

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

AH NORTH CAROLINA OWNER LLC D/B/A THE)
HERITAGE OF RALEIGH,)

Petitioner,)

v.)

N.C. DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, DIVISION OF HEALTH SERVICE)
REGULATION, CERTIFICATE OF NEED)
SECTION,)

Respondent,)

and)

HILLCREST CONVALESCENT CENTER, INC.;)
E.N.W., LLC AND BELLAROSE NURSING AND)
REHAB CENTER, INC.; LIBERTY HEALTHCARE)
PROPERTIES OF WEST WAKE COUNTY, LLC,)
LIBERTY COMMONS NURISNG AND)
REHABILITATION CENTER OF WEST WAKE)
COUNTY, LLC, LIBERTY HEALTHCARE)
PROPERTIES OF WAKE COUNTY LLC, AND)
LIBERTY COMMONS NURSING AND)
REHABILITATION CENTER OF WAKE COUNTY,)
LLC; AND BRITTHAVEN, INC. AND SPRUCE LTC)
GROUP, LLC,)

Respondent-Intervenors.)

12 DHR 08691

HILLCREST CONVALESCENT CENTER, INC.,)

Petitioner,)

v.)

N.C. DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, DIVISION OF HEALTH SERVICE)
REGULATION, CERTIFICATE OF NEED)
SECTION,)

Respondent,)

and)

12 DHR 08666

E.N.W., LLC AND BELLAROSE NURSING AND)
REHAB CENTER, INC.; LIBERTY HEALTHCARE)
PROPERTIES OF WEST WAKE COUNTY, LLC,)
LIBERTY COMMONS NURSING AND)
REHABILITATION CENTER OF WEST WAKE)
COUNTY, LLC, LIBERTY HEALTHCARE)
PROPERTIES OF WAKE COUNTY LLC, AND)
LIBERTY COMMONS NURSING AND)
REHABILITATION CENTER OF WAKE COUNTY,)
LLC; BRITTHAVEN, INC. AND SPRUCE LTC)
GROUP, LLC; AND AH NORTH CAROLINA)
OWNER LLC D/B/A THE HERITAGE OF)
RALEIGH,)
Respondent-Intervenors.)

LIBERTY HEALTHCARE PROPERTIES OF WEST)
WAKE COUNTY, LLC, LIBERTY COMMONS)
NURSING AND REHABILITATION CENTER OF)
WEST WAKE COUNTY, LLC, LIBERTY)
HEALTHCARE PROPERTIES OF WAKE COUNTY)
LLC, AND LIBERTY COMMONS NURSING AND)
REHABILITATION CENTER OF WAKE COUNTY,)
LLC,)
Petitioner,)

v.)

N.C. DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, DIVISION OF HEALTH SERVICE)
REGULATION, CERTIFICATE OF NEED)
SECTION,)
Respondent,)

12 DHR 08669

and)

HILLCREST CONVALESCENT CENTER, INC.;)
E.N.W., LLC AND BELLAROSE NURSING AND)
REHAB CENTER, INC.; BRITTHAVEN, INC. AND)
SPRUCE LTC GROUP, LLC; AND AH NORTH)
CAROLINA OWNER LLC D/B/A THE HERITAGE)
OF RALEIGH,)
Respondent-Intervenors.)

FINAL DECISION

THIS MATTER came for hearing before the undersigned Administrative Law Judge (“ALJ”), Augustus B. Elkins II, on October 1–October 19, 2012, November 27–December 18, 2012, and January 7–11, 2013, in Raleigh, North Carolina. Having heard all of the evidence in this case and having considered the exhibits, arguments, and relevant law, the Undersigned makes the Findings of Fact, by a preponderance of the evidence, enters his Conclusions of Law thereon, and makes the following final decision, pursuant to N.C. Gen. Stat. §§ 150B-34 and 131E-188.

APPEARANCES

For Petitioner AH North Carolina Owner LLC d/b/a The Heritage of Raleigh (“The Heritage”):

Renee J. Montgomery
Robert A. Leandro
Parker Poe Adams & Bernstein, LLP
Post Office Box 389
Raleigh, North Carolina 27602

For Petitioner Hillcrest Convalescent Center, Inc. (“Hillcrest”):

Wallace C. Hollowell III
Elizabeth B. Frock
Nelson, Mullins, Riley & Scarborough, LLP
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, North Carolina 27612

For Petitioners Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County, LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC (collectively, “Liberty”):

Lee M. Whitman
Sarah M. Johnson
Wyrick Robbins Yates & Ponton, LLP
4101 Lake Boone Trail, Suite 300
Raleigh, North Carolina 27609

For Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section (the “CON Section” or “Agency”):

June S. Ferrell
Joel L. Johnson

North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629

For Respondent-Intervenors E.N.W., LLC, and BellaRose Nursing and Rehab Center, Inc. (collectively, “BellaRose”):

Joy Heath
Ruth A. Levy
Law Office of Joy Heath
514 Daniels Street, Suite 182
Raleigh, North Carolina 27605

For Respondent-Intervenors Britthaven, Inc., and Spruce LTC Group, LLC (collectively, “Britthaven”):

Marcus C. Hewitt
Brian C. Vick
Elizabeth Sims Hedrick
Williams Mullen
Post Office Box 1000
Raleigh, North Carolina 27602

APPLICABLE LAW

The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-2 *et seq.* and § 131E-188 of the North Carolina Certificate of Need Law.

The substantive statutory law applicable to this contested case is the North Carolina Certificate of Need Law, N.C. Gen. Stat. § 131E-175 *et seq.*

The administrative regulations applicable to this contested case are the North Carolina Certificate of Need Program Administrative Regulations, 10A NCAC 14C.0101 *et seq.*

BURDEN OF PROOF

As petitioners, The Heritage, Hillcrest, and Liberty each bears the burden of proof in its contested case. *See* N.C. Gen. Stat. § 150B-23(a); N.C. Gen. Stat. § 150B-29(a);

The petitioner in a contested case hearing in the Office of Administrative Hearings (“OAH”) must establish, by a preponderance of the evidence, that the state agency named as 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 state agency named as respondent has:

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

N.C. Gen. Stat. §§ 150B-23(a), -29(a), -34(a).

ISSUES

The Heritage's Contested Issues

1. Whether the Respondent violated the standards of N.C. Gen. Stat. § 150B-23(a) when it failed to determine that The Heritage's CON Application conformed with all the relevant statutory and regulatory criteria and thus was entitled to a CON.

2. Whether the Respondent violated the standards of N.C. Gen. Stat. § 150B-23(a) when it failed to determine that Britthaven's CON Application failed to conform with all the relevant statutory and regulatory criteria and thus was entitled to a CON.

