

**IN THE SUPREME COURT OF MISSISSIPPI**

**ST. DOMINIC-JACKSON MEMORIAL HOSPITAL**

**APPELLANT**

**V.**

**NO. 2011-SA-00007**

**MISSISSIPPI STATE DEPARTMENT OF HEALTH  
and MADISON HMA, LLC d/b/a Madison River  
Oaks Hospital**

**APPELLEES**

**APPEAL FROM THE DECISION OF THE  
MADISON CHANCERY COURT**

**BRIEF FOR APPELLEES**

*ORAL ARGUMENT NOT REQUESTED*

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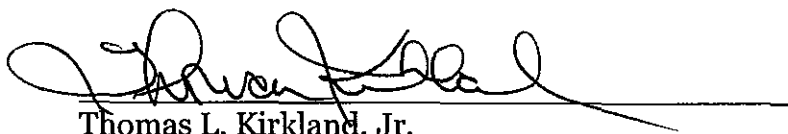
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### **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons 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. St. Dominic-Jackson Memorial Hospital (Appellant).
2. Ed Brunini, Jr., Esq., R. Richard Cirilli, Esq., and Jonathan R. Werne, Esq. of Brunini, Grantham, Grower & Hewes, PLLC (counsel for St. Dominic).
3. Madison HMA, LLC d/b/a Madison River Oaks Hospital (Appellee).
4. Thomas L. Kirkland, Jr., Allison C. Simpson, Chad W. Blalack, and Andy Lowry of Copeland, Cook, Taylor & Bush, P.A. (counsel for Madison HMA).
5. Mississippi State Department of Health (Appellee).
6. Robert E. Fagan, Jr. and Bea Tolsdorf (counsel for Department).
7. The Honorable Mary Currier (State Health Officer).
8. The Honorable Cassandra Walter (hearing officer).
9. The Honorable Cynthia Brewer (chancery court judge).

Respectfully submitted,



Thomas L. Kirkland, Jr.  
Attorney of record for Madison HMA, LLC

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### **STATEMENT OF THE ISSUES**

- I. Whether St. Dominic's Application Sought a New Hospital in Madison County.
- II. Whether St. Dominic Could Meet the Need Criterion for a New Hospital.
- III. Whether St. Dominic's Application Violated the State Health Plan's General CON Review Criteria.
- IV. Whether the Application Failed to Comply with the CON Manual's General Review Criteria.
- V. Whether St. Dominic's Other Components Complied with the Applicable Portions of the Plan or CON Manual.
- VI. Whether the Department's Policy Decision Merits Deference from This Court.

## **STATEMENT OF THE CASE**

Once again, this Court is called upon to decide a case where St. Dominic-Jackson Memorial Hospital (“St. Dominic”) hopes to build a new hospital in Madison County. Despite a vast public-relations campaign and a theory that an administrative ruling on very different facts supports its case, St. Dominic’s argument turns out to be old wine in not terribly new bottles. This Court should affirm the chancery court’s order affirming the State Health Officer’s decision.

### **I. Course of Proceedings Below.**

On December 1, 2008, St. Dominic submitted a Certificate of Need (“CON”) application titled the “Relocation of 71 Acute Care Hospital Beds and Construction of a Health Care Facility and Medical Office Building in Madison County” (the “Application”). The health policy and planning staff of the Mississippi State Department of Health (“the Department”) recommended disapproval of the Application in a February 2009 Staff Analysis. R.E. 8.<sup>1</sup> St. Dominic and Madison HMA, LLC d/b/a Madison River Oaks Hospital (“Madison HMA”) each requested a hearing during the course of review. This hearing began on February 4, 2010, with each party afforded the opportunity to present evidence and testimony to support its position and members of the public invited to voice their support or lack thereof for St. Dominic’s Application. In August 2010, the hearing officer issued her findings to the State Health Officer, recommending disapproval. R.E. 3.

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<sup>1</sup>Our record excerpts are numbered continuously with St. Dominic’s, including R.E. 8 (the Staff Analysis), which St. Dominic did not wish to include in its own excerpts.



Then on September 7, 2010, after reviewing the Application, Staff Analysis, hearing officer's Recommendation, and the hearing record, the State Health Officer issued her Final Order<sup>2</sup> disapproving the Application and the Recommendation submitted by the hearing officer. R.E. 7. St. Dominic opted to appeal the decision to Madison Chancery Court (Brewer, J.), where the State Health Officer's Final Order was affirmed. R.E. 2. Feeling further aggrieved, St. Dominic timely appealed to this Court.

## **II. Relevant Facts.**

In 2001, St. Dominic turned down Madison County's request that it take over operations of the county's hospital in Canton. Ex. 86.<sup>3</sup> St. Dominic explained that it "believe[d] our healthcare ministry can better serve your residents and citizens by maintaining our present facility" in Jackson. Ex. 86.<sup>4</sup>

Now, this Court has before it St. Dominic's third CON application to build a new hospital in Madison County. The first was its attempt to build a hospital on the campus of St. Catherine's Village. That 2003 proposal was approved by the Department but rejected by this Court in May 2006. *St. Dominic-Madison County Med. Ctr. v. Madison*

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<sup>2</sup>Technically, a CON is granted or denied by the State Health Officer, but CON appeals are always brought by or against the Department, not in the name of the State Health Officer. We may refer to the Final Order as being entered by the State Health Officer or by the Department.

<sup>3</sup>Citations to the hearing transcript will be noted as "Tr." and citations to the hearing exhibits will be noted as "ex."

<sup>4</sup>At the hearing, Madison County supervisor Karl Banks testified as to what happened after that: "HMA came in and solved the problem when we were about to lose health care in Madison County because the Board of Supervisors was — we were spending over \$200,000.00 a month just to try to keep their doors open until we could get somebody with expertise to come in and take over the hospital. HMA did that." Tr. 1219-20. He characterized exhibit 86 as "a big, fat no." Tr. 1241.

*County Med. Ctr.*, 928 So. 2d 822 (Miss. 2006). St. Dominic's second proposal in June 2007 was to build a new hospital in the same location as the one currently proposed, Reunion Parkway. Tr. 701, 719. St. Dominic withdrew that application. Tr. 464. In December 2008, it filed the present Application.

St. Dominic's newest Application proposes to relocate a combination of staffed and unstaffed beds to construct a 71-bed hospital in southern Madison County. Tr. 21-22, 318, 324-27; exs. 2, 24, 25. The Application proposes four components: Component I - the new hospital; Component II - medical office building ("MOB"); Component III - mobile magnetic resonance imaging ("MRI") services; and Component IV - obstetric services. St. Dominic stated in its Application, and affirmed through testimony at the hearing, that Components II-IV would not be implemented without approval of Component I, the new hospital: without the hospital "there would be no need to do the other components," testified Lester Diamond ("Diamond"), St. Dominic's Executive Vice-President of Operations. Tr. 330; ex. 2.

