THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

APPELLATE CASE NO. 2020-001323

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

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

v.

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

AND

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

v.

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

AND

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

v.

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

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

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INTRODUCTION

In this joint Reply Brief, the Appellants Trident Medical Center, LLC d/b/a Trident Medical Center and Summerville Medical Center and Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center (collectively "Trident Appellants" or "Trident") respond to the arguments asserted in the brief of the Respondent Department of Health and Environmental Control ("Department") and the brief of the Respondent Medical University Hospital Authority, d/b/a MUHA Community Hospital ("MUHA"). In offering this Reply to selected arguments of the Respondents, the Trident Appellants incorporate and reiterate all of their arguments on all of the issues set forth in their main brief.

ARGUMENT

A. Interpretation of Standard 5 of the 2017-2018 State Health Plan

In its brief, MUHA asserts two primary arguments regarding Trident's appeal of the ALC's interpretation and application of Standard 5 of the 2017-2018 State Health Plan ("State Health Plan" or "Plan"). (*See generally* MUHA Brief, pp. 13-21). First, MUHA claims, without any basis in fact, that Trident makes only cursory arguments on this issue in its main brief and, therefore, Trident has abandoned its appeal of this issue. (MUHA Brief, pp. 15-16). Second, MUHA disputes the merits of Trident's position that the ALC erred as a matter of law in determining that MUHA met its burden in justifying the need for its proposed hospital under Standard 5.[1] (MUHA Brief, pp. 16-20).

Regarding the claim of abandonment, a simple reading of Trident's Brief reveals the lack of a factual basis for MUHA's meritless claim of abandonment of this issue. Contrary to MUHA's

[1] The Department does not argue abandonment in its brief but joins MUHA in disputing Trident's contention that the ALC misinterpreted and misapplied Standard 5 in this case. (Department Brief, pp. 13-15). Therefore, Trident responds to both the Department and MUHA on this issue.

assertion that Trident offers no argument other than its use of the words "contorts" and "strained construction" to describe the ALC's interpretation of Standard 5, Trident in fact addresses the intent of the CON Act, how Standard 5, if correctly interpreted, furthers that intent, how the ALC's interpretation is contrary to the intent and how the ALC misapplied Standard 5 to the facts before it in this case. (Trident Brief, pp. 22-26). Trident has properly preserved this issue for consideration by Court.

Regarding the merits of Trident's arguments concerning the correct interpretation of Standard 5, Trident notes that, although the State Health Plan is not itself a statute or a regulation, it is incorporated into the CON Act and regulations, which provide for the promulgation of the Plan and which make compliance with the Plan a regulatory prerequisite to CON approval. S.C. Code Ann. §§ 44-7-180(B) and 44-7-210(B)(2018); S.C. Code Ann. Regs. 61-15, § 801(3). Thus, it is an appropriate practice to apply the rules of statutory construction to the Plan. *See Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012)("Regulations are interpreted using the same rules of construction as statutes."); *See also MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 7 n.4, 664 S.E.2d 471, 474 n.4 (2008)("The issue whether the Plan standards satisfy the statutory requirements is a legal conclusion based on statutory interpretation principles.").

In *Eagle Container Co., LLC v. County of Newberry*, the South Carolina Supreme Court summarized the general principles applicable to construction of a statute:

> "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *McClanahan v. Richland County Council,* 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002).
>
> "[W]ords in a statute must be construed in context," and "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n,*

> 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Hitachi Data Sys. Corp. v. Leatherman,* 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Miller v. Doe,* 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

379 S.C. 564, 570-571, 666 S.E.2d 892, 895-896 (2008).

MUHA chose to apply for a CON to establish its Proposed Hospital under Standard 5 of the State Health Plan. Standard 5 provides that:

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

(**DHEC Ex. 4, p. 0015-0016**).

The Trident Appellants contend that a plain language reading of Standard 5 compels the conclusion that, in addition to identifying the beds or the bed need at its existing hospital which will be transferred, an applicant must also justify that there is a need for those hospital beds and services at the specific location (site) chosen by the applicant for construction of the new hospital that will be receiving the transferred beds and/or bed need. (Trident Brief, p. 23). In its Order, the ALC concludes that "[t]he phrase 'at the chosen site' answers the question of which hospital (the hospital at the existing site or the new site) is being discussed rather than identifying the geographic area from which the need for the new hospital must be justified." (**Order, p. 57**). Thus, the ALC interprets Standard 5 as requiring that an applicant seeking to transfer beds establish only that need

exists for the new hospital based upon patient origin and other data from the State Health Plan service area as a whole.[2] (**Order, pp. 57-59**).

