THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

APPELLATE CASE NO. 2020-001323

ADMINISTRATIVE LAW COURT CASE NO.: 18-ALJ-07-0358-CC
ADMINISTRATIVE LAW COURT CASE NO.: 18-ALJ-07-0360-CC
ADMINISTRATIVE LAW COURT CASE NO.: 18-ALJ-07-0366-CC

CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper St. Francis Berkeley Hospital and Roper Mount Pleasant Hospital,.....Respondent,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,.....Respondents,

AND

Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center,.....Appellant,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,.....Respondents,

AND

Trident Medical Center, LLC d/b/a Trident Medical Center and Summerville Medical Center,.....Appellants,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,.....Respondents.

APPELLANTS TRIDENT MEDICAL CENTER, LLC AND WALTERBORO COMMUNITY HOSPITAL, INC.'S REPLY TO RESPONDENT MEDICAL UNIVERSITY HOSPITAL AUTHORITY'S MOTION TO DISMISS APPEAL AND RETURN TO JOINT MOTION FOR RELIEF FROM APPEAL BOND

The Appellants Trident Medical Center, LLC, d/b/a Trident Medical Center and Summerville Medical Center and Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center offer this Reply to MUHA's Return opposing Appellants' Motion for relief from the posting of an Appeal Bond established in § 44-7-220(B) of the State Certification of Need and Health Facility Licensure Act ("CON Act"). Appellants address below specific contentions and arguments made by MUHA in its Return but also incorporate by reference all of the arguments set forth in the original Motion.

In its Reply, MUHA argues that, because the General Assembly created the right to object to a CON application in promulgating the CON Act, the General Assembly is empowered to impose on that right whatever conditions it deems appropriate. (MUHA Return, pp. 4-5). In making this argument, MUHA attempts to portray the Appeal Bond simply as part of the larger scheme of the CON Act's purposes and goals 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."[1] S.C. Code Ann. § 44-7-120 (2018). MUHA contends that the balancing of competing public health policies involved in promulgating the CON Act, including

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[1] In its Return, MUHA contends that Appellants do not dispute the need for MUHA's proposed 128-bed community hospital; rather, they simply object to its location in Berkeley County. (MUHA Return, p. 4, n. 4). MUHA portrays Appellants' objections as trivial and claims that the "delay in construction likely caused by this appeal" will harm patients. This claim is a misleading oversimplification of the issues raised by Appellants before the Department and the ALC. MUHA chose to establish its proposed hospital under Standard 5 of the 2017-2018 S.C. State Health Plan, which allows a provider with projected bed need under the Plan to relocate that need to a new facility, provided the applicant can "justify, through patient origin and other data, the need for a new hospital at the chosen site and the potential adverse impact a new hospital at the chosen site could have on the existing hospitals in the service area." The issues of need and potential adverse impact *at the proposed site* of MUHA's hospital in Berkeley County are the controlling legal issues in this case. Moreover, Appellants have not sought to stay MUHA's project, and, unless and until they do so, any delay is entirely within MUHA's control. *See* S.C. Code Ann. §§ 1-23-380(2) and 1-23-610(A)(1); SCACR, Rule 241(b)(11).

the requirement of a punitive and arbitrary Appeal Bond, makes this matter "peculiarly within the province of the General Assembly." (MUHA Return, p. 4).

This argument, however, ignores the crux of Appellants' Motion that the right to judicial review of the final administrative decision on MUHA's CON application in this case is guaranteed by Article I, § 22 of the South Carolina Constitution, and the General Assembly cannot abridge or deny this right through the imposition of an arbitrary and inequitable Appeal Bond. Consequently, while the General Assembly is free to balance competing policies and establish a process for the Department to implement and regulate the activities of healthcare providers in furtherance of those policies, in doing so, it cannot exceed the limitations placed on it by the State or Federal Constitutions. *See Gaud v. Walker*, 214 S.C. 451, 462, 53 S.E.2d 316, 320 (1949)("[T]he provisions of our State Constitution are not a grant but a limitation of legislative power, so that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitution."). Thus, contrary to MUHA's assertions, the General Assembly does not enjoy unlimited authority to legislate the rights of parties participating in the CON process even though it initially created the process.

In *Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 277-278, 802 S.E.2d 794, 801 (2017), the South Carolina Supreme Court answered in the negative a certified question regarding whether determinations of the South Carolina Real Estate Commission ("REC") regarding violations of the Timeshare Act are binding on courts of the judicial branch. In *Fullbright*, the resort developer defendants contended that the conferral of authority on the REC precluded the courts from hearing disputes arising under the Timeshare Act, which the defendants characterized as a comprehensive regulatory scheme intended both to protect consumers from unscrupulous business practices and to provide stability for developers. *Id.* at 275, 802 S.E.2d at 799.

