IN THE SUPREME COURT OF MISSISSIPPI

QUEEN CITY NURSING CENTER, INC., COMMUNITY LIVING CENTERS, LLC d/b/a MERIDIAN COMMUNITY LIVING CENTER, and BEVERLY ENTERPRISES – MISSISSIPPI, INC. d/b/a GOLDERN LIVINGCENTER – MERIDIAN **APPELLANTS**

VS. **CAUSE NO: 2010-SA-01077**

MISSISSIPPI STATE DEPARTMENT OF HEALTH and MEADOWBROOK HEALTH AND REHAB, LLC **APPELLEES**

APPEAL FROM THE DECISION OF THE HINDS CHANCERY COURT, FIRST JUDICIAL DISTRICT

BRIEF OF APPELLEE THE MISSISSIPPI STATE DEPARTMENT OF HEALTH

Of Counsel:
Bea M. Tolsdorf, MSB No. [redacted]
Special Assistant Attorney General
Mississippi State Department of Health
Post Office Box 1700
Jackson, Mississippi 39215
Telephone: 601/576-7446
Facsimile: 601/576-7805

Table of Contents

Table of Authorities

Cases **Page**

Statutes and Other Authority:

Statement of Joinder in the Statement of the Issues presented by Meadowbrook Health & Rehab, LLC

The Mississippi State Department of Health hereby adopts in full and incorporates herein the *Statement of the Issues* presented by the Appellee, Meadowbrook Health & Rehab, LLC in its Brief submitted to this Court on February 22, 2011.

Statement of Joinder in the Course of Proceedings Below presented by Meadowbrook Health & Rehab, LLC

The Mississippi State Department of Health hereby adopts in full and incorporates herein the *Course Proceedings Below* presented by the Appellee, Meadowbrook Health & Rehab, LLC in its Brief submitted to this Court on February 22, 2011.

Statement of Joinder in the Statement of the Facts presented by Meadowbrook Health & Rehab, LLC

The Mississippi State Department of Health hereby adopts in full and incorporates herein the *Statement of the Facts* presented by the Appellee, Meadowbrook Health & Rehab in its Brief submitted to this Court on February 22, 2011.

Statement of Joinder in the Summary of the Argument and the Argument presented by Meadowbrook Health & Rehab, LLC

The Mississippi State Department of Health, although submitting an independent Brief, joins in and adopts in full all legal and equitable arguments presented by Meadowbrook Health & Rehab, LLC in its Brief, submitted on February 22, 2011. The Department does not consider any argument more important than another; however, in effort to address certain issues in full and from a more administrative perspective, the Department determined it was necessary and prudent to submit an independent brief so that it might discuss these pertinent issues that possibly extend beyond the Certificate of Need (hereinafter "CON") presently before this Court.

Summary of the Argument

The decision of the State Health Officer (hereinafter "SHO") to approve the CON application presently before this Court was appropriate and made in accordance with the law. The Final Order issued by the SHO should be afforded great deference as it is not in violation of any statute or law or repugnant to the plain meaning thereof; is not arbitrary or capricious; is not beyond the power of the administrative agency to make and it was supported by substantial evidence. In accordance with statutory provisions and Mississippi case law, it would be inappropriate to subject this decision to any additional or heightened scrutiny. This Honorable Court should allow the decision of the SHO to remain undisturbed, as the Chancery Court did below.

The proposed project does not violate any statute or law; chiefly, the parameters set forth in §41-7-191(2) are not and would not be breached by this project. Since 1990, the year in which the Mississippi Legislature enacted §41-7-191(2), the Mississippi State Department of Health (hereinafter "MSDH") has interpreted the language of this statutory provision to prohibit MSDH from issuing any CON which would create additional long-term care beds and/or additional skilled nursing facilities within the State of Mississippi. Section 41-7-191(2) is referred to and known as the moratorium. In making her final decision, the SHO determined that the moratorium is not violated by this project because the substantial evidence and facts established that no new beds and no additional skilled nursing facilities are proposed; thus the moratorium is not violated.

The SHO did not depart from the long standing interpretation of the moratorium language by MSDH; and thus cannot be said to be arbitrary and capricious. The Mississippi Attorney General has concurred, through an Official Opinion, with MSDH

regarding the proper and lawful interpretation of §41-7-191(2); and thus, the decision of the SHO cannot be said to be repugnant to the plain meaning of the statute nor an error of law.

The manner by which the SHO drafted her Written Findings and Final Order was appropriate and lawful. In making her final decision, the SHO ". . . shall make his written findings and issue his order . . ." as required by §41-7-197 (*Miss. Code Ann.* 1972, as amended). The law requires the SHO to commit her finding to writing and to issue an official and Final Order; it does not require the SHO to issue any findings or analysis with more detail than she has in this matter.

It if for these reasons that the decision of the SHO must be afforded deference and remain undisturbed.

Argument

I. It would be Improper to Apply a Heightened Standard of Review to the Matter Presently Before this Court.

When a final order of an administrative agency, such as MSDH, is appealed, a specific standard of review applies. The Court of Appeals of this State held in *Clay v. Epps*,

> "[w]hen reviewing a decision by a chancery or circuit court regarding an agency action . . . this Court applies the same standard of review that the lower courts are bound to follow. We will examine the appeal to determine whether the order of the administrative agency (1) was unsupported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the aggrieved party." 19 So. 3d 745 (Miss. Ct. App. 2007) (quoting *Sigger v. Epps* 962 So.2d 78, 80 (¶4)(Miss. Ct. App. 2007)).

