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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson III, Administrative Law Court Judge

APPELLATE CASE NO.: 2020-001610
ADMINISTRATIVE LAW COURT CASE NO.: 20-ALJ-07-0108-CC

Lexington County Health Services District, Inc.,
d/b/a Lexington Medical Center, Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control, Prisma Health-Midlands,
Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast,
Providence Health Fairfield, and Kershaw Hospital, LLC
d/b/a Kershaw Health Medical Center, Respondents,

OF WHICH Prisma Health-Midlands is the..... Appellant/Respondent,

AND Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast,
Providence Health Fairfield, and Kershaw Hospital, LLC
d/b/a Kershaw Health Medical Center the Appellant are the Respondents/Appellants.

**FINAL BRIEF OF PETITIONER/RESPONDENT LEXINGTON COUNTY HEALTH
SERVICES DISTRICT, INC., D/B/A LEXINGTON MEDICAL CENTER**

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STATEMENT OF ISSUES ON APPEAL

- I. THE ADMINISTRATIVE LAW COURT CORRECTLY DETERMINED THAT PRISMA HEALTH-MIDLANDS COULD NOT AMEND COPA-97-01 TO ALLOW FOR THE ACQUISITION OF NEW ASSETS OWNED BY A COMPETING HEALTH CARE PROVIDER
 - A. The ALC did not misapprehend the purpose and scope of the Health Care Cooperation Act or Regulation 61-31.
 - B. The ALC did not commit an error of law by ruling on issues sua sponte not raised by the parties.
 - C. The ALC did not err in refusing to address DHEC's review of the substantial amendment proposed to COPA-97-01 under Regulation 61-31 § 508 without public notice or participation.
- II. REGULATION 61-31 § 508 AS APPLIED BY DHEC IN REVIEW OF PHM'S REQUEST TO AMEND COPA-97-01 IS UNCONSTITUTIONALLY VAGUE
 - A. The ALC has the authority to rule on whether a regulation is unconstitutionally vague "as applied" by an administrative agency.
 - B. DHEC's interpretation of Regulation 61-31 § 508 as affording unfettered discretion in fashioning the type of review for substantial changes is unconstitutionally vague.
- III. THE APPELLANTS DID NOT PRESERVE FOR APPEAL THE ISSUE OF DEFERENCE TO DHEC'S INTERPRETATION OF ITS REGULATION
- IV. THE COURT SHOULD REJECT DHEC'S INTERPRETATION OF 'ANOTHER REVIEW' IN REGULATION 61-31 § 508

STATEMENT OF THE CASE

The underlying contested case proceeding before the ALC arose from the Respondent South Carolina Department of Health and Environmental Control's (DHEC or the Department) decision dated February 28, 2020, which purported to amend the ongoing conditions of an existing Certificate of Public Advantage (COPA) originally issued to Baptist Healthcare System of South Carolina, Inc. (BHS), and Richland Memorial Hospital (RMH), on October 6, 1997 (COPA-97-01), so as to informally approve Appellant-Respondent Prisma Health-Midlands' (PHM) proposed acquisition of acute care facilities owned and operated by LifePoint Health, a competing health care provider operating in the same service area as PHM (referred to herein as the DHEC

Decision). (R. pp. 53-57) According to the DHEC Decision, the assets PHM proposed to purchase from LifePoint include Providence Health (HTL-0928), Providence Health – Northeast (HTL-0929), KershawHealth (HTL-0101), and a freestanding emergency department (FED) in Fairfield County operating under HTL-0929. *See id.* The DHEC Decision was not preceded by public notice or opportunity for participation by affected persons. (R. p. 66)

Petitioner/Respondent Lexington County Health Services District, Inc., d/b/a Lexington Medical Center (LMC), the City of Columbia, Fairfield County and Fairfield Memorial Hospital, and Kershaw County each timely submitted requests seeking final review of the DHEC Decision by the DHEC Board (collectively, the “Requestors”), to which DHEC Staff responded and asked the Board to deny the requests on April 15, 2020. (R. p. 61) By letter dated April 21, 2020, the DHEC Board declined to conduct a final review conference. (R. pp. 59-60) The Requestors thereafter sought further administrative review in the ALC, although the remaining Requestors separately dismissed their contested cases prior to the decisions now appealed.

In its Petition for Administrative Review and Request for Contested Case Hearing, LMC challenged DHEC’s authority “to ‘amend’ the ongoing conditions of a previously issued COPA to approve a proposed transaction involving two health care providers in which the assets of one health care provider are acquired by the other health care provider in a manner that otherwise may be construed to violate state and/or federal antitrust laws.” (R. p. 45) (citing S.C. Code Ann. § 44-7-510(2)-(3)). In challenging the substance of DHEC’s review or lack thereof, LMC asserted: “Because there is no evidence PHM submitted the required application, to include responses to the questionnaire, submission of programmatic documents, or even written assurance as required by DHEC’s own regulation, DHEC could not have (and LMC and this Court cannot now) appropriately evaluated any potential benefits to the proposed transaction as necessary to outweigh

the obvious disadvantages.¹” (R. pp. 46-47) (citing S.C. Code Ann. Regs. 61-31 § 202) (footnote in original). LMC alternatively asserted that should the ALC find that COPA-97-01 could be amended to address the new transaction proposed by PHM, the matter “should be remanded with instruction that DHEC engage in the review process necessary to evaluate the ‘amendment’ sought by PHM of the COPA.” (R. p. 48) LMC’s position was that by “[b]y interpreting Section 508 to allow for something other than the review process set forth in the HCCA and Regulation 61-31, DHEC ‘denied contemporaneous notice and participation opportunities that DHEC’s own regulations require be provided to both the public and [affected persons.]’” (R. p. 49) (quoting *Pickens Cty. v. S.C. Dept. of Health and Envtl. Control*, 429 S.C. 92, 105, 837 S.E.2d 743, 750 (Ct. App. 2020)).

In the ALC proceeding, and in addition to engaging in written discovery, the parties filed numerous pre-hearing motions, including PHM’s Motion to Expedite and Respondents/Appellants’ Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield (“Providence”), and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center (“Kershaw”) (collectively referred to as “LifePoint”) Motion to Intervene. The ALC denied PHM’s Motion to Expedite on July 14, 2020 (R. pp. 4-11), and granted the Motion to Intervene on September 4, 2020 (R. pp. 12-20). Ultimately, PHM and LMC filed cross-motions for summary judgment, with the ALC issuing an Order Denying Cross-Motions for Summary Judgment on November 2, 2020 (R. pp. 21-34), followed by an Order clarifying the finality of that decision in response to reconsideration motions filed by PHM and LifePoint on

¹ In significant contrast, just the narrative portion of the application submitted by RMH and BHS in 1996, in accordance with Regulation 61-31, spanned 79 pages.

