THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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

Trident Medical Center, LLC d/b/a Trident Medical Center and Summerville Medical Center,.....	Petitioner/ Respondent,
v.	
South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Health Emergency Services,.....	Respondents,
Of Whom, Medical University Hospital Authority d/b/a MUSC Health Emergency Services is	Appellant.
CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper Mount Pleasant Hospital and Roper St. Francis Berkeley Hospital, ...	Petitioner/ Respondent,
v.	
South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Health Emergency Services,.....	Respondents,
Of Whom, Medical University Hospital Authority d/b/a MUSC Health Emergency Services is	Appellant.

FINAL REPLY BRIEF OF APPELLANT

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Appellant Medical University Hospital Authority, d/b/a MUSC Health Emergency Services ("MUSC") submits this brief in reply to the Initial Briefs of Respondents Trident Medical Center, LLC ("Trident") and CareAlliance Health Services ("Roper").

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I. The ALC erred in concluding that MUSC failed to satisfy Standard 6 of the 2015 State Health Plan.

Standard 6 of the 2015 State Health Plan's section on Freestanding Emergency Services provides:

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

(2015 Plan at XI-5, R. 5885).

A. The ALC erred in concluding that MUSC failed to document where potential patients for the FED would come from.

1. MUSC presented undisputed evidence that MUSC Medical Center receives over 24,000 annual visits from North Area residents who drive past existing ED providers to get to MUSC.

MUSC identified 25 specific zip codes as the primary service area for its proposed FED.[1] (MUSC Ex. 40, R. 5701). In its Initial Brief, Trident argues that MUSC fails to satisfy the first prong of Standard 6 because it did not specify the number of "unique patients" currently driving from the targeted zip codes to MUSC's EDs in downtown Charleston. (Trident Br. at 14). The ALC agreed with Trident's position (*See* Order at 53, ¶ 29, R. 62) (finding an "unknown" number of patients are driving from the targeted zip codes to MUSC).

The ALC misinterpreted Standard 6 as having a volume requirement, but it does not. The first prong of the standard only requires an applicant to identify a proposed service area for the project — "where the potential patients … will come from." MUSC did that by identifying a Tri-County service area (Jt. Ex. 1 at DHEC CON 00002, R. 3156), as well as a primary service area

[1] Three of the 25 zip codes are post office box zip codes, while the other 22 are geographical zip codes. (Tr. at 2048:10-22, R. 2794).

from which MUSC currently gets approximately 25 percent of its total ED visits. (Tr. at 155:19 - 156:1, R. 901-902).

Trident not only misinterprets Standard 6, it misinterprets MUSC's position on Standard 6. MUSC does not attempt to specify an exact number of "unique patients" driving from the targeted zip codes to MUSC's Charleston ED. (*See* Trident Br. at 13) ("MUSC now argues that 20,000 unique patients were shown to be traveling from the proposed service area" to MUSC downtown). Trident also contends that MUSC has provided no evidence of where its ED visits come from (Trident Br. at 14), but that too, is simply false. MUSC has documented that it receives over 24,000 ED visits annually from persons who reside in the 22 geographical zip codes. Finally, Trident criticizes MUSC's expert, as the ALC did, for using "patients" and "visits" interchangeably. (Trident Br. at 13) (citing Order at 53, n.54, R. 62). However, the health planning experts for Trident and Roper also used the terms interchangeably. (*See* MUSC Br. at 19) (citing Tr. at 1259:23 – 1260:6; at 2307:20 – 2308:3; at 2397:3-9, R. 2005-2006; 3053-3054; 3143).

2. <u>The evidence at trial showed why patients are currently driving past six Trident and Roper facilities to obtain ED services from MUSC.</u>

Contrary to Trident's assertion (Trident Br. at 14), Standard 6 does not require MUSC to demonstrate why patients currently drive past existing providers to seek ED services in Charleston. Trident argues that MUSC's original application, which included a helipad and clinical decision unit, would have explained why patients might prefer an MUSC FED. (Trident Br. at 14). According to Trident, MUSC's decision to forego those features left its project an indistinguishable "carbon copy" of the existing Trident and Roper EDs. (Trident Br. at 15).

