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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

APPELLATE CASE NO. 2020-001323

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

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

v.

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

AND

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

v.

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

AND

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

Appellant,

v.

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

Respondents.

INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER APPELLANTS PRESERVED THE ARGUMENT CONCERNING THE ALLEGED PROCEDURAL IRREGULARITIES, WHETHER THE APPELLANTS DEMONSTRATED PREJUDICE AS A RESULT OF THE IRREGULARITIES, AND WHETHER THE 11-DAY DE NOVO TRIAL BEFORE THE ALC CURED THE IRREGULARITIES?

II. WHETHER THE ALC PROPERLY INTERPRETTED STANDARD 5 REGARDING DEMONSTRATING THE NEED FOR AND JUSTIFYING THE ADVERSE IMPACT OF THE HOSPITAL AT THE CHOSEN SITE?

III. WHETHER THE ALC CAN APPROVE THE APPLICATION ON THE CONDITION OF MUHA'S CLOSURE OF ITS FREESTANDING EMERGENCY DEPARTMENT?

STATEMENT OF THE CASE

On December 27, 2017, the Respondent South Carolina Department of Health and Environmental Control ("Department" or "DHEC") received Respondent Medical University Hospital Authority d/b/a MUHA Community Hospital's ("MUHA") certificate of need ("CON") application to establish a 128-bed hospital in Berkeley County ("Project"). (DHEC Ex. 1, pp. 2, 9, and 14-15). During the Department's review of the application, several entities, including Appellants Trident Medical Center, LLC d/b/a Trident Medical Center and Summerville Medical Center ("Trident Health"), and Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center ("CMC"), filed as affected persons in opposition of MUHA's application. (*Id.*, pp. 678-680, 684-686, and 690-691).[1] After review of the application and other information submitted by MUHA and affected persons, the Department approved MUHA's application for the Project on July 23, 2018. (*Id.*, pp. 1009-1013).

[1] CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper St. Francis Berkeley Hospital, and Roper Mount Pleasant Hospital ("Roper"), filed as affected persons in opposition to the MUHA Project. Roper challenged the Department's approval of the CON, filing a request for final review with the Board, a request for contested case hearing with the ALC, and a notice of appeal with the Court of Appeals. However, after reaching an agreement with MUHA, Roper filed a Notice of Agreed Dismissal of its Appeal on October 23, 2020. The Court of Appeals filed an Order dismissing Roper's appeal on October 26, 2020.

Appellants thereafter filed requests for final review with the Board of Health and Environmental Control ("Board") on August 6, 2018. The Board mailed notice of its decision not to conduct a final review conference on September 10, 2018. Appellants filed requests for contested case hearings with the Administrative Law Court ("ALC") on October 9, 2018. After extensive discovery and pre-hearing motions, the ALC conducted a hearing from November 6, 2019 through November 21, 2019. The ALC issued a Final Order on July 8, 2020. On July 20, 2020, motions for reconsideration were filed. The ALC rescinded its Final Order on July 30, 2020, and issued an Amended Final Order on September 4, 2020. The ALC concluded that MUHA's CON application satisfies the State Health Plan ("SHP"), Project Review Criteria ("PRC"), the section 501 findings, and the purposes of the CON Act, and accordingly, the ALC granted a CON for the Project. (Amended Final Order, p. 3). On September 2, 2020, Appellants filed their Notices of Appeal.

STATEMENT OF THE FACTS

Charleston, Berkeley, and Dorchester Counties ("Tri-County Area") are areas of explosive population growth over the past five decades. The State Demographer's estimates and projections for the Tri-County Area are summarized as follows:

County	*Estimates 2017*	*Projections 2020*	*Projections 2024*
Berkeley County	214,470	232,395	255,510
Charleston County	401,738	418,970	444,730
Dorchester County	158,881	166,780	179,110

(MUHA Ex. 2; Murdock Tr., pp. 93-94). The significant industry growth occurring in the Tri-County Area is expected to continue and bring in additional jobs. (DHEC Ex. 1, pp. 34-35). Not even accounting the ongoing inpatient hospital surges as a result of the COVID-19 pandemic, the demand for healthcare services in the Tri-County Area is already high and expected to continue to

rapidly grow.[2] Despite this significant growth, there were no acute care hospital beds in Berkeley County until October 2019.