The Trident Appellants contend that the ALC's interpretation of Standard 5 reflects neither the intent of the standard under the CON law nor the plain language of the standard itself. As argued by Trident Appellants in their brief, under the basic precepts of healthcare planning, a crucial relationship exists between geographic proximity and the health planning concepts of need and adverse impact, viz., the closer in proximity a new hospital is to existing providers, the less the need will be "at the chosen site", and, concomitantly, the closer in geographic proximity a new hospital is to existing providers, the greater the adverse impact to those existing hospitals and to the healthcare delivery system as a whole from the unnecessary duplication of services.[3] The ALC acknowledges this basic concept in part in its discussion of adverse impact. (**Order, p. 33**) ("Trident, Roper, and MUHA are the three dominant inpatient providers in the Tri-County Service Area. TMC is approximately ten miles from the Project with 296 acute care beds and SMC is approximately eleven miles from the Project with 124 acute care beds. Roper Berkeley is approximately four miles away with 50 beds. Obviously, the closer a project is to existing providers, the more likely it will impact those providers.").

Requiring an applicant to justify its specific choice of location for a new hospital with regard to need and adverse impact recognizes and gives effect to the stated purposes of the CON law to prevent unnecessary duplication of facilities and services and to guide the establishment of

[2] In this case, under the State Health Plan, the Tri-County Service Area as a whole showed a surplus of 63 beds.

[3] The stated goals of the CON Act are to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2018).

such facilities and services. Under the ALC's interpretation, the need data being considered encompasses the entire three county service area in which MUHA is located.[4] Yet, as the above quote from the ALC's order indicates, there are three existing hospitals with over 450 acute care hospital beds providing services within a ten-mile radius of MUHA's Proposed Hospital.[5] Allowing MUHA to prove need through the use of service area wide data grievously dilutes the measurement of the effect that a new hospital will have if located in the immediate vicinity of three existing hospitals providing the same services.

With regard to the plain language of Standard 5, the ALC interprets the phrase "at the chosen site" to be a mere descriptor to distinguish between the applicant's existing facility and its new hospital. This conclusion is nonsensical. The plain language of Standard 5 uses the actual descriptor "new" to describe the new hospital and no reason exists to add a second descriptor "at the chosen site" to identify the receiving hospital. *See Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous. (citations omitted)).

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[4] Standard 5 explicitly limits the transfer of beds and/or bed need to sites within the same service area. In that regard, the Department urges this Court to consider the 2020 State Health Plan's statement of bed need for Berkeley County.(Department Brief, p. 3, n. 2). MUHA also asks the Court to consider the 2020 State Health Plan and falsely asserts that there are no significant differences between the applicable Plan in this case and the current 2020 Plan. (MUHA Brief, p. 5). A significant major difference between these Plans, however, is that, for general hospital beds, the Tri-County Service Area has been eliminated in favor of each county being a separate service area. Thus, if the Court decides to consider the 2020 Plan, it must also note that MUHA, as a Charleston County facility, would be prohibited from using Standard 5, which has been renumbered to 7 in the 2020 Plan, to transfer beds or bed need to a Berkeley County location. See https://scdhec.gov/sites/default/files/media/document/2020_South_Carolina_Health_Plan-June_12_2020_0.pdf .

[5] In its brief, MUHA mischaracterizes Trident's argument as advocating some sort of "imaginary" evidentiary rule that excludes any data outside of a ten mile radius of a "chosen site." (MUHA Brief, pp. 16-17). The discussion of the need within ten miles of MUHA's Proposed Hospital in this case comes about because, as a factual matter, there are three hospitals and 450 plus hospital beds that close to MUHA's chosen site.

