

IN THE SUPREME COURT OF MISSISSIPPI

HTC HEALTHCARE II, INC.

APPELLANT

VS.

NO. 2007-SA-01086

**MISSISSIPPI STATE DEPARTMENT OF
HEALTH and GEORGE COUNTY HOSPITAL**

APPELLEES

**JOINT BRIEF OF APPELLEES
MISSISSIPPI STATE DEPARTMENT OF HEALTH AND
GEORGE COUNTY HOSPITAL**

**APPEAL FROM DECISION OF THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY**

ORAL ARGUMENT NOT REQUESTED

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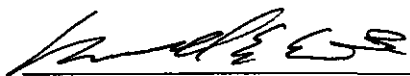
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. HTC Healthcare, II, Inc. (Appellant).
2. H. Ted Cain, President of HTC Healthcare, II, Inc.
3. Thomas L. Kirkland, Jr., Allison C. Simpson, Esq., and Andy Lowry, Esq., of Copeland, Cook, Taylor & Bush, P.A., counsel for Appellant.
4. Mississippi State Department of Health (Appellee).
5. Donald E. Eicher, III, Esq., counsel for the Mississippi State Department of Health.
6. George County Hospital (Appellee).
7. Barry K. Cockrell, Esq. of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, counsel for George County Hospital.
8. David W. Scott, Esq. (Hearing Officer).
9. Ricky Lee Boggan, Esq. (Hearing Officer).
10. The Honorable Patricia D. Wise, Chancellor.


Respectfully submitted,



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Respectfully submitted,



Barry K. Cockrell
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STATEMENT OF THE ISSUES

The following issues are presented in this appeal:

1. Whether there is substantial evidence to support the Department of Health's findings and decision regarding George County Hospital's Medicaid per diem rate?
2. Whether there is substantial evidence to support the Department of Health's findings and decision regarding George County Hospital's construction costs?

I. INTRODUCTION

This Joint Brief is submitted by the Appellees, the Mississippi State Department of Health (the "Department") and George County Hospital ("GCH") in the above-styled appeal filed by HTC Healthcare II, Inc. ("HTC"). On the basis of the following arguments and authorities, the Department and GCH respectfully request this Court to affirm the Final Judgment of the Chancery Court, which upheld the Department's decision to issue a certificate of need ("CON") to GCH for the establishment of a 60-bed nursing home in George County.

II. STATEMENT OF THE CASE

A. Summary of Proceedings

This proceeding involves the comparative review of three (3) competing CON applications for the construction of a 60-bed nursing facility in George County, Mississippi. In 1999, the Mississippi Legislature authorized the Mississippi State Department of Health to issue certificates of need over the course of four (4) fiscal years for the construction or expansion of nursing facility beds in each county in the State having a need for fifty (50) or more nursing facility beds, as shown in the *Fiscal Year 1999 State Health Plan*. George County was one of the six counties authorized for additional beds during the year 2003. (Appellees' Record Excerpts, Tab 1); (Exh. 3).¹

It is undisputed that there is a need for 60 nursing facility beds in George County. (T:29-30). However, the Department could award only a single certificate of need for the establishment of a 60-bed nursing facility in that county. Accordingly, the Department staff utilized a comparative review process for the review and evaluation of the competing

¹ In this Brief, Hearing Exhibits in the administrative hearing before the Department will be cited as "Exh.____." The transcript of administrative hearing testimony will be cited as "T.____." The Clerk's Papers will be cited as "C.P." and to the volume and page number.

applications. According to Ms. Rachel Pittman, Chief of the Division of Health Planning and Resource Development, the Department staff used the identical process in evaluating more than 100 CON applications filed for nursing facilities over the four-year period. (T:24; 28).

In order to conduct a comparative analysis of the competing applications, the Department staff consistently applied the same comparative review criteria. These criteria are described in the *Mississippi Certificate of Need Review Manual* (the "CON Manual") as follows:

Competing Applications: The factors which influence the outcome of competition on the supply of health services being reviewed. Determination will be made that the entity approved is the most appropriate applicant for providing the proposed health care facility or service. Such determination may be established from the material submitted as to the ability of the person, directly or indirectly, to render adequate service to the public. Additional consideration may be given to how well the proposed provider can meet the criteria of need, access, relationship to existing health care system, availability of resources, and financial feasibility. **In addition, the Department may use a variety of statistical methodologies, including but not limited to, "market share analysis," patient origin data, and state agency reports. In the matter of competing applications for nursing facility beds, the Department will conduct a comparative analysis and make a determination based upon a ranking of all competing applications according to the following factors: size of facility; capital expenditure; cost per square foot; cost per bed; staffing; medicare utilization; total cost to medicaid; per diem cost to medicaid; and continuum of care services. Each factor shall be assigned an equal weight. The application obtaining the lowest composite score in the ranking will be considered the most appropriate application.**

CON Manual at 62 (emphasis added). (Exh.7). These comparative review criteria were applied to all of the competing applications for nursing facility CONs, and were used in the comparative analysis of the three applications submitted for a nursing facility in George County.

According to Ms. Pittman, these comparative review criteria were developed to encourage applicants to submit the **most cost-effective proposal possible**. (T:31-32). One of the primary goals of health planning in the State of Mississippi is cost containment. (T:31).

Consequently, one of the Department staff's priorities in reviewing the competing applications was the cost effectiveness of the proposal being submitted. (T:31). Thus, the Department staff **favoring applicants proposing to use existing health care facility space** for the proposed nursing facilities, in order to achieve greater cost containment. (T:32).

On June 1, 2002, three (3) applications were filed for the construction of a 60-bed nursing facility in George County. The applicants included George County Hospital ("GCH"), a non-profit community hospital owned by George County, Mississippi; HTC Healthcare II, Inc. ("HTC"), a Mississippi proprietary corporation; and Delco, Inc. ("Delco"), a Mississippi proprietary corporation which currently owns a 60-bed nursing home in George County. The Department staff deemed these proposals to be competing applications, and conducted a comparative analysis of the applications, based on the established comparative review criteria.

Upon conducting its comparative analysis of the three (3) competing applications, the Department staff determined that GCH obtained the lowest composite score, based on the designated review factors. Specifically, GCH obtained a composite score of 11, while HTC received a score of 13, and Delco a score of 24. The comparative analysis conducted on the applications by the Department staff is reflected on Attachment II to the Staff Analysis on the GCH application. (Appellees' Record Excerpts, Tab 1); (Exh. 3). Accordingly, the Department staff recommended approval of the CON application submitted by George County Hospital. This recommendation precluded the approval of the two other applications.