Respondent Medical University Hospital Authority ("MUHA") is seeking to address this need for healthcare services in Berkeley County. MUHA owns and operates the Medical University of South Carolina ("MUSC"), which is both a tertiary and quaternary teaching hospital and South Carolina's only academic medical center. (DHEC Ex. 1, p. 8). MUSC is located on the downtown Charleston peninsula and, in addition to its acute care and trauma services, is comprised of several specialty divisions. (*Id.*). MUHA offers a wide range of services to a large population base residing primarily in the Tri-County Area, but also across the State and beyond. (*Id.*).

On December 27, 2017, MUHA submitted a CON application for a 128-bed community hospital in Berkeley County. (*Id.*, pp. 1, 9, and 14-15). The hospital will be in Nexton, a growing community in Summerville that is conveniently located off of exit 197 on Interstate-26. (*Id.*, pp. 4 and 9). MUHA sought to add the Project in order to establish a natural, complementary component to its quaternary hospital on the peninsula, where it cares for the sickest patients and provides the most intensive care. (*Id.*, p. 9). MUHA's rationale for the Project revolves around three trends:

> 1) A large percentage of MUHA's adult inpatients originate from the Berkeley County area and establishing a Berkeley County hospital will provide such patients improved access.
>
> 2) Berkeley County is an underserved market and only has one acute care hospital planned and under construction.
>
> 3) Increased demand for inpatient services at MUHA and the Tri-County Area have resulted in capacity constraints and prolonged boarding hours.

[2] In fact, the 2020 SHP, which is the plan currently in effect and accounts for the now operational Roper Berkeley Hospital, the approved Berkeley Medical Center, and MUHA's Project, indicates a need of 185 beds for the Berkeley County service area. *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.").

(*Id.*, p. 9). Prior to pursuing the Project, MUHA considered various alternatives including expanding its existing campus on the peninsula, but determined doing so would require significant renovation cost expenditures, result in limited improvements in quality of care, and create disruption in the provision of existing services. (*Id.*, p. 54-55).

Pursuant to the CON Act and Regulation, the Department cannot approve a project unless it is consistent with the SHP. *See* S.C. Code Ann. § 44-7-210(B); 3 S.C. Code Ann. Regs. 61-15 § 801(3). The 2017-2018 SHP establishes the Tri-County Area as the relevant service area for general hospitals. (Murdock Tr., pp. 57-58; DHEC Ex. 4, p. 26). Pursuant to the SHP, MUHA had an institutional or facility specific bed need of 147, but the Tri-County Area had a surplus of 13 beds.[3] (DHEC Ex. 4, p. 27). MUHA applied for its Project under Standard 5 of the SHP which states:

> 5. A facility may apply to create a new additional hospital at a different site within the same service area through the transfer of existing licensed beds, the projected bed need for the facility, or a combination of both existing beds and projected bed need. The facility is not required to have a projected need for additional beds in order to create a new additional hospital. There is no required minimum number of beds in order to approve the CON application. The applicant must justify, through patient origin and other data, the need for a new hospital at the chosen site and the potential adverse impact a new hospital at the chosen site could have on the existing hospitals in the service area.

(*Id*, pp. 10-11). According to MUHA's CON application, 56% of its overall adult inpatient population in fiscal year 2017 originated from the Tri-County Area and 29% originated from the North Charleston, Summerville, and Moncks Corner submarkets that surround the Project. (DHEC Ex. 1, pp. 24-25).

[3] The 50 beds associated with Berkeley Medical Center ("BMC") were mistakenly not included in the 2017-18 SHP hospital inventory. If the 50 beds for BMC were included, then the Tri-County Area has a surplus of 63 beds. Regardless, this has no impact on MUHA's compliance with the SHP or PRC.

