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 Golden Living Center - Meridian **APPELLANTS**

V. **NO. 2010-SA-01077**

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

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

BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

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

1. Queen City Nursing Center, Inc., Community Living Centers, LLC d/b/a Meridian Community Living Center, and Beverly Enterprises - Mississippi, Inc. d/b/a Golden Living Center - Meridian (Appellants).

2. Thomas L. Kirkland, Jr., Allison C. Simpson, and Andy Lowry (counsel for Appellants).

3. Meadowbrook Health & Rehab, LLC (Appellee).

4. Poplar Springs Nursing Center, LLC and Trend Consultants, LLC (affiliates of Meadowbrook) and Bruce Kelly (member of Meadowbrook and its affiliates).

5. Betty Toon Collins, Esq. and Douglas E. Levanway, Esq. (counsel for Meadowbrook).

6. Mississippi State Department of Health (Appellee).

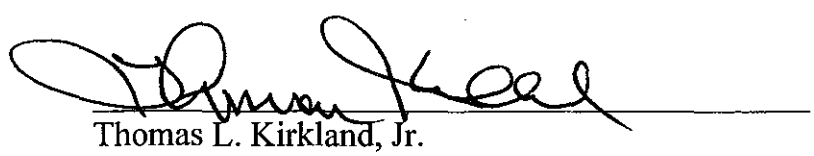
7. Bea M. Tolsdorf, Esq. (counsel for the Department).

8. Cassandra Walter, Esq. (hearing officer).

9. Mary Currier, M.D., M.P.H. (State Health Officer).

10. The Honorable Dewayne Thomas, Chancellor.

Respectfully submitted,



Thomas L. Kirkland, Jr.
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STATEMENT OF THE ISSUES

I. Courts generally defer to an agency's fact-finding. Here, the State Health Officer rejected her hearing officer's detailed findings and conclusions, with no explanation other than adopting a staff analysis based simply on taking the application at its word. Does a heightened standard of review apply to this case?

II. The most important criterion for granting a Certificate of Need ("CON") is need for the project. The hearing proved that Lauderdale County has an oversupply of nursing-home beds, while Kemper County is underbedded. Should the State Health Officer have issued a CON to move 21 beds from underbedded Kemper County to overbedded Lauderdale County, in violation of agency policy?

III. The present CON application was found by the hearing officer to merit disapproval based on its noncompliance with several agency criteria. Given that the State Health Officer failed to explain why any of these findings were incorrect, was she arbitrary and capricious in simply granting the CON anyway?

IV. A statutory moratorium forbids "new construction" of nursing homes, although the Department adheres to an Attorney General's opinion allowing some narrow exceptions to that ban. Did the State Health Officer err in granting a CON for a newly-constructed nursing home that met none of those exceptions? (Alternatively: since when may an agency allow exceptions to statutes?)

STATEMENT OF THE CASE

As the foregoing statement of the issues demonstrates, this case involves not only a blatant example of the Mississippi State Department of Health's ignoring its own need criteria, but also important questions of administrative law.

I. Course of Proceedings Below.

There are presently seven nursing homes in Lauderdale County. R.E. 5 at 2. In January 2009, a would-be eighth applied to the Mississippi State Department of Health for a Certificate of Need ("CON"). R.E. 5 at 2. This applicant, Meadowbrook Health & Rehab, LLC, is owned by Bruce Kelly, who also owns and operates one of the seven existing facilities, Poplar Springs Nursing & Rehab. R.E. 5 at 2. Meadowbrook's application to build a new 60-bed nursing home was labeled as a relocation of 39 beds from Poplar Springs, *and* as the replacement of 21 beds from the no-longer-operating Kemper Homeplace Nursing Facility, which until it discharged all its residents in November 2005 had been one of only two nursing homes in Kemper County. R.E. 5 at 1-3.

In a review confined to the face of the application itself, the application was recommended for approval by the Department's staff in an April 2009 staff analysis. R.E. 4. The present Appellants, which operate three nursing homes in Lauderdale County, timely requested a hearing during the course of review, being "affected persons" under the CON Review Manual and governing statutes. R.E. 5 at 2. Miss. Code Ann. § 41-7-197(2) requires the Department to afford affected persons a hearing before a

hearing officer, who is to consider the evidence and present a recommendation to the State Health Officer, who then makes the final decision.

At a three-day hearing in September 2009, each side was afforded the opportunity to present evidence and testimony, totaling ten witnesses and seventy-one recorded exhibits.[1] In January 2010, the hearing officer, Cassandra Walter, Esq., recommended to the State Health Officer that Meadowbrook's application be disapproved. R.E. 5. The hearing officer determined, based on the evidence presented at the hearing, that the staff analysis was incorrect and that the application did not comply with the controlling 2009 State Health Plan ("the Plan") or with the CON Review Manual, as revised February 23, 2008 (the "CON Manual"), the rules and procedures of the Department, or the governing statutes. R.E. 5.

Regardless, on February 11, 2010, the State Health Officer issued her final order rejecting the hearing officer's recommendation and stating she "concurs with and adopts the staff's findings and recommendation," that is, the staff analysis. R.E. 6. Nowhere did the State Health Officer address the reasoning or evidence set forth by the hearing officer, or set forth any additional reasons for rejecting the hearing officer's recommendation and the hearing evidence in favor of the staff analysis. R.E. 6.

On February 26, Appellants timely appealed to Hinds Chancery Court per Miss. Code Ann. § 41-7-201(2)(f), but that court affirmed the Department's order on June 10,

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[1]See the Department's file in the record, contained in three binders, which includes the application, the hearing officer's recommendation, the final order, and the hearing exhibits.

2010. R.E. 2. The chancery court (Thomas, J.) found that the Department's final order was reached after "much consideration" of the hearing testimony and exhibits, though the court did not cite to any record evidence to that effect. R.E. 2 at 6-7. Nowhere did the chancery court's analysis take into account the failure of the State Health Officer's final order to state any basis for disagreement with the hearing officer's recommendation, or indeed, to make any independent findings whatsoever.

From that decision, Appellants timely filed their notice of appeal to this Court on July 2, 2010.

II. Relevant Facts.

Nursing homes, like most health-care facilities in Mississippi, are subject to the CON law, so that before building or relocating a nursing home, or changing its bed complement, one must first obtain a CON. Miss. Code Ann. § 41-7-191.

The present applicant, Meadowbrook, is owned by the same Bruce Kelly who owns and operates the Poplar Springs nursing home in Lauderdale County. R.E. 5 at 2. When the Kemper Homeplace nursing home in Kemper was shut down[2] in November 2005, Poplar Springs paid $280,000 for Kemper Homeplace's authority for its 21 beds, but not for any physical facility, equipment, or medical supplies. T.133-34, 181.[3] In February 2006, the Department accordingly transferred the 21 beds to Poplar Springs,

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[2]No one then operating Kemper Homeplace is a party to this case, so the "immediate jeopardy" findings that preceded the closing need not detain us here. See hearing ex. 10.

[3]The transcript of the Department's hearing is cited as "T._"; pages cited are reproduced at R.E. 8.

which placed them in abeyance, meaning they could not be used but incurred no Medicaid tax. T.48-49, 53-54.

Poplar Springs then bought in June 2007 (for $440,000) the land on which Meadowbrook proposes to build its new nursing home. R.E. 5 at 3. Meadowbrook filed a CON application in June 2007 very much like the present project, but decided to withdraw that application before the State Health Officer ruled on it. R.E. 5 at 3.