Madison HMA originally operated Madison County Medical Center east of downtown Canton. In October 2005, the Department awarded Madison HMA a CON to relocate its entire hospital to a new location off Nissan Parkway; St. Dominic opposed this CON, unsuccessfully. *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 954 So. 2d 505 (Miss. Ct. App. 2007). The new Madison HMA hospital, Madison River Oaks Hospital, is currently open and doing business.

Further facts relevant to this case will be discussed in the context of the Argument.

## **SUMMARY OF THE ARGUMENT**

In 1998, St. Dominic obtained this Court's ruling that a "relocation" which in reality amounts to building a new hospital must be adjudged by the need criteria for a new hospital, not by any reduced standard of need. Adhering to that ruling, the State Health Officer found substantial evidence that St. Dominic's present Application seeks to build a new hospital in Madison County. That decision is entitled to great deference and is not contradicted by the Department's earlier ruling in the case of Forrest General Hospital, which relocated its orthopedic surgery services and thus did not create a "new hospital" under the guise of a relocation.

Once the Department applied the State Health Plan's need criteria for St. Dominic's new hospital in a county already having a hospital, it was evident that no new hospital is needed. This finding, based on substantial evidence and on the Department's best reading of the Plan it promulgates, is likewise entitled to great deference.

The State Health Officer also found that the new hospital proposed for Madison County would duplicate existing services and would not promote the important goal of cost containment. Therefore, the Application did not comply with the State Health Plan's general considerations for CON review. Nor did the project for a new hospital comply with several of the CON Manual's general review criteria. St. Dominic's proposal for obstetric beds also was not based on substantial evidence and did not meet the relevant criteria.

The State Health Officer found that the Application did not meet the need criteria and would set a damaging precedent if granted. Her decision was in accordance with the precedents set by this Court and amply warrants affirmance.

## ARGUMENT

The issue before this Court is whether the State Health Officer's Final Order disapproving St. Dominic's CON application was supported by substantial evidence and in compliance with the CON law. The CON Law requires that a CON

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

Miss. Code Ann. § 41-7-193(1). "Need" therefore is defined objectively as what the State Health Plan defines it to be. In the present case, the State Health Officer ruled that the Application was effectively for a new hospital and that it did not meet the Plan's projection of need for such a facility. St. Dominic's appeal rests on asking this Court to second-guess the State Health Officer and to rule that its new Madison hospital would not really be a hospital after all.

The scope of review of an appeal of a final order from the Department is controlled by statute:

[t]he [Final] 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 of the [Department], or violates any vested constitutional rights of any party involved in the appeal . . .

Miss. Code Ann. § 41-7-201(2)(f). Insofar as this appeal concerns questions of law, those are reviewed de novo by the courts. Miss. Code Ann. § 41-7-201(2)(f); *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 976 (Miss. 1999).

The State Health Officer's decision "is afforded great deference upon judicial review." *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 728 So. 2d 81, 83 (Miss. 1998) (quoting *Miss. Dept. of Health v. S. W. Miss. Reg'l Hosp.*, 580 S. 2d 1238, 1240 (Miss. 1991)). This "great deference" creates a presumption in favor of the State Health Officer's decision. *Miss. State Dep't of Health v. Miss. Baptist Med. Ctr.*, 663 So. 2d 563, 579 (Miss. 1995). The courts likewise extend "great deference to the agency's interpretation of its own rules and statutes which govern its operation." *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid*, 853 So. 2d 1192, 1202 (Miss. 2003).

The State Health Officer, as the finder of fact, is free to choose between two conflicting positions, if each is supported by substantial, credible evidence. *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1224-25 (Miss. 1997). This evidence need only be "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Pub. Employees' Ret. Sys. v. Dearman*, 846 So. 2d 1014, 1017 (Miss. 2003). In other words, a decision supported by "any evidence" is not arbitrary and capricious. *Slay v. Spell*, 882 So. 2d 254, 257 (Miss. Ct. App. 2004); see *Gill v. Miss. Dep't of Wildlife Conserv.*, 574 So. 2d 586, 591 (Miss. 1990) ("any evidence" standard part of "familiar posture of judicial review of administrative processes").

A decision which is "fairly debatable" as to its correctness is not arbitrary and capricious. *Falco Lime, Inc. v. Mayor & Aldermen of City of Vicksburg*, 836 So. 2d 711, 721 (Miss. 2002). The State Health Officer's Final Order need only have relied upon "substantial" evidence, i.e., "more than a scintilla or a suspicion" to be upheld. *Natchez Cmty.*, 743 So. 2d at 976.

“Therefore, if the evidence is there, the decision stands even though the Chancellor or this Court might have made a different decision.” *United Cement Co. v. Safe Air for the Env’t, Inc.*, 558 So. 2d 840, 842 (Miss. 1990). The court cannot “substitute its judgment for that of the agency or reweigh the facts of the case.” *Miss. State Dep’t of Health v. Mid-South Assocs., LLC*, 25 So. 3d 358, 360 (Miss. 2009) (quoting *His Way Homes, Inc. v. Miss. Gaming Comm’n*, 733 So. 2d 764, 767 (Miss. 1999)). Findings of credibility are for the agency, not for the appellate courts, to make, where substantial evidence appears in the record. *Boyles v. Miss. State Oil & Gas Bd.*, 794 So. 2d 149, 156-57 (Miss. 2001).

The standard of review ultimately derives from the separation of powers: the judicial branch usurps the powers of the executive when courts reverse agency decisions for reasons other than errors of law or conduct that is arbitrary and capricious. *Miss. State Tax Comm’n v. Miss.-Ala. State Fair*, 222 So. 2d 664, 665-66 (Miss. 1969).

**I. The State Health Officer Correctly Applied a “New Hospital” Standard.**

Because of the deference afforded to the Final Order and the limited circumstances which allow the reversal of that Final Order, St. Dominic has a heavy burden to meet before the Court can reverse the State Health Officer’s decision. The Department’s staff found in their review of the Application that the proposed project did not comply with the State Health Plan, the CON Manual, or the rules and procedures of the Department. R.E. 8. After considering nine days of testimony, thirty-one live witnesses, seven witnesses whose prior testimony was admitted as recorded exhibits, and eighty-eight recorded exhibits (not including some merely proffered), along with

the parties' proposed findings of fact, the hearing officer also concluded that St. Dominic's Application failed to comply with the State Health Plan, CON Manual and rules and regulations of the Department. R.E. 3. The State Health Officer agreed, and now St. Dominic asks this Court to reverse that decision.