3. Whether the Respondent violated the standards of N.C. Gen. Stat. § 150B-23(a) when it failed to determine that BellaRose's CON Application failed to conform with all the relevant statutory and regulatory criteria and thus was entitled to a CON.

4. Whether the Respondent correctly determined that Hillcrest failed to conform with all the relevant statutory and regulatory criteria and thus were not entitled to a CON.

5. Whether the Respondent correctly determined that Liberty failed to conform with all the relevant statutory and regulatory criteria and thus was not entitled to CON.

6. Whether the Respondent violated the standards of N.C. Gen. Stat. § 150B-23(a) by failing to find that The Heritage's CON Application was competitively superior to the Applications submitted by Britthaven, BellaRose Hillcrest and Liberty.

7. Whether the Respondent failed to comply with the requirements of N.C. Gen. Stat. §131E-183(a)(1) by failing to consider whether the applicants met the requirement of Policy NH-8 to propose innovative facility design, care practices, and work place practices.

8. Whether the Respondent failed to comply with the requirements of N.C. Gen. Stat. §§ 131E-182(b) and 183(a)(20) by failing to consider the quality of care information that Britthaven and Liberty submitted or were required to submit with their CON Applications.

9. Whether the Respondent violated N.C. Gen. Stat. § 150B-18 by creating and enforcing a threshold requirement for the projected percentage of Medicaid in determining conformity with statutory criterion 13(c) when the requirement has not been promulgated as a regulation.

10. Whether the Respondent violated N.C. Gen. Stat. § 131E-183(a) by failing to independently review and consider whether the applicants conformed with statutory criteria in N.C. Gen. Stat. §§ 131E-183(a) (4), (6), (18a).

Hillcrest's Contested Issues

1. Whether the Respondent exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, failed to act as required by law or rule, and substantially prejudiced Hillcrest's rights by erroneously finding the Hillcrest Application nonconforming with N.C. Gen. Stat. §§ 131E-183(a)(1), (4), (13)(c), and (18a) and erroneously disapproving the Hillcrest Application.

2. Whether the Respondent exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, failed to act as required by law or rule, and substantially prejudiced Hillcrest's rights by erroneously failing to apply N.C. Gen. Stat. § 131E-183(a)(4), (6), and (18a) as separate and independent criteria.

3. Whether the Respondent exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, failed to act as required by law or rule, and substantially prejudiced Hillcrest's rights by erroneously failing to consider the benefits of private rooms on a resident's quality of life.

4. Whether the Respondent erred by erroneously conditionally approving the Britthaven Application to develop a 120 bed nursing facility in the Brier Creek area, Wake County, Project I.D. No. J-8713-11.

5. Whether the Respondent erred by erroneously finding that the Britthaven Application conformed or conditionally conformed with the statutory review criteria in N.C. Gen. Stat. §§ 131E-183(a) and 131E-183(b).

6. Whether the Respondent erred by erroneously finding that the Britthaven Application conformed with N.C. Gen. Stat. §131E-183(a) (20) by finding that Britthaven has provided quality of care in the past.

7. Whether the Respondent erred by erroneously finding that the Britthaven Application was comparatively superior to the Hillcrest Application.

8. Whether the Respondent erred by erroneously conditionally approving the BellaRose Application to develop a 100 bed nursing facility in Southeast Raleigh, Project I.D. No. J-8729-11.

9. Whether the Respondent erred by erroneously finding that the BellaRose Application conformed or conditionally conformed with the statutory review criteria in N.C. Gen. Stat. §§ 131E-183(a) and 131E-183(b).

10. Whether the Respondent erred by erroneously finding that the BellaRose Application was comparatively superior to the Hillcrest Application.

11. Whether the Respondent erred by conducting an erroneous comparative analysis.

12. Whether the Respondent correctly found the Liberty Application nonconforming with N.C. Gen. Stat. §§ 131E-183(a)(1), (4), (18a), and (20), and properly disapproved the Liberty Application.

13. Whether the Respondent correctly found The Heritage Application nonconforming with N.C. Gen. Stat. §131E-183(a)(4) and properly disapproved The Heritage Application.

14. Whether the Respondent erred by failing to find The Heritage Application nonconforming with N.C. Gen. Stat. §131E-183(a)(5).

15. Whether the Respondent erred by otherwise exceeding its authority and jurisdiction, acting erroneously, failing to use proper procedure, acting arbitrarily and capriciously, and failing to act as required by law or rule, which actions substantially prejudiced Hillcrest by approving the Britthaven Application and the BellaRose Application, and by disapproving the Hillcrest Application.

Liberty's Contested Issues

1. Whether, in denying the Liberty Application in Project I.D. No. J-8727-11, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

2. Whether, in approving the Britthaven Application in Project I.D. No. J-8713-11, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

3. Whether, in finding the Liberty Application nonconforming to Criteria 1, 4, 18a and 20, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

4. Whether, in finding the Britthaven Application conforming to Criteria 1, 4, 18a and 20, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or

jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

5. Whether, in failing to find the Liberty Application to be the comparatively superior Application, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

6. Whether, in finding the Britthaven Application to be a comparatively superior Application, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

7. Whether, in considering only the applicants' history of providing quality care in Wake County when determining the applicants' conformity with Criterion 20, the Respondent improperly applied an unpromulgated rule.

8. Whether, in considering only the applicants' history of providing quality care in Wake County when determining the applicants' conformity with Criterion 20, the Respondent failed to act as required by N.C. Gen. Stat. § 131E-182(b).

The Agency's Contested Issues

1. Whether the Respondent substantially prejudiced Petitioner Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in denying its CON Application, Project I.D. No. J-8727-11.

2. Whether the Respondent substantially prejudiced Petitioner Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in denying its CON Application, Project I.D. No. J-8711-11.

3. Whether the Respondent substantially prejudiced Petitioner The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in denying its CON Application, Project I.D. No. J-8717-11.

4. Whether the Respondent substantially prejudiced Petitioner Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the Britthaven Application, Project I.D. No. J-8713-11.

5. Whether the Respondent substantially prejudiced Petitioner Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted

arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the Britthaven Application, Project I.D. No. J-8713-11.

6. Whether the Respondent substantially prejudiced Petitioner Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the BellaRose Application, Project I.D. No. J-8729-11.

7. Whether the Respondent substantially prejudiced Petitioner The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the Britthaven Application, Project I.D. No. J-8713-11.

8. Whether the Respondent substantially prejudiced Petitioner The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the BellaRose Application, Project I.D. No. J-8729-11.

Britthaven's Contested Issues

1. Whether the Respondent substantially prejudiced The Heritage's, Hillcrest's, and/or Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding the Britthaven Application, Project I.D. No. J-8713-11, conforming with all applicable statutory criteria and regulatory standards.

