THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

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SC Court of Appeals

Case No. 17-ALJ-07-0441-CC
Case No. 17-ALJ-07-0444-CC
Appellate Case No. 2020-001072

Trident Medical Center, LLC d/b/a Trident Medical Center and Summerville Medical Center……..Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Health Emergency Services……Respondents,

Of Whom, Medical University Hospital Authority d/b/a MUSC Health Emergency Services is …….Appellant.

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

v.

South Carolina Department of Health and Environmental Control, and Medical University Hospital Authority d/b/a MUSC Health Emergency Services…….Respondents,

Of Whom, Medical University Hospital Authority d/b/a MUSC Health Emergency Services is…….…….Appellant.

INITIAL BRIEF OF RESPONDENT CAREALLIANCE HEALTH SERVICES

Jennifer J. Hollingsworth, SC Bar No. 73535
Shannon V. Lipham, SC Bar No. 103699
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
P.O. Box 2426
Columbia, SC 29202
Telephone: 803-771-8900
JHollingsworth@nexsenpruet.com
SVLipham@nexsenpruet.com

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

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STATEMENT OF THE CASE

On June 6, 2017, the Appellant Medical University Hospital Authority, d/b/a MUSC Health Emergency Services ("MUHA") filed a Certificate of Need ("CON") application for the construction of a 15,300 square foot freestanding emergency department ("FED") in Berkeley County at a cost of $13,584,161. **Joint Ex. 0001-0438**. On June 23, 2017, Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") published MUHA's CON application in the State Register as both accepted for filing and complete for review. **Joint Ex. 0560-0562**. On July 10, 2017, the DHEC staff notified MUHA via letter that the application was deemed complete and identified the relative importance of the Project Review Criteria to be used in review of the application. **Joint Ex. 0545-0547**.

On July 6, 2017, Respondent Trident Medical Center, LLC d/b/a Trident Medical Center and Summerville Medical Center (collectively "Trident") notified DHEC of its status as affected persons and opposition to MUHA's application. **Joint Ex. 0440–0041**. On July 21, 2017, Respondents CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper Mount Pleasant Hospital and Roper St. Francis Berkeley Hospital (collectively "Roper St. Francis") notified DHEC of its status as affected persons and opposition to MUHA's application, and submitted additional opposition points in a letter dated July 31, 2017. **Joint Ex. 0442–56**. DHEC held a Project Review Meeting on August 24, 2017, at which MUHA, Trident, and Roper St. Francis each presented written materials in support of their respective positions. **Joint Ex. 0457–0543; 0563**.

On September 25, 2017, DHEC staff approved MUHA's CON application. **Joint Ex. 0551–0057**. Both Roper St. Francis and Trident sought final review conferences with the DHEC Board, which the Board declined to hold, thus rendering the DHEC staff decision the final agency decision for purposes of requesting contested case review by the Administrative Law Court

("ALC"). Roper St. Francis and Trident timely filed requests for contested case hearings challenging the Department's decision, which were consolidated by the ALC. By Order dated May 4, 2018, the ALC denied MUSC's Motion to Lift the Automatic Stay (**Order Denying to Lift Stay**), and by Orders dated April 11, 2019, the ALC denied Motions for Summary Judgment filed by Roper St. Francis and Trident (**Order Denying Summ. J. (Std. 2); Order Denying Summ. J.**) The Court also heard a number of discovery motions, including Roper St. Francis' Motion for Discovery Order, which the ALC denied in part and granted in part on April 11, 2019. **Order (Discovery Mot**.). The consolidated cases proceeded to a merits hearing before the Honorable Shirley C. Robinson, spanning ten days from July 22, 2019 through August 2, 2019. A total of 12 witnesses testified at the hearing, seven of whom were qualified as expert witnesses, and more than 200 exhibits were entered into evidence. **Final Order, 4-5**.

On May 28, 2020, the ALC issued its Order reversing DHEC's decision to approve MUHA's Proposed Project. On June 8, 2020, MUHA filed a Motion to Alter and Amend the Court's Order (**Mot. to Alter and Amend**), to which Roper St. Francis filed a Response in Opposition (**RSF Resp. in Opp.**), and which was denied by Order dated July 6, 2020 (**Order Denying Mot. to Alter and Amend**). On July 31, 2020, MUHA filed its Notice of Appeal with this Court.

STATEMENT OF THE FACTS

This matter arises under the regulatory program by which Certificates of Need are issued by the State of South Carolina for the development of health care facilities and services in this State. The regulatory scheme consists of the State Certification of Need and Health Facility Licensure Act ("CON Act"), S.C. Code Ann. § 44-7-110, *et seq.*; the regulations promulgated thereunder, 24A S.C. Code Ann. Regs. 61-15 ("CON Regulations"); and a Health Plan which is revised at least biannually. The purposes of the CON Act and thus the regulatory program itself

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 high quality services are provided in health facilities in this State." *See* S.C. Code Ann. § 44-7-120. The primary vehicle by which the CON program is implemented, and its stated goals achieved, is the requirement that a healthcare provider apply for, and receive, a CON from DHEC prior to undertaking certain major projects or providing certain new services. *See* S.C. Code Ann. §§ 44-7-120, -160. In determining whether to grant or deny an application for a CON, the Department evaluates the proposed project under the review criteria found in the CON Regulations and under the policies and standards set forth in the applicable South Carolina Health Plan. *See id*. at § 44-7-210(C). The Department is required to promulgate the South Carolina Health Plan in furtherance of the purpose of the CON Act. *See* S.C. Code Ann. § 44-7-120(3). The Health Plan must contain specific standards and criteria for the review and approval of covered services, including as relevant here the establishment of freestanding emergency services. *See* S.C. Code Ann. § 44-7-180(C).

Project review criteria (PRC) are adopted by the Department through regulation and "must be used in reviewing all projects under the Certificate of Need process." S.C. Code Ann. § 44-7-190(B). The Department must advise an applicant the PRC considered most important to review of a proposed project, and what priority order those PRC will be evaluated, at the time an application is deemed complete for review. S.C. Code Ann. Regs. 61-15 § 304. "When an application has been appealed, the Department may not change the weight of the importance of the [PRC]." *Id.* DHEC is required to consider the Health Plan in effect at the time a CON application is filed, but may consider a subsequently promulgated Health Plan in making its

decision.[1] *See* S.C. Code Ann. § 44-7-225 ("The department, the Administrative Law Court, and the Court of Appeals shall consider the South Carolina Health Plan in place at the time the application was filed and may consider the current South Carolina Health Plan when making its decision"); **Final Order, 10–11**.

MUHA's CON application to construct a new FED in Berkeley County was filed on June 6, 2017, while the 2015 South Carolina Health Plan was in place (*2015 Health Plan*). The 2017-2018 South Carolina Health Plan (2017-2018 Health Plan) was enacted on June 9, 2017, three days after the application was filed. **RSF 56; Final Order, 11**. FEDs are hospital-based outpatient facilities that serve patients who do not require hospitalization. **Tr. 599:12-20; RSF 55-019**. The Health Plan standards applicable to freestanding emergency services are located in Chapter XI of the 2015 Health Plan. **RSF 55-019**. The Health Plan does not provide for defined "service areas" for freestanding emergency services. **Final Order, 10; Tr. 1340:7–12**.

In the 2015 Health Plan, there are six Standards that must be satisfied in order to establish freestanding emergency services. **RSF 55-022-23**. The Standards primarily at issue in these cases are Standards 2 and 6:

> 2. All off-campus emergency services must be an extension of an existing hospital's emergency service in the same county unless the applicant is proposing to establish a freestanding emergency service in a county that does not have a licensed hospital. The hospital must have a license that is in good standing and must be in operation to support the off-campus emergency services.