***A. The Application Sought a New Hospital, Not Just a "Relocation."***

The starting point for reviewing this project is determining whether the State Health Officer's classification of St. Dominic's proposed Madison hospital as a new general acute care hospital (versus the "relocation" of a health care facility or portion thereof) was correct and supported by substantial evidence. The answer to this question determines which State Health Plan criteria St. Dominic's Application must comply with to be approved. This Court has previously considered attempts by health care facilities to establish new facilities and/or services under the guise of a relocation, and the State Health Officer's review of the Application compared to those cases was appropriate.

***1. "What the Project Actually Is" Is a New Hospital.***

This Court has directed the Department and courts regarding the determination of when a proposed health care facility is a new facility versus a relocated one. *St. Dominic*, 728 So. 2d at 85 (Miss. 1998). Regarding the proposed new hospital in *St. Dominic*, this Court stated,

The North Campus project [the new hospital] **does not constitute a 'relocation' in any ordinary sense of the word.** The record is clear that **a completely new building was constructed** in northeast Jackson, and this building has been **staffed with new medical workers and new equipment.** There was **no corresponding decrease in services at the main hospital** in south Jackson, and . . . **the facility is, for all practical purposes, a new hospital.**

*Id.* (emphasis added). This Court reiterated in *St. Dominic's* 2003 attempt to relocate beds to St. Catherine's Village in Madison. *St. Dominic-Madison*, 928 So. 2d 822. In affirming the chancellor, this Court quoted part of the chancellor's holding regarding that application.

As in *St. Dominic*, **a completely new building** is proposed for construction in Madison County, in fact, the project contemplated in this case is contemplated to cost nine million dollars more than the project at issue in *St. Dominic*. Further, this new building will be **staffed with new medical workers and new equipment, rather than transferred employees and equipment** from the Jackson facility. Also, there will be **no corresponding decrease in services** at the Jackson hospital. Therefore, this Court can only find that **the proposed St. Dominic hospital in Madison is, for all practical purposes, a new hospital**. ... [And] our Supreme Court has previously [stated] that **"the showing of need must be commensurate to what the project actually is and the impact which it actually has on the Jackson health care market. ..."**

*Id.* at 826 (emphasis altered). Also supporting the conclusion that a new hospital was proposed in *St. Dominic-Madison*, this Court found that not only would a new building be constructed, with new medical workers and new equipment, but also the new facility would offer surgery, high-level imaging services, full time nursing care, rehabilitation and physical therapy, pharmacy, laboratories and Level IV emergency services. *Id.* at 829. These are services which the Application proposes the new hospital would provide. Ex. 2 at 9-10.

St. Dominic has conceded in its brief that the "satellite campus," as it repeatedly calls its desired Madison County facility, will be for all intents and purposes a new hospital: "The relocated facility in Madison County, Mississippi will provide the same health services (i.e., inpatient acute care services) as St. Dominic's Jackson Campus." Brief at 16. All right then: the "Jackson Campus" is a *hospital*, and thus, a facility that



provides the “same health services (i.e., inpatient acute care services)” will be a *hospital* too. That seems dispositive. Likewise: “a relocated portion of a hospital is just like the original hospital — but on a smaller scale.” Brief at 16. In other words, it’s a hospital.

In any event, the State Health Officer (in adopting the hearing officer’s Recommendation) certainly had substantial evidence to support her findings and conclusions, based on the positions, equipment, building, and services at the new facility.

*Positions:* Similar to the project proposed in *St. Dominic-Madison*, Diamond testified he did not know which positions would be needed at the new hospital, and he could not specify any employees who would be assigned to the new hospital. Tr. 238-39. St. Dominic’s own expert in CON and health planning, Ron Luke (“Luke”), testified “there’s no doubt” that some number of additional positions will be added due to the new hospital. Tr. 561. St. Dominic’s Application also failed to specify employees who would relocate to the new hospital, stating only that employees would be assigned to either “campus” as needed. Ex. 2 at 11. The addition of new staff at a proposed facility is a relevant factor as to whether a new hospital is proposed. *St. Dominic*, 728 So. 2d at 85; *St. Dominic-Madison*, 928 So. 2d at 826. There was substantial evidence, from both testimony and St. Dominic’s sworn Application, from which the State Health Officer could reasonably find that the facility would be staffed with new personnel.

*Equipment:* Also like the project in *St. Dominic-Madison*, the Application proposed *all-new* equipment, stating that “*Relatively little* existing equipment will be available to be moved from the Jackson hospital to the Madison hospital. Regardless of whether new or existing furniture or equipment is placed at the Madison hospital from

the Jackson hospital, a *substantial amount* of new furniture and equipment will be purchased.” Ex. 2 at 12 (emphasis added). The Application also stated that “New beds and related equipment will ultimately have to be purchased whether they are placed at the Madison or Jackson campuses.” Ex. 2 at 25. Diamond tried to rehabilitate the Application by testifying St. Dominic would try to move equipment to the new facility as appropriate, but the hospital has not identified any pieces of equipment to move. Tr. 240, 332. In any event, like every CON application, the Application was filed under oath, and the hearing officer was not obliged to find Diamond more credible.

Significantly, Luke’s e-mail to Dan Isengole, the person in charge of projecting equipment needs at the new hospital, and to Paul Arrington with St. Dominic, stated that Isengole was to “assume acquisition of all required furniture and equipment” *without* “F&E [(furniture & equipment)] relocated from the Main Campus.” Tr. 708-09; Ex. 51. Again, the purchase of new equipment for the to-be-constructed facility is relevant to whether a new hospital is being constructed. *St. Dominic*, 728 So. 2d at 85; *St. Dominic-Madison*, 928 So. 2d at 826. There was substantial evidence, from both the sworn Application and testimony, from which the State Health Officer could reasonably conclude that the new facility would be set up wholly or in large part with new equipment, furniture, and fixtures.

*Building & services:* Finally, the Application proposed to construct a new hospital building. Luke agreed the new building, which would have a cost comparable to a new hospital, would hold general acute care beds and be entitled to provide the services listed at Miss. Code Ann. § 41-7-173(k), diagnostic services, therapeutic services and care under the supervision of physicians, with “many of the same capabilities of any

acute care inpatient facility that's providing a comparable range of — or treating a comparable range of patients." Tr. 564, 713-14, 734. The description of the services to be offered at the "satellite campus" by Luke and by Scott Eddy, one of the project's architects, resembles that found by the *St. Dominic-Madison* Court to lead to the conclusion that a new hospital was being proposed. *St. Dominic-Madison*, 928 So. 2d at 829; tr. 713-14, 734-35, 1084-85; ex. 75. Exhibit 75 includes a list of areas at the "Madison Campus" that includes surgery, imaging, nursing, laboratories, a pharmacy, therapy rooms, an emergency room, and various administrative and support space. No wonder that Noel Falls, Madison HMA's expert in health care planning and CON policy in Mississippi, testified that under the CON law and based on the testimony of St. Dominic's witnesses, the proposal in the Application is "clearly a health care facility, separate, freestanding health care facility, with all of the components of a general acute care hospital," and that he would not "know what else to call it. It's a — it's a hospital."<sup>5</sup> Tr. 1262, 1267.