Trident is incorrect. What distinguishes an MUSC facility from a Trident or Roper facility is just that – it is an ***MUSC*** facility. MUSC is South Carolina's only academic medical center and

the state's highest rated hospital by *U.S. New and World Report.* (Jt. Ex. 1 at DHEC CON 000008, R. 3162).

Trident accuses MUSC of obfuscation for citing a slide describing MUSC's downtown Charleston ED. (Trident Br. at 15). The issue, however, that apparently concerned the ALC was why patients ***currently*** bypass numerous Trident and Roper EDs to seek services at MUSC's downtown ED. (*See* Order at 23, ¶ 68, R. 32). The slide addresses that concern, stating that "patients seek care specifically at MUSC for reasons noted throughout this presentation, and are currently by-passing [existing FEDs] and other alternatives." (Jt. Ex. 1 at DHEC CON 000534, R. 3688). The previous slide in the same presentation lists six factors that distinguish MUSC Health from other providers, such as Trident and Roper. (*Id.* at DHEC CON 000533, R. 3687). These six factors (which do not include a helipad or clinical decision unit) are listed in MUSC's Brief. (MUSC Br. at 21). Furthermore, the slide explains the relevance of the factors to MUSC's FED project: "Individuals seek care within MUSC Health because of this. As part of MUSC, the proposed project will benefit from these differentiating factors." (Jt. Ex. 1 at DHEC CON 000533, R. 3687).

3. MUSC demonstrated why potential patients would redirect from MUSC downtown to the new FED.

Standard 6 does not require an applicant to show why potential patients would redirect to a proposed new FED. Nevertheless, MUSC did so. The reasons included the "differentiating factors" referenced above; the benefits MUSC's ACO members would receive from the FED; the greater convenience, easier access, shorter travel and wait times the FED would offer, and the fact that the FED would treat all age and acuity levels of care. (MUSC Br. at 21-26).

Trident disputes some of these reasons. "Convenience," Trident declares, "is not a standard or criterion .... Therefore, MUSC's argument must fail." (Trident Br. at 17). Trident is certainly

correct that convenience is neither a CON standard nor a criterion. It does not follow, however, that MUSC's argument "must fail."

The concern raised by the ALC is whether MUSC showed why many patients from the targeted zip codes would redirect from MUSC Health in downtown Charleston to MUSC Health's FED in Berkeley County. (Order at 53, ¶ 29, R. 62) Trident's analysis is purely theoretical: convenience is not a standard or criterion, so – according to Trident – it must not be considered. (Trident Br. at 17). Convenience may not be a legal requirement, but it is a relevant, practical consideration as to whether people would redirect from MUSC's downtown Charleston ED to its Berkeley County FED.

Trident also criticized the volume shift projections by MUSC's expert, David Levitt, because they were based, in part, on assumptions. (Trident Br. at 18). All health planning experts rely on assumptions when making future projections. (*See, e.g.*, Tr. at 1260:24 – 1261:2, at 1270:10-15, R. 2006-2007; 2016) (testimony by Trident's expert regarding assumptions he had made in other cases). How can anyone predict the future without relying on assumptions? Mr. Levitt is allowed to do that because the ALC qualified him as an expert, as have numerous other courts over his 28-year career. (Tr. at 1950:22-23; at 1957:9 – 1958:19, R. 2696; 2703-2704).

Trident accuses MUSC of mischaracterizing the ALC's Factual Finding 70. (Trident Br. at 18) (citing MUSC Br. at 24). Factual Finding 70 states:

> 70. Dr. Hall, MUSC's Medical Director for the main emergency department similarly testified that "three, four, and fives" were the acuity levels of the patients that would show up at the FED. (Tr. at 270:6-12, R. 1016).