A. The Application and Staff Analysis.

Like the June 2007 attempt, the present application proposes to "replace and relocate" the 21 beds acquired from Kemper Homeplace and held by Poplar Springs and to "relocate" 39 other beds held by Poplar Springs. Thus, Poplar Springs joined in the CON application "to the fullest extent necessary" as the owner of all the beds and of the land on which Meadowbrook's new facility (to be named Northpointe) would be constructed. R.E. 5 at 2 n.1.

The necessity for calling this eighth nursing home a relocation/replacement/ relocation was the Legislature's moratorium on new nursing-home construction:

> The State Department of Health shall not grant approval for or issue a certificate of need to any person proposing the **new construction of, addition to, or expansion of any health care facility** defined in subparagraphs (iv) (skilled nursing facility) and (vi) (intermediate care facility) of Section 41-7-173(h) ....

Miss. Code Ann. § 41-7-191(2) (emphasis added). The definition referred to therein of "skilled nursing facility" is "an institution or a distinct part of an institution which is

primarily engaged in providing to inpatients skilled nursing care," etc. *Id.* at § 41-7-173(h)(iv).[4]

Meadowbrook was proposing to build a nursing home where none existed, without closing down the facility from which the beds were acquired, and which would increase the number of nursing homes in Lauderdale County from seven to eight. R.E. 5 at 3. The application further described the project as "an all-private-room, state-of-the-art facility." T.57.

The staff analysis, which relied upon the claims presented in the application itself (CON Manual at ch. 3, § 114.01), *nowhere considered* the moratorium or whether the project might in fact be "new construction."[5] R.E. 4. It made no findings at all as to the applicable law. R.E.4. It did refer to the Plan's figures showing a need for 19 additional beds in Lauderdale County as opposed to only two beds needed in Kemper County. R.E. 4 at 3. It also noted that "according to Meadowbrook" alternatives such as renovating Poplar Springs had been considered but did not "seem[] as effective." R.E. 4 at 4. Somewhat mysteriously, this renovation was also asserted to be likely to "result in

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[4]At one time, that statute made an express exception for "making additions to or expansion or replacement of the existing facility, in order to increase the number of its beds to not more than sixty (60) beds," but that portion of the statute was repealed before the present application was filed. *See City of Durant v. Humphreys County Mem'l Hosp.*, 587 So. 2d 244, 246-47 (Miss. 1991) (discussing moratorium as it then existed).

[5]By any civilized standard, the staff analysis should have lost all credibility by its referring to "Poplar Springs" throughout as "Popular Springs."

substantial cost," although no figure was given to contrast with the $5,168,500 proposed capital expenditure for building Meadowbrook's new 60-bed facility. R.E. 4 at 9.

B. The Hearing Officer's Analysis and Recommendation.

At the hearing obtained by Appellants, evidence was put on concerning the facts underlying the application, including the testimony of Bruce Kelly and of Donald Eicher, head of the Department's planning division which had produced the staff analysis. The hearing officer, having heard the testimony and reviewed the exhibits, issued her findings of fact, conclusions of law, and recommendation to the State Health Officer: she disagreed with the staff analysis and recommended disapproval of the project. R.E. 5.

First, she found no showing of any need to relocate any nursing-home beds. R.E. 5 at 6. Testifying for the Department, Eicher admitted that it was Department policy to disapprove a relocation that sought to move beds from a county in greater need to one in lesser need of beds. T.17-18. The hearing officer also noted that, using the Department's own licensure statistics, the actual number of beds in Lauderdale County (even excluding the 21 beds bought from Kemper Homeplace) was 602, not 572. R.E. 5 at 11. Again, Eicher admitted that the Department's licensure division, not his own planning department, "would know more about the actual number of licensed beds in Lauderdale County." T.68. Using the 602 figure, Lauderdale County was overbedded by 11 beds (again, not even counting the Kemper Homeplace beds). R.E. 5 at 12. The discrepancy became even more gross if the 228 beds at the R.P. White mental health nursing facility in Lauderdale County were considered, which Appellants' expert Dr. John Hyde testified

should be done for health-planning purposes because R.P. White competes for patients with the other nursing homes. R.E. 5 at 11. With or without the R.P. White beds, however, the hearing officer found that, given the Department's confessed policy against relocating from a county with greater need to one with lesser need, there was *no* need to move beds from Kemper to Lauderdale. R.E. 5 at 12.

The hearing officer also rejected as not credible the claim that Bruce Kelly made "any good faith effort" to consider alternatives like reopening the 21 beds in Kemper County or opening them at Poplar Springs: "I *do not believe* the Applicant considered less costly or perhaps more effective alternatives for utilizing these 21 beds ..." (emphasis added). R.E. 5 at 13. She noted the lack of documentary evidence of any such consideration, the fact that Kelly never even asked an architect what it would cost to expand Poplar Springs by 21 beds, and the absence in the application of any figure for the allegedly "substantial cost" of such an expansion. R.E. 5 at 12-13.

Finding also that the application failed to demonstrate financial feasibility (R.E. 5 at 13-16), or to promote the general objectives mandated by the State Health Plan – in particular, the project threatened both unnecessary duplication and a failure to contain costs (R.E. 5 at 17-18) – the hearing officer then went on to consider the Legislature's moratorium on construction of new nursing homes. R.E. 5 at 19-22. Looking to the Department's own definition of "construction," the hearing officer found that the project was neither the replacement of an existing facility, nor the relocation of an existing facility, nor the relocation of beds from one facility to another already-existing facility;

these were three exceptions to the moratorium set forth in an Attorney General's opinion that the Department had requested at the time of the previous Meadowbrook application. R.E. 5 at 20; see R.E. 7 (Attorney General opinion). The hearing officer did not dispute the cogency of the June 2008 opinion, but found that its stated exceptions simply did not apply to Meadowbrook's project. R.E. 5 at 21. Therefore, she concluded, the project violated the moratorium and could not be approved. R.E. 5 at 22.

The hearing officer submitted her 23-page recommendation to the State Health Officer on January 11, 2010. R.E. 5.

C. The State Health Officer's Final Order.

One month later, on February 11, the State Health Officer issued her final order, asserting the conclusion that the application complied with the Department's standards. R.E. 6. A fill-in-the-blank form attached to the final order said that the State Health Officer "[c]oncurs with and adopts the staff's findings and recommendation." R.E. 6. This form's language also said that "It 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* [*sic*], and making written findings, that the proposed be Approved" — that last word being presented as typed into a blank. R.E. 6 (emphasis added). Thus, Meadowbrook won its CON. Nowhere did the final order present any reasoning as to why the project did not violate the moratorium or why the hearing officer's recommendation was rejected. Nowhere did the final order explain why it was adopting the staff analysis's findings as to bed need, availability of alternatives, financial

feasibility, or compliance with the State Health Plan's general goals, when those findings had been deemed not credible by the hearing officer.

SUMMARY OF THE ARGUMENT

The State Health Officer granted Meadowbrook a CON for a new nursing home in Lauderdale County despite her hearing officer's finding that, among other issues, there was no need to move 21 beds from Kemper County to Lauderdale. The final order should be reversed.