The Court in that matter goes on to opine that, "[t]hese factors are the ***only*** grounds for overturning an agency's action; otherwise, the agency's determination must remain undisturbed." *Id* @ 745-746 (*Emphasis Added*)(quoting *Miss. Transp. Comm'n v. Anson*, 879 So. 2d 958, 963 (¶13) (Miss. 2004)). This same standard of review applies to appeals of Final Orders issued by MSDH regarding a Certificate of Need, and is spelled out in the Certificate of Need Laws at §41-7-201(2)(f). In pertinent part, §41-7-201(2)(f) states,

> "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.* (1972, as amended)(*Emphasis Added*)

Thus, the Final Order of the SHO in this matter may *only* be disturbed if the Order is defective in a manner prescribed above. As will be discussed below, the decision and Final Order issued by the SHO was appropriate and lawful; and therefore, does not fall into any of the categories outlined in *Epps* and §41-7-201(2)(f) allowing its reversal.

A. The Final Order of MSDH in this Matter Does Not Violate Any Law.

The project proposed by Meadowbrook and approved by the SHO does not violate any sections of the Certificate of Need Law; it is in compliance with the State Health Plan and the Certificate of Need Manual and therefore, the SHO rightfully and lawfully granted CON approval to Meadowbrook. However, in their Brief, the Appellants, (hereinafter the "Opponents") contend that the Final Order of MSDH should be reversed. MSDH wholly disagrees with the Opponents' analysis of the Certificate of Need Laws with regard to this project; and in its Brief, Meadowbrook fully addresses the reasons by which the Opponents analysis is incorrect. MSDH has joined into the Brief submitted by Meadowbrook and adopts all legal and equitable arguments contained therein, so a repetition of those arguments would be mere surplus; however, MSDH must address two specific arguments made by Opponents regarding the Certificate of Need Laws.

1. The CON Application presently before this Court is for the Replacement of an Existing but Closed Nursing Home and for the Relocation of Existing Nursing Home Beds—thus the Moratorium is not Applicable.

In 1990 the Mississippi Legislature enacted Mississippi Code Annotated §41-7-191(2); this became known as the "moratorium" on new skilled nursing facilities. The moratorium is found in the "*Health Care Certificate of Need Law of 1979*" in the "*Public Health*" Volume of the *Mississippi Code Annotated.* MSDH is charged with

administering and enforcing the Certificate of Need Law; specifically, §41-7-187 states, "[t]he State Department of Health is hereby authorized to develop and implement a statewide health certificate of need program." *Mississippi Code Annotated* (1972, as amended). Therefore, it has been delegated to MSDH to interpret and enforce the plain meaning of the moratorium.

It is well-settled in Mississippi case law that MSDH may interpret the rules with which it is charged to enforce, and such interpretation should be afforded deference by the Courts. The Mississippi Supreme Court stated such in *Ricks v. Mississippi State Department of Health*, ". . . the interpretation given the statute by the agency chosen to administer it should be accorded deference." 719 So. 2d 173, 179 (Miss. 1998). "A rebuttable presumption exists in favor of agency decision, and this Court may not substitute its own judgment for that of the agency." *Sierra Club v. Mississippi Environmental Quality Permit Board,* 943 So.2d 673, 678 (Miss. 2006) (quoting *Miss. Comm'n on Envtl. Quality v. Chickasaw County Bd. of Supervisors,* 621 So. 2d 1211, 1216 (Miss. 1993)). "Furthermore, '[t]here is a rebuttable presumption which favors the agency's decision and the challenging party has the burden of proving the contrary.'" *Clay v. Epps,* 19 So. 3d 745 (Miss. Ct. App. 2007) (quoting *Ross v. Epps,* 922 So.2d 847, 849(¶4)(Miss. Ct. App. 2006)). For nearly two decades, MSDH has interpreted the moratorium language contained in *Miss. Code Ann.* §41-7-191(2) to prohibit the CON approval for any project that would create *new or additional* long-term care beds OR create a *new or additional* skilled nursing facility. MSDH does not interpret the moratorium to prohibit any and all construction when such construction is related to a skilled nursing facility.

In the application for the CON that is presently before this Court, Meadowbrook Health & Rehab, LLC (hereinafter "Meadowbrook"), the Applicant, does not request to create any new or additional long-term care beds or to build an additional skilled nursing facility not previously authorized. Instead, the Applicant simply requested to *replace* the old, dilapidated building that formerly housed twenty-one (21) existing beds comprising the Kemper Homeplace Nursing Home (hereinafter "Kemper") and to relocate Kemper and its beds to a new building to be constructed by Meadowbrook, at a site in Meridian, Lauderdale County, Mississippi. In addition to the request to replace the building and to relocate Kemper and its 21 beds, Meadowbrook also requested to *relocate* thirty-nine (39) existing beds currently located at Poplar Springs Nursing and Rehabilitation Center (hereinafter "Poplar Springs") to the Meadowbrook site. Poplar Springs and the proposed Meadowbrook site are both located in Meridian, Mississippi.

As a result of the replacement and relocation of beds, Meadowbrook will exist as a sixty (60) bed nursing home facility (replacing the Kemper facility). Meadowbrook must build a sixty (60) bed nursing facility because Section 106.01 of the FY *2009 Mississippi State Health Plan*, states that MSDH may not approve any new or replacement skilled nursing facility that plans to house fewer than sixty (60) beds; therefore, a replacement facility must have *at a minimum* sixty (60) beds. *2009 State Health Plan, Section 106.01(1)(6),* Chapter 8 @ Page 11. (RE 1 @ Page 3).