December 7, 2020 (R. pp. 35-42). The November 2 and December 7 Orders are both the subject of these appeals by PHM and LifePoint.

STANDARD OF REVIEW

The standard of review applicable to this appeal from the Administrative Law Court (ALC) is established by the Administrative Procedures Act in Section 1-23-610(B) of the South Carolina Code, which provides:

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

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

S.C. Code Ann. § 1-23-610(B); *see also Risher v. S.C. Dept. of Health and Env'tl. Control*, 393 S.C. 198, 203-04, 712 S.E.2d 428, 431 (2011). “A decision of the ALC should be upheld, therefore, if it is supported by substantial evidence in the record.” *Risher*, 393 S.C. at 204, 712 S.E.2d at 431. “Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached.” *Leventis v. S.C. Dept. of Health and Env'tl. Control*, 340 S.C. 118, 131, 530 S.E.2d 643, 650 (Ct. App. 2000) (quotation omitted). “The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.” *Hill v. S.C. Dept. of Health and Env'tl. Control*,

389 S.C. 1, 10, 698 S.E.2d 612, 617 (2010) (quoting *Jones v. S.C. Dept. of Health and Envtl. Control*, 384 S.C. 295, 304, 682 S.E.2d 282, 287 (Ct. App. 2009)). Where the matter involves a question of law, the standard of review is de novo. See *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

STATEMENT OF THE FACTS

Statutory and Regulatory Scheme Applicable to Certificates of Public Advantage

In the enactment of the Health Care Cooperation Act (“COPA Act” or the “Act”), codified at South Carolina Code Section 44-7-500, *et seq.*, the General Assembly expressly found “that cooperative agreements among hospitals . . . and other health care providers would foster improvements in the quality of health care for South Carolinians, moderate cost increases, improve access to needed services in rural areas, and enhance the likelihood that rural hospitals can remain open;” and further “that competition as currently mandated by federal and state antitrust laws should be supplanted by a regulatory program to permit and encourage cooperative agreements between hospitals, . . . or other health care providers when the benefits outweigh the disadvantages caused by their potential adverse effects on competition.” S.C. Code Ann. §§ 44-7-505(2) & (4). Defined by the Act, a certificate of public advantage (or “COPA”) “means the formal approval, including any conditions or modifications, by the department of a contract, business or financial arrangement, or other activities or practices between two or more health providers, health provider networks, or health care purchasers that might be construed to be violations of federal or state antitrust laws.” *Id.* at § 510(2).

The scope of the Department’s authority with regard to COPAs is determined by the Act, and includes the receipt and review of COPA applications using a review process clearly described in the statute (S.C. Code Ann. §§ 44-7-530, -540), with a mandate to forward any applications to

the AG for his or her review, who may then advise DHEC as to whether an application should be approved or denied (S.C. Code Ann. § 44-7-550(A)), and monitor and regulate “agreements approved under [the COPA Act].” S.C. Code Ann. § 44-7-570(A). The General Assembly further sets forth in great detail a comprehensive (yet not all-inclusive) list of issues DHEC “shall consider” in “evaluating the benefits likely to result from the cooperative agreement” and “the disadvantages likely to result” from the agreement. *See id.* at § 44-7-560(A)(1)(a)-(b) (emphasis added). Similarly mandated are issues DHEC “shall consider” in evaluating the risks attendant to the reduction in competition. *See id.* at § 44-7-560(A)(2) (emphasis added). Fundamental to the entirety of this complex legislative scheme is that the General Assembly plainly intends *only for those agreements* between health care providers that DHEC has determined “the applicants have demonstrated that the likely benefits resulting from the agreement outweigh the likely disadvantages from the agreement” are eligible for any protection under the COPA Act. *See* S.C. Code Ann. §§ 44-7-505(4), -560(A), -570(A)(2); *see also* S.C. Code Ann. Regs. 61-31 § 401.

By the plain terms of the COPA Act, in order to obtain the immunity authorized by the Act, health care providers proposing a transaction that would otherwise be subject to scrutiny under federal and state antitrust laws must apply for and receive a COPA. S.C. Code Ann. §§ 44-7-530, -550(B); *see also* *S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 17-18, 382 S.E.2d 11, 13 (Ct. App. 2011) (finding policy exclusion contrary to plain terms of the compulsory coverage statute and therefore invalid). This makes sense, because in order to even attempt to satisfy the requirements of state action immunity described in the Act, the regulatory review must, among other things, be a deliberate and considered act of the State. *See* S.C. Code Ann. § 44-7-520(A); *see also* *Fed. Trade Comm’n v. Ticor Title Ins.*, 504 U.S. 621, 639 (1992) (declining to allow for a finding of active state supervision where in fact there was none). Contrary to the outcome the

Appellants seek here, there is nothing in the Act that suggests health care providers can circumvent the statutory review process and obtain the Act's "immun[ity] from challenge or scrutiny under state antitrust laws" by amending an existing COPA to protect a new and different transaction between different parties². *See* S.C. Code Ann. Regs. 61-31 § 102(10) (defining "Party to a cooperative agreement" as "a person who negotiates or enters into a cooperative agreement"); *see also* S.C. Code Ann. § 44-7-520(B). There is also no support in the law that an agreement to purchase assets among competing health care providers can be informally approved without public notice, participation of affected persons and the AG, and a formal determination by DHEC that the benefits outweigh the disadvantages in order to receive any protection under the COPA Act.

In the underlying DHEC Decision, it is undisputed that DHEC did not determine the likely benefits of the transaction proposed by PHM outweighed the likely disadvantages. *See* DHEC's Answers to LMC's Req. for Admis. No. 2 (R. p. 557); *see also* (R. p. 53). Bizarrely, PHM's Brief proclaims, "It is noteworthy that in amending the conditions to COPA-97-01, DHEC did not amend its determination that likely benefits resulting from the [Joint Operating Agreement of BHS and RMH] outweighs the likely disadvantages from the agreement and that the likely reduction in competition resulting from the JOA is reasonably necessary to achieve the benefits. Those determinations are still incorporated in COPA-97-01." PHM Br., p. 4. This fact is neither noteworthy nor relevant to this appeal, which involves only PHM's desire to purchase its competitor's assets without demonstrating compliance with any of the requirements set forth in the COPA Act. More to the point, DHEC's own regulation succinctly provides,

² The parties to the cooperative agreement that was formally approved by COPA-97-01 were BHS and RMH. As conceded by PHM, the parties to the transaction sought by PHM include Prisma Health and PHM, as well as various LifePoint entities such as Providence and Kershaw, among others. (R. pp. 343-344)

The Department shall issue a Certificate of Public Advantage for a cooperative agreement *if it determines* that the applicant has demonstrated that the likely benefits resulting from the agreement outweigh the likely disadvantages from the agreement; and the reduction in competition likely to result from the agreement is reasonably necessary to obtain the benefits likely to result.