First, this Court should examine the final order under a heightened standard of review. Although the State Health Officer is not bound to accept or defer to the interlocutory findings of the Department's independent hearing officer, numerous courts have held that an agency owes some explanation of its basis for rejecting such findings. In the present case, there was no such explanation and no separate opinion at all by the State Health Officer, who merely adopted a staff analysis that had been proved erroneous at the hearing. Also, when the Department farmed out the interpretation of the CON law to an Attorney General's opinion, it forfeited the usual deference owed to its experienced interpretation of its governing statutes.

Second, the evidence at the hearing proved that there was *no* evidence that Meadowbrook's project moved beds from a county with lesser need to one with greater need, which is the only direction in which the Department will allow nursing-home beds to be relocated. Meadowbrook's own expert admitted that Lauderdale County is overbedded, and there was no dispute that Kemper County is underbedded. It was arbitrary and capricious for the State Health Officer to issue the CON with no evidence that the Department's need policy was met.

Third, the evidence at the hearing satisfied the hearing officer that Meadowbrook failed to seriously consider available alternatives to building a new facility; failed to comply with the State Health Plan's objectives; and failed to provide necessary evidence of economic viability. The State Health Officer did not state any reason why these findings were incorrect, and thus it was arbitrary and capricious for her to grant the CON despite such negative evidentiary findings.

Fourth and last, the Legislature by statute has forbidden "new construction" of nursing home facilities, but the State Health Officer issued a CON for Meadowbrook to do just that. Leaving aside whether the Attorney General opinion on which the Department relies is really correct in stating exceptions to the moratorium, the hearing officer easily found that none of those alleged exceptions applied to Meadowbrook's project. The State Health Officer's order granting the CON was contrary to law and must be reversed on that basis as well.

ARGUMENT

I. A Heightened Standard of Review Is Necessary in This Case.

Two issues affect the standard of review in this case: the State Health Officer's summary rejection of the hearing officer's recommendation, and the Department's adoption of an Attorney General opinion regarding the statutory moratorium on new construction of nursing homes.

In typical cases, the standard of review of a final order of the Department is controlled by Miss. Code Ann. § 41-7-201(2)(f), which provides in part:

> [t]he 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 is **not supported by substantial evidence**, is **contrary to the manifest weight** of the evidence, **is in excess of the statutory authority** or jurisdiction [Department], or violates any vested constitutional rights of any party involved in the appeal. ...

(emphasis added). This statute is "nothing more than a statutory restatement of familiar limitations upon the scope of judicial review of administrative agency decisions." *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 976 (Miss. 1999) (citation omitted). "Substantial evidence" must be "more than a scintilla." *Id.* A decision made "without substantial evidence" is one which is "arbitrary and capricious." *Id.*

> An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone. An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles.

Id.

Because this Court reviews the agency's decision, not the chancellor's, it does not defer to the chancellor's decision on appeal from the agency, but reviews the chancery court's decision de novo. *Miss. State Dep't of Health v. Miss. Baptist Med. Ctr.*, 663 So. 2d 563, 574 (Miss. 1995).

While the burden of proof rests with the party challenging agency action, *Pub. Employees' Ret. Sys. v. Marquez*, 774 So. 2d 421, 425 (Miss. 2000), the reviewing court "must look at the full record before it in deciding whether the agency's findings were supported by substantial evidence," and in its review, "it is not relegated to wearing blinders." *Id.* at 427. This Court's review for substantial evidence "should properly consider the general CON requirements as set forth in the State Health Plan in evaluating the competing proposals." *Cain v. Miss. State Dep't of Health*, 767 So. 2d 207, 212 (Miss. 2000).

As for errors of law, those are reviewed de novo in administrative appeals. *Dialysis Solution, LLC v. Miss. State Dep't of Health*, 31 So. 3d 1204, 1211 (Miss. 2009). This Court has typically given deferential consideration to agency interpretations of their governing statutes, on the following basis:

> This duty of deference derives from our realization that **the everyday experience of the administrative agency** gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate.

Gill v. Miss. Dep't of Wildlife Conserv., 574 So. 2d 586, 593 (Miss. 1990) (emphasis added). Of course, "whatever the precise content of [this Court's] duty of deference, it has no material force where agency action is contrary to the statutory language." *Id.*

So much for the typical standard of review. Appellants now go on to show that this standard may be heightened where the facts warrant, and that the facts in this case warrant such heightened scrutiny.

A. Heightened Scrutiny May Be Applied to Agency Decisions.

Despite the deferential nature of the judiciary's review of administrative decisions, that review may be conducted more rigorously where the facts call for it. For instance, where an agency adopts findings and conclusions wholesale and verbatim from those drafted by one party, "heightened scrutiny" is necessary. *HTC Healthcare II, Inc. v. Miss. State Dep't of Health*, 20 So. 3d 694, 698 (Miss. Ct. App. 2009) (citing *Attala County Bd. of Supervisors v. Miss. State Dep't of Health*, 867 So. 2d 1019, 1021 n.1 (Miss. 2004) (noting chancellor's application of heightened scrutiny)). *See also Miss. Real Estate Comm'n v. Anding*, 732 So. 2d 192, 196 (Miss. 1999) (heightened scrutiny where agency's findings & conclusions adopted from its own allegations).

It has likewise been urged that, where an agency's own fact-finding leads to one conclusion but the agency's final order holds to the contrary, "heightened scrutiny" is justified. *McDerment v. Miss. Real Estate Comm'n*, 748 So. 2d 114, 122 (Miss. 1999) (Waller, J., concurring) ("the Commission found McDerment violated § 75-35-21(f) despite the fact that its own audit revealed otherwise"). Then-Justice Waller's opinion

was joined by three other justices and merits respectful consideration here. This Court applied a similar logic in expressing skepticism about the Division of Medicaid's argument that a provider's costs were unreasonable, when its own fact-finding had led it to the contrary conclusion. *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So. 3d 600, 609 (Miss. 2009).

Thus, Mississippi law provides for treating administrative decisions with a greater degree of scrutiny where the record gives the courts reason to doubt that the agency is in fact deliberating as it ought.

B. The Present Case Demands Heightened Scrutiny.

In the present case, this Court is not confronted with the wholesale adoption of verbatim findings. This case more closely resembles *McDerment* and *Mississippi Methodist*, in that the Department's finder of fact in the case, the hearing officer, reached a considered opinion which she submitted to the State Health Officer, who then rejected that opinion without making any independent findings or explanation of her own.[6]

The federal courts, which have developed a detailed body of administrative case law, have frequently addressed the problem of an agency's unexplained rejection of

[6]The only reported instance we find of a State Health Officer's diverging from the hearing officer's recommendation was in the 1995 *Mississippi Baptist* case, wherein the State Health Officer "reversed" the hearing officer, was then himself reversed by the chancery court, and then this Court affirmed the chancery ruling. *Miss. Baptist*, 663 So. 2d at 564-65. Even in that case, however, it appears that the State Health Officer at least made written findings explaining his position. *Id.* at 574. Here, the officer did not even do that much.

findings reached by a hearing officer or administrative law judge (ALJ). For instance, the Seventh Circuit:

> Cognizant of the special concerns raised by the Board's rejection of an ALJ's factual findings, we have articulated the following "general propositions to guide our review of a Board decision":
>
> 1. In all cases, the standard of review is the "substantial evidence" standard.
>
> 2. Because the ALJ's report is a part of the record with independent significance, **a factual determination of the Board that departs from the findings of the ALJ stands on weaker ground than one that does not.**
>
> 3. **Because only the ALJ can view the demeanor of the witnesses, any of the ALJ's findings that turn on express or implied credibility determinations take on particular significance on review.**
>
> We have added that when the Board has rejected an ALJ's credibility assessment **(express or implied)** in reaching a particular determination, "**then the Board's conclusion is subject to special scrutiny** rather than merely the substantial evidence test."

