

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 DHR 02385

<p>Fletcher Hospital Inc d/b/a AdventHealth Hendersonville Petitioner,</p> <p>v.</p> <p>NC Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need Section Respondent,</p> <p>and</p> <p>MH Mission Hospital, LLLP, Respondent-Intervenor</p>	<p>FINAL DECISION GRANTING SUMMARY JUDGMENT FOR PETITIONER</p>
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THIS MATTER came before the undersigned Administrative Law Judge, David F. Sutton, *via* a WebEx hearing on February 27, 2023, on the following motions for summary judgment: Fletcher Hospital, Incorporated d/b/a AdventHealth Hendersonville’s Motion for Summary Judgment (“AdventHealth’s Summary Judgment Motion”); Respondent-Intervenor MH Mission Hospital, LLLP’s Motion for Summary Judgment Against Fletcher Hospital, Incorporated d/b/a AdventHealth Hendersonville (“Mission’s Summary Judgment Motion”); Respondent’s Motion for Summary Judgment Against Fletcher Hospital, Incorporated d/b/a AdventHealth Hendersonville (“Agency’s Summary Judgment Motion”), each of which were filed with the North Carolina Office of Administrative Hearings (“OAH”) on February 15, 2023; Fletcher Hospital, Incorporated d/b/a AdventHealth Hendersonville (“AdventHealth” or “Petitioner”), North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section (“the Agency” or “Respondent”) and MH Mission Hospital, LLLP (“Mission” or “Respondent-Intervenor”) are collectively referred to herein as the “Parties” and singularly as a “Party.”

The Tribunal considered: AdventHealth’s Summary Judgment Motion, Mission’s Summary Judgment Motion, and the Agency’s Summary Judgment Motion; the Parties’ supporting Memoranda filed on February 15, 2023 with their respective Summary Judgment Motions; the February 22, 2023 Responses filed by Mission and the Agency to AdventHealth’s Summary Judgment Motion and the Response of AdventHealth to Mission’s Summary Judgment Motion and the Agency’s Summary Judgment Motion; the pleadings of record; and all other evidence of record. Having heard the arguments of the Parties’ counsel at the February 27, 2023 hearing on the Summary Judgment Motions, the undersigned Administrative Law Judge hereby **GRANTS** AdventHealth’s Summary Judgment Motion, **DENIES** Mission’s Summary Judgment

Motion and the Agency’s Summary Judgment Motion, and hereby **GRANTS** Summary Judgment in favor of Petitioner, as follows:

I. SUMMARY OF MATERIAL FACTS NOT AT ISSUE

1. The Tribunal is aware that “(t)here is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact.” *See, e.g., Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 164–65 (1975). “Although findings of fact are not necessary on a motion for summary judgment, it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment.” *Id.* Nothing herein shall be deemed to be a finding by this Tribunal of disputed material facts.

2. AdventHealth filed its petition for a contested case hearing pursuant to N.C. Gen. Stat. §§ 131E-188 and 150B-23 and 26 N.C.A.C. 3.0103, challenging the Agency’s May 24, 2022 decision (the “Agency Decision”) to conditionally approve the Certificate of Need (“CON”) application filed by Mission to develop a freestanding emergency department (“FSED”) in Candler, Buncombe County, North Carolina, and identified by the Agency as Project ID B-12192-22 (the “Mission Application”). *Petition for Contested Case Hearing; AdventHealth’s Summary Judgment Motion Brief, Ex. 6 (“Agency File”), AF 461- AF 486; Mission Prehearing Statement, Section 2, ¶ 6.*

3. On July 8, 2022, Mission filed a Consent Motion to Intervene in the above-captioned contested case as a Respondent-Intervenor. The Order allowing intervention was issued on July 11, 2022. *Mission Prehearing Statement, Section 2, ¶ 7.*

4. AdventHealth is an acute care hospital located in Hendersonville, Henderson County, North Carolina. *Petition for Contested Case Hearing, ¶ 1.*

5. Mission is an acute care hospital and Level II trauma center located in Asheville, Buncombe County, North Carolina. *AdventHealth’s Summary Judgment Motion Brief, Ex. 1 (“Mission Application”), pp. MH-025, MH-033.*