S.C. Code Ann. Regs. 61-31 § 401 (emphasis added). There is no provision in the Act that authorizes DHEC to informally support a transaction that might otherwise be in violation of state or federal antitrust laws by adding conditions to an existing COPA. The formality of the COPA is explicitly stated in the Act's definition, and the approval evidence by the COPA is specific to the underlying cooperative agreement and parties thereto according to the plain language of the Act. *See* S.C. Code Ann. §§ 44-7-510(2) & (3), -530. Also important to this appeal is the General Assembly's finding that the immunities afforded by the Act are not available "for conduct in negotiating or entering into a cooperative agreement for which an application for a certificate of public advantage is not filed." *Id.* at § 520(B).

Background of COPA-97-01

The only application for a COPA in any way connected to this proceeding is the COPA application filed by BHS and RMH on October 23, 1996, which sought approval for "the development of a locally controlled nonprofit health care system with continuing supervisory responsibility over the jointly operated hospitals by the Sponsoring Boards." (R. pp. 210-226) As promised by the COPA applicants: "Competition from Lexington and Columbia/HCA hospitals, as well as from other hospitals in the System's core service area, will help to ensure that the hospitals continue to be efficient, low-cost, high quality hospitals." (R. p. 217) At the time of the filing and review of the COPA application, Columbia/HCA had acquired a controlling interest of Providence Hospital, and thus Providence Hospital was referred to as "Columbia/HCA" in the COPA submissions. (R. p. 229) Also notable in the COPA application's discussion of competition was that three of the surrounding counties of Fairfield, Kershaw, Newberry, Orangeburg, and

Sumter Counties, had “large hospitals with over 200 beds each.” *Id.* The landscape of existing providers is very different today, and if approved and the transaction consummated, PHM would be the sole provider of acute care services in Richland, Kershaw, Fairfield and Sumter Counties. (R. p. 203)

LMC participated as an “affected person” during DHEC’s review of the COPA application submitted by BHS and RMH, as did dozens of citizens, businesses and other providers interested in and affected by the proposed combination of BHS and RMH. (R. pp. 439-453, 458, 461-463) Unlike the facts of this appeal, DHEC notified the public of its receipt of the COPA application in the November 22, 1996 State Register.³ (R. pp. 430-432) As DHEC explained during its review of the COPA application, “[t]he overriding issue is whether the benefits of the proposed merger outweigh the disadvantages caused by their potential adverse effects on competition.” (R. p. 459)

In addition to the breadth of public participation, the South Carolina Attorney General (AG) was an active participant during DHEC’s review of the COPA application. DHEC notified the AG of the application submission in accordance with Section 44-7-550(A) of the Act and requested his advice in accordance with the COPA Act. (R. p. 434-437) Additional communications between DHEC and the AG’s Office are included in the record and on January 22, 1997, an Executive Summary was presented to DHEC that “itemizes the areas of concern that have been brought to [AG Condon’s] attention” and that he “would advise DHEC to resolve the issues raised in the [Executive Summary] prior to making a final approval in reference to this merger.” (R. pp. 454-458) DHEC thereafter provided the AG with additional information regarding the COPA application and sought his “advice as to whether or not all of this additional

³ DHEC also notified the public that the COPA application was deemed complete for review by notices published December 25, 26, and 27, 1996, in The State Newspaper, and notified in advance of the public hearing. (R. pp. 438, 460)

information that has been submitted satisfies your concerns that you pointed out in your recommendation to this Department.” (R. p. 476) The importance of the AG’s participation to DHEC is evidenced by a Memorandum in the COPA-97-01 record, in which then-Director of DHEC’s Health Facilities and Services wrote, “in future COPA reviews, the Attorney General or his representative was welcome to participate in developing the conditions, sit at the table during meetings with the applicant, and otherwise be a partner with the Department in developing our decision.” (R. p. 487)

DHEC’s Review of PHM’s Request to Modify COPA-97-01

In correspondence dated December 13, 2019, Prisma Health⁴ notified DHEC of its plans to purchase the LifePoint hospital assets through its affiliate PHM, describing its belief that Prisma Health could benefit from the COPA issued to BHS and RMH some 23 years ago and that little to no review or modification by DHEC of the existing COPA would likely be needed. (R. pp. 91-108) Prisma Health’s President and CEO outlined the plans once the LifePoint assets were acquired, which include pillaging the more lucrative services lines from Providence Hospital Downtown to benefit its existing Midlands operations before ceasing operation of the acute care facility, and only committing to maintaining seven emergency departments for a period of five years after closing on the purchase. (R. pp. 95-101; 524) The only publicly available information regarding the proposed transaction at the time of the DHEC Decision was the Decision itself, which did not make the determination required by the COPA Act as to the likely benefits, likely

⁴ Headquartered in Greenville, South Carolina, Prisma Health (Prisma) is the company formed pursuant to the affiliation agreement entered between Greenville Health System and Palmetto Health Alliance (f/k/a BR Health System, Inc.), and which was added as a member to Palmetto Health Alliance “with certain rights and powers reserved to it” over PHM (formerly Palmetto Health Alliance). (R. p. 307)

disadvantages, and the impact on competition from the proposed transaction, but instead stated the following:

Pursuant to S.C. Code Regs. 61-31, § 508, the Department determined that the proposed changes resulting from the transaction might materially impact the benefits or disadvantages to the community to be served. The Department therefore undertook another review. As a result of that review, and having given substantial consideration to all information provided by PHM to the Department regarding the proposed transaction, the Department has determined that the ongoing conditions of the COPA shall be amended as follows to provide for the addition of the LPNT assets[.]

(R. p. 53) The DHEC Decision is devoid of *any* detail regarding the review and again, makes no findings of any benefit to the community to counteract the very obvious disadvantages. The impetus for DHEC not engaging in a public review process is stated in the DHEC Staff Response to the Requests for Final Review by the DHEC Board:

PHM submitted additional information to the Department regarding the proposed asset acquisition in February 2020. Information contained in a February 2020 submission, while proprietary, was persuasive to the Department in conducting its review pursuant to Section 508 without a public notice or comment period. PHM represented to the Department that the seller of the assets would not proceed with the proposed transaction if the review included public notice and review and provided information to the Department regarding the potential consequences if the transaction were not consummated. PHM's representation to the Department of the possible increase in additional staff layoffs without the transaction as opposed to with the transaction, as well as the potential impact on PH's ability to provide certain safety net services to the South Carolinians within its service area absent the proposed transaction, were persuasive to the Department. The Department conducted a review without public notice or hearing.

