

BEFORE THE SUPREME COURT OF MISSISSIPPI

ST. DOMINIC-JACKSON MEMORIAL HOSPITAL

APPELLANT

VS.

CASE NO. 2011-SA-7

**MISSISSIPPI STATE DEPARTMENT OF HEALTH
AND MADISON HMA, INC. D/B/A MADISON RIVER OAKS
HOSPITAL**

APPELLEES

**BRIEF OF APPELLANT,
ST. DOMINIC-JACKSON MEMORIAL HOSPITAL**

Appeal from the Madison County Chancery Court

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. St. Dominic-Jackson Memorial Hospital, Appellant;
2. Ed Brunini, Jr., R. Richard Cirilli, Jr. and Jonathan R. Werne of Brunini, Grantham, Grower & Hewes, PLLC, Counsel for Appellant, St. Dominic-Jackson Memorial Hospital;
3. Mississippi State Department of Health, Appellee;
4. Robert Emmett Fagan Jr., Counsel for Appellee, Mississippi State Department of Health;
5. Madison HMA, Inc. d/b/a Madison River Oaks Hospital, Appellee;
6. Thomas L. Kirkland, Andy Lowry, Allison C. Simpson, and Chad W. Blalack of Copeland, Cook, Taylor & Bush, P.A., Counsel for Appellee, Madison HMA, Inc. d/b/a Madison River Oaks Hospital;
7. Cassandra S. Walter, Administrative Hearing Officer for the Mississippi State Department of Health; and
8. Honorable Cynthia Brewer, Madison County Chancellor.

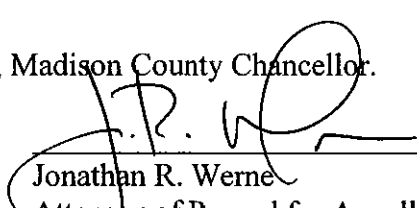

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STATEMENT OF ISSUES

- (1) Whether St. Dominic's CON Application is a relocation of a portion of a health care facility as contemplated under section 41-7-191(1)(b) of the Mississippi Code.
- (2) Whether St. Dominic's CON Application complies with the specific need criteria for a relocation of a portion of a health care facility detailed in the State Health Plan ("SHP").
- (3) Whether St. Dominic's CON Application complies with the specific need criteria for the proposed institution of obstetrical services as set forth in the State Health Plan.
- (4) Whether St. Dominic's CON Application complies with the General Review Criteria as set forth in the Mississippi Certificate of Need Review Manual ("CON Review Manual").

STATEMENT OF THE CASE

On December 1, 2008, St. Dominic filed a Certificate of Need ("CON") application ("CON Application") requesting authority to relocate 65 licensed general acute care beds (in actual operation) from its main campus in Jackson, Mississippi ("Jackson Campus") to a new campus in Madison County, Mississippi ("Madison Campus"), construction of a facility to house those beds and a medical office building, mobile Magnetic Resonance Imaging ("MRI") services and the relocation of six licensed and operational general acute care beds for obstetric services. (Hrg. Ex. 2, CON App., pp. 8-10). In February 2009, the Mississippi State Department of Health ("Department") rendered its staff analysis which recommended disapproval of St. Dominic's CON Application ("Staff Analysis"). (Hrg. Ex. 3). The Department's staff determined that the project was in essence a "new" hospital, not a true relocation, and therefore it would have to meet the specific need criteria for the establishment of a general acute care hospital (and not the specific need criteria for the relocation of a portion of a health care facility). (Hrg. Ex. 3, pp. 4-5). The Staff Analysis found that the CON Application met the General Review Criteria ("GRC") in the CON Review Manual, and all of the adopted rules, procedures and plans of the

Department. (Hrg. Ex. 3, pp. 10-15). The Staff Analysis did not opine negatively in relation to mobile MRI services, or to the medical office building component, but did state that the specific need criteria for the provision of obstetrical services were not met. (Hrg. Ex. 3, pp. 7-10).

At the end of the Staff Analysis, the Staff stated the following as the basis for disapproval of the CON Application: "Although the statute allows the relocation of a health care facility or portion thereof, the Applicant admits that no services will be eliminated or reduced at the Jackson campus. Therefore, the project was reviewed as the construction of an acute care facility in Madison County." (Hrg. Ex. 3, p. 17). Since the proposed project was for the construction of a new acute care facility, "[t]he methodology set out in the 2009 State Health Plan for determining need for a hospital in a county with an existing hospital does not support the addition of a new hospital." (Hrg. Ex. 3, p. 17).

Madison HMA, Inc., the operator of a 67-bed hospital located in Canton, opposed St. Dominic's CON Application. An administrative hearing was conducted at the request of St. Dominic and Madison HMA on the CON Application on February 4-5, 8-11, 17-18 and 25, 2010. At the hearing, each party was represented by counsel and was afforded the opportunity to present evidence and testimony in support of their respective positions. In addition, the public was invited and many statements from both sides of the controversy were heard.

On August 2, 2010, the Administrative Hearing Officer issued an opinion recommending that St. Dominic's CON Application be disapproved. (R.E. 3). On August 26, 2010, the State Health Officer concurred with the Hearing Officer's findings and recommendation. On September 7, 2010, pursuant to section 41-7-201(2)(b) of the Mississippi Code, St. Dominic appealed the State Health Officer's Final Order to the Madison County Chancery Court. (Trial Docket, p. 1). On December 22, 2010, the Madison County Chancery Court affirmed the decision of the Department disapproving St. Dominic's CON Application (R.E. 2). On

December 29, 2010, St. Dominic appealed the decision of the Madison County Chancery Court to the Mississippi Supreme Court. (Trial Docket, pp. 240-41).

STATEMENT OF FACTS

St. Dominic's CON Application can be divided into four parts: (1) Component I involves the relocation of 65 licensed and operational general acute care beds and related ancillary and support services and construction of a facility to house the relocated beds (Hrg. Ex. 2, CON App., pp. 8-9); (2) Component II involves the construction of a 60,000 square feet medical office building (*Id.* at 9); (3) Component III involves the institution of mobile MRI services (*Id.* at p. 9); and (4) Component IV involves the institution of a new obstetrical service including the relocation of six licensed and operational general acute care beds (*Id.* at 9-10). If Component I is not approved, St. Dominic will not pursue the other components. (*Id.* at 8-10). If Component I is approved, the other components must be examined individually in light of the applicable specific need criteria for those components. The failure to approve Component II, III or IV would not prohibit St. Dominic from pursuing Component I.

St. Dominic's CON Application proposes a new satellite campus in Madison County, designated as the St. Dominic Madison Campus, immediately north of the current city limits of the City of Madison, to house the four listed component parts. (Hrg. Ex. 2, CON App., pp. 7-10; Hrg. Ex. 20-21). As part of the CON Application, St. Dominic will relocate existing employees and equipment to the new satellite campus in Madison County. (T. 233, 237-38, 240). The proposed facility will be located on a site with direct access from Parkway East, a four-lane divided parkway that commences close to the intersection of I-55 and MS Highway 463, running north and terminating on Gluckstadt Road near the I-55 Gluckstadt Interchange. (Hrg. Ex. 2, CON App., p. 48, Ex. III.B.6.3.e; Hrg. Exs. 20-21). The proposed location is approximately twelve miles from the main campus of St. Dominic. (T. 735, 760).

SUMMARY OF THE ARGUMENT

St. Dominic is requesting CON authority to relocate up to 71¹ existing licensed and operating general acute care beds and related ancillary and support services associated with general acute care services to a new satellite campus in Madison County, immediately north of the current city limits of the City of Madison and in close proximity to Interstate 55. (Hrg. Ex. 2, CON App., pp. 8-9). The ultimate question for this Court is whether St. Dominic's proposed CON Application is a true relocation of beds as opposed to a "new hospital."

Without question, Mississippi law provides for the relocation of a health care facility or portion thereof from one physical location to another. *See* Miss. Code § 41-7-191(1)(b) (Hrg. Ex. 5). The Department has defined "[a] portion of a health care facility . . . to be a wing, unit, service(s) or **beds**." (Hrg. Ex. 6)(emphasis added). The provision for relocation of beds is a health planning tool that allows the Department under precise statutory authority to redistribute beds within a service area when those beds are inappropriately clustered in a limited area. (T. 613). In the past, the Mississippi Supreme Court criticized the relocation of "phantom" beds (*i.e.*, beds that a hospital is licensed to utilize, but are not in actual operation) as not a "true relocation" of a health care facility. *See St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 728 So. 2d 81, 84-85 (Miss. 1998) (the "*Methodist Opinion*"). Here, St. Dominic is not relocating so-called "phantom" beds. Instead, St. Dominic proposes to relocate 71 licensed and operational acute care beds: As testified by St. Dominic's Executive Vice President of Operations, Lester Diamond, "[i]n this application, we are asking permission to relocate 71 beds that are set up **and operational**." (T. 232-33)(emphasis added).

The Mississippi Supreme Court has also previously held that a relocated health care facility (when considering the ordinary sense of the word, "relocation") should be staffed with

¹ Component I involves the relocation of 65 beds and Component IV involves the relocation six beds, for a total of 71 general acute care beds to be relocated. (Hrg. Ex. 2, CON App., pp. 8-9).

existing medical workers and outfitted with relocated medical equipment, rather than new medical workers and equipment. *See Methodist*, 728 So. 2d at 85; *St. Dominic-Madison Co. Med. Ctr. v. Madison Co. Med. Ctr.*, 928 So. 2d 822, 829 (Miss. 2006) (the “*St. Catherine’s Opinion*”). Here, St. Dominic proposes to relocate existing employees and equipment to the satellite campus in Madison County. Again, Mr. Diamond testified, “[i]n this application, we are indicating that we will relocate the appropriate equipment and appropriate positions necessary to take care of the 71 beds once they are approved.” (T. 233)(emphasis added) Accordingly, St. Dominic’s proposed project is a true relocation project.

St. Dominic’s CON Application is very similar to a project by Forrest General Hospital (“FGH”) recently affirmed by the Mississippi Supreme Court as a true relocation project. (Hrg. Exs. 44, 47, 49). Three years prior to St. Dominic’s CON Application, FGH filed a CON application to establish a new freestanding satellite facility through the relocation of 30 existing licensed and operational general acute care² beds. (Hrg. Ex. 44, p. 2). FGH proposed to relocate existing staff and equipment to the new freestanding satellite. (Hrg. Ex. 44, p. 8).

FGH’s project is similar to St. Dominic’s CON Application in virtually every aspect – including the same Hearing Officer that presided over both applications. Despite these similarities, the same Hearing Officer that approved FGH’s CON application as a “true relocation” disapproved St. Dominic’s CON Application as a “new hospital.” Neither the Hearing Officer nor the Department explained how one application could be approved as a “true relocation” but the other one not. Mississippi law requires state agencies, such as the Department, to “either conform to [their] prior norms and decisions or explain the reason for [their] departure from such precedent.” *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div.*

² Although FGH sought to relocate thirty “orthopedic beds,” there is no such category of beds (as confirmed by the Department) under the CON Law, SHP or CON Review Manual; instead, they are “general acute care beds.” (T. 130-31). This is simply a label placed on the beds by FGH.

of *Medicaid, Inc.*, 21 So. 3d 600, 609 (Miss. 2009) (citation omitted). Here, the Department neither conformed to its prior norm when examining St. Dominic's CON Application nor explained the reason for its departure from such precedent and thus, committed reversible error.

CON applications must also be reviewed by the Department for compliance with the GRC of the CON Review Manual and any specific need criteria of the SHP which are applicable to the application under consideration. (Hrg. Ex. 16). Although the GRC are the same for every CON project, the specific need criteria applicable to the establishment of new hospital is entirely different from the relocation of a health care facility or portion thereof. (Hrg. Ex. 8). Although St. Dominic's CON Application met the Department's definition of a relocation under the CON Review Manual, the Department erroneously reviewed St. Dominic's CON Application under the specific need criteria applicable to the establishment of a new hospital. Accordingly, the Department, again, committed reversible error in not reviewing St. Dominic's CON Application under the specific need criteria applicable to the relocation of a portion of a health care facility.

ARGUMENT

I. STANDARD OF REVIEW

The scope of review of an appeal of a final order of the Department is controlled by section 41-7-201(2)(f) of the Mississippi Code, 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 of the [Department], or violates any vested constitutional rights of any party involved in the appeal.

