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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Court Judge

Case No. 2021-000617

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair .....Appellant,

v.

South Carolina Department of Health
and Environment Control and
Beaufort Memorial Hospital .....Respondent.

FINAL REPLY BRIEF OF APPELLANT MRI AT BELFAIR, LLC D/B/A 3T MRI AT BELFAIR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STANDARD OF REVIEW 2

ARGUMENT 3

I. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER BMH IMPERMISSIBLY SPLIT OUT THE "RELOCATION" COSTS TO AVOID CON REVIEW. 3

II. THE ALC ERRED IN FAILING TO PROVIDE BELFAIR WITH PROPER NOTICE BEFORE CONVERTING THE MOTION TO DISMISS TO ONE FOR SUMMARY JUDGMENT. 4

III. THE "RELOCATION" IS AN ACQUISITION AND/OR EXPENDITURE SUBJECT TO CON REVIEW. 6

A. A "relocation" requires CON review because CONs, NADs, and written exemptions are location specific. 6

B. The "relocation" is an acquisition. 10

C. The project is an expenditure over $2,000,000. 12

IV. THE FACILITIES AT ISSUE ARE "HEALTH CARE FACILITIES" UNDER THE APPLICABLE CODE AND REGULATIONS. 13

V. THE ALC HAD SUBJECT MATTER JURISDICTION OVER THIS CASE. 14

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Amisub of S.C., Inc. v. S.C.D.H.E.C., 403 S.C. 576, 743 S.E.2d 786 (2013) 5, 6, 16, 17
A.O. Smith Corp. v. SCDHEC, 428 S.C. 189, 199, 833 S.E.2d 451, 457 (S.C. Ct. App. 2019)....17
BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005) 4, 5
Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) 3
Hueble v. South Carolina Dept. of Natural Resources, 416 S.C. 220, 785 S.E.2d 461 (2016) 3
Medical University Hops. Auth. v. SCDHEC, Docket No. 18-ALJ-17-0172-CC, 2019 WL 183991, at *9 (S.C.A.L.C. Jan. 4, 2019) 17
Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 616 S.E.2d 722, 729 (Ct. App. 2005) 3

RULES

S.C. R. Civ. Pro. 12.....4, 5
S.C. R. Civ. Pro. 56.....4

STATUTES

S.C. Code Ann. § 1-23-600.....14
S.C. Code Ann. § 1-23-610.....2
S.C. Code Ann. § 44-1-60.....14, 18
S.C. Code Ann. § 44-7-120.....8
S.C. Code Ann. § 44-7-130.....13
S.C. Code Ann. § 44-7-160.....11, 12
S.C. Code Ann. § 44-7-210.....14, 18
S.C. Code Ann. § 44-7-320 through 44-7-340.....16

REGULATIONS

S.C. Code Ann. Regs. 61-15 § 102 .....1, 3, 7, 11, 12, 15, 17
S.C. Code Ann. Regs. 61-15 § 105 11
S.C. Code Ann. Regs. 61-15 § 802 .....7, 8

OTHER AUTHORITIES

Black's Law Dictionary (11th ed. 2019).....11, 12
DHEC, 2020 South Carolina Health Plan, available at https://scdhec.gov/sites/default/files/media/document/2020_South_Carolina_Health_Plan-June_12_2020_0.pdf, at 4, 5 (Mar. 13. 2020).....7, 9

INTRODUCTION

In its initial brief, MRI at Belfair, LLC, d/b/a 3T MRI at Belfair ("Belfair") demonstrated at least four reasons that the Court must vacate the Final Order by the Administrative Law Court ("ALC") and direct to the ALC to either remand the case to the South Carolina Department of Health and Environment Control ("DHEC") to require Certificate of Need ("CON") review for the project at issue, or, at the very least, allow discovery. The core question presented on appeal (and the question both Respondents failed to address in their briefs) is whether Beaufort Memorial Hospital's ("BMH") two-step of separately requesting a non-applicability determination ("NAD") for "replacement" and then immediately thereafter a second NAD for "relocation" of the same piece of expensive medical equipment to a brand new facility is a permissible means of circumventing the CON laws, or whether this practice violates the clear prohibition against cost-splitting set forth in S.C. Regs. 61-15 § 102(2). The answer must be, unequivocally, no. Any other result would undermine the purpose of the CON Act and announce open season for large health care facilities to avoid CON review for costly acquisitions and expenditures by merely splitting costs between multiple projects.