Further, the ALC finds that the requirement of justification of the need for the "new hospital at the chosen site" means justification of need in the entire service area as identified in the State Health Plan. (**Order, pp. 57-59**). The ALC points to use of the phrase "in the service area" at the end of Standard 5 as support for its interpretation of "at the chosen site" as merely a redundant descriptor. (**Order, p. 57**). In fact, use of the defined term "service area" with reference to the adverse impact on existing providers is evidence that the undefined phrase "at the chosen site" encompasses a different concept.[6] *See* ***Hughes v. Western Carolina Regional Sewer Authority***, 386 S.C. 641, 689 S.E.2d 638 (2010)("The general provisions of statutory construction would mandate that when the legislature employs a term other than one specifically defined, the implicit intent is that the undefined term has a different meaning.")

Finally, both the Department and MUHA argue that, regardless of how Standard 5 is interpreted, MUHA justified need for its Proposed Hospital. In their main brief, the Trident Appellants contest this assertion in detail and reference and incorporate those arguments herein. (Trident Brief, *passim*). Generally, Trident contends that MUHA started with its institutional need for 147 beds, as set forth in the Plan, and its need to redirect lower acuity non-tertiary patients to make room for higher acuity patients at its downtown hospital, which provides high level tertiary and quaternary services. Using this need to decant its own patients to another location, MUHA then produced various iterations of data projecting how many of these patients it believed it could redirect to a proposed new hospital located twenty-eight miles away. None of this data addresses an actual need for more community hospital beds in the geographic area where MUHA's Proposed Hospital is to be located. In other words, this data does not address whether patients residing in the area currently lack access to community hospital services. As admitted by MUHA's own health

[6] Under the State Health Plan, each facility is listed in an inventory organized by the applicable service areas. (**DHEC Ex. 4, pp. 22-28**).

planning expert, whose testimony was accepted by the ALC, the answer is that most of the residents of southwest Berkeley County where the Proposed Hospital will be located currently can obtain inpatient community health care services within 15 minutes of where they live. (**Levitt Tr. Vol. III, 1256:20-1257:3**).

B. Failure of the Department to Follow Its Statutes and Regulations

In their main brief, the Trident Appellants set forth in detail the timeline and process that the Department followed in reviewing MUHA's CON application for its Proposed Hospital. (Trident's Brief, pp. 13-18). As Trident details in its brief, the Department failed to comply with its own regulations in several crucial respects and its failure to follow its own rules and requirements resulted in prejudice to Trident in large part because of the shift in the burden of proof that occurs when a decision by the Department is appealed to the ALC. Trident Appellants reference and incorporate their arguments in their main brief and respond specifically below to certain points raised in the briefs of the Department and MUHA on this issue.

As a preliminary matter, both the Department and MUHA contend that Trident failed to preserve its arguments regarding the Department's violations of its own regulatory requirements for the CON review process. (Department Brief, pp. 7-9; MUHA Brief, p. 22). Contrary to these assertions, Trident raised the issues related to the Department's conduct in a timely fashion before the Board, before the ALC at the hearing, on reconsideration and on appeal.[7]

In its Request for Review filed with the Board of the Department, Trident noted that, despite many requests from the opposing parties, the Department failed to include adverse impact as an important criteria and failed to conduct a requested project review hearing that would have

[7] Trident did not raise the issue of the prejudice suffered as a result of the shift of the burden of proof before the Department or the Board because such shift in the burden of proof did not occur until the contested case hearing before the ALC.

allowed the parties to discuss their positions and react to the positions of the applicant and the other parties.[8] (**Trident Request for Review, p. 7**). Trident further raised at the hearing before the ALC the issue of the Department's failure to follow its procedures, including the failure to include and address all of the criteria required by the State Health Plan such as adverse impact, and the ALC addressed Trident's arguments concerning these issues in its original order and in its final amended order on reconsideration. (**Trident Motion to Reconsider, pp. 3-8; Order, p. 6, n.10**).