(R. p. 66) The documents and communications obtained through Freedom of Information Act requests and discovery reveal a one-sided, heavily influenced private review process that was directed and controlled by Prisma. (R. pp. 497-537, 543-554) Indeed, even the conditions imposed in the February 28, 2020, DHEC Decision were extensively negotiated by Prisma, at one point Prisma informing DHEC: "This is what we can and will agree to." (R. pp. 526-530)

Contested Case Review by the ALC

Contrary to the factual representations of LifePoint (LifePoint Br., p. 3), the determinative issue decided by the ALC was in fact exactly as sought by LMC, which was that the ALC “reverse the Department Decision and deny PHM’s request to ‘amend’ the conditions of a previously issued COPA to protect the proposed acquisition of LPNT’s health care facilities” (R. p. 50) The ALC made clear that “the Court’s [Summary Judgment] Order resolves this issue LMC previously raised in its prehearing statement because the Court found an amendment to the COPA was not an appropriate vehicle for covering the Providence assets under the facts of the case.” (R. p. 41)

PHM’s Brief is also inaccurate in numerous respects, as LMC’s position has consistently been that DHEC did not have the authority to amend the existing COPA-97-01 to provide for PHM’s proposed acquisition of LifePoint’s assets. (R. pp. 45-47, 161-162) Both in the ALC and again in this Court, PHM repeatedly (and mistakenly) claims “LMC did not challenge the merits of the Decision.” PHM Br., p. 14. As the “merits of the Decision” undoubtedly include DHEC’s informal approval of PHM’s proposed purchase of LifePoint’s assets by amendment to COPA-97-01, considered by DHEC to be a substantial change to COPA-97-01 yet approved without providing for the statutory review process or making the determinations required by the COPA Act, LMC’s Prehearing Statement most assuredly presents these issues to the ALC for determination. (R. pp. 161-162) Notwithstanding PHM’s unending confusion and misunderstanding of LMC’s contested case challenge, the record establishes that the issues identified in the ALC’s Summary Judgment Order and Clarification Order were thoroughly briefed by all parties to the proceeding, and arguments for and against made without objection at the hearing. (R. pp. 276-296; 388-417; 572-600; 601-611; 733-749) As will be demonstrated below, substantial evidence supports the ALC’s Order reversing the DHEC Decision, and the same should be affirmed by this Court.

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT CORRECTLY DETERMINED THAT PRISMA HEALTH-MIDLANDS COULD NOT AMEND COPA-97-01 TO ALLOW FOR THE ACQUISITION OF NEW ASSETS OWNED BY A COMPETING HEALTH CARE PROVIDER.

A. The ALC did not misapprehend the purpose and scope of the Health Care Cooperation Act or Regulation 61-31.

PHM's discussion of the purpose of the COPA Act and Regulation 61-31 at page 34⁵ is not tied to any finding or alleged misapprehension by the ALC, but reveals that PHM is at best mistaken as to the purpose and scope of the statutory and regulatory scheme governing COPAs. PHM Br., pp. 34-36. The General Assembly clearly stated the intent of the COPA Act is to afford certain immunities to health care providers who "negotiate, enter into, and conduct business pursuant to a cooperative agreement" S.C. Code Ann. § 44-7-520(A). The Act does not, however, "create[] immunity for a person for conduct in negotiating or entering into a cooperative agreement *for which an application for a certificate of public advantage is not filed.*" *Id.* § 520(B) (emphasis added). The ALC's Summary Judgment Order is entirely correct, in that "the underlying document from which the grant of immunity springs is the 'cooperative agreement,' and thus a COPA cannot be issued without a cooperative agreement to support it." (R. p. 28)

What the Appellants seek here is the height of impropriety. Though adamantly opposed to participating in the application and public review process attendant to receiving a COPA, and undisputedly not a party to any existing COPA (including COPA-97-01), LifePoint nonetheless insists the benefits of such protection should be afforded to its desired sale of hospital assets to its competitor, PHM. LifePoint Br., p. 7; R. p. 66. PHM also readily concedes that no cooperative

⁵ It is unclear which arguments are intended to underlie PHM's Issue III(A) of its Appellant's Brief, as the argument at page 27 is not as identified at page 1.

application was filed to support antitrust protection for the proposed transaction (PHM Br. p. 7), and according to DHEC:

PHM's representation to the Department of the possible increase in additional staff layoffs without the transaction as opposed to with the transaction, as well as the potential impact on PHM's ability to provide certain safety net services to the South Carolinians within its service area absent the proposed transaction, were persuasive to the Department. The Department conducted a review without public notice or hearing.

(R. p. 66) It is hard to envision an outcome more contrary to the statutory scheme than to afford immunity for a transaction that would otherwise be subject to antitrust scrutiny that did not first undergo any public notice, participation by affected persons, input and advice from the Attorney General, or a determination by DHEC that the likely benefits to result *from the proposed transaction* outweigh the likely disadvantages *from the proposed transaction* and that the reduction in competition likely to result *from the proposed transaction* is reasonably necessary to obtain the likely benefits. S.C. Code Ann. § 44-7-560(A).

The ALC clearly understood the inconsistency between PHM's request and the purpose and intent of the General Assembly in enacting the COPA Act:

PHM's amendment would add assets which are part of a distinctly different hospital system and therefore completely change the nature of the original cooperative agreement. Yet, PHM seeks to avoid the appearance of profoundly altering the "cooperative agreement" between Baptist Hospital and Richland Memorial Hospital under the pretense it is simply adding a few new conditions to regulate the inclusion of these distinctly different hospitals into the agreement. *More importantly, the amendment not only materially changes the underlying justification for the COPA's approval, but it would provide anti-trust protection to a single buyer that would not have access to the COPA protections.*

(R. p. 30) (emphasis added). In explaining that modification to COPA-97-01 is not the appropriate means for obtaining COPA protection for the proposed transaction, the ALC correctly stated: "PHM is acquiring the assets of a competitor who is being removed from the market *but with whom no cooperative agreement was negotiated or established.*" (R. p. 31) (emphasis added). It

is clear that the ALC's interpretation of the COPA Act was entirely consistent with the plain language of the statute and Regulation 61-31, and there is no error in his determination that the cooperative agreement between BHS and RMH to jointly operate as BR Health System, Inc. (n/k/a PHM) "cannot be extended to achieve the objective of protecting [PHM]'s expansion of its operations from antitrust challenges." (R. p. 32)

B. The ALC did not commit an error of law by ruling on issues sua sponte not raised by the parties.

PHM argues that the ALC committed an error of law because "the ALC identified and ruled on new issues, issues neither party had advocated for, without notice to the respondents." PHM Br., p. 26. LifePoint would "adopt by reference" this issue⁶ and the arguments made by PHM, although in its Brief states the issue as: "The ALC erred as a matter of law and exceeded its statutory authority in reversing, on grounds not raised by the parties, the department's decision to modify COPA-97-01." LifePoint Br., p. 10. Regardless of its framing, the allegation of wrongdoing lacks merit.