Although the Department is afforded deference in its decisions, deference is by no means a "rubber stamp." *Miss. State Dep't of Health v. Baptist Mem'l Hosp.-Desoto, Inc.*, 984 So. 2d 967, 975 (Miss. 2008)(citation omitted). The Department cannot be relieved of its "duty under the statute to review the project for need pursuant to any applicable service specific requirements

of the State Health Plan and the relevant general considerations of the Certificate of Need Review Manual.” *Methodist*, 728 So. 2d at 84. “[W]here an administrative agency errs as a matter of law, courts of competent jurisdiction should not hesitate to intervene.” *Baptist Mem’l Hosp.-Desoto, Inc.*, 984 So. 2d at 975 (quoting *Grant Ctr. Hosp. of Miss., Inc. v. Health Group of Jackson, Inc.*, 528 So. 2d 804, 808 (Miss. 1988)). The court should “not defer to an agency’s interpretation of the statute when that interpretation is repugnant to the best reading thereof.” *Grant Ctr. Hosp. of Miss., Inc.*, 528 So. 2d at 808.

If the Department’s “decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious.” *Miss. State Dep’t of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 977 (Miss. 1999) . Its decision is considered arbitrary “when it is not done according to reason and judgment, but depending on the will alone.” *Natchez Cmty. Hosp.*, 743 So. 2d at 977 (citing *Burks v. Amite County Sch. Dist.*, 708 So. 2d 1366, 1370 (Miss.1998)); see also *Attala County Board of Supervisors v. Miss. State Dep’t of Health*, 867 So. 2d 1019, 1024 (Miss. 2004)(holding “[a]n act is arbitrary when it is done without adequately determining principle . . . absolute in power, tyrannical, despotic, non-rational,-implying either a lack of understanding of or a disregard for the fundamental nature of things.”)(citation omitted). Its decision is considered “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.* (citing *Burks*, 708 So. 2d at 1370).

As set forth below in more detail, the Department failed, among other things, to apply the proper definition of relocation and the appropriate specific relocation criteria to St. Dominic’s CON Application. In addition, the Department failed to conform to its prior norm in examining St. Dominic’s CON Application or explain why it elected not to approve St. Dominic’s CON Application when it had recently approved a similar CON application. For these reasons, among

others set forth herein, the Department committed reversible error. Accordingly, the Department's decision fails as a matter of law and this Court should reverse the Final Order disapproving St. Dominic's CON Application.

II. THE DEPARTMENT ERRED IN FINDING ST. DOMINIC'S CON APPLICATION AS THE ESTABLISHMENT OF A NEW HOSPITAL.

The overriding issue in this appeal is whether St. Dominic's CON Application proposes the establishment of a "new hospital," as opposed to a true relocation of beds from its main campus to Madison County. The Department found that the project constituted the construction of a new hospital. The Department's finding that the proposed project is a new hospital is erroneous, and should therefore be reversed, for at least three reasons. First, the Department's ruling is contrary to the CON Law (*i.e.*, Miss. Code Ann. § 41-7-171, *et seq.*), as well as the CON Review Manual, both of which clearly allow for the relocation of a portion of health care facility (and specifically, the relocation of beds) if an applicant can demonstrate the requisite need. Second, the Department misinterpreted and therefore, misapplied prior decisions by the Mississippi Supreme Court as the basis for its decision that the proposed Madison campus is a new hospital and not a true relocation. Finally, the Department's ruling in this case is arbitrary and capricious because it is inconsistent with the Department's decisions in prior cases involving almost identical facts and issues.

A. THE APPLICATION MEETS DEFINITION OF RELOCATION UNDER CON LAWS AND CON REVIEW MANUAL.

Unless certain exceptions are met, section 41-7-191 of the Mississippi Code requires a certificate of need for "[t]he relocation of a health care facility or portion thereof" Miss. Code Ann. § 41-7-191(1)(b). (Hrg. Ex. 5). Although subsection (b) appears to be very straightforward – a certificate of need is required to relocate a health care facility or a portion of a health care facility – it has been the subject of many hotly-contested lawsuits and decisions

from the Mississippi Supreme Court. Litigants and the courts have wrestled over the words used in the subsection: What does it mean for a health care facility to “relocate”? What constitutes a portion of a health care facility? What must be left of the original health care facility once a portion of it has been relocated? Can the health care facility or portion thereof be relocated to a newly-constructed building? Neither subsection (b) nor the rest of the CON Law answers these important questions.

1. *St. Dominic’s CON Application Meets The Department’s Definition Of “Relocation.”*

Through its statutorily-given authority,³ the Department has answered many of these important questions. Chapter 2, section 100.03 of the CON Review Manual restates subsection (b) and provides that no person shall engage in “[t]he relocation of a health care facility or portion thereof” without obtaining a certificate of need. (Hrg. Ex 6). In a note⁴ in section 100.03, the CON Review Manual defines terms not otherwise defined in subsection (b) or the CON Law. *Id.* “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.” (Hrg. Ex 6). The note further states: “A portion of a health care facility is considered to be a wing, unit, service(s) *or beds*.”⁵ *Id.* (emphasis added). Taking these notes collectively, the Department, using its statutory authority, has interpreted subsection (b) to allow the relocation of beds from one physical location or site to another. This is exactly what St. Dominic is proposing in its CON Application: St. Dominic is requesting authority to relocate 71 beds from one physical location (its Jackson Campus) to

³ One of the functions of the Department is to “[p]rescribe and promulgate such reasonable rules and regulations as may be necessary to the implementation of the purposes of” the CON Law. Miss. Code Ann. § 41-7-185(c). The Mississippi Supreme Court “has generally accorded great deference to an administrative agency’s construction of its own rules and regulations and the statutes under which it operates.” *Baptist Mem’l Hosp.-Desoto, Inc.*, 984 So. 2d at 981 (citation omitted).

⁴ The Department added this note to the CON Review Manual in 1994. (R.E. 5). Prior to 1994, the CON Review Manual simply restated subsection (b) without any further explanation. (R.E. 4).

⁵ The disjunctive “or” also makes it clear that an applicant pursuant to section 100.03 of the CON Review Manual can relocate just beds or services, or relocate both beds and services.

another (the new Madison Campus). St. Dominic's CON Application, on its face, plainly meets the Department's interpretation of subsection (b) in the CON Review Manual. There is no other way to apply the Department's interpretation of subsection (b) to St. Dominic's CON Application. But yet, the Department knowingly elected to ignore its own interpretation of subsection (b) and apply an unrelated subsection of the CON Law regarding the relocation of a health service to St. Dominic's CON Application. (Hrg. Ex. 3, p. 5; T. 25).

2. *The CON Application Meets the Definition of "Relocation" in the Ordinary Sense.*

In the past, the Mississippi Supreme Court has also had the opportunity to consider the above-referenced questions. In 1998, the Court reviewed a CON application filed by Methodist Medical Center ("MMC") "to 'relocate' 64 of the 196 beds which it was licensed to utilize but did not have in actual operation." *Methodist*, 728 So. 2d at 84. According to the Court, the term "relocation" was "not defined in the Health Plan nor in statute" *Id.* At the time of the filing of MMC's CON application, the Department had not included the 1994 note defining "relocation" in the CON Review Manual. (R.E. 4). Therefore, the Department's Health Officer defined⁶ the term "relocation" as "the moving of authority to provide a service from one location to another." *Methodist*, 728 So. 2d at 84. Although MMC's CON application met the Health Officer's definition of relocation, the Court noted in dicta that the project did "not constitute a 'relocation' in any ordinary sense of the word." *Id.* at 85. For example, MMC's CON application proposed to construct a completely new building⁷ that would be staffed with new

⁶ Although the Mississippi Supreme Court criticized the Department's definition of "relocation," the Court did not find it necessary to find it arbitrary and capricious: "While this Court finds the Health Officer's definition of 'relocation' to be suspect, we consider it unnecessary to determine whether this definition is arbitrary and capricious." *Methodist*, 728 So. 2d at 85.

⁷ Although the Mississippi Supreme Court notes that MMC proposes to construct a completely new building, the language should not be viewed as a critique of MMC's CON application. *Methodist*, 728 So. 2d at 84. In fact, logic dictates that a relocated portion of a health care facility must be relocated either to an already-constructed facility or a new building. There is no CON Law, rule or other

medical workers and new equipment. *Id.* Additionally, there would be “no corresponding decrease in services at the main hospital in south Jackson” *Id.*

Unlike MMC’s CON application, St. Dominic proposes to relocate 71 licensed and operational general acute care beds along with staff and equipment to the new campus in Madison County. (T. 232-34). According to testimony by Mr. Diamond, St. Dominic is requesting “permission to relocate 71 beds that are set up and operational.” (T. 233). In other words, there are 71 rooms with 71 actual beds and other equipment that are capable of housing patients at any time of the day. (T. 234). Thus, unlike MMC, St. Dominic is relocating 71 licensed and operational beds to the new campus in Madison Campus.

The Hearing Officer, however, criticized St. Dominic for not identifying the 71 beds to be relocated to the new campus. (R.E. 3, pp. 8-10). The Hearing Officer’s criticism is too simplistic and naïve; it does not consider the practical everyday operations of a hospital. It is difficult – if not impossible – for a healthcare provider to identify 71 beds to be relocated to a facility that will not be open for years after the filing of a CON application. St. Dominic filed its CON Application over two years ago on December 1, 2008 and if ultimately approved by this Court, the new facility will not open until 2014, if not later.⁸ Requiring St. Dominic to identify 71 beds at the time of the filing and maintaining those beds in the same location and condition for six years or longer would be nonsensical and irresponsible. Hospitals are dynamic entities in that beds are many times shifted from one use to another, and the demand for beds varies from service-to-service, day-to-day, and season-to-season. (T. 235). As testified by Mr. Diamond, the hospital is a “fluid environment” – “in terms of services, you might have a growth in one

regulation, promulgated by the Department, that prohibits a new building in conjunction with the relocation of a health care facility. (T. 555).

⁸ Madison HMA received approved to build its replacement hospital on May 8, 2007. (R.E. 6). To St. Dominic’s knowledge, the replacement hospital will open later this month – over four years after receiving approval from the Mississippi Supreme Court.

particular service area, such as orthopaedic; you might have another service area that has some decline.” (T. 235). Identifying the beds would prohibit St. Dominic from adjusting to these shifts in services for its patients. It is more practical to wait and identify the beds at the time the facility is built. (T. 235). Furthermore, St. Dominic is willing to “sit down with the Department” to validate St. Dominic will actually transfer 71 licensed and operational general acute care beds at the time the new facility is opened. (T. 236-37). Finally, the Hearing Officer’s criticism has no foundation in Mississippi law or the CON Review Manual. There is no statute or Departmental regulation that requires a healthcare provider to identify the exact beds to be relocated. Accordingly, the Hearing Officer’s criticism is without merit.

The Hearing Officer also criticized St. Dominic for having a number of empty beds in the hospital. (R.E. 3, pp. 9-10). Once again, the Hearing Officer failed to appreciate the operation of a hospital. St. Dominic’s hospital is broken down into units by specialty (*e.g.*, cardiac unit). Each specialty unit has a number of beds with nurses trained to treat those particular types of patients. On some days, the cardiac unit is full, but the orthopedic unit is not. Conversely, on other days, the orthopedic unit is full, but the cardiac unit is not. Although on both of these days, the hospital has empty beds, it does not necessarily mean these beds are not being used. Additionally, the Hearing Officer relied upon St. Dominic’s reporting of its average patient census. (R.E. 3, pp. 9). This census, which is taken at midnight, does not accurately reflect how busy a hospital is during the day. (T. 242). A midday census would be higher because “you have patients that are coming in to be admitted; at the same time, you have patients who have yet to be discharged.” (T. 242). Thus, the average patient census does not reflect the number of so-called empty beds St. Dominic has in its hospital. Finally, the Hearing Officer’s criticism ignores St. Dominic’s commitment to relocate beds that are in actual operation and its willingness to work with the Department to validate its commitment. (T. 236-37).

St. Dominic is also committed to relocating equipment to the new facility. (T. 233, 40). Mr. Diamond testified that St. Dominic will “move as much equipment as we possibly can that is appropriate, functional and applicable to that new facility.” (T. 240). During the hearing, Madison HMA attempted to show that St. Dominic would purchase only new equipment for the Madison Campus. (T. 179). In the CON Application, St. Dominic submitted an equipment detail from Project Services Group (“PSG”) for the proposed facility. (Hrg. Ex. 2, CON App., Ex. II.5.b). According to the equipment detail cover sheet, PSG “assume[d] no Furniture and Equipment [would be] relocated from the main St. Dominic Hospital Campus.” *Id.* Mr. Diamond clarified that the letter from PSG only detailed a “worst-case scenario of all the equipment that would be needed to fully equip that facility.” (T. 240, 726). Despite Madison HMA’s contention, the letter clearly did not reflect St. Dominic’s intention to only purchase new equipment for the Madison Campus. (T. 240, 726).