As authorized by *Miss. Code Ann.* § 41-7-197 and the *CON Manual*, HTC requested a public hearing during the course of review on the GCH application, and the hearing was conducted on September 28, 2004, and October 22, 2004. During the course of the hearing, testimony and exhibits were offered by both parties. After reviewing and evaluating all of the evidence presented on February 14, 2005, the Hearing Officer adopted the Findings of Fact and

Conclusions of Law submitted by GCH, and recommended approval of the project.
(Administrative Hearing Binder No. 2).

On February 24, 2005, the State Health Officer announced his decision on the issuance of the CON for a 60-bed nursing home in George County, and concurred with both the Department staff and the Hearing Officer that the CON should be awarded to George County Hospital. (Administrative Hearing Binder No. 2). Accordingly, the Department of Health, in a Final Order entered on February 24, 2005, approved GCH's application. (Administrative Hearing Binder No. 2).

Pursuant to *Miss. Code Ann.* § 41-7-201, on March 16, 2005, HTC appealed the Department's Final Order to the Chancery Court of the First Judicial District of Hinds County. Following the submission of briefs and oral argument by counsel, on June 20, 2005, the Honorable Patricia D. Wise, Chancellor of Hinds County, entered an Order and Opinion of the Court in the appeal. (Appellant's Record Excerpts, Tab B); (C.P., Vol.1, pp.90-98).

In the Order, the Court affirmed the Department's decision to grant the CON to GCH in all respects, with the exception of cost to Medicaid (one year). With regard to this issue, the Court noted potential conflicting testimony with respect to personnel costs. *Order and Opinion* at p.4. Since the personnel costs had an impact on cost to Medicaid, the Court found that the Department could not say with certainty whether GCH should have received two (2) points or three (3) points on the criterion of first-year costs to Medicaid. *Id.* at p.5. Accordingly, the Court remanded the matter to the Department for further proceedings on the single issue of first-year costs to Medicaid, and directed the Department to "determine the accurate dollar amount and assess points accordingly." *Order and Opinion* at p.5.

In response to the Court's Order, the Department conducted an administrative hearing on October 24, 2006. At the commencement of the hearing, the Hearing Officer and all counsel of

record agreed that the only issue to be addressed at the hearing concerned one-year costs to Medicaid and calculations relating to the determination of that cost. (Remand Transcript, p.4).

The administrative hearing following remand was completed and closed on October 24, 2006. Following a review and consideration of the evidence presented, as well as arguments of counsel, on December 18, 2006, the Hearing Officer issued his Findings of Fact, Conclusions of Law and Recommendations with respect to the issue presented on remand. (Administrative Record Binder No. 2). In these Findings and Conclusions, the Hearing Officer concluded that GCH and the Department staff properly determined GCH's first-year costs to Medicaid. (Administrative Record Binder No. 2). Consequently, the Hearing Officer concurred with the Department staff, and recommended that the CON for a 60-bed nursing home in George County be awarded to George County Hospital. (Administrative Record Binder No. 2).

In an Administrative Order dated December 21, 2006, the State Health Officer concurred with the Hearing Officer's recommendation, and determined that the CON issued to George County Hospital remained valid. (Administrative Record Binder No. 2). On January 9, 2007, the Department of Health certified these additional administrative proceedings to the Chancery Court by filing the administrative materials, as well as the hearing transcript on remand. (C.P., Vol.1, pp.128-129).

On May 2, 2007, the Chancery Court heard oral argument on the issue involved in the additional administrative proceedings before the Department on remand. (C.P., Vol.3, pp.46-62). On June 4, 2007, the Chancery Court entered its Final Judgment, in which the Court determined as follows:

The Court, having reviewed and considered this administrative record and having heard and considered arguments of all counsel, finds and determines that the Department of Health's decision to issue a CON to George County Hospital for a 60-bed nursing home in George County should be affirmed in all respects. The Department of Health's decision is supported by substantial

evidence, and is not arbitrary or capricious. Further, the Court finds that there are no grounds to reverse or vacate the final order of the Department, as set forth in *Miss. Code Ann.* § 41-7-201.

(Appellant's Record Excerpts, Tab C); (C.P., Vol.2, pp.148-149).

On June 27, 2007, HTC appealed the Chancery Court's Final Judgment to this Court.

B. Statement of Facts

As discussed below, HTC's arguments in this appeal consist solely of re-debating the facts and evidence in the administrative proceedings before the Department of Health. Consequently, it is important to review these facts in the context of the appeal issues raised by HTC.

First, HTC contends that George County Hospital's Medicaid per diem rate is understated, because, as a county-owned hospital, it would qualify for participation in the Medicaid Upper Payment Limit (UPL) Program, which would allow the Hospital to receive additional Medicaid reimbursement for nursing home services. However, this contention is without merit.

Paul Gardner testified that at the time the certificate of need application was submitted, the Medicaid UPL program was not in place. (T:150-152). As a result, the Hospital did not address Medicaid UPL reimbursement in its per diem rate, and should not be penalized for subsequent regulatory changes which became effective after the date the CON application was submitted. (T:150-152).

In any event, the best answer to this question may be found in calculations provided by the Mississippi State Division of Medicaid ("DOM"), which is the official agency charged with administering the State Medicaid Program. **DOM itself projected the Medicaid per diem for each of the three applicants.** These Medicaid per diem calculations are reflected in the Staff

Analysis of each applicant. According to DOM, the projected Medicaid per diem rate for each of the competing applicants is as follows:

<u>Applicant</u>	<u>Medicaid Per Diem Rate Projected by Division of Medicaid</u>
Delco/Glen Oaks	\$102.95
George County Hospital	109.55
HTC	110.62

(Appellees' Record Excerpts, Tabs 1, 2 and 3); (Exh.3 at p.8; Exh.4 at p.8; Exh.5 at p.8).

These projections show that the Division of Medicaid itself estimated that George County Hospital would have a lower Medicaid per diem rate than HTC. Although the per diem rates projected by the Division of Medicaid for all competitors were higher than those projected by the applicants themselves, the fact remains that George County Hospital's Medicaid per diem rate was lower than HTC's.

In addition to the Medicaid per diem rate, HTC also challenges the Department of Health's allocation of points in the following areas: (1) size (square feet); (2) capital expenditure and cost per bed; and (3) cost per square foot (total cost). The Department of Health and George County Hospital will review the facts in the record in response to each of these points.

(1) Size (Square Feet)

HTC correctly notes that the George County Hospital nursing facility will encompass a total of 25,307 square feet, consisting of 7,487 square feet of new construction and 12,276 square feet of space in the existing hospital. Moreover, GCH will use an additional 5,544 square feet of space from within other areas of the Hospital for various types of administrative and support space. HTC argues that "GCH should not be allowed to arbitrarily choose a percentage and simply say its nursing facility will share additional space in common areas of the hospital."

Appellant's Brief at p.14.