(Order at 23, ¶ 70, R. 32). In fact, the question Dr. Hall was answering was asked by Roper's attorney on cross-examination. The question was: "[As] I understood your opinion when we

talked at your deposition, that ***most of the patients*** that are going to show up at the freestanding ED are the level threes and fours. Is that right?" (Tr. at 270:7-11, R. 1016). Dr. Hall responded: "Three, four, fives." (*Id.*). MUSC's Brief pointed out that the ALC's Finding of Fact was incorrect. (MUSC Br. at 24). This was not a mischaracterization. Finding of Fact 70 clearly indicates that, according to Dr. Hall, FEDs serve ***only*** levels 3-5. In fact, his testimony was that they serve ***mostly*** levels 3-5, just like hospital-based EDs. (*Id.*; *see* Tr. at 139:5 – 140:13, R. 885-886).

Trident again accuses MUSC of mischaracterization with respect to the ALC's Conclusion of Law 30. (Trident Br. at 21). The ALC concluded that MUSC's shift projections were flawed, in part, because they "did not take acuity into account." (Order at 53, ¶ 30, R. 62). Standard 6 does not require an applicant to take acuity into account. Both Trident and Roper's experts conceded that, in past FED applications they have drafted, they did not make acuity adjustments. (Tr. at 782:23 – 783:12; at 1261:19 – 1262:2; at 1262:16 – 1263:4, R. 1528-1529; 2007-2008; 2008-2009).

B. <u>The ALC erred in concluding that MUSC failed to document why potential patients are not being adequately served by existing providers.</u>

MUSC documented that many of its potential patients choose to drive past existing facilities to receive ED services at MUSC. (MUSC Br. at 27). These patients, by choice, are not receiving *any* services from existing providers, much less adequate services. They are making that choice even though it means longer drives, wait times, and delays. (MUSC Br. at 28-29).

The ALC ruled that MUSC failed to comply with the "adequate services" prong of Standard 6 because it did not show that existing services lacked capacity. (Order at 53, ¶ 32, R. 62). Although certain other State Health Plan standards require such a showing, Standard 6 does not. (*See, e.g.*, 2020 State Health Plan at 85-88, R. 6871-6874). It was error for the ALC to impose a capacity requirement where none exists in the standard. It was further error for the ALC to

disregard MUSC's capacity constraints, patient choice, and convenience in its analysis. (*See* MUSC Br. at 29-31).

II. The ALC erred in concluding that MUSC failed to satisfy the 2017-18 State Health Plan.

Pursuant to S.C. Code § 44-7-225, the ALC applied the 2017-18 State Health Plan, in addition to the 2015 Plan, to MUSC's FED application. The 2017-18 Plan replaced Standard 6 with a sentence requiring an applicant to document "capacity constraints within existing emergency departments in the service area and/or a travel time of greater than 15 minutes to an existing emergency department in the service area." (2017-18 Plan at 96, R. 6062).

As discussed in its Brief, MUSC complied with the 2017-18 Plan by documenting capacity constraints in its downtown Charleston ED, which the ALC erroneously failed to consider. (Order at 40, ¶ 123, R. 49). It also documented that the only existing EDs within a 15-minute drive of MUSC's proposed FED site are two hospital-based EDs, but they are within 15 minutes only when traffic is light. (MUSC Ex. 60 at 31, R. 5711; Tr. at 2140:11 – 2141:15, R. 2886-2887; see MUSC Br. at 34).

According to Trident, MUSC's position that the ALC should have considered MUSC's capacity constraints is not supported by law. (Trident Br. at 24). MUSC's position, however, is supported by the 2017-18 State Health Plan, which the ALC chose to apply, since MUSC is an existing provider in the service area.[2] (Jt. Ex. 1 at DHEC CON 000022, R. 3176). Trident notes

[2] Roper argues that the ALC established a different service area for the MUSC FED project. (Roper Br. at 18) (citing Order at 27, R. 36). The ALC relied on a capacity analysis created by Roper's expert that examined facilities within a 20-mile radius of the MUSC's primary service area, but there is not a finding that establishes an alternative service area from the Tri-County Area identified in MUSC's application. (Jt. Ex. 1 at DHEC CON 000022, R. 3176). To the contrary, the ALC recognized the Tri-County as the service area. (*See* Order at 30, ¶ 90, R. 39) (referring to "the tri-county service area of Berkeley, Charleston, and Dorchester counties").

that the ALC made a finding that MUSC was capacity constrained. (Trident Br. at 24). That is correct, of course, which is why it was clearly error for the ALC to refuse to consider its own finding. (Order at 40, ¶ 123, R. 49) ("While MUSC's downtown emergency department is constrained, it is not a criterion that the Court may consider.").