[1] The CON Act provides that DHEC, the ALC and this Court have the discretion to consider "the current South Carolina Health Plan when making its decision." S.C. Code Ann. § 44-7-225. DHEC's Regulation 61-15 does not adopt this discretion, instead providing that "[s]hould a new plan be adopted during any phase of the review or appeals process, the applicant shall have the option of withdrawing the application and resubmitting under the newly adopted plan or continuing the review or appeal process under the plan in use when the application was submitted." S.C. Code Ann. Regs. 61-15 § 504.

6. The applicant must demonstrate need for this service by documenting where the potential patients for this proposed service will come from and why they are not being adequately served by existing services in the area.

Id. The 2015 Health Plan also provides that "[t]he following project review criteria are considered to be the most important in evaluating Certificate of Need applications for this service:

1. Compliance with the Need Outlined in this Section of the Plan;
2. Community Need Documentation;
3. Distribution (Accessibility);
4. Resource Availability; and
5. Financial Feasibility.

RSF 55-023. Finally, the 2015 Health Plan provides "[t]he benefits of improved accessibility will be equally weighed with the adverse effects of duplication in evaluating Certificate of Need applications for this service." *Id*.

In the 2017-2018 Health Plan, the Standards were slightly revised in that Standards 5 and 6 are not restated, and instead a newly stated paragraph follows the Standards and provides:

> The applicant must demonstrate need for this service by documenting capacity constraints within existing emergency departments in the service area and/or a travel time of greater than 15 minutes to an existing emergency department in the service area.

RSF 56-026. In the 2017-2018 Health Plan, the PRC considered most important in evaluating applications for FEDs no longer include "Resource Availability" or "Financial Feasibility," and instead identify "Medically Underserved Groups," "Record of the Applicant," and "Staff Resources." *Id.* Also new in the 2017-2018 Health Plan[2] is the statement, "[a]ccess to emergency medical services should be available within fifteen (15) minutes travel time for the majority of residents of the State. The benefits of improved accessibility will outweigh the effects of duplication in evaluating applications for this service." *Id*.

[2] The Standards and requirements for freestanding emergency services are unchanged from the 2017-2018 Health Plan in the 2018-2019 South Carolina Health Plan, enacted on July 12, 2018. **RSF 57-001, -026**.

In the CON application filed June 6, 2017, MUHA proposed to locate the FED in the Nexton development in Berkeley County, a 4,500-acre mixed-use Planned Unit Development (PUD) located near Summerville, which would include a new medical campus with primary care and specialty care, as well as imaging and lab services to be developed by Palmetto Primary Care Physicians. **Joint Ex. 0009-0010**. MUHA's FED was proposed to "increase access to care for service area residents while alleviating capacity constraints at the existing hospital-based ED." **Joint Ex. 0010**. The FED was described as "a freestanding (FS) ED of approximately 15,000 with 10 private treatment areas as well as one isolation treatment area and one resuscitation area. The FS ED will also include a helipad; air medical access provides rapid delivery of advanced medical treatment, improving patient morbidity and mortality rates and decreasing out of hospital time." **Joint Ex. 0021**. MUHA also highlighted a "unique aspect of the proposed project is the proposed inclusion of a clinical decision unit (CDU)." **Joint Ex. 0021**.

MUHA's hospital-based ED consists of three separately identified EDs: the adult ED in the main hospital (herein "Main ED"), the Chest Pain Center ED in Ashley River Tower (herein "CPC ED"), and the pediatric ED in the Children's Hospital, soon to be relocated to the Shawn Jenkins Women and Children's Hospital. **Tr. 210:15-213:18**. The historical volume used as the baseline to project ED utilization in the CON application was all discharges for all patient types seen at the hospital-based EDs downtown, including pediatric and trauma patients. **Joint Ex. 0025**. MUHA's application proposed that "a portion of MUSC's hospital-based ED patients from the service area will shift to the FSED for services." **Joint Ex. 0025**. MUHA also stated "the majority of patient shifting to the FS ED originate from Berkeley and Dorchester Counties." **Joint Ex. 0026**. The utilization methodology resulted in an overall assumption that 21% of all emergency visits to MUHA's tertiary, quaternary Level I trauma center downtown would shift to the FED in Berkeley

County, with 15,129 patient visits projected to redirect to the FED in the first year of the project. **Joint Ex. 0026**.

Regulation 61-15 requires an applicant to demonstrate in the CON application that a proposed service or facility is needed or projected as necessary, which response "shall address at a minimum: . . . justification that the proposed project will not unnecessarily duplicate existing entities." S.C. Code Ann. Regs. 61-15 § 202(2)(b)(11). In the FED application, MUHA's response is that "the proposed project will serve to address the existing challenges at MUSC, and will have no adverse impact on the programs of the competitors in the area. Existing patient volume will shift to the freestanding ED. The existing patient population and population growth can fully support the proposed project." **Joint Ex. 0028**. In the narrative response to Standard 6 of the 2015 Health Plan, MUHA's application states the "project will enhance access and convenience, promote quality of care and increase patient satisfaction. The need for the proposed project is demonstrated throughout this question and Certificate of Need application." **Joint Ex. 0028**. The application does not identify any other FEDs in the proposed service area, nor is the utilization or capacity of existing emergency services in the area addressed by MUHA in the CON application. **Joint Ex. 0020-0028**.

By letter dated July 10, 2019, DHEC notified MUHA that the CON application was deemed complete and that upon receipt of the required application fee, "DHEC will render a decision no earlier than thirty (30) days, but no later than one-hundred (120) days from the date notice is provided to affected persons in the State Register, unless a public hearing is held pursuant to Regulation 61-15, Section 305." **Joint Ex. 0545**. The letter also advised MUHA of the relative importance of the project review criteria DHEC staff would use in review of the CON application: "a. Community Need Documentation; b. Distribution (Accessibility); and c. Medically

Underserved Groups; and d. Financial Feasibility." **Joint Ex. 0546**. DHEC did not identify "Compliance with the Need Outlined in [the] Plan" or "Resource Availability," which are set forth in the 2015 Health Plan as PRC considered most important in evaluating CON applications for freestanding emergency services. **RSF55-023**.

On July 21, 2017, Roper St. Francis submitted detailed opposition to MUHA's application through its health planning expert, Kathryn Platt. **Joint Ex. 0442-0453**. Roper St. Francis specifically raised the application's failure to satisfy Standards 2 and 6 of the 2015 Health Plan. **Joint Ex. 0443-0444**. The analysis included detailed description of the current and approved inventory for emergency services in Berkeley, Dorchester and Charleston Counties, as well as distance and drive times from each to the proposed FED. **Joint Ex. 0444-0447**. At the Project Review Meeting held on August 24, 2017, MUHA provided DHEC with an identification by zip code of the patient origin assumed to redirect to the FED, evidencing that of the 14,366 projected visits, 5,020 would originate from Berkeley County, while 3,603 would originate from Charleston County and 5,749 from Dorchester County. **Joint Ex. 0530**. Thus, only 35% of the ED visits are Berkeley County residents, compared to 40% from Dorchester County and 25% from Charleston County. The single largest zip code by count is a North Charleston (Charleston County) zip code – 29406 accounted for 19% of the redirected visits and is the zip code in which Trident Medical Center and Roper Hospital Northwoods Emergency Department are located. **Joint Ex. 0530**. Margaret Murdock, DHEC's Director of the CON Program, served as the primary reviewer of MUHA's application and developed the staff decision. **Tr. 1316:23-1317:25, 1328:22-1329:1**. Ms. Murdock testified she identified the PRC for the deemed complete letter that she believed were "most important based on [the CON Program's] mission." **Tr. 1331:14-1332:6**. According to Ms. Murdock, DHEC interprets Regulation 304 as giving Department staff the authority to

identify project review criteria for a project that may or may not include all of the project review criteria identified in the Health Plan for that particular facility or service. **Tr. 1431:4-21**.

