2008-SA-00223 E

CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel for Mid-South Associates, LLC, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judge of this Court may evaluate possible disqualifications or recusal:

1. Mid-South Associates, LLC, Appellee;
2. Mississippi State Department of Health and the City of Cleveland, Mississippi, Appellants;
3. Don Eicher, Esq. and Sondra McLemore, Esq., Mississippi State Department of Health, Appellant;
4. John L. Maxey II, Esq. Maxey Wann PLLC, Jackson, Mississippi, attorney for Appellee, Mid-South Associates, LLC;
5. William H. Hussey, Esq. Maxey Wann PLLC, Jackson, Mississippi, attorney for Appellee, Mid-South Associates, LLC;
6. Malenda Harris Meacham, Esq., Hernando, Mississippi, attorney for Appellee, Mid-south Associates, LLC;
7. Thomas L. Kirkland, Jr. Esq., Allison C. Simpson, Esq., and Andy Lowry, Esq., Copeland, Cook, Taylor & Bush, P. A., and Jamie F. Jacks, Esq., attorneys for City of Cleveland, Mississippi.
8. Cassandra Walter, Esq. (hearing officer)
9. F.E. Thompson, M.D. (State Health Officer)
10. The Honorable Vicki Cobb, Chancellor

Dated this the 31st day of July, 2008.

William H. Hussey
Attorney for Mid-South Associates, LLC

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STATEMENT OF THE ISSUE

1. Did the DeSoto County Chancery Court follow settled Mississippi law in performing a *de novo* review of the record and concluding the Mississippi State Department of Health erred in denying Mid-South Associates, LLC a certificate of need to relocate its 75 bed nursing home to DeSoto County, Mississippi?

STATEMENT OF THE CASE

I. *Course of Proceedings Below*

Mid-South Associates, LLC (sometimes hereinafter referred to as "Mid-South") submitted application with the Mississippi State Department of Health (sometimes hereinafter referred to as "MSDH," "Department," or "Opponents") for a certificate of need to relocate its 75 skilled nursing beds from Bolivar County to DeSoto County, Mississippi. (R.E. 4 at 1).

In March, 2007, the Department Staff recommended disapproval of Mid-South's application (R.E. 4 at 13), and Mid-South requested a hearing during course of review. The City of Cleveland, Mississippi (sometimes hereinafter referred to as "Opponents") entered an appearance during the hearing over Mid-South's objection. The hearing during course of review was held on June 4, 5 and 7, 2007 and all parties and interested or affected persons were afforded the opportunity to present evidence and witness testimony. (R.E. 1 at 1-2).

On September 27, 2007, the State Health Officer ("SHO") issued his Final Order, concurring with and adopting the administrative hearing officer's findings of fact and conclusions of law, disapproving the certificate of need sought by Mid-South. (R.E. 5). Aggrieved, Mid-South filed its Notice of Appeal with the DeSoto County Chancery Court on October 9, 2007. On January 25, 2008, the DeSoto County Chancellor issued a ruling which set aside the decision of MSDH and granted Mid-South a certificate of need to relocate its beds to DeSoto County. (R.E. 3 at 4).

Opponents timely appealed the decision of the DeSoto County Chancery Court to this Court.

II. *Relevant Facts*

Mid-South made the business decision to close its Bolivar County facility, in a county the *State Health Plan* designated overbedded by 92 beds, and relocate to DeSoto County, a county designated under state law as having a need for 567 more beds than in its inventory. (R.E. 6 at 18).

There are 112 vacant beds within Bolivar County, calculated as the difference between the Bed Inventory established in the *2007 State Health Plan* and the Average Daily Census reported in the *2005 Report on Institutions for the Aged or Infirm.* Within 30 miles from the center of Cleveland, 212 vacant beds are indicated (R.E. 7 and 8). From 1990 to 2020, the Bolivar County population declines from 41,875 to 37,017 while the Desoto County population increases from 67,910 to 175,168 during the same projected period. (R.E. 9). Individuals aged 65 and over in poverty from 2010 to 2020 in the two counties reflects the greater number in that demographic segment in Desoto County than in Bolivar County (R.E. 10). Dr. John Hyde, Expert Witness for Opponents testified, "The total population is always important." (R.E. 11 at 645.) Jean Beard, Expert Witness for Mid-South, testified the significant growth of population in Desoto County, and the actual reduction in projected population in Bolivar County, increased the need for nursing home beds in Desoto County while diminishing the need in Bolivar County. Beard testified that in 2020, the need for beds in Desoto County would be 1,089 and Bolivar County would still remain overbedded by 40 beds. (R.E. 11 at 129).

