

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

**INITIAL BRIEF OF APPELLANTS TRIDENT MEDICAL CENTER LLC AND
WALTERBORO COMMUNITY HOSPITAL, INC.**

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STATEMENT OF ISSUES ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW IN CONCLUDING THAT THE DE NOVO HEARING BEFORE THE ALC CURED THE DEPARTMENT'S NUMEROUS AND MATERIAL VIOLATIONS OF ITS OWN REGULATIONS IN REVIEWING AND APPROVING MUHA'S CON APPLICATION?

II. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW IN INTERPRETING THE PLAIN LANGUAGE OF STANDARD 5 OF THE STATE HEALTH PLAN THAT AN APPLICANT MUST JUSTIFY THE NEED AND ADVERSE IMPACT FOR A NEW HOSPITAL "AT THE CHOSEN SITE" TO BE MERELY DESCRIPTIVE OF WHERE THE NEW HOSPITAL IS LOCATED RATHER THAN A REQUIREMENT THAT THE APPLICANT JUSTIFY NEED AND ADVERSE IMPACT AT THE LOCATION OF THE PROPOSED NEW HOSPITAL?

III. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW IN APPROVING MUHA'S CON APPLICATION ON THE CONDITION THAT MUHA CLOSE ITS FREESTANDING EMERGENCY DEPARTMENT ("FSED"), GIVEN THAT THE UNCONTROVERTED EVIDENCE IN THE RECORD IS THAT MUHA DOES NOT INTEND TO CLOSE THE FSED AND GIVEN THAT THE ALC CONCLUDED THAT, IN THE ABSENCE OF CLOSURE OF THE FSED, MUHA'S PROPOSED HOSPITAL DOES NOT COMPLY WITH THE STATE HEALTH PLAN?

IV. DOES THE APPEAL BOND REQUIRED BY S.C. CODE ANN. § 44-7-220(B)(2018) IMPERMISSIBLY IMPAIR APPELLANTS' RIGHT TO JUDICIAL REVIEW IN VIOLATION OF THE EQUAL PROTECTION AND DUE PROCESS GUARANTEES OF THE UNITED STATES CONSTITUTION AND THE SOUTH CAROLINA CONSTITUTION?

STATEMENT OF THE CASE

On December 27, 2017, the Respondent Medical University Hospital Authority d/b/a MUHA Community Hospital ("MUHA") filed a Certificate of Need ("CON") application with the Respondent Department of Health and Environmental Control ("Department") to establish a 128-bed community hospital ("Proposed Hospital") in Nexton, a planned development located in Berkeley County, South Carolina. (**DHEC Ex. 1, pp. 0001, 0009, 0025**). On March 22, 2018, the Respondent 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 (collectively, "Roper") notified the Department of its status as an affected person who opposed the Proposed Hospital. (**DHEC Ex. 1, pp. 0676-0677**). By separate

letters, dated April 19, 2018, the Appellants Trident Medical Center, LLC, d/b/a Trident Medical Center and Summerville Medical Center (collectively, “Trident Health”) notified the Department of their status as affected persons and of their opposition to the Proposed Hospital. (**DHEC Ex. 1, pp. 0678-0683; 0684-0686**). The Appellant Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center (“CMC”) filed its similar notice with the Department on July 10, 2018. (**DHEC Ex. 1, pp. 0690-0691**).¹

On July 23, 2018, the Department issued its decision approving MUHA’s Proposed Hospital. (**DHEC Ex. 1, pp. 1009-1012**). Trident Health, CMC, and Roper timely submitted separate requests for a final review conference before the Board of the Department, which requests were declined on September 10, 2018. On October 5, 2018, Roper filed a request with the Administrative Law Court (“ALC”) for a contested case hearing on the Department’s decision. Trident Health and CMC followed suit and filed their requests for contested case hearing on October 9, 2018. The ALC consolidated the requests for contested case review by order dated December 4, 2018, and conducted a hearing on the merits over the course of ten days between November 6, 2019 and November 21, 2019.

On July 8, 2020, the ALC issued its decision approving MUHA’s CON application. Trident Health, CMC and Roper timely filed Motions for Reconsideration raising issues overlooked or misapprehended by the ALC. In response, the ALC rescinded its original order and, on September 4, 2020, issued its Final Amended Order (“Order”) addressing some of the issues raised in the Motions for Reconsideration, but preserving its original decision to approve MUHA’s Proposed

¹ The Regional Medical Center of Orangeburg and Calhoun Counties also submitted a letter of opposition to the Department but it did not request further review of the Department decision. (**DHEC Ex. 1, pp. 0696-0699**).

Hospital. (**R. pp. ___**). On October 2, 2020, Trident Health, CMC and Roper filed their Notices of Appeal of the ALC's Order.

On October 7, 2020, Trident Health and CMC filed a joint motion seeking relief from the posting of a \$1.5 million bond required by S.C. Code Ann. § 44-7-220(B)(2018) ("Appeal Bond") on the grounds that such Appeal Bond is unconstitutional under the Equal Protection and Due Process Clauses of the U.S. Constitution and the S.C. Constitution. (**R. pp. ___**). Roper filed its similar Motion for Relief from Appeal Bond on October 9, 2020. On October 23, 2020 Roper dismissed its appeal in this matter, leaving Trident Health and CMC as the only Appellants.

On October 29, 2020, MUHA filed its Motion to Dismiss Appeal and Return to the Appellants' Motion for Relief from Appeal Bond. (**R. pp. ___**). On November 3, 2020, Trident Health and CMC filed their Return to MUHA's Motion to Dismiss and their Reply to MUHA's Return to the Motion for Relief from Appeal Bond. (**R. pp. ___**). On November 13, MUHA replied to Appellant's Return to the Motion to Dismiss Appeal. (**R. pp. ___**). On November 25, 2020, the Court issued its order denying Appellants' Motion for Relief from Appeal Bond and denying MUHA's Motion to Dismiss but granting the parties the right to brief their arguments in full. (**R. pp. ___**).

STANDARD OF REVIEW

The ALC heard this matter and issued its Final Order containing its findings of fact and conclusions of law pursuant to the contested case review authority granted by S.C. Code Ann. § 1-23-600 (Supp. 2019). Under that authority, the ALC sits as the fact finder in a *de novo* hearing with the presentation of evidence and testimony. *See Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 207-208, 712 S.E.2d 428, 433 (2011) (The ALC is the ultimate fact finder in a contested case proceeding.). In recognition of the ALC's role as the ultimate administrative

fact finder in a contested case, the law limits the judicial review of an ALC's final decision as follows:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2019).

As summarized by the South Carolina Supreme Court:

In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, looking at the entire record on appeal, that evidence from which reasonable minds could reach the same conclusion as the ALC. *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010). However, the Court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 316, 731 S.E.2d 869, 870-71 (2012).

Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). The above standard of review applies to Appellants' Issues I, II, and III, which concern matters raised before the ALC.

Appellants' Issue IV, concerning the constitutionality of the Appeal Bond, is raised for the first time on appeal to this Court because, factually, the issue was not ripe before the ALC in that no Appeal Bond is required until after the ALC process ends, and because, under the established case law, the ALC lacks the authority to determine facial challenges to the constitutionality of a statute. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 38-39

(2011) (“We wish to reiterate that our decision today does not affect the ALC’s inability to 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.”). Because Issue IV involves a question of law, the Court’s standard of review for this issue is de novo. *See Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009)(“This Court reviews all questions of law de novo.”).

STATEMENT OF THE FACTS²

A. Certificate of Need Program

This case arises under the Certificate of Need program for health care facilities and services. The framework of the CON program is established by the State Certification of Need and Health Facility Licensure Act found at S.C. Code Ann. §§ 44-7-110, *et seq.* (2018 and Supp. 2019) (the “CON Act”), the regulations set forth at 3 S.C. Code Ann. Regs. 61-15 (Supp. 2019) (the “CON Regulations”), and the South Carolina Health Plan (collectively the “CON Law”). The Department is the sole state agency that administers the granting of Certificates of Need and the licensure of health facilities in South Carolina. S.C. Code Ann. § 44-7-140 (2018). As such, the Department reviewed MUHA’s CON application and made the initial decision to grant MUHA’s CON application to establish its Proposed Hospital. **(DHEC Ex. 1, p. 1009-1013).**

The stated goals of the CON Act are 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 (2018). These goals are implemented through the requirement that a provider apply for, and receive, a CON from the Department prior

² The Appellants set forth additional facts relevant to specific issues in the Argument sections of this brief. *See* Rule 208(b)(1)(E), SCACR.

to establishing a new health facility or service, adding beds, making large capital expenditures or acquiring medical equipment when the total project cost exceeds a certain threshold amount. S.C. Code Ann. §§ 44-7-120 and 44-7-160 (2018).

In determining whether to grant or deny a CON application, the Department must evaluate the proposed project under the project review criteria found in the CON regulations (“PRC”)³ and under the applicable standards of the South Carolina Health Plan in effect at the time the application is filed. S.C. Code Ann. § 44-7-225 (2018). In this case, the 2017-2018 South Carolina Health Plan (“State Health Plan” or “Plan”) is applicable.

Under the CON Act, the Department cannot grant a CON unless the project complies with the State Health Plan, the PRC and other regulations. S.C. Code Ann. § 44-7-210(B) (2018). The CON Regulations also mandate that “no project may be approved unless it is consistent with the State Health Plan.” 3 S.C. Code Ann. Regs. 61-15, § 801(3) (Supp. 2019). *See MRI at Belfair, LLC v. S.C. Dep’t of Health & Envtl. Control*, 379 S.C. 1, 9, 664 S.E.2d 471, 475 (2008) (Plan standards and Project Review Criteria are separate and distinct requirements that must be met as part of the CON application process.).