2. Whether the Respondent substantially prejudiced The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding The Heritage Application, Project I.D. No. J-8717-11, nonconforming to certain applicable statutory criteria and/or regulatory standards.

3. Whether the Respondent substantially prejudiced Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding the Hillcrest Application, Project I.D. No. J-8711-11, nonconforming to certain applicable statutory criteria and/or regulatory standards.

4. Whether the Respondent substantially prejudiced Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding the Liberty Application, Project I.D. No. J-8727-11, nonconforming to certain applicable statutory criteria and/or regulatory standards.

5. Whether the Respondent substantially prejudiced The Heritage's, Hillcrest's, and/or Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use

proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding the any of the Britthaven Application, Project I.D. No. J-8713-11, comparatively superior to the Applications of The Heritage, Hillcrest and Liberty, and by approving the Britthaven Application.

BellaRose's Contested Issues

1. Whether the Respondent substantially prejudiced Petitioner The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in disapproving the CON Application of The Heritage, Project I.D. No. J-8717-11.

2. Whether the Respondent substantially prejudiced Petitioner The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the CON Application of BellaRose, Project I.D. No. J-8729-11.

3. Whether the Respondent substantially prejudiced Petitioner Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in disapproving the CON Application of Hillcrest, Project I.D. No. J-8711-11.

4. Whether the Respondent substantially prejudiced Petitioner Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the CON Application of BellaRose, Project I.D. No. J-8729-11.

5. Whether the Respondent substantially prejudiced Petitioner Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in disapproving the CON Application of Liberty, Project I.D. No. J-8727-11. (Pursuant to Paragraph 9 of the Liberty Petition for Contested Case Hearing, Liberty is not appealing or otherwise challenging the CON Section's decision to conditionally approve the BellaRose Application).

WITNESSES

Witnesses for Petitioner Liberty:

Michael McKillip, Project Analyst, CON Section

Martha Frisone, Assistant Chief, CON Section

Craig Smith, Chief, CON Section

Kathryn "Kathy" Platt, CON Consultant, Platt HMC, Inc.

Ms. Platt was accepted as an expert in health care planning and submission of CON Applications. (Platt, p. 870; Joint Ex. 122)

Doug Whitman, Development Director, Liberty Healthcare
Amy Fann, Vice President of Clinical Services, Liberty Healthcare

Witnesses for Petitioner Hillcrest:

David Legarth, CON Consultant, DanEs Planning
Mr. Legarth was accepted as an expert in CON review and analysis and health care planning. (Legarth, p. 4661; Joint Ex. 139)
Thomas “Ted” Smith, CEO and Facility Administrator, Hillcrest Convalescent Center
Leonidas “Harris” Hollingsworth, Pharmacist, Hillcrest Convalescent Center

Witnesses for Petitioner The Heritage:

Daniel Carter, CON Consultant, Health Planning Source
Mr. Carter was accepted as an expert in CON review, analysis and health care planning. (Carter, p. 3309; The Heritage Ex. 12)
Henry Todd Kaestner, Executive V. P. of Corporate Development, Brookdale Senior Living
Mr. Kaestner was accepted as an expert in the design and development of facilities. (Kaestner, p. 2068; Joint Ex. 132)
Linda May, Vice President of Skilled Health Care Services, Brookdale Senior Living
Beverly Speroff, Chief, Licensure and Certification Section

Witnesses for Respondent Agency:

Martha Frisone, Assistant Chief, CON Section

Witnesses for Respondent-Intervenor Britthaven:

Maxwell Mason, Development Coordinator, Principle Long Term Care, Inc.
Mr. Mason was accepted as an expert in the preparation, review and analysis of CON Applications. (Mason, pp. 5233-34; Joint Ex. 68)
Raymond Baker, Vice President of Finance, Principle Long Term Care, Inc.
Douglas Suddreth, Vice President of Development, Autumn Corporation
Mr. Suddreth was accepted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and facility design. (Suddreth, p. 6237; Joint Ex. 152)
Kahlisia Tillery, Facility Consultant, Britthaven and Principle Long Term Care

Witnesses for Respondent-Intervenor BellaRose:

James “Jim” Weigard, CON Consultant, Polaris Properties

Mr. Weigard was accepted as an expert in nursing home CON preparation, review and analysis, health care planning, and financial feasibility. (Weigard, p. 6610; Joint Ex. 94)
 Douglas Suddreth, Vice President of Development, Autumn Corporation

Mr. Suddreth was accepted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and facility design. (Suddreth, p. 6237; Joint Ex. 152)

Bill Burroughs, Facility Administrator, Hillside Nursing Center

At the hearing, the testimony was received as follows:

<u>Volume Number & Date</u>	<u>Witness</u>	<u>Affiliation</u>
Vol. 1 - Oct. 1, 2012	Michael McKillip	Agency
Vol. 2 - Oct. 2, 2012	Michael McKillip	Agency
Vol. 3 - Oct. 3, 2012	Michael McKillip	Agency
Vol. 4 - Oct. 4, 2012	Michael McKillip Kathryn Platt	Agency Liberty
Vol. 5 - Oct. 5, 2012	Kathryn Platt	Liberty
Vol. 6 - Oct. 8, 2012	Martha Frisone	Agency
Vol. 7 - Oct. 9, 2012	Martha Frisone Craig Smith	Agency Agency
Vol. 8 - Oct. 10, 2012	Craig Smith	Agency
Vol. 9 - Oct. 11, 2012	Craig Smith Henry Todd Kaestner	Agency The Heritage
Vol. 10 - Oct. 12, 2012	Thomas "Ted" Smith	Hillcrest
Vol. 11 - Oct. 15, 2012	Doug Whitman	Liberty
Vol. 12 - Oct. 16, 2012	Amy Fann	Liberty
Vol. 13 - Oct. 17, 2012	Beverly Speroff	Agency
Vol. 14 - Oct. 19, 2012	Kathryn Platt	Liberty
Vol. 15 - Nov. 27, 2012	Daniel Carter	The Heritage