Under established case law, DHEC is required to follow its own regulations and the provisions of the Administrative Procedures Act in carrying out its functions. *See Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987) ("DHEC is a state administrative agency and can only exercise those powers which have been conferred upon it by the South Carolina General Assembly. DHEC must also follow its own regulations and the provisions of the Administrative Procedures Act, *supra,* in carrying out the legitimate purposes of the agency. Any action taken by DHEC outside of its statutory and regulatory authority is null and void. (citations omitted)). In its Order, the ALC properly concluded that the Department violated S.C. Code Regs. 61-15 §§ 304 and 305 when it prematurely started the review cycle, failed to give the parties adequate notice of the relative importance of the PRC to be applied, and failed to give the parties adequate time to respond and present information thereon. (**Order, p. 6, n.10**). The

[8] In its brief, the Department claims that Trident's alleged lack of prejudice is indicated by its alleged failure to timely raise its complaints regarding the process. (Department Brief, pp. 9-11). Besides being factually untrue, any delay in Trident's being able to assert a claim before the Department is in fact evidence of the prejudice suffered by Trident as a result of the Department's violations of its own regulations. For example, Trident could not have meaningfully raised before the Department the issue of the lack of time to respond to information provided by Mr. Levitt on the day the decision was issued, given the last minute submission of such information and the looming mandatory statutory deadline. *See* Trident Brief, pp. 16-17. Moreover, to the extent the Department cites an unrelated ALC case involving Trident as "evidence" that Trident did not object to the choice of most important criteria by the Department in another matter, such case is not binding on this Court or relevant in any way to the issue before the Court in this case. *See* Department Brief, p. 9.

ALC also found as "error" the Department's failure to address PRC 23, Adverse Effects on Other Facilities. (**Order, p. 68**). Neither MUHA nor the Department has appealed these conclusions by the ALC.

Despite finding numerous violations by the Department of its own regulations, the ALC concluded that, nevertheless, the contested case hearing process cured the prejudices suffered by Trident. (**Order, p. 6, n. 10**). As argued extensively and in detail in Trident's main brief, given the shift in the burden of proof, although Standard 5 of the Plan places the burden of justifying need and adverse impact at the chosen site on MUHA, the Department's failure to follow its own regulations and to provide meaningful review below has resulted in the Trident Appellants alone being forced to carry the burden of proof that the law initially assigns to MUHA.[9] Nothing in the contested case hearing process before the ALC has cured this prejudice.

C. Approval Contingent on Closure of MUHA Freestanding Emergency Department

In its CON application, MUHA represented to the Department that it would close its freestanding emergency department, which was to be located just two miles from the Proposed Hospital (the "MUHA FSED"), in order to consolidate emergency services into the Proposed

[9] In its brief, MUHA points to a typographical error that appears in the Trident Appellants' main brief concerning Trident's burden shifting argument on adverse impact. (MUHA Brief, p. 29, n. 13.) Specifically, MUHA notes that, at page 21 of its main brief, Trident argues that, notwithstanding its conclusion that MUHA's only justification of adverse impact before the Department was its 100% redirection theory, which the ALC rejected as unreasonable, the ALC nevertheless found that Trident had failed to meet its burden before the ALC of proving adverse impact. In support of this argument, Trident cites page 26, n.35 and page 32 for the proposition that the ALC rejected MUHA's 100% redirection theory. Trident also incorrectly cites p. 47 of the Order for that proposition but, as MUHA notes, page 47 of the ALC's Order does not concern adverse impact. This citation is a typographical error and the correct citation is to page 67, which contains the finding of statement of the ALC that "I conclude that MUHA's project complies with PRC 23 despite its faulty theory of 100% redirection in its application." (Order, p. 67). As noted by Trident in its brief, the ALC concluded "ultimately, Petitioners failed to show by a preponderance of the evidence that MUHA's application does not meet the requirements of Standard 5." (Trident Brief, p. 21,n 18; **Order, p. 61**).

Hospital and reduce duplication of emergency services in the service area. (**DHEC Ex. 1, p. 0015**). After the Department approved the Proposed Hospital, MUHA decided not to close the MUHA FSED, and, at the hearing before the ALC, MUHA's Chief Executive Officer testified without contradiction that MUHA intended to operate both the Proposed Hospital with its emergency department and the MUHA FSED. (**Cawley Tr., Vol. III, 494:18-495:7**).