Mid-South proposed a modern, $4.895 Million state-of-the-art facility in DeSoto County to replace its 37 year old Bolivar facility. Mid-South decided against replacing

the Bolivar facility with another facility in Bolivar County because of the established overbedding in Bolivar County and limitations concerning the age and location of the Bolivar facility adjacent to a drainage canal. (R.E. 6 at 18, R.E. 11 at 336-337). Mid-South proposed a facility in Hernando, DeSoto County because there was no nursing home there and Desoto County has an identified need for beds while Bolivar County has excess inventory. Ullery testified the policy of her company is to deliver care with a quality of life as much like home as possible. She testified regarding some of the features and benefits of the proposed facility as follows:

- The proposed facility would have a large lobby area for residents and family to gather complete with furnishings found traditionally in a home or hotel as opposed to institutional style furniture.
- A private physician office would be available for private consultation between physicians and the residents and their families.
- A spacious "transitional" resident bedroom would be available, complete with table and chairs, microwave and refrigerator to help ease the transition of a rehabilitation patient from facility back to their home.
- A cornerstone quality of life feature of the proposed facility would be enhanced dining services. Residents would be served food in a home-like or fine-dining style complete with china and stem-ware and never from institutional trays as in a more traditional nursing home cafeteria setting.
- The new nursing home would have a theater with large screen and popcorn machine for film showings and movie nights for residents and their families.
- A separate game room with pool table and board games would allow male residents to congregate and enjoy fellowship in a comfortable club-like atmosphere.
- Ullery testified that female residents would likely enjoy the garden room with a separate entrance from the outdoor courtyard that would provide access to outdoor gardens with planting activities available.
- For rehabilitative services, the facility would have a spa with whirlpool therapy and a gymnasium for physical therapy designed to promote more

fun into the rehabilitative regimen.

(R.E. 11 at 336-373).

MSDH determined Bolivar County was underserved for nursing home beds based upon its designation as a "MUA" ("medically underserved area") according to federal criteria unrelated to nursing home facilities. (R.E. 1 at 11). After receiving numerous comments in opposition from the Bolivar County community, primarily objecting to the loss of area jobs, MSDH determined that Mid-South's relocation would have an "adverse impact" on a "medically underserved" area and recommended disapproval. (R. E. 4 at 8). The record includes evidence, at law and in evidence introduced at the hearing, that Bolivar County and the surrounding area has more than enough beds to meet its projected need, even after relocating Mid-South's 75 beds. (R.E. 6 at 18). Judy Ullery testified since there are routinely about four discharges per month, after the construction period of 14 to 15 months for the DeSoto facility, there will be few, if any, residents in Mid-South's Bolivar facility. (R.E. 11 at 374). Chance Becnel, the CEO of another Bolivar County facility, testified his facility could absorb many of the remaining residents from Mid-South's Bolivar facility. (R.E. 13 at 6-7). The Hearing Officer, adopting *in toto* the proposed findings of fact and conclusions of law authored by the Opponents, found Mid-South could not prove that residents of Bolivar County may even want to use other available beds. (R.E. 1 at 18).

Further facts relevant to this appeal will be set forth in the argument as necessary.

SUMMARY OF THE ARGUMENT

The MSDH denied Mid-South's application for a certificate of need to relocate its 75 nursing home beds from Bolivar County to DeSoto County, Mississippi. Mid-South appealed the MSDH decision to the DeSoto County Chancery Court. The Chancellor, presented with the MSDH decision and the record made in the administrative tribunal, observed the written findings adopted as the decision of MSDH were adopted *in toto* from those authored by Mid-South's Opponents. The Chancellor found she must review the entire record *de novo* to discern the basis for the MSDH decision.

The Chancellor reviewed the entire record and found MSDH committed an error of law in its use of a standard for determining need for nursing home beds other than the standard established at law in the *2007 State Health Plan*. The Chancellor found the resulting determinations of MSDH were arbitrary and capricious.

The Chancellor set aside the decision of MSDH and granted Mid-South a certificate of need to relocate its 75 beds to DeSoto County, finding Mid-South's application complied with the projection of need established in the *State Health Plan.*

ARGUMENT

But for the action of the MSDH, underserved Desoto County would now have under construction a $4.895 million state-of-the-art nursing home. But for the action of MSDH, a modern skilled nursing facility—a replacement of a forty year old building–would be accessible to all of the citizens of Mississippi. But for the action of the MSDH, health care of the citizens in this state would be improved by the contribution of private capital—not at the expense of the taxpayers. The action of MSDH to deny Mid-South a certificate of need to relocate its nursing home was based on an error of law and, when so recognized by the lower court, was reversed. MSDH now seeks to have the Court reinstate that error of law, a result which will violate settled principles of appellate review as well as deprive Mississippi's health care system of needed resources. The lower court's decision rightly should be affirmed.

I. The Chancellor Correctly Determined the Decision of the MSDH Warranted Review Beyond That Routinely Afforded Administrative Agency Decisions.