DHEC approved the CON application by decision dated September 25, 2017, finding MUHA's application "sufficiently complies" with the Standards in the 2015 Health Plan and the identified relative importance PRC. **Joint Ex. 0551**. No other project review criteria are discussed. As to compliance with the Health Plan Standards, DHEC states, "MUSC is located in Charleston County and seeks to establish the Project in Berkeley County. Berkeley County currently does not have a licensed hospital. MUSC has a license that is in good standing and is in operation to support the Project. MUSC has documented its compliance with the relevant Plan standards, including documentation showing where the potential patients for the proposed Project will come from and why they are not being adequately served by the existing services in the area." **Joint Ex. 0552-0553**. There is no discussion at all of the opposition points raised by Roper St. Francis or Trident, and DHEC instead summarily "finds that the opposition has not provided evidence sufficient to require denial of a CON for the Project." **Joint Ex. 0552**. As noted earlier, Roper St. Francis and Trident both pursued their rights to a contested case proceeding after first seeking review by the DHEC Board of the Department staff decision.

Subsequent to DHEC's decision to grant the CON for MUHA's CON application, and in fact just two months before the contested case hearing was scheduled to commence in March 2019, MUHA produced documents in discovery evidencing that changes had been made to the FED proposed in the CON application. While both Roper St. Francis and Trident offered evidence establishing that the changes were substantial and required a new application under Regulation 61-15 § 310, the ALC disagreed. **Final Order, 18**. The significant changes to the FED planned by MUHA for Berkeley County are generally discussed in the Final Order and further detailed in the

trial exhibits and testimony, as well as in Section VI of the Argument herein below. **TMC 3; TMC 62; RSF 63.**

STANDARD OF REVIEW

This matter before the Court is an appeal of an Administrative Law Court's decision regarding the action of an administrative agency. The Administrative Procedures Act ("APA") governs appeals of such decisions of the ALC. The ALC presides over all contested cases challenging the Department's decision on a CON application and is the fact finder authorized to hear evidence and adjudicate the agency decision. S.C. Code Ann. § 1-23-600(A). Specifically, Section 1-23-610(B) of the APA articulates the applicable standard of review on appeal of the ALC's decision:

> The review of the administrative law judge's order must be confined to the record. The reviewing tribunal 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).

The proceeding before the ALC is a de novo hearing at which evidence and testimony is presented. *See Hill v. S.C. Dept. of Health and Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). "On appeal from a contested CON case, the reviewing court 'may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.'"

Spartanburg Reg'l Med. Ctr. v. Oncology and Hematology Assoc., 387 S.C. 79, 89, 690 S.E.2d 783, 788 (2010) (quoting S.C. Code Ann. § 1-23-380(5)). "The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) (citing *Olson v. S.C. Dept. of Health and Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 500, 501 (Ct. App. 2008). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the ALC reached." *Bailey v. S.C. Dept. of Health and Envtl. Control*, 388 S.C. 1, 6, 693 S.E.2d 426, 429 (Ct. App. 2010) (*citing Leventis v. S.C. Dept. of Health & Envtl. Control*, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000); *see also Hill*, 389 S.C. at 9-10, 698 S.E.2d at 617 ("In determining whether the ALJ's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALJ reached.") In the seminal case of *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981), the Supreme Court described the substantial evidence rule as something less than the weight of the evidence and specifically stated that "a judgment upon which reasonable men might differ will not be set aside." *Id.* at 136, 276 S.E.2d at 307.

ARGUMENT

I. MUHA FAILED TO PRESERVE ISSUES RAISED ON APPEAL.

MUHA's first two issues on appeal generally challenge the ALC's determination that MUHA's CON application does not comply with the South Carolina Health Plan and therefore cannot be approved. Under these two general headings, MUHA identifies at least 10 specific legal errors made by the ALC. MUHA Br., i-ii. As a threshold matter, MUHA's failure to raise these 10 legal errors to the ALC for reconsideration should be considered a failure to preserve the issue for

purposes of appeal. *See* SCALC Rule 29(D)[3]. "It is axiomatic that the losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 413, 661 S.E.2d 62, 66 (2008) (internal quotations omitted); *see also Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.")

MUHA's Motion to Alter or Amend devotes a portion of a single sentence to the claim that the ALC erred in the Final Order in concluding "that MUSC's FED CON application does not satisfy Standard 6 in the 2015 State Health Plan and the Drive Time and Access Standard of the 2017-2018 State Health Plan." **Mot. Alter or Amend, 6**. Not only does the Motion fail to give any other description of these errors that span roughly 17 pages of briefing in this Court, but several of the asserted errors are not mentioned <u>at all</u>, even by implication, in the Motion to Alter or Amend, such as the challenges to the ALC's discretion to consider the 2017-2018 Health Plan or its interpretation and application of the balancing tests. *See id.*; *see also* MUHA Br., 32, 34-35. Because MUHA's challenge to the ALC's determinations regarding compliance with the Health Plans was not sufficiently specific, those legal errors are not preserved for appellate review. *MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 394 S.C. 567, 576-77, 716 S.E.2d 111, 115-16 (Ct. App. 2011) (finding unpreserved for review issues not specifically objected to or not sufficiently specific in reconsideration motion).

[3] Notably, the 2019 Revised Notes to Rule 29 provide, "In accordance with applicable case law on issue preservation, the last sentence of subsection (D), which stated a motion for reconsideration is not a prerequisite to filing a notice of appeal, has been deleted."

II. THE ALC CORRECTLY DETERMINED THAT MUHA'S CON APPLICATION DOES NOT COMPLY WITH THE SOUTH CAROLINA HEALTH PLAN.

A. Substantial Evidence Supports the ALC's Decision that the MUHA CON Application Does Not Comply with the 2015 South Carolina Health Plan.

1. *The ALC correctly determined that MUHA failed to document where the potential patients will come from.*

MUHA contends the ALC "erroneously concluded that MUHA failed to satisfy either prong of Standard 6 [of the 2015 Health Plan]" because it "relied on factual findings that are arbitrary, capricious, and unsupported by substantial evidence." MUHA Br., 18. This contention lacks merit. To the contrary, the ALC thoroughly considered the Health Plan in its decision, with 36 numbered factual findings and 5 separate conclusions of law specific to Standard 6 that are supported by substantial evidence in the record. "In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, looking at the entire record, on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC." *Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014).

As noted above, Standard 6 from the 2015 Health Plan Standards for freestanding emergency services provides:

> The applicant must demonstrate need for this service by documenting where the potential patients for the proposed service will come from and why they are not adequately being served by the existing services in the area.

RSF55-0023. In the 64-page Final Order, the ALC concluded "Roper St. Francis and Trident demonstrated by a preponderance of the evidence and I conclude as a matter of law that MUHA's FED does not comply with Standard 6 of the 2015 [Health] Plan." **Final Order, 52**. MUHA's Brief challenges several but not all of the factual findings that support the ALC's conclusion that the CON application is inconsistent with the Health Plan. As to those issues that MUHA does address in its appeal, the arguments are conclusory disagreements with the ALC and almost

entirely unsupported by any legal authority. *See* Rule 208(b)(1)(D), SCACR. Regardless of the inadequacy of MUHA's challenge as to the issues appealed, "[t]he failure to appeal an alternative ground of the judgment below will result in affirmance." *Sloan v. Dept. of Transp.*, 365 S.C. 299, 307, 618 S.E.2d 876, 880 (2005).