Vol. 16 - Nov. 28, 2012	Daniel Carter	The Heritage
Vol. 17 - Nov. 29, 2012	Daniel Carter	The Heritage
Vol. 18 - Nov. 30, 2012	Linda May Daniel Carter	The Heritage The Heritage
Vol. 19 - Dec. 3, 2012	Daniel Carter	The Heritage
Vol. 20 - Dec. 4, 2012	Thomas "Ted" Smith David Legarth	Hillcrest Hillcrest
Vol. 21 - Dec. 5, 2012	David Legarth	Hillcrest
Vol. 22 - Dec. 6, 2012	David Legarth Leonidas Hollingsworth	Hillcrest Hillcrest
Vol. 23 - Dec. 7, 2012	Maxwell Mason	Britthaven
Vol. 24 - Dec. 10, 2012	Maxwell Mason	Britthaven
Vol. 25 - Dec. 11, 2012	Maxwell Mason Raymond Baker	Britthaven Britthaven
Vol. 26 - Dec. 12, 2012	Raymond Baker Bill Burroughs	Britthaven BellaRose
Vol. 27 - Dec. 13, 2012	Doug Suddreth	Britthaven/BellaRose
Vol. 28 - Dec. 14, 2012	Doug Suddreth	Britthaven/BellaRose
Vol. 29 - Dec. 17, 2012	James Weigard	BellaRose
Vol. 30 - Dec. 18, 2012	James Weigard	BellaRose
Vol. 31 - Jan. 7, 2013	Doug Suddreth	Britthaven/BellaRose
Vol. 32 - Jan. 8, 2013	Kahlisia Tillery	Britthaven
Vol. 33 - Jan. 9, 2013	Martha Frisone	Agency
Vol. 34 - Jan. 10, 2013	Martha Frisone	Agency
Vol. 35 - Jan. 11, 2013	Martha Frisone	Agency

EXHIBITS ADMITTED INTO EVIDENCE

Joint Exhibits

1.	Agency File, 2011 Wake County Nursing Home Review
2.	Hillcrest Application
3.	Britthaven Application
4.	The Heritage Application
6.	Liberty Application
7.	BellaRose Application

Hillcrest, Liberty, Agency, Britthaven and BellaRose Joint Exhibits

11	N.C. Gen. Stat. § 131E-183
13	Agency's Objections and Responses to Liberty's First Set of Interrogatories and Request for Production of Documents
15	Final Agency Decision, 10 DHR 8008
19	Special Focus Facility Initiative
28	Required State Agency Findings, 2008 Davie County Dialysis Review
29	Required State Agency Findings, 2009 Cumberland County Nursing Home Review
30	Required State Agency Findings, 2010 Richmond County Nursing Home Review
31	Required State Agency Findings, 2010 Catawba County Nursing Home Review
33	Hearing Transcript Excerpt, 11 DHR 3173 & 11 DHR 3476
35	Hearing Transcript Excerpt, 11 DHR 3173 & 11 DHR 3476
46	03/03/2011 CMS Survey, Liberty Commons Nursing & Rehabilitation Johnston
47	09/30/2011 CMS Survey, Liberty Commons Nursing & Rehabilitation Johnston

71	Excerpt from previous application filed by Britthaven, Section I.6(a) (dated 10/19/2010)
72	Excerpt from 07/19/2011 draft of Britthaven Application, Section I.6(a)
73	News articles re: Britthaven of Chapel Hill
74	08/10/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Chapel Hill (with 07/27/2010 CMS Survey attached)
75	09/14/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Edenton (with 09/02/2010 CMS Survey attached)
77	07/28/2011 CMS Survey, Chowan River Nursing and Rehabilitation Center
78	Medicare.gov Nursing Home Profile, Greenhaven Health and Rehabilitation Center
79	03/29/2010 CMS Survey, Britthaven of Guilford
80.	05/13/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Guilford (with 04/30/2010 CMS Survey attached)
81	07/29/2011 CMS Survey, Greenhaven Health and Rehabilitation Center
84	07/19/2011 CMS Survey, Premier Nursing and Rehabilitation Center
88	03/08/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of Smithfield (with 02/22/2011 CMS Survey attached)
90	11/30/2011 CMS Survey, Cumberland Nursing and Rehabilitation Center
93	Summary of Max Mason's Opinions
94	C.V. of James Weigard
95	Jim Weigard Deposition Opinions
104	Hillcrest 2011 license (with 2011 Renewal Application attached)
105	Hillcrest 2012 license (with 2012 Renewal Application attached)
106	Excerpt from Required State Agency Findings, 2006 Durham County Nursing Home Review
107	Settlement Agreement in 07 DHR 0764

115	08/15/2011 E-mail from David Legarth to Ted Smith and Bill Hoover
122	C.V. of Kathryn M.T. Platt
123	Kathryn M.T. Platt Expert Report
124	Kathryn M.T. Platt Expert Report for Project I.D. #F-8747-11
126	Medicare.gov Data Sources
127	Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide
134	The Heritage's Responses to BellaRose's First Set of Interrogatories and First Request for Production of Documents
136	Todd Kaestner's handwritten notes
139	C.V. of David S. Legarth
147	Required State Agency Findings, 2007 Union County Nursing Home Review
148	11/27/2007 letter from Certificate of Need Section to Britthaven, Inc. (with Required State Agency Findings, 2007 New Hanover County Nursing Home Review attached)
149	05/02/2008 letter from Certificate of Need Section to Britthaven, Inc. (with Required State Agency Findings, 2007 Brunswick County Nursing Home Review attached)
151	Required State Agency Findings, 2011 Iredell County Nursing Home Review
152	C.V. of Douglas C. Suddreth
155	N.C. Gen. Stat. § 131E-182
156	Excerpt from Transcript of Deposition of Craig Smith, 12 DHR 518
157	Required State Agency Findings, 2008 Mecklenburg County Acute Care Beds Review
158	Required State Agency Findings, 2010 Hoke County Hospitals and Ambulatory Surgery Center Review
159	Affidavit of Martha J. Frisone
160	05/05/2011 E-mails between NorthChase Administrator and Max Mason (CONFIDENTIAL)

162	08/12/2011 E-mails between Robert M. Pearce and Max Mason
163	07/27/2011 E-mails between Ray Baker and Max Mason (CONFIDENTIAL)
167	Required State Agency Findings, 2011 Cumberland-Hoke Acute Care Beds Review
168	Kathryn M.T. Platt - Supplemental Opinions
171	Excerpt from Required State Agency Findings, 2008 Linear Accelerator HSA V/Service Area 18 Review
173	Excerpt from Required State Agency Findings, 1996 Carteret County Nursing Home Review
174	Excerpt from Required State Agency Findings, 1996 McDowell County Nursing Home Review
175	Excerpt from Required State Agency Findings, 1997 Brunswick County Nursing Home Review
176	Excerpt from Required State Agency Findings, 1997 Buncombe County Nursing Home Review
177	Excerpt from Required State Agency Findings, 1997 Greene County Nursing Home Review
178	Excerpt from Required State Agency Findings, 1997 Haywood County Nursing Home Review
179	Excerpt from Required State Agency Findings, 1997 Hoke County Nursing Home Review
180	Excerpt from Required State Agency Findings, 1997 Lenoir County Nursing Home Review
181	Excerpt from Required State Agency Findings, 1997 Lincoln County Nursing Home Review
182	Excerpt from Required State Agency Findings, 1997 Nash County Nursing Home Review
183	Excerpt from Required State Agency Findings, 1997 Yancey County Nursing Home Review