In reviewing this application, MSDH determined that the project proposed does not violate the Moratorium for two major reasons. **First, the project proposed does not create or add any new or additional long term care beds to the bed inventory for the State of Mississippi. Second, the number of nursing home facilities that will exist**

within Long-Term Planning District IV will not increase. During the hearing Don Eicher, Director of the Office of Health Policy and Planning, provided testimony which highlighted these determinations. With regard to the proposed project and its effect on the bed count, Mr. Eicher testified, "[i]n either instance, whether it's built in Kemper County or whether it's rebuilt in Lauderdale County, **there will be no net change in the Planning District, no new beds are created, no beds leave the Planning District**." Hearing Tr. @ Page 8 Lines 4-8. (RE 2 @ Page 2)(*Emphasis Added*). During cross examination, Mr. Eicher answered questions regarding the number of facilities that will be present within Long-Term Planning District IV if the project were approved,

> Q. . . . When – if this application is approved for the replacement facility for Kemper Homeplace, how many nursing home facilities will there be in Lauderdale and Kemper County? . . .
>
> A. . . . Between the two counties, there will **still** be nine.
>
> (Hearing Tr. @ Page 29 Lines 1-29, Hearing Tr. @ Page 30 Lines 1-12) (RE 2 @ Page 8). (*Emphasis Added*).

As will be discussed in great detail below, the moratorium prohibits MSDH from approving any projects which would create new and/or additional long term care beds or an additional skilled nursing facility in the state; however, there are no new beds and no additional skilled nursing facility proposed by this project. Meadowbrook is a *replacement* of Kemper; it will not be built in addition to Kemper. Meadowbrook will not house newly created beds; it will house beds that currently exist (21 beds from Kemper and 39 beds from Poplar Springs). The services at Kemper will be relocated to Meadowbrook, and the services at Poplar Springs will decrease in accordance with the

transfer of the 39 beds. Once this project is completed, Kemper will no longer be located in Kemper County and will no longer be called Kemper; however, it will continue to exist under a different name, in a different location and in a new building.

Although the bricks and mortar Meadowbrook will use to construct the building will be new, the actual nursing home itself will not be considered new for health planning purposes in the State. It will *replace* a previously operating but still existing nursing home—Kemper. The beds which will be used for the provision of skilled nursing care at Meadowbrook will not be new, they will be currently existing beds—21 previously authorized Kemper beds and 39 previously authorized Poplar Springs beds. This CON application does not involve the creation of new beds or the creation of any additional skilled nursing facility and thus the moratorium **does not apply**.

Over the years MSDH has addressed many different transitions occurring at many different health care facilities, including the closure of an entire facility. If a facility closes for any reason, the facility and the beds that had previously been housed in that facility remain viable for sixty (60) months. *Mississippi Code Annotated* §41-7-191(1)(m) states that, "[n]o person shall engage in any of the following activities without obtaining the required certificate of need: (m) [r]eopening a health-care facility **that has ceased to operate for a period of sixty (60) months or more**, which reopening requires a certificate of need **for the establishment of a new health-care facility**." (1972, as amended.)(*Emphasis Added*). *See also, Miss. Code Ann. §41-7-191(1)(a).* Only when a facility has been out of service for a period of time that is in excess of sixty (60) months, does MSDH consider the facility to be "new" for health planning purposes. Stated another way, if a facility were to cease operations, for some period of time not to exceed

sixty (60) months, the facility could reopen, at its current location or within one mile of that location (if the expenditure did not cross the capital expenditure threshold[1]), without the necessity of acquiring a CON. This is due to the fact that §41-7-191(1)(a) and (m) state that the facility and the beds used to re-open the previously closed facility remain in existence during the time the facility ceased to operate. However, if a facility were to close for a period of time that exceeded sixty (60) months, without acquiring the authority to reopen, that facility would be required to apply for CON approval "for the establishment of a new health-care facility." Such approval would be required because the CON statutes require MSDH to consider and characterize the closed entity as a "*new*" health care facility and thus the beds used to provide the services in fact are no longer considered "in existence;" rather they are "*new beds.*"[2]

In the CON application presently before this Court, the facility and all beds involved in the proposed project are legally *established and existing.* During the Administrative Hearing, Mr. Eicher provided testimony establishing such.

> Q. And am I correct that in a closed facility that unless that facility and those beds are reopened in a replacement facility within five years from when it was closed, that those beds essentially would go out of the mix of inventory of beds in Long-Term Planning District IV?

---

[1] §41-7-173(c)(ii), as in effect during the time MSDH reviewed the Meadowbrook project, stated that a "'Capital Expenditure', when pertaining to other than major medical equipment, shall mean any expenditure which under generally accepted accounting principles consistently applied is not properly chargeable as an expense of operation and maintenance and which exceeds Two Million Dollars ($2,000,000.00)."

[2] With respect to the proposed Meadowbrook project, the reason Meadowbrook had to request a CON is not because the project contemplates "the establishment of a new health-care facility" and not because Meadowbrook is requesting new beds. Rather, Meadowbrook had to request CON authority to replace the old building with a new building at a cost greater than $2,000,000 and relocate Kemper and the 39 Poplar Springs beds farther than one mile.

A. Right. The Legislature amended the Certificate of Need law several years ago, and they required that any healthcare facility that's been closed or not provided service in 60 months or more be analyzed as a new facility. And so this facility will lose its – after 60 months of being closed and providing any service, it would not be considered an existing facility. So despite this facility being closed for three-and-a-half years, it's still in existence under the Certificate of Need law until that 60-month threshold gets crossed.