The ALC held "Roper St. Francis and Trident demonstrated that MUHA failed to sufficiently establish the origin of its potential patients for its proposed FED." **Final Order, 53**. In so holding, the ALC concluded that MUHA "could not adequately describe" why patients from the proposed service area were traveling past other existing providers of emergency services to receive care at MUSC.[4] *Id.* The ALC's conclusion that MUHA's application failed to satisfy Standard 6 is in fact not arbitrary or capricious, and there is substantial evidence in the record supporting the Final Order. *See Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.") Missing the point entirely, MUHA yet again offers a laundry list of "differentiating factors" that distinguish MUHA's hospital on the peninsula in order to make it "unique compared to other providers." MUHA's Br., 21. This uniqueness was perfectly apparent to and considered by the ALC, and in fact was part of the basis for its finding as to Standard 6. *See* **Final Order, 24-25, 53** ("The Court is unconvinced that patients from the tri-county and beyond, who presently obtain

[4] MUHA's attempt to discredit the Final Order as if it misunderstands the difference between "visits" versus "patients" is unavailing. MUHA's Br., 18-20. This distinction was not only recognized by the ALC (**Final Order, n.54**), but has no bearing on the finding that MUHA failed to explain the reasons that patients bypass other providers to seek care at MUSC downtown. As noted by the ALC, the entire premise of redirection was aptly described at trial: "'It is a guess.'" **Final Order, n.56; Tr. 1181:1-7**.

services at MUHA's downtown Level I trauma center, which includes a robust specialty practice, will necessarily seek services at MUHA's FED (and be satisfied with telemedicine).")

2. ***The ALC correctly determined that MUHA failed to demonstrate patients in the service area are not adequately served by existing services in the area.***

Repeatedly throughout its Brief, MUHA argues that alleged capacity constraints at its tertiary/quaternary academic medical center in downtown Charleston serves as a basis for satisfying the Health Plan Standards for freestanding emergency services, ignoring the ALC's conclusion that "capacity constraints of MUSC's emergency department is not a factor included in any of the Plans." **Final Order, 53**. Indeed, the ALC properly focused on whether existing services were adequate to serve the potential patients proposed to be served by MUHA. **RSF55-023; Final Order, 53**. MUHA's challenge to the ALC's analysis of existing capacity in the proposed service area as legal error is nearly non-sensical, illogically asserting[5] "there is no language in [Standard 6] that suggests, much less requires, that a CON applicant must demonstrate that existing EDs lack capacity." MUHA Br., 29. The ALC's Final Order devotes 21 factual findings to its analysis of Standard 6's requirement that MUHA "must demonstrate need for this service by documenting . . . why [the potential patients] are not adequately being served by the existing services in the area." **Final Order, 25-33**; **RSF55-023**. MUHA ignores the wealth of evidence considered by the ALC, including a capacity analysis o*ffered by MUHA's health planning expert*, as well as the testimony of the DHEC staff reviewer that she considered the capacity of both existing and approved providers of emergency services.[6] **Final Order, 25-27**.

[5] Similarly, illogical is MUHA's reference to a CON application filed by Roper St. Francis in 2016 for statements regarding capacity concerns, while simultaneously ignoring that the approval and implementation of that project created additional capacity in the service area. MUHA Br., 30.

[6] MUHA also fails to address the ALC's finding that "the Department's assessment of utilization of emergency services could not have been complete or reliable" given the testimony that the

MUHA also offers no alternative reason for Standard 6's requirement that an applicant address why patients are not being adequately served by other providers in the proposed service area. Finally, MUHA ignores the ALC's findings regarding the decline in emergency services utilization and specifically MUHA's declining market share in the areas proximate to the proposed FED, which the ALC found "undermines one of MUHA's argument that serves as the basis for its FED: that it wants to create better accessibility for its existing patients in the proposed service area (which again, is not a criterion for project review), as its market share in the proposed service area appears to be declining." **Final Order, 31**. Though clearly disagreeable, MUHA fails to overcome the substantial evidence that supports the ALC's finding that "there exists sufficient capacity for additional emergency department visits even with ongoing population growth in MUHA's proposed service area." **Final Order, 32**. As such, MUHA's application necessarily fails to comply with Standard 6 of the 2015 Health Plan. "DHEC may not issue a CON unless an application complies with the State Health Plan, project review criteria, and other regulations." *Trident Med. Ctr. v. S.C. Dept. of Health and Envtl. Control*, 412 S.C. 341, 351, 772 S.E.2d 177, 182 (Ct. App. 2015).

B. Substantial Evidence Supports the ALC's Decision that MUHA's CON Application Does Not Comply with the 2017 South Carolina Health Plan.

1. *MUHA's challenge to the ALC's consideration of the 2017 Health Plan is unpreserved, has been abandoned, or is manifestly contrary to the law.*

Arguably unpreserved for the reasons set forth in Section I, MUHA's challenge to the ALC's consideration of the 2017-2018 Health Plan is also inadequate. "Numerous cases have held that where an issue is not argued within the body of the brief but it only a short conclusory statement, it is abandoned on appeal." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496

reviewer was "unaware of the number of treatment spaces in several of the existing FEDs, including Trident Centre Pointe FED." (Final Order, 30).

(Ct. App. 2004). As to this issue, MUHA merely posits a novel interpretation of Section 44-7-225 of the CON Act as to the circumstances when the statute does and does not allow consideration of a subsequently adopted Health Plan, and offers no legal authority to support its conclusory statements. *See* MUHA Br., 32; *see also* Rule 208(b)(1)(D), SCACR. "When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue." *Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 506, 812 S.E.2d 438, 441 (Ct. App. 2018).

Even if the Court does not find the issue unpreserved or waived, MUHA's argument fails as a matter of law. MUHA asserts that applying requirements "found in new Plans enacted after a CON application is filed leads to absurd results and violates due process" and is "fundamentally unfair to hold a CON applicant to standards or requirements that did not exist when the application was filed." MUHA Br., 32. The fallacy of this argument is shown by the plain language of the CON Act: "The department, the [ALC], and the Court of Appeals shall consider the South Carolina Health Plan in place at the time the application was filed and *may consider the current South Carolina Health Plan when making its decision*." S.C. Code Ann. § 44-7-225 (emphasis added). Thus, it is plainly apparent that the legislature empowered a reviewing tribunal to consider a Health Plan enacted after a CON application is filed. *See Brown v. S.C. Dept. of Health and Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.")

2. *The ALC's findings regarding capacity constraints in the service area are supported by substantial evidence.*

With regard to the requirement that MUHA demonstrate need by documenting capacity constraints and/or travel times greater than 15 minutes, MUHA's appeal challenges some but not all of the ALC' findings that support its conclusion that MUHA's application does not comply

with the 2017-2018 Health Plan. While MUHA takes issue with the ALC's discount of the capacity constraints at MUSC's existing EDs in downtown Charleston, MUHA has not appealed the ALC's adoption of a 20-mile radius for a reasonable service area **Final Order, 27**, which was in fact generous in light of the substantial evidence demonstrating the service area proposed in MUHA's CON application was unreasonably broad and that a much smaller radius between five miles and ten miles was appropriate. **Final Order, 22, 27**. Using this 20-mile radius, MUSC is not relevant to the question of capacity constraints, and MUHA fails to rebut the overwhelming evidence that EDs within the 20-mile radius have sufficient capacity to treat more patients and "there was also no evidence regarding excessive wait times at the facilities in MUHA's proposed service area." **Final Order, 25-33; RSF 6; RSF 59; Tr. 729:2-25**; *see also* Rule 208(b)(1)(E), SCACR (requiring discussion and citation of authority in support of each particular issue) and *Fiddie v. Fiddie*, 384 S.C. 120, 129, 681 S.E.2d 42, 47 (Ct. App. 2009).

3. ***The ALC's findings regarding the travel time requirements are supported by substantial evidence.***

In challenging the ALC's findings related to the travel time requirements of the 2017-2018 Health Plan, MUHA ignores that the ALC's consideration of approved CON projects is based on the testimony of the Department. **Final Order, 27**. As to MUHA's arguments based on "heavy traffic" travel times, no such argument was raised to the ALC on reconsideration and MUHA's citation to nothing more than its own witness and Google pales in comparison to the substantial evidence supporting the factual findings of the ALC. **Final Order, 40; Tr. 725:7-726:1; Tr. 2254:19-2257:10; RSF 7; RSF 63**. "[T]he burden is on appellants to prove convincingly that the [ALC]'s decision is unsupported by the evidence." *Tennis v. S.C. Dept. of Social Services*, 355 S.C. 551, 558, 585 S.E.2d 312, 316 (Ct. App. 2003) (quotation omitted).