A. Background.

When a decision of the MSDH denying an applicant a Certificate of Need is presented to a chancery court for review, the chancery court must proceed in its review guided by the parameters established by statute and mindful of the limitations upon the scope of judicial review announced by this Court. This Court's decisions establishing that scope of review are legion. Reviewing courts and this Court often repeat the "familiar limitations upon the scope of review of administrative agency, which is the arbitrary-and-capricious standard." *Greenwood Leflore Hosp. v. Mississippi State Department of Health,* 980 So.2d 931, 934 (Miss. 2008). One legal commentary has

observed just how routine is the consideration of such appeals:

> There is a sense of *deja vu* when reading the opening of successive court opinions that review administrative action. That is because both appellate courts intone almost as a mantra the same multi-part standard of review in most opinions... The agency is the decision maker. Within quite broad parameters, that decision is for the agency to reach. The appeal is a limited one, since courts cannot perform the discretionary tasks of the administrative agency.

1 MS Prac. Encyclopedia MS Law § 2:93. The commentary further alerts litigants to "take that standard seriously, however, since appellate courts do." *Id.*

Equally serious is the responsibility of the administrative agency to actually make a reasoned decision upon which the appellate court can adequately perform its important, albeit limited function in review. When an agency fails to reach a reasoned decision on an issue before it, fails to issue the findings of fact and conclusions of law necessary to inform a decision for which it is responsible, or delegates its responsibility to an unauthorized decision-maker, how can an appellate court perform its review? These questions, in a variety of contexts, have been answered by this Court as a preliminary consideration in its review of lower courts' review of administrative agency decisions. It is unnecessary to distinguish, at this point, between the levels of deference afforded decisions of a lower tribunal or administrative agency by an appellate court in review. Rather, Mid-South would point the Court's attention to the specific decision presented the DeSoto County Chancellor for review as a necessary point of preliminary consideration.

B. It is Indisputable the Proposed Findings of Fact and Conclusions of Law Authored by the City of Cleveland Were Adopted In Toto as the Decision of the State Health Officer.

The Findings of Fact and Conclusions of Law of the Hearing Officer in this case

were copied *in toto* from the proposed findings of fact and conclusions of law presented by the Appellants, Opponents City of Cleveland joined by the Department of Health. This fact is indisputable upon a comparison of those two documents, identical right down to footnotes, grammatical, semantical and typographical errors. (R.E. 1 and 2). The documents differ only slightly in pagination, and in the typing in of the name of the month in which the document was signed by the Hearing Officer. Thus, the Chancellor correctly found she had to conduct her own independent review of the record. Relying on *Mississippi Dept. of Transp. v. Johnson,* 873 So.2d 108 (Miss. 2004), the Chancellor announced she "must review the record de novo." (R.E. 3 at 2).

As will be discussed further herein, the indisputable evidence the Department's decision was adopted *in toto* from the proposed findings of fact and conclusions of law of the Opponents, with those findings predicated upon and adopting the legal error born in the Department's Staff Analysis, was sufficient justification for a heightened scrutiny of the Department's decision. Additionally, the presence of legal error in the Department's findings, forming the basis of the State Health Officer's final decision, warranted the reversal of that decision irrespective of the standard of review applied to consideration of the factual evidence[1]. As this Court will see, there is substantial evidence in the record to support the reversal of the Department on the basis of legal error alone. Woven throughout the Department's purported findings are inferences and

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[1] Though the Brief of the Appellants/Opponents spends page after page arguing the evolution of jurisprudence allowing divergence from the "great deference" normally afforded the reasoned decision of a lower tribunal, the arguments are merely academic in light of the indisputable facts of this case. Though Appellants apparently concede no evidence exists the Hearing Officer actually reviewed the record in this case (the decision "perhaps drafted by attorneys who frequently practice before the Department"), Appellants now urge this Court to defer to that decision as if it had been.

factual determinations by the Department entirely dependent upon the premise the projected need for nursing home beds in Bolivar and DeSoto Counties, published in the applicable *2007 State Health Plan* is "not true" or "artificial." (R.E. 1 at 22).

C. *Appellate Courts Must Examine The Entire Record For Evidence to Explain the Basis for an Agency Decision*

"When reviewing an administrative agency's decision," a court "must look at the full record before it in deciding whether the agency's findings were supported by substantial evidence." *Public Employees' Retirement System v. Marquez*, 774 So.2d 421, 427 (Miss. 2000). In so doing, the court "is not relegated to wearing blinders." *Id.* In this case, the Chancellor acknowledged the standard of review of a final order of the Department is controlled by statute and that, normally, an appellate court would review the Department's decision under the substantial evidence standard. (R.E. 3 at 2). As should be clear to this Court, the Chancellor had a valid concern regarding the integrity of the decision of the Department of Health, irrespective of any determination of its ultimate "correctness." This Court has opined judicial review of an administrative decision "is necessarily a function of the court's ability to divine with confidence" what the administrative agency "has done and how has it done it." *See generally, McGowan v. Mississippi State Oil & Gas Bd.*, 604 So.2d 312, 321 (Miss. 1992). In the case before the Court, it is evident the DeSoto County Chancellor had cause to sift much more carefully through the record to discern the basis for the Department's decision. Ultimately, the Chancellor determined the Department's findings were arbitrary and capricious, predicated as they were upon a fundamental error of law regarding the projected need for nursing home beds.