Rather than evaluating MUHA's Proposed Hospital based on the uncontested evidence presented by MUHA, the ALC instead rejected MUHA's stated decision to keep the MUHA FSED open and concluded that, "Although I find MUHA justified the need for its hospital with patient origin data, it must be emphasized that MUHA's application relies in part on patient volumes that will be redirected from MUHA's FSED…. However, it now appears MUHA plans to keep the FSED open independently. The extent to which this change would affect the volume numbers supporting MUHA Berkeley is unclear, but likely significant. Therefore, my decision in this case is premised on the FSED and its patient volume being absorbed by MUHA Berkeley as premised in MUHA's CON application." (**Order p. 27, n. 37**). The ALC further held that keeping the MUHA FSED open would also "result in an unacceptable adverse impact" on the existing local hospitals in violation of Standard 5 of the State Health Plan. (**Order, pp. 39-40**). Given these findings, the ALC determined that "the granting of the CON must be dependent upon MUHA honoring its original declaration that upon opening MUHA Berkeley, its FSED, if operating, will be closed." (**Order, p. 40**).

In response to Trident's raising this issue on reconsideration, MUHA's counsel argued that MUHA is required to comply with the CON as granted by the ALC and that, therefore, MUHA "understands" that it must close the FSED once its Proposed Hospital is constructed, licensed and operational. (**MUHA Response in Opposition to Motion for Reconsideration, p.5**). Because the understanding of MUHA with regard to the need to close the MUHA FSED was not in the form

of testimony or evidence before the ALC, the Trident Appellants have continued to assert this issue on appeal.[10] *E.g.*, *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101; 105, 590 S.E.2d 511, 513 (Ct.App. 2003)("Arguments made by counsel are not evidence.").

In their main brief, the Trident Appellants contend that, in light of the undisputed evidence presented at the hearing that MUHA intends to operate the MUHA FSED even after its Proposed Hospital opens and the finding by the Court that such action would cause MUHA's project to be in violation of Standard 5 of the Plan, it is inconsistent, arbitrary, capricious and in contravention of the CON Law for the ALC to approve MUHA's CON application. Trident also argues that the ALC's granting of MUHA's CON "dependent upon MUHA's honoring its original declaration" to close the MUHA FSED upon the opening of the Proposed Hospital, some three or four years from now, is unenforceable and likewise inconsistent, arbitrary, capricious and in contravention of the CON Law. (*See generally* Trident's Brief, pp. 27-30).

In its brief, MUHA characterizes this issue as a "red herring" and repeats its after-the-hearing assertion that it will close the subject FSED upon opening the proposed hospital. (MUHA Brief, p. 30). Going further than its argument before the ALC on reconsideration, however, MUHA also states that its promise regarding closure of the FSED is made with the intent to be binding upon it in this appeal, and MUHA's counsel certifies to the Court that MUHA has authorized counsel to make this binding concession. (*Id.*, at n. 47). The Department in its brief makes similar

[10] Moreover, MUHA continues to proceed with its own appeal of the decision of the ALC to deny a CON for the FSED, which appeal is currently pending before this Court. (*See Trident Medical Center, LLC v. S.C. Dep't of Health & Envtl. Control*, Appellate Case No. 2020-001072).

arguments regarding MUHA's promises to close the MUHA FSED.[11] (Department Brief, pp. 15-17). Without questioning or doubting the veracity of MUHA's counsel, MUHA's promise to close the MUHA FSED occurs outside the testimony and evidence presented at the hearing before the ALC. Therefore, Trident reiterates the arguments set forth in their main brief on this issue and specifically incorporates them herein.

The ALC acted arbitrarily and capriciously in (a) rejecting the actual uncontested testimony of MUHA's CEO as to MUHA's intentions in implementing its project; (b) in finding that MUHA's Proposed Hospital would violate the State Health Plan if implemented as MUHA testified it would be; and (c) in nevertheless approving MUHA's Proposed Hospital contingent on a condition that will not occur, if ever, until after the CON expires and the $325 million Proposed Hospital is open and operating.[12]

D. Unconstitutionality of Appeal Bond[13]

In its brief, MUHA contends that the Motions Panel lacked the authority to accept the posting of a $1.5 million bond in satisfaction of § 44-7-220(B) of the Certificate of Need Act (the "Appeal Bond Statute"). (MUHA Brief, pp. 30-40). To the extent that the Appeal Bond Statute is constitutional, which the Trident Appellants dispute, this Court's Motions Panel correctly exercised its authority to interpret the law to allow the posting of a single bond, where, as here, the Appellants are filing joint main and reply briefs and MUHA need file only one reply brief in

[11] To the extent that the Department references a settlement order of the ALC in another unrelated matter to claim that Trident has agreed to conditions placed on implement of a project, such order is not relevant to this appeal nor is it binding on this Court. (*See* Department Brief, p. 17).