Madison HMA also questioned Ronald Luke, J.D., Ph.D., St. Dominic’s expert, regarding a statement in the CON Application that “relatively little existing equipment will be available to be moved from the Jackson Campus to the Madison Campus.” (Hrg. Ex. 2, CON App., p. 12, T. 727). According to Madison HMA, this meant St. Dominic would purchase all new equipment for the new facility. Not surprisingly, Madison HMA’s attempt to improperly construe the language of St. Dominic’s CON Application is without merit. St. Dominic cannot be expected to maintain the same equipment from the filing of the CON Application in 2008 until the completion of the facility in 2014 or later. St. Dominic will need to purchase new equipment to accommodate inevitable growth at the Jackson Campus and to replace equipment that has reached the end of its life cycle. Thus, it is extremely reasonable for St. Dominic to state that relatively little existing equipment at the time the CON Application was filed in 2008 will be available to be moved to the new Madison Campus that will likely take place almost six years or

more after the filing of the CON Application. Once again, it would be irresponsible for St. Dominic to continue to use out-of-date equipment for patient care just so it will not be penalized for purchasing new equipment for the relocation. Clearly, this statement does not mean that St. Dominic will not relocate equipment to the new facility or that St. Dominic will purchase all new equipment for the new Madison Campus.

Like the relocation of the beds, St. Dominic was criticized for not identifying the exact equipment to be relocated. (R.E. 3, p. 10). This criticism similar to the identification of the beds also fails. Dr. Luke testified, “[g]iven the amount of time that will pass between December of 2008 and when this facility would be ready to open, identification of specific pieces of equipment is just not practical.” (T. 727). Practically, St. Dominic will move equipment on “a cost effective basis” (T. 560). Dr. Luke testified, “this is really no different than if you’re relocating a big law office. You make a judgment about whether some of your old desks and chairs are worth moving or whether it would be more cost effective to buy new ones and sell those off as used or donating to the Salvation Army.” (T. 560). “[T]he move is an economic and managerial decision, and chances are, in most cases you decide to move some things and retire some equipment and purchase other new.” (T. 560). In fact, St. Dominic has admitted that it will purchase some new equipment. (T. 240). However, as noted by Dr. Luke, “there’s nothing that prohibits the purchase of new equipment and the hiring of new staff as a part of the relocation of general acute care beds.” (T. 560).

St. Dominic will relocate employees to the new Madison Campus. Mr. Diamond testified: “we will relocate the . . . appropriate positions necessary to take care of the 71 beds once they are approved.” (T. 233). Once again, Madison HMA and the Hearing Officer criticized St. Dominic for not identifying the employees by name that would be relocated. (R.E. 3, p. 10, T. 730). And once again, it would be very difficult – if not impossible – for St. Dominic

to identify the names of every employee that would be relocated to the new campus that will not open until 2014 or later. (T. 239, 730). Instead, St. Dominic will relocate the necessary positions from the Jackson Campus to the Madison Campus. (T. 237-38, 730). As testified by Dr. Luke, "I mean, first of all, we're talking about 2013 or 2014, and so it would be kind of silly to say Sally Jones is going to go up there when you don't know whether Sally Jones will even be working for you. So what we're talking about in terms of moving staff, I think, is -- is positions rather than -- rather than named people." (T. 730).

Despite all of the unwarranted criticism leveled by the Department and Madison HMA, the facts remain the same. St. Dominic plans to relocate 71 licensed and operational beds from its Jackson Campus to the new Madison Campus. St. Dominic is also committed to relocating its equipment and employees at the time the facility opens. Thus, unlike MMC's CON application, St. Dominic's CON Application meets the definition of "relocation" in the ordinary sense. The Department's failure to come to the same conclusion warrants reversal.

B. ST. DOMINIC DOES NOT PROPOSE TO RELOCATE A HEALTH SERVICE.

The CON Law also requires a certificate of need for "[t]he relocation of one or more health services from one physical facility or site to another physical facility or site" Miss. Code Ann. § 41-7-191(1)(e). (Hrg. Ex. 5). This relocation provision is separate and apart from subsection (b) requiring a certificate of need for the relocation of a health care facility. Like subsection (b), neither subsection (e) nor the CON Law defines the term "relocation." Unlike subsection (b), the Department has not promulgated any rules or regulations interpreting subsection (e) in the CON Review Manual. (Hrg. Ex. 6). St. Dominic does not propose to relocate a health service to its Madison Campus. Thus, subsection (e) is not applicable to St. Dominic's CON Application.

1. The Department Applied The Wrong Subsection Of The CON Law To St. Dominic's CON Application.

Relying on the *St. Catherine's* Opinion, the Department inappropriately applied subsection (e) to St. Dominic's CON Application.⁹ (Hrg. Ex. 3, p. 5, T. 25). In doing so, the Department wholly failed to recognize the distinction between the relocation of a health care facility or portion thereof (subsection (b)) and the relocation of a health service (subsection (e)). In this case, St. Dominic does not request authority to relocate a health service. St. Dominic requests authority to relocate a portion of a health care facility (i.e., 71 licensed and operational general acute care beds) from one physical location to another. (T. 234-37).

St. Dominic does not dispute that the relocated facility will provide health services. 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. (Hrg. Ex. 2, CON App., pp. 8-9). But this does not necessarily mean that St. Dominic is relocating any health services to the proposed facility as contemplated by subsection (e). As previously explained, the CON Law clearly permits the relocation of a portion of a health care facility. Logically speaking, when you relocate a portion of a health care facility, the relocation results in two health care facilities: the relocated portion of the health care facility and the original facility minus the relocated portion. In other words, a relocated portion of a hospital is just like the original hospital – but on a smaller scale. Thus, it makes perfect sense that the relocated portion of a hospital will offer and perform the same services as the original hospital. In this case, the inpatient acute care services transfer with the relocation of the general acute care beds. For these reasons, Dr. Luke testified

⁹ Likewise, the *St. Catherine's* Court inappropriately applied subsection (e) to St. Dominic's previous CON application seeking to relocate 100 licensed, but not operational beds from its main campus to property owned by its sister corporation, St. Catherine's Village. As specifically stated in the *St. Catherine's* Opinion, the Court found the previous *Methodist* Opinion applicable and controlling since it also dealt with a hospital's request to relocate licensed, but not operational beds. *St. Catherine's*, 928 So. 2d at 825. But unlike the *St. Catherine's* Court, the *Methodist* Court neither interpreted nor applied subsection (e), but instead, found subsection (b) applicable to MMC's CON application. *Methodist*, 728 So. 2d at 88.

that inpatient acute care services are “implicit in the -- if you have licensed acute care beds, you are -- you are authorized under the CON law, or you require no further authorization to provide inpatient acute care services.” (T. 551). The Department, therefore, should have applied subsection (b) to St. Dominic’s CON Application and not subsection (e).

In addition, the type of health services that St. Dominic will provide at the new campus are not listed as a reviewable health service under the CON Law. (T. 551). The CON Law requires a certificate of need before a health care provider, such as a hospital, can offer one of the fourteen designated health services. Miss. Code Ann. § 41-7-191(1)(d)(i) – (xv) (Hrg. Ex. 5). In other words, a hospital that proposes to offer open heart surgery (listed as one of the fourteen designated health services) and has not done so in the prior twelve months must obtain a certificate of need from the Department before offering such services. In contrast, a hospital could offer other health services not listed as one of the fourteen designated health services without obtaining a certificate of need as long as it did not exceed the capital expenditure threshold. For example, a hospital is free to offer computed tomography (“CT”) services without going through the process of obtaining a certificate of need. Thus, it would be illogical to prohibit a hospital to relocate something that does not require a certificate of need in the first place. Accordingly, subsection (e) only applies to the relocation of those designated health services that require a certificate of need. Since inpatient acute care services are not listed as one of the fourteen designated health services, subsection (e) is not applicable to St. Dominic’s CON Application and the Department erred in applying it to St. Dominic’s CON Application.

The Department should not have treated St. Dominic’s request to relocate a portion of a health care facility as a request to relocate a health service. The Department erred in applying subsection (e) to St. Dominic’s CON Application and thus, the Court should overturn the Department’s decision to disapprove St. Dominic’s CON Application as a matter of law.

2. Even If Subsection (e) Applies, The Mississippi Supreme Court Now Allows For The Partial Relocation Of Health Services.

If the Court determines that subsection (e) applies to St. Dominic's CON Application, then the Court must decide whether the CON Law permits the partial relocation of health services. Relying on the *St. Catherine's* Opinion, the Department answered this question in the negative. (Hrg. Ex. 3, p. 5; T.25). According to Mr. Donald Eicher, the Director of the Office of Health Policy and Planning for the Department, "[r]elocation is not the transfer of a part of a service; it is a transfer of the entire service."¹⁰ (T. 25). Mr. Eicher further testified, "[a]fter the authority to provide a service has been relocated, the transferring facility will no longer have the authority to provide the same service."¹¹ (T. 25); *St. Catherine's*, 928 So. 2d at 829. Since St. Dominic will not eliminate any of its current services at its main campus, the CON Application is not a relocation under subsection (e).

Irrespective of the Department's reliance on the *St. Catherine's* Opinion, the Mississippi Supreme Court recently clarified any issue about whether a partial relocation of a health care facility requires a corresponding elimination of services. In *Wesley Health System, LLC v. Mississippi State Department of Health*, 08-SA-01276-SCT (Miss. 2009) (the "*Forrest General* Opinion"), the Mississippi Supreme Court issued a per curiam affirmance of the Hinds County Chancery Court's opinion in a contest over the appropriateness of FGH relocating a portion of its health care facility (more specifically, thirty general acute care beds, identified by FGH as orthopedic beds) from its main campus to a newly constructed free standing facility, without

¹⁰ The Court in *St. Catherine's* similarly stated, "a 'relocation' is not the transfer of a part of a health service – it is the transfer of an entire health service." *St. Catherine's*, 928 So. 2d at 829.

¹¹ The *St. Catherine's* Court stated, "[a] reasonable inference from this definition is that, after the authority to provide a service has been relocated, the transferring facility would no longer have the authority to provide the same service." *St. Catherine's*, 928 So. 2d at 829. As part of the Court's analysis, the Court relied upon the definition of "relocation" as set forth in the *Methodist* Opinion. *Id.* Unfortunately, the Department's reliance upon the definition was misplaced. As previously noted, the Department revised the definition of "relocation" after MMC filed its CON Application (*i.e.*, 1994 note) and thus, the definition of "relocation" from the *Methodist* Opinion is no longer applicable. (R.E. 5).

eliminating its orthopaedic “service”¹² at its main campus. (Hrg. Exs. 47, 49). Wesley argued in opposition to the proposed relocation that FGH’s CON application “should not be approved [because] it proposes the relocation of only part of Forrest General’s orthopaedic service line, and the CON law does not provide for that sort of a relocation.” (Hrg. Ex. 47, p 6). Citing section 41-7-191(1)(e) of the Mississippi Code, the Chancellor concluded that the “statute *does not state*”¹³ that a hospital must relocate ‘all’ of a particular type of health service in order to obtain a CON.” (Hrg. Ex. 47, p 7)(emphasis added).

By issuing its per curiam affirmance of the Chancellor’s opinion, the Mississippi Supreme Court clearly overruled the language in the *St. Catherine’s* Opinion requiring a transfer of an entire service and not permitting the partial transfer of a service. Thus, St. Dominic is permitted to partially relocate those clinical services associated with the relocation of general acute care beds to the Madison Campus.

C. THE DEPARTMENT’S DECISION IS INCONSISTENT WITH ITS PRIOR NORMS AND THUS, IS ARBITRARY AND CAPRICIOUS.

During the hearing, St. Dominic attempted to present evidence regarding the similarities in the CON application at issue in the *Forrest General* Opinion and the CON Application submitted by St. Dominic in the instant case. (T. 106-125, 624-25, 681). The Hearing Officer

¹² FGH proposed to relocate a portion of its “orthopedic” services. (Hrg. Ex. 44 p. 8). This Court should note that the “orthopedic” service line is once again simply a label placed on it by FGH. (T. 362). The CON Law makes no distinction between a hospital’s cardiac or orthopedic services. The CON law only defines “health services.” See Miss. Code Ann. § 41-7-173(k). FGH “acknowledged that a certain level of orthopedic surgery services would be retained on the main campus.” (Hrg. Ex. 44 p. 8; Hrg. Ex. 47, p. 6). FGH retained the orthopedic service at the main campus for two reasons: (1) maintain its status as a Level II trauma center, and (2) allow non-Southern Bone and Joint Specialists physicians “to continue to use the main campus of Forrest General for orthopedic surgery.” (Hrg. Ex. 44, p. 8-9; Hrg. Ex. 47, p. 6).