In rejecting the defendants attempt to curtail judicial review of the administrative decisions of the REC, the Court found:

> We are mindful that this question implicates the separation of powers vital to the proper functioning of our government and reiterate that "the judicial branch retains the ultimate authority in deciding when agency decisions comport with established law. Thus, judicial review of administrative decisions requires a balancing between an agency's specialization and authority, and the checks and balances deeply rooted in our democratic government." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 53, 766 S.E.2d 707, 728 (2014) (Toal, C.J., dissenting). We therefore hold that the REC's decisions must be subject to judicial review and answer the third certified question "no," as qualified below.
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> The state constitution declares, "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard ..., and he shall have in all such instances the right to judicial review." S.C. Const. art. I, § 22. The Administrative Procedures Act (the APA) provides that "[i]n a contested case, all parties must be afforded an opportunity for hearing after notice of not less than thirty days." S.C. Code Ann. § 1-23-320(A) (Supp. 2016). "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review...." *Id.* § 1-23-380 (Supp. 2016). This entitlement "does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law." *Id.* A court can reverse an agency's decision if, for example, the agency's decision was contrary to constitutional or statutory provisions or otherwise affected by an error of law. *Id.* § 1-23-380(5)(a), (d) (Supp. 2016); *see also id.* § 1-23-610(B)(a), (d) (Supp. 2016) (establishing the same grounds for reversal of a decision of the administrative law court).
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> Our law only requires there be some avenue for a court to determine the validity of the REC's ruling. If the court satisfies itself that the decision was lawful, there will be no further inquiry into the wisdom of the REC's decision. This procedure properly balances a person's constitutional and statutory right to challenge an administrative agency's decision with the deference that should be given to an agency tasked by the legislature with administering a particular statutory scheme.

Id. at 277-281, 802 S.E.2d at 801-802.

The Court's recognition of the necessity of ensuring "some avenue" for judicial review of administrative decisions, albeit limited in scope, is consistent with the intent of Article I, § 22,

which was added to the South Carolina Constitution in 1970 "as a safeguard for the protection of liberty and property of citizens." *Ross v. Medical University of South Carolina*, 328 S.C. 51 492 S.E.2d 62 (1997)(citing *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895,* p. 21 (1969)).[2] In this case, the General Assembly exercised its authority to articulate healthcare policies and establish a scheme for implementation of its policies in the form of the CON Act. In imposing an onerous and arbitrary Appeal Bond on the exercise of the right to judicial review, however, the General Assembly exceeded the limits imposed by Article I, § 22.

As a further related contention in its Return, MUHA asserts that Appellants' arguments concerning the lack of a legitimate purpose for the Appeal Bond fail because it is not within the purview of the Court to question the wisdom of the Appeal Bond provision. (MUHA Return, p. 5). MUHA again misapprehends Appellants' arguments in this regard.

In their Motion, Appellants discuss the numerous existing provisions in the law that provide for attorney's fees, costs, security, and damages for delay and for frivolous appeals and note that, unlike the Appeal Bond, the existing protections extend to both appellants and respondents and cover cases other than those that arise under the CON Act. (Motion, pp. 5–7). Appellants contend that the existence of these available protections belies any claim that

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[2] The comments to the *Final Report,* at p. 21, state the purpose behind the Committee's recommendation that Article 1, § 22 be added to the Constitution as:

> More and more governmental decisions are being made under powers delegated to administrative divisions of State Government. In many cases, the decisions of administrative divisions are more significant than laws enacted by the General Assembly or decisions made by the courts. The Committee agrees with many other constitutional study groups throughout the country that judicial and quasi-judicial decisions of administrative agencies should be consistent with due process of law and complete fairness to the citizen. This provision is recommended as a safeguard for the protection of liberty and property of citizens.

the Appeal Bond provided for in § 44-7-220(B) bears a rational relationship to a legitimate government purpose, as is required under the state and federal Equal Protection Clauses. Instead, Appellants assert that the Appeal Bond serves no purpose other than as an impermissible deterrent or barrier to the exercise of the Appellants' constitutional rights to judicial review of the final administrative decision rendered by the ALC in this case.[3] (Motion, p. 11).

Finally, MUHA disputes Appellants' arguments concerning the constitutionality of the Appeal Bond requirement. MUHA particularly takes issue with Appellants' discussion of the differences between the case at bar and the few South Carolina appellate cases that consider the constitutionality of an appeal bond. (MUHA Return, pp. 6-8). Appellants incorporate by reference the specific arguments made in their Motion and specifically note that none of the landlord/tenant cases cited by MUHA concern appeals of final decisions of administrative agencies, which are governed by Article I, § 22.[4] Therefore, these cases are not persuasive to the issue before the Court.

