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**Jan 08 2021**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

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APPELLATE CASE No.: 2019-001159  
ADMINISTRATIVE LAW COURT CASE No.: 18-ALJ-07-0100-CC

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Trident Medical Center, LLC, d/b/a Trident Medical Center ..... Respondent,  
v.

South Carolina Department of Health and Environmental Control  
and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center  
– Berkeley County ..... Respondents,

Of Which Medical University Hospital Authority d/b/a MUSC Radiation  
Therapy Center – Berkeley County is the ..... Appellant.

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**RETURN OF TRIDENT MEDICAL CENTER, LLC OPPOSING  
MOTION FOR LEAVE TO FILE JOINT AMICUS BRIEF**

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The Respondent Trident Medical Center, LLC (“Trident”) offers this Return in opposition to the Motion for Leave to File Joint Amicus Brief (“Motion”) filed by the Medical University of South Carolina (“MUSC”) and its affiliated not-for-profit corporation, MUSC Strategic Ventures. In their Motion, these entities seek to appear before the Court as amici curiae in order to argue in support of the efforts of the Appellant Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County (“MUHA”) to overturn the decision of the Administrative Law Court (“ALC”) denying MUHA’s Certificate of Need (“CON”) application. Trident asserts that MUSC’s and MUSC Strategic Ventures’ attempt to appear in this matter as amici curiae should be denied because the issues they seek to brief and argue have already been fully and adequately briefed by the parties in this case and because, despite characterizing

themselves as “friends of the court,” MUSC and MUSC Strategic Ventures propose only to offer redundant arguments in support of their affiliated agency, the Appellant MUHA.

## **BACKGROUND**

On May 22, 2017, MUHA submitted its CON application to add a sixth linear accelerator to its inventory to be located in a proposed radiation therapy center in Berkeley County (“Proposed Project”). (**R. pp. 1595-1817**). Trident appeared before the Respondent Department of Health and Environmental Control (“DHEC”) as an affected person to oppose MUHA’s Proposed Project. (**R. p. 1818**). On November 22, 2017, DHEC approved MUHA’s Proposed Project. (**R. pp. 1969-1972**). The DHEC Board declined to conduct a final review conference of its staff’s decision and, thereafter, Trident petitioned the ALC for contested case review. (**R. pp. 37-89, 54-55**).

The ALC conducted the contested case hearing on this matter over five nonconsecutive days beginning January 14, 2019 and ending January 24, 2019. (**R. p. 90**). On January 24, 2019, at the close of the hearing, Trident made an oral motion before the court requesting judgment as a matter of law on the grounds that MUHA’s Proposed Project, as presented to DHEC, constitutes an unlawful and unconstitutional joint venture, which by its unlawful nature cannot comply with applicable CON standards and criteria. (**R. p. 1297, line 17 – p. 1310, line 13**). Concurrent with its oral motion, Trident submitted its written Motion for Directed Verdict and Memorandum in Support reiterating its oral motion and arguments and requesting, as its sole relief, that the ALC reverse DHEC’s decision and deny MUHA’s CON application. (**R. pp. 1999-2030**).

On May 14, 2019, after providing MUHA the opportunity to fully respond by brief to all issues raised, the ALC issued its Order Granting Petitioner’s Motion for Judgment as a Matter of Law and Denying Certificate of Need on Other Grounds (“Final Order”). (**R. pp. 1-35**). After the ALC denied MUHA’s Motion to Reconsider (**R. 36**), MUHA filed its Notice of Appeal with this

Court on July 15, 2019. Final briefs and the record on appeal were filed with the Court on March 19, 2020. On August 4, 2020, MUHA filed a Motion to Transfer or Certify with the South Carolina Supreme Court seeking to transfer this matter to that court for review. On September 21, 2020, the Supreme Court denied MUHA's Motion to Transfer or Certify. As it now stands, this matter has been fully briefed and the parties are awaiting oral arguments before the Court.

### **ARGUMENT**

This case arises under the Certificate of Need program for health care facilities and services 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), and the State Health Plan (collectively the "CON Law"). In determining whether to grant or deny an application for a CON, DHEC and the ALC must review a proposed project under the project review criteria found in the CON regulations ("Project Review Criteria") and under the applicable standards of the State Health Plan in effect at the time the application is filed. S.C. Code Ann. § 44-7-225 (2018). Under the CON Law, DHEC and the ALC are prohibited from granting a CON to an applicant unless the project as proposed complies with the State Health Plan, Project Review Criteria, and other regulations. *See* S.C. Code Ann. § 44-7-210(B) and 3 S.C. Code Ann. Regs. 61-15, § 801(3) (Supp. 2019).