6. The Agency is an agency of the State of North Carolina authorized and required to review CON applications under the Article 9 of Chapter 131E of the North Carolina General Statutes. *Petition for Contested Case Hearing, ¶ 2; N.C. Gen. Stat. § 131E-175 et seq.*

7. The Mission Application was filed with the Agency on or about February 15, 2022. *Mission Prehearing Statement, Section 2, ¶ 1; Agency File, AF-006; Mission Application, p. MH-001.*

8. Mission’s proposed capital expenditure for the Project that is the subject of the Mission Application is \$14,749,500. *Mission Application pp. MH-002, MH-173.* This amount exceeds the statutory threshold of \$4,000,000, and therefore the proposed project would constitute a “New Institutional Health Service” under N.C. Gen. Stat. § 131E-176(16)(b), thereby requiring a CON.

9. Pursuant to N.C. Gen. Stat. § 131E-185(a1)(2), “the Department shall ensure that a public hearing is conducted at a place within the appropriate service area if one or more of the following circumstances apply; the review to be conducted is competitive; the proponent proposes to spend five million dollars (\$5,000,000) or more; a written request for a public hearing is received before the end of the written comment period from an affected party as defined in G.S. 131E-188(c); or the agency determines that a hearing is in the public interest.”

10. The Agency did not hold a public hearing with respect to the Mission Application. *AdventHealth’s Summary Judgment Motion Brief, Ex. 4 (“McKillip Dep.”), p. 35.*

11. The intake form for the Mission Application indicated that: “If a public hearing is required by law, during the COVID-19 state of emergency, no public hearings will be scheduled.” *Agency File, AF-6.* The intake form specifically indicated that a public hearing was required by law. *Id.*

12. On February 17, 2022, Mike McKillip, the Agency Project Analyst assigned to review the Mission Application, wrote Mission’s representative, Catherine Durham, informing her that “[d]ue to the COVID-19 State of Emergency, no public hearings were being scheduled. See Public Notice at https://info.ncdhhs.gov/dhsr/coneed/press_release/2020/PublicHearings-during-COVID.pdf.” *Agency File, AF-07.*

13. The above link was to a Public Notice dated November 19, 2021, entitled Scheduling of Public Hearings for Certificate of Need Applications During the COVID-19 Pandemic. See https://info.ncdhhs.gov/dhsr/coneed/press_release/2020/PublicHearings-during-COVID.pdf.

14. The Public Notice provided in pertinent part:

Public hearings for certificate of need applications are scheduled only if they are required by law. The law requires a public hearing be held if the capital cost of a project proposed in a certificate of need application is \$5,000,000 or more, the review is competitive, or a written request to hold a public hearing is received by the Healthcare Planning and Certificate of Need Section during the 30-day public comment period for the review.

During the COVID-19 pandemic, the Healthcare Planning and Certificate of Need Section asks that no one request a public hearing be held due to social distancing guidelines and potential restrictions on locations to hold public hearings.

If a public hearing was required by law, members of the public will be given an opportunity to submit remarks in lieu of a public hearing in writing . . .

Remarks from members of the public must be received no later than 5:00 p.m. on the 20th day of the month after the last day to submit written comments. If the 20th day falls on a weekend or holiday, the last day to submit remarks is the last business day **before** the weekend or holiday

The applicant will have an opportunity to respond to any written comments received during the 30-day public comment period and any written remarks from members of the public submitted in lieu of a public hearing. Within three business days of receipt of the remarks, the project analyst will notify the applicant that comments and/or remarks were received and request that the applicant provide a response within 10 business days of the analyst's notice.

See Id. (Emphasis in original).

15. Also on February 17, 2022, Mr. McKillip sent Ms. Durham a separate letter via e-mail entitled “**Notice Regarding Public Hearings during COVID-19.**” *Agency File, AF-210 – AF 211.*

16. The language in Paragraph 14 above appeared verbatim in the letter referenced in Paragraph 15 above. *Compare Agency File, AF-210 – AF 211 and https://info.ncdhhs.gov/dhsr/coneed/press_release/2020/PublicHearings-during-COVID.pdf*

17. The Certificate of Need Section of the Agency did not conduct public hearings between March 2020 and August 2022. *AdventHealth's Summary Judgment Motion Brief, Ex. 5 (“Pittman Dep.”), p. 62; Mission's Summary Judgment Motion Brief, Exhibit H (“Pittman Aff.”), ¶ 5.*