This argument may be summarily rejected because it is undisputed that even if George County Hospital's total square footage were strictly confined to new construction and the renovated area of the Hospital specifically dedicated to resident care, as shown on Exhibit 12, **George County Hospital would still have the largest size in terms of square footage.**

Additionally, there is substantial and credible testimony in the record to support George County Hospital's decision to allocate other areas of the Hospital for use in conjunction with the nursing home. During his testimony, Paul Gardner, the Administrator of George County Hospital, explained in detail how the Hospital allocated the space within the Hospital for purposes of nursing home use. He stated that GCH took the square footage associated in the dining and kitchen areas, along with medical records and administrative space. (T:126-27). Additionally, the Hospital has a purchasing building for materials management. (T:127). Mr. Gardner added together these areas that would have a direct relationship with and a direct responsibility to the nursing home, and they totaled approximately 40,000 square feet. (T:127). The Hospital then allocated approximately 25% of that square footage to be attributed to the nursing home project. (T:127). Mr. Gardner viewed this as a conservative estimate. (T:127).

(2) Capital Expenditure and Cost Per Bed

Next, HTC makes various allegations concerning the total capital expenditure proposed by George County Hospital. Specifically, HTC suggests that George County Hospital failed to include adequate costs for renovation. For example, HTC notes that the Hospital would have to install a sprinkler system at a cost of approximately \$20,000 to \$25,000. Additionally, HTC alleges that George County Hospital's proposal did not provide for adequate space to meet nursing home licensure requirements, including special care rooms; an adequate number of activity rooms, space for a social service office or administrator's office; and day room space.

HTC also contends that George County Hospital failed to include the cost of implementing a nurse call system and fire system.

During his rebuttal testimony, Paul Gardner addressed in detail each of the points raised by HTC with respect to the use of various areas in the Hospital for the nursing facility. He stated that two of the private rooms in the existing part of the Hospital would be dedicated for special care. (T:234). The Hospital deals with isolation every day, and two of the existing Hospital rooms would be designed as isolation rooms. (T:234-35).

Mr. Gardner also testified that available rooms within the Hospital would be used as a utility room and for other purposes in caring and treating for the nursing home residents. (T:235). Additionally, the Hospital has areas available for a dedicated waiting area, lobby areas, activities and day room, and plenty of other space for patients and the members of their family to meet. (T:235). Social services and utilization personnel are already located in the Hospital and they will also be providing those services for nursing home residents. (T:236).

With regard to questions raised by Mr. Cain concerning an administrator's office, Paul Gardner testified that this office would be located within the Hospital building that would include the nursing home. (T:236-37). Accordingly, this arrangement is in compliance with the regulations of the Mississippi State Board of Nursing Home Administrators, which require the offices of the nursing home administrator to be in the nursing facility. (Exh. 23).

Another area addressed by both Paul Gardner and Charles Gardner, the architect for GCH, concerns the sprinkler system. Paul Gardner testified that in 2000, the Hospital completed a 25,000 square foot addition to the facility. (T:237). That area was required to be sprinkled. Mr. Gardner noted that the Hospital plans to sprinkle the other remaining 30,000 square feet of the old existing hospital building, regardless of whether GCH receives a CON for the nursing

facility. (T:237-238). In any event, Charles Gardner verified that the total cost of adding a sprinkler system to the nursing facility area would be only \$25,000. (T:172).

Paul Gardner also discussed the Hospital's plans for a nurse call system within the nursing facility. Mr. Gardner confirmed that the Hospital's existing nurse call system can be expanded into the new nursing facility area, and that was taken into account in projecting the cost of the project. (T:238). The same would apply to the proposed fire alarm system for the new nursing facility area. (T:238).

The final area has to do with various Life Safety Code issues, including firewalls and double egress doors. Mr. Gardner explained that his Hospital staff is very familiar with those requirements and deal with the State regularly on those issues. (T:239). He confirmed that the Hospital's CON application addresses all Life Safety Code issues, and will be in full compliance with the applicable regulations. (T:239-240).

(3) Cost Per Square Foot (Total Cost)

HTC contends that the Department of Health staff did not properly calculate cost per square foot in reviewing these applications. Specifically, HTC questioned both the manner of calculation, as well as the resulting cost per square foot proposed by George County Hospital.

In explaining the Department staff's calculation of cost per square foot for the GCH proposal, Ms. Pittman testified that the staff started with GCH's proposed total capital expenditure of \$369,000, and deducted non-fixed equipment cost of \$15,000.00. (T:35-36). This resulted in a total construction cost figure of \$354,000. The Department staff then divided \$354,000 by 25,370 square feet, which is the amount of space proposed to be utilized for the nursing facility (both existing and new construction). (T:35-36). The result is a cost per square foot of \$13.99. (T:36). **Ms. Pittman testified that the Department staff used this methodology in order to give credit to an applicant proposing to use existing, already built**

space for the proposed nursing facility which, as previously discussed, was one of the cost containment approaches encouraged by the Department. (T:35-37).

Another issue raised by HTC concerns a comparison of GCH's proposed cost per square foot to the construction costs reflected in the *Means Construction Cost Data* book. Ms. Pittman testified, however, that the *Means Construction Cost Data* does not take into account a situation such as that presented in this case, in which a nursing home proposal involves both new construction and use of existing space. (T:90-91). It is true that George County Hospital's estimated cost per square foot of \$13.99 is much lower than the estimated costs shown in the *Means Construction Cost Data*. However, that is a direct result of the previously discussed method used by the Department staff in determining cost per square foot with regard to these competing applications.

Additionally, George County Hospital presented substantial evidence in support of the reasonableness of its projected cost for new construction. Mr. Charles Gardner, a licensed architect who assisted in the formation of the construction costs for the GCH proposal, testified that the Hospital's estimated new construction cost of approximately \$42.00 a square foot was reasonable and achievable. (T:159-161). He pointed to a number of factors that would contribute to relatively low new construction costs, such as the flat site, good soil conditions, simple one-story construction, and other factors. (T:157-160). As Paul Gardner, the Hospital Administrator pointed out, the Hospital's estimated new construction cost is actually slightly higher than HTC's calculation. (T:115). Paul Gardner noted that the Hospital planned to save considerable money by acting as its own construction manager and by doing a significant amount of the construction work in-house. (T:115). He further noted that the Hospital's new construction cost per square foot was comparable to projections submitted by other applicants for nursing home CONs. (T:144-146).

III. SUMMARY OF THE ARGUMENT

In certificate of need appeals, the scope of judicial review is narrow and limited. On numerous occasions, this Court has held that the Department of Health's decision should be upheld where it is supported by substantial evidence and is not arbitrary and capricious. In addition, this Court has emphasized that a reviewing court may not substitute its judgment for that of the Department of Health.