This case began in May 2017 when MUHA applied to DHEC for a CON for its Proposed Project. (**R. pp. 1595-1817**). In response to the Part A Questionnaire of the CON application form concerning the ownership and management of the Proposed Project, MUHA identified itself as the proposed licensee of the radiation therapy center. Under the law, the "licensee" of a project is the "legal entity who, or whose governing body, has the ultimate responsibility and authority for the

conduct of the facility or services; the owner of the business. The licensee must be the entity to whom the Certificate of Need is issued.” 3 S.C. Code Ann. Regs. 61-15, § 202(8)(b) (Supp. 2019).

MUHA is an agency of the State of South Carolina created under S.C. Code Ann. § 59-123-60(E) (2020) for the purpose of operating all of the hospitals, clinics, and other healthcare and related facilities of MUSC. Although MUHA was named as the proposed licensee, the CON application indicated that the operation and management of the facility would be vested in an entity known as “MUSC Health Cancer Care Network, LLC” (“MUSC Network”). **(R. pp. 1599-1600)**. MUSC Network is described in MUHA’s CON application as a Delaware limited liability company licensed to do business in South Carolina, which is owned 51% by Alliance Oncology, LLC and 49% by the proposed amicus MUSC Strategic Ventures. **(Id.)**.

The CON application describes Alliance Oncology, LLC (“Alliance”), the majority owner of MUSC Network, simply as a “nationwide leader in radiation oncology and radiosurgery programs.” **(R. pp. 1600-1601)**. As became clear during discovery in the ALC proceeding and later during the contested case hearing, Alliance is a for-profit Delaware limited liability company based in Newport Beach, California. **(R. pp. 1524 and 1529; R. p. 798, lines 7-8)**. The ALC ultimately found as a fact, supported by the substantial evidence in the record, that Alliance, not MUHA, is actually the entity with the right of control over the operation of MUSC Network and the Proposed Project.<sup>1</sup> **(R. pp. 30-31)**.

MUSC Strategic Ventures, the minority owner of MUSC Network, is described in MUHA’s application as a 501(c)(3) entity formed at the direction of, and controlled by, MUSC

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<sup>1</sup> Based on the substantial evidence in the record and the correct application of the law, the ALC found that “[MUHA/MUSC] is to control Quality Assurance and provide Telemedicine from its doctors to the sites. Alliance has sole control over every other aspect of the business.” **(R. p. 30)**. The ALC’s conclusion that Alliance, not MUHA, is the proper licensee of the Proposed Project alone supports the ALC’s reversal of DHEC’s decision and denial of MUHA’s CON application. **(See also Trident’s Brief, Argument V, at pp. 35-39)**

for the purpose of supporting the missions and activities of MUSC and its affiliates. **(R. p. 1603)**. According to MUHA's CON application, MUSC Strategic Ventures' function is to determine and implement strategies that enable MUSC and MUHA to "collectively collaborate" with other healthcare providers. **(R. p. 1604)**. According to the official description set forth in an organizational chart contained in MUSC's Comprehensive Annual Financial Report for the Year Ended June 30, 2018, "MUSC Strategic Ventures ... was formed in September 2015 to allow affiliation with tax exempt entities to support the missions and programs of [MUSC and MUHA]." **(R. p. 1508, n. 7)**. However, Patrick Cawley, M.D., who is the Chief Executive Officer of MUSC Strategic Ventures (as well as the Vice-President of Health Affairs for MUSC and the Executive Director of MUHA), testified in his deposition that MUSC Strategic Ventures "predominantly joint ventures with for-profit companies that we otherwise couldn't work with as part of MUHA or MUSC." **(R. p. 2015, lines 11-18)**. Dr. Cawley later confirmed his understanding of MUSC Strategic Ventures' purpose in his hearing testimony. **(R. p. 769, lines 6-12)**.