(Hearing Tr. @ Page 12 Lines 23-20, Hearing Tr. @ Page 13, Lines 1-12) (RE 2 @ 3-4).

Therefore, Kemper, under the auspices of the CON laws, remains an existing facility with twenty-one existing beds and may lawfully replace its current building or facility. This is precisely what is proposed in the CON application presently before this Court—the Kemper building or "facility" would be replaced by the new Meadowbrook building or "facility." Additionally, the proposed project also involves thirty-nine (39) beds from Poplar Springs. Presently, Poplar Springs is a fully functional facility and; therefore, the beds to be relocated from Poplar Springs are established and existing as well. Because the project does not propose the creation of new beds or the establishment of an additional facility comprised of newly created beds, the Moratorium does not apply.

i. The Manner by which the MSDH has Interpreted the Moratorium Language found in §41-7-191(2) is not Repugnant to the Plain Meaning of the Statute.

"Great deference is afforded to an administrative agency's construction of its own rules and regulations and the statutes under which it operates." *Melody Manor Convalescent Center v. Mississippi State Department of Health and Green County Hospital and Extended Care Facility,* 546 So. 2d 972, 974 (Miss. 1989). The Court in *Ricks v. Mississippi State Department of Health,* stated that ". . . this Court has held that

unless the Department's interpretation is repugnant to the plain meaning thereof, the court is to defer to the agency's interpretation. 719 So. 2d 173, 179 (Miss. 1998). In the present case, it cannot be said that the decision of the SHO was repugnant to the plain meaning of the statute. The *plain* meaning of the statute is to prevent MSDH from approving any projects which would create any new long term care beds or an additional skilled nursing facility with new long-term care beds *or* any expansion or addition that would cause an increase in the long-term care bed count in the State of Mississippi. It would be illogical, unreasonable and debilitating for all skilled nursing facilities in the State if MSDH considered only the words "new construction," "addition" and "expansion" in applying the Moratorium. Such an interpretation would virtually extinguish the ability of currently-existing skilled nursing facilities in the state to provide physical plants that can meet the demands of the populations they serve. The facilities must be allowed to develop and change so that they may respond to current trends found in the health-care industry—including replacing aging and out-of-date buildings. To disallow such would not be poor health planning; it would be NO health planning.

If Opponents' assertion as to the meaning of §41-7-191(2) were accepted, all existing skilled nursing facilities would be prohibited from repairing, replacing or rebuilding their physical plant. Do Opponents suggest that a nursing home should not be allowed to construct a replacement building (apparently so, if such facility has been forced to close because of the unsafe conditions posed by the state of its physical plant) or expand and/or add on to its existing physical plant? ". . . [T]his Court should reject the Department's . . . misreading of the statutory moratorium, and honor the Legislature's intent that no 'new construction' be performed." *Brief of the Opponent* at Page 42. This

interpretation of the Moratorium is a dangerous one. Even if Opponents limit their interpretation to closed nursing homes, the result will make it virtually impossible for valid and constructive health planning to occur and would be contrary to the CON law. *See Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131, 1140 (Miss. Ct. App. 1999) ("[C]ourts need to understand the possible effects in order not to interpret the statute in such a way as to cause absurd results.").

If MSDH interpreted the moratorium in the same manner as the Opponents, MSDH would be prohibited from issuing a CON to a skilled nursing home to rebuild after its facility was forced to close because it was destroyed, partially or in its entirety, after a fire or natural disaster. To put this into perspective, assume that the Opponents' interpretation of §41-7-191(2) is correct. Then assume that the State of Mississippi is once again ravaged by a natural disaster not unlike Hurricane Katrina. According to Opponents, §41-7-191(2) would prohibit MSDH from allowing skilled nursing facilities, that were forced to close because of storm damage, to relocate and rebuild on higher ground or even to rebuild at its former site. It would also prohibit MSDH from allowing such closed skilled nursing facilities to rebuild any portion of what had been destroyed or damaged by the disaster. This prohibition would exist regardless of the reason necessitating such construction. A closed nursing home that could not reopen its doors, in an "as-is" condition, in the building in which it was located when it closed would simply never be allowed to reopen regardless of the circumstances of its closure and the facility and beds would simply be lost.

ii. Mississippi Code Annotated §41-7-191(2)(t) Gives the Mississippi State Department of Health the Authority to Give Certificate of Need Approval for a Project that Would Create *New* Long Term Care Beds *and* Create a

New Skilled Nursing Facility—it is an exception to the Moratorium. Section §41-7-191(2)(t) DOES NOT Evidence a Prohibition Against Any and All Construction Related to a Skilled Nursing Facility

In an attempt to further their argument that §41-7-191(2) prohibits the construction of a replacement facility, the Opponents cite §41-7-191(2)(t) as "proof" that the moratorium prohibits *any* construction when such is made in connection with a skilled nursing facility. In truth, §41-7-191(2)(t) is totally irrelevant to the issue and project presently before this Court; however, in an effort to fully address the arguments made by the Opponents, MSDH must discuss this statutory provision and its purpose. §41-7-191(2)(t) states, in part,

> The State Department of Health shall issue certificates of need to the owner of a nursing facility in operation at the time of Hurricane Katrina in Hancock County that was not operational on December 31, 2005, because of damage sustained from Hurricane Katrina to authorize the following: (i) the construction of a new nursing facility in Harrison County; (ii) the relocation of forty-nine (49) nursing facility beds from the Hancock County facility to the new Harrison County facility; (iii) the establishment of not more than twenty (20) non-Medicaid nursing beds at the Hancock County facility; and (iv) the establishment of not more than twenty (20) non-Medicaid beds at the new Harrison County facility. *Miss. Code Ann. 41-7-191(2)(t)* (1972, as amended)(*Emphasis Added.*)

While this statutory provision does specifically provide for the construction of a skilled nursing facility, it provides for the construction of a previously unauthorized nursing home, not a replacement nursing home. This subsection, similar to subsections (a) through (s) of §41-7-191(2), provides for a very specific exception to the moratorium and is factually distinguishable from the matter at hand.