III. THE ALC PROPERLY CONCLUDED THAT MUHA'S CON APPLICATION DOES NOT SATISFY THE APPLICABLE PROJECT REVIEW CRITERIA.

MUHA challenges the ALC's determination that its CON application failed to satisfy the Community Need Documentation, Distribution (Accessibility), and Medically Underserved Groups PRC. *See* MUHA Br., 36. MUHA's primary heading regarding the priority criterion for freestanding emergency services in the 2015 Health Plan does not state a challenge to the ALC's Final Order and thus the discussion is disregarded. MUHA Br., 35-36.

A. MUHA's CON Application Does Not Satisfy PRC 802.2 (Community Need Documentation).

As to PRC 802.2 (Community Need Documentation), MUHA incorrectly asserts the ALC "did not specify which subparts" MUHA failed to comply with. MUHA Br., p. 37. To the contrary, the ALC clearly found MUHA failed to satisfy subsection (c) of PRC 802.2 because MUHA "does not address an identified (documented) need of the target population" and space constraints at MUSC's EDs downtown "is not the community need required to satisfy Standard 6 *or project review criterion 802.2*." **Final Order, 34** (emphasis added). MUHA's appeal ignores the ALC's repeated findings that MUHA's application focused on the *wrong* target population, which form the basis of its conclusion that "MUHA incorrectly focused on the population it currently serves in the community and suggestion that a portion of that population would patronize its new FED in Berkeley County simply because they would choose a shorter travel time." **Final Order, 54**. MUHA's failure to appeal the relevant factual findings, which are the basis for the ALC's conclusion that the CON application fails to satisfy PRC 802.2, is sufficient basis alone to affirm the ALC's decision.

B. MUHA's CON Application Does Not Satisfy PRC 802.3 (Distribution (Accessibility)).

MUHA's complaints regarding the Distribution (Accessibility) PRC perhaps most heavily rely on the arrogant proposition that access to MUSC's services is the improvement in access contemplated by the CON Act and Regulation 61-15. *See* MUHA Br., 41. This Court should handily reject the assertion that patient choice alone is reason to approve the development of otherwise unnecessary and duplicative services and facilities. The ALC correctly found that "[n]either patient choice nor convenience is included in the Plan or encompassed by the project review criterion 802.2." **Final Order, 34**. In fact, the testimony of the Department was that accommodating patient choice for a particular provider is not a purpose of CON. **Tr. 1507:2-12**. The ALC also correctly found that by "'proposing to serve the patients that they were already serving,'" MUHA's application failed to satisfy PRC 802.3's requirement to locate services in medically underserved areas. **Final Order, 34-35**, citing **Tr. 1482:4-11; 2161:17-22**.

The ALC found that "MUHA's CON application does not comply with [PRC] 802.3 because it is both unnecessarily duplicative and is admittedly intended to serve patients who are already served by MUSC and thus, those patients cannot be considered to be medically underserved." **Final Order, 35**. MUHA simply ignores, yet cannot dispute, the ALC's findings that "the location of MUHA's proposed FED is less than 10 miles of multiple providers of emergency services," and that "[t]he existing and approved capacity for emergency services within 20 miles of MUHA's proposed FED location is approximately 342,000 visits per year in 168 treatment spaces, which does not include" two additional approved but not yet implemented hospital-based EDs. **Final Order, 35; RSF 59**. In light of the substantial evidence in the record supporting the factual findings of the ALC, this Court should affirm the decision below. *See DIRECTV, Inc. & Sub. v. S.C. Dept. of Revenue*, 421 S.C. 59, 68, 804 S.E.2d 633, 638 (Ct. App.

2017) ("An appellate court should only reverse the ALC's order if it is unsupported by substantial evidence in the record or contains an error of law.")

C. MUHA's CON Application Does Not Satisfy PRC 802.10 (Medically Underserved Groups).

MUHA also ignores the very specific factual findings in the Final Order that support the ALC's conclusion regarding Medically Underserved Groups. MUHA Br., 42. In the Final Order, the ALC states "'Medically Underserved Groups' was addressed above under the heading of 'Distribution (Accessibility)' which included a discussion of both duplication of services and the need to locate services in medically underserved areas." **Final Order, 39**. MUHA also mischaracterizes the ALC's finding regarding PRC 802.10. MUHA Br., p. 42. When quoted in its entirety, it is clear the ALC finds MUHA's application fails to satisfy subsection (a): "There is nothing about MUHA's FED that will have any material impact, if any, on the medically underserved population." **Final Order, 36**; *see also* S.C. Code Ann. Regs. 61-15 § 802.10(a).

The undisputed evidence is that MUHA proposes to serve those patients already being served at MUSC's EDs downtown, a proposition stated throughout the CON application and acknowledged by the Department at the hearing. **Tr. 1482:4-11**; **Joint Ex. 0025-0026, 0028**. MUHA has not appealed the ALC's finding that MUHA's application is "intended to serve patients who are already served by MUSC and thus, those patients cannot be considered to be medically underserved." **Final Order, 35**. Because the ALC's application of the project review criteria are not affected by an error of law and the findings are supported by substantial evidence, the Court should affirm the Final Order. *See DIRECTV, Inc.*, 421 S.C. at 78, 804 S.E.2d at 643.

IV. THE ALC CORRECTLY DETERMINED THAT MUHA'S CON APPLICATION DOES NOT SATISFY THE PURPOSES OF THE CON ACT.

MUHA's argument that the ALC erred in finding the CON application did not comply with the CON Act's purposes again suffers from procedural and substantive inadequacies, and arguably

is not preserved for appellate review for the reasons explained in Section I above. *See* MUHA Br., 43-44. Without any identification of which "erroneous conclusions" are challenged, MUHA offers self-serving conclusory reasons "it complies with the four purposes of the CON Act." MUHA Br., 44. Here again, MUHA ignores key factual findings that underpin the ALC's conclusion and merely regurgitates the same egocentric[7] and facility-specific[8] perspective that was flatly rejected by the ALC. "'An unappealed ruling is the law of the case and requires affirmance.'" *Dreher v. S.C. Dept. of Health and Envtl. Control*, 412 S.C. 244, 249, 772 S.E.2d 505, 508 (2015) (quoting *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013)).

In challenging the Final Order's conclusion that the CON application fails to satisfy the purposes of the CON Act, MUHA ignores the ALC's finding that the unnecessary duplication represented by MUHA's proposed FED "would be contrary to the purpose of the CON Act in promoting cost containment." **Final Order, 35**. And MUHA makes no mention of the ALC's finding that the unnecessary duplication represented by MUHA's application would "result[] in wasted health care dollars," which clearly violates the cost containment purpose of the CON Act. **Final Order, 59**; *see also* S.C. Code Ann. § 44-7-110 (stating that the purpose of CON includes to promote cost containment). MUHA's failure to appeal these findings, which each alone is sufficient to support the ALC's conclusion that the CON application does not satisfy the purposes

[7] That the improvement of access is "for thousands of North Area residents whose provider of choice for emergency services is MUSC." MUHA Br., 44. The ALC correctly concluded that "[i]ncreased accessibility and convenience to MUHA's existing patients" are not factors that appear in the CON Act, the regulations or the Health Plans. **Final Order, 55, 57.**

[8] That services would improve at MUSC "by relieving its capacity constraints." MUHA Br., 44. The ALC correctly concluded that neither the Plan nor regulations consider facility-specific needs in evaluating applications for FEDs. **Final Order, 53, 55, 59**. Whereas in contrast, evaluation of applications for acute care beds consider facility-specific needs. **RSF 55-002-007**.

of the CON Act, render them unappealed rulings that require affirmance of the Final Order. *See Dreher*, 412 S.C. at 250, 772 S.E.2d at 508.