D. The Statutory Standard of Review Governing Appeals of Department of Health Decisions Regarding Certificates of Need.

Notwithstanding arguments of the Opponents to the contrary, the standard of review to be applied in this appeal of the Order of the Mississippi State Department of Health denying a Certificate of Need is not in dispute; it is statutory:

> ...The order 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 of the State Department of Health 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 State Department of Health, or violates any vested constitutional rights of any party involved in the appeal.

Miss. Code Ann. § 41-7-201(2)(f) (emphasis added). This is actually a straightforward case which exposes the important role of judicial review of an administrative agency decision as more than a rote application of the "substantial evidence rule." The fundamental notions of due process, notice and an opportunity to be heard, are poorly served when those charged with hearing a cause abdicate objectivity through rote adherence to the will of one side of a legal dispute.

II. An Appellate Court Reviews Questions of Law De Novo.

A. This Court Should View Mid-South's CON Application, as Did the Chancellor Below.

The MSDH is charged with reviewing applications for certificates of need to relocate nursing home beds under §§ 41-7-191(1)(b) and (e) and §41-7-193 of the Mississippi Code. Section 41-7-191(1)(b) requires a certificate of need be granted authorizing the relocation of a health care facility as proposed by Mid-South. Section 41-7-193(1) provides, in relevant part, the following with regard to obtaining a certificate

of need:

> A Certificate of Need shall not be granted or issued to any person for any proposal, cause or reason, unless the proposal has been reviewed for consistency with the specifications and the criteria established by the State Department of Health *and substantially complies with the projection of need as reported in the state health plan in effect at the time the application for the proposal was submitted.*

(emphasis added). As the Department and this Court have acknowledged, a determination of "need" for a healthcare planning project is the most relevant consideration in any certificate of need review. (R.E. 1 at 8). This Court has observed:

> Pursuant to statute, the controlling question in every CON review is whether the project substantially complies with the Plan's projection of need, not any other lesser standard of need. **If MSDH strays from applying the Plan's projection of need, it commits legal error, and acts arbitrarily and capriciously.**

St. Dominic-Madison County Medical Center v. Madison County Medical Center, 928 So.2d 822, 826 (Miss. 2006)(emphasis in original). The applicable *2007 State Health Plan* establishes the need for nursing home beds in Bolivar and Desoto Counties, *as a matter of law.* It is indisputable the *Plan* establishes DeSoto County with a need for 567 more beds than currently in its inventory. It is equally indisputable the *Plan* establishes that *Bolivar County is overbedded by 92 beds.* (R.E.6 at 18).

Mid-South appealed the denial of its Certificate of Need because it believes, and the Chancellor below agreed, a review of the entire record of the Department hearing on Mid-South's application exposes one arbitrary and capricious determination after another by the Department, each predicated on a fundamental error of law. Laced throughout the MSDH Staff Analysis, the Department's Findings, and repeated in the Appellants' Brief filed in this Court, is the assertion the bed need established by the *2007 Plan* is "not true," "phantom," and "irrelevant." (R.E. 1 at 22). This argument of

the Opponents is legal error on its face, and although a wishful argument of the Opponents, the lower court could not stray from the law on Opponents' speculation. On this basis alone, the Chancellor was justified in her decision to reverse the Department's decision. As this Court will see, the Department extended this legal error as a foundational premise for its other findings in consideration of Mid-South's application, and, therefore, the DeSoto County Chancellor had a sound basis upon which to determine those findings, like fruit from the poisonous tree, arbitrary and capricious.

B. The Department is Charged to Review CON Applications Objectively.

Mississippi's *State Health Plan* is the blueprint for allocation of the state's healthcare resources. Specifically for nursing home beds, for which a legislative moratorium is in effect prohibiting the expansion or addition of nursing home beds in the state's inventory, the *State Health Plan* allocates the number of beds allowed within the separate Health Care Planning Districts. Nursing home beds can be relocated or replaced within a Planning District, but no beds can be relocated from one Planning District to another and the introduction of additional beds into the state inventory is not allowed. Both Bolivar County and DeSoto County are located within the same Planning District. The second page of Table 8-4, from Chapter 8, page 18 of the *2007 Mississippi State Health Plan* identifies the projected need for nursing home beds within the counties designated within Long Term Care Planning District I (LTCPD I). The *State Health Plan* clearly establishes DeSoto County as having a projected need for 567 more beds than in its current inventory and projects Bolivar County as being overbedded by 92 beds:

Table 8-4 (continued)
2007 Projected Nursing Home Bed Need

District I												
County	Population 0 - 64	Bed Need (0.5/1,000)	Population 65 - 74	Bed Need (14/1,000)	Population 75 - 84	Bed Need (59/1,000)	Population 85+	Bed Need (179/1,000)	Total Bed Need	# Beds in Abeyance	Licensed/CON Approved Beds	Difference
Attala	15,757	7.88	1,662	23.27	1,505	88.80	734	131.39	251	0	120 / 60	71
Bolivar	33,131	16.57	2,396	33.54	1,778	104.90	911	163.07	318	60	350	-92
Carroll	8,707	4.35	1,040	14.56	655	38.65	302	54.06	112	0	60	52
Coahoma	24,773	12.39	1,871	26.19	1,564	92.28	769	137.65	269	0	186	83
DeSoto	131,632	65.82	9,642	134.99	5,230	308.57	2,110	377.69	887	0	320	567
Grenada	19,177	9.59	1,797	25.16	1,465	86.44	718	128.52	250	0	257	-7
Holmes	17,918	8.96	1,342	18.79	1,070	63.13	536	95.94	187	0	148	39
Humphreys	9,988	4.99	689	9.65	573	33.81	279	49.94	98	0	60	38
Leflore	30,809	15.40	2,115	29.61	1,728	101.95	870	155.73	303	0	410	-107
Montgomery	9,271	4.64	1,006	14.08	897	52.92	432	77.33	149	0	120	29
Panola	31,246	15.62	2,570	35.98	1,920	113.28	870	155.73	321	0	190 / 20	111
Quitman	8,828	4.41	715	10.01	572	33.75	280	50.12	98	0	60	38
Sunflower	29,947	14.97	1,724	24.14	1,309	77.23	646	115.63	232	2	244	-14
Tallahatchie	11,685	5.84	1,103	15.44	853	50.33	417	74.64	146	0	68 / 60	18
Tate	23,888	11.94	2,084	29.18	1,375	81.13	626	112.05	234	0	120	114
Tunica	9,015	4.51	676	9.46	418	24.66	195	34.91	74	0	60	14
Washington	49,559	24.78	3,777	52.88	2,894	170.75	1,394	249.53	498	58	356	84
Yalobusha	10,463	5.23	1,158	16.21	902	53.22	421	75.36	150	2	120	28
District Total	**475,794**	**237.90**	**37,367**	**523.14**	**26,708**	**1,575.77**	**12,510**	**2,239.29**	**4,576**	**122**	**3,249 / 140**	**1,065**

(R.E. 6 at 18)(emphasis added).

Chapter 8, Section 106.01 (4) of the *State Health Plan* states the Department of Health "shall use population projections as presented in Table 8-4 when calculating the bed need. These population projections are the most recent projections prepared by the Center for Policy Research and Planning of the Institutions of Higher Learning. (March 2005)." (R.E. 6 at 14). It is abundantly clear Mississippi law establishes the objective standards and data upon which need for nursing home beds is to be

measured. In applying the standards, this Court, in *Mississippi State Department of Health v. Southwest Mississippi Regional Medical Center*, 580 So.2d 1238 (Miss. 1991), stated these standards, "[A]uthorized the department both to establish criteria for certification of need and *objectively review information tendered in applications*. The department's power is limited only in that its actions may not be arbitrary or capricious." *Id.* at 1241. (emphasis added). In this case, the Department arbitrarily ignored the objective data contained in Table 8-4 from the *2007 State Health Plan, supra.*

C. The Department Ignored the Objective Standard Established at Law.

Opponents have made much noise about 60 beds currently held in abeyance (voluntarily and temporarily delicensed) by an unrelated Bolivar County facility, Shelby Nursing and Rehab Center. Miss. Code Ann. § 41-7-191(1)(c) provides in relevant part:

> [I]f a health care facility has voluntarily delicensed some of its existing bed complement, it may later relicense some or all of its delicensed beds without the necessity of having to acquire a certificate of need. The State Department of Health shall maintain a record of the delicensing health care facility and its voluntarily delicensed beds and *continue counting those beds* as part of the state's total bed count for health care planning purposes.

(emphasis added). Although the CON statutes and the Department's own regulations establish the fact that those beds *shall* be counted as part of the inventory for health care planning purposes, Appellants suggest, contrary to law, those 60 beds are "phantom beds" and "irrelevant" to the objective consideration of need in Bolivar County. In an attempt to obscure the established fact that the 60 beds held in abeyance at Shelby Nursing and Rehab Center *must* be counted by the Department in its evaluation of the need for nursing home beds in Bolivar County, the Department found "no assurance that if the Application is approved Shelby will bring those beds

back on-line or even if they were back on-line that anyone would use those beds." (R.E. at 1 at 18). Notwithstanding the clearly established legal error attendant that particular finding, the Department even chose to ignore evidence in the record Shelby Nursing and Rehab Center intended its 60 beds "temporarily and voluntarily delicensed." (R.E. 12).