Regardless of St. Dominic's testimony that it intends to operate the new hospital as a satellite facility, whether or not the new hospital is considered a satellite of the Jackson hospital or a separate hospital, it is still a new hospital under the CON law. Tr.

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<sup>5</sup>Eddy, however, *did* know what else to call it:

- Q. Now, with regard to this facility that's being proposed in Madison, would you agree with me that what you have designed up there is a new hospital?
- A. I would agree it's a building to put relocated beds in.

Tr. 1083-84. When asked "if you were going to make a new hospital, would you have drawn it any differently?" Eddy responded, "No." Tr. 1084.

1268. Falls testified that the idea that a hospital can obtain a CON for a new facility just because it is under the same license as another facility is

kind of an absurd proposition. [While it] is not unusual for hospitals to operate under the same license ... **from a health planning perspective, those facilities are always counted separately as hospitals.** And they always have been, and are to this day in Mississippi counted as separate hospitals.

Tr. 1268 (emphasis added); see also tr. 1269; ex. 83 at slide 3. Falls concluded that even if St. Dominic were successful in convincing the Department to put both hospitals under one license, the Madison hospital would still be counted as a separate hospital requiring a CON. Tr. 1274. Thus, from testimony and the Application, there was substantial evidence from which the State Health Officer could conclude that the new facility was indeed a new hospital.

The issue before this Court is not, despite St. Dominic's apparent confusion on this point, whether or not St. Dominic can point to substantial evidence in the record to support its desired conclusion. The issue, rather, is whether the State Health Officer's decision is supported by substantial evidence. As the chancery court correctly found, it is, and that resolves the issue on appeal. The Department had substantial evidence from which it could conclude that the "satellite campus" would actually be a new hospital, and this Court should affirm.

2. *The Department Did Not Mischaracterize the Project.*

The foregoing demonstrates that the project proposed by St. Dominic is, for all practical purposes, a new hospital, and to be evaluated on that basis. Because St. Dominic (which has plenty of hard-earned experience on this topic) recognizes this, it

***B. The Prior Chancery Court Case Relied upon by St. Dominic Is Entirely Different.***

This “actually is” standard is why the Forrest General case urged on this Court by St. Dominic is distinguishable. We note at the outset that the supposed precedential value of this Court’s per curiam affirmance is far from clear; indeed, one of the prerequisites for this Court to issue such an affirmance is that “an opinion would have no precedential value.” M.R.A.P. 35-A(c). This Court does not even allow trial courts to rely on trial-court opinions that it affirms per curiam. *In re Guardianship of Duckett*, 991 So. 2d 1165, 1181 (Miss. 2008). Can such “authority” override this Court’s holding that a relocation “is not the transfer of a part of a health service – it is the transfer of an entire health service”? *St. Dominic-Madison*, 928 So. 2d at 829. It would seem not.

Regardless, St. Dominic’s argument is that, because the Forrest General case and its own are supposedly similar, it was arbitrary and capricious for the Department to rule favorably in one and unfavorably in the other. This argument fails because the two projects are *not* the same. A comparison of the information available regarding the Forrest General and St. Dominic Applications, along with the evidence proffered at the hearing, shows significant dissimilarities between the two projects, which can be summed up as this: in Forrest General’s case, the only relocation was of orthopedic services and their designated, used beds, *not* of an *general* acute-care service and some beds to go along with it. This is sufficiently demonstrated by St. Dominic’s proffer as exhibit 47 of the chancery court’s opinion. R.E. 9. A new facility that offers *only* orthopedic services is not a “new hospital.” It does not offer the same range of services as Forrest General itself offers, by contrast with the present case, where St. Dominic has

admitted to this Court that its satellite hospital (or “campus”) “will provide the same health services” as the Jackson hospital (or “campus”). Thus, under the “what the project actually is” standard, the Forrest General project was not anything close to a “new hospital.” The State Health Officer therefore did not act contrary to law or abuse her discretion when she ruled favorably for the Forrest General relocation but unfavorably for the St. Dominic “relocation.”

In the event that this Court would like a more detailed analysis, it may consider the following:

*Beds:* Forrest General proposed to relocate/transfer dedicated, existing *orthopedic* beds from a designated wing and to construct a new satellite *orthopedic* institute campus adjacent to the existing Southern Bone and Joint Specialists’ (an orthopedic surgery group) facilities. Proffered ex. 43; R.E. 9. St. Dominic, as shown above, is not proposing to relocate/transfer *any* identified beds to Madison County. Tr. 331. St. Dominic’s current bed utilization shows the beds proposed to be relocated to Madison may not even be set-up and staffed beds. Tr. 295, 301, 304, 317, 329. The proposed new St. Dominic hospital wouldn’t be adjacent to any specialized group servicing those specific type beds/services, but instead would be a freestanding, *full-service* general acute care hospital. Ex. 2.

*Service line:* Forrest General proposed to relocate its orthopedic services from the parent hospital to the proposed facility, with only limited exceptions. Proffered ex. 43. St. Dominic is not proposing to relocate *any* service line from its main hospital to the Madison hospital. Instead, testimony at the hearing demonstrated there would be no decrease in the services provided at the main hospital. Tr. 564, 704, 713-14, 734; Ex.

2. Further, St. Dominic would offer new, duplicated services in Madison since it would offer all the services that could be offered by a general acute care hospital of the size proposed. Tr. 704.

*Trauma designation:* Forrest General is the only Level II trauma hospital in south Mississippi. R.E. 9. In order to maintain its trauma designation as a Level II,<sup>6</sup> Forrest General, though relocating its orthopedic services, must maintain a minimum level of orthopedic services at its main hospital. R.E. 9. St. Dominic is not a Level II trauma center, having instead chosen to pay a penalty not to participate at that level but only as a Level IV center. Tr. 278-79. (In fact, at the time of the Application's filing, St. Dominic was not even a Level IV center, but only paid the trauma penalties. Tr. 278; Ex. 2, 3. By the time of the hearing, St. Dominic filed to participate as a Level IV facility. Tr. 245-46.) Regardless, St. Dominic would not be relocating beds and services in order to ensure it has space to continue to serve a high level of trauma cases, or leaving only the required minimum of some certain service at its main campus to maintain its trauma designation. Instead, St. Dominic would provide general acute care services at both locations. Tr. 564, 704, 713-14, 734.