Appellant Trident Health owns and operates two acute care hospitals in the Tri-County Area, Trident Medical Center in North Charleston and Summerville Medical Center in Summerville. Trident Health also received approval for construction of Berkeley Medical Center ("BMC"), a 50-bed general acute care hospital in Moncks Corner, which remains in a pre-construction stage despite having received a CON in 2016. Appellant CMC is a community hospital located in Walterboro. Both Trident Health and CMC are subsidiaries of Hospital Corporation of America, a for-profit operator of health care facilities that is publicly traded on the New York Stock Exchange. (Gallati Tr., pp. 9-10).

After receiving MUHA's application, the Department published notice in the March 23, 2018 *State Register* that MUHA's application was deemed complete and that the review cycle had begun. (DHEC Ex. 1., p. 1021). During the review period, Trident Health and CMC submitted notice to DHEC that they were affected persons in opposition to MUHA's Project on April 19, 2018 and July 10, 2018, respectively. (*Id.*, pp. 678, 684, and 690). On July 6, 2018, the Department reviewer, Margaret Murdock, informed MUHA and affected persons that in lieu of an in-person project review meeting, there would be an opportunity to submit written arguments and/or documentation in support of or in opposition to the application. (*Id.*, pp. 692-693). Ms. Murdock requested the written arguments and/or documentation be submitted by July 13, 2018. (*Id.*; Murdock Tr., pp. 52-53). On July 11, 2018, and at the request of Appellants, Ms. Murdock extended the date for submission of written arguments and/or documentation to July 18, 2018. (DHEC Ex. 1, pp. 692, 694, and 1001; Murdock Tr., pp. 52-53). Ms. Murdock also sent MUHA and the affected persons a copy of the "deemed complete" letter, which listed the relative importance of the PRC being used in review of the MUHA application, on July 11, 2018. (DHEC Ex. 1., pp. 692 and 1000; Murdock Tr., pp. 31-33). Thereafter, Appellants submitted their 37-page

written opposition on July 18, 2018. (*Id.*, pp. 703 and 992). Ms. Murdock reviewed and analyzed the written material submitted by the affected persons. (Murdock Tr., pp. 55-56). To obtain clarification regarding a component of the need analysis, Ms. Murdock contacted MUHA's health planner, David Levitt. (Murdock Tr., 54-55). By email dated July 23, 2018, Mr. Levitt emailed Ms. Murdock supplemental information regarding the need analysis. (*Id.*; DHEC Ex. 1 at 977). On that same day, Ms. Murdock issued the decision granting the CON to MUHA for its Project. (DHEC Ex. 1 at p. 1009).

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs the standard of review from an ALC's decision. *Trident Med. Ctr. v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 341, 348, 772 S.E.2d 177, 180 (Ct. App. 2015). Section 1-23-610(B) provides that the Court of Appeals:

> may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See also S.C. Code Ann. § 1-23-380(5). In a nutshell, this Court's review "is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law." *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 617 (2010). In this matter, the ALC's findings and conclusions are supported by robust evidentiary support and free of legal errors. Further, Appellants were not prejudiced.

ARGUMENT

I. APPELLANTS FAILED TO PRESERVE THE ARGUMENTS RELATED TO THE PROCEDURAL IRREGULARITIES, WERE NOT PREJUDICED AS A RESULT OF THE IRREGULARITIES, AND TO THE EXTENT THERE WAS ANY PREJUDICE, IT WAS CURED BY THE *DE NOVO* CONTESTED CASE.

Appellants contend two alleged procedural irregularities associated with DHEC's review warrant denial of MUHA's CON application and that it was an error of law for the ALC to determine the contested case cured these irregularities. (Appellants' Br., pp. 13-22). The two alleged irregularities are:

(1) DHEC prematurely started the review cycle such that by the time the affected persons received the "deemed complete" letter, there were only 12 days left in the review cycle and DHEC could not have performed a "meaningful review."[4]

(2) DHEC's selection of the PRC as being most important did not mirror the PRC listed as important in the SHP.[5]

Appellants failed to preserve these arguments for review. Moreover, Appellants were not prejudiced. Finally, to the extent there was any prejudice, the *de novo* contested case before the ALC cured the errors.