Slusher v. Nat'l Labor Rel. Bd., 432 F.3d 715, 727 (7th Cir. 2005) (citations omitted & emphasis added). The United States Supreme Court itself has observed that "evidence supporting [an agency's] conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn [different] conclusions." *Universal Camera Co. v. Nat'l Labor Rel. Bd.*, 340 U.S. 474, 477 (1951). This reasoning is in full accord with this Court's oft-stated observations about deference to lower tribunals' findings of fact:

> It has long been recognized that the trial judge is in the best position to view the trial. "The trial judge **who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle** is by his very position **far better equipped to make findings of fact** which will have the reliability that we need and desire." **Using a cold, printed record of a case, if that**, a successor judge **sits in an inferior position** to the judge who presided over the trial of the case.

Pinecrest, LLC v. Harris ex rel. Estate of Callender, 40 So. 3d 557, 562 (Miss. 2010) (citation omitted & emphasis added). Here, in fact, the State Health Officer did not attend the hearing, and was reviewing "a cold, printed record" as opposed to being in the hearing officer's position to evaluate the testimony of the witnesses.

It also follows that an agency's basis for disagreement with its fact-finder's evaluations should be stated on the record, to facilitate appellate review:

> although the findings of the ALJ are not binding on the Council, they should not be ignored. The conflicting findings are part of the record as a whole, and will be considered in determining whether the Council's decision is supported by substantial evidence. Furthermore, **when the Appeals Council rejects an ALJ's credibility findings, it should do so expressly and state its reasons for doing so.** This will **enable a reviewing court to determine whether the Council's reasons for rejecting the ALJ's credibility findings are based on substantial evidence**.

Bauzo v. Bowen, 803 F.2d 917, 922 (7th Cir. 1986) (citations omitted & emphasis added).

State courts have held likewise. *See Ritland v. Ariz State Bd. of Med. Examiners*, 140 P.3d 970, 974 (Ariz. Ct. App. 2006) ("the Board's decision must reflect its factual support for rejecting the ALJ's credibility findings"); *Bd. of Educ. of Melrose Mun. Schs. v. N.M. State Bd. of Educ.*, 740 P.2d 123, 130 (N.M. Ct. App. 1987) (failure to review record where rejecting hearing officer's findings violated due process, "particularly ...

where the State Board gave no legally valid reasons for its reversal, and the decisional issues necessarily rested on a determination of the credibility of witnesses").

An Alabama decision on this issue is particularly persuasive in its reasoning: recognizing that the agency, not the hearing officer, was entitled by statute to make the final determination, the court nonetheless recognized that the agency's

> supporting evidence, in cases **where it rejects the [hearing officer's] findings, must be stronger than would be required in cases where the findings are accepted**, since in the former cases the supporting evidence must be deemed substantial when measured against the [hearing officer's] contrary findings as well as the opposing evidence.

State Personnel Dep't v. Mays, 624 So. 2d 194, 196 (Ala. Ct. App. 1993) (emphasis added) (quoting *Personnel Bd. v. King*, 456 So. 2d 80, 82 (Ala. Ct. App. 1984)). Moreover, in *Mays*, the agency had at least troubled itself to state its reasons for disagreeing with the hearing officer. *Id.* The court however reversed, because the alleged failures of the hearing officer to consider certain evidence were contradicted by the plain language of the hearing officer's report. *Id.* at 197-98.

In short, if the Department's discretion is not to be unbridled, the State Health Officer's disagreements with the independent hearing officer must have some stated basis. It may be that the State Health Officer's failure to rebut the hearing officer's findings and conclusions, in and of itself, is arbitrary and capricious, being an unexplained act of will alone, and Appellants urge this Court to consider whether that is not in fact the case. Regardless, however, it seems indisputable that fundamental fairness

requires this Court to treat the State Health Officer's unexplained decision with the heightened scrutiny such conduct deserves.

C. No Deference Is Due to an Agency's Adoption of an Attorney General's Opinion.

The final wrinkle on the standard of review in this case is that the Department's interpretation of the moratorium statute is not the product of its "everyday experience" which "gives it familiarity with the particularities and nuances of the problems committed to its care," but rather, is the result of its requesting an opinion from the Attorney General's office.

This Court does not "defer" to opinions of the Attorney General of the State of Mississippi. They are not binding authority by any means, though "they can be persuasive authority." *Ball v. Mayor & Bd. of Aldermen of City of Natchez*, 983 So. 2d 295, 306 (Miss. 2008).

While we do not find that this Court has previously considered the issue, it seems contrary to the legal basis for deferring to an agency's interpretation of statute for this Court to extend the same deference where, as here, the agency has punted the decision to the Attorney General's office. The testimony of Eicher for the Department (on direct) reinforces this impression:

> Q. Mr. Eicher, do you know what the reason for requesting this Opinion was?
>
> A. Yes. In particular, at the time, the applicant asked in a determination request if they could do this – would this violate the moratorium.
>
> And so in response to receiving that request and **because this is an interpretation of the statute and the Certificate of Need**

law, it was decided to write the Attorney General and ask an Opinion, official Opinion, as to whether this could be allowed or not.

Q. And this meaning this particular project?

A. Well, maybe not in particular this particular project, but **could we allow a nursing home to relocate or replace itself under the moratorium law** or, in particular, 41-7-191(2), Paragraph 2.

Q. **And does the agency typically rely upon opinions of the Attorney General on legal matters when the interpretation of the statute is necessary to reach your conclusions?**

A. It would be my opinion that, **yes, after we've written the Attorney General and we get an Opinion, we typically follow it.**

T.20-21 (emphasis added). "Because" the Department was interpreting the very body of law on which it supposedly has expertise meriting deference, "it was decided" to have the Attorney General's office supply the answer. Appellants submit that, on these facts, the "Department's interpretation" of the moratorium statute merits no more deference than does the Attorney General's opinion it obtained in lieu of exercising its own expertise.

The Attorney General's office does not have the daily practical experience in the workings of every other state agency that would merit deference on the basis stated in *Gill*; it is not a super-agency. *See Hertz Co. v. Corcoran*, 520 N.Y.S.2d 700, 702 (N.Y. Sup. Ct. 1987) (although "agency's interpretation of a statute which it is responsible for administering is entitled to great weight," court notes "the attorney general is not the agency administering the regulatory portions of the Insurance Law" and its statutory interpretation merits less respect). If deference to agency decisions has any rational basis, as it clearly does in *Gill*, then that deference is not properly extended to an agency that

outsources its core functions to the Attorney General, contrary to the general rule of deference:

> **The rationale for this rule is that administrative agencies generally have special competence in interpreting and applying specialized legislation in their field of expertise.** Since the instant interpretation comes not from the agency charged with the duty of executing the statute, defendant board, but from the Attorney General, **the rule and its rationale are inapplicable.**

Reinelt v. Mich. Pub. Sch. Employee Ret. Bd., 276 N.W.2d 858, 860 (Mich. Ct. App. 1979) (citation omitted & emphasis added).