In their briefs, both BMH and DHEC conspicuously avoid addressing the simple fact that BMH impermissibly split the costs of one project (purchasing a new MRI for the new facility) into two separate projects – the "replacement" of an MRI at an existing facility and the "relocation" of that MRI to a new facility. Neither Respondent disputes two very important facts: (1) that BMH's plan from the start was to purchase the new MRI to place it in the new Okatie facility, and (2) that had BMH been upfront about this plan to DHEC in the original project plan, the project would have required a CON. For this reason alone, the Court should vacate the ALC's Final Order with instructions to the ALC to remand the case to DHEC to undergo a CON review of the project, or

at the very least to permit discovery to move forward.

In addition to the impermissible cost splitting, the Court should also reverse the Final Order for at least three other reasons. First, the ALC failed to provide the required notice before converting the motion to dismiss to one for summary judgment and erred in denying Belfair the opportunity to conduct discovery. The fact that Belfair submitted documentation to the ALC does not rectify that error. Second, the "relocation" of the MRI is an acquisition subject to CON review and the overall development of an entirely new imaging center is an expenditure over the threshold determined by regulation and is also subject to CON review. In their briefs, Respondents distort statutory language and the definition of "acquisition," but have done nothing to change this conclusion. Third, the facilities at issue are "health care facilities" as defined in the relevant regulations, and neither Respondent disputes the attributes that make them such. Instead, BMH and DHEC conclude, without explanation or support, that the facilities are merely physician offices – ignoring publicly available information to the contrary.

Finally, contrary to BMH's perfunctory argument, the ALC properly exercised subject matter jurisdictions over this matter as a contested case matter challenging an agency decision.

Respondents have provided no response to the core issue on appeal and no convincing argument in response to all of the other reasons that this case demands to be reversed.

STANDARD OF REVIEW

While the Administrative Procedures Act does provide the standard of review on appeal from a decision of the ALC, the Final Order rests on several errors of law, as demonstrated herein and in Belfair's initial brief. S.C. Code Ann. § 1-23-610. One such error of law is the ALC's grant of summary judgment in violation of the Rules of Civil Procedure. Thus, the standard of review demonstrated in Belfair's initial brief is the relevant standard of review, and as

demonstrated therein and below, the Final Order contained many errors of law. Namely, this Court should "review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to [Belfair]." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). Further, "summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusion to be drawn therefrom." *Gadson v. Hembree*, 364 S.C. 316, 613 S.E.2d 533 (2005). Finally, because this appeal rests on issues of statutory interpretation as applicable to this case, this Court must review it *de novo*. *Hueble v. South Carolina Dept. of Natural Resources*, 416 S.C. 220, 228, 785 S.E.2d 461, 465 (S.C. 2016).

ARGUMENT

I. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER BMH IMPERMISSIBLY SPLIT OUT THE "RELOCATION" COSTS TO AVOID CON REVIEW.

As demonstrated in Belfair's initial brief, BMH impermissibly split out the "relocation" costs in a blatant attempt to avoid CON review. Neither BMH nor DHEC made any attempt to dispute the impermissibility of cost-splitting. This is because Respondents have no rational argument to avoid the plain language of the relevant regulation that provides that, "[a]n applicant ***may not split or combine one expenditure into two or more expenditures for the purpose of avoiding Certificate of Need review***." S.C. Code Ann. Regs. 61-15 § 102(2) (emphasis added).

Unable to refute this most basic principle, BMH and DHEC blatantly avoid responding to this argument in their respective briefs. Neither disputes the fact that BMH openly admitted in the materials submitted in the second NAD request that the MRI was purchased for the ***sole*** purpose of placing it in a brand new facility, not to replace the old MRI as they had previously claimed. For this reason alone, and as demonstrated further in Belfair's initial brief, this Court must vacate

the ALC's Final Order and should order the ALC to direct BMH to submit the entire project for CON review.

Moreover, neither BMH nor DHEC bothered to dispute the fact that building and furnishing an entirely new imaging center at the brand new Okatie Facility was another impermissible cost splitting exercise that requires examination of a CON review. Accordingly, as demonstrated in Belfair's initial brief, the Court should also reverse and vacate the Final Order to require that the entire new imaging center be subjected to CON review, or at the very least allow Belfair to conduct discovery on the costs to further support this factual issue.