"The general rule undoubtedly is that the moving party should be confined to the relief asked for in his motion or specified in the notice thereof, or at most to relief necessarily incident thereto." *Coogler v. Calif. Ins. Co. of San Francisco*, 192 S.C. 54, 5 S.E.2d 459 (1939). In *Coogler*, a venue change to Fairfield County was reversed on appeal because the motions briefed and argued before the trial court only sought transfer to Chester County. *Id.* at 460. The case at bar is not all similar to *Coogler*. Rather, the underlying facts are akin to those in *Cooper River Timber Company v. Cone*, 181 S.C. 288, 187 S.E. 341 (1936), wherein the plaintiff sought a general order

⁶ LifePoint did not preserve this issue or any other issue for appellate review, having questioned only the finality of the Summary Judgment Order in its Motion to Alter or Amend (Reconsider). (R. pp. 795-799) *Godfrey v. Heller*, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993) (holding issue unpreserved for appeal where appellant failed to challenge theory of relief not raised or argued at trial by way of post-trial motion).

of reference that was opposed and argued before the trial court. “While it appears that the court, as a general rule, when a motion is made preliminary to the hearing of a case upon the merits, may not grant relief beyond the limits or scope of the notice of the motion, this is not true in all cases.” *Id.* As explained by the Supreme Court in *Cooper River*: “In the case at bar, the motion for a general order of reference was opposed by the defendant and was fully argued at the hearing, according to the court’s order, by counsel in the case. Judge Mann had before him the pleadings, and in reaching a conclusion, necessarily fully analyzed them.” *Id.*

Indeed, the ALC similarly had before it LMC’s Petition, the parties’ pre-hearing statements, as well as the extensively briefed cross-motions for summary judgment, and the court “necessarily fully analyzed them” in rendering its decisions. Again as in *Cooper River*, the issues raised in the briefs were fully argued by all parties at a hearing before the ALC that lasted nearly four hours. (R. pp. 812); *see also Salvo v. Hewitt, Coleman & Assoc., Inc.*, 274 S.C. 34, 39, 260 S.E.2d 708, 711 (1979) (refusing appeal even if notice of motion insufficient to appraise opposing party of relief sought and grounds therefor, in part because appellant fully argued issues without objection at hearing). Finally, quite unlike the unanticipated venue change found improper in *Coogler*, Judge Anderson ordered the exact relief sought by LMC in its Petition for Administrative Review and the Cross-Motion for Summary Judgment, which was reversal of the DHEC Decision and denial of PHM’s request to amend COPA-97-01 to allow for purchase of its competitor’s assets. “There was no surprise” to PHM or LifePoint that such result could follow the motions. *Salvo*, 274 S.C. at 39, 260 S.E.2d at 711.

Perhaps most important and clearly not *sua sponte* was the ALC’s finding that the transaction sought by PHM was not the type regulated by the COPA Act. In reaching that conclusion, the ALC *adopted and agreed* with the position taken by PHM and DHEC in opposition

to LMC's request for summary judgment regarding the definition of "cooperative agreement" and its exclusion of the transaction proposed by PHM. In fact, PHM specifically asserted to the ALC:

The transaction between PHM and [LifePoint] is nothing more than a contract for LPNT to sell its assets to PHM. Clearly, PHM, the single nonprofit entity created by COPA-97-01, is the only healthcare system acquiring the LPNT Assets. A single purchaser does not fall within the unambiguous language defining a 'cooperative agreement' as an acquisition of assets by two or more or a group.

(R. p. 585) PHM reiterated this argument at the hearing on the motions before the ALC. (R. p. 966, l. 7 – p. 967, l. 16) DHEC's Response in Opposition to LMC's Cross-Motion for Summary Judgment similarly asserted: "The proposed transaction is a simple sale or transfer of assets from one entity, LifePoint, to another entity, PHM. This is not an acquisition of assets among or by two or more health care providers." (R. p. 603) Significantly, LifePoint adopts these positions in its Brief and does not appeal the ALC's finding. LifePoint Br., p. 6. With these facts, the Court should find the ALC's ruling is the law of the case. *See Resolution Trust Corp. v. Eagle Lake and Golf Condominiums*, 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993) (holding procedural ruling not appealed was the law of the case, despite appealing merits of defenses).

Far from a "simple sale" or "transfer of assets," the ALC correctly found that "PHM is acquiring the assets of a competitor who is being removed from the market but with whom no cooperative agreement was negotiated or established." (R. p. 31) Agreed and unappealed by the Appellants and DHEC, the proposed transaction "does not fall within the unambiguous language defining a 'cooperative agreement'" (R. p. 585) The General Assembly clearly stated, "[n]othing in [the COPA Act] creates immunity for a person for conduct in negotiating or entering into a cooperative agreement for which an application for a certificate of public advantage is not filed." S.C. Code Ann. § 44-7-520(B). Because the issues identified by PHM as "*sua sponte*" are in fact all issues raised or referenced by the parties in the proceeding below, and the findings based on substantial evidence in the record, reversal of the ALC is unwarranted and the decisions should

be affirmed. Moreover, in light of the law of the case regarding the transaction's exclusion from the COPA Act, the Court can affirm the ALC's ruling on this issue alone. "An unappealed ruling, right or wrong, is the law of the case." *Skywaves I Corp. v. Branch Banking and Trust Co.*, 423 S.C. 432, 451, 814 S.E.2d 643, 654 (Ct. App. 2018) (affirming trial court decision on grounds not appealed and thus the law of the case).

- C. The ALC did not err in refusing to address DHEC's review of the substantial amendment proposed to COPA-97-01 under Regulation 61-31 § 508 without public notice or participation.