*Available alternatives:* Forrest General stated that renovating its older wings was not a practical investment and renovation of existing space for orthopedic rooms and specialty operating rooms could not be done at the existing site because of building constraints. The new orthopedic institute's rooms were larger than Forrest General's

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<sup>6</sup>A Level II trauma center must have neurosurgery and orthopedic surgery available on a 24-hour basis. Tr. 174-75. Therefore, to maintain its Level II trauma designation, Forrest General has to maintain a minimum level of orthopedic services at its hospital. Level IV is the lowest level in the trauma system with no specialty surgery services, but only general emergency surgeries. Tr. 175.

previous orthopedic unit rooms for accommodating orthopedic patients and the new operating rooms will be larger for focusing on orthopedic surgery. Proffered Ex. 43; R.E. 9. In the case of St. Dominic, because no beds/rooms have been identified, St. Dominic cannot show that any rooms are undersized for the type patient care needed. Tr. 331. Testimony at the hearing, while demonstrating portions of St. Dominic are older, also demonstrated those portions had undergone significant renovations over the years. Tr. 1077.

*Location:* Forrest General's proposed new facility was located in the *same city* as the parent hospital and would only be five minutes from it. R.E. 9. St. Dominic's proposed new hospital would be located in a new city and new county.

*Duplication of services:* The Department testified at the Forrest General CON hearing there was no unnecessary duplication of services since the proposal was for relocation of its existing orthopedic service and the beds to accommodate that service. The chancery court considered that relocating existing, operational orthopedic beds was a re-configuration of the hospital's orthopedic services in order to be more efficient and to accomplish institutional objectives. R.E. 9. St. Dominic does not propose a reconfiguration but an expansion and duplication of its current services. Tr. 564, 704.

*Staff and equipment:* Testimony at the Forrest General CON hearing demonstrated it would transfer existing staff and equipment to the orthopedic campus. R.E. 9. As shown above, St. Dominic was squirrely on this issue. Tr. 238-40, 332. The Application included an equipment list and cost for all new equipment. Ex. 2.

*Nothing like that CON that St. Dominic opposed in the 1990s:* The chancery court held Forrest General's CON application was "entirely different from a situation in



which a hospital attempts to circumvent the regulatory requirements for constructing a ‘new acute care hospital’ with phantom beds in a new market under the guise of a relocation.” R.E. 9. Meanwhile, St. Dominic continues to toss and turn in the bed it made in 1998: its project attempts to build a new acute care hospital, as demonstrated herein, by circumventing the Plan’s criteria and standards under the guise of a relocation. Maybe the beds proposed to be moved by St. Dominic this time are not “phantom beds,” but given the testimony and exhibits at the hearing, they are not all operational, set-up and staffed beds either — neither phantom nor tangible, but some eerie condition in between. Tr. 295, 301, 304, 317, 329, 331; Ex. 23-31.<sup>7</sup>

— Having dutifully read all that, this Court can see that the Department did not deal St. Dominic a raw hand in failing to find anything controlling in the Forrest General example. At the hearing in the present case, the Department’s Don Eicher testified that in his opinion the new Forrest General facility, treating only orthopedic patients, was not a new stand-alone general acute care hospital, but is dependent on the main hospital for support services, including janitorial, laundry, food services and pharmacy. The Forrest General facility also did not have an emergency department. Tr. 174. Eicher testified that FGH’s orthopedic relocation “was completely dependent” on Forrest General’s main campus, whereas St. Dominic’s facility proposes a “general acute care hospital that would operate by itself independent, and have all the services necessary, to provide a full range of hospital services.” Tr. 131-133.

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<sup>7</sup>Following Bram Stoker’s description of vampires as the “Un-Dead,” perhaps these beds should be described as “Un-Beds.”

The foregoing demonstrates why St. Dominic's cited authority for the supposedly reversible error of disregarding the Forrest General case is not on point. As this Court has held,

proper exercise of [the Public Service Commission's] sound discretion **permits differing treatment of similar issues** in different utility cases. However, in the **absence of a clearly enunciated factual basis for making such a distinction between utilities**, set forth in their order, **such different treatment** clearly constitutes arbitrary and capricious action by the PSC.

*Miss. Pub. Serv. Comm'n v. Miss. Power Co.*, 429 So. 2d 883, 900 (Miss. 1983) (emphasis added). This Court held that the agency *could* treat "similar issues" differently, *if* it enunciated a factual basis. But in the present case, there is not a "similar issue." Forrest General presented a case for relocating a *single service and beds dedicated to that service*, in a project that did not even begin to resemble a new hospital, and that therefore did not trigger the well-established requirement that a "relocation" which in fact amounts to a new hospital must be treated as a new hospital.

As the Department found:

the fact that Forrest General believes that it is medically appropriate to maintain a certain level of orthopedic care on the main campus is certainly reasonable, in view of Forrest General's position as a large trauma center, with responsibilities to not only the Forrest County area, but to the entire region of South Mississippi. **The bottom line is that the project must be reviewed on the whole, to determine the true nature of the proposal.** I am satisfied that Forrest General proposes a true relocation of orthopedic beds and services, and that any remaining orthopedic services on the main campus are appropriate and essential for Forrest General's mission as a community hospital with a commitment to comprehensive trauma care.

Proffered ex. 44 at 9-10 (emphasis added). The Department correctly applied this Court's rule that "the showing of need must be commensurate to what the project

actually is.” Retention of minimal orthopedic services at the parent hospital was not aimed at allowing Forrest General to open a new hospital down the road, but rather had the specific and reasonable justification of preserving its Level II status, an issue which never arose in any St. Dominic application.

Thus the Department did not err by omitting to “clearly enunciate” why Forrest General’s CON was distinguishable, for there was no “similar issue” that it “treated differently.” This Court does not need express findings to reach that conclusion. In a CON case, like any other administrative appeal, “[t]he court must look at the full record in deciding whether substantial evidence exists to support the agency’s findings.” *Open MRI, LLC v. Miss. State Dep’t of Health*, 939 So. 2d 813, 816 (Miss. Ct. App. 2006). And as set forth above in great detail, the entire record does provide substantial evidence which, even if the judiciary might incline to rule the other way, must be held to support the ruling the Department did make. *United Cement Co.*, 558 So. 2d at 842. The two cases were simply not similar, as was well known to the hearing officer (Hon. Cassandra Walter), who had presided over both Forrest General’s hearing and the present hearing. Proffered ex. 44.