Nevertheless, in this appeal, HTC is requesting this Court to do precisely that. In its Brief, HTC seeks to have this Court act as a fact-finder, and to ignore the substantial evidence introduced by George County Hospital during the administrative hearing. HTC wants the Court to make findings on the evidence presented in the light most favorable to HTC, despite the fact that there is substantial and credible evidence in the record to support the Department of Health's determination that the CON should be awarded to George County Hospital. HTC's arguments are directly contrary to well-established principles of judicial review.

Additionally, the specific arguments advanced by HTC are equally flawed. In each instance, HTC simply ignores the evidence in the record that supports the Department's decision.

First, there is substantial evidence to show that the Department properly allocated points for Medicaid costs. HTC contends that GCH's Medicaid per diem rate is understated because, as a county-owned hospital, it would qualify for participation in the Medicaid Upper Payment Limit ("UPL") Program. However, at the time the CON application was submitted, the Medicaid UPL Program was not in place. **More significantly, the Mississippi State Division of Medicaid ("DOM"), which is the official agency charged with administering the State Medicaid Program, calculated the Medicaid per diem for each of the three competing applicants. These projections from DOM itself demonstrate that George County Hospital would have a**

lower Medicaid per diem rate than HTC. Accordingly, there is no basis for HTC's contention that GCH's Medicaid per diem would significantly exceed the Medicaid rate of HTC.

HTC's other argument is that there was not substantial evidence to support the Department's findings regarding GCH's construction costs. This argument consists of several components.

First, HTC contends that George County Hospital should not have been allowed to "arbitrarily" choose a percentage of existing space within the Hospital, and say that its nursing facility will share these common areas. This argument may be summarily rejected because it is undisputed that even if George County Hospital's total square footage were strictly confined to new construction in the renovated area of the Hospital specifically dedicated to patient care, George County Hospital would still have the largest size in terms of square footage. Thus, even if the other areas of shared space within the Hospital are ignored, George County Hospital still wins this point.

Additionally, there is substantial and credible evidence in the record to support George County Hospital's decision to allocate other areas of the Hospital for use in conjunction with the nursing home. One of the Department of Health's objections during this process was to encourage the use of existing health facility space, in order to achieve cost containment. It is perfectly reasonable for George County Hospital to allocate a small percentage of its existing administrative and support space for use by the nursing home. It was within the clear administrative discretion of the Department of Health to accept this information as reasonable and appropriate.

Next, HTC contends that George County Hospital's capital expenditure is under-stated, in that it did not provide for adequate space to meet nursing home licensure requirements. However, testimony by Paul Gardner, the Administrator of George County Hospital, and Charles

Gardner, the independent architect retained by the Hospital for the project, both substantiate the use of various areas of the Hospital for the proposed nursing facility, and that these areas are in compliance with the applicable licensure regulations.

HTC further contends that the Department of Health did not properly calculate costs per square foot in reviewing these applications. This contention is also without merit. Ms. Pittman testified that the Department staff used a methodology in order to give credit to an applicant proposing to use existing, already-built space for the proposed nursing facility. This method is not only reasonable, but also is consistent with the *State Health Plan's* stated policy of giving priority to cost-effective proposals.

HTC also argues that the Department should have used a different formula in determining George County Hospital's cost per square foot. However, there is nothing in any CON regulation which mandates the use of the formula proposed by HTC. In prior certificate of need decisions, the Supreme Court of Mississippi has made it clear that the methodologies utilized by the Department of Health in reviewing certificate of need applications are not "carved in granite." Instead, the Department staff is accorded flexibility, subject to the requirement that the tools and approaches used by the Department cannot be arbitrary or capricious. In this instance, the Department staff's method for calculating costs per square foot is not only reasonable, but perfectly consistent with its stated goal of encouraging cost-effective proposals which take advantage of the use of existing, but unused health care facility space.

George County Hospital presented substantial evidence in support of the reasonableness of its projected cost for construction. This included testimony by both Paul Gardner, the Hospital Administrator, and Charles Gardner, the project architect. Thus, there is substantial evidence in the record to substantiate the reasonableness of the cost proposed by George County Hospital.

Finally, HTC takes issue with the fact that the Hearing Officer adopted the proposed Findings of Fact and Conclusions of Law submitted by George County Hospital. This is a standard practice in CON hearings, and is perfectly appropriate. Moreover, even if the Court employs a “heightened” standard of review in this appeal, the result is the same: There is substantial evidence in the record to support the Department of Health’s decision.

On the basis of the substantial evidence which supports the Department of Health’s decision, as well as a long line of decisions issued by this Court, the Chancery Court’s Final Judgment should be affirmed.

IV. ARGUMENT

A. The Scope of Judicial Review in Certificate of Need Appeals is Narrow and Limited.

On numerous occasions, this Court has delineated the scope of judicial review in certificate of need appeals. As stated in *St. Dominic Jackson Memorial Hospital v. Mississippi State Department of Health*, 728 So. 2d 81, 83 (Miss. 1998), the State Health Officer’s granting of a certificate of need is subject to judicial review, but it:

shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the Court finds that the order . . . is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the . . . Department . . ., or violates any vested constitutional rights of any part involved in the appeal.

St. Dominic, 728 So. 2d at 83 (citing *Magnolia Hospital v. Mississippi Department of Health*, 559 So. 2d 1042, 1044 (Miss. 1990); *Miss. Code Ann* § 41-7-201(4) (Supp. 2000); see also *Mississippi State Department of Health v. Mississippi Baptist Med. Ctr.*, 663 So. 2d 563, 573 (Miss. 1995).

Similarly, in *Grant Center Hospital of Mississippi v. Health Group of Jackson, Mississippi, Inc.*, 528 So. 2d 804, 808 (Miss. 1988), the Court established clear limitations on judicial review of CON decisions by the Department of Health:

These restrictions put two hotly disputed points **outside our authority**. These are (1) **whether there is a need** for additional beds for psychiatric care of children and adolescents and (2) which applicant, all things considered, is best able to fulfill that need

Grant Center, 528 So. 2d at 808 (emphasis added). This Court has consistently emphasized that it is beyond the legal authority of a reviewing court to determine **whether there is a need** for a given health service by an applicant seeking a certificate of need. Instead, the role of the Court is to determine whether there is substantial evidence to support the Department of Health's decision. *Jeff Anderson Regional Medical Center v. Mississippi State Department of Health*, 798 So. 2d 1264, 1266 (Miss. 2001).