Reversal of the ALC would lead to the absurd result of affording COPA immunity to health care providers that have negotiated and entered a proposed transaction for which a COPA application was not submitted, a result that clearly contravenes the plain language and intent of the COPA Act itself. *See* S.C. Code Ann. § 44-7-520(B). PHM and LifePoint would have this Court overlook and ignore the nature of the transaction proposed, focusing instead on the broader but irrelevant issue of DHEC's authority generally. PHM Br., p. 16 ("The Department has the authority to approve, monitor and regulate an amendment to COPA-97-01. The plain and unambiguous language of the Act and regulations authorizes [*sic*] DHEC to amend COPAs and their conditions after the COPA is issued.") The ALC recognized the absence of any controversy as to DHEC's authority generally to review changes to an existing COPA or even changes to COPA-97-01. (R. p. 27) Rather, the ALC properly rejected PHM's requested amendment to COPA-97-01, concluding that the proposed transaction "is not a 'change' to the agreement between Richland Memorial Hospital and Baptist Hospital." (R. p. 31) Worth repeating, "PHM is acquiring the assets of a competitor who is being removed from the market but with whom no cooperative agreement was negotiated or established." (R. p. 31)

Because of its finding that amendment of COPA-97-01 was not an appropriate mechanism for PHM to obtain COPA protection for its purchase of LifePoint's assets, the ALC did not reach

the question of whether DHEC's "interpretation and application of 'another review' under §508 is correct as a matter of law." (R. pp. 32-33) The ALC addressed PHM's similar allegations of error on reconsideration:

The Court never held that a cooperative agreement and/or COPA could not be amended to include additional assets. The Court's [*sic*] determined that Providence's assets could not be included under the existing COPA based upon applying the law **to the facts of this case**. The Court is aware that PHM previously incorporated a new greenfield hospital under the COPA and the Court's Order neither addressed that addition of assets nor made a blanket determination stating that no assets could ever be added to the COPA's coverage.

...

Ultimately, the Court interpreted the meaning of the words of the statutes and regulations and reached a legal conclusion as to what the legislature meant by its use of that wording. The Court did not by any means apply a meaning beyond the words and phrases utilized by the General Assembly. In fact, although PHM asserts the Court's Order was legislating, PHM offered no explanation to support its assertion other than the Court applying its independent reasoning to reach a legal conclusion in this case.

(R. p. 39) (emphasis in original). PHM incorrectly claims "the Final Order disagrees with DHEC's interpretation of the Act and Regs.," when in fact the ALC explicitly stated it ***did not reach*** the issue of DHEC's interpretation at all. PHM Br., p. 23; (R. pp. 39-40). The ALC's determination that an amendment to COPA-97-01 was not a mechanism by which PHM could obtain COPA protection for its purchase of a competitor's assets is supported by substantial evidence. As such, the decision not to engage in "an exercise in dicta" was well founded. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("In light of our disposition of the case, it is not necessary to address Futch's remaining issues.")

II. REGULATION 61-31 § 508 AS APPLIED BY DHEC IN REVIEW OF PHM'S REQUEST TO AMEND COPA-97-01 IS UNCONSTITUTIONALLY VAGUE.

A. The ALC has the authority to rule on whether a regulation is unconstitutionally vague "as applied" by an administrative agency.

In *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), the Supreme Court unequivocally held “ALCs are empowered to hear as applied challenges to statutes and regulations. ALCs are better suited for making the factual determinations necessary for an as applied challenge, and finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision.” *Id.* at 108, 705 S.E.2d at 38. “In an ‘as-applied’ challenge, the party challenging the constitutionality of the statute claims that the ‘application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.” *Doe v. State*, 421 S.C. 490, 503, 808 S.E.2d 807, 813 (2017) (quoting *Ada v. Guam Soc’y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., Rehnquist, C.J., and White, J., dissenting)). “[T]he practical effect of holding a statute unconstitutional ‘as applied’ is to prevent its future application in a similar context, but not to render it utterly inoperable.” *Id.* at 503, 808 S.E.2d at 814 (quotation omitted).

In determining whether a statute or regulation is unconstitutionally vague, “[t]he concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication.” *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (quoting *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971)); *see also Huber v. S.C. State Bd. Of Phys. Therapy Exam’rs*, 316 S.C. 24, 26, 446 S.E.2d 433, 435 (1994) (“The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies.”) A regulation is impermissibly vague if “written in such a manner as to permit or encourage arbitrary and discriminatory enforcement.” *See Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 541, 737 S.E.2d 830, 842 (2012) (Hearn, J., dissenting) (citations omitted). Illustrated in the context of criminal statutes, “[a] vague statute would [] allow police to be guided not by clear language, but by whim.” *Id.* at 542, 737 S.E.2d at 843 (quotation

omitted). In light of the clear holding of *Travelscape, LLC*, the ALC was empowered to rule on LMC's challenge⁷ to Regulation 61-31 § 508, had it deemed appropriate to do so.

- B. DHEC's interpretation of Regulation 61-31 § 508 as affording unfettered discretion in fashioning the type of review for substantial changes is unconstitutionally vague.

In the COPA Act, the General Assembly directed the Department to address provisions for public hearings (Section 44-7-540) and "promulgate regulations to implement the provisions of this article including any fees and application costs associated with the monitoring and oversight of cooperative agreements approved under this article." S.C. Code Ann. § 44-7-570(D). The Supreme Court in *Heyward v. South Carolina Tax Commission*, 240 S.C. 347, 126 S.E.2d 15 (1962), made clear however that an agency cannot use its power to promulgate rules or regulations to change the law as implemented by the legislature: "The respondent was invested with rule-making power for the purpose of carrying out the legislative will expressed in statutory form; but it had no legal authority to enact new laws in the nature of regulations to satisfy its own theory as to the enforcement of the income tax laws of this State." *Heyward*, 240 S.C. at 355-56, 126 S.E.2d at 20 (holding agency lacked authority to adopt by regulation a method of reporting income for tax purposes not provided for by statute). Agency rules or regulations that materially alter or add to the law are void. *See Milliken and Co. v. S.C. Dept. of Labor*, 275 S.C. 264, 267, 269 S.E.2d 763, 764 (1980).

According to DHEC, when presented with a substantial change to an existing COPA, Regulation 61-31 § 508 affords DHEC the "discretion to conduct the review it deems appropriate

⁷ To the extent relevant to PHM's continued belaboring of LMC's Petition or prehearing statement, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. Rather, . . . it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Doe*, 421 S.C. at 503, 808 S.E.2d at 813 (quotations omitted).

based on the facts and circumstances involved including, but not limited to, the significance of the proposed change, any relevant time constraints related to the proposed change, and any exigent circumstances as found by DHEC or as represented to DHEC by the parties to the cooperative agreement.” Op. S.C. Att’y Gen., 2020 WL 1068931 *1 (S.C.A.G. Feb. 25, 2020)⁸. DHEC’s interpretation renders the regulation impermissibly vague, in that the type of review to be conducted can be ever-changing, which allows DHEC “to be guided not by clear language, but by whim.” *See Town of Mount Pleasant* at 542, 737 S.E.2d at 843.

