph Brevard, *An Alphabetical Digest of the Public Statute Law of South Carolina*, at 189 (1814) [hereinafter Brevard] ("The rights, etc. incident to a corporation are—to have perpetual succession—to sue, etc.—*to purchase*—to have

a common seal, by which its acts are manifested—to make by-laws, etc." (emphasis added) (citing Blackstone's Commentaries)); William, Tucker Blackstone, St. George, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, at 475 (1803) [hereinafter Blackstone] (providing a corporation has the powers "[t]o sue or be sued, implead or be impleaded, *grant or receive*, by it's [sic] corporate name, *and do all other acts natural persons may*" (emphasis added)); *id.* at 477 ("An aggregate corporation may take goods and chattels for the benefit of themselves and their successors . . . .").[9]

ii. The General Assembly has confirmed and extended the powers granted by MUSC's original charter.

Even in accepting the Medical College and the property, the General Assembly allowed MUSC to retain its rights and attributes as a corporate body. The 1913 Act provided that MUSC's original charter was "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." 1913 Act No. 126, § 2. Thus, MUSC retained its powers under the law in effect in 1832. The Act further vested the management and control of MUSC in a board of trustees and directed the board to "fix . . . the rules for the government of the college, and make such rules and by-laws as may be proper for the business of the college." *Id.* § 3.

In 1996, the General Assembly granted "to the Board of Trustees of the Medical University of South Carolina authority to enter into reasonable agreements to transfer the management and

[9] *See also* S.C. Code Ann. § 33-31-302(6) (providing nonprofit corporations have "the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power" to hold an interest in another entity); S.C. Code Ann. § 33-31-305 (providing "[a]ll charitable, social, and religious corporations validly created by legislative authority before 1900, . . . in addition to the powers theretofore granted them, have all the powers enumerated in Section 33-31-302, 'Powers of Corporation'").

operations of the Medical University Hospital to one or more private operators." S.C. Code Ann. § 44-7-3110. The statute expressly recognized that MUSC has affiliates. S.C. Code Ann. § 44-7-3110(B)(6) (recognizing "the Medical University of South Carolina *and its affiliates*" (emphasis added)). Thus, the 1996 enactment of section 44-7-3110 confirmed MUSC's authority to establish affiliates.

In 2000, the General Assembly authorized the creation of MUHA to operate the "Medical University hospitals, clinics, and other health care and related facilities as shall be determined from time to time by resolution of the board" of trustees of MUSC. S.C. Code Ann. § 59-123-60(E). The General Assembly again confirmed and extended the original MUSC charter and, thus, the powers granted to MUSC under the law in effect in 1832:

> 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.

The General Assembly has also recognized MUSC's ability to establish affiliates in other statutes. *See* S.C. Code Ann. § 59-101-195 & -197 (enacted in 1990 and 1995, respectively) (requiring MUSC and the University of South Carolina School of Medicine to report the compensation of administrators and physicians of their "affiliates" to the General Assembly); S.C. Code Ann. § 59-101-197 ("For purposes of this section 'affiliate' means any entity controlled by or under common control with another entity, whether through ownership, interlocking boards or officers, charter, bylaws, or otherwise and including each professional staff office or practice of each medical school receiving an appropriation from the State, and each trust or foundation which has as one of its significant purposes the support of a medical school receiving an appropriation from the State.").

iii. The ALC failed to properly interpret MUSC's original charter and subsequent legislation.

The ALC erred in concluding MUSC has no implied powers to create subsidiary or affiliated entities. It cannot be reasonably disputed that a corporation has the power to incorporate a subsidiary or affiliate. *See* S.C. Code Ann. § 33-31-302(6) (providing nonprofit corporations have "the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power" to hold an interest in another entity). As a corporation under its original charter, MUSC necessarily had the power to create subsidiaries or affiliates to achieve its broad healthcare mission. *See* Brevard at 189; Blackstone at 475; *Moye v. Bd. of Trustees of the Univ. of S.C.*, 255 S.C. 46, 54, 177 S.E.2d 137, 140 (1970) (stating the powers of a state university include "the implied power of the board to do those things necessary and proper for the achievement of the ends for which the university was founded").[10] The General Assembly has never repealed or restricted MUSC's original powers; rather, it has repeatedly "confirmed and extended" those powers. *See* 1913 Act No. 126, § 2; S.C. Code Ann. § 59-123-30; *see also* S.C. Code Ann. § 33-31-305. Thus, MUSC has had the power to create affiliates since its inception.