II. THE ALC ERRED IN FAILING TO PROVIDE BELFAIR WITH PROPER NOTICE BEFORE CONVERTING THE MOTION TO DISMISS TO ONE FOR SUMMARY JUDGMENT.

This Court should vacate the Final Order because the ALC erroneously converted BMH's motion to dismiss to one for summary judgment without providing ***any*** notice or opportunity to respond. Rule 12(b), SCRCP, requires that if a court chooses to treat a motion to dismiss for failure to state a claim as one for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." The ALC, however, did no such thing. Failing to do so is reversible error, and this Court should therefore reverse the Final Order. *See BPS, Inc. v. Worthy*, 362 S.C. 319, 331, 608 S.E.2d 155, 162 (Ct. App. 2005) ("The circuit judge committed reversible error in proceeding to consider and convert the initial Rule 12(b)(6) motion to a motion for summary judgment without giving [plaintiff] adequate and reasonable opportunity and time to present all materials pertinent to a Rule 56 motion.").

BMH argues both that the Final Order did not convert the motion to one for summary judgment and also that Belfair had ample opportunity to respond to the materials presented before the ALC. Both are without merit.

First, the Final Order unequivocally states that, in granting the motion, it "invokes principles analogous to a motion for summary judgment." (R. p. 26, Final Order at 6.) Similarly, the Final Order recognized that the rules invoked by BMH in its motion to dismiss, SCRCP Rules 12(b)(1) and (6), "are inappropriate" and refused to rule on the argument under these rules. Accordingly, regardless of how BMH attempts to characterize it, the Final Order granted summary judgment without providing the necessary notice and opportunity and, in doing so, committed reversible error.

Second, as demonstrated in its initial brief, Belfair was denied the opportunity to present ***all*** materials made pertinent to a motion for summary judgment as the rules require. The fact that Belfair submitted information to support its arguments in response to the motion does not rectify the error. *See BPS, Inc.*, 362 S.C. at 324, 608 S.E.2d at 158 (holding that a conversion to summary judgment without proper notice was reversible error, even where the non-moving party filed "various affidavits" and deposition transcripts).

In response to Belfair's assertion that it was denied the right to conduct *any* discovery in the case prior to the ALJ granting summary judgment, BMH argues that the decision in *Amisub of S.C., Inc. v. S.C.D.H.E.C.*, 403 S.C. 576, 743 S.E.2d 786 (2013), requires that Belfair be denied the opportunity to seek discovery to support its claims. That decision, however, is inapposite. In *Amisub*, the respondent filed a motion for summary judgment, in part based on a lack of subject matter jurisdiction because DHEC never issued a staff decision. *Id.* The Supreme Court of South Carolina dismissed the case for lack of jurisdiction because DHEC did not issue a staff decision in that case, and had no legal duty to do so. *Id.* at 593, 743 S.E.2d at 795. The Court did not even address the need for additional discovery, or lack thereof, as the issue turned on whether there was jurisdiction over a matter where no staff decision was made. *Id.*

There is no reading of *Amisub* that implies, let alone states, that discovery is not necessary in a case such as this one. In this case, the ALJ ruled that it ***did*** have jurisdiction in this matter. Unlike this case, *Amisub* did not address issues of whether certain costs met regulatory thresholds or other factual issues affecting the outcome. Instead, in *Amisub*, there was no dispute as to the facts on which the court relied to find a lack of jurisdiction. BMH's argument on this point is unfounded and misleading.

III. THE "RELOCATION" IS AN ACQUISITION AND/OR EXPENDITURE SUBJECT TO CON REVIEW.

As demonstrated above and in Belfair's initial brief, the Final Order must be vacated because BMH split project costs in direct violation of the relevant regulations. However, even if they had not split the project into a replacement then relocation (and clearly they did), the "relocation" of the MRI, standing alone, is subject to CON review because CONs and NADs are not transferable at will. The ALC erred in holding that the relocation of the MRI was not an "acquisition" and that discovery was therefore unnecessary. (R. p. 24, Final Order at 4.) This holding is in error because, as demonstrated more fully in Belfair's initial brief: (1) a CON/NAD cannot transfer to a new location, and the relocation therefore required a CON review; (2) the actual total project costs of the "relocation" exceeded the regulatory threshold amount; and (3) the total expenditure exceeds the threshold under applicable regulations.