184	Excerpt from Required State Agency Findings, 2001 Wayne County Nursing Home Review
185	Excerpt from Required State Agency Findings, 2003 Union County Nursing Home Review
186	Excerpt from Required State Agency Findings, 2005 Brunswick County Nursing Home Review
187	Excerpt from Required State Agency Findings, 2006 Cumberland County Nursing Home Review
188	Excerpt from Required State Agency Findings, 2007 Mecklenburg County Nursing Home Review
189	Excerpt from Required State Agency Findings, 2008 Perquimans County Nursing Home Review
190	Excerpt from Required State Agency Findings, 2008 Union County Nursing Home Review
191	Excerpt from Required State Agency Findings, 2010 Johnston County Nursing Home Review
192	Excerpt from Required State Agency Findings, 2011 Pasquotank County Nursing Home Review
193	Excerpt from Required State Agency Findings, 2001 Forsyth County Nursing Home Review
194	Excerpt from Required State Agency Findings, 2001 Davie County Nursing Home Review
195	Excerpt from Required State Agency Findings, 2000 Orange County Nursing Home Review
196	Excerpt from Required State Agency Findings, 2000 Durham County Nursing Home Review
197	Excerpt from Required State Agency Findings, 2002 Johnston County Nursing Home Review
198	Excerpt from Required State Agency Findings, 2002 Cumberland County Nursing Home Review

199	Excerpt from Required State Agency Findings, 2002 Pitt County Nursing Home Review
200	Excerpt from Required State Agency Findings, 2003 Pasquotank County Nursing Home Review
201	Excerpt from Required State Agency Findings, 2004 Union County Nursing Home Review
202	Excerpt from Required State Agency Findings, 2004 Wilson County Nursing Home Review
203	Excerpt from Required State Agency Findings, 2004 Pitt County Nursing Home Review
204	Excerpt from Required State Agency Findings, 2005 Mecklenburg County Nursing Home Review
205	Excerpt from Required State Agency Findings, 2006 Mecklenburg County Nursing Home Review
207	Excerpt from Required State Agency Findings, 2006 Wake County Nursing Home Review
208	Excerpt from Required State Agency Findings, 2007 Guilford County Nursing Home Review
209	Excerpt from Required State Agency Findings, 2007 Northampton County Nursing Home Review
211	Excerpt from Required State Agency Findings, 2007 Beaufort County Nursing Home Review
212	Excerpt from Required State Agency Findings, 2008 Haywood County Nursing Home Review
213	Excerpt from Required State Agency Findings, 2008 Jackson County Nursing Home Review
214	Excerpt from Required State Agency Findings, 2008 Forsyth County Nursing Home Review
215	Excerpt from Required State Agency Findings, 2010 Wake County Nursing Home Review
216	Excerpt from Required State Agency Findings, 2010 Scotland County Nursing Home Review

217	Excerpt from Required State Agency Findings, 2010 Richmond County Nursing Home Review
218	Excerpt from Required State Agency Findings, 2011 Cleveland County Nursing Home Review
219	Excerpt from Required State Agency Findings, 2011 Mecklenburg County Nursing Home Review
220	Excerpt from Required State Agency Findings, 2011 Iredell County Nursing Home Review
221	Excerpt from Required State Agency Findings, 2011 Forsyth County Nursing Home Review
222	Excerpt from Required State Agency Findings, 2011 Lee County Nursing Home Review
223	Excerpt from Required State Agency Findings, 2011 Henderson County Nursing Home Review
224	03/08/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of Smithfield
225	02/22/2011 CMS Survey, Britthaven of Smithfield
226	08/10/10 letter from Nursing Home Licensure and Certification Section to Britthaven of Chapel Hill
227	07/27/2010 CMS Survey, Britthaven of Chapel Hill
228	09/14/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Edenton
229	09/02/2010 CMS Survey, Britthaven of Edenton
230	07/28/2011 CMS Survey, Chowan River Nursing and Rehabilitation Center
231	11/30/2011 CMS Survey, Cumberland Nursing and Rehabilitation Center
232a	05/13/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Guilford
232b	04/30/2010 CMS Survey, Britthaven of Guilford
233	03/31/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Guilford

234	03/29/2010 CMS Survey, Britthaven of Guilford
235	08/11/2011 letter from Nursing Home Licensure and Certification Section to Greenhaven Health and Rehabilitation Center
236	07/29/2011 CMS Survey, Greenhaven Health and Rehabilitation Center
237	12/22/2011 letter from Nursing Home Licensure and Certification Section to Piney Grove Nursing and Rehabilitation Center
238	12/14/2011 CMS Survey, Piney Grove Nursing and Rehabilitation Center
239	08/01/2011 letter from Nursing Home Licensure and Certification Section to Premier Nursing and Rehabilitation Center
240	07/19/2011 CMS Survey, Premier Nursing and Rehabilitation Center
241	03/10/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of New Bern
242	02/25/2011 CMS Survey, Britthaven of New Bern
243	06/10/2010 CMS Survey, Britthaven of Charlotte
244	01/12/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of Charlotte
245	12/23/2010 CMS Survey, Britthaven of Charlotte

Liberty's Exhibits

300	Agency's Objections and Responses to Liberty's Second Set of Interrogatories and Second Request for Production of Documents
301	Excerpt from Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide and Scope and Severity Grid
302	Liberty Days of Care Chart
304	State Operations Manual, Chapter 7
305	07/19/2011 E-mails between Martha McMillan, Max Mason and Beverly Johnston (with attachment)

The Heritage's Exhibits

The Heritage 8	Excerpt from 2011 State Medical Facilities Plan
The Heritage 9	Photographs from The Heritage Application
The Heritage 10	Floor Plans from The Heritage Application
The Heritage 11	Comparison demonstrative exhibits
The Heritage 12	C.V. of Daniel R. Carter
The Heritage 14	Daniel Carter's comparative factor chart
The Heritage 15	Exhibits referenced in The Summary of the Opinions of Daniel Carter
The Heritage 18	Todd Kaestner's handwritten notes
The Heritage 19	Section II.6(a) of CON Nursing Facility application
The Heritage 21	News & Observer news article
The Heritage 22	Special Focus Facility ("SFF") Initiative
The Heritage 23	State Operations Manual, Chapter 7
The Heritage 24	ESRD Information Form for New Facility
The Heritage 26	Excerpts from Transcript of deposition of Michael McKillip
The Heritage 27	Required State Agency Findings, 2007 New Hanover County Nursing Home Review