As an alternative to demonstrating capacity constraints, the 2017-18 Plan provides that an applicant can show need by demonstrating "a travel time of greater than 15 minutes to an existing emergency department in the service area." Trident argues this can only refer to a travel time between an existing provider and patients. (Trident Br. at 30-31). Trident contends that the applicant must show that its potential patients live farther than 15 minutes from an existing provider. (*Id.*). It is not clear whether Trident believes the applicant, in order to be approved, must demonstrate that all or just some (and if some, how many) of its potential patients must live more than 15 minutes away from an existing provider.[3] Not only would that require some difficult and complex assumptions, it would not further the goal of the 15-minute rule, which exists to ensure that FEDs are not all congregated in one place, like gas stations around an interstate exit. Emergency department services need to be distributed throughout the population, and the 15-minute rule is intended to further that goal. For that reason, the relevant drive time is between the proposed project site and existing providers.

In addition to replacing Standard 6 with the capacity constraints or travel time requirement, the 2017-18 Plan is inconsistent with the 2015 Plan in another way. The 2017-18 Plan gives greater weight to "improved accessibility" than to the "adverse effects of duplication," (2017-18 Plan at

[3] What is clear is that Trident believes, as does the ALC, that when the State Health Plan refers to an "existing" provider it actually means an "approved" provider, i.e., one not yet existing but who may exist in the future. (*See* Trident Br. at 29-30; MUSC Br. at 33).

96, R. 6062) while the 2015 Plan weighs them equally. (2015 Plan at XI-5, R. 5885). The ALC found the MUSC FED would have no adverse effects on other facilities under Regulation 61-15 § 802.23. (Order at 59, ¶ 61, R. 68). Nevertheless, the ALC concluded it could not engage in a meaningful balancing test because of its arbitrary and capricious finding that the MUSC FED would not improve accessibility for anyone. (Order at 58, ¶ 58; 59, ¶ 62, R. 67, 68). MUSC disagrees with Trident's argument that "adverse effects" means one thing in Regulation 61-15 § 802.23 and another thing in S.C. Code Ann. § 44-7-180(B)(4). MUSC also disagrees with Trident's position that improved accessibility for patients who prefer to seek ED services at an MUSC facility is somehow irrelevant to the required balancing test. (*See* Trident Br. at 32).

III. The ALC erred in concluding MUSC's application did not comply with certain project review criteria.

The ALC concluded that MUSC's application did not comply with three regulatory criteria: Community Need Documentation (802.2), Distribution (Accessibility) (802.3), and Medically Underserved Groups (802.10). Each of these criteria has multiple subparts, but the ALC reached its conclusion without analyzing or, in some instances, even referencing all subparts. (Order at 54-56, R. 63-65; see MUSC Br. at 36-43). This was error, as a statute or regulation must be read so that no "provision or part shall be rendered surplusage, or superfluous...." *Citizens for Quality Rural Living, Inc. v. Greenville Cty. Planning Comm'n*, 426 S.C. 97, 106, 825 S.E.2d 721, 726 (Ct. App. 2019).

IV. The private meeting between co-Respondents MUSC and DHEC did not violate the letter or the spirit of the South Carolina Administrative Procedures Act.

Trident argues that the joint defense agreement entered into by MUSC and DHEC was invalid. (Trident Br. at 45-46). MUSC disagrees, but the issue is irrelevant. The ALC concluded it "need not decide the issue" (Order at 60, n.59, R. 69) and MUSC therefore did not appeal it.

What MUSC did appeal was the ALC's Conclusion of Law 69, in which the Court ruled that the meeting during trial between DHEC and MUSC complied with the letter of S.C. Code Ann. § 1-23-360, but not with its "spirit." (Order at 60, ¶ 69, R. 69).

