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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.

MOTION TO CERTIFY AND TRANSFER FROM THE COURT OF APPEALS

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, Appellant Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County (“MUHA”) moves to certify this case for review prior to determination by the Court of Appeals. The issues on appeal pertain to legal principles of major importance and issues of significant public interest and, therefore, this Court should consider and resolve this appeal directly without waiting for the Court of Appeals to first consider and rule upon it. This appeal is fully briefed and ready for consideration. If this Court certifies this appeal, it will need only to hold oral argument, if it chooses to do so, and decide the case.

Factual and Procedural Background

This appeal arises from the application a public hospital, MUHA, submitted to the South Carolina Department of Health and Environmental Control (“DHEC”) seeking a certificate of need (“CON”) to increase the capacity of MUHA’s radiation therapy cancer treatment services by adding a linear accelerator—a radiation device used to treat cancer patients—in the new Nexton development¹ in Berkeley County. The expansion would provide greater access to cancer care for MUHA’s patients who live in this fast-growing area.

MUSC—along with its affiliates, MUHA and University Medical Associates of the Medical University of South Carolina (“UMA”), which is MUSC’s physician faculty practice plan—is both a teaching hospital and South Carolina’s only academic medical center. MUSC began as the Medical College of South Carolina, a private corporation authorized by the General Assembly. 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 Medical College’s property 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). MUSC has achieved international recognition and national acclaim as a premier biomedical research, educational, and clinical institution. Its Hollings Cancer Center provides patients with a full range of cancer specialties, is one of the leading cancer treatment centers in the Southeast, and is the only National Cancer Institute-designated cancer center in South Carolina.

¹ Nexton is a fast-growing area near Summerville. See Warren L. Wise, *Nexton, big as a small city, is rapidly developing as Charleston’s next job, home center*, THE POST & COURIER (Sept. 30, 2019) (“[T]he [Nexton] development at full build out could one day have as many residents as the current populations of Clemson, North Myrtle Beach or West Columbia, roughly between 16,000 and 20,000 people. That will make it as big as Moncks Corner and Georgetown combined.”), https://www.postandcourier.com/business/real_estate/nexton-big-as-a-small-city-is-rapidly-developing-as/article_32bf69da-dd88-11e9-a65d-1b1c30cdf418.html.

The General Assembly created MUHA in 2000 to construct, operate, and maintain the hospitals and related facilities and infrastructure that were formerly the responsibility of MUSC. *See* S.C. Code Ann. § 59-123-60(E). As the entity charged with managing and operating MUSC's medical care facilities, MUHA applied for a CON permitting the proposed facility at issue in this case, which would be an off-campus, outpatient department of MUHA's main hospital in downtown Charleston.

MUHA's CON application for the proposed facility involves several other entities. MUSC established MUSC Strategic Ventures ("MSV") in 2015 to function for charitable, scientific, and educational purposes and to advance, nurture, and support the missions and programs of MUSC and UMA. MSV functions to lessen the burdens on those entities by conducting activities those entities would otherwise conduct. MSV joined with Alliance Oncology, LLC—a nationwide leader in radiation oncology and radiosurgery programs that partners directly with healthcare providers to offer the latest oncology technologies to the providers' patients and to assist the providers with "back office" business operations, such as billing, collections, and information services—to create a separate entity, MUSC Health Cancer Care Network, LLC (the "Network"). The Network exists to operate, manage, and market the oncology service line for certain MUSC-related hospitals in South Carolina. Alliance owns 51% of the Network, and MSV owns 49%.

MUHA entered into a management agreement with the Network, which provides that Alliance—as an owner of the Network—would assist with financing for equipment and office space, employ all administrative and technical personnel, provide marketing services, provide billing and collection services, and provide working capital advances to the Network. MUHA identified the Network as the management entity for the proposed project in its CON application, and disclosed the Network's ownership and governance structure in the CON application.

Trident Medical Center, LLC d/b/a Trident Medical Center (“Trident”) is a for-profit limited liability company incorporated in Delaware. It challenged MUHA’s CON application on specific grounds related to whether the application complied with (a) the State Certification of Need and Health Facility Licensure Act (the “CON Act”), which the General Assembly enacted to govern the establishment of medical facilities and projects in South Carolina and “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; (b) the CON Regulations² promulgated by DHEC in accordance with its statutory authority, *see* S.C. Code Ann. § 44-7-150(3); and (c) the State Health Plan, which DHEC is required by statute to publish, and which establishes standards for CONs for specific categories of healthcare services and lists the project review criteria deemed most important in evaluating CON applications for each type of healthcare facility or service. S.C. Code Ann. Regs. 61-15 § 106.

DHEC considered Trident’s challenge but approved MUHA’s CON application. Trident then requested a contested case hearing before the Administrative Law Court (“ALC”) and raised the same arguments it raised to DHEC. Trident focused its arguments on the theory that the proposed facility would not accomplish the goals of the CON Act and the 2015 State Health Plan. However, near the end of the five-day contested case hearing, Trident asked the ALC to deny the CON application based on criteria not considered by DHEC and not previously raised by Trident or any other party. It asked the ALC to find MSV and the Network were invalid or *ultra vires* entities and to deny the CON application on that basis.

² S.C. Code Ann. Regs. 61-15 §§ 101 through 802.

Rather than rule within the limits of its statutory authority as an executive-branch entity responsible for reviewing final executive agency decisions,³ the ALC exceeded its authority by ruling that 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. The ALC also found—despite the issue never having been raised by any party or DHEC—that MUHA is not the “proper applicant” because a for-profit company (Alliance) is the majority owner of the management company (the Network) that MUHA intended to use to manage certain day-to-day operations of the proposed facility. According to the ALC, Alliance is the actual “owner” of the proposed facility.