B. Parties

(i) MUHA

MUHA, the CON applicant and intended licensee of the Proposed Hospital, is an agency of the State of South Carolina, created under S.C. Code Ann. § 59-123-60(E) (2020) to support its

³ The PRC consist of 33 general criteria, which are set forth in 3 S.C. Code Ann. Regs. 61-15, § 802 (Supp. 2019). For ease of reference each criterion will be referred to using “PRC” in place of the full regulatory citation. For example, 3 S.C. Code Ann. Regs. 61-15, § 802(2)(b) is cited as PRC 2(b).

affiliated state agency, the Medical University of South Carolina (“MUSC”).⁴ MUHA is charged under the law with governing and operating MUSC’s hospitals, clinics, and other healthcare and related facilities and is funded by revenues from its clinical operations, specific appropriations from the State, and grants and donations from third parties. *See* S.C. Code Ann. §§ 59-123-60(E)(9) and (11) (2020); (**Goodlett Tr., Vol III, 691:5-692:10.**).

MUHA owns and operates MUSC Health University Medical Center, an academic medical center located on the peninsula in downtown Charleston (“MUSC Medical Center”).⁵ (**Cawley Tr., Vol. III, 392:2-23**). As an academic institution, MUSC Medical Center provides general acute care hospital services but also provides tertiary and quaternary services, which are specialized services such as solid organ transplants and comprehensive neonatal intensive care delivered to high acuity patients. No other hospital provider in Charleston, Berkeley, and Dorchester Counties (the “Tri-County Service Area”) offers quaternary services, although Trident Medical Center, located in North Charleston, and Roper Hospital in downtown Charleston do offer tertiary services, such as open heart surgery. (**Sullivan Tr., Vol. II, 561:10-20; Cawley Tr., Vol. III, 386:4-14; Gallati Tr., Vol. II, 26:8-24; Johnson Tr., Vol. I, 191:11-14**).

Unlike MUSC Medical Center, MUHA’s Proposed Hospital will be a community hospital that treats only non-tertiary patients. (**DHEC Ex. 1, p. 00014**). All of the providers who opposed

⁴ MUSC is an institution of higher learning whose function, as set forth in its enabling legislation, is to appoint faculty and confer degrees in medicine, dental medicine, pharmacy, nursing, and health-related professions upon students and other persons. S.C. Code Ann. § 59-123-60(A)(2) (2020).

⁵ At the time of the hearing, MUSC Medical Center was licensed for 657 acute care beds. (**DHEC Ex. 4, p. 0032**). After the Department issued its decision approving MUHA’s Proposed Hospital in Berkeley County, MUHA acquired an additional 715 acute care hospital beds as result of its \$137 million purchase of Springs Hospital in Lancaster County, Carolinas Hospital System in Florence County, Chester Regional in Chester County, and Marion Regional Medical Center in Marion County. (**Goodlett Tr., Vol III, 699:15-700:14**).

MUHA's Proposed Hospital – Roper, Trident Health and Colleton Medical Center – currently offer the same services as will be provided at MUHA's Proposed Hospital.⁶ (**Bosse Tr., Vol. I, 129:14-21; Gallati Tr., Vol. II, 65:2-7; Hiott Tr., Vol. II, 245:19 – 246:4**).

ii. Trident Health

Trident Health operates two acute care hospitals in the Tri-County Service Area: Trident Medical Center, located in North Charleston, and Summerville Medical Center, located in Dorchester County. (**Gallati Tr., Vol. II, 23:13-22; 30:21-23**).⁷ At the time of the hearing, Trident Medical Center was licensed for 322 beds, including medical/surgical beds, psychiatric beds, and inpatient rehabilitation beds. (**Gallati Tr., Vol. II, 126:20-25**). As noted, among the services offered at Trident Medical Center are open heart surgery services and Level II trauma services. (**Gallati Tr., Vol. II, 35:4-38:8**). MUHA's Proposed Hospital is to be located in the center of Trident Medical Center's primary service area, just six minutes from the ZIP Code from which Trident draws the majority of its patients. (**Gallati Tr., Vol. II, 76:11-80:22**).

Summerville Medical Center is licensed to operate 124 medical/surgical beds. (**Gallati Tr., Vol. II, 51:16-19**). In addition to providing the full range of general hospital services, Summerville Medical Center provides all of the perinatal and neonatal services for Trident Health through its

⁶ Roper operates four acute care hospitals in the Tri-County Service Area, including Roper St. Francis Berkeley Hospital (“Roper–Berkeley”), located in Berkeley County about four miles from MUHA's Proposed Hospital. (**Bosse Tr., Vol I, 94:16-24; 109:2-110:3**). Although Roper is no longer a party appellant, in terms of the issue of need and unnecessary duplication of services, Roper's presence in the market remains relevant to this appeal.

⁷ On May 26, 2016, Trident Medical Center was issued a CON to construct Berkeley Medical Center, a 50-bed hospital to be located in Moncks Corner in Berkeley County. Because of wetlands' issues, Berkeley Medical Center is in the pre-construction phase and was not operational at the time of hearing. (**DHEC Ex. 4, p. 0033, n. 10; Gallati Tr., Vol. II, 30:17-20; 62:10-23**). Because of its status at the time of hearing as approved but not yet operational, the ALC declined to consider Berkeley Medical Center in its determination of the need for MUHA's Proposed Project. (**Order, p. 30, n. 40**).

Level II perinatal center. (**Valentine, Vol. II, p. 177:24-178:7**). MUHA's Proposed Hospital is located within a fifteen-minute drive of Summerville Medical Center and within twelve to thirteen minutes of Summerville Medical Center's primary service area ZIP Codes. (**Valentine, Vol. II, p. 187:1-10**). As a system, Trident Health gets 80% of its total patient volume from Berkeley and Dorchester Counties, with the remainder coming from Charleston County. (**Gallati Tr., Vol. II, 75:8-13**).

iii. Colleton Medical Center

CMC, which is located in Walterboro in rural Colleton County, South Carolina, is licensed to operate 116 medical/surgical beds, of which 84 are set up and staffed for use. (**Hiott Tr., Vol. II, 212:2-4; 221:1-10; 224:4-6; 229:20-25; 233:10-11**). CMC provides basic inpatient and outpatient medical and surgical services to the community it serves. (**Hiott Tr., Vol II, 221:13-222:1**). Although CMC is the only hospital in Colleton County, it competes with Roper and MUHA for patients located in its service area. (**Hiott Tr., Vol II, 231:22-232:15**). According to the redirection analysis contained in MUHA's CON application, MUHA expected to redirect 10% to 30% of its current patients residing in certain Colleton County ZIP Codes to its Proposed Hospital. (**Hiott Tr., Vol. II, 247:18-250:10**). MUHA amended its redirection analysis before the hearing to reduce the expected percentage of patients from Colleton County to 2% because Colleton is outside the Tri-County Service Area. Nevertheless, even the amended analysis signals MUHA's expectation that it can redirect patients who are within 40 to 60 minutes' drive times of the Proposed Hospital, which drive times include Colleton County. (**Trident Ex. 94; Levitt Tr., Vol. III, 1297:21-1298:6**). CMC is a rural hospital that has suffered low inpatient utilization because of the lack of population growth and losses in net income every year since 2014. (**Hiott Tr., Vol. II, 230:1-234:23**).

C. MUHA CON Application

In its CON application, MUHA proposes to establish a \$325 million, 128-bed community hospital in Berkeley County near the I-26 and Highway 17A interchange, twenty-eight miles from MUHA's downtown MUSC Medical Center facilities. **(DHEC Ex. 1, pp. 0009, 0025; Sullivan Tr., Vol. II, 432:17-23)**. MUHA sought to establish its Proposed Hospital under Standard 5 of the State Health Plan, which allows a facility with a bed need to utilize such need to create a new hospital at a different site within the same service area subject to certain conditions. **(DHEC Ex. 4, p. 0015)**. Under the Plan, MUHA had a stated need for 147 additional beds at MUSC Medical Center in downtown Charleston. **(DHEC Ex. 1, p. 0023; DHEC Ex. 4, p. 0032)**. In its application MUHA proposed to use a portion of this need to create a new 128-bed community hospital in Berkeley County for the stated purpose of addressing and alleviating capacity constraints at MUSC Medical Center by shifting lower acuity patients away from MUSC Medical Center and providing primary and secondary care to those patients at the Proposed Hospital twenty-eight miles away.⁸ **(DHEC Ex. 1, p. 0023)**. MUHA claimed that this shift in the treatment location for lower acuity patients would allow MUHA to provide better access to the tertiary and quaternary services it provides at MUSC Medical Center. **(DHEC Ex. 1, p. 0023)**.