It is well-settled that the "[d]ecisions of administrative agencies are given great deference." *Jackson HMA, Inc. v. Mississippi State Department of Health*, 822 So.2d 968, 970 (Miss. 2002). In these appeals, the "burden of proof rests on the challenging party to prove that [the Department of Health] erred." *Id.*

In the decision of *Attala County Board of Supervisors v. Mississippi State Department of Health*, 867 So.2d 1019 (Miss. 2004), this Court again emphasized the standards of judicial review when an appeal is taken from a Final Order of the Mississippi State Department of Health:

The decision rendered by the hearing officer and the SHO [State Health Officer] is "afforded great deference upon judicial review by the court, even though we review the decision of the chancellor." . . .

There is a rebuttable presumption in favor of the decision rendered by an agency. . . . "[T]he burden of proving to the contrary is on the challenging party." . . . This Court, as well as, chancery and

circuit courts, cannot “substitute its judgment for that of the agency or reweigh the facts of the case.” . . .

Our constitution does not allow for the courts to conduct a de novo retrial of matters on appeal from administrative agencies. . . . The judiciary is not permitted to make administrative decisions. . . . Therefore, this Court has recognized the strict limitation set out in Miss. Code Ann. § 41-7-201(2)(f) for appellate review in our courts as to decisions of the SHO and the MSDH.

867 So.2d at 1023-35 (citations omitted).

The *Attala County Board of Supervisors* decision is particularly significant to this appeal, because the Court in that case addressed the appeal of a CON awarded during a similar comparative review process concerning the establishment of a 60-bed nursing facility. In affirming the decision of the Chancery Court, which had affirmed the Department of Health’s decision to award a CON to Garry V. Hughes, this Court specifically addressed the Department’s use of this same comparative review methodology. The Court held that the methodology utilized by the Department staff in its comparative review of the competing CON applications was not arbitrary or capricious. Further, the Court noted that in previous certificate of need cases, it has emphasized the flexibility and discretion vested in the Department of Health in conducting CON review:

The methodology used in any given case should not be carved in granite; instead, some flexibility is required. It is prudent to utilize a methodology that will accommodate the various and sundry circumstances found in each individual case.

867 So.2d at 1024, quoting *HTI Health Services of Mississippi, Inc. v. Mississippi State Department of Health*, 603 So.2d 848, 853 (Miss. 1992).

In the same decision, the Court noted that an administrative agency’s decision is deemed to be arbitrary “when it is not done according to reason and judgment, but depending on will alone.” 867 So.2d at 1024, quoting *Mississippi State Department of Health v. Natchez*

Community Hospital, 743 So.2d 973, 977 (Miss. 1999). Further, an action is defined as being capricious when it is “done without reason, in a whimsical manner.” *Id.*

In *Mississippi State Department of Health v. Rush Care, Inc.*, 882 So.2d 205 (Miss. 2004), this Court once again held that the Department of Health’s decision should be upheld where it is supported by substantial evidence and is not arbitrary and capricious, even if the Department uses an imperfect analysis in its findings. *Id.* at 210-211. The Court found that the Department’s findings were supported by substantial evidence, and that the Court should not substitute its judgment for that of the Department. *Id.* at 210.

In its Brief, HTC suggests that the Court should ignore its own established standards of judicial review, and refuse to grant deference to the administrative agency because the Department of Health purportedly ignored the “surrounding facts and controlling principles.” *Appellant’s Brief* at p.7. HTC contends that the Department took each application at face value rather than conducting an independent assessment, and that “the State Health Officer forfeited his right to the ordinary deference owed an administrative agency on appeal.” *Appellant’s Brief* at pp.4, 8.

These arguments are completely refuted by the evidence in the administrative record itself. As shown below, HTC’s entire appeal is predicated on ignoring the evidence in support of GCH’s proposal. A review of the administrative record demonstrates, without question, that there is substantial evidence to support the Department’s findings and decision on both GCH’s Medicaid per diem rate, and GCH’s construction costs.

With regard to HTC’s contention that the Department blindly accepted the contents of the competing applications at face value, it is critical to note that all applications were certified by the applicants, under oath, to be true and correct. (Administrative Record Binder No. 1, Exh.10 of CON Application). The Department staff evaluated these applications based on the certified

statements of the applicants. *Id.* This has been the standard and, indeed, necessary practice of the Department of Health over the course of the last 20-plus years.

Moreover, regardless of the recommendations made by the Department of Health staff, the administrative hearing afforded HTC an open opportunity to challenge those recommendations through the offering of testimony and evidence. All parties to the hearing introduced evidence in support of their respective positions. The Hearing Officer and the State Health Officer took all of this evidence into account in making the final Department of Health decision. There is absolutely no factual or legal basis for HTC's contention that this process was a "rubber-stamp."

In summary, the Department of Health properly performed its administrative responsibilities in the review and assessment of these competing applications for a certificate of need. There is more than substantial evidence to support the Department's final decision. The mere fact that HTC, a disgruntled competitor, disagrees with that decision does not mean that the well-established standards of judicial review and deference to administrative agency decisions, should suddenly be suspended. The extensive Mississippi case law on judicial review of CON decisions applies fully to this proceeding, and under those precedents, the Department of Health's decision in this case should be affirmed.

B. There is Substantial Evidence in the Administrative Record to Support the Department's Decision.

As discussed throughout this Brief, it is abundantly clear that there is substantial evidence in the administrative record to support the Department of Health's decision. In its Brief, HTC seeks to have this Court re-weigh the evidence presented before an administrative agency, and to make findings of fact which are favorable to HTC's position. HTC would have the Court accept the evidence presented by HTC, reject the evidence introduced by GCH, and render a finding in

favor of HTC. This would obviously violate the previously discussed standards of judicial review.

In its Brief, HTC advances three (3) primary arguments: (1) the Department improperly allocated points for the Medicaid per diem rate; (2) the Department improperly allocated points for construction costs; and (3) the Department's decision should be subject to "heightened scrutiny" because the Hearing Officer adopted the proposed findings of fact and conclusions of law submitted by George County Hospital. GCH and the Department of Health address each of these arguments below.

C. There is Substantial Evidence to Support the Department's Findings on the Medicaid Per Diem Rate.

HTC contends that George County Hospital's Medicaid per diem rate is understated, because, as a county-owned hospital, it would qualify for participation in the Medicaid Upper Payment Limit (UPL) Program, which would allow the Hospital to receive additional Medicaid reimbursement for nursing home services. However, this contention is without merit.

Paul Gardner testified that at the time the certificate of need application was submitted, the Medicaid UPL program was not in place. (T:150-152). As a result, the Hospital did not address Medicaid UPL reimbursement in its per diem rate, and should not be penalized for subsequent regulatory changes which became effective after the date the CON application was submitted. (T:150-152).