Primarily, the Harrison County facility referenced in §41-7-191(2)(t) would exist as a *new* and additional skilled nursing facility[3]. The facility referenced in Hancock County, would re-opened at its original location, while a *new additional* location, would be constructed in Harrison County. Put simply, one facility would become two and the number of skilled nursing facilities in Long Term Care Planning District IV would increase by one (1). This statutory provision also provided for the creation of forty (40) new skilled nursing beds, thereby increasing the number of skilled nursing beds in the State of Mississippi. In short, the exception to the moratorium provided at (2)(t) was not necessary simply to construct a replacement building; it was necessary to construct a *new* and additional skilled nursing facility, and to create *new* and additional long-term care beds. Therefore, when analyzing the project outlined in §41-7-191(2)(t) in its totality, it becomes evident why the project required a legislatively mandated exception to the moratorium—it created a new never before authorized facility and new never before authorized beds. The project approved by the SHO in this matter does not propose to do such.

In the matter presently before this Court, Meadowbrook will construct a new building that will replace an old, dilapidated building. Unlike the project outlined in (2)(t) above, in the project proposed by Meadowbrook, one facility ***does not*** become two; one building is ***replaced*** by another building. Unlike the project outlined in (2)(t) above, Meadowbrook will use existing beds; ***no new or additional beds*** are created by this project.

[3] The CON that is authorized in §41-7-191(2) has not been applied for and granted to date; therefore the projects outlined in this subsection have not been undertaken.

It is important to note that the §41-7-191(2)(t) is the last in a lengthy list of exceptions—twenty (20) to be specific—to the moratorium language found in §41-7-191(2). *All* of these exceptions provide for the creation of new or additional skilled nursing beds. There are ***no*** exceptions that provide for brick and mortar construction alone. That can only mean that the Legislature did not intend for the moratorium to prohibit construction when no new beds are to be housed in the new construction.

2. The State Health Officer Drafted and Issued her Written Findings and Final Order in the Manner Required by Law and Prescribed in §41-7-191(2)

When deciding whether or not a CON application meets all of the necessary criteria, the only "finding" or "analysis" that is truly definitive is the one made by the SHO; everything prior to that decision is a *recommendation.* The SHO is not bound to accept the recommendation made in the staff analysis or the recommendation made by the Hearing Officer—the SHO is required to review the record before her and determine whether or not the proposed project satisfies the CON laws and the requirements set forth in both the State Health Plan and Certificate of Need Manual. Mississippi Code Ann. §41-7-197(2) outlines what actions the SHO must take in order to fulfill her statutorily prescribed duties as final arbiter over CONs at the administrative level. Specifically, §41-7-197(2) states in part, "[t]he State Health Officer shall make his written findings and issue his order after reviewing said records." (1972, as amended).

The statute does not specify or outline any specific findings the SHO must include in the "written findings" or what such findings must contain. The statute simply requires that the SHO make a written finding and issue an order. Because the Legislature did not specify how the SHO should make her written findings, the manner by which the written

findings are produced is within the SHO's discretion. In the matter presently before this Court, the SHO did just as the Legislature prescribed—she issued her written finding and Final Order.

In the SHO's Final Order it is stated, "[t]he State Health Officer ***Finds***: Concurs with and adopts the staff's findings and recommendation." (State Health Officer's Final Order) (RE 3 @ Page 3)(*Emphasis Added.*) Additionally, this same Order states, "[i]t is the intent of the State Health Officer, after considering the Department's plans, standards and criteria; staff's analysis; hearing officer's recommendation, if any, and making written findings, that the proposed project be Approved." So ***Ordered*** this the 11th day of February, 2010. (State Health Officer's Order)(RE 3 @ Page 3)(*Emphasis Added.*) The SHO did just as the statute required—she issued a written finding and order. She was not required to write an opinion detailing her analysis and decision. The simple fact that the Opponents do not agree with what the SHO's written findings and order say does not unilaterally impose a duty upon the SHO not previously required of her; specifically to draft a detailed opinion. The SHO made written findings and a Final Order—as is required by §41-7-197(2)—therefore, said findings and order are appropriate and lawful.

B. The Final Order of MSDH is Supported by Substantial Evidence and Is Not Contrary to the Manifest Weight of the Evidence.

In presenting their application and CON proposal, Meadowbrook supplied MSDH with ample evidence to support approval of the requested CON. "Substantial evidence is 'something less than a preponderance of the evidence but more than a scintilla or a glimmer. The reviewing court is concerned only with the reasonableness of the administrative order, not its correctness.'" *Sierra Club v. Mississippi Environmental Quality Permit Board,* 943 So.2d 673, 678 (Miss. 2006)(quoting *Miss. Dep't of Envtl.*

Quality v. Weems, 653 So.2d 266, 280-281(Miss. 1995)). The factual and evidentiary support provided by Meadowbrook clearly demonstrated to MSDH that the project proposed substantially complied with the requirements set forth in the Certificate of Need Laws, 2009 State Health Plan and the Certificate of Need Manual. In its Brief, Meadowbrook fully addresses how the project proposed satisfies all requirements necessary for CON approval. MSDH has joined into the Brief submitted by Meadowbrook and adopts all legal and equitable arguments contained therein; and therefore, in the interest of brevity, MSDH would direct the Court to the Meadowbrook Brief for a full analysis of project compliance with all applicable laws, rules and regulations.