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[4] Citing Regulation 61-15 Sections 303(1) and 305(1), the ALC held that DHEC is required to first notify the applicant that its application is complete and invoice the applicant with the application fee. (Amended Final Order, FN10 at p. 6). After collecting the application fee, DHEC is then required to publish notice in the *State Register* that the review cycle had begun. (*Id.*). The notification the application is complete also includes the PRC deemed of relative importance to the project under review. (*Id.*). According to the ALC, "DHEC published MUHA's CON application as 'deemed complete' in the March 23, 2018 State Register when the notification to the applicant and applicant's application fee had not yet been received in violation of regulation 61-15 §§ 304-305." (*Id.*). Despite these irregularities, the ALC determined the Appellants were not prejudiced. (*Id.*).

[5] In the deemed complete notification, DHEC determined the following PRC were of relative importance to MUHA's Project: Compliance with the Need outlined in the SHP; Community Need Documentation; Distribution (Accessibility); and Ability to Complete the Project. (DHEC Ex. 1, pp. 1000-1001). The 2017-2018 SHP listed the following PRC as being most important in reviewing CON applications for general hospitals: Compliance with the Need outlined in the SHP; Community Need Documentation; Distribution (Accessibility); Record of the Applicant; Cost Containment; and Adverse Effects on Other Facilities. (DHEC Ex. 4, p. 12). The ALC held that "even though the Department can re-order PRC criteria, the Department's failure to specifically address [adverse effects on other facilities] in its decision when it is identified as one of the most important PRC in the 2017-2018 SHP was error." (Amended Final Order, p. 68). Nonetheless, the ALC held this error was cured as a result of the *de novo* contested case proceeding. (*Id.*).

A. Appellants failed to preserve these arguments for review.

Even if DHEC failed to comply with regulatory provisions concerning review of the application, Appellants did not preserve these arguments for review by the ALC, much less the Court of Appeals. Section 44-7-210(E) of the S.C. Code of Laws states, "The issues considered at the contested case hearing considering a [CON] are limited to those presented or considered during the staff review." Appellants were aware of the purported time constraints upon submission of their opposition material on July 18, 2018. (DHEC Ex. 1, pp. 703 and 968). Appellants were also aware of the relative importance of the PRC to be used in evaluating the Project and the PRC listed as important in the SHP. Yet, Appellants did not raise these purportedly fatal issues to the Department during the review period. Therefore, pursuant to Section 44-7-210(E), these alleged procedural irregularities were not appropriate issues for consideration during the ALC's contested case.

Similarly, Appellants did not present these alleged irregularities to the Board in their requests for final review. It is recognized that "administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). The irregularities were also not initially raised to the ALC with either the filing of Appellants' petitions for administrative review, or prehearing statements wherein parties are to list "issues presented for determination" by the ALC. *See* Rule 14, SCALC. Appellants likewise did not file any dispositive motions related to these irregularities prior to the lengthy contested case. It is difficult to comprehend how these irregularities only manifested themselves after issuance of the ALC's Final Order when Appellants raised the irregularities in their Motion for Reconsideration. Moreover, it would be an unwise use of resources to reverse a decision based upon irregularities known by Appellants at hour one, but

not complained of until hour eleven. For these reasons, Appellants failed to preserve the arguments concerning procedural irregularities for review by this Court.

B. Appellants suffered no prejudice as a result of the procedural irregularities.

Appellants were not prejudiced as a result of the alleged irregularities. "As a general rule, a party must establish prejudice as a result of another's failure to follow mandatory statutory procedure." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 14, 577 S.E.2d 190, 197 (2003). In a series of unconvincing claims, Appellants argue that had the irregularities been remedied, DHEC would have conducted a "meaningful review," determined the Project failed to comply with the SHP and PRC, denied MUHA's application, and accordingly, when that decision was challenged by MUHA at the ALC, the burden to demonstrate compliance with the SHP and PRC would have been on MUHA, as the petitioner, not Appellants. Appellants fail to demonstrate any prejudice, as their claims are tenuous, exaggerated, and without support.