Based on the above, the St. Dominic Application does not propose a relocation of a facility, service, or portion of either. The State Health Officer, agreeing with both the Staff Analysis and hearing officer’s recommendation, correctly ruled that the Application proposed an establishment of a new general acute care hospital in Madison County and that the Application did not comply with the Plan’s applicable need criteria.

## **II. St. Dominic Could Not Meet the Need Criteria for a New Hospital.**

As shown above, St. Dominic proposes a new hospital, not a relocation. Therefore, it must comply with the State Health Plan's criteria for a new hospital, which St. Dominic cannot do.

### **A. *St. Dominic's Application Fail to Comply with the Applicable Plan Criteria.***

The State Health Plan sets forth two different need criteria concerning hospitals. The first is Section 108.02 entitled CON Criteria and Standards for the "Establishment of a General Acute Care Hospital," which refers to the applicable methodology contained in Policy Statement 108.01(1). Ex. 7. Policy Statement 108.01(1) contains the methodology for "Counties Without a Hospital" in 1(a) and for "Counties With Existing Hospitals" in 1(b). Tr. 1297; Ex. 7. Both Falls and Eicher testified that because the Application proposed the establishment of a new hospital, the methodology and criteria for "Counties with Existing Hospitals" applies. Tr. 1252-53.

The second criterion is Section 108.03 entitled CON Criteria and Standards for "Construction, Renovation, Expansion, Capital Improvements, Replacement of Health Care Facilities, and Addition of Hospital Beds." Because St. Dominic's Application proposes the establishment of a general acute care hospital, Section 108.02(1), CON Criteria and Standards for the Establishment of a General Acute Care Hospital, governs the Application's review. Although St. Dominic argued it does not have to comply with Criterion 108.02 because the Application does not propose the addition of any beds, the criterion is for the "Establishment of a General Acute Care Hospital" regardless of the beds' source. Tr. 1301.

Therefore, the applicable criterion is this:

**108.02 Certificate of Need Criteria and Standards for the Establishment of a General Acute Care Hospital**

The [Department] will review applications for [CON] to construct, develop, or otherwise establish a new hospital under the applicable statutory requires of Sections 41-7-173, 41-7-191, and 41-7-193, Mississippi Code of 1972, as amended. The [Department] will also review applications for [CON] according to the general criteria listed in the [Manual]; all adopted rules, procedures, and plans of the [Department]; and the specific criteria and standards listed below.

1. **Need Criterion: The applicant shall document a need for a general acute care hospital using the appropriate need methodology as presented in this section of the Plan. In addition, the applicant must meet the other conditions set forth in the need methodology.**

Ex. 7 (bold in original). The “appropriate need methodology as presented in this section of the Plan,” referenced above, is the Acute Care Hospital Need Methodology, Criterion 1(b), Counties with Existing Hospitals.<sup>8</sup> Ex. 7. Section 1(b) provides the following regarding CON applications for general acute care hospitals:

1. Acute Care Hospital Need Methodology: With the exception of psychiatric, chemical dependency, and rehabilitation hospitals, the [Department] will use the following methodologies to project the need for general acute care hospitals:
  - ....
  - b. **Counties with Existing Hospitals** - The MSDH shall use the following formula to determine the need for an additional hospital in a county with an existing hospital:

$$ADC + K(\sqrt{ADC})$$

**Where: ADC = Average Daily Census**

**K = Confidence Factor of 2.57**

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<sup>8</sup> Subpart (a), Counties Without a Hospital, is inapplicable as there is already a hospital in Madison County. Tr. 1298-99.

The formula is calculated for each facility *within a given General Hospital Service Area (GHSA)*; then beds available and beds needed under the statistical application of the formula are totaled and subtracted to determine bed need or excess *within each GHSA*. Map 11-2 delineates the GHSA's. The MSDH may consider approval of a hospital with a maximum of 100 beds if: (a) the number of beds needed is 100 or more; (b) there is strong community support for a hospital; and (c) a hospital can be determined to be economically feasible.

Ex. 7 (bold & underline in the original, italics added). Because it could not meet the projection under Section 1(b), as required by the applicable need criterion, St. Dominic argued that this formula was not applicable to its project, as it was not proposing to add any additional acute care beds to General Hospital Service Area ("GHSA") 3 (the "Service Area"). Tr. 710-12.

However, as shown above, this methodology determines the "need for an additional hospital" in the county, with or without the addition of acute care beds. The calculation above results in an excess of 1,300 beds in the Service Area. Tr. 1299. The italicized language makes it clear that, for a county *with* an existing hospital, any proposal to build an additional hospital in that county must focus upon the bed need within the county's entire GHSA, *not* the bed need within that county alone. It is undisputed that GHSA-3, which includes Madison County, is overbedded and will not support any additional beds. Tr. 712, 1299. (Regardless, even applying the formula above solely to Madison County, as St. Dominic misleadingly implies would be appropriate, results in an excess of 34 beds, not a "need of 100 or more." Tr. 1298.) Therefore, St. Dominic's Application does not comply with the applicable Plan need methodology for general acute care hospitals.

**B. *The Application Could Not Be Reviewed Under the Criteria for Projects Which Do Not Add Beds.***

The other criterion, which St. Dominic wanted the Department to apply to its Application, is Section 108.03, CON Criteria and Standards for Construction, Renovation, Expansion, Capital Improvements, Replacement of Health Care Facilities, and Addition of Hospital Beds, subsection (1)(a), "Projects which do not involve the addition of any acute care beds." Tr. 714-15. This Section states:

**108.03      Certificate of Need Criteria and Standards for Construction, Renovation, Expansion, Capital Improvements, Replacement of Health Care Facilities, and Addition of Hospital Beds**

The [Department] will review applications for a [CON] for the addition of beds to a health care facility and projects for construction, renovation, expansion or capital improvement involving a capital expenditure in excess of \$2,000,000 under the applicable statutory requirements of Sections 41-7-173, 41-7-191, and 41-7-193, Mississippi Code of 1972, as amended. The MSDH will also review applications for [CON] according to the general criteria listed in the [CON Manual]; all adopted rules, procedures and plans of the MSDH; and the specific criteria and standards listed below.

The construction, development, or other establishment of a new health care facility, the replacement and/or relocation of a health care facility or portion thereof, and changes of ownership of existing health care facilities are reviewable regardless of capital expenditure.