Summary of Argument

The ALC lacked statutory authority to deny MUHA’s CON application on these grounds. *See* 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 [DHEC’s] staff review.”); *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 38 (2011) (providing the ALC does not have the power to rule on the constitutionality or validity of a law or regulation). The ALC’s review is limited to a narrow inquiry: whether the CON

³ *See Amisub of S.C., Inc. v. S.C. Dep’t of Health & Envtl. Control*, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013) (providing the ALC is an executive branch department created by the General Assembly, which operates as a court of limited authority and cannot exceed the authority granted to it by the General Assembly (citing *Howard v. S.C. Dep’t of Corrs.*, 399 S.C. 618, 733 S.E.2d 211 (2012))); *S.C. Dep’t of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 186, 700 S.E.2d 468, 470 (Ct. App. 2010); S.C. Code Ann. § 1-23-500 (stating the ALC “is an agency and a court of record within the executive branch of the government of this State”); *see also 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”).

application meets the regulatory requirements provided in the CON Act, the CON Regulations, or the State Health Plan. *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 healthcare 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, and nothing in the CON Act, CON Regulations, or the State Health Plan empowers either DHEC or the ALC to evaluate whether a management company—which is not the CON applicant and is not a party to the case—lawfully exists and operates. DHEC and the ALC have the same task under the CON Act and the Administrative Procedures Act: apply the CON standards and criteria to CON applications to approve or deny those applications. *See* S.C. Code Ann. § 44-7-210(E); S.C. Code Ann. §§ 1-23-505(3) & -600; *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 577, 595 S.E.2d 851, 853 (Ct. App. 2004). Given that DHEC cannot approve or deny a CON application based on its interpretation of the validity or constitutionality of the management company and the minority owner of the management company, the ALC has no authority to consider those issues during a contested case hearing.

The ALC's usurpation of statutory authority it does not have prevented MUHA from expanding its cancer treatment options to Nexton and deprived South Carolina citizens and cancer patients of greater access to necessary medical treatment.

Grounds for Motion to Certify

This Court has discretion to certify any case pending before the Court of Appeals and transfer the case for review by this Court before it has been determined by the Court of Appeals. *See* Rule 204(b), SCACR. "Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." *Id.* The Court has certified

appeals involving other important questions of statutory interpretation in past cases. *See, e.g., Clarendon Cty. ex rel. Clarendon Cty. Assessor v. TYKAT, Inc.*, 394 S.C. 21, 22, 714 S.E.2d 305, 306 (2011) (granting a motion to certify to address the ALC's interpretation of a taxation statute); *Ventures S.C., LLC v. S.C. Dep't of Revenue*, 378 S.C. 5, 8, 661 S.E.2d 339, 340 (2008) (granting a motion to certify in an appeal from another ALC ruling interpreting a statute). The Court should certify this case and decide the important issues raised in this appeal before it has been determined by the Court of Appeals because the case meets both of the Rule 204(b) criteria.

This case presents a legal principle of major importance: the scope of the ALC's authority in reviewing DHEC's agency decision to approve a CON for the expansion of healthcare services. The ALC in this case went beyond its statutory authority, and beyond the scope of DHEC's agency decision, to deny the CON application on legal grounds it is not empowered to consider. This usurpation of authority—and the question of how far the ALC's authority extends in reviewing a healthcare CON application—is of major importance because it affects all healthcare CON applications. This Court must rule on the limits of the ALC's statutory authority to guide future ALC (and DHEC) healthcare CON decisions, both those made with regard to other MUHA applications currently undergoing DHEC or ALC review, and those of other parties seeking to expand access to healthcare in South Carolina.

This case also presents issues of significant public interest. The ALC's usurpation of power it cannot lawfully exercise prevents a public hospital from timely expanding its leading cancer treatment center to a fast-growing area to provide better access to treatment for South Carolina cancer patients. An appeal following the normal course through the Court of Appeals and this Court will take several years to reach a final resolution. During that time, MUHA may struggle to obtain approval for other projects that would expand treatment options to provide greater access

to medical care for the people of South Carolina. Thus, the ALC's ruling and the length of the standard appellate process may deprive South Carolinians of several years' worth of expanded access to healthcare treatment options. A delayed resolution of this case is detrimental to the health of the people of South Carolina and is contrary to the goals of the CON Act expressly stated by the General Assembly. *See* S.C. Code Ann. § 44-7-120.

This Court should expedite a resolution of these important issues by certifying and transferring the case from the Court of Appeals, and it should protect the healthcare needs of the people of South Carolina by reversing the ALC's ruling.

Conclusion

MUHA respectfully requests that the Court certify this case and order its transfer from the Court of Appeals.

(signature page attached)

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the.....

Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):


Pleadings:

Motion to Certify and Transfer from The Court of Appeals

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SC Court of Appeals

Via E-Mail

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

RE: Trident Medical Center, LLC, d/b/a Trident Medical Center v. South Carolina
Department of Health and Environmental Control and Medical University Hospital
Authority, d/b/a MUSC Radiation Therapy Center-Berkeley County
Appellate Case No. 2019-001159
Our File No. 019243.01524

Dear Mr. Shearouse:

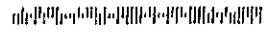
Enclosed please find a Motion to Transfer or Certify the above-referenced matter to the Supreme Court. We are submitting a check for the \$50.00 filing fee to the Court via U.S. Mail pursuant to the Court's order addressing the coronavirus emergency.

By copy of this letter, we are notifying the Court of Appeals of this filing and serving a copy of the filing on all counsel of record.

Very truly yours,

A. Mattison Bogan

cc: Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
William R. Thomas, Esquire
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The Honorable Jenny Abbott Kitchings




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