18. The Tribunal takes Official Notice of the fact that on May 14, 2021, North Carolina Governor Roy Cooper issued Executive Order No. 215, in which he determined that based on the data available at that time that: “the Face Covering requirement should be lifted in most settings, and the capacity restrictions, and social distancing requirements should be lifted for all settings.” *AdventHealth's Summary Judgment Motion Brief, Ex. 15.*

19. Specifically, Executive Order No. 215 provided: “This Executive Order fully lifts the capacity limitations and social distancing requirements on businesses in Executive Order No. 209, and lifts the indoor Face Covering requirement on most businesses and operations.” *Id.*

20. Ms. Pittman, the Assistant Chief of the Agency, testified at her deposition, however, that the State of Emergency issued by Governor Cooper was still in place, which she contended justified not having a public hearing. *Pittman Dep. p. 64.*

21. The COVID-19 State of Emergency contained no restrictions on public gatherings. *AdventHealth's Summary Judgment Motion Brief, Ex. 16 (Executive Order No. 116: Declaration of a State of Emergency to Coordinate Response and Protective Actions to Prevent the Spread of Covid-19).*

22. Ms. Pittman also testified via affidavit in this case that the Agency did not schedule or hold public hearings on CON applications “out of concerns for public safety because of the ongoing COVID pandemic.” *Pittman Aff.*, ¶ 5.

23. Despite the above statements by Ms. Pittman, the Agency did, in fact, conduct public hearings during the State of Emergency, including a CON public hearing. An *in-person* public hearing was held in Buncombe County on Mission’s Project B-12232-22 to add 67 beds to a hospital, along with Novant Health’s Project B-12230-22 to develop a 67-bed hospital, and AdventHealth’s Project B-12233-22 to develop a 67-bed hospital pursuant to a need determination in the 2022 SMFP (“2022 Acute Care Bed CON”) while the State of Emergency for COVID-19 was still in effect. *Pittman Dep. p. 64; AdventHealth’s Summary Judgment Motion Brief, Ex. 14, Public Hearings July 1, 2022 Reviews; AdventHealth’s Summary Judgment Motion Brief, Ex. 17, Executive Order 267: Termination of the Covid-19 State of Emergency.*

24. In addition to the public hearing for the 2022 Acute Care Bed CON, the Agency conducted at least seven public hearings during the COVID-19 State of Emergency via WebEx on March 3, 2021, July 8, 2021, July 12, 2021, July 14, 2021, July 20, 2021, July 26, 2021, and July 28, 2021, related to the development of the Proposed 2022 State Medical Facilities Plan (“SMFP”), and on March 3, 2022, related to the development of the Proposed 2023 SMFP. *AdventHealth’s Summary Judgment Motion Brief, Ex. 13, p.4; Pittman Dep. p. 67.*

25. Neither the Agency nor Mission provided any evidence to contradict the fact that the above public hearings took place, but rather, Ms. Pittman testified that WebEx hearings were not an option because: (a) “it was like pulling teeth to get approval to have the two Webex accounts” that representatives of the Planning Section had, each account was “e-mail specific” and that it was “quite expensive;” (b) WebEx hearings would not be “in the service area” as required by statute; and (c) the Agency did not think that it could get funding to hold Webex hearings for CONs. *Pittman Dep. p. 68.*

26. In her affidavit, Ms. Pittman also identified additional notices sent by the Agency at various times regarding the fact that the Agency would not be conducting public hearings due to public safety concerns in addition to the November 19, 2021, Public Notice identified above. *Pittman Aff.* ¶¶ 7-8. Ms. Pittman contends, and AdventHealth did not dispute, that each of these notices would have been provided to AdventHealth or someone acting on its behalf. *Id.* ¶¶ 7-10.

27. Ms. Pittman further contends that the Agency did not “refuse” to conduct a public hearing during the time that it did not conduct public hearings, but rather, simply asked that people not ask for a public hearing due to the COVID pandemic and indicated that written comments in lieu of a public hearing could be submitted. *Id.* ¶ 6.

28. Ms. Pittman also states in her affidavit that had anyone requested a public hearing despite the request by the Agency that they not do so, that “we would have taken that request up with Agency’s leadership and counsel for determination on how to proceed.” *Id.* ¶ 11.