In response to discovery requests during the contested case proceeding, MUHA produced the MUSC Network Operating Agreement ("Network Operating Agreement") between Alliance and "MUSC Health" and the Network Management Agreement ("Network Management Agreement") by and among Alliance, MUSC Network, and "MUSC Health." These agreements, which were not provided to DHEC by MUHA, set out in detail the specific rights, duties and functions of the parties regarding the ownership, operation, and control of the Proposed Project, as well as the broader relationships among the parties. At the hearing, MUHA offered further information to explain the nature of the entities involved in the MUSC Network joint venture and the relationships among them. **(R. p. 795, lines 1-2; R. pp. 1509 - 1521; and R. pp. 1522 – 1563)**.

As discussed in Trident's brief, the clarifying testimony and documents produced during discovery before the ALC and at the subsequent hearing prompted Trident to move at the conclusion of the hearing for an order denying MUHA's CON application on the following grounds: (a) MUSC Strategic Ventures is an *ultra vires* corporation created by MUSC in violation of its enabling statute found at S.C. Code Ann. § 59-123-60 (2020); and (b) MUSC Network, which has MUSC Strategic Ventures as a minority owner, is an illegal and unconstitutional joint venture formed in violation of S.C. Const. art. X, § 11. Trident contended that, because MUSC Network, the designated operator of the Proposed Project is an unlawful entity, MUHA's CON application does not comply with the standards and criteria of the CON Law and must be denied. **(R. pp. 1999 - 2030).**

Briefly summarized, Trident's first argument, which was accepted by the ALC, was that MUSC, as a creature of statute, has only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged. *See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). In its enabling legislation, MUSC's governing board is given the authority to elect officers and to appoint professors and to fix their compensation, to make bylaws and regulations, to confer the appropriate degrees in medicine, dental medicine, pharmacy, nursing, health-related professions, and graduate studies upon persons qualified to receive them, and to make contracts and hold, purchase, lease or sell real estate and personal property for corporate purposes. S.C. Code Ann. § 59-123-60(A) (2020). MUSC has no statutory authority to create a subsidiary or affiliated corporation to perform the educational functions it is charged with performing.

In direct contrast, in the same legislation, the General Assembly established the Appellant MUHA as a separate state agency, with the power to:

establish such not-for-profit corporations as the board considers necessary to assist the authority in carrying out its functions; provided, that any entity created pursuant to this subsection is considered to be an entity of the authority and subject to all laws and regulations applicable to the authority under this section. The formation of for-profit corporations by the authority is strictly prohibited.

S.C. Code Ann. § 59-123-60(E)(13) (2020). Thus, while MUHA is expressly granted the authority to establish not-for-profit entities to carry out its functions with regard to its healthcare operations, any such nonprofit entities are subject to all laws and regulations applicable to MUHA.

MUHA represented in its CON application, and the evidence at the hearing supports the representation, that MUSC, not MUHA, created MUSC Strategic Ventures. For that reason alone, MUSC Strategic Ventures is an *ultra vires* corporation. Further, neither MUSC nor MUHA has any authority to form for-profit corporations. Therefore, under the plain language of § 59-123-60(E)(13), quoted above, MUSC Strategic Ventures, even assuming it is validly created, is subject to the same limitation and it cannot participate as a minority owner of the for-profit corporation MUSC Network, which MUHA designated to be manager and operator of its Proposed Project.

Trident's second argument, accepted by the ALC, was that S.C. Const. art. X, § 11 provides that "neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation." In *Nichols v. South Carolina Research Auth.*, 290 S.C. 415, 421, 351 S.E.2d 155, 158 (1986), the South Carolina Supreme Court found that "[t]he Constitution clearly prohibits public agencies . . . from engaging in joint ownership with private parties." In a later case, *O'Brien v. S.C. ORBIT*, the Supreme Court clarified that public bodies also cannot circumvent this constitutional prohibition by using other nongovernmental entities as go-betweens. 380 S.C. 38, 43, 668 S.E.2d 396, 398-399 (2008).

In this case, neither MUHA nor MUSC will be direct owners of MUSC Network, the entity that will lease the facility space, employ all of the administrative and technical clinical staff, own

all of the equipment, and manage and operate the Proposed Project. Instead, MUHA and MUSC have attempted to utilize MUSC Strategic Ventures, a corporation created and controlled by MUSC, to jointly own MUSC Network, a private, for profit company. (*See R. pp. 1507 – 1508 and R. 1594*). As specifically acknowledged by Dr. Cawley, MUSC Strategic Venture’s purpose is that it “predominantly joint ventures with for-profit companies that we otherwise couldn’t work with as part of MUHA or MUSC.” (**R. p. 2015, lines 11 - 18**).