In *MRI at Belfair, LLC v. South Carolina Department of Health and Environmental Control*, 392 S.C. 314, 709 S.E.2d 626 (2011), the Supreme Court rejected DHEC’s treatment of costs for determining whether projects required CON review: “Where, as here, DHEC’s chosen method has no basis in the facts of the proposal and arbitrarily allows a potential applicant to avoid the CON review process, it is contrary to the purposes of the CON Act and therefore an error of law.” *Id.* at 321-22, 709 S.E.2d at 630. DHEC’s application of Section 508 to the substantial change proposed by PHM has done exactly what the Supreme Court cautioned against, by “creating incentives for potential applicants to manipulate” the COPA process “and avoid [COPA] review.” *Id.* at 322, 709 S.E.2d at 630. However, because it appears that under other circumstances DHEC may engage in the review process set forth in the COPA Act and Regulation 61-31, the regulation is not facially invalid. Whether or what type of review DHEC may require for substantial changes

⁸ PHM and LifePoint both emphasize the February 25, 2020 opinion of the Attorney General, solicited by DHEC to ascertain whether “a court is likely to agree with DHEC’s analysis as reasonable.” Op. S.C. Att’y Gen., 2020 WL 1068931 *1. The record reflects PHM’s involvement in this component of the “review” process as well, pressing an interpretation inconsistent with one taken only weeks before to DHEC regarding the review required for a substantial change. (R. pp. 395-397, 497-511, 543-554)

to existing COPAs lacks any practical criterion of fair notice, as such, and as demonstrated in the record, the Regulation is invalid as applied.

III. THE APPELLANTS DID NOT PRESERVE FOR APPEAL THE ISSUE OF DEFERENCE TO DHEC'S INTERPRETATION OF ITS REGULATION.

PHM and LifePoint both allege error⁹ in the ALC's "failing to give deference to the Department of Health and Environmental Control's interpretation of the Health Care Cooperation Act and S.C. Regulation 61-31." PHM Br., p. 1. More succinctly stated by LifePoint, "the Administrative Law Court erred as a matter of law in failing to give deference to the Department's interpretation of COPA Regulation 61-31, § 508 to allow modification of COPA-97-01, given that such interpretation was reasonable and in accordance with the rules of statutory construction." LifePoint Br., p. 8. Regardless of how framed, the issue of whether the ALC failed to give deference to DHEC's interpretation of its regulation was not preserved for appellate review.

"Put simply, Rule 59(e) motions serve a vital purpose for proper issue preservation. As in other appellate matters, we require issue preservation in administrative appeals." *Home Med. Sys., Inc. v. S.C. Dept. of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). In fact, among the revisions to the Rules of Procedure for the Administrative Law Court in 2019 was the deletion of the last sentence of SCALC Rule 29(D), which provided that a motion for reconsideration was not a pre-requisite to filing a notice of appeal. *See* SCALC Rule 29, 2019 Rev. Notes. Instead, and consistent with the issue preservation rules of this Court, "[i]ssues raised in the contested case proceedings but not addressed in the written order are no longer deemed denied, but must be raised by the parties in a motion for reconsideration in order to be preserved for appeal." *Id.*

⁹ LMC reiterates the earlier point that LifePoint did not raise any issues for reconsideration, including the alleged failure to afford deference to DHEC, in its reconsideration motion. *See supra*, n.6.

Following the ALC's Order Denying Cross-Motions for Summary Judgment, both LifePoint and PHM filed motions under SCALC Rule 29(D). (R. pp. 751-762; 795-799) Similar to LifePoint's motion, PHM sought clarification as to the finality of the ruling, but unlike LifePoint, PHM also alleged error in the *sua sponte* rulings and the misapprehension/misinterpretation of the COPA Act, Regulation 61-31, and COPA-97-01 by the ALC. (R. pp. 756-761) Crucially, no party asked the ALC to reconsider the propriety for deference to DHEC. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (holding appellant's attempt to inject new issues and theories on appeal was improper). "A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original) (providing extensive discussion of issue preservation rules and reconsideration motions). The issue preservation rules thus require Appellants to have asked the ALC to rule on deference to DHEC.

Even should the Court be inclined to consider this unpreserved argument, Appellants ignore that there is no need for agency deference where the terms of the statute are clear. *See Comm'rs of Public Works v. S.C. Dept. of Health and Env'tl. Control*, 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007) (reiterating that the primary rule of statutory construction is ascertaining legislative intent and where clear, the terms of a statute must be applied according to literal meaning). Moreover, in addressing the purpose of the Act and the availability of a COPA

for the transaction proposed by PHM, the ALC's findings are consistent with DHEC's analysis and accepts DHEC's interpretation of "cooperative agreement" as part of the determination that PHM could not amend COPA-97-01 to provide for its acquisition of LifePoint's assets. (R. pp. 27-29, 603-604) Because the ALC determined an amendment to COPA-97-01 was not available to PHM, it did not reach the propriety of DHEC's interpretation of "another review" in the Regulation. (R. pp. 32-33) Because the ALC's ruling is based on the plain language of the COPA Act and because there is no evidence to support the ALC erred in declining to reach DHEC's interpretation¹⁰ of Section 508 where it first found amendment was not appropriate, the ALC's decision should be affirmed.

IV. THE COURT SHOULD REJECT DHEC'S INTERPRETATION OF 'ANOTHER REVIEW' IN REGULATION 61-31 § 508.

LMC submits this Court can affirm the ALC on the additional sustaining ground that DHEC's interpretation of "another review" is manifestly contrary to the COPA Act. Section 508 of Regulation 61-31 is the only statutory or regulatory provision referenced in the DHEC Decision pursuant to which DHEC purported to act in "updating" or "amending" the conditions of COPA-97-01. (R. p. 53) "Regulations are interpreted using the same rules of construction as statutes." *Bruning v. S.C. Dept. of Health and Envtl. Control*, 418 S.C. 537, 545, 795 S.E.2d 290, 294 (2016). "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 the light of the intended purposes of the statute." *McLanahan v. Richland Cty. Council*, 350 S.C. 433, 567 S.E.2d 240 (2002). "The words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation."