Thus, the State Health Officer's failure to state any basis for disagreeing with the hearing officer's 23-page opinion, and the Department's delegation of its administrative expertise to the Attorney General's office, call for a departure from the normal deference extended to agency decisions.

With the proper standard of review thus established, we turn to the errors of the decision below.

II. The Applicant Failed to Demonstrate Need for the Project.

New construction of a nursing home is forbidden by the moratorium, and the State Health Plan does not include specific criteria for the replacement or relocation of a nursing home; therefore, the Department applies its general review criteria set forth in the CON Manual. *See Miss. Baptist*, 663 So. 2d at 574. "What defines need in any given case depends upon the purpose behind the enactment of the CON laws, particular statutory provisions, where applicable, and, as in this case, a consideration of the

Department's stated general review criteria." *Id.* at 579. While there are many such general criteria, need is at the core of any CON review: "It should come as no great revelation that a showing of *substantial evidence of need* is required in order for an applicant to secure a certificate of need for any health care proposal to which the CON laws apply." *Id.* (emphasis added). Therefore, as did the hearing officer, we begin with general review criterion five, "GR-5," need for the project.

A. What the Staff Analysis Found.

The staff analysis found GR-5 satisfied, in part through the simple expedient of misstating what GR-5's subparts actually say. GR-5 is titled "Need for the Project," and subpart (a) is as follows:

> **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 all 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. 9 at 61 (emphasis added). Thus, "need" is the foremost consideration ("no great revelation"), and "access" is another consideration as regards "all residents of the area," especially certain "underserved groups."

Comparing GR-5(a) to the staff analysis, one finds that the subpart has been named "Access by Population Served." R.E. 4 at 5. This is because *need is not mentioned.* In its review of GR-5's first subpart, the staff analysis considers only "access," which is supposedly increased because the project will increase the number of private rooms available. Nowhere in the State Health Plan or the CON Manual is the

luxury of private rooms designated as improved "access" to health care; indeed, it was undisputed at the hearing that the CON criteria do not even mention private rooms in nursing homes. T.365. Thus, under the leading subpart of the need criterion, the staff analysis ignored the issue of "need" and deemed "access" promoted by a factor – private rooms – that is not even addressed in the CON criteria.

As for the other subparts of GR-5, the "need of the population presently served" by the service to be relocated must be considered. The staff analysis conceded that moving the 21 beds from Kemper County to Lauderdale would increase the need in Kemper to 23 beds, but for some unstated reason compared this, not to leaving the 21 beds in Kemper County, but to relocating the 39 beds from Poplar Springs to Kemper County and thus creating "a need of 58 beds" in Lauderdale. Nowhere did this portion of the staff analysis consider simply reopening the 21 beds in Kemper County. Nowhere did it consider whether the need of Kemper County was being disserved.

The staff analysis also bought into the application's claims that there would be no negative effect on existing facilities – hardly surprising, since the staff's procedure was to consider the application's own claims, not any facts supplied by other facilities. And the staff noted that six whole letters had been received in support of the project, versus one letter in opposition from the three Appellant facilities. (To its credit, the staff analysis made no finding of community support.)

B. What the Hearing Officer Found.

Need was the first issue addressed in the hearing officer's recommendation, which reached the opposite conclusion from the staff analysis, and in fact considered the issue of need dispositive: "the absence of any proof of need for the project is sufficient alone to require" disapproval. R.E. 5 at 12. The hearing officer relied on the Department's stated policy that "a CON application for the relocation of nursing home beds from one county to another must demonstrate a greater need in the proposed county than that of the county from which the applicant is taking beds." R.E. 5 at 12. This was a correct statement of Eicher's testimony for the Department:

> A. . . . The other part and principle is that there's a greater bed need in the county where it's being moved to from the county.
>
> Kemper County, the 2009 State Health Plan shows a need for two beds, as opposed to Lauderdale having a need of 19.
>
> And, therefore, you're moving from having less need to a county that has greater need. So that's our other principle that **we wouldn't allow you to move the other direction.**
>
> If you were moving from Lauderdale to Kemper, **you would not be recommended for approval because you are moving from a county with a higher need to one that has a lesser need.**
>
> Q. And there's nothing in the statutes or policies of the State Department of Health that prohibits the relocation of nursing home beds across county lines, is there?
>
> A. No. Other than that principle of **moving to a higher need.**

T.17-18 (emphasis added). Based on this clear statement of the Department's policy, the hearing officer found, based on the testimony and evidence at the hearing, that the project could not be approved, because in fact Kemper County, not Lauderdale, was the county with the greater need.

True, the staff analysis thought otherwise: Kemper County needed only two beds, while Lauderdale needed 19. However, the hearing officer found "several problems" with this calculation. First, because the effect of the project is to move 21 beds from Kemper to Lauderdale, the project actually creates a need of 23 in Kemper and leaves Lauderdale overbedded by two. R.E. 5 at 9.

Further, that calculation depends on incorrect figures for the number of beds in Lauderdale County. The hearing officer noted that the Department's practice is to exclude nursing-home beds operated by the State's mental-health department, so that 228 beds at the R.P. White facility are disregarded; including those beds would show that Lauderdale is in fact overbedded by 260, even discounting the 21 beds from Kemper Homeplace. R.E. 5 at 11. Eicher for the Department admitted ignorance as to whether or not R.P. White competes with neighboring nursing homes for patients. T.101-02. In fact, Lauderdale County nursing home administrators testified that R.P. White does compete with them. T.414, 453-54, 469, 477, 489, 512. Appellants' expert noted that R.P. White's beds should be included in computing need. T.562. Meadowbrook's experts' stated basis for excluding R.P. White's 228 beds was that "it's a state facility" and that, on sheer speculation, "I would think people might be a little more reluctant to admit their family member to R.P. White." T.312, 362; see T.391 ("stigma"). Eicher said that the Department excludes R.P. White's beds *because* the Department of Mental Health does not require CON approvals, T.14, but how that fact equates to no *need* for

those beds, he did not say. The manifest weight of the evidence is that R.P. White's beds are indeed part of those available for nursing-home care in Lauderdale County.

Most importantly however, even when we leave aside R.P. White's beds and the 21 beds in abeyance, there still are actually *602* beds in Lauderdale County, *not* 572 as the staff analysis claimed. As the hearing officer noted, even Meadowbrook's own expert in healthcare planning, Dan Sullivan, admitted that 602 was the correct total. T.326.

> Q. Now, **do you agree with me that the State Health Plan just has an error in its addition of the number of beds** [in Lauderdale County]?
>
> A. You know, the State Health Plan was drafted, whenever that was, a year-and-a-half ago. And so I don't know what the situation was. I know what the situation is now. **I agree with you today, there's 602 beds.**

T.385 (emphasis added). Sullivan's candor is to be respected. Although GR-5 says that the planning division's data are to be considered reliable, it makes an exception for when the facts "clearly show[] otherwise." R.E. 9 at 61. The Department's Eicher conceded that the licensure division, not the planning division, is better informed on the number of beds. T.68. He admitted that he could not explain the figure of 572 beds in the Plan. T.69.

Therefore, this is not a case where substantial evidence could support either the 572-bed figure or the 602-bed figure. Meadowbrook's own expert conceded that 602 is the correct figure, and the Department's planning director had no evidence to the contrary. The hearing officer was indisputably correct in finding that the 602-bed figure was "clearly shown" to be more reliable.