¹³ Contrary to the testimony of Mr. Eicher, the Department previously emphatically argued in favor of the Chancellor’s interpretation of section 41-7-191(1)(e): “[c]ontrary to Wesley’s creative but flawed theory, there is *absolutely nothing in the Mississippi Certificate of Need Law which remotely suggests that a hospital cannot relocate a portion of its acute care beds or services* This statute does not state or even imply that a hospital must relocate ‘all’ of a particular type of health service in order to obtain a CON. This ‘all or nothing’ interpretation was created out of thin air . . . and there is no basis for that interpretation in the language of the statute itself.” (Hrg. Ex. 48, p. 22) (emphasis added).

disallowed any evidence regarding the FGH CON application.¹⁴ (T. 119, 123). This evidence was highly relevant in light of the Department's contrary positions on the two CON applications.

St. Dominic's CON Application is like FGH's approved CON application in almost every respect. In its CON application, FGH proposed to relocate thirty licensed and operational general acute care beds to a new freestanding health care facility. (Hrg. Ex. 44, p. 4). St. Dominic also proposes to relocate 71 licensed and operational general acute care beds to a new freestanding health care facility. (Hrg. Ex. 2, CON App., pp. 8-10). In other words, neither FGH nor St. Dominic proposed to relocate the controversial licensed and not operational beds (*i.e.*, "phantom beds"). Instead, both FGH and St. Dominic proposed to relocate a portion of their main campus (*i.e.*, a health care facility or more specifically, a hospital) and both relocations will result in an additional health care facility and more specifically, a hospital.

Both FGH and St. Dominic propose to construct a new freestanding facility. FGH projected the total capital expenditure for the proposed facility to be \$31,264,770 (or \$1,042,159 per relocated bed) to house the thirty relocated beds in a new facility. (Hrg. Ex. 44, p. 4; Hrg. Ex. 47, p. 2). Similarly, St. Dominic projected the total proposed capital expenditure, not including the medical office building, to cost approximately \$1,300,000 per bed. (Hrg. Ex. 56, Table 1; Hrg. Ex. 2, Add. Doc., Ex. III.A.1.C.4). Both FGH and St. Dominic's proposed health care facilities will provide health services. Neither FGH nor St. Dominic will eliminate any health services at their main campus. Both FGH and St. Dominic propose to relocate staff and equipment to the new satellite facilities. Both FGH and St. Dominic admit that they will have to hire some new staff and purchase some new equipment for the new facilities. (Hrg. Ex. 44, p. 9).

¹⁴ According to the Hearing Officer, "I've already been on the record many times expressing my view that *stare decisis does not appeal [sic] to an administrative decision.*" (T. 123)(emphasis added). Her view, however, is not supported by Mississippi law. Mississippi law requires a state agency to "either conform to its prior norms and decisions or explain the reason for its departure from such precedent." *Miss. Methodist Hosp. & Rehab. Ctr., Inc.* 21 So. 3d at 609 (citation omitted).

Mississippi law requires state agencies, such as the Department, to “either conform to [their] prior norms and decisions or explain the reason for [their] departure from such precedent.” *Miss. Methodist Hosp. & Rehab. Ctr., Inc.*, 21 So. 3d at 609 (citation omitted); see also *Miss. Public Svc. Comm’n v. Miss. Power Co.*, 429 So. 2d 883, 900 (Miss. 1983). If a state agency treats similar issues differently, then it must provide “a clearly enunciated factual basis for making such a distinction” *Miss. Public Svc. Comm’n*, 429 So. 2d at 900. Otherwise, “such different treatment clearly constitutes arbitrary and capricious action by the [state agency.]” *Id.*

The Department attempted to distinguish St. Dominic and FGH’s CON applications by arguing that the proposed FGH facility is not a “stand-alone hospital.” (T. 129). In other words, the proposed FGH facility “was completely dependent” on FGH’s main campus for support services, including janitorial, laundry, food services and pharmacy. (T. 131). The CON Law, however, does not make such distinction between a dependent or “stand alone” hospital. Section 41-7-173(h)(i) of the Mississippi Code defines “Hospital” as “an institution which is primarily engaged in providing to inpatients, by or under the supervision of physicians, diagnostic services and therapeutic services for medical diagnosis, treatment and care of injured, disabled or sick persons, or rehabilitation services for the rehabilitation of injured, disabled or sick persons.” Either the institution provides diagnostic, therapeutic or rehabilitation services or not – if it does, then it is a hospital. It does not say that an institution is not a hospital if it is dependent on another facility for its support services. It does not matter whether the hospital does its own laundry or sends it out each day – it is still a hospital under the CON Law. The Department’s ill-conceived “distinction” is no true distinction.

To the contrary, St. Dominic and FGH’s respective CON applications presented the Department with the same issues. The Department, however, treated St. Dominic and FGH

differently without providing any justification for doing so. Accordingly, the Department acted in an arbitrary and capricious manner.

III. ST. DOMINIC'S CON APPLICATION COMPLIES WITH THE SPECIFIC NEED CRITERIA OF THE STATE HEALTH PLAN.

CON applications must also be reviewed by the Department for compliance with any specific need criteria of the SHP which are applicable to the application under consideration. As previously demonstrated, St. Dominic is proposing a true relocation of a portion of a health care facility. Therefore, Component I of St. Dominic's CON Application must be analyzed under the specific need criteria of the SHP applicable to the relocation of a portion of a health care facility. The Department wrongfully applied the specific need criteria for the establishment for a new hospital. Additionally, Component IV of the CON Application¹⁵ requests authority to provide obstetrical service at the Madison Campus. The Hearing Officer erred in determining St. Dominic failed to comply with the specific need criteria applicable to Component IV.

A. ST. DOMINIC'S CON APPLICATION COMPLIES WITH THE CON CONSTRUCTION AND RELOCATION CRITERIA.

Chapter 11, section 108.03 of the SHP ("CON Construction and Relocation Criteria") apply to "[t]he 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" (Hrg. Ex. 7)(emphasis added). Since St. Dominic's CON Application requests authority to relocate a portion of its current health facility (i.e., 71 licensed and operational general acute care beds), the CON Construction and Relocation Criteria should apply to St. Dominic CON Application. (T. 546-47). The Hearing Officer

¹⁵ There are no specific need criteria for Component II – Construction of a Medical Office Building. (T. 28). The Hearing Officer found that St. Dominic complied with the specific need criteria for Component III – MRI Services. (R.E. 3, pp. 21-24).

inexplicably failed¹⁶ to consider whether St. Dominic's CON Application complied with these criteria. Accordingly, the Hearing Officer's decision is erroneous as a matter of law and must therefore be reversed.

The CON Construction and Relocation Criteria provide two separate need criteria depending upon whether the proposed project involves the addition of any acute care beds. (Hrg. Ex. 7) . The first, Need Criterion 1(a), is applied to projects that do not involve the addition of any acute care beds. (Hrg. Ex. 7) . The second, Need Criterion 1(b), is applied to projects that involve the addition of beds. (Hrg. Ex. 7) . Like the *Forrest General* case, this project does not involve the addition of general acute care beds to General Hospital Service Area ("GHSA") III. (T. 605, Hrg. Ex. 40, p. 6, Hrg. Ex. 44, p. 11). St. Dominic proposes to relocate 71 licensed and operational beds from Hinds County to Madison County; Hinds County and Madison County are both in GHSA III. Thus, St. Dominic need only comply with the Need Criterion 1(a).

Need Criterion 1(a) provides that an applicant's documentation of need for a relocation "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 consulting firms, and deficiencies cited by accreditation agencies (JCAHO, CAP, etc.)." (Hrg. Ex. 7)(emphasis added). During his testimony, Dr. Luke characterized this criterion as "institution specific" (T. 548-49). In other words, there is not a specific formula that has to be met by the applicant. Instead, the Need Criterion is more flexible in permitting the applicant to demonstrate why the project is needed. The Criterion provides examples of how an applicant can demonstrate need. (Hrg. Ex. 7). Of course, this list by its very terms ("may consist of, but it is not limited to") is neither exclusive nor exhaustive. Thus, an applicant is not required to

¹⁶ Interestingly, the same Hearing Officer applied these same CON Construction and Relocation Criteria to FGH's CON application. (Hrg. Ex. 44, p. 11-12). At no point in her opinion, did the Hearing Officer attempt to explain why she departed from her previous analysis in *Forrest General*. (R.E. 3).

document “licensure or regulatory code deficiencies [or] deficiencies cited by accreditation agencies” These are simply two of the unlimited ways that an applicant may or may not satisfy Need Criterion 1(a).

During the hearing and through its CON Application, St. Dominic offered substantial evidence to support its compliance with this criterion. St. Dominic instituted multiple long range plans that support the creation of the Madison Campus. St. Dominic presented testimony of four consultants/experts recommending the relocation of a portion of St. Dominic’s Jackson Campus to Madison County. These experts enumerated multiple reasons for their support. The Hearing Officer’s failure to consider this evidence or even to remark about it was error. St. Dominic presented substantial evidence to support its compliance with Criterion 1(a) of the SHP.

1. Institution of Long Range Plans

St. Dominic submitted its 2009 Strategic Plan, as well as the update to the Five-Year Strategic Plan for the period 2007-2011 (collectively referred to as the “Strategic Plan”) as a long-range plan in support of its CON Application. (Hrg. Ex. 2, CON App., Ex. III.A.1.C.1). The most recent update to the Strategic Plan¹⁷ was adopted by St. Dominic’s governing board on November 20, 2008. *Id.* The Strategic Plan documented that one of St. Dominic’s goals is to “[d]evelop [a] Madison County satellite facility to meet [the] needs of community and physicians.” *Id.* Another documented goal is to “[c]ontinue pursuit of CON approval for [a] satellite facility in Madison County.” *Id.* Clearly, St. Dominic has demonstrated a long-standing commitment to provide health care services to patients in Madison County and the surrounding

¹⁷ During the hearing, Madison HMA presented a draft executive plan for 2009 that did not document St. Dominic’s goal to “[c]ontinue pursuit of CON approval for [a] satellite facility in Madison County.” (Cf. Hrg. Ex. 33-34); however, as the document states, it is simply a **draft** and not the final plan approved by St. Dominic’s Board of Directors on November 20, 2008. Furthermore, Madison HMA ignores the fact that there are two other references to St. Dominic’s goals that include St. Dominic’s long-term desire for a satellite facility in Madison County. (Hrg. Ex. 2, CON App., Ex. III.A.1.C.1). Thus, Madison HMA’s argument is without merit.

area. This is further demonstrated by the fact St. Dominic previously filed a CON application in June 2002 seeking to relocate beds from its main campus to property located at St. Catherine's Village. (Hrg. Ex. 2, CON App., p. 39; *St. Catherine's*, 928 So. 2d at 823).

St. Dominic also presented its Master Facility Plan in support of the CON Application. (Hrg. Ex. 2, Add. Doc., Ex. II.1.4, Hrg. Exs. 58-61). As Mr. Diamond explained, "along with the strategic plan, you have to have the facilities and the resources to accommodate what is in your strategic plan, and therefore you undertake a Master Facility planning process." (T. 259). St. Dominic engaged Kevin Crook of the Hammes Company in August of 2007 to "determine its immediate needs on the Jackson campus" and how these needs would be impacted by the relocation of a portion of its beds to Madison County. (T. 257-58). Mr. Diamond testified, "[t]he Master Facility planning process began . . . in relation to what are our immediate needs on the Jackson campus. During that process, we then said, we also need to consider what if we get a campus in Madison, because that had been a desire of ours, is to have a campus in Madison. So that needed to be contemplated as well during the planning process." (T. 257-58).

Mr. Crook explained that the purpose of a Master Facility Plan "is to look at the current facility, to analyze any problems the facility has, pros and cons, and then develop options to correct those deficiencies, as well as to meet any strategic initiatives. So it's really a long-term look-ahead of what the facility will look . . . 10 years from now." (T. 900-01). It is important for hospitals, such as St. Dominic, to have a Master Facility Plan: "[W]hen a hospital gets into a problem when its [sic] no longer apparent how they grow and expand the facility, that's when they begin to do master planning." (T. 901).

Beginning in August 2007, Mr. Crook undertook an extensive analysis of the Jackson Campus which included questionnaires to St. Dominic employees, tours of the facility, and interviews of physicians and members of its administrative staff. (Hrg. Ex. 58, p. 14; T. 904).