In its CON application, MUHA identified the Tri-County Service Area as its primary service area for the Proposed Hospital, with a secondary service area covering Georgetown, Horry, Williamsburg, Florence, Colleton, Orangeburg, and Beaufort Counties. **(DHEC Ex. 1, p. 0025)**. In Figure 17 of its application, MUHA provided the Department with a summary of the percentages of redirection it expected to occur in the third year of operation among its adult, non-tertiary

⁸ Dr. Patrick Cawley, MUHA's Chief Executive Officer, admitted that MUHA cannot require its MUSC Medical Center patients to redirect and seek services at the Proposed Hospital, but rather, MUHA must rely on patients to choose to travel to the new hospital for treatment. **(Cawley Tr. Vol. III, 529:15-530:8)**.

patients within a certain drive time of the Proposed Hospital. For example, MUHA projected that it would draw 65% of its current patients who live within zero to fifteen minutes of the Proposed Hospital away from MUSC Medical Center to the Proposed Hospital. (**DHEC Ex. 1, p. 0039, Fig. 17**).

In Attachment N to its application, MUHA provided the Department with a more detailed chart showing the percentages of assumed patient redirection from each of the 94 ZIP Codes it chose as its service area based on the drive time to the Proposed Hospital. In Attachment N, the projected redirection percentages ranged from 65% for patients living within an eleven to fifteen minute drive of the Proposed Hospital to 10% for patients who live fifty-six to seventy miles away. (**DHEC Ex. 1, pp. 0424-0426**). Just prior to the hearing before the ALC, MUHA produced another version of Attachment N, which reduced the redirection percentages for all ZIP Codes outside the Tri-county Service Area down to 2%. This reduction was made without regard to actual drive times and instead was based on whether a county line occurs between the patient and the Proposed Hospital.⁹ (**Trident Ex. 94; Levitt Tr., Vol. III, 1297:21-1298:6**).

In its application, MUHA offers the projected redirection of its own lower acuity patients residing in the Berkeley County area as its primary justification of both need for the Proposed Hospital and for the claimed lack of adverse impact on the other providers in the area. According to MUHA, because it projects that it will fill its Proposed Hospital with only its own redirected patients, there will be no capture of patients from the other providers serving the market. (**DHEC**

⁹ For example, in the corrected version of Attachment N, the redirection percentage of patients living in Orangeburg County ZIP Code 29059, which is *thirty-one* minutes from the Proposed Hospital, is reduced to 2%, down from 30%, because Orangeburg County is outside the Tri-county Service Area. On the other hand, MUHA still projects that 35% of patients who live in West Ashley will redirect from MUSC Medical Center and choose to drive *thirty-two* minutes to the Proposed Hospital in Berkeley County for care. (**Trident Ex. 94**).

Ex. 1, p. 0023). Other than this speculative 100% redirection theory, MUHA provided no adverse impact analysis in its CON application with regard to the adverse effect its Proposed Hospital would have on other providers in the service area.¹⁰ (**Murdock Tr., Vol. III, 260:5-17**).

Finally, to support its application for the Proposed Hospital, MUHA represented to the Department that it planned to close a freestanding emergency department that MUHA planned to open in Summerville, just two miles from the Proposed Hospital (“MUHA FSED”). The stated reason for the closure was to consolidate emergency services into the Proposed Hospital. (**DHEC Ex. 1, p. 0015**). After the Department issued its decision to approve the Proposed Hospital, however, MUHA decided not to close the MUHA FSED and, based on the uncontradicted testimony before the ALC, MUHA intends to operate two emergency departments within two miles of each other in Berkeley County. (**Cawley Tr., Vol. III, 494:18-495:7**).

¹⁰ As a community hospital, MUHA’s Proposed Hospital will offer only non-tertiary services and not the specialized tertiary and quaternary services that are offered at MUSC Medical Center. (**DHEC Ex. 1, p. 00014**). In all, within a ten-mile radius of the Proposed Hospital, there are facilities with a total of 456 existing acute care beds offering these same non-tertiary services. (**Sullivan Tr., Vol. II, 530:20-531:1**).

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE DE NOVO HEARING BEFORE THE ALC CURED THE DEPARTMENT'S NUMEROUS AND MATERIAL VIOLATIONS OF ITS OWN REGULATIONS IN REVIEWING AND APPROVING MUHA'S CON APPLICATION.

A. Background

When MUHA filed its CON application for the Proposed Hospital with the Department, it triggered a detailed, mandated review process that is set forth in the CON Law. Under that process, upon the filing of MUHA's application and the payment of the initial filing fee, the Department was required to publish a notice in the State Register indicating that the Department had accepted the filing of MUHA's application. 3 S.C. Code Ann. Regs. 61-15, § 302.1 (Supp. 2019). The Department published the notice of filing in this case on January 26, 2018. (**DHEC Ex. 1, p. 1018**). The Department had thirty days from this date to request such additional information from MUHA as the Department deemed necessary to complete the application. 3 S.C. Code Ann. Regs. 61-15, § 302.2 (Supp. 2019). In this case, the record contains no requests from the Department for additional information to complete the application. (*See generally* **DHEC Ex. 1**).

Under the law, after the Department determines that an application is complete, it is required to (a) notify the applicant by certified mail of the relative importance of the project review criteria to be used by the Department in reviewing the application and (b) invoice the applicant by certified mail for the CON application fee due fifteen days from receipt of the invoice. 3 S.C. Code Ann. Regs. 61-15, § 303.1 and § 304 (Supp. 2019). Once the Department receives payment of the application fee, the Department must publish a notice in the State Register notifying affected persons that the application is complete, which then triggers the 120-day statutory review cycle for that application. S.C. Code Ann. § 44-7-210(A) (2018); 3 S.C. Code Ann. Regs. 61-15, § 305.1 (Supp. 2019).

In this case, the Department failed to follow this procedure. Instead, the Department published on March 23, 2018 a notice in the State Register that MUHA's CON application was deemed complete. This premature publication started the clock on the review cycle before the applicant and affected persons, such as the Appellants, were provided notice of the relative importance of the PRC to be used by the Department in its review of the application. (**DHEC Ex. 1, p. 1021**).

Margaret Murdock, the Director of the CON program, who had never reviewed a new hospital application before, testified that, although she determined by March 9, 2018 that the application was complete, she inadvertently neglected until July 11, 2018 to send the certified deemed complete letter notifying the applicant and opposing providers of the relative importance of the PRC and the invoice for the application fee.¹¹ As noted, both the letter and the payment of the application fee are prerequisites to publication of the deemed complete notice that starts the review cycle under the law. (**Murdock Tr., Vol. III, 25:20-26:1; 186:17-187:8; 190:21-196:12; 345:16-21**). Because of the Department's error, by the time the parties received the July 11 notice of the criteria that the Department would consider to be most important in evaluating MUHA's application, there were only twelve days left in the review cycle for the Department to issue its decision. *See* S.C. Code Ann. § 44-7-210(A)(Requiring Department staff to issue a decision no earlier than thirty calendar days, but no later than one hundred twenty calendar days, from the date affected persons are notified that the application is complete.).

The State Health Plan designates as the most important criteria for review of an application for general hospital beds: Compliance with the Need Outlined in the Plan (PRC 1); Community

¹¹ Although transmitted on July 11, 2018, the letter itself is dated May 21, 2018. (**DHEC Ex. 1, p. 1000**). As explained by Ms. Murdock, she found the letter under some things on her desk either just before or after several of the parties notified her that they had not yet received the deemed complete letter. (**Murdock Tr., Vol. III, 191:15-192:9**).

Need Documentation (PRC 2); Distribution (Accessibility) (PRC 3); Acceptability (PRC 4); Record of the Applicant (PRC 13); Cost Containment (PRC 16); and Adverse Effect on Other Facilities (PRC 23). (**DHEC Ex. 4, p. 0017**). In the July 11, 2018 deemed complete letter, which was many months late, the Department indicated that it considered Compliance with the Need Outlined in the State Health Plan (PRC 1), followed by Community Need Documentation (PRC 2), Distribution (Accessibility)(PRC 3), and Ability to Complete the Project (PRC 14) as the most important criteria for review of MUHA’s application. (**DHEC Ex. 1, pp. 1000-1001**).

The Department’s selection of these four PRC as being the most important in the review of MUHA’s Proposed Hospital is contrary to the State Health Plan’s statement of most important criteria in that, in its deemed complete letter, the Department added Ability to Complete the Project (PRC 14) to the list of most important PRC and omitted Acceptability (PRC 4), Record of the Applicant (PRC 13), Cost Containment (PRC16) and Adverse Effect on Other Facilities (PRC 23). Ms. Murdock testified that she eliminated these latter PRC from her deemed complete notice and added others under her interpretation of the authority given to the Department to “reorder” criteria for specific projects.¹² (**Murdock Tr., Vol. III, 351:18-352:13**); *See* S.C. Code Ann. § 44-7-210(B) (2018).

¹² The CON Act requires the State Health Plan to contain a general statement as to the project review criteria considered most important in evaluating Certificate of Need applications for each type of facility, service, and equipment.” S.C. Code Ann. § 44-7-180(B)(4)(2018). In this case, the applicable Plan designated the PRC “adverse impact” as among the most important PRC for reviewing an application for a new hospital. (**DHEC Ex. 4, p. 0017**). The authority of the Department to “reorder” criteria under § 44-7-210(B) does not allow the Department to eliminate criteria that are required by law to be given importance. The plain meaning of “reorder” is to “change the order in which something is arranged” (<https://www.oxfordlearnersdictionaries.com/us/definition/english/reorder?q=reorder>). Eliminating criteria is not reordering. *See Paschal v. State Election Comm’n*, 317 S.C. 434, 437, 454 S.E.2d 890, 892 (1995)(a court must construe a statute according to its plain and ordinary meaning).