29. N.C. Gen. Stat. §131E-185(a1)(2) provides in pertinent part that: “[n]o more than 20 days from the conclusion of the written comment period, the Department shall ensure that a

public hearing is conducted at a place within the appropriate service area if one or more of the following circumstances apply; the review to be conducted is competitive; the proponent proposes to spend five million dollars (\$5,000,000) or more; a written request for a public hearing is received before the end of the written comment period from an affected party as defined in G.S. 131E-188(c); or the agency determines that a hearing is in the public interest. (Emphasis Added).

30. By its plain terms, written request for a public hearing is not required under N.C. Gen. Stat. § 131E-185(a1)(2) when the proponent proposes to spend five million dollars (\$5,000,000) or more, and it is undisputed that the proposed capital expenditure for the Project that is the subject of the Mission Application is \$14,749,500, which is in excess of \$5,000,000. *Mission Application pp. 2, 173.*

31. While it is undisputed that AdventHealth did not request a public hearing nor did it mention in its written comments the lack of a public hearing, neither the Agency nor Mission points to any evidence or legal authority of any kind indicating that AdventHealth was required to do either. Rather, the North Carolina General Statutes explicitly state that it was the Agency that was required to ensure that a public hearing was conducted. N.C. Gen. Stat. § 131E-185(a1)(2).

32. The Agency and Mission rely on newly developed procedures for written comments in lieu of a public hearing that were afforded to AdventHealth and others to support its contention that AdventHealth had adequate opportunity to make its position known regarding the Mission Application. *See, e.g., Pittman Aff. ¶ 12; Agency's Summary Judgment Motion Brief, pp. 25-29; Mission's Summary Judgment Motion Brief, pp. 25-29.* Neither the Agency nor Mission points to any statute, rule, regulation, or case law that would allow the Agency to develop a substitute for the public hearing required under N.C. Gen. Stat. § 131E-185(a1)(2), and this Tribunal is not aware of any.

33. Lastly, both Mission and the Agency (through the affidavit of Ms. Pittman, its Assistant Chief) contend that if the Agency erred by not conducting a public hearing and that AdventHealth was substantially prejudiced as a matter of law as a result, that 152 separate CON applications, constituting 86 separate reviews where a public hearing was required, would be nullified. *See, e.g., Pittman Aff. ¶¶14-19; Mission's Response to AdventHealth's Summary Judgment Motion Brief, p. 30.*

34. Neither Mission nor the Agency point to any statute, rule, regulation, or case law that would support the position that if the Agency does not comply with N.C. Gen. Stat. § 131E-185 on numerous occasions, it excuses the Agency's failure to comply with the statute on every occasion, and this Tribunal is not aware of any statute, rule, regulation, or case law that would do so.

II. CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings ("OAH") has jurisdiction over the Parties and subject matter of this contested case pursuant to N.C. Gen. Stat. § 150B-23 *et seq.* and N.C. Gen. Stat. § 131E-188, and there is no question as to misjoinder or nonjoinder. The Parties received proper notice of all proceedings in this matter.

2. The substantive law applicable to this contested case is the CON Law, N.C. Gen. Stat. §131E-175 *et seq.*

3. The procedural law applicable to this contested hearing is the North Carolina Administrative Procedure Act (“APA”), N.C. Gen. Stat. § 150B-1 *et seq.*, to the extent not inconsistent with the CON Law, N.C. Gen. Stat. § 131E-175 *et seq.*

4. The administrative regulations applicable to this contested case hearing are the North Carolina Certificate of Need Program Administrative Regulations, 10A N.C.A.C. 14C. 0101 *et seq.*, and the OAH Regulations, 26 N.C.A.C. 3.0101 *et seq.*

5. Administrative law judges may rule on all prehearing motions authorized under the North Carolina Rules of Civil Procedure, including motions for summary judgment under Rule 56. *See* N.C. Gen. Stat. § 150B-33(b)(3a); *see also* 26 N.C.A.C. 3.0105(1), (6). “[J]ust as in other contested cases, an ALJ may enter summary judgment in a case challenging a CON decision.” *Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep’t Health & Hum. Servs.*, 237 N.C. App. 113, 119, 764 S.E.2d 491, 494 (2014)