From this analysis, Mr. Crook helped St. Dominic understand the deficiencies of the current facility and provide a number of options to address those deficiencies. (Hrg. Ex. 58, pp. 18-24; T. 904). Mr. Crook performed a site assessment (*i.e.*, adequacy of parking, access to circulation, etc.) and building assessment (*i.e.*, operational efficiency of departments, patient flow and accommodations, space analysis, etc.) of the Jackson Campus. (Hrg. Ex. 58, p. 19; T. 910).

In his site assessment, Mr. Crook noted that St. Dominic needed to relocate “many of the outpatient services to the north campus” to reduce congestion. (Hrg. Ex. 58, p. 20). Currently, the entrance to the medical office building on the main campus is very confusing¹⁸ and congested. (T. 911). The Jackson Campus also has inadequate parking along with “an old parking garage” that has “had a number of renovations,” but “additional renovations . . . will be required . . . to keep [it] up and operational.” *Id.* Mr. Crook noted a number of the buildings on the Jackson Campus date from the 1950s and the 1960s.¹⁹ (Hrg. Ex. 58, p. 21). As these facilities age, they no longer “meet the current requirements for health care today, if you were doing a new, modern building.” (T. 913-14). It can be very difficult to provide patient care in buildings that are as old as St. Dominic’s current facilities. (T. 914). Although St. Dominic continually renovates its facility, these renovations are “more cosmetic in nature. It’s really improving the finishes, so the basic building systems are still obsolete behind the walls.” (T. 915). The facilities do not “meet the air changes, don’t meet the electrical requirements, don’t meet the handicap requirements of a current modern facility.” *Id.*

¹⁸ Dr. Clay Hays, a cardiologist with Jackson Heart, also testified that the Jackson Campus can be confusing. (Hrg. Ex. 67, p. 620, 629). Jackson Heart has video directions to its clinic “[j]ust to prevent confusion. People nowadays they come to Jackson, and all these highways and this-and-that are going every which way, and they don’t know how to get in there, and so we want to be able to make it as easy as possible for them to know where to go to prevent confusion.” (Hrg. Ex. 67, p. 629).

¹⁹ “[F]or instance, in what’s called the north wing . . . that building is one of the older structures on the campus. And, in fact, if you walk down the hallways . . . you can sense how aged the building is. You can actually reach up and touch the ceiling because the ceiling heights are so low to try to accommodate the building systems in those areas.” (T. 914).

In his analysis, Mr. Crook concluded that St. Dominic has limited property²⁰ to expand its services horizontally. (T. 912-13). Furthermore, Mr. Crook concluded that any “[a]dditional expansion on the Jackson Campus will further increase the magnitude of these problems.” (Hrg. Ex. 58, p. 20). An expansion of services “will only increase those problems.”²¹ There’s . . . no additional land to buy and expand and to ship things out of. So as you add more and more services on that campus, the traffic’s going to increase, the parking problems are going to increase, everything will continue to increase more and more over time.”²² (T. 922-23).

Based upon the operational and structural deficiencies²³ as outlined by Mr. Crook, St. Dominic needed to understand how the increase of its current patient population would require the need to increase services at the Jackson Campus and how it could accommodate that growth. (T. 924-25). Mr. Crook projects that St. Dominic will need to place into service all 417 of its licensed beds by 2016. (Hrg. Ex. 58, p. 28; T. 926-28). Mr. Crook’s projections are “based on really the **population growth only**, not a change in market share. So again, it’s a very conservative growth rate²⁴ that’s been predicted for this model.” (T. 929)(emphasis added). Mr.

²⁰ Mr. Diamond confirmed Mr. Crook’s conclusion: “[w]e are also facing the situation where we have somewhat of a landlocked situation on our Jackson campus. There’s very little green space left, so we have to be very deliberate in our consideration of where to locate future services.” (T. 259).

²¹ Dr. Rick Thomas, an expert in health planning and demography, validated Mr. Crook’s conclusion: “So this is going to continue to increase pressure on the central facility, and really limiting their ability to expand the numbers and types of services. The -- the gap between the need for services and the resources available is going to increase as the population increases. And then also you’ll end up with a distorted system where you have a maldistribution of resources relative to the need.” (T. 462).

²² Dr. Thomas confirmed Mr. Crook’s testimony that relocation is an appropriate mechanism used to free up space at a hospital’s main campus: “We’re seeing all these -- not only moving to where the population is, but being relocated from congested inpatient facilities so that space can be cleared up for the people that need hospitalization in the central city.” (T. 453).

²³ Although these are not licensure or regulatory code deficiencies or deficiencies cited by accreditation agencies, these deficiencies still support St. Dominic’s compliance with Need Criterion 1(a). As previously noted, the documentation list included in Need Criterion 1(a) is not exclusive, but simply provides examples of documentation that can satisfy the criterion.

²⁴ Mr. Falls unconvincingly testified in the hearing that these projections could change if St. Dominic’s obtains a goal found in a draft strategic plan never adopted by the Board of an average length of stay (“ALOS”) of 5.0. (T. 1319, 1418-19, Hrg. Ex. 34). Mr. Falls also testified that Mr. Crook failed to account for a decrease in St. Dominic’s market share. (T. 1424, 1485). Mr. Falls testified without any support documentation that St. Dominic’s market share would decrease based on the increase of beds at a

Crook analyzed two alternatives for St. Dominic: (1) make renovations and additions only at the Jackson Campus and without a Madison Campus (*i.e.*, “without Madison”); or (2) make some renovations and additions at the Jackson Campus, but also relocate a portion of its current facility to the Madison County (*i.e.*, “with Madison”). (Hrg. Ex. 58, p. 40). Mr. Crook ultimately determined the Madison Campus alternative to be superior for several reasons. (T. 940).

First, the Madison Campus will have “superior functionality” over the other alternative. (T. 940). The Madison Campus will have “ample space, ample site, to do things correctly without trying to wedge it into a very constricted existing site.” *Id.* Furthermore, the Madison Campus “lays out better, you have more convenient parking, more convenient access. All of those areas that the main campus -- that south campus would have significant issues with.” (T. 940). Second, the Madison Campus is the least costly alternative. Mr. Crook determined that the “with Madison” option would result in a cost savings of approximately \$3,000,000²⁵ to St. Dominic. (T. 962; Hrg. Exs. 60-61). Third, a hospital like St. Dominic is required to spend at least an average of \$15 to \$20 million per year to keep its buildings up-to-date. (T. 915). The Madison Campus will allow St. Dominic to use this money in a way to increase access to patients in Madison County and the surrounding areas. (T. 941). Fourth, the construction of a satellite campus will enhance patient quality and safety as it will not be as disruptive to patient care at the Jackson Campus. (T. 941). Fifth, the Madison Campus will allow the Jackson

HMA-owned facility in Rankin County, Mississippi and the yet-to-be-opened replacement of Madison River Oaks. (T. 1424). These baseless opinions should be disregarded. Mr. Falls also testified Mr. Crook should have reduced St. Dominic’s market share over time. (T. 1485). According to Mr. Falls, St. Dominic’s overall market share since 2007 has been trending down. *Id.* But if you include the year 2006, St. Dominic overall market share actually rose from 15.3 percent to 16.5 percent – a 7.5 percent increase in market share. (T. 1485). Thus, Mr. Crook’s decision to maintain St. Dominic’s market share is more than reasonable under the circumstances.

²⁵ Originally, the “with Madison” alternative would have resulted in a cost savings of approximately \$15,000,000 to St. Dominic. (Hrg. Ex. 2, Add. Doc., Ex. II.1.4). As a result of the passage of time, the economic downturn, and the completion of certain projects by St. Dominic, Mr. Crook supplemented his documentation to reflect the current timeline and proposed costs for the Master Facility Plan. (Hrg. Exs. 60-61; T. 955-57, 960-62).

Campus to “maintain[] the focus of . . . being a tertiary referral center.” (T. 941). Sixth, the Madison Campus will increase patient access (*i.e.*, more convenient parking, more accommodating rooms for handicapped or bariatric patients). (T. 941-42). Seventh, Madison Campus will be more efficient. “The relationship between departments is better. It’s more efficient. It provides you opportunities for long-term growth versus limiting that growth.” (T. 942). In conjunction with the Master Facility Plan, Mr. Crook, as an expert and consultant in health planning, recommended the relocation of the beds to the new Madison Campus. (T. 940).

2. *Testimony of Dr. Rick Thomas*

St. Dominic engaged Rick Thomas, Ph.D. as a health care planner and demographer “to review the historical situation in terms of the demographic characteristics of the Madison County population and the surrounding relevant counties, in terms of the population characteristics, age distribution, sex, race, socioeconomic status and so forth” (T. 412-13). Dr. Thomas was also tasked “to look at the trends that were taking place in terms of the demographics in the population, to what extent was the population growing, becoming redistributed throughout the county, changing in terms of its demographic characteristics.” (T. 413). Finally, Dr. Thomas “was asked to take this information and determine the consequences of these trends for health and health care in Madison County; to what extent do these trends indicate the need or lack of need for additional types of facilities.” *Id.*

According to Dr. Thomas, Madison County is one of the fastest growing counties in Mississippi. (Hrg. Ex. 38, p. 3, T. 414). This growth has been driven by the influx of new residents primarily from Hinds County. (Hrg. Ex. 38, p. 3, T. 414-15). Madison County is similar to other areas where “you have the notion of the donut hole where people move out of the central city into the surrounding communities and build those up” (T. 416). As a result, a hospital should be “looking for where the patients are moving, where the physicians are moving

as well, and looking at -- taking that information and looking at the current and future needs, and making your decisions in terms of locations accordingly.” (T. 416).

In the absence of actual data, Dr. Thomas estimated the population and the expected growth of Madison County and the surrounding areas. (T. 419-20). Based upon generally accepted methods for estimating populations, Dr. Thomas estimated the year-end 2009 population of Madison County to be 108,000. (Hrg. Ex. 38, p. 12; T. 432-33). Dr. Thomas then projected the population of Madison County through year 2020. (Hrg. Ex. 38, pp. 13-15; T. 433-37). Dr. Thomas demonstrated how the population in the Ridgeland/Madison area along with the adjacent areas is certainly increasing. (Hrg. Ex. 38, pp. 17-23; T. 4339). In fact, “the population growth is coming closer and closer to the proposed site for the St. Dominic Hospital, suggesting that actually this is an appropriate location for a new health facility” (T. 439).

Dr. Thomas discussed the process of suburbanization (*i.e.*, relocation of people from the central city to the outlying suburban areas) and how it affects healthcare. (Hrg. Ex. 38, p. 29). “Typically all the hospitals are in the central city, usually in the inner city. And over time, they become increasingly decentralized, either by establishing satellites in suburban areas, or actually picking up the hospital and moving it to suburban areas in toto.” (T. 448-49). “As the physicians for a hospital move their practices, in some cases their residences to the suburban areas, there’s growing pressure on the hospitals to at least create some sort of facilities to make it more convenient both for their physicians and their patients.” (T. 449). Dr. Thomas cited DeSoto County²⁶ as a similar situation in support of St. Dominic’s decision to relocate beds to Madison County. Dr. Thomas also compared the City of Madison with cities²⁷ throughout the

²⁶ “[A] a good example is . . . also from Mississippi where Baptist Hospital in Memphis established 20 years ago a satellite hospital in DeSoto County. And a very similar type situation except DeSoto County wasn’t nearly as large in terms of population as Madison County is today.” (T. 451).

²⁷ Dr. Thomas reviewed “35 or 40 cities in the Southeast that had that same population and found that 85 percent of them have a hospital in that particular city.” (T. 453-54). Dr. Thomas found them to be

Southeast and found that similar cities had a satellite facility as proposed by St. Dominic. Dr. Thomas concluded, "I mean, looking at the number of people, looking at the demand, and the lack of resources, this area is ripe for a new hospital."²⁸ (T. 452).

Dr. Thomas testified that the proposed location for the Madison Campus is the superior location. (T. 454-56). Dr. Thomas examined the distribution of the population along with its characteristics and needs. (T. 456). Once the needs are determined, the next step is "to match the distribution of beds with the distribution of the population and the needs that these populations have." *Id.* The goal of any rational health system plan should be to match the supply with the demand. (T. 462-63). In Madison County, the distribution of beds and services has not kept up with the pace of the population: "Madison County . . . from an outside perspective, appears to be behind the curve in terms of reallocating health resources to meet the changing distribution patterns." (T. 456-57). Thus, Dr. Thomas concluded, the proposed location has "all the ingredients in place to support a hospital" (T. 457).