The Heritage 28	Required State Agency Findings, 2009 Davie County Dialysis Review
The Heritage 29	Required State Agency Findings, 2009 Cumberland County Nursing Home Review
The Heritage 34	07/08/2011 E-mails between Hunter Diefes and Doug Whitman
The Heritage 35	Excerpt from previous application filed by Britthaven, Section I.6(a) (dated 10/19/2010)
The Heritage 36	Excerpt from 07/19/2011 draft of Britthaven Application, Section I.6(a)
The Heritage 37	Required State Agency Findings, 2006 Durham County Nursing Home Review
The Heritage 38	Settlement Agreement in 07 DHR 0764
The Heritage 39	Required State Agency Findings, 2010 Johnston County Nursing Home Review
The Heritage 42	Required State Agency Findings, 2008 Union County Nursing Home Review
The Heritage 43	Required State Agency Findings, 2011 Iredell County Nursing Home Review
The Heritage 48	07/27/2011 E-mails between Ray Baker and Max Mason (CONFIDENTIAL)
The Heritage 49	Declaratory Ruling for Project I.D. No. F-7911-07
The Heritage 52	Hillside Nursing Center of Wake Forest 2011 license (with 2011 Renewal Application attached)
The Heritage 53	Everest Long Term Care 2011 license (with 2011 Renewal Application attached)
The Heritage 54	Liberty Nursing and Rehabilitation Center of Wake County 2011 license (with 2011 Renewal Application attached)

The Heritage 55	Hillside Nursing Center of Wake Forest 2012 license (with 2012 Renewal Application attached)
The Heritage 56	Everest Long Term Care 2012 license (with 2012 Renewal Application attached)
The Heritage 57	Liberty Nursing and Rehabilitation Center of Wake County 2012 license (with 2012 Renewal Application attached)
The Heritage 58	Britthaven of North Chase CON Application
The Heritage 59	Affidavit of Randy Uzzell
The Heritage 64c	Medicare.gov Nursing Home Profile, Barbour Court Nursing and Rehabilitation Center
The Heritage 65	06/21/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Charlotte (with 07/14/2010 letter from CMS, 06/10/2010 CMS Survey, 01/14/2011 letter from Nursing Home Licensure and Certification Section, and 12/23/2010 CMS Survey attached)
The Heritage 66	07/27/2010 CMS Survey, Britthaven of Chapel Hill
The Heritage 67	05/13/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Guilford (with 04/30/2010 CMS Survey attached)
The Heritage 68	09/14/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Edenton (with 09/27/2010 & 12/14/2010 letters from CMS and 09/02/2010 CMS Survey attached)
The Heritage 69	03/08/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of Smithfield (with 03/15/2011 letter from CMS, 05/13/2011 letter from Nursing Home Licensure and Certification Section, and 02/22/2011 CMS Survey attached)
The Heritage 70	08/01/2011 letter from Nursing Home Licensure and Certification Section to Premier Nursing and Rehabilitation Center (with 08/12/2011 & 10/17/2011 letters from CMS and 07/19/2011 CMS Survey attached)
The Heritage 71	08/12/2011 letter from CMS to Chowan River Nursing and Rehabilitation Center (with 10/17/2011 letter from CMS and 07/28/2011 CMS Survey attached)

The Heritage 72	08/11/2011 letter from Nursing Home Licensure and Certification Section to Greenhaven Health and Rehabilitation Center (with 08/19/2011 & 08/29/2011 letters from CMS and 07/29/2011 CMS Survey attached)
The Heritage 73	12/16/2011 letter from CMS to Cumberland Nursing and Rehabilitation Center (with 11/30/2011 CMS Survey attached)
The Heritage 74	03/31/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Guilford (with 04/15/2010 letter from CMS and 03/29/2010 CMS Survey attached)
The Heritage 79	08/12/2011 CMS Survey, Britthaven of Chapel Hill
The Heritage 80	06/24/2010 letter from Nursing Home Licensure and Certification Section to City of Oaks Health and Rehab Center (with 07/8/2010 letter from Nursing Home Licensure and Certification Section, 07/08/2010 letter from CMS, and 06/10/2010 CMS Survey attached)
The Heritage 81	01/28/2011 letter from Nursing Home Licensure and Certification Section to Capital Nursing and Rehabilitation Center (with 02/18/2011 & 03/24/2011 letters from CMS and 01/21/2011 CMS Survey attached)
The Heritage 82	10/27/2011 letter from CMS to Liberty Commons Nursing & Rehabilitation (with 09/30/2011 CMS Survey attached)
The Heritage 83	03/31/2011 letter from CMS to Mary Gran Nursing Center (with 03/11/2011 CMS Survey attached)
The Heritage 84	03/07/2011 letter from Nursing Home Licensure and Certification Section to N.C. State Board of Examiners for Nursing Home Administrators (with 03/11/2011 letter from CMS to Liberty Commons Nursing & Rehabilitation - Rowan, 03/07/2011 letter from Nursing Home Licensure and Certification Section to Liberty Commons Nursing & Rehabilitation - Rowan, and 02/23/2011 CMS Survey attached)
The Heritage 85	06/22/2010 letter from Nursing Home Licensure and Certification Section to Liberty Commons Nursing and Rehabilitation Center of Halifax County (with 06/10/2010 CMS Survey attached)
The Heritage 86	11/19/2010 letter from CMS to Springwood Care Center of Forsyth (with 11/17/2010 letter from Nursing Home Licensure and Certification Section and 11/05/2010 CMS Survey attached)

The Heritage 86a	Excerpt from 11/29/2010 CMS Survey, Springwood Care Center of Forsyth
The Heritage 87 The Heritage 87a	Liberty CMS Nursing Home Compare Monetary Penalty Listings Medicare.gov Nursing Home Profile, Liberty Commons Nursing and Rehabilitation Center of Halifax County
The Heritage 88	Nursing Home Data Compendium 2010
The Heritage 90	01/14/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of Charlotte (with 12/23/2010 CMS Survey attached)
The Heritage 91	03/10/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of New Bern (with 03/15/2011 letter from CMS and 02/25/2011 CMS Survey attached)
The Heritage 92	12/22/2011 letter from Nursing Home Licensure and Certification Section to Piney Grove Nursing and Rehabilitation Center (with 12/23/2011 letter from Nursing Home Licensure and Certification Section, 02/29/2012 letter from CMS and 12/14/2011 CMS Survey attached)
The Heritage 93	Charts re: Liberty deficiencies and penalties
The Heritage 97	Chart re: Britthaven deficiencies
The Heritage 101	Excerpts from Transcript of Deposition of Robert Evans