6. Summary judgment is properly granted when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56.

7. In order to create a “genuine issue of material fact,” one must put forth “substantial evidence.” *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). “Substantial evidence” is such relevant evidence as “a reasonable mind might accept as adequate to support a conclusion.” *Andresen v. Progress Energy, Inc.*, 204 N.C. App. 182, 184, 696 S.E.2d 159, 161 (2010). A question of fact that is not material does not preclude summary judgment. *Kessing.*, 278 N.C. at 534, 180 S.E.2d at 830. Conclusory statements offered in an affidavit, standing alone, are insufficient to defeat a motion for summary judgment. *See Midulla v. Howard A. Cain Co., Inc.*, 133 N.C. App. 306, 309, 515 S.E.2d 244, 246 (1999).

8. AdventHealth, as the Petitioner, has the burden of proof in this matter pursuant to N.C. Gen. Stat. § 150B-25.1.

9. Specifically, as the Petitioner, AdventHealth has the burden to prove by a preponderance of the evidence that the Agency “named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency did any of the following:

- (1) Exceeded its authority or jurisdiction.
- (2) Acted erroneously.
- (3) Failed to use proper procedure.
- (4) Acted arbitrarily or capriciously.
- (5) Failed to act as required by law or rule.”

Id.; N.C. Gen. Stat. § 150B-23.

10. As the party moving for summary judgment, AdventHealth must prove there is no triable issue of material fact. See *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002).

11. As the movant who brought this action, AdventHealth must establish its claim “beyond any genuine dispute with respect to any of the material facts.” *Gebb v. Gebb*, 67 N.C. App. 104, 107, 312 S.E.2d 691, 693 (1984), citing *Dev. Corp. v. James*, 300 N.C. 631, 268 S.E.2d 205 (1980). “A material fact is one which would constitute or irrevocably establish any material element of a claim or a defense.” *Id.* (citing *Bone Int., Inc. v. Brooks*, 304 N.C. 371, 283 S.E.2d 518 (1981)). “If the movant establishes that [it] is entitled to summary judgment, [its] motion should be granted unless the non-movant responds and shows either the existence of a genuine issue of material fact or that [it] has an excuse for not so showing. *Id.* (citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979)).

12. If the non-moving party fails to show a genuine issue of material fact exists, the motion for summary judgment should be granted. *E.g.*, *Steel Creek Dev. Corp. v. Smith*, 300 N.C. 631, 637, 268 S.E.2d 205, 209-10 (1980).

13. When a motion for summary judgment is made, “[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party.” *Rose v. Guilford County*, 60 N.C. App. 170, 173, 298 S.E. 2d 200, 202 (1982).

14. There are no genuine issues of material fact that control the outcome or preclude the entry of summary judgment in this contested case.

15. Pursuant to N.C. Gen. Stat. § 131E-188(a), after a decision of the Agency to issue a certificate of need, any affected person, as defined in subsection (c) of N.C. Gen. Stat. § 131E-188 shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the North Carolina General Statutes.

16. AdventHealth meets the definition of an affected person under N.C. Gen. Stat. § 131E-188(c) because it provides services similar to the services under review in this contested case.

17. AdventHealth meets the definition of a “person aggrieved” under N.C. Gen. Stat. § 150B-2(6) because it is a person affected substantially in its rights and property by the Agency’s Decision on the Mission Application.

18. The North Carolina General Assembly has designated the Agency as the health planning agency for the State of North Carolina and empowered it to establish standards, plans, criteria, and rules to carry out the provisions and purposes of the Certificate of Need Act and to grant or deny certificates of need. N.C. Gen. Stat. §§ 131E-177(1), (6).

19. AdventHealth is a pre-existing, competing health service provider and the Agency Decision has substantially prejudiced its rights as a matter of law as the Agency failed to comply with its statutory duties to follow the review procedure set forth in the Certificate of Need Act, specifically the provisions in N.C. Gen. Stat. §131E-185. See *Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. 1, 17, 647 S.E.2d 651, 662 (2007); *Parkway Urology, P.A., v. N.C. Dep't of Health & Human Servs.*, 205 N.C. App. 529, 534, 696 S.E.2d 187, 192, n.5 (2010); *Wake Radiology Servs., LLC v. N.C. Dep't of Health & Human Servs.*, 16 DHR 2092 (2016).