A. A "relocation" requires CON review because CONs, NADs, and written exemptions are location specific.

CONs, NADs, and written exemptions, by their very nature are specific to the location to which they are granted, and cannot be "relocated" without further evaluation. The applicable regulations clearly set forth a scheme that relies on the underlying assumption that CONs, NADs, and written exemptions are granted based on the location for which they are requested. This is

demonstrated throughout the regulations. For example, S.C. Code Regs. Ann. 61-15 § 102(4) explains that while a CON review is not required for an acquisition of health care facility, service, or equipment that is already in place, a CON review ***would be required to relocate the equipment.*** By way of further example, the regulations make clear that a CON review includes the review of location specific demographic information, and in fact specifically contemplates the need for CON review of "relocations." *See* S.C. Code Ann. Regs. Ann. 61-15 § 802(2)(d) ("[i]n the case of a reduction, ***relocation,*** or elimination of a facility or service, the applicant should address the need that the population presently has for the service, the extent to which that need will be met by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other underdeveloped groups, to obtain needed healthcare." (emphasis added)). Finally, the 2020 State Health Plan also specifically provides that CON review is required to relocate beds, services, or equipment. *See* DHEC, 2020 South Carolina Health Plan, available at https://scdhec.gov/sites/default/files/media/document/2020_South_Carolina_Health_Plan-June_12_2020_0.pdf, at 5 (Mar. 13. 2020). Each of these examples demonstrates that the regulatory scheme contemplated that CONs, NADs, and written exemptions are specific to the location for which they are requested.

In its brief, BMH attempts to discredit each of these examples, but fails to provide any convincing argument as to why the Court should tie itself into knots to avoid the obvious conclusion that relocation of expensive equipment, such as the MRI in this case, requires CON review. BMH obtusely argues that S.C. Code Regs. Ann. 61-15 § 102(4) does not apply to this situation. In doing so, BMH fails to address the clear implication in the regulation – that a "relocation" of equipment or services requires additional review because the nature of any previous

NAD or CON is specific to the original location. To attempt to circumvent the plain language of S.C. Code Ann. Regs. Ann. 61-15 § 802(2)(d), BMH urges the Court to interpret that language to apply only in the situation "when a relocation requires CON review" but fails to explain in what situation a relocation ***would*** require a CON review. Indeed, the "relocation" at issue in this case ***does*** require a CON review, and 61-15 § 802(2)(d) requires BMH to submit location specific information for the new location under a CON review to ensure the appropriate review for the need of the MRI at the new location.

Moreover, as demonstrated in Belfair's initial brief, the very purpose of the CON Act is to ensure that health services are not unnecessarily grouped in over-served areas, leaving other areas without access to the same quality of services. *See* S.C. Code Ann. § 44-7-120. Put simply, the CON Act was enacted to focus on the specific location of proposed health services and equipment. BMH's argument in favor of ignoring the location specific nature of CONs, NADs, and written exemptions should be rejected. To that end, the relocation of valuable equipment providing valuable services necessarily requires a CON review for DHEC to determine the impact on the access to healthcare in the respective depleted and supplemented communities. This is especially true when the proposed relocation is from a medically underserved area to an over-served area, as is the case here.

BMH downplays the effect of the relocation at issue and makes a number of assumptions and bold factual assertions that further highlight the necessity for both discovery in this contested case action and CON review for the project. First, BMH claims, without citation, that the relocation is not costly. The cost of the project, however, is a factual issue in dispute to which Belfair has not been allowed discovery. While BMH makes a bald assertion about the costs without citation or support, Belfair has provided an affidavit from a highly respected expert witness

that establishes the costly nature of the project at issue. (*See* R. p. 171, Platt Aff. ¶¶ 9-10.) Second, BMH claims that the project "will not result in any duplication of health care facilities or services" and will have "no impact on the quality of imaging services that BMH is presently providing." (BMH Brief at 15.)[1] Again, these are disputed issues of fact. The resolution of these facts would be one of the primary purposes of the requested CON review (or at least of the contested case hearing), the very purpose of which is to evaluate whether the change will duplicate services or have an effect on the quality of imaging services in the population.