1.      **Need Criterion:**

- a.      **Projects which do not involve the addition of any acute care beds:** The applicant shall document the need for the proposed project. Documentation may consist of, but is not limited to, citing of licensure or regulatory code deficiencies, institutional long-term plans (duly adopted by the governing board), recommendations made by consultant firms, and deficiencies cited by accreditation agencies (JCAHO, CAP, etc.). In addition, for projects which involve construction, renovation, or expansion of emergency department facilities, the applicant shall include a statement indicating whether the hospital will participate in the

statewide trauma system and describe the level of participation, if any.

Ex. 7 (bold & underline in original). St. Dominic's expert, Luke, based his rationale for Section 108.03(1)(a)'s being applicable upon Section 100.03 of the CON Manual concerning the scope of the CON law. Ex. 6. That section states that the following requires a CON:

The relocation of a health care facility or portion thereof, or major medical equipment unless such relocation of a health care facility or portion thereof, or major medical equipment, which does not involve a capital expenditure by or on behalf of a health care facility, is within five thousand two hundred eighty (5,280) feet from the main entrance of the health care facility.

NOTE: The relocation of a health care facility is defined as the relocation of a health care facility from one physical location or site to another.

A portion of a health care facility is considered to be a wing, unit, service(s), or beds.

The relocation of major medical equipment shall include, but is not limited to, the relocation of major medical equipment from one physical facility to another physical facility.

Ex. 6. But the statute does not mention "relocation" of beds. Rather, it states;

(1) No person shall engage in any of the following activities without obtaining the required [CON]:

....

(b) The relocation of a health care facility or portion thereof, or major medical equipment, which does not involve a capital expenditure by or on behalf of a health care facility, is within five thousand two hundred eighty (5,280) feet from the main entrance of the health care facility.

Miss. Code Ann. § 41-7-191(1)(b). Regardless, from this section of the CON Manual, Luke concluded that because the Note above includes beds as a "portion" of a health care



facility, the Application was not for a general acute care hospital but the relocation of beds, i.e. a portion of a health care facility, so that it had to comply only with the part of the Plan regarding construction of a health care facility without the addition of new beds. Tr. 550-51, 553, 1285-86.

That argument fails for the same reason that most of St. Dominic's arguments in this case must fail: "what the project actually is" is a new hospital, and therefore the State Health Officer would have erred as a matter of law had she applied a need criterion for a "partial relocation" to the Application. This Court has seen several times now the relevant authority from the 1998 *St. Dominic* case and the 2006 *St. Dominic-Madison* case, and we will not repeat ourselves here. Any interpretation of the CON Manual contrary to those precedents would have been improper.

Thus, the State Health Officer's interpretation of Section 100.03 as inapplicable to the Application was a reasonable one. The courts extend "great deference" to an agency's reasonable interpretation of its governing statutes and regulations. *Elec. Data Sys. Corp.*, 853 So. 2d at 1202.

The State Health Officer also had substantial evidence from which to conclude that it would be unwise to apply Section 100.03 to any "partial relocation" that effectively sets up a new hospital. The expert witness Falls noted that St. Dominic's theory would allow a partial relocation to create a new general acute care hospital. "If that's the case, then it is separately reviewable under the [Plan's] criteria for a new hospital in a county with a hospital ...." Tr. 1286-87. The proposed misapplication of Section 100.03 would have consequences:

**[Y]ou could build hospitals all over the state under this theory without going through the [CON] Review Manual.** Any hospital with capacity that they feel that they can define as operational ... that wants to build a new hospital somewhere, can just simply seek to relocate [those operational beds] and build a new health care facility, have it licensed under the same license, and build it without respect to the need criteria for ... new general acute care hospitals.... **[That] would be terrible health care planning.**

Tr. 1288-89 (emphasis added). The courts' deference to agency interpretations "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*, 574 So. 2d at 593.

Because the State Health Officer's interpretation is in conformity with this Court's precedent and has a reasonable policy basis, St. Dominic's challenge of that interpretation is without merit.

### **III. St. Dominic's Application Violated the State Health Plan's General CON Review Criteria.**

The Plan contains four general CON policies with which each CON application must comply as follows:

Mississippi's health planning and health regulatory activities have the following purposes:

- To improve the health of Mississippi residents
- To increase the accessibility, acceptability, continuity, and quality of health services
- To prevent unnecessary duplication of health resources
- To provide some cost containment

Ex. 18. The State Health Officer, adopting the hearing officer's findings, agreed that the new hospital was not necessary to improve the health of Mississippi residents or to

increase the accessibility, acceptability, continuity, and quality of health services. (We've seen that GHSA 3 is already overbedded.) As for unnecessary duplication, St. Dominic's own expert admitted that the new hospital would duplicate services. Tr. 704.

As for cost containment, the hearing provided substantial evidence that the new Madison facility would be more expensive than expansion at St. Dominic's existing hospital. St. Dominic's expert, Kevin Crook, compared the cost between the two options, Exhibit 60 (with Madison) and Exhibit 61 (without Madison). Tr. 957. He contended that if St. Dominic built a new hospital in Madison, plus the other projects in St. Dominic's master plan, the cost would be \$3 million less than without building the Madison hospital. Tr. 962.

However, it is really those other projects which create the illusion of savings. The new emergency department at the Jackson hospital will cost \$23 million, and the heart institute and surgery to be added there will cost \$80 million, a total of \$103 million for two projects which have no connection to the Madison hospital. Tr. 1113-14. Mysteriously, in the calculation for "without the Madison hospital," these two projects total \$120 million, a \$17-million difference. Tr. 1114-15. As the Department found, when this extra \$17 million difference is subtracted from the alleged cost "without the Madison campus," that yields a cost of \$219 million: less than the \$233 million that St. Dominic projected its cost to be for the "with Madison campus" option. Tr. 1115.

Based on the substantial evidence of available space at the Jackson facility for St. Dominic's proposed 60 new beds in its tower addition, another \$50 million could be subtracted from the project's costs, giving a total of \$170 million for the "without Madison campus" option, contrasted to the proposed \$233 million for the "with

Madison” opinion. Tr. 1116. Roy Holland, an expert in the field of pre-hospital construction and planning, testified,

Q: [W]hat’s your opinion there as to whether or not, based on their own projections here, from a cost standpoint, whether or not building a hospital in Madison County is cost effective or not?

A: It would be my opinion that it wouldn’t be very cost effective.

Tr. 1116. Evidence showed that though the Master Plans promised to solve St. Dominic’s alleged problems, a Madison hospital would not solve any of them. Tr. 1116-17.

The State Health Officer thus had substantial evidence on which to conclude that the State Health Plan’s general criteria were not met by the Application, even had the Application not failed to meet the specific Plan criteria for a new hospital.