Instead, and as elsewhere in the appeal, MUHA offers arguments singular to its own patient population and a problem apparently generated by its failure to address space constraints in its downtown EDs for many years. **Final Order, 8**. MUHA's fundamental proposition that "public needs" can be met with just the purported need of an unidentified and indeterminable subset of MUSC's existing patient base that choose to seek treatment of the tertiary/quaternary academic medical center in downtown Charleston is simply not sufficient alone to satisfy the purposes of CON. **Final Order, 34, 58-59**. To this point, the Supreme Court's decision in *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 121-22, 678 S.E.2d 430, 433 (2009), is instructive. In *Dema*, the Supreme Court considered whether a private right of action existed under the CON Act by implication: "If the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party." *Id.* at 121, 678 S.E.2d at 433. In finding no implied private right existed, the Supreme Court held the expressly stated purpose of the CON Act "clearly indicates that in enacting the CON Act, the Legislature intended to advance the quality of healthcare provided in this State for all people receiving the care, not for a particular individual." *Id.* at 122, 678 S.E.2d at 433. By clear analogy, MUHA's continued suggestion that an alleged need of its patients to have access to MUHA's emergency services closer to their homes is not a community need "to aid society and the public in general" as contemplated by the CON Act. *See Dema*, 383 S.C. at 121, 678 S.E.2d at 433.

MUHA has failed to overcome the overwhelming evidence that supports the ALC's conclusion that MUHA's FED "is unnecessarily duplicative of facilities and services that exist in the proposed service area for which additional capacity exists" and "does not promote cost

containment and will not best serve the public need." **Final Order, 59**. Even if the Court found MUHA's reasoning to be relevant (although notably the arguments are unsupported by any reference to the record), "[w]hen conflicting evidence on an issue exists, the appellate court defers to the findings of the fact-finder in accordance with the substantial evidence standard of review." *DIRECTV, Inc.*, 421 S.C. at 79, 804 S.E.2d at 643.

V. THE ALC'S FINDINGS AND CONCLUSIONS REGARDING MUHA'S COMMUNICATIONS WITH THE DEPARTMENT NEED NOT BE DISTURBED.

By its heading, MUHA's appeal asserts that a "private meeting" that occurred between MUHA and DHEC in the middle of the contested case hearing "did not violate the letter or spirit of the South Carolina Administrative Procedures Act." MUHA Br., 44. In conclusion, MUHA states "[a]ccordingly, the communications between DHEC and MUSC in this case were not ex parte. The APA does not prohibit co-parties from communicating privately about issues in a contested case." MUHA Br., 45. The Final Order does not contain a finding or conclusion that suggests the APA prohibits "co-parties from communicating privately about issues in a contested case." Thus, the precise nature of what MUHA appeals is unclear. What is clear, however, is the inadequacy and incompleteness of MUHA's description of the conduct underlying the ALC's discussion of the "private meeting."

More fully captured in the Final Order, the "private meeting" at issue occurred on the eve of Ms. Murdock's testimony on behalf of DHEC, after the presentation of evidence by both Roper St. Francis and Trident. **Tr. 1544:20-1570:7; Final Order, 44-45**. In addition to legal counsel for MUHA and DHEC, MUHA's health planning expert was present for at least a portion of the meeting (a participant not mentioned by MUHA). **Tr. 1565:1-24; Final Order, 45**. As noted by the ALC, "[t]he stated purpose of the meeting was to discuss the trial testimony that had already been rendered including Ms. Murdock's interpretation of Roper St. Francis and Tridents' experts'

testimony." **Final Order, 45**. MUHA's appeal also misrepresents the basis for the ALC's conclusions, as it was "the surreptitious oral joint defense agreement entered into which the Department and MUHA entered at the conclusion of the first week of trial for the purposes of securing Ms. Murdock's thoughts on testimony rendered by witnesses who previously testified and to prepare her for her testimony" that troubled the ALC. **Final Order, 60**. And it was clearly that agreement and conduct that underpins the ALC's conclusion that the spirit of the APA was violated and smacked of unfairness, not the meeting alone. *See id.*

The hearing transcript details how disruptive these activities were to the hearing. The existence of the "private meeting" was revealed by happenstance after several hours of cross-examination of DHEC's only witness, at which point DHEC objected to any inquiry into the substance of the meeting based on "an oral [joint defense] agreement that [MUHA and DHEC] entered into Friday," which was in the middle of the hearing at the close of the first week of trial. **Tr. 1545:7-1546:14**. The ALC immediately adjourned the hearing and instructed the parties to submit briefs on the propriety of such agreement. **Tr. 1547:8-10**; **RSF Bench Memo**. As evidenced by the Final Order, while DHEC ultimately "agreed to waive whatever privilege existed" (**Final Order, n.59**), the ALC nonetheless found that the agency and the applicant "do not share a 'common and singular public-private interest' in this matter" and was "unpersuaded by their arguments to the contrary, including that there is a public interest in the CON being approved." **Final Order, n.59** (citing *Hunton & Williams v. U.S. Dept. of Justice*, 590 F.3d 272, 281 (4th Cir. 2010)). In disagreeing with the reasoning offered by MUHA defending the joint defense agreement, the ALC found "[w]hile both have an interest in the approval of the CON application, their underlying interests and motivations are not the same." **Final Order, n.59**.

Regardless of the substantial evidentiary support for the ALC's findings, MUHA's appeal speaks to a conclusion not found in the Final Order. As noted above, the Final Order does not contain a finding or conclusion that suggests the APA prohibits "co-parties from communicating privately about issues in a contested case." Given that MUHA argues about a principle not encompassed in the Final Order, the Court should decline to entertain MUHA's challenge and the ALC's findings and conclusion need not be disturbed.

VI. ADDITIONAL SUSTAINING GROUNDS TO SUPPORT THE OUTCOME OF THE ALC'S DECISION.

As provided by this Court's Rules, "[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal." Rule 208(b)(2), SCACR. The Supreme Court in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), specifically clarifies that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 338 S.C. at 419, 526 S.E.2d at 723.

A. MUHA'S CON Application Does Not Comply with Standard 2 of the 2015 Health Plan.

In a Motion for Summary Judgment filed prior to the merits hearing, Roper St. Francis challenged DHEC's approval of MUHA's CON application because it did not comply with Standard 2 of the 2015 Health Plan as a matter of law. The Standard provides,

> All off-campus emergency services must be an extension of an existing hospital's emergency service in the same county, unless the applicant is proposing to establish a freestanding emergency service in a county that does not have a licensed hospital. The hospital must have a license that is in good standing and must be in operation to support the off-campus emergency services.

RSF55-22. The basis for Roper St. Francis' summary judgment motion was that DHEC's approval of Roper St. Francis Berkeley Hospital ("Roper Berkeley Hospital") and issuance of a CON for Roper Berkeley Hospital prior to MUHA's submission of the FED application foreclosed

MUHA's ability to use the exception language of Standard 2 to establish off-campus emergency services in Berkeley County. *See id*.; *see also* **RSF Mot. Summ. J., 11-12.** There is no dispute that MUHA proposed to establish the FED in a county other than Charleston County, which is the only county as of the time of the hearing that MUHA had an existing hospital with "a license that is in good standing" and "in operation to support the off-campus emergency services." **Final Order, 7-8**. The only exception provided in Standard 2 is "unless the applicant is proposing to establish a freestanding emergency service in a county that does not have a licensed hospital." **RSF55-022**.

The ALC denied summary judgment, disagreeing with Roper St. Francis that Roper Berkeley Hospital was a "licensed hospital" for purposes of Standard 2. **Order Denying Summ. J. (Std. 2), 7**. The ALC concurred in the Department's interpretation of Standard 2 that the "licensed hospital" is one "that not only has a CON but also, is licensed to operate as provided in Regulation 61-16, *Minimum Standards for Licensing Hospital and General Infirmaries*. *Id*. As an additional reason to affirm denial of MUHA's CON application, Roper St. Francis submits that the Court should find MUHA's application does not comply with Standard 2 of the 2015 Health Plan. *See Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 217, 758 S.E.2d 187, 195 (Ct. App. 2014) (holding that arguments raised by summary judgment motion denied by the trial court may be raised as additional sustaining grounds because orders denying summary judgment are not appealable).