¹⁰ PHM's reconsideration motion raised the failure to rule on LMC's assertion that DHEC's interpretation was arbitrary, but PHM did not ask the ALC to reconsider and rule on deference due to DHEC. (R. p. 40)

Charleston Co. Parents for Public Schools v. Moseley, 343 S.C. 509, 519, 541 S.E.2d 533, 538 (2001). The plain meaning rule is based on the principle that “it is not the court’s place to change the meaning of a clear and unambiguous statute.” *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). Only where a regulation is silent or ambiguous will the court consider deference to an agency interpretation, assuming the interpretation is worthy of deference. *See Bruning*, 418 at 545, 795 S.E.2d at 294.

The COPA Act provides the process for review of agreements between health care providers seeking the protections of a COPA. *See* S.C. Code Ann. §§ 44-7-540, -550, -560. The COPA Act in fact mandates this same review process for the AG’s pursuit of enforcement or criminal prosecution proceedings for actions exceeding the scope of an approved COPA. S.C. Code Ann. § 44-7-570(C) (“A review by the Attorney General must be conducted according to the standards set forth in this article.”) Regulation 61-31 § 508 is thus plain and unambiguous, if an applicant amends an agreement after receipt of a COPA, “the Department will decide whether or not the amendment is substantial and thereby requires another review.” S.C. Code Ann. Regs. 61-31 § 508. The only review is that set forth in the statute, and DHEC’s failure to adhere to the statute was error. *See S.C. Dept. of Revenue v. Blue Moon of Newberry*, 397 S.C. 256, 262-63, 725 S.E.2d 480, 484-85 (2012) (rejecting agency’s interpretation using notion of what terms should mean where language of regulation plainly met and imposed no other requirements).

DHEC promulgated Regulation 61-31 to “implement the legislative intent that there be a state regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers which would otherwise violate federal or state anti-trust laws when the benefits outweigh disadvantages caused by their potential adverse effects on competition.” S.C. Code Ann. Regs. 61-31 § 101. The COPA Regulations are strikingly

similar to the regulations DHEC has promulgated pursuant to the CON Act in several relevant respects. The interplay of these two major public health enactments was acknowledged by PHM.¹¹.

In overseeing both the CON Program and the COPA Program, DHEC's regulations address changes that may be proposed by an applicant during the review and after issuance of a COPA or CON. In Chapter 3 (Disposition of Application) of the COPA Act, Section 308 addresses "Project Changes During Review Period" as follows:

The Department will review any amendments submitted during the review process and may notify the applicant that the amendments constitute a new application, and that the requirements of Section 301, 302, and 303 of this regulation must be complied with. All applicable times shall be counted as though the amendment were a new application.

S.C. Code Ann. Regs. 61-31 § 308. The parallel provision for changes to a CON application during review is found at Regulation 61-15 § 310 (providing that DHEC will review amendments to CON applications during review to determine whether an amendment is substantial and constitutes a new application). In Chapter 5 (Monitoring) of the COPA Act, Section 508 addresses "Changes After Receipt of a Certificate of Public Advantage" and provides,

If an applicant amends, alters, or otherwise changes the agreement after receipt of a Certificate of Public Advantage, ***the Department will decide whether or not the amendment is substantial and thereby requires another review.*** A change in the application will be considered substantial if the Department believes that the change materially changes the reasons for approval, might materially impact the benefits or disadvantages to the community to be served, or will change the service area of the original application. The addition or deletion of a party to the agreement does not necessarily constitute a substantial change unless the Department believes that the above mentioned criteria will occur.

S.C. Code Ann. Regs. 61-31 § 508. (emphasis added). This language for post-issuance changes

¹¹ As explained in PHM's Memorandum to DHEC interpreting Section 508, "[u]nder the statutory construction rubric of reading statutes *in pari materi*, in interpreting § 508, DHEC should look to the legislative findings of the COPA Act and the purposes of the CON Act together, since they are both statutes that deal with the same subject matter, i.e[.], promotion and protection of health care in this state." (R. pp. 500-501)

and the significance of substantial amendments is also paralleled in the CON Regulations, which provide at Regulation 61-15 § 605 (Project Changes After Receipt of Certificate of Need): “If an applicant amends or alters his project after receipt of a Certificate of Need, the Department will decide whether or not the amendment is substantial *and thereby constitutes a new project.*” S.C. Code Ann. Regs. 61-15 § 605 (emphasis added).

While there is no jurisprudence addressing Regulation 61-31, this Court has considered Regulation 61-15 § 605. In *MRI at Belfair, LLC, v. S.C. Dept. of Health and Envtl. Control*, 394 S.C. 567, 575-76, 716 S.E.2d 111, 115 (Ct. App. 2011), this Court affirmed the analysis under Section 605 for changes to a CON was that “any change that would impact the applicant’s ability to comply with the same criteria was relevant evidence on whether the change is *substantial enough to create a new project.*” *Id.* at 574-75, 716 S.E.2d at 114-15 (emphasis added). It is undisputed that DHEC found the change proposed by PHM to COPA-97-01 was a substantial change that required another review. (R. p. 53) DHEC’s interpretation of Section 508 as allowing for a private, internal review without public notice, participation or input from the AG ignores the explicit review requirements set forth in the COPA Act. “[W]here, as here, the plain language of the statute is contrary to the agency’s interpretation, the Court will reject the agency’s interpretation.” *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). “[T]he ALC was not required to defer to the Department’s interpretation in this instance because it was contrary to the plain language of the statute.” *Media Gen. Comm’ns, Inc. v. S.C. Dept. of Revenue*, 388 S.C. 138, 149, 694 S.E.2d 525, 531 (2010).

CONCLUSION

Based on the foregoing, Respondent LMC respectfully requests that this Court uphold the ALC’s reversal of the DHEC Decision and dismiss these appeals.

Respectfully submitted,

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Dated: April 5, 2021

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson III, Administrative Law Court Judge

APPELLATE CASE NO.: 2020-001610
ADMINISTRATIVE LAW COURT CASE NO.: 20-ALJ-07-0108-CC

Lexington County Health Services District, Inc.,
d/b/a Lexington Medical Center, Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control, Prisma Health-Midlands,
Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast,
Providence Health Fairfield, and Kershaw Hospital, LLC
d/b/a Kershaw Health Medical Center, Respondents,

OF WHICH Prisma Health-Midlands is the..... Appellant/Respondent,

AND Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast,
Providence Health Fairfield, and Kershaw Hospital, LLC
d/b/a Kershaw Health Medical Center the Appellant are the Respondents/Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the *Petitioner/Respondent's Final Brief* in the
above-referenced matter complies with Rule 211(b), SCACR.

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