In response to the Department’s invitation to affected persons to submit written comments on MUHA’s application,¹³ Trident Health’s healthcare planning and healthcare finance expert, Daniel J. Sullivan, provided written correspondence to the Department on July 18, 2018, setting forth Trident Health’s detailed arguments in opposition to the Proposed Hospital. (**DHEC Ex. 1, pp. 0703-0740**). Colleton Medical Center adopted Mr. Sullivan’s report by letter to the Department dated July 18, 2018. (**DHEC Ex. 1, pp. 0992-0993**). On that same day, Roper also submitted a letter to the Department from its healthcare planning expert, Mark Richardson, containing detailed arguments in opposition to the Proposed Hospital. (DHEC Ex. 1, pp. 0741-0961). In their submissions to the Department, both Roper and Trident Health, among other criticisms, pointed to significant irregularities in the patient origin data used by MUHA in its CON application to support need for the Proposed Hospital. (**DHEC Ex. 1, pp. 0716-0717; 0743-0747**).

According to Ms. Murdock, she also was having trouble “connecting the dots” on this issue, such that she called MUHA’s healthcare planning and healthcare finance expert, David Levitt, and requested that he provide her with certain information she believed she needed to “nail down” her decision. (**Murdock Tr., Vol. III, 64:9-65:6**). Ms. Murdock received the information she requested in the form of an email from Mr. Levitt sent at 9:00 a.m. on Monday, July 23, 2018, the day the decision was due. (**Murdock Tr., Vol. III, 323:3-4; DHEC Ex. 1, pp. 0977-0987**).

Through inadvertence, Mr. Levitt did not transmit his email with the additional utilization information to the other parties until 11:30 a.m. on July 23. (**DHEC Ex. 1, p. 0977**). At the hearing Ms. Murdock agreed that, given the impending deadline for decision, neither she nor the opposing

¹³ On July 6, 2018, seventeen days before the deadline for a final decision under the CON Law and five days before the Department advised the parties of the relative importance of the review criteria, the Department notified the parties that it would not conduct a project review meeting. Instead, the Department invited affected persons to provide written comments on MUHA’s application to the Department by July 13, 2018, which deadline was extended to July 18, 2018, upon late transmittal of the deemed complete letter. (**DHEC Ex. 1, pp. 0692-0693**).

providers had the opportunity to meaningfully review or respond to Mr. Levitt's utilization information that the Department used to "connect the dots" and approve MUHA's \$325 million Proposed Hospital.¹⁴ (**Murdock Tr., Vol. III, 324:7-21**).

The pressure from the time constraint caused by the premature start of the review cycle and the delayed issuance of the deemed complete letter is evident in the Department's decision letter issued on July 23, 2018. In its decision, the Department sets out cursory conclusions regarding the four PRC identified in its deemed complete letter. For example, on Compliance with the Need Outlined in the State Health Plan (PRC 1), Community Need Documentation (PRC 2), and Ability to Complete the Project (PRC 14), the Department's discussion simply repeats or summarizes the requirements of the criteria and inserts MUHA's name as having satisfied them. (**DHEC Ex. 1, pp. 1009-1012**). For Distribution (Accessibility)(PRC 3), the Department's brief discussion asserts that MUHA included data that showed that a "significant percentage" of its existing patients originate from areas "in close proximity" to the Proposed Hospital and that MUHA's projected utilization by such patients justified approval of the project. The Department further notes that it "took into account" Roper-Berkeley and Trident's Berkeley Medical Center, neither of which were operational at the time the decision was made, and that there would be no unnecessary duplication of services from adding MUHA's Proposed Hospitals to the already approved or existing hospitals in the service area. (**DHEC Ex. 1, pp. 1011**).

Finally, the decision discusses no specific adverse impact analysis and makes no findings or conclusions with regard to adverse impact, cost containment, the record of the applicant, or acceptability, all of which must be considered under the State Health Plan. (**Murdock Tr., Vol.**

¹⁴ Roper attempted to respond to Mr. Levitt's information but Roper's response was received by the Department too late to be considered prior to issuance of the Department's decision. (**Murdock Tr., Vol. III, 323:21-324:6; DHEC Ex. 1, pp. 0988-0989**).

III, 352:14-353:9). Furthermore, contrary to Standard 5 of the Plan, which requires **the applicant** to justify need and adverse impact at the chosen site, the Department’s decision states simply that the affected persons opposing the application did not demonstrate sufficient grounds to deny approval of the Proposed Hospital. (**DHEC Ex. 1, pp. 1009-1013; DHEC Ex. 4, p. 0015**).

B. Argument

In its Order, the ALC acknowledges the numerous failures of the Department to follow its mandated statutory and regulatory procedures in this case.¹⁵ (**Order, pp. 5-6; p. 6, n. 10; pp. 60-62; p. 68**). In each case, however, the ALC ultimately concludes that the Department’s many violations of its own regulatory requirements were harmless “procedural irregularities” and the Appellants were not prejudiced thereby because the contested case review before the ALC is *de novo* and theoretically cures any due process deprivations that occurred below. (**Order, p. 6, n. 10**). In making these findings and conclusions, the ALC errs as a matter of law in failing to recognize that (a) the purpose of the mandated procedures is to ensure a meaningful review by the sole agency charged with administering the CON Law; (b) the cumulative effect of the Department’s numerous violations of its regulations was to prevent any such meaningful review by the Department; and (c) because of the shift in the burden of proof to the Appellants that occurs before the ALC¹⁶, MUHA was relieved of its “overarching” burden as the applicant to justify the need for, and the adverse impact of, its Proposed Hospital, resulting in prejudice to the

¹⁵ In its Order, the ALC properly concluded that the Department violated S.C. Code Regs. 61-15 §§ 304 and 305 when it prematurely started the review cycle, failed to give the parties adequate notice of the relative importance of the PRC to be applied, and failed to give the parties adequate time to respond and present information thereon. (**Order, p. 6, n.10**). The ALC also found as “error” the Department’s failure to address PRC 23, Adverse Effects on Other Facilities. (**Order, p. 68**).

¹⁶ *See Leventis v. S.C. Dep’t of Health & Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (The burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue).

Appellants.¹⁷ Because of the shift in the burden of proof that occurs between the Department and the ALC, not only was the prejudice to the Appellants not cured by the contested case review process, it was exacerbated by it. *See Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Serv. Info. Tech. Mgmt. Off.*, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001)(“An adequate de novo review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body.”) (Emphasis added). As discussed below, the ALC did not provide an adequate review capable of curing the deficiencies in the Department’s review.

In holding that the contested case review process cured the Department’s violations of its own law and regulations, the ALC relies on *Ross v. Medical University of South Carolina*, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997), in which the Supreme Court of South Carolina held that Article I, § 22 of the South Carolina Constitution requires an administrative agency to provide notice and an opportunity to be heard before it makes its final decision, but it does not require an agency to give notice and an opportunity to be heard at each level of the administrative process. Specifically, the ALC found in its Order:

Despite the procedural irregularities in this case, I find neither Roper nor Trident were prejudiced. At the agency level, MUHA had to show its proposed hospital met all statutory and regulatory requirements for a CON, and the Department determined MUHA met the requirements. To the extent the review period was shortened to such to an extent that Petitioners could not properly mount an offense against the proposed hospital, they have received due process before this Court. Specifically, an adjudicatory hearing held before the Administrative Law Court satisfies the requirements of due process in cases involving agency decisions.

(Order, p. 6, n.10). The ALC’s conclusions made in reliance on *Ross* are misplaced.

¹⁷ *See Sierra Club v. S. C. Dept. of Health & Env'tl. Control*, 426 S.C. 236, 257-59, 826 S.E.2d 595, 606-07 (2018) (“Here, Sierra Club undoubtedly bore the burden of proof before the ALC because it was challenging DHEC’s decision to renew Chem-Nuclear’s operating license. . . . Although Sierra Club undoubtedly bore the burden of proving its case, Chem-Nuclear nevertheless bore an overarching burden to satisfy the regulatory requirements necessary for Chem-Nuclear to earn its license.”).

Contrary to the ALC's assertion, Appellants did not contend only that they lacked the proper time to "mount an offense" to MUHA's Proposed Hospital. Appellants contend that *the Department* lacked the time and information to conduct the meaningful review intended by the CON Law. More importantly, the Appellants contend that the time constraints caused by the Department's violations of its regulations resulted in the Department approving MUHA's CON application even though MUHA did not meet its burden under the Plan to justify need and adverse impact at the chosen site.

Ms. Murdock testified that, with just a few days left in the review cycle, she was having trouble "connecting the dots" on MUHA's attempt to justify the need for its project. Therefore, she contacted MUHA's healthcare planning and healthcare finance consultant and requested that he provide her with certain additional information she believed she could use to "nail down" her decision. (**Murdock Tr., Vol. III, 64:9-65:6**). As Ms. Murdock admitted, neither she, as the Department reviewer, nor the Appellants, as affected persons, had the opportunity to meaningfully review or respond to this vital utilization information that MUHA submitted the day the decision was issued approving the Proposed Hospital. (**Murdock Tr., Vol. III, 324:7-21**).

Moreover, other than its claim that the Proposed Hospital would serve only MUHA's redirected patients with no adverse impact on other providers, MUHA offered no adverse impact analysis to justify, under Standard 5 of the Plan, the adverse impact of the Proposed Hospital at the chosen site. Yet both the Department and the ALC concluded that MUHA's 100% redirection analysis satisfied Standard 5, notwithstanding that neither the Department nor the ALC found MUHA's 100% redirection theory credible.