BMH also appears to argue that the two facilities are in the same "service area" and that the fact that the relocation is within the same "service area" somehow affects whether the relocation requires CON review, but has failed to cite to anything in support. (BMH Brief at 16.) This is because no such regulation or statute exists. In fact, a service area is only defined with specific reference to the services evaluated. *See* DHEC, 2020 South Carolina Health Plan, at 4-5. Also, DHEC has generally considered geographic distance from the project, distribution, population densities, and a host of other project-specific factors to define "service area," rather than arbitrarily relying on county boundaries. *See e.g. Trident Med. Ctr., LLC d/b/a Trident Med. Center and Summerville Med. Ctr. v. SCDHEC, et al.*, Dckt. No. 17-ALJ-07-0441-CC, 2020 WL 3033191, *16 (S.C.A.L.C. May 28, 2020) (noting that DHEC found a three-county service area to be too large, but found a five to ten mile radius, at most, to be reasonable). As Belfair has demonstrated, there is a genuine issue of material fact as to whether the Port Royal and Okatie Facilities are within the same service area, let alone whether the population of Port Royal is

[1] Unable to dispel the plain language of the statute, BMH claims that "DHEC has consistently interpreted the CON Act, the CON regulation, and the South Carolina Health Plan as not requiring CON review for the relocation of an MRI Scanner," but does not cite to a single example of this allegedly "consistent interpretation." (BMH Brief at 15.) The Court should give such statements no weight or consideration.

adequately served when its sole MRI service is relocated approximately 20 miles away in Okatie. (*See* R. p. 172, Platt Aff. ¶ 11.) BMH, on the other hand, has merely speculated to the contrary, further demonstrating the need for discovery on this factual issue.

Thus, the regulatory scheme and purpose of the CON Act unambiguously provide that CONs, NADs, and written exemptions are location specific, and nothing that BMH or DHEC argues refutes this. Accordingly, the Court should reverse the ALJ's factual finding that Port Royal and Okatie Facilities are within the same service area, especially as no discovery on this issue has been allowed. Further, the Court should reverse the ALJ's finding that a "relocation" within a service area is somehow exempt from CON review. Instead, the Court should hold that the relocation requires a CON review, or, at the very least, Belfair must be given the opportunity to conduct discovery to establish factual support as to the relevant service areas.[2]

B. The "relocation" is an acquisition.

The "relocation" of the MRI is undoubtedly an acquisition, the cost of which exceeds the threshold and requires CON review, and nothing that BMH or DHEC argues challenges that conclusion. As shown in Belfair's initial brief, the project at issue here involves the acquisition of a virtually new 1.5T MRI by a brand new facility, accomplished by the acquisition of the new MRI by BMH for a different existing facility with the original intent/purpose of providing it to the new facility. Pursuant to the CON Act, a "person or health care facility [] is required to obtain a [CON] from [DHEC] before undertaking . . . [t]he acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of [$600,000]." S.C. Code Ann. §

[2] BMH also makes an underhanded attempt to assign nefarious intent to Belfair in pursuing this contested case. Belfair's intent, however, is not at issue – although it is clearly an interested party. Instead, the issue is whether BMH will be allowed to purposefully skirt CON review by splitting project costs and misleading DHEC and the public.

44-7-160(3) and (6); S.C. Code Ann. Regs. 61-15, § 102(1)(c) and (f). Thus, under the plain meaning of the statute, the project requires a CON.

In its brief, BMH further perpetrates the scheme at issue by attempting to claim that the MRI was "previously acquired" by BMH (*see* BMH Brief at 22), but again ignores the fact that, by their own submissions, ***BMH acquired the MRI just a few months prior with the express purpose of placing it at the Okatie Facility, not to replace the MRI at the Port Royal Facility***. There was no separate "acquisition" and then "relocation." BMH only ever planned one project – the acquisition of a new MRI for the new facility. In addition, BMH's contention that the challenge is somehow untimely is equally obtuse. As Belfair has demonstrated, Belfair had no basis to challenge the first NAD because the NAD was a sham perpetrated to avoid CON review. The first NAD only requested replacement of the MRI ***at the Port Royal facility***, a sham project that, had it been a legitimate request just to replace the MRI at that facility, Belfair would not challenge. The issue arose when the impermissible cost splitting took place – when BMH executed their ultimate plan to place the brand new MRI at Okatie. Thus, there can be no issue of timeliness.

Further, the new Okatie facility acquired the MRI, whether it was purchased or given by BMH. BMH claims that to require a CON for this relocation would render S.C. Code Ann. Regs. 61-15 § 105(1)(a) meaningless. This interpretation is nonsensical. Section 105(1)(a), on its face, applies to the "[r]eplacement of like equipment with similar capabilities," when the replacement is actually a replacement (intended to remain in place) and not an attempt to circumvent CON review. That is simply not the case here, as only became evident when BMH submitted the second NAD.