Roper Berkeley Hospital is identified as one of the inpatient facilities that comprises Roper St. Francis, a "50-bed acute care hospital in Summerville, South Carolina (Berkeley County), which includes an emergency department with 15 treatment spaces." **Final Order, 7**. DHEC issued CON SC-16-01 to Roper St. Francis for Roper St. Francis Hospital Berkeley in 2016. **RSF5-001**. Roper St. Francis raised this specific concern to DHEC staff by letter dated July 31, 2017

(**Joint Ex. 0454-0456**), but the decision to approve MUHA's FED issued September 25, 2017, simply states, without explanation, "Berkeley County currently does not have a licensed hospital." **Joint Ex. 0552**. The ALC acknowledged that "[a]t the time of the hearing, the Department had approved a CON for Roper St. Francis Berkeley Hospital and construction had commenced." *Id.* Under the APA, a "license" is defined to include "the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission required by law, but does not include a license required solely for revenue purposes." S.C. Code Ann. § 1-23-505(4).

In the findings related to the 2015 Health Plan, the ALC declines to take judicial notice that Roper Berkeley Hospital was operational as of October 4, 2019. **Final Order, 21**. The additional sustaining ground regarding Standard 2 is clearly supported by the following finding:

> Ms. Murdock testified that while certain project review criteria address 'existing' facilities, the Department looked at approved facilities for purposes of planning: 'as part of our general purposes of CON and guiding establishment where these services are needed, I think we need to look towards what will exist in the future [e.g., approved facilities] in addition to what exists now.' (Tr. 1353:11-1354:5). Ms. Platt concurred with this approach. (Tr. 726:1-18; Tr. 2240:14-2241:25). The Court concurs with the Department and Roper St. Francis that approved facilities should be considered for purposes of health care planning as it is consistent with the stated purpose of the CON outlined in Section 44-7-120 of the South Carolina Code: [quotation omitted].

Final Order, 27 (footnote omitted). Simply stated, the Department's interpretation of "existing" to include approved projects "for purposes of planning" and the CON's purpose of "guiding establishment where services are needed," necessarily requires the Department consider a hospital with a CON to be a "licensed" hospital for purposes of Standard 2. *Id.*

The denial of summary judgment was erroneous for those same reasons addressed in *South Carolina Department of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012), which questioned whether an undercover agent was a "bona fide guest" for

purposes of a regulation that restricts the consumption of alcoholic beverages in a private club to members or "bona fide guests" of members. 397 S.C. at 258, 725 S.E.2d at 481. The agency argued that "bona fide guest," which was not defined in the regulation, "implies that the guest have some degree of familiarity or camaraderie with the member . . . or an allegiance to the organization's purpose." *Id.* at 263-64, 725 S.E.2d at 485. The Supreme Court rejected this implied meaning and held that such view "would be an improper narrowing of the regulatory definition based on some notion of what a bona fide guest *should* be, not what the regulation actually provides." *Id*. at 263, 725 S.E.2d at 485. In reversing the agency's decision, the Supreme Court held that the regulation was met "[b]y its own terms" and that the regulation "imposes no other requirements." *Id.* at 262-63, 725 S.E.2d at 484. In this instance, DHEC's view was that only licensed hospitals "in operation" were included within the meaning of Standard 2 and the ALC agreed. **Order Denying Summ. J. (Std. 2), 7**. Applying the plain meaning rule[9] and reading the clear and unambiguous language in the Health Plan Standard, however, all that is required is a "licensed hospital," not a "licensed hospital in operation," for purposes of the exception. *See* **RSF55-022**. As explained by the Supreme Court in *Blue Moon of Newberry*, it would be an "improper narrowing of the regulatory definition based on some notion of what a [licensed hospital] *should* be, not what the regulation actually provides," to ignore Roper St. Francis Berkeley and approve MUHA's FED under the exception. *See Blue Moon of Newberry*, 397 S.C. at 263, 725 S.E.2d at 485.

In the proceedings below, Roper St. Francis offered as relevant an earlier contested case involving the Department, where DHEC interpreted the term "residence" in a landfill permitting regulation to include only structures for which certificates of occupancy had issued, which resulted

[9] The plain meaning rule is based on the principle that "it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000).

in the exclusion of planned future developments, and was rejected for leading to an absurd result contrary to the intent of the regulations themselves:

> Under the Respondents' interpretation, if the permit applicant to DHEC can 'win the race'–that is, succeed in obtaining a permit before a planned house, school, hospital, or park is finished with construction – these neighbors will be ignored for the purposes of [the regulation]. The logical extension of the Respondents' argument is that any planned 'residence'– no matter how far along the development or construction process–must be ignored. And since many of these ignored, planned developments are likely to ultimately be constructed and occupied after the permit has been granted, under Respondents' interpretation, they will end up being located within 1,000 feet of the Class II Landfill–a result the regulation seeks to avoid.

Grand Bees Development, LLC, v. S.C. Dept. of Health and Envtl. Control, Docket No. 11-ALJ-07-0556-CC, 2013 WL 1192259, *13 (S.C. Admin. Law J. Div. Mar. 19, 2013) (Robinson, J.). In *Grand Bees*, the agency's unreasonably narrow interpretation of "residence" produced an absurd result that could not have been intended in light of the express purposes and findings of the regulations and governing laws. *See id.* at *13-14. Similarly here, a narrowed interpretation of "a county that does not have a licensed hospital" in the Health Plan Standards to require a licensed and operational hospital, and ignoring an approved hospital that has been issued a CON pursuant to the CON Regulations, leads to an absurd result that is contrary to the purpose of the CON Act, the CON Regulations, and the Health Plan. *See* S.C. Code Ann. § 44-7-120 (including as the purpose of the CON Act to "prevent unnecessary duplication" and "guide the establishment of health facilities and services"); *see also* S.C. Code Ann. Regs. 61-15 § 101 (same). The absurd result is also inconsistent with DHEC's testimony and the ALC's factual findings related to the need to consider approved facilities "for purposes of planning." **Final Order, 27; Tr. 1353:8-1354:5**. For this additional reason, the Court should affirm the ruling of the ALC. *I'On, L.L.C.*, 338 S.C. at 419, 526 S.E.2d at 723.

B. MUHA's FED Project as Changed During the Contested Case Cannot Be Approved.

This Court may also consider the arguments raised by Roper St. Francis and Trident during the contested case hearing that the changes to MUHA's FED after DHEC's approval rendered the proposal unapprovable as an additional reason to affirm the ALC. *See* Rule 220(c), SCACR. Section 44-7-210(C) of the CON Act provides, in relevant part:

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

S.C. Code Ann. § 44-7-210(C); *see also* S.C. Code Ann. Regs. 61-15 § 307(1) (providing that DHEC may refuse to issue a CON even if an application is in compliance with the State Health Plan but is inconsistent with project review criteria or departmental regulations). The CON Act further mandates that a CON "if issued, is valid only for the project *described in the application* including location, beds and services to be offered, physical plant, capital or operating costs, or other factors set forth in the application, *except as may be modified in accordance with regulations*." S.C. Code Ann. § 44-7-230(A) (emphasis added). The Supreme Court has held the CON Regulations provide "a process for which DHEC has formulated exacting procedural requirements" for the submission and review of CON applications. *Amisub of S.C., Inc. v. S.C. Dep't of Health and Envtl. Control*, 403 S.C. 576, 590, 743 S.E.2d 786, 794 (2013). The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 213, 574 S.E.2d 196, 198 (2002). Similarly, the Court should presume DHEC did not intend a futile act in the development of Regulation 61-15 and the "exacting procedural requirements" for receipt and

review of CON applications; but rather, intended the regulatory provisions to accomplish something. *See id*.