20. While “an agency’s interpretation of a statute that it is tasked with administering should be accorded some deference by the reviewing tribunal,” “[t]he agency’s interpretation is only entitled to such deference, however, if it is both reasonable and based on a permissible construction of the statute.” *AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs.*, 240 N.C. App. 92, 110, 771 S.E.2d 537, 547-48 (2015) (citing *Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463, *aff'd per curiam*, 362 N.C. 504, 666 S.E.2d 749 (2008)); *Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006).

21. The weight given to the agency’s interpretation by this tribunal depends upon “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade....” *AH N.C. Owner*, 240 N.C. App at 110, 771 S.E.2d at 548 (quoting *Good Hope*, 189 N.C. App. at 544, 659 S.E.2d at 463).

22. “The cardinal principle of statutory construction is that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish.” *AH N.C. Owner.*, 240 N.C. App. at 110, 771 S.E.2d at 548 (2015), quoting *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443–44 (1983).

23. Courts do not defer to an agency’s interpretation of a statute that is an impermissible construction of the statute. *AH N.C. Owner*, 240 N.C. App. at 110, 771 S.E.2d at 548 (2015), citing *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 724, 670 S.E.2d 629, 635, *disc. review denied*, 363 N.C. 374, 678 S.E.2d 665 (2009); *Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006).

24. A court will, under no circumstances, follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration. *AH N.C. Owner*, 240 N.C. App. at 110, 771 S.E.2d at 548 (2015); *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012).

25. Pursuant to N.C. Gen. Stat. § 131E-185(a1)(2), the Agency was required to ensure that a public hearing was conducted at a place within the appropriate service area so long as one or more of the following circumstances applied: the review to be conducted is competitive; the proponent proposes to spend five million dollars (\$5,000,000) or more; a written request for a public hearing is received before the end of the written comment period from an affected party as

defined in G.S. 131E-188(c); or the agency determines that a hearing is in the public interest. The use of the word “or” signifies that each circumstance stated in the statute is a separate, independent ground for a public hearing and the requirements for one part to apply cannot be interposed into a different, independent ground that the legislature determined alone triggered the right to a public hearing. *Davison v. Duke Univ.*, 282 N.C. 676, 707, 194 S.E.2d 761, 780 (1973) (“Further, the disjunctive participle ‘or’ is used to indicate a clear alternative. The second alternative is not part of the first, and its provisions cannot be read into the first.” (quotation omitted)); *Grassy Creek Neighborhood All., Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (“In its elementary sense the word ‘or’, as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately” (quotation omitted)).

26. As part of its review of the Mission Application, the Agency was required to hold a public hearing under N.C. Gen. Stat. § 131E-185(a1)(2) because the proposed capital expenditure for the project that is the subject of the Mission Application is \$14,749,500. *Mission Application pp. 2, 173.*

27. The mandate under N.C. Gen. Stat. § 131E-185(a1)(2) is unequivocal and affords the Agency no discretion to consider or adopt an alternative to a public hearing where one is required.

28. While this Tribunal recognizes the severity of the COVID-19 pandemic, at the time Agency was required to conduct a public hearing on the Mission Application, there were no restrictions on public gatherings, such restrictions having been lifted pursuant to Executive Order No. 215, which was issued by Governor Cooper on May 14, 2021, nearly one year prior to the date upon which a public hearing should have been held in this review.

29. Despite the Agency’s contention that it was justified in not conducting a public hearing because the original State of Emergency issued in Executive Order 116 was still in effect, the undisputed evidence shows that there is nothing in Executive Order 116 that would have prevented a public hearing from occurring, and the Agency did, in fact, conduct public hearings while the State of Emergency was in effect, both prior to, and after, the date upon which a public hearing should have been held in this review. *See Findings of Fact ¶¶ 23-24 supra.* Thus, the Agency cannot rely on the existence of the State of Emergency to justify its failure to conduct the public hearing on the Mission Application as required by N.C. Gen. Stat. § 131E-185(a1)(2).