C. The Final Order of the MSDH is Not Arbitrary or Capricious.

"An agency decision is 'arbitrary' if "it is not done according to reason and judgment, but depending on the will alone." *Case v. Public Employees' Retirement System,* 973 So.2d 301, 311 (Miss. Ct. App. 2008) (quoting *Miss. State Dep't of Health v. Natchez Cmty. Hosp.,* 743 So.2d 973, 977(¶13)(Miss. 1999)). "A 'capricious' decision is 'done without reason, in a standing of or disregard for the surrounding facts and settled controlling principles.'" *Id* @ 311. The Final Order issued by MSDH in this matter is not arbitrary or capricious. MSDH has interpreted the Moratorium contained in §41-7-191(2) to prohibit the agency from issuing a CON for the establishment of new beds or for the establishment of new or additional skilled nursing facilities; not to prohibit MSDH from issuing a CON to repair, replace or rebuild a facility which will require no new beds. This has been the interpretation and policy of MSDH since 1990 and MSDH has uniformly enforced the moratorium in that manner since that time. The SHO determined

that the facts and evidence presented established that no new beds and no additional skilled nursing facilities were being created and thus the Moratorium did not apply to this project. The decision of the SHO was well-reasoned, based on the substantial evidence and deferred to the long-standing practice of MSDH; therefore, her decision cannot be said to be arbitrary or capricious nor an error of law.

II. The Request for an Official Attorney General Opinion made by the Mississippi State Department of Health in this Matter has No Effect on the Deference Shown to Final Orders of the Mississippi State Department of Health.

As outlined in **Section I.** above, according to *Clay v. Epps*, 19 So.3d 745 (Miss. Ct. App. 2007), and §41-7-201(2)(f), the Final Order of the SHO in this matter may ***only*** be reversed if the decision violates the law, is unsupported by substantial evidence, is beyond the legal authority of the administrative agency or violates some constitutional right of an aggrieved party. This is the standard of review to be applied in this matter. In the present case, the decision of the SHO does not "fit" any of the delineated grounds for reversal; and therefore her decision must stand. In the brief submitted by the Opponents, it is suggested that this Court should ignore the statutorily prescribed standard of review simply because MSDH invoked its legally established right to seek out an Attorney General's Opinion on an issue effecting the Agency. To find that MSDH essentially waived *all* deference due its interpretation of statutes under which it operates, simply by asking for an Official Attorney General Opinion would prove to be an infringement on the rights of the State Agency to counsel. Additionally, such a holding could have grave legal consequences for the State of Mississippi.

The acting Attorney General for the State of Mississippi serves as the legal counsel for the state. Specifically, "[h]e shall be the chief legal officer and advisor for

the state . . ." Mississippi Code Annotated §7-5-1(1972, as amended). As Chief Legal Counsel, the Attorney General shall provide legal advice to his clients—the State Agencies and State Officers—when such is requested. Mississippi Code Annotated §7-5-25 states in pertinent part, "[t]he Attorney General ***shall*** give his opinion in writing, without fee, to . . . the State Board of Health, . . . when requested in writing, upon any question of law relating to their respective offices." (1972, as amended)(*Emphasis Added*). This same provision goes on to state:

> When any officer, board, commission, department of person authorized by this section to require such written opinion of the Attorney General shall have done so and shall have stated all the facts to govern such opinion, and the Attorney General has prepared and delivered a legal opinion with reference thereto, **there shall be no liability, civil or criminal, accruing to or against any such officer, board, commission, department or person who, in good faith, follows the direction of such opinion and acts in accordance therewith . . .**" (*Id.*)(*Emphasis Added*).

Therefore, when a State Agency or a State Officer is faced with a decision or dilemma in which it would be prudent to obtain legal counsel, such advice and counsel may be sought from the acting Attorney General and his staff. The right to counsel for a State Agency does not, and should not, come at the cost of the deference a State Agency or State Officer is shown when its interpretation of a statute under which its operates is challenged. State Agencies and State Officer have the right to legal counsel—as evidenced by §7-5-25. Additionally, when the decisions of State Agencies or State Officers are reviewed by the Courts of this state, Courts must give such decisions the limited review outlined in *Clay* and great deference. *Ricks,* 719 So.2d at 177 (holding, "[t]his Court is bound . . . to give due deference to the factual finding of the administrative agency and to the chancellor who adopted the same findings.").

The right to legal counsel and the right to deference are two unrelated issues and are not mutually exclusive. Simply put, MSDH may ask its attorney for legal advice and counsel on a particular issue and still be afforded deference on that issue if challenged in the court system. To hold otherwise, would cause State Agencies and State Officers to question the necessity of obtaining legal counsel, and to make crucial decisions that could be potentially legally unsound—all for fear that a waiver of deference would occur if such a request were made. Decision-making by the appointed authority of a state agency regarding the administration of its statutory charge without legal consultation on that administrative law could prove to be a practice that creates liability and financial exposure for the State of Mississippi. In short, the Opponent's position on this issue is impractical and presents poor public policy.