Ms. Murdock testified inexplicably that she believed that MUHA would in fact draw patients from other providers but that she did not consider the 100% redirection theory to be "unreasonable." (**Murdock Tr., Vol. III, 284:22-285:2**). In other words, although the Department

believed that the Proposed Hospital would in fact impact other providers, Ms. Murdock accepted MUHA's 100% redirection theory on its face and excused MUHA's failure to otherwise justify any adverse impact to be caused by its Proposed Hospital. Ms. Murdock then excluded Adverse Effect on Other Facilities (PRC 23) from the list of most important criteria, performed no independent analysis of adverse impact, and made no specific findings as to adverse impact in the Department's decision letter. (**Murdock Tr., Vol. III, 359:2-16**).

The ALC also did not believe that 100% redirection would occur and actually found MUHA's theory "unreasonable." Nevertheless, the ALC approved MUHA's CON application because, in the ALC's opinion, with the burden of proof shifted from MUHA to the Appellants, the Appellants failed to prove there would be adverse impact.¹⁸ (**Order, p. 26, n. 35, p. 32; and 47**). Hence, despite finding the 100% redirection theory "unreasonable," the ALC concluded "[w]hether MUHA's theories were sound or not does not negate the fact that they conducted an analysis of various factors that could contribute to adverse impact and ultimately concluded that there would be no adverse impact. Thus, MUHA complied with the requirements of Standard 5 to present a justification for its project at the agency level." (**Order, p. 60**).

The ALC's conclusion that MUHA met its burden under Standard 5 because it "presented a justification" for its project at the agency level ignores the plain language of Standard 5 which requires MUHA "to justify adverse impact," not simply to present a justification, however unsound or unbelievable, to the Department and the ALC. The ALC's holding that Appellants were required to prove adverse impact in response to MUHA's failure to offer any demonstration of potential adverse impact, applies Standard 5 in a way that shifts the burden of demonstrating adverse

¹⁸ The ALC concluded "ultimately, Petitioners failed to show by a preponderance of the evidence that MUHA's application does not meet the requirements of Standard 5. Rather, the evidence established that any potential adverse impact is justified by the benefits of accessibility [the Proposed Hospital] will offer."

impact from the applicant to Appellants in contravention of the Plan's plain language. In other words, although Standard 5 of the Plan places the burden of justifying need and adverse impact at the chosen site on MUHA, the Department's failure to follow its own regulations and provide meaningful review below has resulted in the Appellants alone being forced to carry the burden of proof that the law initially assigns to MUHA. *See Kiawah Dev. Partners v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 43-44, 766 S.E.2d 707, 723 (2014)(Where the law places the burden of proof on a party, it was error for the ALC to place the burden on the opposing parties). Accordingly, because MUHA failed to meet its burden under Standard 5 to justify adverse impact MUHA's request for a CON should be denied.

II. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW IN INTERPRETING THE PLAIN LANGUAGE OF STANDARD 5 OF THE STATE HEALTH PLAN THAT AN APPLICANT MUST JUSTIFY THE NEED AND ADVERSE IMPACT FOR A NEW HOSPITAL "AT THE CHOSEN SITE" TO BE MERELY DESCRIPTIVE OF WHERE THE NEW HOSPITAL IS LOCATED RATHER THAN A REQUIREMENT THAT THE APPLICANT JUSTIFY NEED AND ADVERSE IMPACT AT THE LOCATION OF THE PROPOSED NEW HOSPITAL.

Under Standard 5, a hospital with projected bed need is allowed to transfer or relocate that need to a different site for the purpose of creating a new hospital, provided certain conditions are met. Specifically, Standard 5 provides:

A facility may apply to create a new additional hospital at a different site within the same service area through the transfer of existing licensed beds, the projected bed need for the facility, or a combination of both existing beds and projected bed need. The facility is not required to have a projected need for additional beds in order to create a new additional hospital. There is no required minimum number of beds in order to approve the CON application. *The applicant must 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.*

(DHEC Ex. 4, p. 0015-0016) (emphasis added). In its CON application and at the hearing before the ALC, MUHA asserted that its Proposed Hospital was needed to address and alleviate

capacity constraints at MUSC Medical Center by offering nontertiary care at the Proposed Hospital twenty-eight miles away in an effort to entice lower acuity patients away from MUSC Medical Center. (**DHEC Ex. 1, p. 0023**). MUHA claimed that this shift in the treatment location for lower acuity patients would allow MUHA to provide better access to the tertiary and quaternary services provided at MUSC Medical Center. (**DHEC Ex. 1, p. 0023**).

Appellants argued before the ALC that, under the plain language of Standard 5, in order to justify the Proposed Hospital, MUHA was required to demonstrate more than its institutional need for 147 new hospital beds as reflected in the Plan (which need is not disputed) and its capacity constraints at MUSC Medical Center. Appellants contended that Standard 5 clearly and unequivocally requires that MUHA demonstrate that a need for the Proposed Hospital's services actually exists in the geographic area where the hospital is to be located. In other words, in this case, MUHA proposes a new 128-bed community hospital providing only non-tertiary services when there are numerous hospital facilities with a total of 456 existing acute care beds already offering these same non-tertiary services within a ten-mile radius of the location of the Proposed Hospital.¹⁹ (**Sullivan Tr., Vol. II, 530:20-531:1**). Appellants assert that it was error for the ALC to accept MUHA's need to make room for high acuity patients at MUSC Medical Center twenty-eight miles away as sufficient justification of need under Standard 5 for spending \$325 million to duplicate services already being offered in the geographic area where the Proposed Hospital will be located.²⁰

¹⁹ MUHA's own health planning expert admitted that currently the residents of southwest Berkeley County where the Proposed Hospital will be located can obtain inpatient community health care services within 15 minutes of where they live. (**Levitt Tr. Vol. III, 1256:20-1257:3**).

²⁰ Compliance with the PRC and the State Health Plan are two separate requirements for approval of a CON. Thus, while MUHA's institutional need (PRC 1) and community need (PRC 2) are relevant inquiries under the CON Law, the requirements of Standard 5 of the Plan must also be met. "The department may not issue a Certificate of Need unless an application complies with the

In order to accept MUHA’s justification for the Proposed Hospital, the ALC contorts the plain language of Standard 5 as follows:

“At the chosen site” merely functions as an adjectival prepositional phrase to describe the noun “hospital” that precedes it, just like “at a different site” describes the “hospital” discussed in the first sentence in this Standard. In both cases, the phrases “at a different site” and “at the chosen site” describe the hospital that will be created under the Standard and differentiate it from the existing hospital from which the need will be transferred. The phrase “at the chosen site” answers the question of which hospital (the hospital at the existing site or the new site) is being discussed rather than identifying the geographic area from which the need for the new hospital must be justified. Indeed, if there was any doubt that “at the chosen site” functions as an adjectival prepositional phrase, the second time “at the chosen site” is utilized in the last sentence of Standard 5 is conclusive. Additionally, the word “new” identifies the hospital which will receive the transferred beds and “at the chosen site” identifies where that hospital is situated thus distinguishing it from the site of the existing hospital.

* * *

In sum, the plain meaning of Standard 5 sets forth that a hospital seeking to transfer beds must establish that the receiving hospital has a need based upon patient origin and other data. And, the patient origin and other data for a hospital should be based upon the service area as set forth in the State Health Plan. This interpretation is the most practical and reasonable interpretation that is consonant with the purpose, design, and policy of lawmakers.

(Order, pp. 57-59). Using this strained construction of Standard 5, the ALC concluded that MUHA justified the need and adverse impact for its new hospital in Berkeley County by using patient origin and other data from the entire Tri-County Service Area, including data concerning the need for beds to accommodate high acuity patients at MUSC Medical Center.²¹ **(Order, p. 59).**

South Carolina Health Plan, Project Review Criteria, and other regulations.” S.C. Code Ann. § 44-77-210(B); *MRI at Belfair LLC v. S.C. Dep’t of Health and Env’tl. Control*, 379 S.C. 1, 9, 664 S.E.2d 471, 475 (2008) (Compliance with the State Health Plan and the Project Review Criteria are independent requirements for approval of a CON).

²¹ For example, in its conclusions regarding need for the Proposed Hospital, the ALC found, “MUHA clearly has a large institutional need of 147 beds as set forth in the State Health Plan. Therefore, considering Standard 5 allows the transfer of institutional need, with no prohibition even if the service area has a bed surplus, and considering the benefits to both the target population but also the inescapable benefits to the whole population served by MUHA downtown—and in

The ALC’s interpretation of “at the chosen site” as being merely descriptive of the new hospital²², rather than being a geographic boundary on the proof needed under Standard 5 to justify a new hospital, completely ignores the concepts of healthcare planning that are the underpinning of Standard 5. A crucial relationship exists between geographic proximity and the health planning concepts of need and adverse impact. The closer in proximity a new hospital is to existing providers, the less the need is “at the chosen site”. Concomitantly, the closer in geographic proximity of the new hospital to existing providers, the greater the adverse impact to those existing hospitals and the greater the harm to the healthcare delivery system as a whole.²³

Standard 5, which allows a provider to transfer the general hospital bed need it has at one location to a new location, takes into account the importance of location to the concepts of need and adverse impact by requiring an applicant to justify need and adverse impact “at the chosen site”. The ALC’s erroneous interpretation of Standard 5 renders geographic proximity and the words “at the chosen site” meaningless because it would allow an applicant to move its bed need and create a new hospital without a consideration of the proximity of the new hospital to other

particular their unique high acuity patients—I find MUHA has demonstrated a need. (**Order, p. 59**).