In its Findings, the Department suggests the methodology employed in the *State Health Plan* and the objective data published therein "not true." (R.E. 1 at 22). As such, this finding is arbitrary and capricious, as a matter of law, as are any findings predicated upon a departure from that objectively established need. As this Court observed in *St. Dominic-Madison County Medical Center, supra,* "If MSDH strays from applying the Plan's projection of need, it commits legal error, and acts arbitrarily and capriciously."

The DeSoto County Chancellor recognized this legal error:

> Although [the City of Cleveland and the Department] argue that these numbers are "artificial" and do not reflect the current situation because they are based on data from 2005, **they are, in fact, the State's own numbers reflected in their most recent (2007) State Health Plan.**

(R.E. 3 at 3)(emphasis added). Accordingly, the Chancellor correctly determined the Department's conduct arbitrary and capricious and, as a matter of law, a *de novo* review of the Department's attendant findings was warranted. Simply put, where a fact-finder utilizes a standard for need other than that published in the *Plan*, "it commits legal error." *St. Dominic-Madison County Medical Center, supra.* Further, when the fact-finder adopts verbatim the findings of fact and conclusions of law of just one party, and those findings are predicated upon a legally flawed standard, no deference for those findings is warranted. This Court has held the verbatim adoption of one party's

findings of fact and conclusions of law necessarily lessens the deference afforded those findings and, in conjunction with legal error therein, warrants no deference to those findings:

> The chancellor erred by applying an incorrect legal standard, and also by adopting a litigant's findings of fact and conclusions of law. Hence we do not give deference to the findings of fact and conclusions of law of the lower court. Instead, we review the record *de novo.*

Brooks v. Brooks, 652 So.2d 1113, 1118 (Miss. 1995).

D. The Department's Findings, Based Upon Legal Error, Are Due No Deference.

Having established legal error upon which the Department measured Mid-South's application for compliance with the projected need for nursing home beds, specifically in the projection of need for Bolivar County, the DeSoto County Chancellor was justified in heightened scrutiny of the Department's attendant findings, regardless of the label Appellants City of Cleveland and the Department would ascribe to her level of inquiry. "[W]here an administrative agency ***errs as a matter of law,*** courts of competent jurisdiction should not hesitate to intervene." *Grant Center Hosp. of Mississippi, Inc. v. Health Group of Jackson, Mississippi, Inc.,* 528 So.2d 804, 808 (Miss. 1988). Errors of law include arbitrary and capricious determinations made in disregard of established facts and controlling principles. In light of the need for nursing home beds established in the *2007 State Health Plan* as a matter of law, the Department made numerous arbitrary and capricious findings of fact with regard to Mid-South's proposal. Let us now turn to the General Review Criteria against which the Department reviewed Mid-South's application.

The Department found, in the verbatim adoption of the findings of Mid-South's

opponents, that General Review Criterion 5, "need for the project," was the most relevant to the application and the specific criteria in which Mid-South failed to prove the need for relocation of its beds. (R.E. 1 at 8). General Review Criterion 5(a) states the Department may consider:

> The need that the population served or to be served has for the services proposed to be offered or expanded and the extent to which residents of the area- in particular low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly- are likely to have access to those services.

(R.E. 1 at 8). General Review Criterion 5(b) of the *Certificate of Need Review Manual* states the Department may consider in the case of the relocation of a facility or service:

> [T]he need that the population presently served 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 relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly, to obtain needed healthcare.

(R.E. 1 at 13). Even when the fact that Bolivar County is *overbedded* by 92 beds is established in the *2007 State Health Plan* as a matter of law (and DeSoto County underbedded by 567 beds), the Department's findings in regard to these criteria included "[r]emoving these [75] beds from Bolivar County will only further force Bolivar County to be and its residents to live in a medically underserved area," "there is not a real 'need' for beds in DeSoto County," and "though the Plan shows that DeSoto County is underbedded by 560 beds, [City of Cleveland's expert] Hyde testified this was an artificial need." (R. E. 1 at 10, 22).

With the need in Bolivar and DeSoto Counties clearly, objectively and legally established, these findings of the Department are arbitrary and capricious. The Department erred by straying from the projected bed need for Bolivar and DeSoto

Counties as established in the *Plan* and then drawing inferences of adverse impact based upon that error. Another extreme example of the arbitrary and capricious character of the Department's findings is evident in the Department's finding Mid-South's application for a DeSoto County facility should be disapproved because Mid-South "failed to demonstrate how its proposed [DeSoto County] project would provide for an improved, higher quality of care for the people of Bolivar County." (R.E. 1 at 13).