As found by the ALC, the participation of MUSC Strategic Ventures in MUSC Network in violation of the law and the Constitution renders MUSC Network incapable, under the law, of managing and operating the Proposed Project as presented in MUHA’s CON application. It cannot lease the facility space, employ all of the technical and administrative staff of the facility, provide or procure the financing for the facility, or own all of the equipment, including the linear accelerator, to be used at the facility. (**R. p. 35**). Thus, the ALC properly concluded that, given its significant role in the Proposed Project, the absence of MUSC Network meant “the project’s ability to satisfy the Project Review Criteria of Financial Feasibility, as submitted to, reviewed by, and approved by DHEC through attestations in the CON application, is no longer present.” (*Id.*) Therefore, the ALC determined that MUHA’s CON application did not comply with the CON Law and properly ordered that the application be denied. Moreover, based on the testimony and evidence before it, the ALC found as a further sustaining ground that MUHA was not the proper applicant or licensee under the law because, in the Proposed Project, as structured and presented to DHEC, Alliance, the for-profit majority owner of MUSC Network, was actually the “legal entity who, or whose governing body, has the ultimate responsibility and authority for the conduct of the facility or services.” *See* 3 S.C. Code Ann. Regs. 61-15, § 202(8)(b) (Supp. 2019); (*See also generally R. pp. 1 - 35*).

On appeal, MUHA raises the following issues for review by the Court. First, MUHA argues that the ALC lacked the statutory authority to consider and make a determination on the constitutional and statutory issues raised by Trident because (a) the issues allegedly do not arise under the CON Law; (b) because the ALC, as an executive branch court, cannot decide constitutional issues; and (c) because the ownership issues considered by the ALC allegedly were not presented to or considered by DHEC below. MUHA also challenges the ALC’s additional sustaining ground that MUHA is not the proper licensee of the Proposed Project under the CON Law. Additionally, MUHA disputes the ALC’s conclusions that MUSC Strategic Ventures is an *ultra vires* entity and that MUSC Network is an unlawful and unconstitutional joint venture. Finally, MUHA asserts for the first time on appeal that the findings of the ALC with regard to MUSC Network, MUSC Strategic Ventures, and Alliance violated those entities’ due process rights because these entities were not parties to the contested case proceeding.<sup>2</sup> (**R. pp. 2070 - 2075; R. p. 36**).

In their proposed joint brief, attached to the Motion, MUSC and MUSC Strategic Ventures summarize their two “fundamental arguments” as the ALC has no power over issues involving the rights and interests of entities that were not parties to the DHEC or ALC proceedings, and, even assuming the ALC has such power, the non-parties must be provided notice and an opportunity to

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<sup>2</sup> As Trident argues in its brief, MUHA did not raise this issue in its Motion to Reconsider and, therefore, failed to preserve the issue for review by this Court on appeal. *See Brown v. S. C. Dep’t of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (Issues not raised to and ruled on by the ALC are not preserved for appellate consideration.). MUSC and MUSC Strategic Ventures should not be allowed to cure MUHA’s oversights by appearing as “friends of the court” and asserting these arguments. *See James v. Anne’s, Inc.*, 390 S.C. 188, 193-194, 701 S.E.2d 730, 733 (2010) (“In the current appeal, it is not a party, but the amici[,] who are attempting to belatedly raise standing, but we find they are similarly precluded from asserting the issue on error preservation grounds because the amici can argue only the issues that were raised by the parties) (citing Rule 213, SCACR).

be heard on those issues. (**Proposed Joint Amicus Brief, p. 4**). All of MUSC and MUSC Strategic Ventures' arguments on these issues have been raised and fully briefed by the Appellant MUHA in its main and reply briefs. Trident, as the Respondent, has fully responded to these issues in its brief. The purported amici would add nothing of value to this Court's determination of the issues before it. No "desirable" reason exists under Rule 213, SCACR, to allow MUSC and MUSC Strategic Ventures to appear and reiterate arguments already ably made by the actual applicant in this CON matter.