The ALC found the 2000 statute authorizing the creation of MUHA[11] eliminated any preexisting power for MUSC to establish nonprofit affiliates *and* expressly prohibited MUSC from

---

[10] *See also In re McConnell*, S.C. Op. Atty. Gen., 2004 WL 2451471, at *14 (Oct. 22, 2004) ("Opinions of this Office have consistently concluded that a governmental entity is not prohibited from creating a nonprofit corporation for fundraising and to assist the entity in carrying out its statutory purpose and mission. Public colleges and universities have done so frequently over the years.").

[11] *See* S.C. Code Ann. § 59-123-60(E) ("As shall be provided in an implementing resolution by the Board of Trustees of the Medical University of South Carolina, the Board of Trustees of the Medical University of South Carolina becomes the governing body of the Medical University hospitals, clinics, and other health care and related facilities (hereinafter 'hospital') as shall be determined from time to time by resolution of the board. Whenever the board functions in its

establishing for-profit affiliates. (ALC Or. of Judgment at 21–22, R. 21-22). The ALC interpreted the statute as granting MUHA the *sole* authority to establish affiliates. (*Id.* at 21, R. 21). The ALC's conclusion is an error of law. The General Assembly did not implicitly eliminate MUSC's authority to establish nonprofit affiliates by granting MUHA the authority to establish nonprofit affiliates. Moreover, the General Assembly did not state that MUHA is the "sole" entity possessing this authority; it merely granted authority to MUHA.

The express grant of authority to MUHA to establish nonprofit affiliates—and its prohibition of for-profit MUHA affiliates—reinforces MUSC's power to create affiliates and partner with other corporations under the 1832 charter as a corporate body. MUSC's power predated the 2000 legislation. The General Assembly's addition of a section allowing the creation of MUHA did not repeal MUSC's authority by implication. *See Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) ("'Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement.' Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them. Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." (citations omitted)). Rather, it demonstrates the General Assembly's

---

capacity as the governing body of the hospital, the board of trustees is constituted and designated as the Medical University Hospital Authority, an agency of the State of South Carolina (hereinafter called authority). The board, as the governing body of the authority, has the powers granted the Board of Trustees of the Medical University of South Carolina under this chapter and the following powers: . . . (13) 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.").

awareness that, without express authorization, the newly-created MUHA would not have the implied powers that MUSC has exercised for nearly 200 years. *See Berkebile v. Outen*, 331 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) ("A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject."). When the General Assembly enacted section 59-123-60(E), it could have simultaneously amended MUSC's enabling legislation to prohibit MUSC's creation of nonprofit affiliates. It did not. Consequently, MUSC's original authority remains, and the ALC erred in finding MSV is an invalid, *ultra vires* entity that must be dissolved.

B. The ALC erred in finding the Network is an unconstitutional joint venture.

The ALC erred in finding the Network is an unconstitutional joint venture in violation of Article X, section 11 of the South Carolina Constitution. First, the Network is a valid entity. The Network does not violate Article X, section 11 because it is not a vehicle whereby MUSC or MSV is investing public funds in equity securities or otherwise putting public funds at risk. *See O'Brien v. ORBIT*, 380 S.C. 38, 42–43, 668 S.E.2d 396, 398–99 (2008) ("Article X, § 11 was intended to 'protect public funds from risky investments' and the ORBIT trust was 'no different than any other investment house'"); *Brashier v. S.C. Dep't of Transp.*, 327 S.C. 179, 490 S.E.2d 8 (1997), *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (finding the Department of Transportation's establishment of, and involvement with, a corporate affiliate as a means to finance, develop, and operate a toll road did not transform the Department into an unconstitutional joint owner or stockholder of the affiliate). To the contrary, the use of the Network to manage the proposed project *eliminates* the risk of loss of public funds.