[12] As noted in Trident's main brief, a certificate of need expires upon the licensing of a facility. *See* 3 S. C. Code Ann. Regs. 61-15, § 604. While the Trident Appellants concede that the ALC could entertain a motion to hold MUHA in contempt, revocation of the improvidently granted CON for the Proposed Hospital could not be among the remedies.

[13] The Department does not address this issue in its brief.

response. As such, MUHA's costs in responding to this appeal and any delay in implementation of MUHA's Proposed Hospital occasioned by this appeal are not increased by having more than one appellant. [14]

On the merits of this issue, MUHA argues in its brief that, because the General Assembly created the right to object to a CON application in promulgating the CON Act, the General Assembly is empowered to impose on that right whatever conditions it deems appropriate. (MUHA Brief, pp. 33-37). In making this argument, MUHA attempts to portray the Appeal Bond simply as part of the larger scheme of the CON Act's purposes and goals to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2018). MUHA contends that the balancing of competing public health policies involved in promulgating the CON Act, including the requirement of a punitive and arbitrary Appeal Bond, makes this matter "peculiarly within the province of the General Assembly." (MUHA Brief, pp. 33-34).

This argument, however, ignores the crux of Trident's arguments that the right to judicial review of the final administrative decision on MUHA's CON application in this case is guaranteed by Article I, § 22 of the South Carolina Constitution, and the General Assembly cannot abridge or deny this right through the imposition of an arbitrary and inequitable Appeal Bond. Consequently, while the General Assembly is free to balance competing policies and establish a process for the

[14] Appellants have not sought to stay MUHA's project, and, unless and until they do so, any delay is entirely within MUHA's control. *See* S.C. Code Ann. §§ 1-23-380(2) and 1-23-610(A)(1); SCACR, Rule 241(b)(11). Furthermore, even if this Court finds that the Motions Panel lacked the authority to allow two, albeit joint, appellants to post a single maximum bond amount, nothing in the Appeal Bond Statute prohibits allowing the Trident Appellants to choose to proceed with only one named corporate entity as appellant, given that the issues and arguments raised and the relief requested are identical and applicable in practical effect to all the facilities who opposed MUHA's Proposed Hospital.

Department to implement and regulate the activities of healthcare providers in furtherance of those policies, in doing so, it cannot exceed the limitations placed on it by the State or Federal Constitutions. *See Gaud v. Walker*, 214 S.C. 451, 462, 53 S.E.2d 316, 320 (1949)("[T]he provisions of our State Constitution are not a grant but a limitation of legislative power, so that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitution."). Thus, contrary to MUHA's assertions, the General Assembly does not enjoy unlimited authority to legislate the rights of parties participating in the CON process even though it initially created the process.

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

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

> We are mindful that this question implicates the separation of powers vital to the proper functioning of our government and reiterate that "the judicial branch retains the ultimate authority in deciding when agency decisions comport with established law. Thus, judicial review of administrative decisions requires a balancing between an agency's specialization and authority, and the checks and balances deeply rooted in our democratic government." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 53, 766 S.E.2d 707, 728 (2014) (Toal, C.J., dissenting). We therefore hold that the REC's decisions must be subject to judicial review and answer the third certified question "no," as qualified below.

> The state constitution declares, "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard ..., and he shall have in all such instances the right to judicial review." S.C. Const. art. I, § 22. The Administrative Procedures Act (the APA) provides that "[i]n a contested case, all parties must be afforded an opportunity for hearing after notice of not less than thirty days." S.C. Code Ann. § 1-23-320(A) (Supp. 2016). "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review...." *Id.* § 1-23-380 (Supp. 2016). This entitlement "does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law." *Id.* A court can reverse an agency's decision if, for example, the agency's decision was contrary to constitutional or statutory provisions or otherwise affected by an error of law. *Id.* § 1-23-380(5)(a), (d) (Supp. 2016); *see also id.* § 1-23-610(B)(a), (d) (Supp. 2016) (establishing the same grounds for reversal of a decision of the administrative law court).
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> Our law only requires there be some avenue for a court to determine the validity of the REC's ruling. If the court satisfies itself that the decision was lawful, there will be no further inquiry into the wisdom of the REC's decision. This procedure properly balances a person's constitutional and statutory right to challenge an administrative agency's decision with the deference that should be given to an agency tasked by the legislature with administering a particular statutory scheme.