Furthermore, as argued fully in Trident's brief, the ALC's findings regarding MUSC Strategic Ventures and MUSC Network do not constitute improper "adjudications of a non-party's rights," as characterized by MUHA in its brief and, now, by the purported amici in their Motion and proposed brief. Because they chose to participate in the Proposed Project, the named entities were required to be identified by MUHA in its CON Application as entities involved in the ownership and management of the Proposed Project.<sup>3</sup> In order to consider whether to grant or deny MUHA's CON application, the ALC as of necessity had to consider issues related to those entities.<sup>4</sup>

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<sup>3</sup> 3 S.C. Code Ann. Regs. 61-15 § 202(2)(a) (Supp. 2019) sets forth in its Appendix the CON application form, including Questionnaire A, concerning ownership and management of a proposed project, which an applicant must complete as part of the CON review process.

<sup>4</sup> In addition to the basic information concerning the ownership and management of the Proposed Project that was presented to DHEC in MUHA's own CON application, the ALC considered the Part D Assurances contained in the CON application in which MUHA affirmed that "the facility would be operated and maintained in accordance with the standards prescribed by law and regulations for the maintenance and operation of such facilities." (**R. p. 1637**). *See* 3 S.C. Code Ann. Regs. 61-15 § 202(2)(d) (Supp. 2019). The ALC also considered Project Review Criteria 13, entitled "Record of the Applicant (Owner and/or Administrator)," which requires demonstration of the experience and ability of the owner and/or operator of a proposed facility. 3 S.C. Code Ann. Regs. 61-15 § 802(13) (Supp. 2019). Finally, as discussed by the ALC in its Final Order, Project Review Criteria concerning the ability to complete the project, the financial feasibility of the project, and the extent to which the project will serve medically underserved groups are all dependent on the identity and nature of the ownership and management of the project. (**R. p. 16**).

Contrary to MUHA's assertions, the ALC did not order any relief, including dissolution, against MUSC or MUSC Strategic Ventures. The sole relief granted by the ALC was to deny MUHA's CON application, as presented to DHEC. (**R. pp. 34-35**). This ultimate conclusion of the ALC, that MUHA's CON application must be denied, does not affect any entity with regard to any matter outside of the MUHA CON matter in this case. The effect of the Final Order of the ALC is to adjudicate MUHA's CON application *in this case* and to prohibit MUHA from receiving a CON for the Proposed Project as presented to DHEC *in this case*. The Appellant MUHA alone is the subject of the court's relief. Thus, the ALC considered the issue of the legality and constitutionality of the designated operator of the Proposed Project and the issue of the proper licensee of the Proposed Project, arrived at its conclusions thereon, applied those conclusions to the CON application before it, and granted relief limited to the denial of the CON application, all of which occurred within the confines and context of the CON Law.

MUSC and MUSC Strategic Ventures have failed to meet their burden under Rule 213 to identify a legitimate friend of the court interest in this appeal and failed to state reasons to support their claims that the filing of an amicus brief is desirable, *i.e.*, that such brief would aid the Court in determining the issues in this case. Restating the Appellant MUHA's arguments, including some that have not been preserved, does not justify reopening briefing in this case at this stage of the proceedings.

## CONCLUSION

For the reasons stated above, the Court should deny MUSC and MUSC Strategic Ventures' Motion for Leave to File a Joint Amicus Brief.

Respectfully submitted,

*s/David B. Summer, Jr.*

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
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– Berkeley County ..... Respondents,

Of Which Medical University Hospital Authority d/b/a MUSC Radiation  
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**PROOF OF SERVICE**

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The undersigned hereby certifies that on January 8, 2021, s/he caused a copy of the **RETURN OF TRIDENT MEDICAL CENTER, LLC OPPOSING MOTION FOR LEAVE TO FILE JOINT AMICUS BRIEF** to be served upon all counsel of record via electronic mail 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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January 8, 2021

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The Honorable Jenny Abbott Kitchings  
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**RECEIVED**

**Jan 08 2021**

**SC Court of Appeals**

***Re: Trident Medical Center, LLC, d/b/a Trident Medical Center vs. South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County Appellate Case No. 2019-001159***

Dear Ms. Kitchings:

Enclosed for filing please find a *RETURN OF TRIDENT MEDICAL CENTER, LLC OPPOSING MOTION FOR LEAVE TO FILE JOINT AMICUS BRIEF* in the above-referenced matter. We are submitting this filing via e-mail as permitted by the Supreme Court's order addressing the coronavirus emergency.

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

With best regards, I am

Sincerely,

*s/David B. Summer, Jr.*

David B. Summer, Jr.

DBSjr/tmb

Enclosures

cc: Ashley C. Biggers, Esquire (*via electronic mail*)  
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