MSV stands on its own as a registered nonprofit corporation. It is not a state agency. *See* (MUSC Health Articles of Incorporation, Ex. 4 to MUHA's Memo. in Opp. to Directed Verdict,

R. 2054–57); *see also U.S. ex rel. Abbott-Burdick v. Univ. Med. Assocs.*, No. 2:96-1676-12, 2002 WL 34236885, at *2 (D.S.C. May 23, 2002) (finding another MUSC affiliate, UMA, is not a state entity because its "corporate structure and actions are typical of a non-governmental entity," it "is run by a chief executive officer, it owns stock in other corporations, and it borrows money"). Moreover, the South Carolina Supreme Court has affirmed the constitutionality of transactions in which a governmental entity contributes funds to build a hospital but contracts with a private company to operate the hospital, even where the private entity has the right to all revenues generated by its operation of the hospital. *Taylor v. Richland Mem'l Hosp.*, 329 S.C. 47, 50, 495 S.E.2d 431, 433 (1998); *see also Gilbert v. Bath*, 267 S.C. 171, 176–77, 227 S.E.2d 177, 179–80 (1976) (finding such an arrangement is not prohibited by article X, section 6 of the South Carolina Constitution, which has since been renumbered as article X, section 11).

In *Taylor*, a political subdivision of Richland County entered into an agreement with a private, nonprofit hospital corporation to create a new nonprofit corporation—referred to as "the System"—to "take over and operate the hospital facilities of both parties." 329 S.C. at 48–49, 495 S.E.2d at 432. The parties transferred substantially all assets of their hospital systems to the System. *Id.* The Supreme Court rejected an argument that the arrangement was an unconstitutional joint venture under article X, section 11 of the South Carolina Constitution, finding "because Richland County will not be liable for the System's obligations and the System will not have the powers to tax and to pledge the full faith and credit of any political entity, this alliance does not create a risk that any losses will be shifted to the public." *Id.* at 50, 495 S.E.2d at 433. The court noted "[t]he intent of Article X, § [11] was to 'prevent the state from entering into business hazards which might involve obligations upon the public,'" and found "no evidence

the proposed alliance will run afoul of this constitutional provision." *Id.* (quoting *Chapman v. Greenville Chamber of Commerce*, 127 S.C. 173, 120 S.E. 584, 588 (1923)).

Like the alleged joint venture in *Taylor*, there is no evidence that the Network's management of the proposed facility would impose obligations on the public. In fact, Trident presented no evidence showing how MSV or the Network are funded and, thus, offered no evidence that public funds will be at stake or that a loss or liability incurred by MSV or the Network will become a liability for MUSC, MUHA, or the State. *See id.*; *see also Chapman*, 127 S.C. 173, 120 S.E. at 588 (rejecting an argument under article X, section 11 on the ground that "[n]o liability could attach to the state, or to the county, or to the city"). Rather than construe the evidence in the light most favorable to MUHA, as it was required to do in ruling on Trident's motion for directed verdict, the ALC found the Network unconstitutional. *See Repko v. Cty. of Georgetown*, 424 S.C. 494, 500, 818 S.E.2d 743, 747 (2018) ("When reviewing a ruling on a motion for a directed verdict, this Court, like the trial court, must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party."). The ALC erred by applying the wrong standard, ruling on an issue despite lacking sufficient evidence to do so, and misinterpreting the South Carolina Constitution.

Second, as a healthcare and educational entity, MUSC's business contracts with for-profit companies are necessary and permitted. MUSC's mission is "to preserve and optimize human life in South Carolina and beyond through education, research, and patient care." *Our Mission*, Medical University of South Carolina, https://web.musc.edu/about/leadership/president/mission. "MUSC provides an interprofessional environment for learning, discovery, and healing through (1) education of health care professionals and biomedical scientists, (2) research in the health sciences, and (3) provision of comprehensive health care." *Id.* MUSC created MSV to assist it in

accomplishing this mission, and MSV's association with Alliance furthers the mission. *See* (Trial Tr. at 759–60, R. 848–49). MSV's joint venture with Alliance does not increase the risk of loss of public funds and is not an unconstitutional joint ownership by the state in a company or corporation. It is a contractual endeavor by an affiliate of MUSC that promotes the ability of MUSC (i) to accomplish its General Assembly-mandated obligations; (ii) to fulfill its tripartite mission of patient care, education, and research; and (iii) to satisfy the purpose and goals of the CON Act, CON Regulations, and State Health Plan.

South Carolina's higher education statutes also require collaboration with private industry. According to the General Assembly, the "mission for higher education in South Carolina is to be a global leader in providing a coordinated, comprehensive system of excellence in education by providing instruction, research, and life-long learning opportunities which are focused on economic development and benefit the State of South Carolina." S.C. Code Ann. § 59-103-15(A)(1). The goals to be achieved through this mission include "cooperation among the General Assembly, Commission on Higher Education, Council of Presidents of State Institutions, institutions of higher learning, *and the business community*," and economic growth. S.C. Code Ann. § 59-103-15(A)(2)(e)–(f) (emphasis added). The General Assembly also enumerated certain "critical success factors" that institutions of higher education must meet, including "institutional cooperation and collaboration," which requires the "sharing and use of technology, programs, equipment, supplies, and source matter experts within the institution, with other institutions, *and with the business community*," and "*cooperation and collaboration with private industry.*" S.C. Code Ann. § 59-103-30(B)(4) (emphasis added).