In the matter before this Court, MSDH choose to invoke its right to counsel and requested an Official Opinion from the Attorney General on the moratorium issue. Specifically, MSDH wanted to ensure that the manner by which it had interpreted the moratorium—an interpretation that has been in place for nearly two (2) decades without conflict—was accurate and legally sound. Therefore, unlike the Opponents would have this Court believe, MSDH did not look to the Attorney General to decide how it should enforce the moratorium; it looked to the Attorney General to make sure that their enforcement was proper. Mississippi case law and §41-201(2)(f) clearly provide what the standard of review in this matter must be; and the request for an Official Attorney General Opinion by MSDH has no effect on that standard nor on the deference shown to the Final Order of the SHO.

III. The Final Order of the SHO Corresponds with the Official Attorney General Opinion and the Long Standing Interpretation of the Moratorium by the MSDH.

In June 2008, the Mississippi Attorney General's Office issued an official Opinion to Dr. F. E. Thompson, Jr. MD, MPH, who was the State Health Officer for Mississippi at the time. In the official request for an opinion submitted by MSDH on May 23, 2008, Dr. Thompson posed four (4) questions to the Attorney General, three (3) of which are relevant to this project. First, "[d]oes MSDH have the authority to issue a CON for the replacement of an existing nursing home or intermediate care facility." (Request for Opinion) (RE 4 @ Page 2). Second, "[d]oes MSDH have the authority to issue a CON for the relocation of an existing nursing home or intermediate facility?" (Request for Opinion) (RE 4 @ Page 2). And lastly, "[d]oes MSDH have the authority to issue a CON for the relocation of existing nursing home beds from one facility to a *proposed* replacement facility where the Applicant needs such beds to meet the minimum 60 bed requirement or to increase the total beds of the facility for other considerations such as efficient operations or meeting projected need?" (Request for Opinion) (RE 4 @ Page 3)(*Emphasis Added*).

Prior to issuing his official opinion on the issues presented, the Attorney General provides some historical comment on the long-standing interpretation of moratorium by MSDH and the Mississippi State Supreme Court,

> The relevant statute, 41-7-191, establishes a Moratorium on the issuance of CONs for new construction of, addition to, or expansion of skilled nursing or intermediate care facilities. The Mississippi State Department of Health has interpreted, and the Mississippi Supreme Court has deferred to such interpretation, that where the Moratorium refers to the new construction of, addition to, or expansion of facilities, it actually bars the creation of new beds as

> made available through such facilities. (Attorney General's Opinion-June 13, 2008)(RE 5@ Page 2).

In response to the inquiries made by MSDH, the Attorney General opined, "[w]ith respect to your first inquiry, this office is of the opinion that the Mississippi Department of Health may properly issue a CON for the replacement of an existing nursing home or intermediate care facility, so long as the replacement facility does not create new beds." (Attorney General's Opinion-June 13, 2008)(RE 5 @ Page 2). With regard to whether or not the Department may issue a CON that would authorize the relocation of a facility, the Attorney General stated; ". . . relocation is similarly subject to the number of requirements imposed on replacement: there must be no new available beds after the relocation, else the Moratorium is violated." (Attorney General's Opinion-June 13, 2008)(RE 5 @ Page 2).

Regarding the final issue presented to the Attorney General, he stated, ". . . the Department of Health is authorized to issue Certificates of Need in the relocations described in your fourth inquiry." (Attorney General's Opinion-June 13, 2008)(RE 5 @ Page 3).

In its Brief, the Opponent contends that the Attorney General Opinion discussed above is inapplicable to the project proposed in the CON application presently before this Court. "Therefore, even on the exception stated in the June 2008 opinion, the Meadowbrook project does not qualify, in whole or in part, for an exception to the §41-7-191(2) moratorium. MSDH thus acted contrary to law when it issued the CON in this case . . ." *Brief of Opponents* at 39. MSDH wholly disagrees with this analysis. The project proposed by Meadowbrook and approved by the SHO falls within three of the

factual situations set forth in the request made by MSDH to the Attorney General and the response and opinion thereto.

First, the Attorney General found that an *existing* skilled nursing facility could be replaced. Kemper *is* an existing skilled nursing facility according to the CON laws. A closed skilled nursing facility is not considered a *new* facility upon reopening unless that facility has been closed sixty (60) months or more and has no authority to reopen. At the time of CON approval, Kemper had been closed less than sixty months and therefore, is an *existing facility.*

Second, the Attorney General stated that a skilled nursing facility may be relocated. Kemper is an existing skilled nursing facility and may therefore relocate; however, ". . . there must be no new available beds after the relocation, else the Moratorium is violated." (Attorney General's Opinion-June 13, 2008)(RE 5 @ Page 2).

With regard to the fourth situation outlined by the Attorney General, the Opponents state, ". . . this does not apply here either, as the proposed Meadowbrook facility is not 'already existing.'" *Brief of the Opponents* @ Page 39. In the Official Request for an Opinion, MSDH provides the factual scenario concerning this CON to the Attorney General,

> In other words, all *construction* of a *new* or replacement nursing home must include at least 60 beds. In the event that MSDH receives an application for the replacement of a nursing homes having less than 60 beds, MSDH usually addresses it by relocating a sufficient number of existing authorized beds from another facility, or facilities, so that the proposed *new* or replacement facility will meet this 60 bed requirement. (Request for Opinion.)(RE 4 @ Page 2) *(Emphasis Added).*

In the first sentence, MSDH illustrates for the Attorney General that a replacement facility may be "constructed"; it may be "new." In his conclusion, regarding issue four, the Attorney General states, "[i]t is the opinion of this office that the Mississippi State Department of Health has the authority to issue a CON for . . . (4) the relocation of existing nursing home beds from one facility to a ***proposed*** replacement site. (Attorney General's Opinion-June 13, 2008)(RE 5 @ Page 3-4)(*Emphasis Added*). Therefore, when the Attorney General uses the term "already-existing location," it can be inferred, by looking at the opinion in its entirety, that this means a facility that *is or is to be* used as the replacement facility. It does not prohibit a new building from being constructed to house the replacement facility.