To begin, the lack of prejudice is demonstrated by Appellants' failure to address the irregularities contemporaneously at the time in which they occurred. The Appellants had the opportunity to present these alleged deficiencies to the Board, but did not. The Appellants had the opportunity to present these alleged deficiencies to the ALC at an early stage, but did not. It was not until two years after issuance of the Department's July 23, 2018 decision that Appellants raised the procedural irregularities as grounds for denial in their Motion for Reconsideration dated July 20, 2020. If Appellants were truly prejudiced, they would have raised the irregularities at an earlier stage.

Regarding the alleged erroneous selection of relative importance criteria, Appellants (and Roper) made no issue of the Department's selection of relative importance criteria in its review and approval of the BMC and Roper Berkeley CON applications in 2009, wherein the Department

declined to include cost containment as a relative importance criteria, despite cost containment being listed as a PRC considered important pursuant to the respective SHPs. (DHEC Ex. 2, p. II-9; DHEC Ex. 3, p. II-11; DHEC Ex. 7, pp. 1107-1108; DHEC Ex. 8, pp. 726-727; and Murdock Tr., pp. 43-47). Yet ten years later when MUHA's application for a Berkeley County hospital is under review, Appellant Trident Health claims such selection is an error warranting reversal. Additionally, contrary to Appellants' assertion that DHEC eliminated criteria, Ms. Murdock testified that she considered all PRC and, pursuant to S.C. Code Ann. Section 44-7-190(B) and Regulation 61-15 Section 801(2), determined the relative importance of the PRC for MUHA's Project. (Murdock Tr., pp. 34-35 and 47). Ms. Murdock did not ignore or eliminate any PRC from consideration. (*Id.*, pp. 38 and 47).

Regardless, the Department performed a thorough and thoughtful review. Ms. Murdock reviewed the application, voluminous material submitted by the affected persons, prior SHPs, Joint Annual Reports, prior and pending related CON applications, and population data. (Murdock Tr., 55-56). The CON Act and Regulation do provide a timeframe for review of applications, and the Department issued its decision within the prescribed timeframe. *See* S.C. Code Ann. § 44-7-210(A); 3 S.C. Code Ann. Regs. 61-15 § 305. Unlike the briefing schedule of an appeal before this Court, where there are designated timeframes for filing the appellant's brief, the respondent's brief, and the appellant's reply brief, there is no similar schedule for applicants and affected persons in the Department's review of CON applications. *See* Rules 208-211, SCACR. The Department reviews the application and other written submissions by the applicant and affected persons, then makes a decision. While limited time may have existed for Appellants to review and respond to Mr. Levitt's email submission on July 23, 2018, this does not result in the Appellants being prejudiced. Moreover, the limited time for Ms. Murdock to review the July 23,

2018 submission does not mean she failed to perform a "meaningful review," however Appellants may define that term.

Appellants cross-examined Ms. Murdock during the contested case and, at no point, did she waver in her support of the decision granting the CON. Ms. Murdock did not indicate that she would have decided differently if certain sequences or information changed. In fact, the ALC, which conducted an 11-day contested case, ultimately came to the same conclusion as DHEC – *i.e.*, MUHA's application is consistent with the SHP and PRC. For these reasons, Appellants have failed to demonstrate any prejudice resulting from the mentioned irregularities.

C. The *de novo* contested case cured the resulting prejudice, if any.

To the extent there was prejudice as a result of the irregularities, which the Department denies, such prejudice was cured by the 11-day *de novo* hearing before the ALC. The hearing provided Appellants a full and unfettered opportunity to make opening statements and present evidence, including the direct, cross, re-direct, and re-cross examination of witnesses. The ALC carefully considered all evidence and arguments, and drafted a thorough 71-page order. The hearing before the ALC satisfied the due process requirements and, accordingly, any irregularities during the Department's review were harmless.