Dr. Thomas also graphically demonstrated the large volume of traffic²⁹ in Madison County. (Hrg. Ex. 38, p. 330; T. 460). Dr. Thomas testified how the location of the hospital can improve patient access: "One thing you want to look at is where the most people have the

very similar: "They were in suburban counties that were adjacent to a central city, central county, where there was a major hospital and satellite facilities had been established." (T. 454).

²⁸ Multiple physicians testified regarding this increased demand for services in Madison County and the need for an additional hospital. Dr. Rebekah Moulder, a family practice physician with an office in Madison, has seen the patient demand in Madison County increase every day: "Well, within the last year, between myself and my partner, we've probably doubled the number of patients that we see a day. And we continue to grow. We each see between three and five new patients a day that have never been to the practice before." (Hrg. Ex. 66, p. 811). Dr. David Waddell, an OB-GYN, testified, "patients that live out in the country don't expect to have a hospital . . . by their house. But in population centers where all the other services of . . . a bustling city are present, and at any other town . . . half the size of Madison out in rural Mississippi would have a hospital" (Hrg. Ex. 71, p. 901). Dr. Malcolm Taylor, a cardiologist, testified, "Madison County is not going to get smaller. We need better medical facilities in the area, and more medical facilities. I think there's room for everyone there. There could be two hospitals in Madison County without difficulty. And there are not going to be 500-bed hospitals. They are going to be less than a hundred beds. So I think they both will be very busy." (Hrg. Ex. 69, T. 858).

²⁹ Dr. Thomas stated "there's no way really to indicate the true volume like on a 3-D map, or something like that, and the extent of congestion that this reflects." (T. 460).

greatest access to the facility. So you would -- knowing what we know about this cone [of traffic] moving upwards, as the population moves upwards, you'd want to look at that being some place like the proposed site as the location for the next health facility." (T. 460). Accordingly, Dr. Thomas as an expert and consultant recommended the relocation of portion of St. Dominic's current facility to the proposed location in Madison County.

3. Testimony of Dr. Ronald Luke

St. Dominic engaged Dr. Luke of Research & Planning Consultants, LP to prepare the CON Application and review whether St. Dominic should proceed with the project as defined in this Application. (Hrg. Ex. 2, Add. Doc., p. 24, Ex. V2). Dr. Luke has extensive experience in testifying in CON hearings in the State of Mississippi and other states. (Hrg. Ex. 2, Add. Doc., Ex. V2; T. 539). Dr. Luke was tendered and accepted as an expert witness in the field of CON and health planning. (T. 541). Dr. Luke offered multiple reasons for St. Dominic to proceed with the project as defined in the CON Application.

Madison County has "one of the lowest beds per thousand population ratio of any county in the state, rural or urban, anybody." (T. 614; Hrg. Ex. 40, pp. 11-12). For 2010, Madison County has 0.7 beds per thousand population -- compared to Rankin and Hinds Counties that have 2.5 and 8.2 beds per thousand, respectively. (Hrg. Ex. 40, pp. 11-12). Mississippi's "average occupied beds per thousand population . . . is 1.74." (T. 615). Applying the State's average to Madison County's population, then Madison County should have a total of 161 beds³⁰ (roughly 94 more beds than are currently licensed in Madison County). (Hrg. Ex. 40, p. 10). This leads to a maldistribution³¹ of beds in GHSA III. (T. 614). This is why the CON Review

³⁰ "[I]n effect, it gives an idea that if Madison County were even at the average level that it would have substantially more than the 67 beds, licensed beds that it currently has." (T. 615).

³¹ This maldistribution of beds is evident to physicians in the community. Dr. Taylor testified, "if anything, we've been probably -- especially in Madison County, under-represented in terms of the need for more hospital beds. And so I think it would be a great addition." (Hrg. Ex. 69, pp. 845-46).

Manual specifically authorizes the partial relocation of beds as a tool to redistribute beds into more appropriate areas. (T. 613). The redistribution of beds is a worthy health planning objective. (T. 613). Dr. Luke testified, “to better distribute the beds relative to the population as the population shifts, yes, because that will affect -- that will affect access. It can affect quality. I think in some cases, it can also be beneficial in terms of cost by lower density development of health facilities that tends to cost us.” (T. 613). The relocation of beds “to Madison County is appropriate because of the needs of the population there, the relatively small number of licensed acute care beds located in the county relative to its population.” (T. 680).

Moreover, a tertiary healthcare facility like St. Dominic must constantly make capital expenditures to renovate and expand the facility and to acquire new and replacement equipment. (Hrg. Ex. 2, CON App., p. 13). In fact between the years 2003 through 2007, St. Dominic spent a total of \$127.8 million (or averaged \$25.6 million per year) on the Jackson Campus. *Id.* In addition, Dr. Luke conservatively forecasted that St. Dominic will need to place into service all 417 of its licensed acute care beds by 2017 based on population growth alone. (T. 586, Hrg. Ex. 40, p. 2). Accordingly, St. Dominic will need to make similar yearly capital expenditures to not only meet the needs of the population it serves (*i.e.*, placing all general acute care beds into service), but also to accommodate new technology, improve operational efficiency, and comply with regulations. (Hrg. Ex. 2, CON App., p. 13). Thus, Dr. Luke concluded that the proposed project is superior to the alternative of making all capital expenditures on the Jackson Campus because the Madison Campus improves geographic access to hospital services for the residents of Madison County and the adjacent counties. *Id.*

4. Testimony of Martin Brown, CPA

The proposed project has also been reviewed and recommended by Martin Brown, a CPA and healthcare consultant with Pershing Yoakley & Associates, PC. Mr. Brown was tendered

and accepted as an expert in healthcare accounting and finance. (T. 837). Mr. Brown prepared the financial analysis in connection with the CON Application. *Id.* Mr. Brown also reviewed the Master Facility Plan and the two alternatives prepared by Mr. Crook. (Add. Doc., Ex. IV; T. 840). Mr. Brown “determined that the project with the Madison campus is financially feasible and is a superior alternative to just the Jackson campus’ Master Facility Plan.” (Add. Doc., Ex. IV; Hrg. Ex. 55; T. 840, 843-44).

5. *St. Dominic Demonstrated Substantial Compliance with the CON Construction and Relocation Need Criteria.*

St. Dominic offered substantial evidence to support its compliance with the CON Construction and Relocation Need Criteria. St. Dominic instituted multiple long range plans that support the creation of the Madison Campus. The Madison Campus will not only increase patient access to the residents of Madison County and the other adjacent counties, but will also improve the quality of health care for the patients of the Jackson Campus by allowing it to focus on being a tertiary referral center. In addition, St. Dominic presented testimony of four consultants/experts that recommended the relocation of a portion of St. Dominic’s Jackson Campus to Madison County. These experts enumerated multiple reasons for their support. The Hearing Officer’s failure to consider this evidence or even to remark about it was error. St. Dominic presented substantial evidence to support its compliance with Criterion 1(a) of the SHP.

B. COMPONENT IV COMPLIES WITH THE APPLICABLE SPECIFIC NEED CRITERIA SET FORTH IN THE SHP.

Component IV of the proposed project requests authority to provide obstetrical service at the Madison Campus. Chapter 10, section 103.02 of the SHP sets forth the appropriate specific need criteria for Component IV of the proposed project. (Hrg. Ex. 12). St. Dominic submitted substantial evidence that the project complied with applicable criteria.

Need Criterion 1(a) requires an applicant to “demonstrate how the applicant can reasonably expect to deliver a minimum of 150 babies the first full year of operation and 250 babies by the second full year” (Hrg. Ex. 12). In its CON Application, St. Dominic states, “[t]he applicant projects that increased obstetrical market share alone will account for 93 deliveries between the Madison and Jackson Campus in the first year of operation and for 115 deliveries in the second year of operation.” (Hrg. Ex. 2, CON App., p. 36). The Department and Hearing Officer relied on this statement alone to determine whether St. Dominic complied with Need Criterion 1(a). (Hrg. Ex. 3, p. 8-9; R.E. 3, p. 25; T. 636-37). But this statement does not constitute all of St. Dominic’s evidence in support of its compliance with Need Criterion 1(a). The point of this statement is that based upon **market share alone** the proposed Madison Campus will have 93 OB discharges. This, however, is **only half of St. Dominic’s analysis** contained in the CON Application. (T. 636-38).

The Hearing Officer and the Department failed to consider the additional detailed analysis performed by Dr. Luke of the deliveries currently taking place at the Jackson Campus from the service area for the proposed Madison Campus. (T. 637-638). For 2007, there were 400 deliveries at the Jackson Campus from the five county service area³² for the proposed Madison Campus. (Hrg. Ex. 40, p. 21; T. 637). Two hundred and sixty-nine of those deliveries would be appropriate at the proposed Madison Campus. (Hrg. Ex. 40, p. 21; T. 637). These deliveries, coupled with the number of deliveries from the increase in market share, total 362 deliveries at the new Madison Campus in year one and 384 deliveries in year two. (T. 637-38). Thus, contrary to the findings of the Department and Hearing Officer, St. Dominic undoubtedly complies with Need Criterion 1(a) of the SHP.

³² The five counties are: Attala, Holmes, Leake, Madison and Yazoo County. (Hrg. Ex. 40, p. 21).

Need Criterion 1(b) of the SHP requires an applicant to demonstrate “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.” (Hrg. Ex. 12). The Hearing Officer notes that Dr. Luke believes the Department was not “applying this [sic] criteria because the Plan does not track that information.” (R.E. 3, p. 24). This is not just a belief by Dr. Luke, but it is a fact. The Department admitted to this fact in the Staff Analysis and through the testimony of Mr. Eicher: “Need Criterion 1b was not analyzed as the 2009 State Health Plan does not contain sufficient information to make a determination of the optimum utilization rate of 60 percent.” (Hrg. Ex. 3, p. 9; T. 29-30, 638-39; Hrg. Ex. 2, CON App., pp. 36-37). The Hearing Officer does not offer any explanation of how St. Dominic can be held to a standard that the Department admits it cannot analyze. Accordingly, the Hearing Officer erred in applying this standard to St. Dominic’s CON Application.

IV. ST. DOMINIC’S APPLICATION SATISFIES THE GR CRITERIA SET FORTH IN THE CON REVIEW MANUAL.

In addition to the specific need criteria, every CON application must be reviewed to determine if it is in substantial compliance with the sixteen GRC set forth in the CON Review Manual. (Hrg. Ex. 16). St. Dominic submitted evidence that its CON Application is in substantial compliance with each GRC.³³

GRC-1 requires the proposed project to be reviewed for consistency with the SHP in effect at the time of submission. (Hrg. Ex. 16). Because the Application satisfies the specific need criteria applicable to the relocation of a health care facility or a portion thereof and to the establishment of obstetrical services, as well as the four primary goals of the SHP, as discussed below, it also satisfies GRC-1.

³³ The following criteria were found to either be complied with by St. Dominic or not applicable to St. Dominic’s CON Application: GRC-2, 7, 9, 10, 11, 12, 13, 15, 16. (R.E. 3, pp. 25-26, 41-43).

GRC-3 requires the identification of alternatives to the proposed project and a description why these alternatives were not chosen. (Hrg. Ex. 16). The Master Facility Plan focused on two options: (1) the need to renovate and/or expand facilities at St. Dominic's Jackson campus (*i.e.*, "without Madison"); and (2) how this renovation and/or expansion would be affected if St. Dominic is allowed to relocate a portion of its beds to Madison County³⁴ (*i.e.*, "with Madison").

According to Dr. Luke, St. Dominic will need to place into service all 417 of its licensed acute care beds by 2017, conservatively based on population growth alone. (T. 586, 589-600; Hrg. Ex. 40, p. 2). Given the fact that St. Dominic faces inevitable ten-year growth in the patient population at its Jackson campus, it looked at how best to plan for and accommodate this growth as part of the facility planning process performed by Mr. Crook. According to Mr. Crook, in evaluating the "with Madison" and "without Madison" options, he identified and prioritized deficiencies at the Jackson campus and developed options for correcting those deficiencies.

In the end, Mr. Crook concluded that relocation of a portion of its bed complement to Madison County is the best option available to St. Dominic for several reasons: (1) expansion to Madison County is superior from a functionality and efficiency standpoint (*i.e.*, more convenient parking and more convenient access for patients at both the Jackson and Madison campuses); (2) relocation to Madison County will be less costly to St. Dominic and thus, the healthcare system; (3) relocation, as opposed to new construction, renovation, and expansion, will be less disruptive to current operations at the main campus and will enhance higher quality and patient safety; (4) relocation provides a quicker construction schedule; (5) St. Dominic patients residing in Madison County will be closer to hospital services and thus, will have improved access and choice of patient care; (6) St. Dominic employees residing in Madison County will be closer to work; and

³⁴ St. Dominic also considered whether to relocate a portion of its health care facility to other areas besides Madison County. St. Dominic determined that "the . . . biggest gap we saw in terms of our surrounding area was in Madison County." (T. 260, 611-12). Rankin and Hinds Counties have satisfactory hospital services. (T. 260).