Finally, DHEC attempts to twist the meaning of "acquisition" into something more specific than what it is. DHEC distorts the definition of "acquisition" in Black's Law Dictionary, failing

to cite the full definition. The full definition is: "The process by which one gains knowledge or learns a skill []. 2. The gaining of possession or control over something; esp., the act of getting land, power, money, etc. []. 3. Something acquired; esp., something one has obtained by buying it or **being given it** []." Black's Law Dictionary (11th ed. 2019) (emphasis added). In doing so, DHEC ignores the simple fact that an acquisition need not be a purchase. The argument that Okatie could somehow possess the MRI without acquiring it is nonsensical. It is unclear why DHEC, charged with upholding the CON Act, avoids the conclusion that CON review is required when the brand new facility and imaging center in Okatie was coming into possession / control of the virtually new MRI, and therefore acquired it.

For all of these reasons, the project at issue is the acquisition of the brand new $1,200,000 MRI at a brand new facility and therefore required CON review.

C. The project is an expenditure over $2,000,000.

The project at issue (development of a brand new imaging center) also constitutes an expenditure on behalf of a health care facility that exceeds the regulatory threshold and so requires a CON. The CON Act provides, in relevant part, a "person or health care facility [] is required to obtain a [CON] from [DHEC] before undertaking . . . [a]n expenditure by or on behalf of a health care facility in excess of []$2,000,000." S.C. Code Ann. § 44-7-160(3) and (6); S.C. Code Ann. Regs. 61-15, § 102(1)(c) and (f). Under the definition of total project costs, the expenditure at issue includes, at a minimum, the value of the MRI, the cost to move it, the costs involved in preparing the new facility for the MRI, and the costs for the rest of the imaging equipment and build out. Although Belfair has been unjustly denied the right to seek discovery on this matter, it appears as though these total project costs well exceed the $2,000,000 threshold in the regulation. (*See* R. p. 171, Platt Aff. ¶ 10.)

BMH and DHEC argue that the project is not an "expenditure by or on behalf of a health care facility," but fail to acknowledge the obvious – BMH ***is a health care facility***, and BMH is the one requesting the NADs and completing the project.[3] Moreover, BMH inexplicably argues that Belfair's allegations regarding the total project cost are conjecture. (BMH Brief at 18.) BMH is correct that Belfair does not have the exact figures, because Belfair was denied the right to conduct discovery to discover, investigate, and evaluate the actual costs. This argument only highlights the need for discovery and the error in prematurely dismissing this action.

Whether the project is an acquisition or expenditure (or both), there is a clear dispute of fact as to the actual total project costs of the project proposed by BMH. The project cost goes to the heart of whether a CON review is required, and the ALC erred in dismissing this case without evaluating those costs based on actual evidence. Accordingly, the Court should vacate the Final Order, deny the motion to dismiss, or, at the very least, permit Belfair the opportunity to conduct discovery before ruling on summary judgment. The Final Order granting the drastic remedy of summary judgment cannot stand when Belfair has demonstrated far more than a scintilla of evidence to support its claims and has been denied the opportunity to seek discovery on the issues the ALC has claimed are not in dispute. To the contrary, the project costs involved are very much disputed, and summary judgment was improper.

IV. THE FACILITIES AT ISSUE ARE "HEALTH CARE FACILITIES" UNDER THE APPLICABLE CODE AND REGULATIONS.

Finally, as demonstrated in Belfair's initial brief, both the Okatie and Port Royal Facilities are "health care facilities" as defined in the CON Act and accompanying regulations. Both facilities, according to BMH's website, provide rehabilitation facilities and radiation therapy and therefore qualify as "health care facilities" pursuant to S.C. Code Ann. § 44-7-130(10).

[3] BMH and DHEC do not challenge the classification of BMH as a "health care facility".

Neither BMH nor DHEC provide any substantive argument opposing the classification of the facilities as rehabilitation facilities that also provide radiation therapy. Instead, both appear to generally classify the Facilities as "physician's offices" (DHEC Brief at 7,) or "medical office buildings" (BMH Brief at 14,) without any citation or other explanation. The lack of response is telling. Moreover, even if they did contest that the facilities are rehabilitation facilities and that they provide radiation therapy, it would only further highlight the need for discovery.

Accordingly, the Court should accept that these Facilities are "health care facilities" as defined in the CON Act, or, at the very least, allow discovery to determine the nature of the facilities.