Chapter 2 of Regulation 61-15 sets forth the Application Procedures adopted by DHEC in accordance with the CON Act's mandate, and thus are considered necessary to carry out DHEC's CON duties. S.C. Code Ann. § 44-7-150(3) (requiring DHEC to adopt "substantive and procedural regulations necessary to carry out its duties). Consequently, MUHA's CON application must be consistent with Chapter 2's Application Procedures in order to be considered in compliance with the CON Regulations. S.C. Code Ann. § 44-7-210(B); *see also* S.C. Code Ann. Regs. 61-15 § 307(1). Similarly, Part C of Regulation 61-15 § 202 identifies Programmatic Documents that an applicant must provide in support of various elements of a proposed project. These required components are separate and distinct requirements necessary to approval of a CON application. *See MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 379 S.C. 1, 9, 664 S.E.2d at 475 (2008) (holding prerequisites of compliance with project review criteria is independent of requirement to comply with Health Plan standards).

The Final Order describes many of the changes made by MUHA after DHEC approved the CON application and before the contested case hearing, including a relocation of the site, reduction in size and cost, elimination of certain services. **Final Order, 18-20**[10]. The ALC compares MUHA's changes to changes proposed for Roper Berkeley Hospital in February 2017 during construction of the new hospital (which were functional design changes from the 2008 CON application), perhaps overlooking that those changes were made pursuant to Regulation 61-15 §

[10] In slightly more detail, the relocation was away from the major medical campus planned for Nexton to a retail outparcel on a major highway; the size reduction was from 15,000 square feet to 10,700 square feet with the elimination of the CDU and reduction from 12 exam rooms to 7 exam rooms and 5 "fast track" treatment areas; and the helipad was eliminated. **Final Order, 19-20; RSF 7; RSF 63.**

605[11] (*i.e. modified in accordance with the regulations*). S.C. Code Ann. § 44-7-230(A); S.C. Code Ann. Regs. 61-15 §§ 311, 605. In fact, these changes are described in the periodic reports provided to DHEC as required by CON Regulation. **RSF 5**. In significant contrast, MUHA's changes occurred after DHEC's approval and before the CON was issued, a time not addressed by DHEC regulation and thus are not *in accordance with the regulations*. *See* S.C. Code Ann. Regs. 61-15 § 310; *compare* S.C. Code Ann. Regs. 61-15 § 605.

The testimony of Roper St. Francis' expert in health planning was that MUHA's abandonment of the 15,000 square foot FED with 10 private treatment areas, an isolation area, a resuscitation area and a 5 room CDU located adjacent to a medical campus in favor of a 10,700 square foot facility with 7 treatment rooms and 5 "fast track" or urgent care bays located on a main thoroughfare outparcel to a large retail shopping center was a material alteration of project reflected in the CON application approved by DHEC. **Tr. 715:1-716:5**. The record includes substantial evidence demonstrating that components required by Regulation 61-15 for a CON application are missing or incomplete in light of the new FED planned by MUHA. **Tr. 711:23-722:4; 2269:6-2272:5; RSF 63**. For example, the Programmatic Documents provided in the CON application in support of zoning, utilities and community endorsement no longer have any bearing on the FED proposed to the ALC for approval, as each and every letter of support endorses the Nexton FED model. **RSF 63-018; Joint Ex. 0132-0298**. There is also no evidence in the record on which to find MUHA's CON application complies with Regulation 61-15 §§ 202(2)(c)(6)-(8). **RSF 63-019**. Finally, there is no evidence that the governing body of the health facility, identified in the CON application as Medical University Hospital Authority Board of Trustees, has approved

[11] In fact, the Exhibit referenced by the ALC demonstrates that Roper St. Francis engaged DHEC for a determination in advance "that the Department does not consider these project amendments to be substantial as described in S.C. Code Regs. 61-15, Section 605." **RSF5-002**.

the new FED presented to the ALC, and it is unclear who is financially responsible for its development. *See* **Joint Ex. 0420, TMC 65; TMC 67**. Satisfaction of the programmatic documentation requirements of Regulation 61-15 is a procedural prerequisite to approval of a CON application. *See e.g.* S.C. Code Ann. Regs. 61-15 § 202(2)(c)(9); *see also* S.C. Code Ann. § 44-7-150(3). The material inadequacies in MUHA's CON application as a result of the unilateral changes to the FED result in an unapprovable project, as the requirements of Regulation 61-15 are not met. While the *de novo* nature of the contested case hearing allowed for the submission of evidence regarding the new plans for MUHA's FED made after approval of the CON application, the CON Act's mandate remains that a CON may not issue unless an applicant complies with the Health Plan, project review criteria, *and other regulations*. *See* S.C. Code Ann. § 44-7-210(B). As such, the material deficiencies in MUHA's compliance with Regulation 61-15 § 202 represent an additional ground on which the Court may affirm the ALC's decision to deny MUHA's CON application.

CONCLUSION

For the reasons discussed above, the Administrative Law Court's decision reversing DHEC's approval of MUHA's CON application is supported by substantial evidence in the whole record and is not affected by error of law. In the alternative, additional sustaining reasons exist in the record to affirm the decision of the Administrative Law Court. Therefore, Roper St. Francis respectfully requests that the Court affirm the decision of the Administrative Law Court and deny the CON Application of MUHA.

s/ Jennifer J. Hollingsworth

Jennifer J. Hollingsworth, SC Bar No. 73535
Shannon V. Lipham, SC Bar No. 103699
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
Telephone: 803.771.8900
Facsimile: 803.253.8277
JHollingsworth@nexsenpruet.com
SVLipham@nexsenpruet.com

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

December 11, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Case No. 17-ALJ-07-0441-CC
Case No. 17-ALJ-07-0444-CC
Appellate Case No. 2020-001072

Trident Medical Center, LLC d/b/a Trident Medical Center and Summerville Medical Center……..Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Health Emergency Services……Respondents,

Of Whom, Medical University Hospital Authority d/b/a MUSC Health Emergency Services is …….Appellant.

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

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Health Emergency Services…….Respondents,

Of Whom, Medical University Hospital Authority d/b/a MUSC Health Emergency Services is…….Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on December 11, 2020, s/he caused a copy of ***Respondent CareAlliance Health Services, et al.'s Initial Brief*** to be served on all parties to the appeal by electronic and U.S. Mail addressed as follows:

Ashley C. Biggers, Esq.
biggersac@dhec.sc.gov
Vito M. Wicevic, Esq.
wicevivm@dhec.sc.gov
SC DHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201
Attorneys for S.C. Department of Health and Environmental Control

David B. Summer, Jr., Esq.
davidsummer@parkerpoe.com
William R. Thomas, Esq.
willthomas@parkerpoe.com
Amy S. Flanary-Smith
Amyflanarysmith@parkerpoe.com
PARKER POE ADAMS & BERNSTEIN
1221 Main Street, Suite 1100
Columbia, South Carolina 29201
Attorneys for Respondent Trident Medical Center, LLC

Daniel J. Westbrook, Esq.
dan.westbrook@nelsonmullins.com
Travis Dayhuff, Esq.
travis.dayhuff@nelsonmullins.com
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201
Attorneys for Appellant Medical University Hospital Authority d/b/a MUSC Health Emergency Services

s/Jennifer J. Hollingsworth
Jennifer J. Hollingsworth, SC Bar #73535
Shannon V. Lipham, SC Bar #103699
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, South Carolina 29201
Telephone: (803) 771-8900
Facsimile: (803) 727-1446
jhollingsworth@nexsenpruet.com
svlipham@nexsenpruet.com
Attorneys for Respondent, CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper Mount Pleasant Hospital and Roper St. Francis Berkeley Hospital

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