In support of its argument on the Medicaid UPL issue, HTC cites an Arkansas federal court case and a federal regulation. However, these authorities do **not** address whether the Medicaid UPL program for nursing homes was in effect in Mississippi as of the date of the filing of the CON applications. Although general Medicaid requirements are established by the federal government, they are implemented by Medicaid agencies at the state level. The federal rule itself (42 C.F.R. § 447.272(d)(1)) provides that states have until "Medicaid State plan rate year

2008” to implement the UPL program for government operated hospitals and nursing facilities. HTC failed to introduce evidence, such as testimony from a State Medicaid official, to show that the UPL program was implemented and in full force and effect, as of the date of the application filings and point assessments by the Department of Health. In fact, as discussed below, Mississippi Medicaid officials **did** provide a Medicaid per diem rate for each applicant, and if the UPL program were in place at that time, it would have been reflected in those rates.

Clearly, many factors have changed since the applications were originally filed more than two years ago. For example, construction costs have certainly increased. Nevertheless, it would not be proper to reopen the application process due to changes which occur subsequent to the date of filing of the applications. Such a scenario would be a “moving target” situation without definitive rules and finality to the application process. *See Miss. Code Ann. § 41-7-193(1)* (a CON proposal must substantially comply “with the projection of need as reported in the state health plan in effect at the time the application for the proposal was submitted”); *Grant Center*, 528 So.2d at 810 (Commission should consider CON application under State Health Plan in effect at the time CON application was submitted, regardless of subsequent changes to the plan which may alter need for the project).

In any event, the best and definitive answer to this question is found in calculations provided by the Mississippi State Division of Medicaid (“DOM”), which is the official agency charged with administering the State Medicaid Program. **DOM itself projected the Medicaid per diem for each of the three applicants. These Medicaid per diem calculations are reflected in the Staff Analysis of each applicant.** According to DOM, the projected Medicaid per diem rate for each of the competing applicants is as follows:

<u>Applicant</u>	<u>Medicaid Per Diem Rate Projected by Division of Medicaid</u>
Delco/Glen Oaks	\$102.95
George County Hospital	109.55
HTC	110.62

(Appellees' Record Excerpts, Tabs 1, 2, and 3); (Exh.3 at p.8; Exh.4 at p.8; Exh.5 at p.8).

These projections show that the Division of Medicaid itself estimated that George County Hospital would have a lower Medicaid per diem rate than HTC. Although the per diem rates projected by the Division of Medicaid for all competitors were higher than those projected by the applicants themselves, the fact remains that George County Hospital's Medicaid per diem rate was lower than HTC's. **This is objective and independent proof with respect to projected Medicaid impact.** Accordingly, there is no basis for HTC's contention that GCH's Medicaid per diem would significantly exceed the Medicaid rate of HTC.²

D. There is Substantial Evidence to Support the Department's Findings on George County Hospital's Construction Costs.

In its Brief, HTC challenges the Department of Health's allocation of points in the following areas: (1) size (square feet); (2) capital expenditure and cost per bed; and (3) cost per square foot (total cost). The Department of Health and George County Hospital will respond to each of these arguments in order.

1. Size (Square Feet)

HTC correctly notes that the George County Hospital nursing facility will encompass a total of 25,307 square feet, consisting of 7,487 square feet of new construction and 12,276 square

² It should be noted that although the Division of Medicaid projected Delco to have the lowest Medicaid per diem, that does not alter the scoring results because GCH continues to have the lowest composite score based on this information. Under this scenario, Delco would move into first place in the category of Medicaid per diem, GCH would be second, and HTC would be third. Therefore, Delco would reduce its composite score from 24 to 22, GCH would increase its composite score from 11 to 12, and HTC would increase its composite score from 13 to 14. The end result is the same: GCH has the lowest composite score.

feet of space in the existing hospital. Moreover, GCH will use an additional 5,544 square feet of space from within other areas of the Hospital for various types of administrative and support space. HTC argues that "GCH should not be allowed to arbitrarily choose a percentage and simply say its nursing facility will share additional space in common areas of the hospital." *Appellant's Brief* at p.14.

This argument may be summarily rejected because it is undisputed that even if George County Hospital's total square footage were strictly confined to new construction and the renovated area of the Hospital specifically dedicated to resident care, as shown on Exhibit 12, **George County Hospital would still have the largest size in terms of square footage.** See Exh. 12 (Floor Plan which shows 7,487 square feet of new construction and 12,276 square feet of renovation for resident care rooms and related areas, for a total square footage of 19,763). Accordingly, HTC's arguments concerning the use of other areas of the Hospital for the nursing home is completely academic. Even if only the new construction and the area dedicated to renovation, as shown on Exhibit 12, are used, George County Hospital continues to have the highest amount of square feet (19,753) and the lowest cost per square foot (\$17.91), **without regard to the use of other areas of the Hospital.** Accordingly, HTC's argument on this point has absolutely no merit.

Additionally, there is substantial and credible testimony in the record to support George County Hospital's decision to allocate other areas of the Hospital for use in conjunction with the nursing home. During his testimony, Paul Gardner, the Administrator of George County Hospital, explained in detail how the Hospital allocated the space within the Hospital for purposes of nursing home use. He stated that GCH took the square footage associated in the dining and kitchen areas, along with medical records and administrative space. (T:126-27). Additionally, the Hospital has a purchasing building for materials management. (T:127).

Mr. Gardner added together these areas that would have a direct relationship with and a direct responsibility to the nursing home, and they totaled approximately 40,000 square feet. (T:127). The Hospital then allocated approximately 25% of that square footage to be attributed to the nursing home project. (T:127). Mr. Gardner viewed this as a conservative estimate. (T:127).

As previously discussed, one of the Department of Health's objectives during this process was to encourage the use of existing health care facility space, in order to achieve cost containment. It is certainly not unreasonable for George County Hospital to allocate a small percentage of its existing administrative and support space for use by the nursing home. The Department of Health had the administrative discretion to review this information and evaluate whether it was appropriate to include these areas as part of the nursing home. There is nothing arbitrary or capricious about this decision-making process.

In any event, the key point is this: even if the other areas of the Hospital are ignored, it is undisputed that George County Hospital still has the greatest amount of square footage in its proposed nursing facility, based on the areas of new construction and renovation for resident care rooms and related areas. Thus, HTC's argument on this point must be rejected.³

2. Capital Expenditure and Cost Per Bed

Next, HTC makes various allegations concerning the total capital expenditure proposed by George County Hospital. Specifically, HTC suggests that George County Hospital failed to include adequate costs for renovation. For example, HTC notes that the Hospital would have to install a sprinkler system at a cost of approximately \$20,000 to \$25,000. Additionally, HTC alleges that George County Hospital's proposal did not provide for adequate space to meet

³ In this same section of its Brief, HTC advances the strange notion that the Department of Health failed to consider the impact on existing hospital patients if the certificate of need should be granted to George County Hospital. In fact, Paul Gardner, the Administrator of George County Hospital, testified without contradiction that the Hospital would be able to accommodate the nursing home residents without any adverse impact on Hospital operations. (T:117-125; 245-246). HTC offered absolutely no evidence to the contrary.

nursing home licensure requirements, including special care rooms; an adequate number of activity rooms, space for a social service office or administrator's office; and day room space.⁴ HTC also contends that George County Hospital failed to include the cost of implementing a nurse call system and fire system.