V. THE ALC HAD SUBJECT MATTER JURISDICTION OVER THIS CASE.

As the ALC correctly concluded, the ALC had jurisdiction over this matter because the ALC has jurisdiction over contested case hearings challenging final agency decisions, including those challenging the applicability of CON review. *See* S.C. Code Ann. §§ 1-23-600(A)-(D); § 44-1-60(F). As relevant here, any staff decision from DHEC "involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of [DHEC]," gives rise to a contested case. S.C. Code Ann. § 44-1-60(A) and (C). CONs, written exemptions, and "any issuance of a determination regarding the applicability of" a CON review may all give rise to a contested case hearing. *See id*. § 44-7-210(G). The staff decision may be challenged by an affected person within 15 days of mailing, triggering a final review by the Board. *Id*. § 44-1-60(E)(2). Where the Board declines to hold a final review conference, an affected person "may file a request with the [ALC] for a contested case hearing within thirty calendar days after [] notice is mailed ... that the board declined to hold a final review conference." *Id*. § 44-1-60(G)(1).

Here, each of the necessary steps has occurred. BMH submitted a request for an NAD. On

July 1, 2020, DHEC issued an NAD, which constitutes a formal, written decision from DHEC. (R. pp. 202-203, NA-20-04, attached to Belfair's Resp. to Mot. to Dismiss as Ex. E.) Just six days later, on July 7, 2020, Belfair filed a request for final review. (R. pp. 205-222, Request for Final Review, attached to Belfair's Resp. to Mot. to Dismiss as Ex. F.) On August 12, 2020, the DHEC Board formally declined to hold a final review conference. (R. pp. 224-225, Denial of Final Review, attached to Belfair's Resp. to Mot. to Dismiss as Ex. G.) In that denial, the Board noted that by denying the review, the staff response became the final agency decision and that an "affected person may request a contested case hearing before the [ALC] within thirty calendar days after notice is mailed." (*Id.*) On September 9, 2020, less than 30 days later, Belfair filed a request with the ALC for a contested case hearing. (R. pp. 227-249, Request for Contested Case Hearing, attached to Belfair's Mot. to Dismiss as Ex. H.) Thus, under the APA, the ALC has jurisdiction over this contested case hearing.

In its brief, BMH contradicts its own previous action of ***requesting*** an NAD by now claiming that it was not required to do so, and now arguing that the actual request for NAD was not really a request for NAD. This argument is flawed in several ways.

First, the mere fact that BMH sought and received an NAD precludes this argument. Whether BMH now claims they wanted it or not, BMH received a formal, written staff decision. DHEC then denied final review, finalizing the staff response as the final agency decision. Under the APA, any timely challenge to that decision belongs exclusively in front of the ALC.

Second, BMH submitted the NAD request with the clear intent of seeking a decision from DHEC. Under the regulations, "[w]hen ***any question exists***, a potential applicant shall forward a letter requesting a formal determination by [DHEC] as to the applicability of the [CON] requirements to a particular project…" S.C. Code Ann. Regs. 61-15 § 102(3) (emphasis added).

Thus, it was BMH's responsibility to decide in the first instance when they think there is a sufficient question to warrant requesting a written determination. Here, BMH made that decision and requested such a determination. Their request triggered the regulatory process requiring DHEC to consider the request and to issue a written determination.

Third, BMH clearly decided it was in its best interest to make such a request. Failure to comply with the CON regulations is grounds for DHEC to impose a variety of penalties, including monetary penalties, suspension of licenses and CONs, injunctions, and criminal charges. *Id.* § 701; S.C. Code Ann. § 44-7-320 through 44-7-340. In requesting a determination on the front end, BMH sought and received protection from an enforcement action by DHEC, monetary penalties, suspension of licenses and CONs, and criminal charges. Furthermore, as shown above, BMH was right to have a "question" as to applicability, since this project does indeed require a CON review. Further, in order to complete its original plan/scheme of placing the MRI in the new facility without CON review, BMH needed the protection of the NAD. Without the NAD, the scheme would have involved significantly more risk (the risk of penalties as opposed to the risk of being told that a proper CON review is required). Having received the protection accorded by a formal, written NAD, it is entirely disingenuous for BMH to contend now that the NAD has been challenged (and BMH's scheme was discovered), that it was not required to seek a written determination from DHEC. Indeed, such conduct is grossly inequitable and should be estopped.