30. Although the Agency further contends that it was aware at the time it conducted the public hearing on the 2022 Acute Care Bed CON that the State of Emergency was going to be lifted at a future date, if the State of Emergency had precluded public hearings, which the Tribunal concludes as a matter of law that it did not, only its actual repeal, rather than its anticipated repeal, could support the Agency’s argument on this point. Pursuant to the decision in *AH North Carolina Owner LLC v. N.C. Dep’t of Health & Human Servs.*, 240 N.C. App. 92, 110, 771 S.E.2d 537, 547-48 (2015), this interpretation by the Agency is not entitled to deference as it is neither reasonable nor based on a permissible construction of N.C. Gen. Stat. § 131E-185(a1)(2).

31. Likewise, the attempts by the Agency to shift the burden to AdventHealth to request a public hearing are of no avail. N.C. Gen. Stat. § 131E-185(a1)(2) unequivocally by its terms requires the Agency to “ensure that a public hearing is conducted at a place within the appropriate service area,” and no reasonable interpretation of the statute required AdventHealth to request a public hearing where Mission proposed to spend five million dollars (\$5,000,000) or more. While the plain reading of N.C. Gen. Stat. § 131E-185(a1)(2) reveals that a request for a public hearing by an affected party can also trigger the Agency’s duty to conduct a public hearing, a determination by this Tribunal that AdventHealth was required to request a public hearing would amount to an impermissible construction of the statute, and this Tribunal is not required to defer to the Agency on such a construction. *AH North Carolina Owner LLC v. N.C. Dep’t of Health & Human Servs.*, 240 N.C. App. 92, 110, 771 S.E.2d 537, 548 (2015).

32. Similarly, the Tribunal is unwilling, and is not required, to accept the Agency and Mission’s position that because the Agency issued various notices to the public that were received by persons acting on behalf of AdventHealth, AdventHealth cannot challenge the Agency’s failure to conduct a public hearing because it failed to raise the issue in its written comments. First, neither Mission nor the Agency cite to any statute, rule, regulation, or case law supporting this position, nor is the Tribunal aware of any. Secondly, accepting this position would create an exception to the Agency’s statutory duty to ensure that a public hearing takes place when the Agency announced in advance that it would not comply with the statute. Finally, AdventHealth would not have been aware of the harm it incurred until the point in time that the Agency issued its decision approving the Mission Application. A decision to deny the application would have meant that the failure to conduct a public hearing, while error, did not result in substantial prejudice to AdventHealth’s rights. Further, nothing under the CON law causes an affected person to lose its right to challenge an Agency action or inaction unless it raised the issue in its response to written comments.

33. Likewise, the procedures for written public remarks in lieu of a public hearing that were afforded AdventHealth and others by the Agency, are merely a duplication of an existing right—the right to comment in writing—afforded to Affected Persons, and do not excuse the Agency’s failure to conduct the statutorily required public hearing, nor are they a substitute for the ability of a member of the public, such as AdventHealth, to comment orally at a public hearing. Had the General Assembly concluded that written comments were sufficient, it would not have included the requirement of a public hearing *in addition to* the requirement of permitting written comments. *See In re K.W.*, 191 N.C. App. 812, 815, 664 S.E.2d 64, 66 (2008) (“[I]n interpreting a statute, we must presume the legislature meant for every word and provision to have meaning, and that our interpretation, if possible, does not render any provision meaningless.”) An interpretation in this matter that the use of written comments in lieu of a public hearing would render the requirement of a public hearing meaningless.

34. The Legislature made clear that the process related to public hearings is materially different from filing written comments. With respect to public hearings, N.C. Gen. Stat. § 131E-185(a1)(2), provides:

At such public hearing oral arguments may be made regarding the application or applications under review; and this public hearing shall include the following:

a. An opportunity for the proponent of each application under review to respond to the written comments submitted to the Department about its application;

b. An opportunity for any person, except one of the proponents, to comment on the applications under review;

c. An opportunity for a representative of the Department, or such other person or persons who are designated by the Department to conduct the hearing, to question each proponent of applications under review with regard to the contents of the application;

35. The opportunity to ask questions in person and hear oral argument, as provided by the above statute, is unquestionably not present in the written comment process proposed by the Agency.

36. Mission and the Agency's contention that 152 separate CON applications, constituting 86 separate reviews where a public hearing was required would be nullified if this Tribunal determines that the Agency erred in not having a public hearing and that AdventHealth was substantially prejudiced as a result is incorrect, and irrelevant even if it was correct.