Section 1-23-360 clearly spells out exactly what it proscribes: ex parte communications between a party and an agency "assigned to make findings of fact and conclusions of law in a contested case." (Id.). If the spirit of the statute embraced a broader prohibition, the General Assembly would have identified it. DHEC has no authority to make findings of fact or conclusions of law in a contested case. Nothing in the statute suggests any concern about private communications between DHEC and another party at any stage of a CON review or contested case. (See DHEC Br. at 2).

V. MUSC preserved the issues it raised on appeal.

In its Initial Brief Roper argues that MUSC failed to preserve several issues raised on appeal. (Roper Br. at 11-12) (citing SCALC Rule 29(D)). Roper appears to take the position that SCALC Rule 29(D) requires that, to be preserved for appeal, an issue must have been raised in a motion for reconsideration, even if the lower court ruled on the issue. (Roper Br. at 11-12). The notes to Rule 29(D) provide: "Issues raised in the contested case proceeding 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." (SCALC Rule 29(D), 2019 Revised Notes) (emphasis added).

This rule is echoed in South Carolina case law. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444–45 (2000) (holding that an issue was not preserved for appeal because it was not sufficiently raised in the trial court's ruling and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Town of Arcadia Lakes v. S.C. Dep't of*

Health & Envtl. Control, 404 S.C. 515, 536, 745 S.E.2d 385, 396 (Ct. App. 2013) (holding that an issue is not preserved where neither the ALC addressed an issue nor the appellants requested a ruling on the issue in their motion to reconsider).

All the issues raised by MUSC in its Initial Brief were properly preserved because they were addressed in the ALC's Order and/or MUSC's Motion to Alter and Amend. MUSC's Initial Brief consisted of 5 arguments with subparts. MUSC's first argument is that the ALC erred in concluding that MUSC failed to satisfy Standard 6 of the 2015 State Health Plan. (MUSC Br. at 18-31). This issue was addressed in the ALC's Order and in MUSC's Motion to Alter and Amend.[4] (Order at 22-33, 31-42; MUSC Mot. to Alter and Amend at 6, ¶ 3, R. 6783). MUSC's second argument is that the ALC erred in concluding that MUSC failed to satisfy the 2017-2018 State Health Plan. (MUSC Br. at 31-34). This issue was addressed in the ALC's Order and in MUSC's Motion to Alter and Amend.[5] (Order at 40, ¶¶ 123-25, R. 49; MUSC Mot. to Alter and Amend at

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[4] The sub-issues to MUSC's first argument were addressed in the Order and MUSC's Motion to Alter and Amend. Issue IA (Order at 22-25, R. 31-34; MUSC Mot. to Alter and Amend at 6, ¶ 3, R. 6783); Issue 1.A.1. (Order at 53, ¶¶ 29-31, R. 62; MUSC Mot. to Alter and Amend at 3, ¶¶ 1.e, 1.g, 6, ¶ 3, R. 6780, 6783); Issue I.A.2. (Order at 23, ¶ 68, 53 ¶ 29, R. 32, 62; MUSC Mot. to Alter and Amend at 3, ¶¶ 1.e, 1.g, 6, ¶ 3, R. 6780, 6783); Issue I.A.3. (Order at 53, ¶¶ 29, 31, R. 62; MUSC Mot. to Alter and Amend at 3, ¶¶ 1.e, 1.g, 6, ¶ 3, R. 6780, 6783); Issue I.A.4. (Order at 23-24, 53, ¶ 30, R. 32-33, 62; MUSC Mot. to Alter and Amend at 4, ¶¶ h-i, 6, ¶ 3, R. 6781, 6783); Issue I.B. (Order at 53, ¶ 32, R. 62; MUSC Mot. to Alter and Amend at 6, ¶ 3, R. 6783); Issue I.B.1. (Order at 53, ¶ 32, R. 62; MUSC Mot. to Alter and Amend at 6, ¶ 3, R. 6783); Issue I.B.2. (Order at 53, ¶ 32, R. 62; MUSC Mot. to Alter and Amend at 2, ¶ 1.c, 6, ¶ 3, R. 6780, 6783); Issue I.B.3. (Order at 34, ¶ 103, R. 43; MUSC Mot. to Alter and Amend at 3, ¶ 1.e, 6, ¶ 3, R. 6780, 6783).