In support of this contradictory argument, BMH relies exclusively on *Amisub*, 403 S.C. 576, 743 S.E.2d 786. That case, however, clearly explains that the ALC ***has*** jurisdiction over a contested case based on a final decision from DHEC, whether an NAD or CON, but only where a final written decision has been provided. *Id.* In *Amisub*, the petitioner had requested that DHEC require the respondent to submit a request for an NAD or a CON application on a specific project,

but DHEC declined to require such an application. *Id.* at 580, 743 S.E.2d at 788. The petitioner requested a contested case hearing to challenge the validity of DHEC's ***refusal to issue a written determination*** in response to the petitioner's request. *Id.* at 581, 743 S.E.2d at 789. Thus, the petitioner attempted to challenge the fact that DHEC failed to make any final agency decision in writing. *Id.* The court reasoned that since no written final agency existed to contest, and since a competitor cannot create such a determination by asking DHEC to review a competitor's project, there was no agency action to dispute and thus, no jurisdiction. *Id.* at 596, 743 S.E. 2d at 797.[4]

Here, on the other hand, BMH requested and was granted a decision as to the applicability of a CON review. To be clear, once BMH requested a determination under § 102(3), nothing in the CON statute or regulations permitted DHEC ignore the request. Belfair only challenged that decision once it had been made and had been reduced to a formal, written determination. The DHEC Board confirmed that decision by denying a final review conference and expressly stating that written staff decision became "the final agency decision" in the matter. Under the regulations, as *Amisub* correctly explained, DHEC is required "to issue a final determination to [a party that requests one] regarding whether or not a CON is necessary for a proposed project." 403 S.C. at 590, 743 S.E.2d at 794; *see also id.* at 596, 743 S.E.2d at 798 ("[W]here there is a CON, a NAD, or an exemption for which written approval is required, a formal decision emanates from DHEC for which a contested case proceeding is provided by law."); *A.O. Smith Corp. v. SCDHEC*, 428 S.C. 189, 199, 833 S.E.2d 451, 457 (S.C. Ct. App. 2019) (quotations and citations omitted) ("The ALC is authorized to make a final determination—after a final agency decision. . ."); *Medical University Hops. Auth. v. SCDHEC*, No. Dkt. 18-ALJ-17-0172-CC, 2019 WL 183991, at *9 (S.C.A.L.C. Jan. 4, 2019) (holding the ALC has jurisdiction over a decision extending a CON

[4] It is noteworthy that the court in *Amisub* was interpreting the prior version of the relevant regulations, prior to the significant re-write promulgated in 2012.

because in addition to authority under S.C. Code. § 44-7-210, the ALC has jurisdiction over "other actions of [DHEC] which may give rise to a contested case hearing" (citing § 44-1-60)). Once a final decision is given and a request for a contested case hearing is timely filed, as it was here, the ALC has jurisdiction.

For these reasons, the ALC properly exercised jurisdiction over this contested case hearing challenging the validity of DHEC's final decision finding that a CON review is not applicable to the "relocation" of the MRI at issue.

CONCLUSION

This Court should recognize BMH's actions for what they are – a blatant attempt to skirt the CON laws. Allowing this conduct would provide a roadmap for other large healthcare systems to avoid CON review on large projects – which would surely become known as the "BMH Two-Step." Smaller health care facilities would not be able to take advantage of the BMH Two-Step because the maneuver requires a second facility in an underserved location. But the BMH Two-Step would allow larger healthcare systems to add equipment (and in fact build large and expensive facilities like the one here) to saturated markets without CON review, depriving the population and other health care facilities the protections of the CON Act.

Ultimately, Belfair asks the Court to defend the integrity of the CON laws and prohibit the blatant cost-splitting measures and deception implemented by BMH. Belfair asks that the Court not render the CON process meaningless. For the foregoing reasons and any others in the record or presented in any other briefing, or at a hearing, if any, Appellant Belfair respectfully submits that the Final Order granting dismissal in favor of Respondents should be REVERSED, and the Court should direct the ALC to remand the issue to DHEC to conduct CON review, or in the alternative, permit Belfair the opportunity to conduct discovery.

Respectfully submitted,

Dated: January 26, 2022

*/s/ A. Victor Rawl, Jr.*_____

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Court Judge

Case No. 2021-000617

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair .....Appellant,

v.

South Carolina Department of Health
and Environment Control and
Beaufort Memorial Hospital .....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Dated: January 26, 2022

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