37. Pursuant to N.C. Gen. Stat. § 131E-188(a), an affected person seeking to challenge a decision of the Agency to award a CON must file a petition for a contested case hearing within 30 days of the entry of the Agency decision, otherwise, pursuant to N.C. Gen. Stat. § 131E-187(c)(1), the Agency is required to issue the certificate of need to the applicant within 35 days of its decision if no request for a contested case hearing is made. Therefore, even assuming that the Agency took the maximum time allowable of 150 days for review of the applications provided for in N.C. Gen. Stat. §§ 131E-186 and 131E-185(a1) and (c), the time for filing a contested case hearing with respect to Agency decisions on each of the applications identified by Ms. Pittman would have run as of the date of this Order.

38. Neither Mission nor the Agency has identified which of the 86 reviews, if any, are the subject of contested case hearings, and thus the information before the Tribunal is insufficient for it to determine whether any other Agency decision not involving the parties to this contested case will be affected as a result of this Order. Regardless, and more importantly, the extent to which any other decision of the Agency is affected by the terms of this Order is wholly irrelevant as to whether the Agency exceeded its authority or jurisdiction, acted erroneously, failed to act as required by law, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by rule or law when it failed to conduct the public hearing required under N.C. Gen. Stat. § 131E-185 with respect to the Mission Application. Violations of law do not become acceptable because they occur multiple times or because parties choose not to pursue legal avenues to have their rights enforced. Repeated errors by the Agency are not validated, excused, or made lawful simply because they were made numerous times.

39. While AdventHealth has made the required showing of Agency error, it must also establish substantial prejudice as a matter of law to be entitled to summary judgment in this contested case. *Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. 1, 17, 647 S.E.2d 651, 662 (2007); *Parkway Urology, P.A., v. N.C. Dep't of Health & Human Servs.*, 205 N.C. App. 529, 534, 696 S.E.2d 187, 192, n.5 (2010); *Wake Radiology Servs., LLC v. N.C. Dep't of Health & Human Servs.*, 16 DHR 2092 (2016).

40. Specifically, Courts of this State have held that where the Agency ignores the express language of the Certificate of Need law, substantial prejudice is proven as a matter of law. *See id.*

41. In this case, the undisputed evidence reveals that no public hearing took place, AdventHealth was deprived of the opportunity to give oral comments at and to participate in a public hearing, and thus in accordance with the decision in *Hospice at Greensboro* can show, and has shown, that the Agency's failure to conduct the public hearing prejudiced it as a matter of law.

42. Therefore, AdventHealth is entitled to summary judgment as a matter of law that the Agency exceeded its authority or jurisdiction, acted erroneously, failed to act as required by law, failed to use proper procedure, acted arbitrarily and capriciously, and such error substantially prejudiced the rights of AdventHealth as a matter of law.

FINAL DECISION

Based upon the foregoing Undisputed Material Facts and Conclusions of Law, and having reviewed the evidence of record, the Undersigned Administrative Law Judge finds, concludes, and so holds that there is no genuine issue as to any material fact, and Petitioner AdventHealth is entitled to judgment as a matter of law. AdventHealth's Summary Judgment Motion should be and therefore is **GRANTED** and Summary Judgment is **ENTERED** in favor of AdventHealth and against Mission and the Agency, whose respective Summary Judgment Motions are **DENIED**, and the Agency's decision approving the Mission Application is **REVERSED**.

NOTICE OF APPEAL RIGHTS

Under the provisions of North Carolina General Statute § 131E-188(b): "Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal of the final decision shall be taken within 30 days of the receipt of the written notice of the Final Decision and notice of appeal shall be filed with the Office of Administrative Hearings and served on the Department [North Carolina Department of Health and Human Services] and all other affected persons who were parties to the contested hearing."

Under N.C. Gen. Stat. § 131E-188(b1): "Before filing an appeal of a final decision granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court of

Appeals. The bond requirements of this subsection shall not apply to any appeal filed by the Department.”

In conformity with the Office of Administrative Hearings' Rule 26 NCAC 03.0102 and the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail or served via electronic service as indicated on the Certificate of Service attached to this Final Decision.

IT IS SO ORDERED.

This the 17th day of March, 2023.

A handwritten signature in blue ink that reads "David F. Sutton". The signature is written in a cursive style and is positioned above a solid blue horizontal line.

David F Sutton
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 17th day of March, 2023.

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