Fundamentally, a health care project must be reviewed for what it actually is. *See generally, Singing River Hosp. System v. Biloxi Regional Medical Center,* 928 So.2d 810 (Miss. 2006); *St. Dominic-Jackson Memorial Hosp. v. Mississippi State Dept. of Health*, 728 So.2d 81 (Miss. 1998). Mid-South's Application proposes to close its Bolivar County facility and relocate to DeSoto County, a relocation from an area with lesser need to an area with greater need. Following the proposed relocation, Bolivar County will remain overbedded, according to the *State Health Plan*- objective data which binds the MSDH and the reviewing courts. As the Court of Appeals of Mississippi has observed, the relocation of a health care facility encompasses the closure of an existing facility and the complete relocation of its services to another location. *St. Dominic-Jackson Memorial Hosp. v. Mississippi State Dept. of Health,* 954 So.2d 505, 509 (Miss. App. 2007). In this case, the Department's inference that, in order to approve the relocation of a health care facility, an applicant must propose health care services for both the county it is leaving, as well as the county in which it proposes to relocate, is contrary to logic and common sense principles, unreasonable, and, of course, arbitrary and capricious.

With the *objective need for nursing home beds* established at law, the

substitution of a different standard and the inference of fact based on legal error renders attendant findings arbitrary and capricious. The Department found, contrary to the need for beds established in the *Plan,* Bolivar County is a "medically underserved area" ("MUA") based on federal criteria evaluating "four factors for an area- elderly population, percent of the population in poverty, infant mortality rate, and the ratio of primary care physicians to the population. (R. E. 1 at 11) (emphasis added). While this MUA designation is not necessarily untrue, it is based upon imported criteria, not specified within the *State Health Plan,* and arbitrarily presented by MSDH to contradict the *State Health Plan*'s own definition of "need" for nursing home beds. Further, contends the Department, although DeSoto County is *also* considered "medically underserved" based upon that same federal criteria, *it shouldn't be.* (R.E. 1 at 11).

Recognition of Mid-South's proposed DeSoto County project for "what it is" requires acknowledgment the Bolivar County facility will be closed. That closure is the *affective* action or condition upon which the Department was charged to then objectively consider the resulting *effects* for Bolivar County. The lower court found and Opponents apparently concede the reality Mid-South could shutter its facility at any time or, like the Shelby Nursing Center facility, designate any or all of its beds in abeyance, *without Department approval.*

The undisputed evidence in the record is the majority of any of Mid-South's remaining residents could be absorbed into other Bolivar County facilities and its census reduced by attrition by the time it was ready to open its DeSoto County facility. The Department ignored these established facts and made arbitrary and capricious findings. For example, the record includes testimony from Chance Becnel (CEO of two

nearby nursing facilities, one located in Cleveland and one approximately 12 miles from Cleveland) who testified his two facilities could absorb many of the remaining patients that chose not to relocate to the new DeSoto County facility. (R.E. 13 at 6). Judy Ullery, president of the company that owns the Mid-South facility to be relocated, testified there would be ample time to transfer patients to nearby facilities during the time it took to construct the new facility (who chose not to relocate to the DeSoto County facility) and, by ceasing admissions, they could reduce the census by attrition. (R. E. 11 at 374).

Without attempting to improperly recast the weight given this and other testimony presented the Department, its ultimate findings in regards to these facts is clearly arbitrary and capricious. With regard to Becnel's testimony regarding availability of beds in his Cleveland and his other local facility, the Department chose to credit the subjective proposition that such an alternative "did not take into consideration the preferences or choices that residents or family members *may have* for choosing one nursing home over another." (R.E.1 at 18)(emphasis added). With regard to Judy Ullery's testimony regarding Mid-South's plans to provide for as smooth a transition as possible and reduce Mid-South's census through attrition, the Department chose to cast her testimony as an interest in "killing everybody off." The capriciousness inherent in this implication warrants no further comment, despite the Department's sinister repetition.

Finally, the Department's findings regarding General Review Criterion 5(e) - Community Reaction- lack objective analysis and thus, are arbitrary and capricious. General Review Criterion 5(e) of the Certificate of Need Review Manual states:

> The community reaction to the *facility* will be considered. The applicant may choose to submit endorsements from community officials and individuals expressing their reaction to the proposal. If *significant* opposition to the proposal is expressed in writing or at a public hearing, the opposition may be considered an adverse factor and weighed against the endorsements received.