[5] The sub-issues to MUSC's second argument were addressed in the Order, MUSC's Motion to Alter and Amend, and MUSC's proposed Order. Issue II.A. (Order at 40, ¶¶ 123-25, R. 49; MUSC Mot. to Alter and Amend at 2, ¶ 1.d, 6, ¶ 3, R. 6779, 6783); Issue II.B. (Order at 40, ¶ 123, R. 49; MUSC Mot. to Alter and Amend at 2, ¶ 1.c, 6, ¶ 3, R. 6779, 6783); Issue II.C. (Order at 40, ¶¶ 124-25, R. 49; MUSC Mot. to Alter and Amend, 2, ¶ 1.d, 6, ¶ 3, R. 6779, 6783); Issue II.D. (Order at 58-59, R. 67-68; MUSC Mot. to Alter and Amend at 6, ¶ 4, R. 6783; MUSC's proposed Final Order 38, ¶ 72, R. 6767).

6, ¶ 3, R. 6783). MUSC's third argument is that the ALC erred in concluding MUSC's application did not comply with all project review criteria. (MUSC Br. at 35-42). This issue was addressed in the ALC's Order and in MUSC's Motion to Alter and Amend.[6] (Order at 50-56, R. 59-65; MUSC Mot. to Alter and Amend at 6, ¶¶ 2-3, R. 6783). MUSC's fourth argument is that the ALC erred in concluding MUSC's application did not comply with the purposes of the CON Act. (MUSC Br. at 43-44). This issue was addressed in the ALC's Order and in MUSC's Motion to Alter and Amend. (Order at 59, ¶ 67, R. 68; MUSC Mot. to Alter and Amend at 6, ¶ 3, R. 6783). MUSC's fifth argument is that the private meeting during trial between co-Respondents MUSC and DHEC did not violate the letter or the spirit of the South Carolina Administrative Procedures Act. (MUSC Br. at 44-45). This issue was addressed in the ALC's Order. (Order at 60, ¶ 69, R. 69). Because these arguments were all addressed by the ALC and/or raised by MUSC in its Motion to Alter and Amend, all are preserved.

Roper argues that MUSC was not specific enough in its Motion to Alter and Amend, but the same wording for each argument or issue is not required for each argument or issue to be sufficiently specific for preservation. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642–43 (2011) ("Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue."); *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302-03, 641 S.E.2d 903, 907 (2007) (finding that although SCDOT did not phrase an objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to

[6] The sub-issues to MUSC's third argument were addressed in the Order and MUSC's Motion to Alter and Amend. Issue III.A (Order at 50-52, 54-56, R. 59-61, 63-65; MUSC Mot. to Alter and Amend at 6, ¶¶ 2-3, R. 6783); Issue III.B. (Order at 54-55, R. 63-64; MUSC Mot. to Alter and Amend at 6, ¶ 3, R. 6783); Issue III.C. (Order at 55, ¶¶ 38-42, R. 64; MUSC Mot. to Alter and Amend at 6, ¶ 3, R. 6783); Issue III.D. (Order at 55-56, R. 64-65; MUSC Mot. to Alter and Amend at 5, ¶ 1.l, 6, ¶ 3, R. 6782, 6783).

allow the trial court to rule on the issue); *see also, State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (finding issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict). Furthermore, "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018), *cert. granted* (Oct. 18, 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in part and dissenting in part)), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019).

In summary, every issue raised on appeal was raised to and ruled on by the ALC. If any doubt exists on whether any issue is subject to multiple interpretations, that doubt "should be resolved in favor of preservation." *Johnson*, 422 S.C. at 412, 812 S.E.2d at 210.