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

The Court's recognition of the necessity of ensuring "some avenue" for judicial review of administrative decisions, albeit limited in scope, is consistent with the intent of Article I, § 22, which was added to the South Carolina Constitution in 1970 "as a safeguard for the protection of liberty and property of citizens." *Ross v. Medical University of South Carolina*, 328 S.C. 51 492 S.E.2d 62 (1997)(citing *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895,* p. 21 (1969)). In the case at bar, the General Assembly exercised its authority to articulate healthcare policies and establish a scheme for implementation of its policies in the form of the CON Act. In imposing an onerous and arbitrary Appeal Bond on the exercise of the right to judicial review, however, the General Assembly exceeded the limits imposed by Article I, § 22.

MUHA further contends that Trident's arguments concerning the lack of a legitimate purpose for the Appeal Bond fail because it is not within the purview of the Court to question the wisdom of the Appeal Bond Statute. (MUHA Brief, p. 34). In their brief, the Trident Appellants discuss the numerous existing provisions in the law that provide for attorney's fees, costs, security, and damages for delay and for frivolous appeals and note that, unlike the Appeal Bond, the existing protections extend to both appellants and respondents and cover cases other than those that arise under the CON Act. (Trident Brief, pp. 38-40). Trident contends that the existence of these available protections belies any claim that the Appeal Bond provided for in § 44-7-220(B) bears a rational relationship to a legitimate governmental purpose, as is required under the state and federal Equal Protection Clauses. Instead, the Appeal Bond serves no purpose other than as an impermissible deterrent or barrier to the exercise of the Appellants' constitutional rights to judicial review of the final administrative decision rendered by the ALC in this case.[15]

Finally, MUHA disputes Appellants' arguments concerning the constitutionality of the Appeal Bond requirement. MUHA particularly takes issue with Appellants' discussion of the differences between the case at bar and the few South Carolina appellate cases that consider the constitutionality of an appeal bond. (MUHA Brief, p. 37, n. 66). The Trident Appellants incorporate by reference the specific arguments made in their main brief and specifically note that the landlord/tenant cases relied on by MUHA do not concern appeals of final decisions of

[15] MUHA also questions the Trident Appellants' assertions that imposition of a total $3 million would in fact chill their right to judicial review and makes the baseless assertion that Appellants' upstream parent company, HCA, should be considered capable of posting vast sums to support the appeal of its downstream subsidiaries in this case. (MUHA Brief, p. 31, n. 49). The financial wherewithal of HCA is not relevant because HCA is not a party to this appeal.

administrative agencies, which are governed by Article I, § 22.[16] Therefore, these cases are not persuasive to the issue before the Court.

Similarly, MUHA provides a lengthy list of statutory provisions that purport to require appeal bonds. (MUHA Brief, p. 39, n. 69). This list of existing bond provisions is not relevant to the issues raised by Trident in this proceeding. First, many of these provisions are not true appeal bonds in that the posting of the bond is required only if the appellant wants a stay of the appealed judgment or order. Second, the vast majority of the statutory provisions cited by MUHA do not concern administrative appeals to which Article I, § 22 would apply. Finally, MUHA does not cite any cases considering the constitutionality of the bond provisions in question. To the extent these provisions have gone unchallenged, their mere existence is not persuasive on the issue of the constitutionality of an attempt by the General Assembly to limit or deter the constitutional right of judicial review under Article I, § 22, which must be given "in all instances" to persons before they are finally bound by a decision of an administrative agency.

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

CONCLUSION

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

Respectfully submitted,

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March 15, 2021
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

APPELLATE CASE NO. 2020-001323

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

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

v.

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

AND

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

v.

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

AND

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

v.

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

PROOF OF SERVICE

The undersigned hereby certifies that on March 15, 2021, a copy of the **INITIAL REPLY BRIEF OF APPELLANTS TRIDENT MEDICAL CENTER LLC AND WALTERBORO COMMUNITY HOSPITAL, INC**. was served on all counsel of record via electronic mail containing the above-referenced document to each counsel's individual AIS email address pursuant to SC Supreme Court COVID Order 2020-05-29-02 as follows:

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