Once the 602 beds are compared to the projected need of 591 beds, the result is that *Lauderdale County at the time of the application was overbedded by 11 beds, compared to Kemper County's being underbedded by two* – even treating the 21 beds from Kemper Homeplace as still in Kemper County, despite that facility's being closed and despite their being owned by Poplar Place in Lauderdale County. (Treating them as in Lauderdale changes the numbers to +23 need in Kemper and -32 need in Lauderdale.) This finding by the hearing officer was confirmed again by Meadowbrook's own expert, Sullivan: using the 602-bed figure that he admitted was correct, "[i]nstead of showing a positive need for 19, I showed a negative 11 beds. So an excess of beds, assuming that [the 602 figure] were the case." T.342. The hearing officer quoted this testimony in her recommendation. R.E. 5 at 12.

Therefore, in light of the Department's stated policy of not allowing beds to move from a county with greater need to one with lesser need, the hearing officer found that need was not shown.

C. The State Health Officer's Order Was Arbitrary and Capricious.

Despite these concessions by the applicant itself at the hearing; despite the Department's statement of its policy against allowing a county with lesser need to suck beds out of a county with greater need; despite the hearing officer's clear presentation of these facts – despite all this, the State Health Officer, without explanation, simply adopted the staff analysis and approved the application, as if the statutorily-required hearing had never happened. If that was not arbitrary and capricious, then nothing is.

It understates the case to say that the manifest weight of the evidence was that Lauderdale has 602 beds and lesser need than Kemper. There was *no* substantial evidence to support a greater bed need in Lauderdale than in Kemper. "If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious." *Natchez Cmty.*, 743 So. 2d at 977. Likewise, "a decision unsupported by any evidence is by definition arbitrary and capricious." *Gill*, 574 So. 2d at 591.

We have argued above that a heightened scrutiny is required in this case, but quite frankly, on this issue, the ordinary standard of review more than suffices. Substantial evidence is "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Marquez*, 774 So. 2d at 425 (quoting *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991)). No reasonable mind could decide that, against the facts adduced at the hearing and the admissions by Meadowbrook, the bed need was anything other than what the hearing officer found it to be. Certainly, the absence of any explanation by the State Health Officer does not provide this Court with any ground to suppose that she had any rational basis for preferring the exploded numbers in the staff analysis to the undisputed proof at the hearing.

Nor did the State Health Officer say that she was setting aside the Department's stated policy against moving beds from needier counties to counties with lesser need. This Court has held that "an agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent." *Miss. Methodist*, 21 So. 3d

at 609 (quoting *Miss. Valley Gas Co. v. Fed. Energy Reg. Comm'n*, 659 F.2d 488, 506 (5th Cir. 1981)). Here, there is neither conformity nor explanation, only "a lack of understanding of *or disregard for* the surrounding facts and settled controlling principles," which is to say, a capricious act. *Natchez Cmty.*, 743 So. 2d at 976 (emphasis added).

The State Health Officer's final order approving the application and issuing the CON to Meadowbrook was therefore arbitrary and capricious, being not based on substantial evidence and failing to explain its departure from Department policy. This Court should reverse.

III. The Application Failed to Meet Other Established Criteria as Well.

Beyond the dispositive issue of need, the hearing officer found "several other grounds for the disapproval of this Application." R.E. 5 at 12. None of these was addressed by the State Health Officer. While this Court can and should reverse on the foregoing need issue, Appellants will address these other grounds for disapproval (and hence reversal) as well. A heightened scrutiny of the record evidence will show that the hearing officer was correct and that the State Health Officer acted without substantial evidence in rejecting the hearing officer's findings.

A. Meadowbrook Did Not Consider Available Alternatives.

Criterion GR-3 looks to the "availability of less costly or more effective alternative methods of providing the service to be offered, expanded or relocated." One obvious alternative was to add the 21 Kemper beds to the Poplar Springs facility rather than

construct a new one.[7] Having conducted the hearing, reviewed the evidence, and observed the conduct of the witnesses, the hearing officer concluded that there had been no credible evidence that Meadowbrook really conducted any "careful consideration and deliberation" such as the staff analysis imagined. R.E. 5 at 12; R.E. 4 at 4. This finding was based not merely on intangibles such as demeanor, but on record evidence. Bruce Kelly admitted he bought the 21 Kemper Homeplace beds without ever considering placing them at Poplar Springs. T.135. After he bought those beds, he also bought 34 additional acres adjoining Poplar Springs. T.135. But he never obtained any architectural proposal for adding the 21 beds at his existing facility. T.172. In preparing the staff analysis, the Department had no information as to the cost of adding the 21 beds to Poplar Springs, although it could have requested it. T.85.

There was thus no substantial evidence that adding the 21 beds at Poplar Springs would not be "less costly." There was no substantial evidence at all of that cost, as compared to the $5,168,500 that building and staffing a new facility from scratch would cost. It should be evident that Meadowbrook did not seriously consider an alternative for which it did not even trouble to obtain a price tag. The hearing officer did not err when she found that GR-3 was not met, and the State Health Officer offered no explanation of any basis for disagreeing with that finding; rather, she merely adopted the bland

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[7]Granted, this alternative is thwarted by the need analysis at issue II above, because beds cannot be relocated from Kemper to Lauderdale, but then, the present issue is superfluous once the need analysis is accepted. However, even on Meadowbrook's own theory of need, it fails this criterion.

assurances of the staff analysis, which as Eicher admitted at the hearing were based purely on the applicant's own assertions. T.89. On a substantial-evidence review, particularly the heightened review proper on the facts of this case, this Court can see that GR-3 was not met. While we will discuss the State Health Plan's general goals below, it's evident that the important goal of cost containment is not met when less costly alternatives are not considered. GR-3 is thus an important requirement, and it was arbitrary and capricious for the State Health Officer to approve the project when it failed to meet that criterion.

B. Meadowbrook Failed to Conform to the State Health Plan's Goals.

The hearing officer found that Meadowbrook was "required to demonstrate that the application will advance the four general goals of the State Health Plan" – prevention of unnecessary duplication; cost containment; improvement to the health of Mississippi residents; and quality of health services. R.E. 5 at 17; see R.E. 9 at § 100.01(1). She found that the relocation from Kemper to Lauderdale was not needed (indeed, was contrary to the need criterion), and "any amount of money spent for an unnecessary relocation of a service from one county to another is not money well-spent." R.E. 5 at 18. Further, the Division of Medicaid opposes the project as increasing its costs by $1,117,850 per year. R.E. 5 at 17; R.E. 4 at 11. Constructing a new facility rather than adding on to an existing facility was also an unnecessary duplication, particularly when the evidence showed that Lauderdale needs no more beds. Nor does moving beds out of underbedded Kemper County improve access for the citizens of Kemper County, while

overbedded Lauderdale County does not need more beds. Finally, the mere provision of private beds does not improve access to health care or even its quality, as demonstrated by the fact that the CON criteria do not even deem private vs. semiprivate to be a factor worth considering: the staff analysis confused Meadowbrook's marketing plan with health-care planning.

The State Health Officer did not explain how the hearing officer was supposedly incorrect in any of her findings. Instead, she rejected those findings without explanation and adopted a staff analysis which, as we've seen, merely parroted the self-serving claims of Meadowbrook's application. The application failed to conform to the State Health Plan and should have been disapproved. The final order granting the CON should be reversed.