²² In its Order, the ALC concludes that “[t]he phrase ‘at the chosen site’ answers the question of which hospital (the hospital at the existing site or the new site) is being discussed rather than identifying the geographic area from which the need for the new hospital must be justified.” (**Order, p. 57**). The ALC further notes that Standard 5’s use of the adjective “new” is also descriptive of the hospital being created by the transferred need. *Id.* The ALC does not indicate why the Board of the Department, which approved the Plan, would find it necessary to use two terms to distinguish the hospital being created from the existing hospital from which the need is to be transferred.

²³ The ALC acknowledges this concept in its discussion of adverse impact when it finds “Trident, Roper, and MUHA are the three dominant inpatient providers in the Tri-County Service Area. TMC is approximately ten miles from the Project with 296 acute care beds and SMC is approximately eleven miles from the Project with 124 acute care beds. Roper Berkeley is approximately four miles away with 50 beds. Obviously, the closer a project is to existing providers, the more likely it will impact those providers.” (**Order, p. 33**).

existing providers and the services they provide.²⁴ "[I]t is clear the legislature intended the State Health Plan to be an enforceable document." *Trident Med Ctr. v. S.C. Dep't of Health and Envtl. Control, et al.*, 412 S.C. 341, 350, 772 S.E.2d 177, 182 (Ct. App. 2015). In the context of a Standard 5 review, "at the chosen site" is the linchpin for the concept of geographic proximity in the evaluation of the need for, and adverse impact of, a new hospital, both of which are directly related to how close the new hospital is to other existing providers.

In this case, MUHA's institutional need for 147 beds, as set forth in the Plan, and its need to redirect lower acuity patients to make room for higher acuity patient at its downtown hospitals does not obviate the requirement that MUHA prove that the patients at the chosen site of the new hospital in Berkeley County "need" the community hospital services being offered by MUHA. Therefore, the ALC erred as a matter of law in interpreting Standard 5 to allow MUHA's need to decant patients in order to serve high acuity patients at MUSC Medical Center to substitute for need at the chosen site. For this reason, the decision of the ALC should be reversed and MUHA's CON application should be denied.

²⁴ The ALC interpretation of Standard 5 also ignores that the standard evaluates need for the services proposed by the Project (not the services offered at a different facility), and the overwhelming evidence was that the other community hospitals in the area were available to meet the community's needs for the same non-tertiary services proposed by MUHA.

III. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW IN APPROVING MUHA'S CON APPLICATION ON THE CONDITION THAT MUHA CLOSE ITS FREESTANDING EMERGENCY DEPARTMENT ("FSED"), GIVEN THAT THE UNCONTROVERTED EVIDENCE IN THE RECORD IS THAT MUHA DOES NOT INTEND TO CLOSE THE FSED AND GIVEN THAT THE ALC CONCLUDED THAT, IN THE ABSENCE OF CLOSURE OF THE FSED, MUHA'S PROPOSED HOSPITAL WOULD FAIL TO COMPLY WITH THE STATE HEALTH PLAN

In its CON application, MUHA represented to the Department that MUHA would close its FSED, which was to be located just two miles from the Proposed Hospital, in order to consolidate emergency services into the Proposed Hospital and reduce duplication of emergency services in the service area. (**DHEC Ex. 1, p. 0015**). By making this promise to close the MUHA FSED, MUHA was able to include the patients it expected to treat at the MUHA FSED in its projected utilization numbers for the Proposed Hospital. (**Sullivan Tr., Vol. II, 519:7-520:6**). After the Department issued its decision to approve the Proposed Hospital, however, MUHA decided not to close the MUHA FSED and, at the hearing before the ALC, MUHA testified without contradiction that it intended to operate two emergency departments, one in the Proposed Hospital and the MUHA FSED two miles away.²⁵ (**Cawley Tr., Vol. III, 494:18-495:7**).

In its Order, the ALC made the following specific findings as to the effect MUHA's decision to keep the MUHA FSED open has on the projected utilization of the Proposed Hospital:

In its application, MUHA notes it plans to open a freestanding emergency department (FSED) approximately two miles from the Project, but that it plans to close the FSED once MUHA Berkeley opens in order to consolidate emergency services into the community hospital and reduce duplication of emergency services in the service area. MUHA therefore incorporated the patients it expected to treat at the FSED in its projected utilization calculations for MUHA Berkeley. However, after DHEC approved MUHA's CON for MUHA Berkeley, MUHA decided not to

²⁵ At the time of the hearing, MUHA had an approved, but appealed, CON for the FSED. (**Order, p. 4**). In its Order, the ALC took judicial notice that, on May 28, 2020, the ALC issued its decision denying MUHA's request for a CON for the proposed FSED, which was followed on June 8, 2020 by MUHA's Motion to Alter or Amend. The ALC denied the motion on July 6, 2020 and MUHA filed its Notice of Appeal with this Court, where the matter is currently pending as Case No.: 2020-001072. (*See Order, p. 4, n. 8*).

close the FSED and retain both emergency departments. It did not update its volume totals accordingly. **(Order, p. 7, n. 12)**

MUHA's volume calculations in its CON application were based in part on absorbing the emergency room volumes from its proposed FSED in Nexton and MUHA has not revised its volume predictions consistent with its decision not to absorb the FSED in the Project. **(Order, p. 11, n.16).**

In light of the these findings, the ALC concluded, "Although I find MUHA justified the need for its hospital with patient origin data, it must be emphasized that MUHA's application relies in part on patient volumes that will be redirected from MUHA's FSED at Nexton because the application states the FSED will be absorbed by MUHA Berkeley. However, it now appears MUHA plans to keep the FSED open independently. The extent to which this change would affect the volume numbers supporting MUHA Berkeley is unclear, but likely significant. Therefore, my decision in this case is premised on the FSED and its patient volume being absorbed by MUHA Berkeley as premised in MUHA's CON application." **(Order p. 27, n. 37).**

The ALC made similar findings with regard to MUHA's alleged adverse impact analysis:

Despite the above findings concerning lack of adverse impact, the Project would result in an unacceptable adverse impact if MUHA's proposed Nexton FSED is not absorbed by the Project. Originally, MUHA set forth in its CON application that upon opening the new hospital, MUHA would close the FSED the Department had approved for Berkeley County. However, after Petitioners objected to this CON for this Project, MUHA changed its position and now seeks to keep the FSED open. Presumably, MUHA's FSED's physicians would be apt to refer patients to MUHA Berkeley. Thus, MUHA Berkeley would potentially receive the benefit of duplicate emergency room referrals, thereby increasing its patient volumes and revenues for the Project. Although the increase in patient referrals would make MUHA Berkeley more financially feasible, it would do so at the financial harm to the existing local hospitals—specifically to Roper Berkeley. I find this impact would be a material adverse effect. This is especially pertinent in light of MUHA's contention that it did not intend to redirect patients from those existing hospitals. Therefore, I find the granting of the CON must be dependent upon MUHA honoring its original declaration that upon opening MUHA Berkeley, its FSED, if operating, will be closed. Otherwise, the Project will create an adverse impact to existing hospitals in violation of Standard 5.

(Order, pp. 39-40).

In the face of the undisputed evidence presented at the hearing that MUHA intends to operate its FSED even after its Proposed Hospital is established and the finding by the Court that such conduct will cause MUHA's project to be in violation of Standard 5 of the Plan, it is inconsistent, arbitrary, capricious and in contravention of the CON Law for the Court to find that MUHA's CON application must be approved. Moreover, the Court's granting of MUHA's CON "dependent upon MUHA's honoring its original declaration" to close its FSED upon the opening of the Proposed Hospital, some three or four years from now, is unenforceable and likewise inconsistent, arbitrary, capricious and in contravention of the CON Law.

The ALC's conditional approval of a CON relies on MUHA taking action to close its FSED once its new hospital becomes operation. This condition cannot be enforced. Once MUHA has spent \$325 million constructing its new hospital and becomes licensed and operational, its CON is fulfilled, *i.e.*, it expires. *See* 3 S. C. Code Ann. Regs. 61-15, § 604 ("Fulfillment of the Certificate of Need occurs, although not limited to, the [sic] submission of an adequate final completion report as determined by the Department."). In other words, the condition the ALC places on the approval of MUHA's CON in this case cannot occur until the CON has expired under the law. Once the CON has expired and MUHA's new hospital is operational, enforcement of the condition requiring closure of the FSED will be difficult, if not impossible.²⁶

MUHA represented to the Department that it would close the FSED because MUHA needed to use the FSED patient volumes and revenues to support its Proposed Hospital application. Thereafter, the Department accepted MUHA's enhanced utilization numbers and projected

²⁶ A CON is essentially a permit to establish a healthcare facility or service. *See* 3 S.C. Code Ann. Regs. 61-15, § 102 (Supp. 2019). Once MUHA constructs its \$325 million hospital, the Department must issue a license in order for the hospital to become operational. *See generally* 3 S.C. Code Ann. Regs. 61-16. Thus, once the Proposed Hospital is constructed, licensed, and opened, revocation of the CON is not available as a remedy for MUHA's failure to close the FSED.

revenues at face value. Once the Department approved its CON application for the Proposed Hospital, however, MUHA chose to present its Proposed Hospital project to the ALC, for purposes of *de novo* review, with the modification that it would not close the FSED upon the opening of MUHA Berkeley.