VI. Roper's Additional Sustaining Grounds Fail.

A. The ALC correctly ruled that MUSC's application complied with Standard 2 of the State Health Plan.

Standard 2 of the 2015 State Health Plan provides:

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

(2015 Plan at XI-4, R. 5884) (emphasis added).

MUSC does not provide emergency services in Berkeley County, so its compliance with Standard 2 depends upon whether the county already contains a "licensed" hospital. Roper argues now, as it did in its pretrial Motion for Summary Judgment, that the term "license," as used in Standard 2, is defined by the South Carolina Administrative Procedures Act ("APA") and

Administrative Law Judge Division Act: "'License' includes the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission required by law, but does not include a license required solely for revenue purposes." S.C. Code Ann. §§ 1-23-310(4); 505(4). Roper argues that under this definition, two licensed hospitals already exist in Berkeley County, although neither have completed construction or obtained licenses to operate. (Am. Order Denying Summary Judgment at 5, [hereinafter Am. Order] R. 78; Roper Br. at 26-30).

MUSC's position is that the ALC correctly denied Roper's summary judgment motion on this issue.[7] The ALC concluded that the appropriate definition of "license," as used in Standard 2, is that in Regulation 61-16: "a certificate issued by the Department to the licensee that authorizes the operation of a hospital ...." S.C. Code Regs. 61-16 § 101. Using this definition, there is no licensed hospital in Berkeley County and MUSC's application complies with Standard 2.

The ALC based its decision on its own independent analysis and interpretation. (Am. Order at 8-10, R. 81-83). However, the ALC also deferred to DHEC's interpretation of Standard 2. (Am. Order at 7-8, R. 80-81) (citing *Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2004)). The ALC held that "it is apparent that the Department interprets 'licensed hospital' in Standard 2 as a hospital that not only has a CON but also, is licensed to operate as provided in Regulation 61-16." (Am. Order at 8, R. 81). The ALC cited to multiple instances where DHEC's interpretation is abundantly clear, including DHEC's letter of September 25, 2007 to MUSC approving its Berkeley County FED application, the argument at the summary judgment hearing by DHEC counsel, and in its memorandum opposing

[7] The ALC declined to address this argument in the Order, characterizing it as a "veiled attempt by the parties to circumvent this Court's ruling denying Roper St. Francis and Trident's Motion for Summary Judgment as to Standard 2 ... and to further bolster any argument as to Standard 2 on appeal of this case." (Order at 21, ¶ 62, R. 30).

summary judgment. (*Id.*) Furthermore, as the ALC explained, "we defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statue," and DHEC's "interpretation not only best supports the purposes of the CON and Licensure Act, but is also worthy of deference." (Am. Order at 7-8, R. 80-81).

In its Brief Roper raises new grounds challenging DHEC's interpretation of the meaning of "license," as used in Standard 2. (Roper Br. at 28-29).[8] Roper now argues that CON Director Margaret Murdock's testimony regarding DHEC's consideration of "existing facilities" for "purposes of planning" and "general purposes of CON" somehow amounts to Roper having a "licensed hospital" in the service area under Standard 2. (Roper Br. at 28).

Roper cites to the ALC's capacity analysis regarding whether patients are adequately served by existing services in the area, which mentions Ms. Murdock's testimony regarding "existing" facilities. (Roper Br. at 28) (citing Order at 27, R. 36). Roper argues that the Court's capacity analysis and Ms. Murdock's testimony "necessarily requires" DHEC to "consider a hospital with a CON to be a 'licensed' hospital for purposes of Standard 2." (*Id.*) This is quite a

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[8] The South Carolina Supreme Court has stated:

> While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000).

jump as the ALC simply noted that Ms. Murdock testified that "for purposes of planning: 'as part of [DHEC's] general purposes of CON and guiding establishment", it will look to "approved facilities". (Order at 27, ¶ 83, R. 36). DHEC's consideration of these "existing" facilities for "general planning purposes" does not amount to every single "approved" facility meeting the Standard 2 definition of "licensed hospital." Furthermore, the ALC's mention of this section of Ms. Murdock's testimony is related to the ALC's capacity analysis, which is separate and apart from its analysis on the meaning of "licensed hospital" in paragraphs 61-62 of the Order and in its Amended Order Denying Summary Judgment. As mentioned above, the ALC previously held that there is "sufficient evidence" of DHEC's interpretation of the meaning of "licensed hospital". (Am. Order at 7, n.4, R. 80). Ms. Murdock's testimony does not change that. Thus, it is clear that Roper's new argument regarding this section of Ms. Murdock's testimony is misplaced and unsupported by the extensive evidence otherwise.