(7) relocation of general acute care beds to Madison will promote focus on the main Jackson campus as a tertiary referral center. (Hrg. Ex. 58, p. 45; T. 939-41). Accordingly, GRC-3 is completely satisfied.

GRC-4 requires an applicant to establish the immediate and long-term financial feasibility of the proposed project. (Hrg. Ex. 16). St. Dominic included as part of its CON Application a three-year financial analysis which demonstrated that the proposed Madison campus will be operated as part of St. Dominic's overall hospital. (Hrg. Ex. 2, CON App., Ex. IV; Add. Doc., Ex. IV). The Department did not contest St. Dominic's financial projections or its affirmation that the project will be financially feasible. (Hrg. Ex. 3, pp. 11-12). St. Dominic presented the testimony of Mr. Brown, who testified regarding its financial statements and projections. The submitted financial statements and projections, as well as the testimony of Mr. Brown, demonstrate that St. Dominic has historically operated, and will continue to operate, within healthy financial margins. Madison HMA presented no evidence to the contrary.

GRC-5 requires an applicant to demonstrate need for the proposed project. (Hrg. Ex. 16). Need for the proposed project can be determined in multiple ways as set forth in the SHP. (Hrg. Ex. 16). The need requirement as set forth in GRC-5 is distinct from the specific need criteria as discussed for the individual Components I and IV of the proposed project.

St. Dominic affirms in its CON Application that all residents of GHSA III, and in particular Madison County, will have access to its Madison facility, including the proposed MRI and obstetrical and neonatal services, regardless of payor source or ability to pay. (Hrg. Ex. 2, CON App., pp. 14, 46). Also supportive of this criterion is the testimony of Dr. Malcolm Taylor, a prominent African-American cardiologist, whose practice includes a significant Medicare and Medicaid and minority population. (Hrg. Ex. 69).

Madison County is in need of additional hospital services. As testified by Dr. Rebekah Moulder, she and her partner, Dr. Scott Torrey, see new patients every day in their clinic in Madison. (Hrg. Ex. 66, p. 811). As a result, they need to bring in a new physician to their clinic. *Id.* Dr. Waddell also testified that in his experience, the number of patients that he is treating from Madison County is increasing each year. (Hrg. Ex. 71, p. 892). Dr. Moulder's testimony reflects the sentiment of many other physicians in Madison County regarding their ability to meet the needs of the increased patient population: "That worries me sometimes, as to whether or not we can see all of the patients we need to see in a day." *Id.*

On average, Drs. Moulder and Torey each refer one patient a week to St. Dominic for admission and 50 percent of these individuals would be better served in a low acuity setting as proposed by St. Dominic. (Hrg. Ex. 66, p. 813). Dr. Gene Loper, a family practice physician located in Ridgeland, Mississippi, and his partner, Dr. Michael Sanders, also admit approximately one to two patients to St. Dominic each day and about 85 percent of these patients are low acuity patients that can be better served at the proposed facility. (Hrg. Ex. 70, pp. 880-81). Dr. Moulder testified these patients "would be well-served by [the proposed facility] simply because of family reasons, locations the ease of getting in and out. I know it's not that far, but it takes 20 minutes to get down to St. Dominic's from Madison" (Hrg. Ex. 66, p. 815).

Furthermore, the proposed facility would increase access for patients in Madison County. Dr. Taylor testified that facilities that offer medical outpatient surgeries, treat different types of pneumonias or provide obstetrical services "are really absent in the county right now in terms of being quickly accessible." (Hrg. Ex. 69, p. 847). Dr. David Mulholland, a cardiologist with Jackson Heart, testified, "I think it's a matter of access, both of patients to hospital services and of hospitals to their patients." (T. 1601).

Additionally, Madison County has a need for additional emergency room services. As the Fire Chief for the City Madison, Tom Lariviere, who testified in favor of St. Dominic's CON Application, stated, "the next piece . . . of the puzzle is the transport time to an emergency room." (T. 1686). Dr. Hays testified, "[a]gain, this goes back to this time -- that's sort of our theme, to be able to go some place that's safe is important. If they are having a heart attack and they arrest, you want to -- seven minutes is the critical time that they need to be able to be defibrillated." (Hrg. Ex. 67, p. 633). Mr. Lariviere also testified, "obviously minutes count, if it's the four minutes for basic [life support] or eight minutes for advanced life support." (T. 1686). Both Dr. Hays and Dr. Taylor testified that they would advise any patient who had symptoms of chest pain to go to the nearest emergency room. (Hrg. Ex. 67, p. 633, Hrg. Ex. 69, p. 848). Dr. Hatten testified that a Level IV emergency room in Madison County would "improve access to care in timeliness, and not to mention convenience for them, not having to travel the distance, and just providing care to that area of the state." (Hrg. Ex. 68, p. 827).

It would also reduce the number of patients presenting to the emergency room at the Jackson Campus. Dr. Hatten testified that St. Dominic's current emergency room treats approximately 36,000 patients a year,³⁵ but only 28 to 30 percent of those patients are admitted to the hospital. (Hrg. Ex. 68, p. 827). Seventy percent (or 25,200) of those patients are discharged home. *Id.* Dr. Hatten testified that he treats patients from Madison County on every shift he works. *Id.* The number of emergency room visits to a community hospital, such as the one proposed by St. Dominic, has risen significantly and continues to grow each year. (Hrg. Ex. 83, Slide 9, Chart 3.7; T. 1443).

Dr. Taylor testified that St. Dominic's emergency room ("ER") is "very, very packed, especially during when it gets cold from, say, December through March, we've got people

³⁵ For 2007, St. Dominic treated 36,105 patients in the emergency room. (Hr. Ex. 25, p. 21).

everywhere. And the emergency room is full, people standing in the emergency room, 24 hours, waiting on a bed.” (Hrg. Ex. 69, p. 847). Dr. Moulder testified, “it would be nice to have some place close to put [patients in need of emergency room care], and some place that’s not . . . congested – that you know they are not going to have to wait five hours to be seen.” (Hrg. Ex. 66, p. 815). Dr. Taylor testified that an ER in Madison County “would free up the emergency room for minor truly emergent type of problems.” *Id.* Many of these individuals “could have been treated in a low acuity hospital setting in a much better way in terms of being more comfortable and not having to spend an extra eight hours in the emergency room . . .” *Id.*

The only other existing hospital in Madison County is Madison County Medical Center, which is currently located in Canton and operated by Madison HMA. In the near future, Madison HMA will open a 67-bed replacement hospital to be called “Madison River Oaks” that will be located on the Nissan Parkway, approximately 6-7 miles north of the facility proposed by St. Dominic. Madison HMA contends that if St. Dominic’s CON Application is approved, its hospital in Canton will be adversely impacted.³⁶ Specifically, Mr. Falls testified that the hospital will have a difficult time attracting residents from southern Madison County to its new facility because the St. Dominic facility will be closer to them and therefore more convenient. (T. 1356-57). Notably, however, Madison HMA did not present any analysis or other evidence through Mr. Falls (or any other witness for that matter) that showed the projected number of patients³⁷

³⁶ Jerry Cotton, former CEO of Baptist Medical Center, testified that Baptist would also be adversely impacted by the proposed facility: “It’s hard to predict the numbers, but for sure we would lose market share.” (T. 1169). Mr. Cotton testified that the proposed mobile MRI “could possibly” have an impact on Baptist. (T. 1172). Later, Mr. Cotton testified he could not say for sure how the mobile MRI would affect Baptist. (T. 1201). Nevertheless, Mr. Cotton’s concern about losing market share to the proposed St. Dominic facility is simply that, a concern, and Mr. Cotton admitted that he did not have “any specific evidence to suggest that [a loss of market share] would occur . . .” (T. 1202).

³⁷ During his testimony, Dr. Luke reviewed projections for the new Madison River Oaks produced during discovery by Madison HMA. (Hrg. Ex. 41, T. 660). No representative from Madison HMA confirmed the validity of these projections and whether Madison HMA would not meet these projections due to St. Dominic’s proposed Madison County campus. In fact, based upon his review of the projections, Dr. Luke testified that these projections did not change his opinion that the proposed facility

Madison HMA would lose to St. Dominic, nor did it present any testimony or evidence that showed an adverse financial impact on Madison HMA.

In comparison to Mr. Falls, Dr. Luke prepared a comprehensive eight-page analysis that studied the impact of the proposed project on existing providers. Dr. Luke's analysis was included as part of St. Dominic's CON Application. (Add. Doc., Ex. III.B.5.d.). According to Dr. Luke, in looking at potential adverse impact, the issue is whether "a proposed action [will] materially interfere with the ability of those existing providers to accomplish their organizational mission and to continue serving patients in their Service Area." (T. 581). Dr. Luke explained that if the test was simply whether the new provider would impact the current volumes of the existing provider, "you could never recruit a new provider." *Id.* Applying this analysis, Dr. Luke focused on the volumes of the existing providers in 2007, as well as the providers' financial condition at that time. (T. 582). Dr. Luke's conclusion was that "none of the existing providers would experience volumes that would be below where they were in 2007 once the - the new Madison campus opens for business." (T. 583). Specifically, the conclusions reached by Dr. Luke were as follows:

- (1) The four hospital systems providing the bulk of hospital services in Madison County are St. Dominic, University, Baptist and HMA. Together, they serve 97 percent of Madison County patients.
- (2) The impact of market share gains by St. Dominic from development of the Madison Campus will be distributed to the other three systems in proportion to their current market shares.
- (3) The development of [St. Dominic's] Madison Campus will not cause any hospital system to have fewer patient days after the Madison Campus opens than it had in CY 2006. Therefore, the Madison Campus will not have a material adverse impact on any

would not have an adverse impact on Madison County Medical Center. (T. 674-75). Apparently, Madison HMA is not too concerned with the possibility of losing patients since it is moving forward with the opening of its replacement hospital in spite of St. Dominic's appeal to the Supreme Court.

hospital system and will not prevent any hospital system from continuing to perform its mission.

(4) The Madison Campus will not cause [Madison HMA] to have negative net income and therefore will not have a financial impact on the ability of Madison County Medical Center to construct its replacement hospital. [Madison HMA] and the Madison Campus can both reach their projected market shares with a reasonable county retention rate for acute care services.

(Hrg. Ex. 2, Add. Doc., Ex. III.B.5.d.).

Dr. Luke's analysis of potential adverse impact is sound and logical. The test should not be whether an existing provider in the service area will lose patients to the new provider. A loss of patients will inevitably occur when the new provider enters the market allowing for improved physician and patient access and choice. Such a test is not found in the CON Laws, SHP or CON Review Manual. Instead of focusing on the potential loss in patients or market share, the test should be whether the new provider will impact the existing provider's ability to accomplish its organizational mission and/or whether the existing provider will suffer financially. If this test is applied, neither Madison HMA nor any other provider will be significantly impacted by St. Dominic's relocation of beds to Madison County. Mr. Falls did not present any evidence to the contrary (other than his unsubstantiated opinion), nor did any other witness for Madison HMA testify regarding adverse impact.

As part of its Application, St. Dominic submitted approximately 20 letters of comment from area business persons and members of the medical community. (Hrg. Ex. 2, CON App., Ex. III.B.5.e., Add. Doc., Ex. III.B.5.e.). St. Dominic also submitted with its CON Application a petition signed by 160 persons. *Id.* In addition, Mary Hawkins-Butler, the Mayor of the City of Madison, and Tim Johnson, President of the Madison County Board of Supervisors, testified in support of St. Dominic's CON Application. (Hrg. Ex. 72, T. 373). Both Mayor Hawkins-Butler

and Mr. Johnson testified that a large majority of the residents of Madison County want and support St. Dominic's proposal. (Hrg. Ex. 72, p. 1010, T. 375-76).

This testimony was corroborated by the overwhelming support³⁸ that St. Dominic received from citizens who appeared during the hearing and those who signed St. Dominic's "on-line petitions." In total, more than 100 people appeared during the hearing to voice their support for St. Dominic's CON Application, and at the conclusion of the hearing, approximately thirteen people, including physicians and leaders in the Madison County business community, made public statements in support of St. Dominic's Madison Campus. St. Dominic also introduced petitions signed by approximately 3,000 citizens and "on-line petitions" signed by over 5,000 citizens who support St. Dominic's effort to relocate a portion of its hospital beds to Madison County. (Hrg. Ex. 73, T. 1019). Although several people also appeared on behalf of Madison HMA and voiced their disapproval of St. Dominic's CON Application (or more specifically, voiced support for the new Madison River Oaks hospital), it is indisputable that there is overwhelming community support for St. Dominic's proposal.