The Supreme Court of South Carolina recognized that "[a]n adequate de novo review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body." *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001). In *Unisys*, an appeal involving a contract dispute between the State and a corporation, the corporation argued requiring it to proceed under the Procurement Code deprived it of procedural due process. 346 S.C. at 173. Specifically, the corporation contended the chief procurement officer ("CPO"), who was to perform an

administrative review pursuant to the Procurement Code, was not impartial because of his involvement in the contract negotiations and investigation of disputes. *Id.* Further, the corporation argued the CPO's recusal and designation of an acting CPO to perform the administrative review was unauthorized, and that the acting CPO was not impartial. *Id.* at 173-74. The Supreme Court noted that under the Procurement Code, the corporation could seek *de novo* review of the CPO's decision by the Procurement Review Panel, thereby rendering harmless any due process violations based on the insufficiency of the CPO's review. *Id*. at 174.

Similarly, the Supreme Court in *Ross v. Medical University of South Carolina*, 328 S.C. 51, 492 S.E.2d 62, (1997) held that procedural irregularities with a pretermination hearing were cured by full and meaningful participation in a posttermination hearing. In *Ross*, MUSC did not provide Dr. Ross, a tenured professor, a pretermination hearing; however, the Supreme Court determined, "although the pretermination procedures afforded Dr. Ross did not comply with minimum due process requirements, the error was remedied by the subsequent Committee hearing." 328 S.C. at 67. Additionally, a Vice President participated as both a prosecutor and adjudicator, thus violating Article I, Section 22 of the South Carolina Constitution, which prohibits the same person from serving in these capacities. *Id.* at 71. Regardless, this constitutional violation was cured by the Board's later independent consideration of the grievance. *Id.*

Likewise, the alleged procedural irregularities that occurred during staff review were fully cured by Appellants participation in a lengthy *de novo* trial before the ALC. (Amended Final Order, pp. 6 and 67). The procedural irregularities did not involve some fundamental right that could only be protected by imposing additional procedures at the Department staff review level. The ALC considered all of Appellants' arguments and determined the Project met all applicable

requirements. Accordingly, to the extent there was any prejudice due to the irregularities, the prejudice was cured by the subsequent *de novo* trial before the ALC.

II. THE ALC PROPERLY CONCLUDED THAT MUHA's PROJECT COMPLIED WITH STANDARD 5.

Appellants contend the ALC erred in interpreting Standard 5's use of "at the chosen site" as being a descriptive adjectival phrase of where the new hospital was located. (Appellants' Br., pp. 22-26). Instead, Appellants argue that to comply with Standard 5, MUHA was required to demonstrate a need and justify the adverse impact in the geographic area where the hospital is to be located. (*Id.*, p. 23). Appellants also assert that the ALC erred in accepting MUHA's institutional need to make room for high acuity patients at its downtown hospital as a sufficient justification of need under Standard 5. (*Id.*). To the contrary, the ALC's interpretation, which is misconstrued by Appellants, was proper and in accordance with the rules of statutory construction. The ALC's interpretation also has a sound basis in health planning and furthers the purposes of the CON Act and Regulation.

Citing precedent from the Court of Appeals and Supreme Court, the ALC correctly recited the manner in which the SHP is to be interpreted:

> The South Carolina Supreme Court held that "it is clear the legislature intended for the State Health Plan to be an enforceable document." *Trident Med. Ctr. v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 341, 350, 772 S.E.2d 177, 182 (Ct. App. 2015). Accordingly, interpretation of the State Health Plan is comparable to the interpretation of a DHEC regulation. "Regulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639–40, 723 S.E.2d 191, 195 (2012). "The first question of statutory interpretation is whether the statute's meaning is clear on its face." *Wade v. Berkeley Cty.*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002).

(Amended Final Order, p. 56). Thereafter, the ALC properly interpreted and applied Standard 5.

Ultimately, the ALC held that the plain meaning of Standard 5 requires the applicant to establish the receiving hospital has a need based upon patient origin and other data. (*Id.*, p. 59).