As noted, the ALC correctly determined that this change in the project was not reflected in MUHA's utilization and need analyses or in its claims of no adverse impact on the Appellants. Thus, when the ALC considered the project presented to it through the uncontroverted evidence presented by MUHA, the ALC concluded that MUHA had not justified the need for the Proposed Hospital or justified its adverse impact on existing facilities as required by Standard 5 of the Plan. The ALC cannot then approve MUHA's Proposed Hospital based on its assumption that MUHA will close the MUHA FSED when the only evidence in the record is to the contrary. Under the CON Act, neither the Department nor the ALC can approve a CON unless the project complies with the State Health Plan, the PRC and other regulations. S.C. Code Ann. § 44-7-210(B) (2018). Therefore, the Order of ALC must be reversed and MUHA's CON application denied.

IV. THE APPEAL BOND REQUIRED BY S.C. CODE ANN. § 44-7-220(B)(2018) IMPERMISSIBLY IMPAIRS APPELLANTS' RIGHT TO JUDICIAL REVIEW IN VIOLATION OF THE EQUAL PROTECTION AND DUE PROCESS GUARANTEES OF THE UNITED STATES CONSTITUTION AND THE SOUTH CAROLINA CONSTITUTION.

Once Appellants exhausted their administrative remedies by appearing and participating in proceedings before the Department staff, the Board of the Department and, finally, the ALC, Appellants' right to initiate judicial review became available under three statutory provisions governing such appeals. S.C. Code Ann. § 1-23-380 (Supp. 2019) of the Administrative Procedures Act provides that "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 pursuant to this article and Article 1." (Emphasis added). Section 1-23-380 applies to appeals from all agency decisions.

S.C. Code Ann. § 1-23-610(A)(1)(Supp. 2019) provides specifically for the judicial review of a final decision of the ALC:

For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.

(Emphasis added). Finally, the CON Act at § 44-7-220(A) provides that a party who is aggrieved by a final decision of the ALC in a CON case "may seek judicial review" of the final decision under § 1-23-380 of the Administrative Procedures Act, discussed above.

On October 2, 2020, Appellants filed their Notices of Appeal in accordance with the above statutes. In 2010, however, the General Assembly amended the CON Act section recognizing the right of judicial review from CON cases to add a new requirement:

If the relief requested in the appeal is the reversal of the Administrative Law Court's decision to approve the Certificate of Need application . . . , the party filing the appeal shall deposit a bond with the Clerk of the Court of Appeals within five

calendar days after filing the petition to appeal. The bond must be secured by cash or a surety authorized to do business in this State in an amount equal to five percent of the total cost of the project or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars. If the Court of Appeals affirms the Administrative Law Court's decision or dismisses the appeal, the Court of Appeals shall award to the party whose project is the subject of the appeal all of the bond and also may award reasonable attorney's fees and costs incurred in the appeal. If a party appeals the denial of its own Certificate of Need application . . . and there is no competing application involved in the appeal, the party filing the appeal is not required to deposit a bond with the Court of Appeals.

S.C. Code Ann. § 44-7-220(B)(2018).

Analyzing the plain language of § 44-7-220(B) reveals the following. The requirement that an Appeal Bond be posted applies only (i) in a CON case (ii) where the ALC decided to approve the CON application and (iii) where the appellant is requesting reversal of the decision. The statute contains no language that provides discretion to this Court in collecting the Appeal Bond, setting the bond amount, or in dispensing the bond funds; rather § 44-7-220(B) requires that, in each case, the entire Appeal Bond, up to \$1.5 million for a party appellant, be collected and awarded to the prevailing CON applicant without the slightest proof of the damages, if any, actually caused by the appeal. In other words, neither the collection nor the award of the Appeal Bond bears any relation to any potential or actual damages suffered or to be suffered by the CON applicant or to any potential or actual conduct or motive of an appellant other than the mere filing of a Notice of Appeal seeking judicial review of a decision of the ALC. Further, although § 44-7-220(B) does not explicitly require dismissal of an appeal for failure to post the Appeal Bond, the context of the language appears to compel the Court to treat the failure to post the bond as requiring dismissal. As noted, nothing in the statute gives the Court the discretion to make exceptions or reductions to the bond posting requirement based on a party's financial situation.

A. IMPOSITION OF THE APPEAL BOND VIOLATES APPELLANTS' DUE PROCESS RIGHTS TO JUDICIAL REVIEW GUARANTEED BY U.S. CONST. AMEND. XIV, § 1 AND S.C. CONST. ART. I, §§ 3 AND 22.

The courts of South Carolina have long recognized the general rule that “the right of appeal is not an inherent or vested right, but is a matter of grace” and that “in the absence of a constitutional restriction, the legislature in its discretion may abridge or regulate the right of appeal.” *Horn v. Blackwell*, 212 S.C. 480, 483, 48 S.E.2d 322, 323 (1948). Unlike in *Horn*, in this case there is an applicable constitutional restriction that prohibits abridgment of the right to judicial review of a decision of the ALC.

In *Horn*, the South Carolina Supreme Court considered a law that required a tenant to post a bond at the time of appeal in order to stay ejectment.²⁷ The law specifically provided that “[i]n the event the tenant shall fail to file the bond herein required within five (5) days after service of the notice of appeal such appeal shall be dismissed.” *Id.* The tenant argued that a constitutional provision providing that “the right of appeal [in cases tried by a magistrate] shall be secured under such rules and regulations as may be provided by law,” prohibited the General Assembly from imposing a bond requirement on such appeal. In rejecting the tenant’s arguments, the Court noted that the constitutional provision in question did not prohibit the General Assembly from specifying the manner of exercising the right to appeal from a magistrate’s order of ejectment, including requiring that the tenant post a bond to stay ejectment during an appeal. *Id.*

The *Horn v. Blackwell* decision, which was decided in 1948, is distinguishable from this case in many important and informative respects. First, *Horn* did not involve an appeal from an administrative agency. As discussed below, Art. I, § 22, which was added to the South Carolina Constitution in 1970, explicitly requires that at least one level of judicial review be provided to

²⁷ As noted, the requirement of an Appeal Bond under § 44-7-220(B) is not connected to any stay or delay of the decision of the ALC to grant a CON to an applicant.

persons before they can be bound by decisions of an administrative agency.²⁸ Appellants in this case have received no judicial review of the decision to award MUHA a CON to establish a new \$325 million, 128-bed hospital in the service areas of their existing facilities.²⁹

Second, the appeal bond in *Horn* was to be given in exchange for a stay of ejectment of the tenant from the property of the landlord. The stated purpose of the bond in *Horn* was to protect the landlord from the effects of such stay of ejectment during the appeal. As noted above, § 44-7-220(B) is silent on the purpose of the Appeal Bond. Indeed, an analysis of existing law indicates that, to the extent that the Appeal Bond might be said to protect against delay or the costs of appeal, or to deter and compensate for frivolous appeals, it is wholly duplicative of existing law that

²⁸ See *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). The comments to the *Final Report*, at p. 21, state the purpose of Article 1, § 22 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.

²⁹ 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 Env'tl. Control*, 291 S.C. 267, 353 S.E.2d 277 (1987)(discussing the origins of the CON program).

already adequately provides for these protections. On the other hand, the requirement that an appellant post up to a \$1.5 million Appeal Bond simply to maintain an appeal is undoubtedly a deterrent or outright barrier to the exercise of the constitutional right to judicial review of an administrative decision provided by S.C. Const. art. I, § 22.

The constitutional provision cited by the tenant in *Horn* provided that the right of appeal from magistrate decisions be secured under “such rules and regulations as may be provided by law.” *Horn*, 212 S.C. at 483, 48 S.E.2d at 323. This language tilts in favor of regulation by the General Assembly, rather than restricting such regulation. Article I, § 22 of the South Carolina Constitution, entitled, “Procedure before administrative agencies; judicial review,” provides that:

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; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have *in all such instances* the right to judicial review.

(Emphasis added). The Fourteenth Amendment to the United States Constitution and the South Carolina Constitution further provide that the State shall not deprive any person of life, liberty or property without due process of law. *See* U.S. Const. amend. XIV, § 1 and S.C. Const. art. I, § 3.

As summarized by the South Carolina Supreme Court, “[t]he fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.” *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing S.C. Const. art. 1 § 22)). The *Kurschner* Court also notes that “[d]ue process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. (Citations omitted). Rather, due process is flexible and calls for such procedural protections as the particular situation demands.” *Id.*, 376 S.C. at 171-172, 656 S.E.2d at 350.

The flexibility of due process of necessity applies only to the elements of notice and opportunity to be heard and such flexibility allows administrative bodies to meet those requirements of due process in different ways, depending on the circumstances. There is only one way to protect the right of judicial review “in all such instances” and that is to provide unfettered access to at least one judicial branch court. With respect to decisions of the ALC in CON cases, the only judicial review provided by law is an appeal to the Court of Appeals. *See, e.g.*, S.C. Code Ann. § 1-23-380 (“Except as otherwise provided by law, an appeal is to the court of appeals”). The substantial and mandatory Appeal Bond requirement of § 44-7-220(B) of the CON Act impermissibly burdens and impedes the constitutional due process right to judicial review afforded by the South Carolina Constitution and should be declared invalid.