#### **IV. The Application Failed to Comply with Many of the CON Manual’s General Review Criteria.**

Having failed to meet the new-hospital need criterion or to comply with the State Health Plan’s general criteria, the Application could not have been approved. It thus should not be necessary to examine each of the general review criteria in the CON Manual. St. Dominic’s briefing on these criteria amounts to setting forth the allegedly substantial evidence that supported its Application, while giving little or no heed to the substantial evidence to the contrary on which the State Health Officer was entitled to rely. St. Dominic also repeatedly argues that her findings as to the CON Manual criteria are wrong because she was wrong to first find that the Application proposed a new hospital. Neither of these arguments has merit. St. Dominic would have to show, first, that the State Health Officer had *no* substantial evidence from which to find that the

Application violated *even one* of the general review criteria. Ex. 16 at 60. And St. Dominic would also have to show that it was not really trying to build a new hospital in Madison County, which, as already repeatedly demonstrated above, it cannot do. The hearing officer dealt with these issues in adequate detail, and we refer this Court to R.E. 3 which was adopted by the State Health Officer.

**V. St. Dominic's Other Components Also Did Not Comply with the Applicable Portions of the Plan or CON Manual.**

Though St. Dominic's Application and the testimony presented at the hearing demonstrated that St. Dominic was not interested in implementing Components II-IV of the Application if Component I was not approved, we briefly consider here the only one briefed by St. Dominic on appeal, regarding Component IV, the ob/gyn services. Brief at 34. St. Dominic's own evidence at the hearing was that the new hospital would have 93 obstetric ("OB") discharges in its first year, well below the 150 required by the State Health Plan. Tr. 802-03.

Now, on appeal, St. Dominic complains that the Jackson hospital's deliveries from the same service area as would be occupied by the Madison hospital were not included, which would total 269 out of the 400 performed at the Jackson hospital.

First, this omits to consider part 1(b) of the relevant need criterion, which requires "subject to verification by the [Department], that all existing OB beds within the proposed Perinatal Planning Area have maintained an optimum utilization rate of 60 percent for the most recent 12-month reporting period." Ex. 12. Luke admitted he did not calculate the occupancy rate for OB beds at St. Dominic and admitted he did not

even *know* how many beds his own hospital was using for OB services. Tr. 797. St. Dominic thus could not possibly present substantial evidence that it would meet 1(b) of the criterion, subparts (a) *and* (b) of which must be met. St. Dominic now complains that the 2009 State Health Plan did not publish data to assist it in calculating its compliance with 1(b), but the burden of proof to demonstrate compliance is on the applicant, not on the agency. The Department was not required to do St. Dominic's research for it, and St. Dominic could at least have counted its own beds.

Second, given St. Dominic's failure of proof as to the number of beds used at the Jackson hospital for OB, and the lack of any evidence as to why the Madison hospital would take over nearly all the Jackson hospital's patients, the State Health Officer did not err in finding a lack of substantial evidence to support the notion that the Madison hospital could sustain 150 deliveries a year with the six beds designated under Component IV, let alone the 362 claimed by St. Dominic in its brief. Criterion 1(a) for OB required St. Dominic to "demonstrate how the applicant can *reasonably expect* to deliver a minimum of 150 babies the first full year of operation." Ex. 12 (emphasis added). St. Dominic has not shown how it was arbitrary or capricious for the Department to doubt whether the Application proved a *reasonable expectation* that the 150-deliveries requirement would be met. Again, even if substantial evidence might have supported St. Dominic's position, the State Health Officer cannot be reversed given that there was also substantial evidence supporting her position. This assignment of error lacks merit.

## VI. The Department's Policy Decision Merits Deference from This Court.

In adopting the hearing officer's recommendation, the State Health Officer agreed that the St. Dominic Application, if approved, would set a "damaging precedent":

If the only criteria an acute care hospital must go through in order to do a project like this is to declare the project part and parcel of its existing facility as a "satellite campus," then we can look forward to many, many more projects just like this one in the immediate future.

If St. Dominic is permitted to proceed with this project under the guise of a "relocation" by satisfying the need requirement with nothing more than a showing that: 1) Madison County is one of the fastest growing counties in Mississippi, 2) the current transportation system is inadequate, 3) there are parking and patient flow problems at its Jackson Campus, and 4) many Madison County residents are inconvenienced by having to drive to Jackson for healthcare, **the standard will have been officially lowered from what is currently required** by the state CON law, the SHP, and the CON Manual.

Approval of a project of this magnitude, under the circumstances that exist is **simply not good health planning and is not good policy** for the Department.

R.E. 3 at 47 (emphasis added).

The "needs" of Madison County are being met already. That is what the *need criteria* address. Most of us can remember our parents' explaining to us the difference between "needs" and "wants." St. Dominic, and its supporters, may *want* a new hospital, but the *need*, as determined under the State Health Plan, does not exist for one. The CON Law would mean nothing if a hospital's quest for market share and a well-conducted public-relations campaign (in spite of which, many citizens of Madison County opposed the new hospital as a wasteful grab for patients) could justify the courts in reversing the State Health Officer's decisions.

The Department acted within its discretion, on the basis of substantial evidence, and in conformity with law. The Final Order of the State Health Officer should be affirmed.

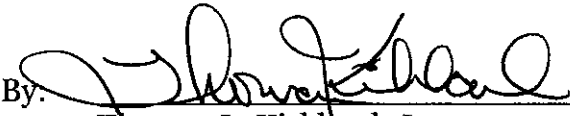


## CONCLUSION

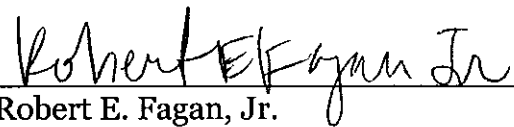
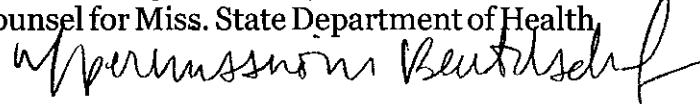
For all the reasons stated above, this Court should affirm the decision of the Madison Chancery Court affirming the Final Order of the State Health Officer. The matter should be remanded to the chancery court for an award of reasonable attorney's fees and costs pursuant to Miss. Code Ann. § 41-7-201(2)(f).

Respectfully submitted, this the **19th** day of August, 2011.

MADISON HMA, LLC

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MISSISSIPPI STATE DEPARTMENT OF HEALTH

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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby attests that he has this day caused a true and complete copy of the foregoing document to be served via United States mail (postage prepaid) upon the following:

The Honorable Cynthia Brewer  
MADISON CHANCERY COURT  
Post Office Box 404  
Canton, Mississippi 39046

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So certified, this the **19<sup>th</sup>** day of August, 2011.

  
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Andy Lowry