HTC's arguments on these points are completely absurd, and ignore the evidence presented by George County Hospital during the administrative hearing. During his rebuttal testimony, Paul Gardner addressed in detail each of the points raised by HTC with respect to the use of various areas in the Hospital for the nursing facility. He stated that two of the private rooms in the existing part of the Hospital would be dedicated for special care. (T:234). The Hospital deals with isolation every day, and two of the existing Hospital rooms would be designed as isolation rooms. (T:234-35).

Mr. Gardner also testified that available rooms within the Hospital would be used as a utility room and for other purposes in caring and treating for the nursing home residents. (T:235). Additionally, the Hospital has areas available for a dedicated waiting area, lobby areas, activities and day room, and plenty of other space for patients and the members of their family to meet. (T:235). Social services and utilization personnel are already located in the Hospital and they will also be providing those services for nursing home residents. (T:236).

With regard to questions raised by Mr. Cain concerning an administrator's office, Paul Gardner testified that this office would be located within the Hospital building that would include the nursing home. (T:236-37). Accordingly, this arrangement is in compliance with the regulations of the Mississippi State Board of Nursing Home Administrators, which require the offices of the nursing home administrator to be in the nursing facility. (Exh. 23).

⁴ It is noteworthy that both of HTC's witnesses, Ted Cain and Lantz Kuykendall, admitted that they had never inspected George County Hospital. (T:195; 225). Accordingly, neither is in a position to offer an evaluation of physical conditions within the Hospital. On the other hand, Paul Gardner testified from direct experience and observation that the Hospital had adequate space to provide for the nursing home.

Another area addressed by both Paul Gardner and Charles Gardner, the architect for GCH, concerns the sprinkler system. Paul Gardner testified that in 2000, the Hospital completed a 25,000 square foot addition to the facility. (T:237). That area was required to be sprinkled. Mr. Gardner noted that the Hospital plans to sprinkle the other remaining 30,000 square feet of the old existing hospital building, regardless of whether GCH receives a CON for the nursing facility. (T:237-238). In any event, Charles Gardner verified that the total cost of adding a sprinkler system to the nursing facility area would be only \$25,000. (T:172).

Paul Gardner also discussed the Hospital's plans for a nurse call system within the nursing facility. Mr. Gardner confirmed that the Hospital's existing nurse call system can be expanded into the new nursing facility area, and that was taken into account in projecting the cost of the project. (T:238). The same would apply to the proposed fire alarm system for the new nursing facility area. (T:238).

The final area has to do with various Life Safety Code issues, including firewalls and double egress doors. Mr. Gardner explained that his Hospital staff is very familiar with those requirements and deal with the State regularly on those issues. (T:239). He confirmed that the Hospital's CON application addresses all Life Safety Code issues, and will be in full compliance with the applicable regulations. (T:239-240).

In summary, George County Hospital offered testimony to support the use of various areas of the Hospital for the proposed nursing facility. HTC did not offer any testimony to demonstrate that the Hospital's plans would be in violation of any particular licensure regulation. Accordingly, there is no basis for denying the Hospital's application for any alleged failure to meet these requirements.

3. Cost Per Square Foot (Total Cost)

HTC contends that the Department of Health staff did not properly calculate cost per square foot in reviewing these applications. Specifically, HTC questioned both the manner of calculation, as well as the resulting cost per square foot proposed by George County Hospital.

In explaining the Department staff's calculation of cost per square foot for the GCH proposal, Ms. Pittman testified that the staff started with GCH's proposed total capital expenditure of \$369,000, and deducted non-fixed equipment cost of \$15,000.00. (T:35-36). This resulted in a total construction cost figure of \$354,000. The Department staff then divided \$354,000 by 25,370 square feet, which is the amount of space proposed to be utilized for the nursing facility (both existing and new construction). (T:35-36). The result is a cost per square foot of \$13.99. (T:36). Ms. Pittman testified that the Department staff used this methodology in order to give credit to an applicant proposing to use existing, already built space for the proposed nursing facility which, as previously discussed, was one of the cost containment approaches encouraged by the Department. (T:35-37).

HTC contends that a different calculation should have been used by the Department in calculating cost per square foot. Ted Cain, the owner of HTC, testified that he felt it would be more appropriate to use the following formula in determining GCH's cost per square foot:

$$\frac{319,000 + 2,500 + 20,000 + 10,000}{7,487 \text{ (actual)}} = 46.95 \text{ cost per sq. ft.}$$

(Exh.22).

Mr. Cain contended that this formula would be a more "apples to apples" comparison to his project, because it compares actual new construction in both applications. (T:205-206).

However, the formula proposed by Mr. Cain does not take into account the fact that George County Hospital also proposes to use existing space within the hospital for the proposed nursing facility. The formula proposed by Mr. Cain looks strictly at new construction

costs, and ignores the significant amount of already constructed space that George County Hospital will use in operating the nursing home.

As previously discussed, Ms. Pittman testified that the Department of Health's comparative evaluation encouraged the use of existing space in order to achieve cost effectiveness. Clearly, George County Hospital has submitted the most cost effective proposal by virtue of its extensive utilization of existing space.⁵ The calculation used by the Department, which resulted in a cost per square foot of \$13.99 for the GCH proposal, is not an unreasonable or arbitrary method for taking into account the use of existing hospital space.

In support of his argument, HTC suggests that the CON Manual dictates the use of a specific formula for the calculation of cost per square foot. However, the comparative review criteria developed by the Department of Health staff for the comparative review of nursing facility applications simply states that one of the factors to be considered is "cost per square foot." It does not designate the particular formula to be used for calculating cost per square foot during the comparative review of competing nursing home applications. Consistent with its goal of encouraging cost effective proposals through the use of already constructed space, the Department of Health used a cost per square foot formula which factored in both the cost of new construction and the use of existing space. This is a rational analysis used by the Department to further the well-established health planning goal of cost containment.