That patient origin and other data should be for the service area as set forth in the SHP – in this case, the Tri-County Area. (*Id.*, p. 59). As the ALC remarked, there are a number of flaws with Appellants' interpretation that MUHA needed to demonstrate a need and justify the adverse impact at the geographic area of the Project. For example, the Appellants' interpretation ignores the plain meaning of "at the chosen site" and its context within Standard 5. (*Id.*, pp. 56-57). Additionally, the Appellants' interpretation would leave the ALC to guess precisely the scope of "the chosen site," which is inconsistent with the SHP's uniform discussion of hospital need in the context of service areas. (*Id.*, p. 57).

The Appellants then misapprehend the ALC's analysis and ultimate holding regarding Standard 5, stating that it was an error to accept that MUHA's need to make room for high acuity patients at its downtown campus as a sufficient justification for the Project. (Appellants' Br., p. 23). In actuality, the ALC determined that MUHA justified the need for its Project based not only on the need to make room for high acuity patients at its downtown campus, but also because MUHA demonstrated a significant percentage of its patients originate in the Tri-County Area (including the submarkets near the Project), the significant population growth, the reasonableness of the service area, the patient redirection percentages, and the projected utilizations. (Amended Final Order, pp. 27 and 59).

Appellants' suggestion that MUHA's institutional or facility specific bed need is best addressed at its downtown hospital is inconsistent with health planning and the purposes of CON. A purpose of CON is to guide the establishment of health facilities that best serve the public needs. S.C. Code Ann. § 44-7-120; 3 S.C. Code Ann. Regs. 61-15 § 101. Analogously, a basic health planning tenet is the placement of facilities where people are and where they can best access the facilities. (Amended Final Order, p. 17). While the institutional or facility-specific need for the

Project originates from the MUHA hospital on the peninsula, the patients driving this need originate from across the State. As noted, 56% of MUHA's existing adult inpatients originate in the Tri-County Area, with 29% originating in the submarkets surrounding the Project. (DHEC Ex. 1, pp. 24-25). However, only 5% of MUHA's existing adult inpatients originate from the peninsula. (*Id.*). The ALC correctly found "it is much more reasonable to place the new hospital in Nexton—a place from which a large percentage of the patients currently originate, than a site with only 5% of the patient origin population." (Amended Final Order, p. 18).

Notably, even if the Court were to adopt Appellants' interpretation, the evidence supports finding that MUHA's Project is consistent with Standard 5. The ALC found:

> [I]n this case, it ultimately does not matter whether the factual analysis is based upon [Appellants'] interpretation that the [ALC] consider only patient origins and data "near" the chosen site or the State Health Plan's geographical service area because, under either scenario, MUHA established a bed need for MUHA Berkeley based upon patient origins and other data.

(*Id.*, pp. 59-60). There is a need for MUHA's hospital, supported by patient origin and other data, in the Tri-County Area, and more specifically, "near" the geographical site of the Project.

In conclusion, the ALC properly applied the rules of statutory construction in determining that MUHA's application complied with Standard 5 of the SHP. In doing so, the ALC's interpretation furthered sound health planning and the purposes of the CON Act and Regulation. In contrast, Appellants argue for an interpretation that is inconsistent with the Plan's plain language and produces unreasonable and inconsistent results. For these reasons, the ALC correctly interpreted Standard 5.

III. THE ALC HAD AUTHORITY TO APPROVE MUHA'S PROJECT ON THE CONDITION THAT IT NOT ALSO OPERATE ITS FREESTANDING EMERGENCY DEPARTMENT.

Appellants argue the ALC's granting of the CON on the condition that MUHA honor its original declaration to close the Nexton Freestanding Emergency Department ("FED") upon

opening of the Berkeley Hospital is unenforceable and inconsistent, arbitrary, capricious and in contravention of the CON law. (Appellants' Br., pp. 27-30). At the outset, MUHA has now unequivocally avowed it will not operate the Nexton FED once the MUHA Berkeley Hospital opens. (MUHA Resp. in Opp'n to Mots. to Reconsid., p. 5). Nevertheless, Appellants provide no substantive explanations for its criticisms.