Roper continues to assert that the "plain meaning" of Standard 2 supports its argument that a "licensed hospital" does not mean a "licensed hospital in operation." (Roper Br. at 29). As the ALC confirmed, however, when Standard 2 is read in conjunction with the CON and Licensure Act, S.C. Regulation 61-15, and the State Health Plan, a "'licensed hospital' is not simply one that has received a CON; it must also be one that has a valid license and is in operation." (Am. Order at 10, R. 83).

As the ALC properly analyzed, "[t]he statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." (Am. Order at 9, R. 82) (citing *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). Furthermore, as MUSC previously noted, "[t]he term 'licensed' is used various times throughout the Plan, in ways that make health planning sense only if defined as

operational or authorized to provide services." (MUSC Memo in Opp. to Roper's Mot. for Summ. Judgment at 5, R. 6604). This is reflected in the 2015 Plan's inventory of facilities, which states: "All licensed general hospitals, including Federal facilities are listed in the inventory." (2015 Plan at III-1, R. 5819). At the time of this case, the Plan's inventory did not list Roper hospital in Berkeley County. (*Id.*)

B. The ALC correctly ruled that the changes to MUSC's application were not substantial.

The second additional sustaining ground asserted by Roper is that the changes made to MUSC's FED project after DHEC's approval rendered the project "unapprovable". (Roper Br. at 31-34). The ALC denied this argument in its Order. (Order at 50, ¶ 22, R. 59).

Roper seems to argue that MUSC did not follow appropriate procedures by presenting its changes to the ALC, instead of DHEC. If a CON applicant amends its application during the DHEC review process or after issuance of a CON, the Department will determine whether the amendment is substantial and constitutes a new application. (S.C. Code Regs. 61-15 §§ 310, 605). If, however, an applicant amends its application after a contested case has been filed, but before issuance of a CON, the ALC determines whether the amendment is substantial and constitutes a new application. (Order at 49, ¶ 17, R. 58) (citing *MRI at Belfair, LLC v. S.C. Dep't of Health and Envtl. Control*, 394 S.C. 567, 577-588, 716 S.E.2d 111, 116 (Ct. App. 2011)). The ALC addressed MUSC's project changes at length (Order at 18-21, 48-50, R. 27-30, 57-59) and concluded that none were either substantial or material. (*Id.* at 50, ¶ 22, R. 59).

CONCLUSION

For all the reasons set forth above and in MUSC's Brief, MUSC respectfully requests that the Court reverse the ALC's denial of MUSC's application for a CON to establish a freestanding emergency department in Berkeley County.

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April 9, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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

Trident Medical Center, LLC d/b/a Trident Medical Center and Summerville Medical Center,.....	Petitioner/ Respondent,
v.	
South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Health Emergency Services,.....	Respondents,
Of Whom, Medical University Hospital Authority d/b/a MUSC Health Emergency Services is	Appellant.
CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper Mount Pleasant Hospital and Roper St. Francis Berkeley Hospital, ...	Petitioner/ Respondent,
v.	
South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Health Emergency Services,.....	Respondents,
Of Whom, Medical University Hospital Authority d/b/a MUSC Health Emergency Services is	Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that ***Appellant's Medical University Hospital Authority's Final Reply Brief of Appellant*** *in the above-referenced matter complies with Rule 211(b), SCACR.*

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PROOF OF SERVICE

The undersigned hereby certifies that on April 9, 2021, a copy of ***Appellant's Medical University Hospital Authority's Final Reply Brief of Appellant*** was served on all parties to the appeal by electronic mail and hand delivery as follows:

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