In prior certificate of need decisions, the Supreme Court of Mississippi has made it clear that the methodologies utilized by the Department of Health in reviewing certificate of need applications are not "carved in granite." *HTI Health Services of Mississippi, Inc. v. Mississippi State Department of Health*, 603 So.2d 848, 853 (Miss. 1992). Instead, the Department staff is

⁵ HTC contends that its proposed nursing facility would be added to a planned personal care/assisted living facility. However, the evidence at the hearing established that the assisted living facility was not in existence at the time HTC's CON application was submitted and, in fact, still had not been constructed at the time of the hearing, more than two years later. (T:226).

accorded flexibility, subject to the requirement that the tools and approaches used by the Department cannot be arbitrary or capricious. "The Department's power is limited only in that its actions may not be arbitrary and capricious." *Mississippi State Department of Health v. Southwest Mississippi Regional Medical Center*, 580 So.2d 1238, 1240 (Miss. 1991). In this instance, the Department staff's method for calculating cost per square foot is not only reasonable, but consistent with its stated goal of encouraging cost-effective proposals. Accordingly, there is nothing arbitrary, capricious or improper about the method used by the Department staff to calculate cost per square foot.

Another issue raised by HTC concerns a comparison of GCH's proposed cost per square foot to the construction costs reflected in the *Means Construction Cost Data* book. Ms. Pittman testified, however, that the *Means Construction Cost Data* does not take into account a situation such as that presented in this case, in which a nursing home proposal involves both new construction and use of existing space. (T:90-91). It is true that George County Hospital's estimated cost per square foot of \$13.99 is much lower than the estimated costs shown in the *Means Construction Cost Data*. However, that is a direct result of the previously discussed method used by the Department staff in determining cost per square foot with regard to these competing applications.

Additionally, George County Hospital presented substantial evidence in support of the reasonableness of its projected cost for new construction. Mr. Charles Gardner, a licensed architect who assisted in the formation of the construction costs for the GCH proposal, testified that the Hospital's estimated new construction cost of approximately \$42.00 a square foot was reasonable and achievable. (T:159-161). He pointed to a number of factors that would contribute to relatively low new construction costs, such as the flat site, good soil conditions, simple one-story construction, and other factors. (T:157-160). As Paul Gardner, the Hospital

Administrator pointed out, the Hospital's estimated new construction cost is actually slightly higher than HTC's calculation. (T:115). Paul Gardner noted that the Hospital planned to save considerable money by acting as its own construction manager and by doing a significant amount of the construction work in-house. (T:115). He further noted that the Hospital's new construction cost per square foot was comparable to projections submitted by other applicants for nursing home CONs. (T:144-146).

In summary, the method used by the Department of Health staff to calculate cost per square foot in reviewing the competitive applications was both reasonable and proper. Additionally, there is substantial evidence in the record to support the reasonableness of the construction costs proposed by George County Hospital. Thus, there is more than adequate support for the Department staff's conclusion that, when all factors are considered, George County Hospital proposed the lowest cost per square foot, and was properly awarded the lowest score under this criterion.⁶

E. The Hearing Officer Properly Adopted George County Hospital's Proposed Findings of Fact and Conclusions of Law.

After the conclusion of the administrative hearing, both HTC and GCH submitted Proposed Findings of Fact and Conclusions of Law to the Hearing Officer. This is a standard

⁶ Although it is not necessary to address this area for purposes of this appeal, the Hearing Officer properly found that HTC's true score was actually worse than first indicated, due to HTC's failure to include all costs associated with the project. During cross-examination, Mr. Cain acknowledged that HTC's application did not include any cost of purchasing real estate. (T:226). However, Mr. Cain also identified a real estate contract for the purchase of the real property on which the facility would be located (Exh. 25). This real estate contract reflected a purchase price of \$200,000, and Mr. Cain confirmed that this was the purchase price of the property. (T:227-228). The contract is dated June 18, 2002 (Exh. 25), and was submitted to the State Department of Health in response to the Department's request for proof of ownership of the property for the nursing facility. (T:226-227).

It is clear that this real estate cost of \$200,000 should have been included in HTC's capital expenditure for the proposed project. Although HTC may contend that one of the purposes of the land purchase was for the planned construction of an assisted living facility, the fact remains that this purchase was also made for the specific purpose of constructing the nursing facility. Moreover, as previously discussed, the assisted living facility has yet to be constructed.

When this capital expenditure of \$200,000 is added to the scoring grid, HTC's proposal falls further behind. Specifically, HTC's score on capital expenditure moves from second place to third place. This results in a composite score for HTC of 14, which is still higher than GCH's score of 11.

practice in CON hearings before the Department of Health. It is also common for courts to request the parties to submit proposed opinions, findings and conclusions for the Court's review and possible adoption. There is nothing unusual or improper about this procedure.

In fact, in the previously cited case of *Attala County Board of Supervisors v. Mississippi State Department of Health*, 867 So.2d 1019 (Miss. 2004), this Court noted that the hearing officer in that CON proceeding also had adopted, verbatim, the findings of fact and conclusions of law submitted by counsel for one of the parties. *Id.* at 1021, n. 1. Therefore, the Chancery Court applied a "heightened scrutiny" and "analyzed such findings with greater care." *Id.* Even under this heightened standard of review, both the Chancery Court and the Supreme Court upheld the Department of Health's decision.

Similarly, in this appeal, there is substantial evidence in the record to support the Department of Health's decision, regardless of whether a "normal" or "heightened" standard of review is used. The Hearing Officer's Report is primarily a recitation of the evidence presented in support of the issuance of a certificate of need to George County Hospital. The facts are the facts, and the evidence is the evidence. Taken together, this evidence, which is identified in the Hearing Officer's Report, is more than sufficient to substantiate the issuance of a certificate of need to George County Hospital. Regardless of which standard of review is employed, the result is the same: The administrative agency's decision is supported by substantial evidence, and should not be disturbed on appeal.

V. CONCLUSION


This CON proceeding has gone through an exhaustive administrative and judicial process. HTC's arguments have been considered in two different administrative hearings, by two different Hearing Officers, and by the State Health Officer. George County Hospital's certificate of need has been recommended for approval by the Department of Health staff, the

Hearing Officers, and the State Health Officer. The Chancery Court conducted two separate appeal hearings on this matter. In the first decision, the Chancellor affirmed the Department's decision in all respects, with the exception of a single issue, which was remanded to the Department of Health for further consideration. Following that process, the Chancery Court once again reviewed the administrative record, arguments of the parties and issues on appeal, and affirmed the Department of Health's decision in all respects.

On the basis of the foregoing arguments and authority, the Mississippi State Department of Health and George County Hospital respectfully request this Court to affirm the Final Judgment of the Chancery Court.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served by United States mail, postage prepaid, a true and correct copy of the foregoing Joint Brief of Appellees to Honorable Patricia D. Wise, Chancellor of Hinds County, and to Thomas L. Kirkland, Jr., Esq., counsel for the Appellant, at their usual respective business mailing addresses.

DATED: March 20, 2008.



Barry K. Cockrell