Hillcrest's Exhibits

502	Floorplan of Hillcrest's proposed facility
503	Floorplan of Hillcrest's proposed facility
505	3D View of Hillcrest's proposed facility
506	Chart of FY2010 Data from License Renewal Applications
507	Photographs from the Hillcrest Application

511	12/14/2011 CMS Survey, Piney Grove Nursing and Rehabilitation Center
512	12/23/2010 CMS Survey, Britthaven of Charlotte
514	The Carriage Club of Charlotte 2011 license (with 2011 Renewal Application attached)
515	The Carriage Club of Charlotte 2012 license (with 2012 Renewal Application attached)
516	Comparative Analysis (as compared to Hillcrest)
517	07/15/2011 E-mails between Max Mason and Dannie Kennedy
518	N.C. Medical Board Licensee Information for Dr. Aarti Dixit
519	Photographs of Hillside resident rooms

Britthaven's Exhibits

609	Required State Agency Findings, 2010 Catawba County Nursing Home Review
610	Required State Agency Findings, 2010 Richmond County Nursing Home Review
611	Required State Agency Findings, 2008 New Hanover County Dialysis Review
612	Required State Agency Findings, 2011 Cabarrus County Dialysis Review
622	Hillcrest 2012 license (with 2012 Renewal Application attached)
627	N.C. Division of Aging and Adult Services, Continuing Care Retirement Communities
628	Hillcrest Resident Charges Chart
629	Hillcrest Durham - Payor Mix Chart
631	08/02/2011 E-mails between Doug Whitman, Mathew Bork and Hunter Diefes
632	Principle Long Term Care, Inc. Summary of Patient Days Chart (July 2010 - Jan. 2012)
633	Principle Long Term Care, Inc. Summary of Patient Days Chart (Feb. 2010 - Aug. 2011)
634	07/27/2010 CMS Survey, Britthaven of Chapel Hill
636	04/30/2010 CMS Survey, Britthaven of Guilford

639	06/10/2010 CMS Survey, Britthaven of Charlotte
642	Brookdale Senior Living, Company Update
643	03/16/2010 letter from Oklahoma State Department of Health to Bradford Village
644	02/26/2010 CMS Survey, Bradford Village
645	05/03/2011 letter from Oklahoma State Department of Health to Bradford Village
646	04/21/2011 CMS Survey, Bradford Village
647	Brookdale Senior Living locations (website printout)
648	07/16/2011 E-mails between Martha McMillan, Max Mason and Beverly Johnson (CONFIDENTIAL)
652	Substandard Quality of Care Deficiencies in Britthaven Chart

BellaRose's Exhibits

705	Comparison of The Heritage and BellaRose Chart
707	Photographs of Hillside Nursing & Rehab
708	Photographs of Hillside Nursing & Rehab resident rooms
709	Excerpt from Transcript of Deposition of Todd Kaestner
710	Excerpt from Transcript of Deposition of Daniel Carter

Agency's Exhibits

800	Required State Agency Findings, 1996 Carteret County Nursing Home Review
801	Required State Agency Findings, 1997 Lenoir County Nursing Home Review
802	Required State Agency Findings, 1998 Nash County Nursing Home Review
803	Required State Agency Findings, 2001 Wayne County Nursing Home Review

804	Required State Agency Findings, 2003 Union County Nursing Home Review
805	Required State Agency Findings, 2006 Brunswick County Nursing Home Review
806	Required State Agency Findings, 2006 Cumberland County Nursing Home Review
807	Required State Agency Findings, 2006 Union County Nursing Home Review
808	Required State Agency Findings, 2007 Mecklenburg County Nursing Home Review
809	Required State Agency Findings, 2008 Union County Nursing Home Review
810	Required State Agency Findings, 2010 Johnston County Nursing Home Review
811	Recommended Decision in 08 DHR 3676 & 08 DHR 3680
814	Final Agency Decision in 10 DHR 3788
819	2012 License Renewal Applications Chart
820	10/20/2005 Memo from CMS to State Survey Agency Directors
821	Public records for Arati Dixit
822	White Pages website print out for Aarti Dixit
823	1997 State Medical Facilities Plan
824	2008 State Medical Facilities Plan

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

The Parties

1. Petitioner AH North Carolina Owner, LLC d/b/a The Heritage of Raleigh (“The Heritage”) currently owns and operates a senior living community with independent living and multi-unit assisted housing and services in Raleigh, North Carolina. (Joint Ex. 4). The Heritage is a wholly-owned subsidiary of Brookdale Senior Living, Inc., (“Brookdale”). Brookdale Senior Living, Inc. owns and operates senior housing communities throughout the United States, including a continuing care retirement community (“CCRC”) in Charlotte, North Carolina that includes Medicare certified nursing facility beds. (Joint Ex. 4).

2. Petitioner Hillcrest Convalescent Center, Inc. currently owns and operates a skilled nursing facility in Durham, North Carolina. (Joint Ex. 2). The Hillcrest nursing facility in Durham has an on-site pharmacy. Hillcrest's Durham nursing facility has been family owned and operated since 1951. (Joint Ex. 2).

3. Petitioners Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County, LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC (collectively “Liberty”) own and operate nursing facilities in North Carolina. (Joint Ex. 6). The Liberty entities are North Carolina limited liability companies. Affiliates of Liberty own and operate 19 nursing homes throughout North Carolina.

4. Respondent Certificate of Need Section (“CON Section” or “Agency”) is the agency responsible for the administration of North Carolina’s Certificate of Need (“CON”) Law, codified at N.C. Gen. Stat. Chapter 131E, Article 9.

5. Respondent-Intervenors E.N.W., LLC and BellaRose Nursing and Rehab Center (collectively “BellaRose”) were formed in 2011. (Joint Ex. 7). Respondent-Intervenors E.N.W., LLC (lessor) and BellaRose Nursing and Rehab Center, Inc. (lessee) are corporate entities registered in North Carolina. The principals in each of the co-applicants are all members of the same family who have been involved in the ownership and operation of long term care facilities in North Carolina since 1958. The principals of these companies own and operate Hillside

Nursing Center of Wake Forest in Wake County and Windsor Point CCRC in Fuquay-Varina, Wake County.

6. Respondent-Intervenors Britthaven, Inc. and Spruce LTC Group, LLC (collectively “Britthaven”) own and operate nursing facilities in North Carolina. (Joint Ex. 3). The facilities are operated by the same management company. The Britthaven applicants own and/or operate 10 facilities in North Carolina. (Joint Ex. 3). Additionally, Britthaven’s affiliate, Principle Long Term Care, Inc., manages 43 facilities in North Carolina, more than 10 percent of all nursing homes in in the State, including Tower Nursing and Rehab Center in Wake County. (*See, e.g.*, Joint Ex. 3).