(R.E. 1 at 24)(emphasis added). On its face, it is unfathomable how this criterion could be interpreted to authorize a "referendum" for the Bolivar County community to oppose *closure* of any health care facility[2]. Logically, this criterion as written contemplates the evaluation of meaningful community reaction to a *proposed* facility. Mid-South can close its Bolivar County facility without anyone's permission. By proposing a new facility where one does not yet exist, as with Mid-South's proposed DeSoto County facility, it is logical for the public and corporate citizenry to be heard. The DeSoto County community might have raised significant opposition in reaction to the proposal, but there was none. The Department's findings regarding this criterion were arbitrary and capricious because the Department chose to credit the reaction of individuals expressing disfavor with the removal of Mid-South's 75 beds from Bolivar County. (R.E. 1 at 24-26). With the overbedding in Bolivar County established at law, the consideration of community reaction against the removal of those beds from Bolivar County loses all objective relevance towards demonstrating "significant" community

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> A recurrent theme introduced through the City of Cleveland's witnesses was the opposition to the loss of area jobs as a result of the relocation. Obviously, any observer must be concerned with the suffering from *any* job loss in our economy and that loss is magnified in an area hard-hit with unemployment like the Mississippi Delta. However, Mid-South does not propose to shut down and move jobs out-of-state or overseas, but intends to *maintain* employment opportunities in Mississippi.

reaction. It sets up the Department's determination of that criterion as a wholly subjective public referendum and is a clear deviation from the statutory requirement of objective review. Thus, the Department's findings regarding this criterion are arbitrary and capricious without the necessity of even reaching a resolution between competing definitions of "significant" evidence of community reaction, whether favorable toward the project or not.

III. The Desoto County Chancellor's Decision to Set Aside the Department's Decision, and thereby Grant Mid-South a Certificate of Need to Relocate, has Substantial Support in the Record.

Despite the City of Cleveland and Department's arguments to the contrary, the decision of the DeSoto County Chancellor itself deserves deference. While this Court reviews the Chancellor's decision *de novo*, it must affirm upon substantial evidence to support that decision. Like the Chancellor below, it is bound by the record made in the Department proceeding and, like the Chancellor, *must* intervene to answer questions of law. Unlike the DeSoto County Chancellor below, this Court has the benefit of reviewing a decision reasoned independently and as a result of an actual review of the entire record and the whole of the evidence therein.

A. The Chancellor Recognized Mid-South's Application Complied With the State Health Plan's Overriding Goals for Health Planning Projects.

The Chancellor recognized and acknowledged the argument of Opponents all Certificate of Need Applications must substantially comply with the four overriding goals of health planning in Mississippi:

> [T]o prevent unnecessary duplication of health resources, promote cost containment, improve the health of Mississippi residents; and increase the accessibility, acceptability, continuity

> and quality of health services, with the primary objectives being the avoidance of unnecessary duplication of health resources and promoting cost containment.

(R. E. 3 at 4). The Chancellor also acknowledged Opponents' argument, in keeping with this Court's established precedent, "the controlling question in every CON review is whether the project substantially complies with the Plan's projection of need, not any other lesser standard of need." *St. Dominic-Madison County Medical Center v. Madison County Medical Center, supra.* The Chancellor found the Department's conduct in evaluating Mid-South's Application arbitrary and capricious, holding "MSA showed the 'need' using the *[State Health Plan's]* own numbers indicating there is an underbedding in DeSoto County and an overbedding in Bolivar County." (R. E. 3 at 3). The Chancellor also announced she found in the record:

> ...testimony about the new proposed facility which indicated that the health needs of the citizens of Mississippi will be well served by such a facility and the four goals of the SHP and the GR Criteria will be met by the building of this proposed facility by providing quality health services to the residents of the state.

(R.E. 3 at 4). With evidence the Department substituted the legally established need for nursing home beds with subjective and arbitrary criteria indicating Bolivar County is "medically underserved," the Chancellor was justified in ignoring irrelevant arguments about the economic conditions in Bolivar County, as allegedly impacted by the relocation, and misplaced inferences regarding the costs associated with the proposed DeSoto County facility. There exists substantial evidence in the record Mid-South's proposed $4.895 Million facility will be constructed with Mid-South's own funds. (R. E. 4 at 11). Further evidence indicates Mid-South will decrease its Medicaid utilization at substantial savings to the state. (R. E. 4 at 12). Dismissing the City of Cleveland and

Department's protestations regarding the difference in "costs" between DeSoto and Bolivar Counties is not an impermissible "re-weighing of evidence" by the Chancellor. Likewise, it is not error to recognize Mid-South's decreased Medicaid utilization as substantial evidence of cost containment. What would be error is to allow to stand the Department's arbitrary assertion that decreased Medicaid utilization in DeSoto County equates to "adverse impact" upon the segment of the Bolivar County population who might qualify for Medicaid services. After all, at the end of the day, it is need for beds that is the controlling issue.

CONCLUSION

For the reasons discussed herein, and with evidence of clear legal error in the decision of the MSDH, this Court should affirm the ruling of the DeSoto County Chancery Court which set aside the decision of MSDH and granted Mid-South's Application for a certificate of need to relocate its 75 beds to DeSoto County.

Respectfully submitted, this the 31st day of July, 2008.

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CERTIFICATE OF SERVICE

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