The Attorney General interprets §41-7-191(2) to prohibit the creation of new beds; it does not prohibit a facility from (i) repairing an existing physical plant, (ii) replacing an existing physical plant with a new building at a different site and relocating the facility and its beds to such new building and (iii) relocating existing beds from another facility to the "proposed replacement site" in order to comply with the 60-bed minimum rule. "The Court merely applied the language of the Moratorium, as interpreted by the Department of Health: though a replacement facility may not violate the Moratorium, any facility that creates new beds is not permissible under 41-7-191(2)." (Attorney General's Opinion-June 13, 2008)(RE 5 @ Page 3). The SHO and the Attorney General interpret the language contained in §41-7-191(2) in the same manner; therefore the decision of the SHO cannot be said to be repugnant to the plain meaning of the statute, nor can the decision of the SHO be considered to be arbitrary or capricious. Further, the fact that the Attorney General Opinion is in agreement with the SHO

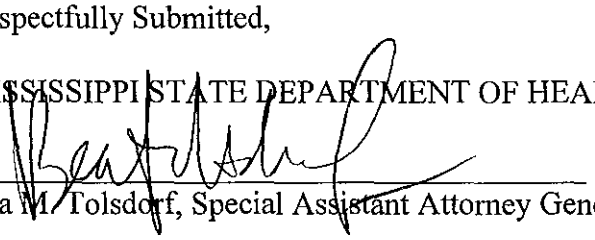
evidences that the decision of the SHO was *not* made in plain error or in a manner that is inconsistent with the law; and therefore, her decision should be given great deference as required by law.

Conclusion

MSDH on a daily basis must interpret and define the laws, rules and regulations under which it operates and which it is to enforce; therefore, the manner by which MSDH interprets of §41-7-191(2) must be given great deference. For approximately two decades, MSDH has remained steadfast in its interpretation of the language contained in §41-7-191(2). Since 1990, MSDH has found that the moratorium prohibits the agency from issuing a CON that would create additional beds or facilities within the state. The legal interpretation of the language contained in §41-7-191(2) by MSDH has been analyzed and approved by the Mississippi Attorney General. In approving this project, the SHO examined the moratorium and agreed with this interpretation. The decision of the SHO to approve this project was neither arbitrary nor capricious. Said decision was based upon the substantial evidence in the record, which clearly established that no new beds or additional facilities are created by this project, therefore, the SHO's decision, and thus the Final Order of MSDH, is consistent with the long-standing interpretation of the moratorium by MSDH. Further, the SHO's decision cannot be said to be an error of law, as the facts and plain meaning of the controlling statutory provisions support this Final Order. The Opponents have presented nothing to the Court to prove otherwise, and thus, the Final Order of MSDH must not be disturbed.

Respectfully Submitted,

MISSISSIPPI STATE DEPARTMENT OF HEALTH

BY: 

Bea M. Tolsdorf, Special Assistant Attorney General

Of Counsel:
Bea M. Tolsdorf (MSB # 102590)
Special Assistant Attorney General
Mississippi State Department of Health
Post Office Box 1700
Jackson, Mississippi 39215-1700
Telephone: (601)-576-7446
Telefax: (601)-567-7805

Statement of Joinder in the Conclusion presented by Meadowbrook Health & Rehab, LLC in its Brief

In addition to the Conclusion presented above, the Mississippi State Department of Health hereby adopts in full and incorporates herein the *Conclusion* presented by the Appellee, Meadowbrook Health & Rehab, LLC in its Brief submitted to this Court on February 22, 2011.

CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that she has on this day caused to be sent via United State Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Attorneys for Queen City Nursing Center,
Meridian Community Living Center and
Beverly LivingCenter – Meridian:

Thomas L. Kirkland, Jr., Esq.
Allison C. Simpson, Esq.
COPELAND COOK TAYLOR & BUSH
P.O. Box 6020
Ridgeland, Mississippi 39158-6020
asimpson@cctb.com

Attorneys for Meadowbrook Health and Rehab, LLC:

Doug Levenway, Esq.
Betty Toon Collins, Esq.
Elizabeth G. Hooper, Esq.
Wise Carter Child & Caraway
401 East Capitol Street, Suite 6
Post office Box 651
Jackson, Mississippi 39205-0651
BTC@wisecarter.com

So certified, this the 22nd day of February, 2011.

Bea M. Tolsdorf
Special Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that she has on this day caused to be sent via United State Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

The Honorable Dewayne Thomas
Hinds County Chancery Court
Post Office Box 686
Jackson, Mississippi 39205-0686

Attorneys for Queen City Nursing Center, Meridian Community Living Center and Beverly Living Center – Meridian:

Thomas L. Kirkland, Jr., Esq.
Allison C. Simpson, Esq.
Andy Lowry, Esq.
COPELAND COOK TAYLOR & BUSH
P.O. Box 6020
Ridgeland, Mississippi 39158-6020

Attorneys for Meadowbrook Health and Rehab, LLC:

Doug Levenway, Esq.
Betty Toon Collins, Esq.
Elizabeth G. Hooper, Esq.
Wise Carter Child & Caraway
401 East Capitol Street, Suite 6
Post office Box 651
Jackson, Mississippi 39205-0651

So certified, this the 22nd day of February, 2011.

Bea M. Tolsdorf
Special Assistant Attorney General