GRC-6 requires an applicant demonstrate how the proposed project meets the health related needs of members of medically underserved groups which have traditionally experienced difficulties in obtaining equal access to health services (*e.g.*, Medicaid eligibles, low income persons, racial and ethnic minorities, women, and handicapped persons). (Hrg. Ex. 16). There is no question that St. Dominic since its inception has always been committed to providing quality care to the underserved, minority and low-income populations in Jackson and the surrounding areas. (Hrg. Ex. 2, CON App., p. 48). As testified by Dr. Mullholland, "St. Dominic . . . delivers some of the best medical care that I have ever seen in my life" (T. 1603). St. Dominic

³⁸ During the hearing, Madison HMA attempted to demonstrate that the support in favor of St. Dominic's CON Application was a result of a "misleading" marketing campaign. (T. 1221, 1226-27). Madison HMA, however, never submitted any of the advertisements as evidence to demonstrate how the market campaign was misleading.

makes its services available to all patients regardless of ability to pay. (Hrg. Ex. 2, CON App., pp. 46-47). It is indisputable that if this CON Application is granted, the same quality of care would be made available to all residents of Madison County. While southern Madison County is a relatively prosperous area, a significant portion of the population of northern Madison County and Yazoo, Holmes, Leake and Attala Counties can be considered medically underserved. This project will make additional capacity available closer to their residences. Furthermore, St. Dominic is not abandoning the population from Hinds County, Mississippi. St. Dominic will continue to serve these patients at its Jackson Campus.

GRC-8 requires an applicant to explain the relationship of the services proposed to be provided to the existing health care system of the area in which the services are proposed to be provided. (Hrg. Ex. 16). In addition to the fact that St. Dominic's proposed Madison facility will not have an adverse impact on Madison HMA or any other existing provider, St. Dominic's plan to put the equivalent of a Level IV³⁹ ER in the facility will contribute to the area's existing trauma plan. There is no reason to believe that the ER proposed as part of St. Dominic's Madison Campus will not perform equally well as the current ER at St. Dominic's main campus. Indeed, a facility in Madison County operated by St. Dominic will be a positive contribution to the existing health care system and one that will meet many recognized needs for medical services in Madison County.

GRC-14 requires that all construction projects be designed and constructed with the objective of maximizing cost containment, protection of the environment, and conservation of energy along with the impact of the construction costs on the cost of providing health care. (Hrg. Ex. 16). St. Dominic affirms in its CON Application that the proposed Madison facility will be

³⁹ At the time of the filing the CON Application, St. Dominic participated in the trauma system by paying the fee as required by statute. (T. 245-46). Since that time, St. Dominic has filed an application to participate as a Level IV provider. *Id.*

in conformity with the Americans with Disabilities Act and all licensing specifications for a general acute care hospital. (Hrg. Ex. 2, CON App., p. 54). Madison HMA presented no evidence to the contrary. Additionally, St. Dominic represented that there will not be a significant increase in patient costs as a result of this project. In fact, the evidence shows that St. Dominic's costs will decrease. The projected cost per patient day "without Madison" is expected to be \$3,782 in Year 1; \$3,921 in Year 2; and \$4,056 in Year 3. (Hrg. Ex. 56, Table 5A). The projected cost per patient day "with Madison" is projected at \$3,726 for Year 1; \$3,862 for Year 2; and \$4,011 for Year 3. (Hrg. Ex. 56, Table 5C). Once again, Madison HMA did not challenge the validity of St. Dominic's financial projections. Although St. Dominic's cost per patient day will increase under either scenario (the most recent actual cost per patient day was \$2,671), the "with Madison" option is clearly the better alternative from a cost standpoint.

Additionally, it should be noted that in its Staff Analysis, the Department opined that the proposed project cost exceeds the "high range" (*i.e.*, 75th percentile) for construction listed in the 2009 *RS Means Building Construction Cost Data* ("RS Means"), and it also exceeds the cost of a recently approved 95-bed replacement hospital in Picayune. (Hrg. Ex. 3, pp. 14-15). St. Dominic presented the testimony of Mr. Eddy which controverted the Department's conclusions. Mr. Eddy is a licensed architect who prepared the programming and schematic designs for the proposed Madison facility as well as the cost estimates for the project. (T. 1033, 1037). According to Mr. Eddy, unlike the Department's analysis, RS Means does not include in its calculation of cost items such as fixed or movable equipment, fees or capitalized interest. (T. 1047). Stated differently, the Department's analysis and RS Means are comparing apples to oranges. If equipment, fees, and interest are not taken into account and the focus is strictly on "construction costs" (as opposed to what Mr. Eddy termed "project costs"), the cost of the

proposed Madison facility is \$265.56⁴⁰ per square foot, which is well below \$319.37 per square foot, *i.e.*, the 75th percentile for RS Means (after applying a two-year escalation factor). (T. 1047, 1050, 1052-53). Moreover, as Mr. Eddy explained, one should expect that construction costs for a new hospital in Madison, Mississippi will be slightly higher because (1) Madison County has “a higher quality level than maybe what Means uses as their numbers,” and (2) St. Dominic has historically built higher quality facilities because “[t]hey’re looking for longevity in their buildings.” (T. 1050). Finally, it is worth noting that Mr. Eicher testified that the construction cost of St. Dominic’s proposed project, standing alone, does not constitute a basis upon which the Department would disapprove the CON Application. (T. 104).

For the foregoing reasons, St. Dominic presented substantial evidence to demonstrate its compliance with the GRC of the SHP. The Hearing Officer erred in finding otherwise and thus, her decision should be reversed.

V. ST. DOMINIC’S APPLICATION IS IN COMPLIANCE WITH THE FOUR GENERAL GOALS OF THE SHP.

The SHP provides that the purposes and policies underlying Mississippi’s CON laws include: (1) improvement of the health of Mississippi residents; (2) the increase of accessibility and quality of health services in Mississippi; (3) the prevention of unnecessary duplication of health resources; and (4) the provision of some cost containment. (Hrg. Ex. 18). The SHP further states that CON applications must “substantially comply” with these policies in order to be granted. (Hrg. Ex. 18). For the reasons below, St. Dominic presented substantial evidence that its CON Application substantially complies with the general goals of the SHP.

⁴⁰ The initial cost estimate submitted with St. Dominic’s Application in December 2008 was \$306.90 per square foot for the hospital component, or Component I. (Hrg. Ex. 2, CON App., Ex. III.B.14). However, Mr. Eddy testified that he had prepared revised cost estimates in January 2010 that resulted in an approximate 13.5% decrease due to a “marked reduction in construction costs” that is attributable to the state of the economy. (T. 1038). Accordingly, the revised estimate for the total cost of construction for the entire Madison facility is \$64,000,000 (compared to \$74,000,000 in 2008). (Hrg. Ex. 2, CON App., Exhibit III.B.14; Hrg. Ex. 75).

A. THE PROJECT WILL IMPROVE THE HEALTH AND INCREASE ACCESSIBILITY AND QUALITY OF HEALTH CARE SERVICES.

There is no dispute that St. Dominic has historically provided an extremely high quality of services at its Jackson campus. St. Dominic will provide the same quality service at its Madison Campus. Accordingly, St. Dominic's Application promotes the SHP's general goal of quality care. On the issue of access, geographic access to health care by the citizens of Madison County and surrounding areas will be vastly improved with the location of a hospital in southern Madison County. As explained above, there is a need for the Madison Campus, and that need is greatest in the southern and western parts of the county. Presently, the overwhelming majority of residents in Madison County are leaving the county to obtain needed medical care. St. Dominic's proposed Madison campus will make health care services much more readily available to all of the citizens of Madison County. Additionally, there is no evidence that financial access will in any way be impaired by the proposed project. To the contrary, St. Dominic has indicated its commitment through the years to provide care to persons without regard to their ability to pay. (Hrg. Ex. 2, CON App., pp. 46-48). St. Dominic is an active participant in the Medicaid program and plans to continue to serve Madison County's Medicaid population at its proposed Madison campus. Accordingly, St. Dominic's Application promotes the SHP's goal of access to care.

B. THE PROPOSED RELOCATION DOES NOT CONSTITUTE AN UNNECESSARY DUPLICATION OF SERVICES.

Madison HMA takes the position that St. Dominic's proposed Madison Campus would unnecessarily duplicate services already offered by Madison HMA in Madison County. Madison HMA currently operates a 67-bed hospital in Canton, which is located in northern Madison County. Its replacement facility will open in the new future. St. Dominic's Madison facility will not constitute an unnecessary duplication of services. As previously discussed, there is a clear

need for more than 67 beds in Madison County as well as additional hospital and emergency room services and St. Dominic's Madison Campus will not only address that need, but will also provide services in the highest density area of the County.

C. THE PROPOSED RELOCATION PROMOTES THE GOAL OF COST CONTAINMENT.

St. Dominic's proposed relocation of 71 acute care hospital beds to Madison County promotes the SHP's goal of cost containment. As discussed above under GRC-2, St. Dominic has in place a ten-year Master Facility Plan that includes a cost comparison of the "with Madison" and "without Madison" options. Kevin Crook, an expert in health facility planning, testified that the "with Madison" option will result in a cost savings of approximately \$3,000,000 to St. Dominic. (T. 962; Hrg. Exs. 60-61). St. Dominic's financial expert testified that this will result in a lower cost per patient day which naturally promotes the goal of cost containment.

CONCLUSION

The decision to allow St. Dominic to relocate beds from its main campus in Hinds County to Madison County should be based on the analysis of two issues. First, do the CON Laws and rules and regulations (*i.e.*, CON Review Manual and SHP), promulgated by the Department to implement the statutory scheme, authorize the relocation of beds (*i.e.*, a portion of a health care facility) from the Jackson Campus to a Madison Campus. Second, did St. Dominic demonstrate compliance with the specific need criteria (chapter 11, section 108.03 of the SHP) for the relocation of the beds from Hinds County to Madison County and the GRC.

The answer to the first question is the clear: the relocation of a portion of health care facility is authorized by section 41-7-191(1)(b) of the Mississippi Code, and partial relocation of beds is specifically authorized by the CON Review Manual. The Hearing Officer concluded that St. Dominic "made a valiant effort to disguise the project as merely the relocation of beds and related services, but that effort fails." (R.E. 3, p. 46). St. Dominic, however, did not disguise its

CON Application as the relocation of beds; St. Dominic filed a CON Application to do just that as specifically permitted by the subsection (b) and the CON Review Manual. Thus, the Hearing Officer erred in not analyzing St. Dominic's CON Application (like she did FGH's CON application) as a true relocation of beds.

The answer to the second question is the overwhelming evidence that Madison County is "underbedded", that St. Dominic's ability to expand patient services at its Jackson Campus is critically limited, and that the people of Madison County suffer from important access limitations, especially for emergency and low acuity services. St. Dominic submitted evidence demonstrating substantial compliance with the SHP and CON Review Manual.

The Department and the Hearing Officer have a duty to utilize the relocation "tool" granted by the Legislature to remedy the maldistribution of beds in GHSA III. They failed to meet this duty. The Hearing Officer also laments that an approval of this CON Application will cause damaging precedent.⁴¹ (R.E. 3, pp. 46-47). But the only damaging precedent that is being set in this case is for the Hearing Officer and the Department to completely ignore its previous approvals and to ignore the needs of the patient population of Madison County. The Hearing Officer and the Department failed to explain why it completely departed from its previous analysis in Forrest General. Accordingly, the decision of the Department is arbitrary and capricious and should be reversed.

⁴¹ This lamentation further demonstrates the absurdity of the Hearing Officer's review of the CON Application. Against St. Dominic she cries out this will set a damaging precedent, but in her review of FGH's CON application, she lauds and actually encourages hospitals to develop such a campus as proposed by St. Dominic. (Hrg. Ex. 44, p. 10).

This the 18th day of May, 2011.

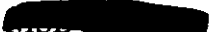


Respectfully submitted,

ST. DOMINIC-JACKSON MEMORIAL HOSPITAL

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CERTIFICATE OF SERVICE

I, Jonathan R. Werne, attorney for appellant, St. Dominic-Jackson Memorial Hospital, certify that I have this day served a copy of this Brief of Appellant by United States mail with postage prepaid on the following persons at these addresses:

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