C. The Project's Financial Feasibility Was Not Demonstrated.

GR-4 of the Department's CON criteria looks to the "immediate and long-term financial feasibility of the proposal." R.E. 9 at 60. The staff analysis relied on Meadowbrook's avowal that "the project will have minimal, if any, impact on the cost of health care in Mississippi or on Medicaid, Medicare, or any other payor." R.E. 4 at 4. This was directly contradicted by Medicaid's opposition to the project, cited later in the staff analysis without any glimmer of self-contradiction; Medicaid projects spending an additional $1,157,850 annually if the project is carried out. R.E. 4 at 11.

The hearing officer found that GR-4 was not met, focusing in particular on the requirement that the project's financial feasibility be demonstrated. Meadowbrook never

produced a cash-flow statement, neither in its application nor at the hearing, and without one, its projected income could not be estimated or tested. R.E. 5 at 14-15. It omitted from its $5,168,500 capital expenditure the cost of the 21 beds ($280,000) and the cost of the land on which its 60-bed facility would be built ($440,000), which would have made the real cost closer to $6 million. R.E. 5 at 14.[8] And finally, the debt-service ratio (which the Department requires each applicant to calculate) was less than one – in the words of Appellants' expert Dr. John Hyde, "you're not making enough income to pay your debt." T.577-78. Meadowbrook's response was to complain that the Department's methodology (as set forth in its form for CON applications) was a poor one. T.633. However, performing the calculation the way that the Department's own application requires it to be done, Meadowbrook's ratio was below one, i.e., not viable. T.576-77, 619-20; see Table 6A (attached to application).

The hearing officer found that Meadowbrook's inability to meet a favorable debt-service ratio, in addition to its failure to put any cash-flow projection into evidence (despite claiming to have created one), indicated the project was not financially feasible. R.E. 5 at 16. The State Health Officer did not provide any explanation why this finding was incorrect, or why the staff analysis's adoption of Meadowbrook's bare assertions in its application should be preferred to the evaluation of the fuller record made by the

[8]Meadowbrook's explanation was that the land was supposedly bought before the project was contemplated. T.226. How this makes the cost of the land not part of the cost of the facility is unclear.

hearing officer. On a properly heightened standard of review, this Court should reverse on that basis as well.

Thus, looking at availability of alternatives, the goals of the State Health Plan, and financial feasibility, the Meadowbrook project could and should have been disapproved on any one of those criteria. The State Health Officer did not explain otherwise. This Court should reverse.

IV. Meadowbrook's New Construction Violates the Legislature's Moratorium.

The last issue considered by the hearing officer was the project's conflict with the moratorium at Miss. Code Ann. § 41-7-191(2): no "new construction of, addition to, or expansion of any . . . skilled nursing facility." While this Court's resolution of the foregoing issues should render it unnecessary to interpret the moratorium in the present case, Appellants brief this issue to preserve the error below for review, should this Court wish to consider it.

The purpose of the moratorium, obviously, is to control health care costs, particularly those incurred by the financially strapped Medicaid program. T.579-80. As Bruce Kelly admitted at the hearing, Medicaid residents at the proposed Meadowbrook facility would cost Medicaid more than the same residents if they occupied beds at Poplar Springs. T.206. Meadowbrook's financial expert, Shane Hariel, testified that newer beds are reimbursed at a higher rate than older beds. T.271. Therefore, as Hariel admitted under cross, the Medicaid "fair rental rate" per bed per day was $11.56 for a Poplar Springs bed at the time of the hearing, but would have been $14.73 for a bed at the new

Meadowbrook facility.[9] T.271-72. Thus, even leaving aside the 21 Kemper beds, the 39 beds from Poplar Springs would cost Medicaid over three dollars more each, per patient, per day; and this cost would continue to be higher than the equivalent Poplar Springs bed – year after year. T.273. Hence Medicaid's opposition to the project, and hence the Legislature's purpose in curbing new construction of nursing homes.

Meadowbrook contended that, because it was "replacing" or "relocating" beds, it was not violating the moratorium. The fact remains that its project calls for the new construction of a 60-bed facility where none had stood previously, which meets any normal concept of "new construction." Words in statutes must be construed according to their ordinary meanings. Miss. Code Ann. § 1-3-65.[10] Subsection (2) makes no exception for "relocation" or "replacement."

To help understand what the Legislature means by "new construction," this Court may also look to subsection (2)(t) of the statute, which begins as follows:

> (t) 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

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[9]This fair rental rate is of course only a component of the total per-diem reimbursement paid by Medicaid.

[10]As discussed below, this Court has allowed the Department discretion "to define terms in a manner inconsistent with their generally accepted definition." *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 728 So. 2d 81, 84-85 (Miss. 1998). However, the term at issue in *St. Dominic* was "relocation," which was "not defined in the Health Plan nor in statute." *Id.* at 84. Further, the cited authority for this holding was a case addressing the Department's definition of "population base," which again arose from a regulation, not from statute. *Miss. State Dep't of Health v. Golden Triangle Reg'l Med. Ctr.*, 603 So. 2d 854, 855-56, 857 (Miss. 1992). Where a statutory term is at issue, as here, we submit that § 1-3-65 controls. The Attorney General's opinion errs if it suggests otherwise.

> 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 facility 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) (emphasis added). Here, the Legislature expressly distinguished, under separate roman numerals, the *construction of a new nursing facility* from the "relocation" or "establishment" of beds.

"Facility" is not defined as such in the CON law, but § 41-7-173(h)(iv) does define "skilled nursing facility" as, in pertinent part, "an institution *or a distinct part of an institution* which is primarily engaged in providing to inpatients skilled nursing care." The language we have emphasized suggests that a physical "part" of a building is meant.

Against this, the hearing officer found, Meadowbrook and the Department relied on the June 2008 Attorney General's opinion we mentioned at I.C. above. This opinion claims that this Court has agreed with a supposed interpretation of the Department's, that "no new construction" really means "no new beds." R.E. 7 at 2. The supposed authorities here are two decisions by this Court, no page of which is pinpointed by the opinion. R.E. 7 at 2 (citing *St. Dominic*, 728 So. 2d 81, and *City of Durant v. Humphreys County Mem'l Hosp.*, 587 So. 2d 244 (Miss. 1991)).

First, we will follow the hearing officer in demonstrating that, applying the June 2008 opinion, Meadowbrook failed to qualify for any exception from the moratorium. Second and in the alternative, we will examine whether the Department really has

authority to define "new construction" to mean something other than what the statute says.

A. Meadowbrook Does Not Meet the Alleged Exceptions to the Moratorium.

The hearing officer did not question the correctness of the Attorney General's opinion, but rather applied it to the facts of Meadowbrook's project. Doing so, she found it did not qualify.

The June 2008 opinion found three exceptions to the moratorium: (1) replacement of an existing nursing home, (2) relocation of an existing nursing home, and (3) relocation of beds from one existing facility to another existing facility on "efficiency" grounds. R.E. 5 at 20; R.E. 7 at 2-3

First, the hearing officer found that Meadowbrook is not a "replacement" of an "existing" facility. Kemper Homeplace does not exist. It was closed in November 2005; all its beds were officially transferred to Poplar Springs by the Department in February 2006. The Department's own directory lists only one nursing home in Kemper County, and it isn't Kemper Homeplace.[11] For Kemper Homeplace to "exist" would render the word "nonexisting" devoid of meaning.

Second, the project is not the relocation of an existing facility. Kemper Homeplace cannot relocate, because it does not exist. And Poplar Springs is not relocating; it means to continue doing business right where it is. Thirty-nine beds are not a "facility" and cannot be relocated as an "existing facility."