B. IMPOSITION OF THE APPEAL BOND VIOLATES APPELLANTS’ RIGHT TO EQUAL PROTECTION OF THE LAWS GUARANTEED BY U. S. CONST. AMEND. XIV, § 1 AND S.C. CONST. ART. I, § 3.

As summarized by the South Carolina Supreme Court in *Joseph v. S.C. Dep’t of Labor, Licensing & Regulation*, 417 S.C. 436, 451, 790 S.E.2d 763, 771 (2016):

The Equal Protection Clause provides, “nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) (citation omitted). Under the rational basis test, the Court must determine: (1) whether the law treats similarly situated entities differently; (2) if so, whether the legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 293–94, 737 S.E.2d 601, 608 (2013) (citing *Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep’t of Rev.*, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003)).

Appellants contend that the Appeal Bond required by § 44-7-220(B) fails the rational basis test for determining the validity of laws under the Equal Protection Clause because (a) it applies only to an extremely limited class of persons seeking to appeal a decision of the ALC in a

CON case, (b) it lacks any rational basis for being so limited; and (c) it bears no rational relation to a legitimate government purpose in that numerous laws already exist to protect the rights of all persons engaged in the judicial review process and there is no rational basis for placing deterrents on the right to judicial review in a CON matter.

In *Lindsey vs. Normet*, 405 U.S. 56, 92 S.Ct. 862 (1972), the United States Supreme Court addressed a challenge to a bond requirement found in Oregon's landlord-tenant laws. The Oregon law required tenants challenging eviction procedures to post a bond equal to twice the value of the amount of the rent expected to accrue while the case was on appeal ("the double bond"). If the judgment was affirmed, the landlord received the entire bond without proof of any damage. Oregon law did not impose a double bond requirement for any other appellant or in any other case.

Applying the rational relationship test, the United States Supreme Court could find no rational purpose for requiring appealing tenants to post a double bond when there is no relationship to any damage sustained by the landlord during appeal. Specifically, the Court stated "the claim that the double bond requirement operates to screen out frivolous appeals is unpersuasive." *Id.* at 78. Further, the Court observed that no other appellants were subject to this obligation and stated, "we discern nothing in the special purposes of the [law] or in the special characteristics of the landlord tenant relationship to warrant this discrimination." *Id.* As a result, the Court held that requiring a special bond for this one class of appellants was arbitrary and irrational and in violation of the equal protection clause of the Fourteenth Amendment. "When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily be denied to others without violating the Equal Protection Clause." *Id.*, at 79, 92 S.Ct. at 877.

In this case, only appellants challenging an approved CON project face an onerous bond requirement as a prerequisite to maintaining an appeal to the Court of Appeals. An applicant appealing the denial of a CON is not required to post a bond in order to appeal the denial. Further, other persons seeking to exercise the right of judicial review of a decision by the ALC, such as persons opposing the issuance of environmental permits or persons contesting other non-CON actions of the Department or persons contesting the actions or decisions of governmental agencies other than the ALC, are not required to post substantial sums of money for the privilege of judicial review, with the potential result that the entirety of those funds will be automatically disgorged to a prevailing applicant without any discretion to the appellate court or any proof of actual damages. Because the Appeal Bond requirement applies only to a small subset of appeals from the ALC, the Appeal Bond statute violates the Equal Protection Clause.

Moreover, no legitimate government purpose exists to justify the disparate treatment found in the Appeal Bond statute. For example, nothing in the CON Act suggests a basis for treating persons seeking judicial review of the approval of a CON project differently from an applicant seeking review of a decision to deny its CON application. The stated goals of the CON Act are 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 (2018). All of these goals are served if a provider, who has already been awarded a CON or who is already providing healthcare services in an area (*i.e.*, an "affected person") is granted access to the appellate courts in the same manner as a provider who is applying for a CON to establish or expand services.

As discussed above, to the extent that the Appeal Bond can be considered an attempt to compensate a CON applicant for the delay to its proposed project or to protect against or deter frivolous appeals or to compensate a CON applicant for its costs incurred in an appeal, there are numerous existing provisions of law that adequately address those issues. S.C. Code Ann. §§ 1-23-380(2) and 1-23-610(A)(1) and Rule 241(b)(11), SCACR, all provide that the filing and service of a notice of appeal does not stay the ALC decision appealed from. Thus, unless the appellant seeks a stay (supersedeas), the CON applicant is free to commence work on its project without regard to the appeal.

Moreover, in the opposite case, where the appellant affirmatively seeks a stay to prevent the project from going forward, Rule 241(c)(3), SCACR, provides that the granting of supersedeas “may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate.” Rule 241(c)(3) also provides that “where it appears that the granting ... of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the ... court may order other affirmative relief upon such terms as are deemed appropriate.” Thus, without reference to the Appeal Bond, the Court can fashion any monetary or other undertaking to compensate a CON applicant should the Court grant an appellant’s request to stay (delay) the project pending resolution of the appeal. Thus, the Appeal Bond required by § 44-7-220(B) provides a CON applicant no protection from delay that is not already provided for in the law.

Similarly, if an Appellant files a frivolous appeal for any improper purpose, including delay, the Appeal Bond required by § 44-7-220(B) does nothing to protect a CON applicant beyond the protections already provided for in the law. Section 44-7-220(C) provides that, in addition to the mandatory award of the full Appeal Bond, in the event the Court of Appeals determines that

an appeal is frivolous, it “may award damages incurred as a result of the delay, as well as reasonable attorney’s fees and costs, to the party whose project is the subject of the . . . judicial review.” Rule 269, SCACR, also allows the Court to address frivolous appeals by “impos[ing] upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.”

Finally, to the extent that a CON applicant incurs costs as a result of an appeal, there are numerous provisions that directly address these costs. Rule 222, SCACR, allows a prevailing respondent to apply to the Court to have certain costs and a portion of its attorneys’ fees paid by the Appellant. The Appeal Bond provision itself provides that, in addition to the mandatory award of the Appeal Bond, the Court of Appeals “may award reasonable attorney’s fees and costs incurred in the appeal.” *See* S.C. Code Ann. § 44-7-220(B).

As the above discussion illustrates, the Appeal Bond required by § 44-7-220(B) does not enhance or provide additional protection to a CON applicant not already afforded in existing separate provisions for attorney’s fees, costs, security in the event of stays, and damages for delay and frivolous appeals. Unlike the Appeal Bond, however, the existing protections extend to both appellants and respondents and cover cases other than those that arise under the CON Act. As observed by the United States Supreme Court in *Lindsey*:

While a State may properly take steps to insure that an appellant posts adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord. This requirement is unnecessary to assure the landlord payment of accrued rent since the undertaking [a tenant] must file pursuant to the general appeal bond statute . . . must cover ‘the value of the use and occupation of such property . . . from the time of the appeal until the delivery of the possession thereof, and since the landlord may bring a separate action at law for payment of back rent under [another law]. Moreover, the landlord is protected against waste or damages occurring during the appeal by undertaking [under another law] that the tenant must file if he wishes to remain in possession of the property during the appeal. The

claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars non-frivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond. The impact on ... appellants is unavoidable: if the lower court decision is affirmed, the entire double bond is forfeited; recovery is not limited to costs incurred by the appellee, rent owed, or damage suffered. No other appellant is subject to automatic assessment of unproved damages. We discern nothing in the special purposes of the statute or in the special characteristics of the landlord tenant relationship to warrant this discrimination.

* * *

The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The nonindigent ... appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon. The discrimination against [this] class of ... appellants is arbitrary and irrational, and the double-bond requirement ... violates the Equal Protection Clause.

Lindsey, 405 U.S. at 77-79, 92 S.Ct. at 876-877.

The Appeal Bond requirement set forth in § 44-7-220(B) applies only to a small subset of appellants and excludes other similarly situated appellants. No rational basis exists for such disparate treatment. Further, the Appeal Bond serves no legitimate governmental purpose not already addressed by other laws. Finally, whether or not the General Assembly intended it to be so, the Appeal Bond provided for in § 44-7-220(B) serves no real purpose other than as an impermissible deterrent or barrier to the exercise of the Appellants' constitutional rights to judicial review of a decision of the ALC. Under the rationale set forth in *Lindsey*, the Appeal Bond in this case violates the Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution and of S.C. Const. art. I, § 3.

For the reasons set forth above, the Appellants respectfully request that this Court find that the Appeal Bond requirement set forth in 44-7-200(B) 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 and order that the

Appellants are therefore relieved from any obligation to comply with the requirement in order to maintain their duly filed appeals in this case.

CONCLUSION

For the reasons discussed above, Appellants respectfully request that this Court reverse the decision of the ALC and deny MUHA's CON application or grant such other relief as the Court deems appropriate.

Respectfully submitted,

s/David B. Summer, Jr.

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December 2, 2020
Columbia, South Carolina

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Dec 02 2020

SC Court of Appeals

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,.....Appellant-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,.....Appellant,

v.

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 December 2, 2020, a copy of the **Initial Brief of the Appellants Trident Medical Center, LLC and Walterboro Community Hospital, Inc.**, was served on all counsel of record via electronic mail containing the above-referenced document to each counsel's individual AIS email address pursuant to SC Supreme Court COVID Order 2020-05-29-02 as follows:

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RECEIVED
Dec 02 2020
SC Court of Appeals

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 Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proofs of Service.

By copy of this letter and pursuant to the Court's standing Order, we are serving copies of the same to all counsel of record via email.

With best regards, I am

Sincerely,

s/David B. Summer, Jr.

David B. Summer, Jr.

Enclosures

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