To accomplish these goals—and to provide the type of comprehensive and specialized healthcare that patients and the State expect from MUSC—it is necessary for MUSC to collaborate

with affiliates and private companies. Testimony presented at the contested case hearing shows how Alliance's role helps MUHA, as the licensee and clinical provider, meet the goals and purposes of the CON Act and State Health Plan and allows MUHA to provide quality healthcare. (Trial Tr. 798, R. 887) ("[T]he benefit of the Alliance Oncology alliance is that the non-clinical expertise and resources that Alliance brings is for the non-clinical side."); (Trial Tr. 904–05, R. 993–94) ("[G]iven Alliance's back office resources . . . , their ability to build efficiently and effectively, coding issues, . . . that they would have a positive impact as a partner on operations)." Alliance also allows MUHA to obtain linear accelerators at a lower cost than other providers. (Trial Tr. 905, R. 994) ("[V]olume pricing is always beneficial. So, to the extent that . . . Alliance Oncology is buying ten accelerators to put in ten different locations throughout the world, they're going to get a better price from the vend[o]r than a provider who's only buying one.").

The ALC therefore erred in ruling the Network is an unconstitutional joint venture that must be dissolved. The only testimony on the substance of the CON application addressed whether the statutory needs and criteria were met. The ALC should have approved this application on those grounds.

V. The ALC erred in finding MUHA is not the "actual licensee."

The ALC's finding that MUHA is not the "actual" licensee because Alliance is the majority owner of the Network also fails on the merits. *See* (ALC Or. of Judgment at 34, R. 34). The licensee is "the legal entity who, or whose governing body, has the ultimate responsibility for the conduct of the facility or service; the owner of the business." S.C. Code Ann. Regs. 61-15 § 202(b)(8). MUHA would control the clinical operations of the facility and is therefore the entity with "ultimate responsibility for the conduct of the facility or service" consistent with the purpose of the CON Regulations to "ensure that high quality services are provided in health facilities in

this State." *Id.*; S.C. Code Ann. Regs. 61-15 § 101. MUHA was the organization "with whom rests the ultimate responsibility for compliance with [DHEC's hospital licensing regulation]" and whose license would be subject to denial, suspension, revocation, or monetary penalty for failure to comply with the CON Act or CON regulations. *See* S.C. Code Ann. § 44-7-320; S.C. Code Ann. Regs. 61-16 § 201(J); (Trial Tr. 705–10, 715–16, 720–21, 724–25, R. 794–99, 804–05, 809–10, 813–14; MUSC Project Review Slides at 19–21, MUHA Trial Ex. 9, R. 1582–84). MUHA is therefore the actual licensee, and it does not matter whether MUHA is the majority owner of the contracted management company. The ALC's findings that Standard 6 of the State Health Plan applies to the application (rather than Standard 7, which DHEC applied), that the Network would control "almost every aspect" of the proposed facility, and that the project is not financially feasible if the Network must dissolve all fail for the same reasons.

CONCLUSION

MUHA respectfully requests that the Court reverse the ALC's denial of MUHA's application for a CON to expand its radiation therapy services.

(signature page attached)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ A. Mattison Bogan

Daniel J. Westbrook
SC Bar No. 012939
E-Mail: dan.westbrook@nelsonmullins.com
Travis Dayhuff
SC Bar No. 15916
E-Mail: travis.dayhuff@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
William C. Wood, Jr.
SC Bar No. 015111
E-Mail: bill.wood@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County

Columbia, South Carolina

March 24, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Case No. 18-ALJ-07-0100-CC
Appellate Case No. 2019-001159

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 certifies that this brief complies with Rule 211(b), SCACR.

(signature page attached)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ A. Mattison Bogan
Daniel J. Westbrook
SC Bar No. 012939
E-Mail: dan.westbrook@nelsonmullins.com
Travis Dayhuff
SC Bar No. 15916
E-Mail: travis.dayhuff@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
William C. Wood, Jr.
SC Bar No. 015111
E-Mail: bill.wood@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County

Columbia, South Carolina

March 24, 2020