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[11]It is Mississippi Care Center of DeKalb.

Third and last, the June 2008 opinion purports to allow a nursing home to "relocate[] some number of the beds from one location and transfer them to a second, already-existing location." R.E. 7 at 3. But as the hearing officer correctly found, this does not apply here either, as the proposed Meadowbrook facility is not "already existing."

Therefore, even on the exceptions 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. The Department thus acted contrary to law when it issued the CON in this case, and its order doing so should be reversed.

B. The Department Cannot Create a Lesser Standard of Need by Redefining "New Construction" as "New Beds."

The foregoing argument provides more than sufficient reason to reverse the final order below and to disapprove Meadowbrook's too-clever-by-half CON application. However, if this Court retains any doubts on that score, Appellants submit that the plain language of the CON law forbids the construction of a new nursing-home facility in Lauderdale County.

The issue of the Department's duty to comply with the CON law was recently revisited by this Court in the *Dialysis Solution* case, where although the CON Law provided that a CON expires 12 months after being issued, the Department was "renewing" CONs after they had expired. *Dialysis Solution*, 31 So. 3d at 1208-09. This Court reversed the Department:

> "a statutory agency has only legislation [sic] granted authority, there is not inherent authority." *Miss. Pub. Serv. Comm'n v. Miss. Power & Light Co.*, 593 So. 2d 997, 999 (Miss 1991). **An agency cannot grant itself broader authority than the Legislature gave it.** *See id.* ("... [T]his Court has repeatedly stated that powers legislatively granted to and exercised by an administrative agency are limited to and must not exceed the authority prescribed by the legislative enactment."). **Rules and regulations must be consistent with the relevant statutes.** *See id.* ("Statutory provisions control with respect to the rules and regulations promulgated by [an administrative agency]. Accordingly, [an administrative agency] **may not make rules and regulations which conflict with, or are contrary to, the provisions of a statute, particularly the statute it is administering** or which created it.").

Id. at 1214 (emphasis added). This Court looks to the Legislature's intent behind a statute and will not uphold an agency reading contrary to that purpose. *Miss. Methodist*, 21 So. 3d at 607-08.

Section 41-7-191(2) forbids new construction, addition to, or expansion of a nursing home. It does not say "new beds." The plain language of the statute forbids "new construction," and beds are not "constructed." Nor does it make sense to prohibit both "addition to" a number of beds and "expansion of" those beds – should the Legislature be supposed to have prohibited exchanging twin-sized beds for queen-sized? Most importantly, perhaps, the Department's reading makes an administrative end-run around the Legislature's cost-containment policy enacted in the moratorium.

For the reasons stated at section I.C. of this Argument, the Attorney General's opinion is not due any such deference as this Court might afford the Department's interpretation of its governing statutes. Regardless, no such deference is possible where the language of the statute is contrary to the Department's reading thereof. Nor is the

Legislature's evident intent – to reduce capital expenditures related to health care – served by allowing every nursing home in the state to rebuild its facility down the street on a more lavish scale, so long as no beds are added. As seen above, new beds cost Medicaid more than the same number of new beds, so that holding the number of beds constant is not in itself cost-neutral.

The June 2008 opinion nowhere explains the relevance of *City of Durant*, but it does note this Court's holding in the *St. Dominic* case that the Department can "define terms in a manner inconsistent with their generally accepted definition." R.E. 7 at 3 (citing *St. Dominic*, 728 So. 2d at 84-85). We saw above (at 36 n.10) that this holding is misapplied when statutory language is at issue. And it's a strange holding on which to rely in any event, given that this Court found the Department's definition of "relocation" to be "highly suspect legally" in that case. *Id.* at 85. Regardless, however, the main holding in *St. Dominic* is on point with this case and does not favor the Attorney General's reading of § 41-7-191(2):

> This Court concludes that the most serious error committed by the Health Officer, and the error requiring reversal, was not in defining "relocation," but rather in **electing to apply a severely lessened standard of need to the North Campus project based upon a conclusion that a relocation was taking place**. Regardless of the interpretation of the term "relocation," there is **nothing in statute or case law which indicates that a lessened standard of need applies to determine if a "relocation" should be approved**.

Id. (emphasis added). In the present case, the Department is once again applying a lesser standard to a project on the theory that it is a "relocation" and not a "new construction."

But as we've already seen above, there is no service-specific need criterion for a "relocation" of a nursing home. The only need criterion is for a new facility, and under the moratorium, the "need" for new construction of a nursing home is set at zero. By treating the building of a 60-bed facility as a "relocation," the Department gives itself *carte blanche* to approve what the Legislature has said cannot be done.

On the contrary: as this Court has held, "the showing of need must be commensurate to what the project actually is and the impact it actually has on the ... health care market." What Meadowbrook's project "actually is" is an eighth nursing home facility in Lauderdale County. The fact that it will not add to the state's overall bed count (though certainly add to Lauderdale's, and subtract from underbedded Kemper's) does not change the fact that it will be "new construction" of a previously nonexistent facility with its own license and its own patients, with higher Medicaid costs.

For these reasons, this Court should reject the Department's, or rather the Attorney General's, misreading of the statutory moratorium, and honor the Legislature's intent that no "new construction" be performed. Any policy implications of this holding – whether or not it's a good idea for the Legislature to forbid the construction or expansion of nursing-home facilities – are for that body, not for the courts, to contemplate:

> It is our job **to apply the law as it is written, not to rewrite it in view of public policy considerations which we think the Legislature failed to address**. "Our Constitution provides that if there is a public policy issue to be addressed, it is for the Legislature, not this Court."

Falco Lime, Inc. v. Mayor & Aldermen of City of Vicksburg, 836 So. 2d 711, 725 (Miss. 2002) (emphasis added) (quoting *Farmer v. B & G Food Enters., Inc.*, 818 So. 2d 1154, 1162 (Miss. 2002) (McRae, P.J., dissenting)). The Department must apply the statute as it's written, not as the Department thinks it ought to have been written.

Therefore, the final order below should be reversed.

CONCLUSION

Meadowbrook asked the Department for permission to build a 60-bed, all-private-rooms nursing-home facility in an overbedded county, by moving beds from a county with greater need (in violation of Department policy), without giving any genuine consideration to available alternatives, without demonstrating the financial feasibility of the project, without complying with the State Health Plan's goals, and without meeting even the alleged exceptions to the Legislature's moratorium on nursing-home construction. The Department responded by approving the application.

This Court should reverse the final order below, and in so doing, provide the State Health Officer (and our State agencies generally) with some guidance as to how to proceed where the final decision-maker disagrees with a hearing officer or ALJ's findings of fact. Without such guidance, it appears, agencies will consider themselves entitled to set aside factual findings and hearing records at their whim, and this honorable Court will have its future work cut out for it.

Respectfully submitted, this the ***19th*** day of November, 2010.

QUEEN CITY NURSING CENTER, INC., COMMUNITY LIVING CENTERS, LLC d/b/a Meridian Community Living Center, and BEVERLY ENTERPRISES - MISSISSIPPI, INC. d/b/a Golden Living Center- Meridian

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellants hereby certifies that he has on this day caused to be delivered via United States mail, postage prepaid, a true and complete copy of the foregoing document, to the following:

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So certified, this the ***19th*** day of November, 2010.

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