Similarly, MUHA provides a lengthy list of statutory provisions that purport to require appeal bonds. (MUHA Return, p. 10, n. 14). This list of existing bond provisions is not relevant to the issues raised by Appellants in this proceeding. First, many of these provisions are not true appeal bonds in that the posting of the bond is required only if the appellant wants a stay of the appealed judgment or order. Second, the vast majority of the statutory provisions cited by MUHA do not concern administrative appeals to which Article I, § 22 would apply. Finally,

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[3] MUHA also questions Appellants' statements that imposition of a total $3 million would in fact chill Appellants' right to judicial review and makes the baseless assertion that Appellants' upstream parent company, HCA, should be considered capable of posting vast sums to support the appeal of its downstream subsidiaries in this case. The financial wherewithal of HCA is not relevant because HCA is not a party to this appeal.

[4] *See Wheeler v. Hyler*, 228 S.C. 584, 91 S.E.2d 265 (1956) and *Horn v. Blackwell*, 212 S.C. 480, 483, 48 S.E.2d 322, 323 (1948).

MUHA does not cite any cases considering the constitutionality of the bond provisions in question. To the extent that these provisions have gone unchallenged, their existence is not persuasive on the issue of the constitutionality of an attempt by the General Assembly to limit or deter the constitutional right of judicial review under Article I, § 22, which must be given "in all instances" to persons before they are finally bound by a decision of an administrative agency.[5]

CONCLUSION

For the reasons set forth herein and in Appellants Motion for Relief from Appeal Bond, the Appellants respectfully request that this Court find that the Appeal Bond requirement set forth in § 44-7-200(B) of the CON Act violates the Due Process requirements of U.S. Const. amend. XIV, § 1 and S.C. Const. art. I, §§ 3 and 22 and the Equal Protection guarantees of U. S. Const. amend. XIV, § 1 and S.C. Const. art. I, §§ 3. Further, Appellants request that the Court order that the Appellants are relieved from any obligation to comply with such unconstitutional Appeal Bond in maintaining their duly filed appeals in this case.

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[5] In its Return, MUHA argues that Appellants are not persons who can be finally bound by the decision of the ALC in this case because the ALC did not order Appellants to do anything. (MUHA Return, p. 7). This argument indicates a lack of understanding on MUHA's part that, under the CON Act, all regulated healthcare providers must apply for CONs in order to provide or expand certain healthcare services or establish certain healthcare facilities. In doing so, they directly or indirectly compete against one another for the authority to fill a finite need for healthcare services and facilities. To the extent one provider is granted a CON for a service that fills a need determined by the Department in the South Carolina Health Plan, all other competing providers are bound by that decision and are foreclosed from seeking to provide those services until additional need is recognized. Further, the winning provider has the justified expectation under the CON Act that it will be allowed to serve the existing need covered by its CON without competition from other providers until additional need is recognized. In this case, Appellants are direct competitors with MUHA in the provision of hospital services in Charleston, Dorchester, and Berkeley Counties, who have been awarded Certificates of Need to provide services. As such, they are within the class of persons who are finally bound by a decision to grant a CON to a competitor in the service area. *See, e.g., S.C. Baptist Hosp. v. S.C. Dep't of Health and Envtl. Control*, 291 S.C. 267, 353 S.E.2d 277 (1987)(discussing the origins of the CON program).

Respectfully submitted,

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November 3, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

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ADMINISTRATIVE LAW COURT CASE NO.: 18-ALJ-07-0360-CC
ADMINISTRATIVE LAW COURT CASE NO.: 18-ALJ-07-0366-CC

CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper St. Francis Berkeley Hospital and Roper Mount Pleasant Hospital,.....Respondent,

v.

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South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,.....Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on November 3, 2020, s/he has caused a copy of the **Appellants Trident Medical Center, LLC And Walterboro Community Hospital, Inc.'s Reply To Respondent Medical University Hospital Authority's Motion To Dismiss Appeal And Return To Joint Motion For Relief From Appeal Bond** to be served upon all parties of record by electronic mail and U.S. Mail, postage prepaid, addressed as follows:

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November 3, 2020

VIA EMAIL ONLY CTAPPFILINGS@SCCOURTS.ORG
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
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Re: Appellate Case No: 2020-001323

CareAlliance Health Services, *et al.* vs. South Carolina DHEC, *et al.* AND Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. South Carolina DHEC, *et al.* AND Trident Medical Center, LLC, d/b/a Trident Medical Center and Summerville Medical Center vs. SC DHEC, *et al.*

Dear Ms. Kitchings:

Enclosed for filing in connection with the above, please find Appellants Trident Medical Center, LLC and Walterboro Community Hospital, Inc.'s Reply to Respondent Medical University Hospital Authority's Motion to Dismiss Appeal and Return to Joint Motion for Relief from Appeal Bond.

By copy of this letter and pursuant to the Court's standing Order, we are serving a copy of the Reply via email and U.S. Mail upon all counsel of record.

With best regards, I am

Sincerely,

David B. Summer, Jr.

DBSjr/ccq
Enclosure
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