The CON Act and Regulation address implementation of a project for which a CON is issued. Section 44-7-230(A) states, "Implementation of the project or operation of the facility or medical equipment that is not in accordance with the Certificate of Need application or conditions subsequently agreed to by the applicant and the department may be considered a violation of this article." *See also* 3 S.C. Code Ann. Regs. 61-15 § 311. Accordingly, the CON holder is bound by its application or other agreed upon conditions.

If the ALC's decision denying MUHA's CON application for its Berkeley County FED is reversed by this Court,[6] and MUHA lawfully constructs and operates the FED, then it would be obligated to close the FED upon opening the Project, as provided by the ALC's Amended Final Order. (Amended Final Order, pp. 40 and 61). Failure to do so may subject MUHA to being in contempt of the ALC's Amended Final Order. *See* S.C. Code Ann. § 1-23-630(A) ("Each administrative law judge of the division has the same power at chambers or in open hearing as do circuit court judges and to issue those remedial writs as are necessary to give effect to its jurisdiction.") and *S.C. Dep't of Labor, Lic., and Reg., S.C. Manufactured Housing Bd. v. Scruggs*, Docket No. 2011-ALJ-11-0264-IJ (S.C. Admin. Law J. Div. Oct. 25, 2013) (Anderson, C.J.) (imposing a monetary penalty against respondent for violating the ALC's order enjoining

[6] *See* Appellate Case No. 2020-001072.

respondent from engaging in the unlicensed practice of manufactured housing contracting and installation).

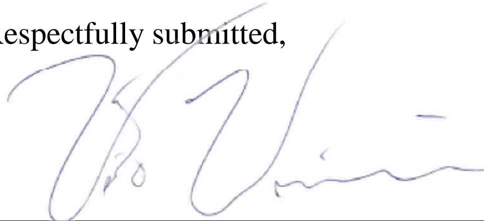
Appellant Trident Health has agreed to a consent order of dismissal executed and filed by the ALC where there are conditions placed on implementation of a project. *See Trident Med. Ctr., LLC v. S.C. Dep't of Health & Envtl. Control*, Docket No. 17-ALJ-07-0019-CC (S.C. Admin. Law J. Div. July June 20, 2017) (Durden, J.). In that matter, Trident Health challenged DHEC's approval of Roper's CON application for relocation and replacement of an FED. As part of resolution for that case, the consent order of dismissal prescribes that Roper would only set up and staff 10 of the 15 FED treatment bays for a period of three years. Trident acknowledged that the provisions of the consent order were "consistent with the South Carolina Health Plan, statutes and regulations related to the South Carolina CON Program." (*Id.*). The ALC's limitation in this matter is similarly consistent. In sum, the ALC's findings regarding the FED are reasonable, enforceable, and in accordance with the CON Act and Regulation.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court affirm the ALC's decision.

[Signature page follows]

Respectfully submitted,



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February 3, 2021
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

APPELLATE CASE NO. 2020-001323

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

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

v.

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

AND

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

v.

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

AND

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

Appellant,

v.

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

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on February 3, 2021, a copy of the **Initial Brief of Respondent South Carolina Department of Health and Environmental Control** was served on all counsel of record via electronic mail, containing the above-referenced document, to each counsel's individual AIS email address pursuant to SC Supreme Court COVID Order 2020-05-29-02 as follows:

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Re: Appellate Case No. 2020-001323

CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper St. Francis Berkeley Hospital and Roper Mount Pleasant Hospital v. South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital

AND

Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center v. South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,

AND

Trident Medical Center, LLC, d/b/a Trident Medical Center and Summerville Medical Center v. South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital.

Dear Ms. Kitchings:

Enclosed for filing in connection with the above matter, please find the ***Initial Brief of Respondent South Carolina Department of Health and Environmental Control and Respondent South Carolina Department of Health and Environmental Control's Designation of Matter to be Included in the Record on Appeal***, along with the ***Proofs of Service***.

By copy of this letter and pursuant to the Court's standing Order, we are providing a copy of the same to all counsel of record. Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Vito M. Wicevic

Enclosures

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