Special Allocation of Nursing Facility Beds in Wake County

1. The State Medical Facilities Plan (“SMFP”) is the official plan developed and published each year which inventories certain services, facilities, and equipment that are subject to CON regulation as well as the utilization of those services, facilities, and equipment. The SMFP also projects future needs for additional services, facilities, and equipment in each service area. (*See* Agency Ex. 818). The State Medical Facilities Plan is developed under the direction of the North Carolina State Health Coordinating Council (“SHCC”). N.C. Gen. Stat. § 131E-176(25); *Frye Reg’l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 42-43, 510 S.E.2d 159, 162-63 (1999).

2. The 2011 SMFP included a special need determination for 240 additional nursing facility beds in Wake County. (Heritage Ex. 8). This special need allocation was the result of a Petition filed by Brookdale Senior Living, Inc. in the summer of 2010. (Joint Ex. 1). In its Petition, Brookdale contended that underutilized nursing facilities in Wake County were chronically underutilized and, as a result, the standard need methodology for nursing facility beds failed to show the true need for additional nursing facility beds in Wake County. (Joint Ex. 1). Brookdale’s Petition was granted by the North Carolina State Health Coordinating Council and the special allocation of 240 nursing facility beds for Wake County was included in the 2011 SMFP. (Heritage Ex. 8).

The Applications

1. On or around August 15, 2011, in accordance with the review schedule set forth in the 2011 SMFP, sixteen (16) applications were filed to develop part of the 240 nursing facility beds allocated in the 2011 SMFP. (Joint Ex. 1). Because the applications sought approval to develop a total of 1,570 new nursing care beds, exceeding the need determination, the Agency batched the applications for purposes of a competitive review (the “Review”).

2. The Heritage filed an application to develop a 90-bed nursing facility on the campus of the existing senior living community, The Heritage of Raleigh. (Joint Ex. 4). In the Agency Findings, The Heritage is referred to as “Brookdale-North Raleigh.” (Joint Ex. 1).

3. Hillcrest filed a CON application to develop a 120-bed nursing facility in Wake Forest, Wake County, North Carolina, identified as Project I.D. No. J-8711-11. (Joint Ex. 2). In the Agency Findings, Hillcrest is referred to as “Hillcrest-Wake Forest.” (Joint Ex. 1).

4. Liberty filed a CON application to develop a 130-bed nursing facility with 120 new nursing facility beds and 10 nursing facility beds relocated from Capital Nursing Rehabilitation Center in Wake County. (Joint Ex. 6). In the Agency Findings, the application of Liberty at issue in this case is referred to as “Liberty-North Raleigh.” (Joint Ex. 1).

5. BellaRose filed a CON Application with the Agency proposing to develop a 100-bed nursing facility pursuant to the adjusted need determination in the 2011 SMFP in Raleigh, Wake County, North Carolina, identified as Project I.D. No. J-8729-11. (Joint Ex. 7). In the Agency Findings, BellaRose is referred to as “BellaRose-Raleigh.” (Joint Ex. 1).

6. Britthaven filed a CON application to develop a 120-bed nursing facility. (Joint Ex. 3). In the Agency Findings, the application at issue in this case is referred to as “Britthaven-Brier Creek.” (Joint Ex. 1).

CON Section’s Decision

1. The applications of The Heritage, Hillcrest, Liberty, BellaRose, and Britthaven, along with several other applications, were reviewed in a competitive review cycle beginning September 1, 2011. (Joint Ex. 1). Project Analyst Mike McKillip and CON Section Assistant Chief Martha Frisone were the Agency employees assigned to the Review. CON Section Chief Craig Smith was also consulted and provided some input into the Agency’s decision in this Review.

2. As provided under the CON review process, the applicants, including The Heritage, Hillcrest, Liberty, BellaRose, and Britthaven, filed written comments and exhibits concerning the proposals submitted by other applicants. N.C.G.S. § 131E-185(a1). (Joint Ex. 1). The CON Section also held a public hearing in Wake County as required under the CON law. (Joint Ex. 1). Each of the applicants whose proposals are at issue in these contested case made presentations at the public hearing and submitted response to the written comments.

3. Mr. McKillip reviewed each application and determined whether each individual application, standing alone, conformed to the statutory and regulatory review criteria. After making determinations regarding conformity to the review criteria for each application, Mr. McKillip conducted a comparative analysis of the applications.

4. On or around January 27, 2012, the CON Section notified the applicants about its decision to approve BellaRose and Britthaven, and to conditionally approve Universal Properties, Fuquay-Varina, LLC. The applications submitted by The Heritage, Hillcrest, and Liberty were disapproved. On February 3, 2012, the CON Section issued written notice of the findings and conclusions upon which it based its decision.

5. The Agency approved: (a) an application filed by Britthaven to develop a 120-bed nursing facility; (b) an application filed by BellaRose to develop a 100-bed nursing facility in Wake County; and (c) an application from Universal Properties/North Raleigh, LLC and Universal Health Care/North Raleigh, Inc. (collectively “Universal”) to add 20 licensed nursing

care beds to Universal's existing nursing facility in Wake County. Universal is not a party to this contested case and the 20 beds awarded to Universal are not at issue.

6. The Agency determined that BellaRose did not conform with the requirement of SMFP Policy GEN-4 because the BellaRose application did not include a written statement describing the project's plans to assure water conservation. (Joint Ex. 1). However, the Agency determined that this deficiency could be conditioned and BellaRose was approved subject to the condition that it submit documentation that meets the requirements of Policy GEN-4.

7. The applications submitted by The Heritage and Hillcrest were found nonconforming with N.C.G.S. § 131E-183(a)(13)(c) ("Criterion 13(c)"), which addresses proposed services to medically underserved groups. (Joint Ex. 1). Based on its finding that The Heritage and Hillcrest were nonconforming with Criterion 13(c), the CON Section found both applications nonconforming with Criteria 1 (SMFP Policy GEN-3), 4, and 18a. (N.C.G.S. § 131E-183(a)(1), (4) and (18a); Joint Ex. 1).

8. Liberty's application was found nonconforming with statutory Criterion 20 which addresses quality of care. (N.C.G.S. § 131E-183(a)(20); Joint Ex. 1). For the same reasons that the Agency found Liberty nonconforming with Criterion 20, the application also was found nonconforming with Criteria 1 (SMFP Policy GEN-3), 4, and 18a. (N.C.G.S. § 131E-183(a)(1), (4) and (18a); Joint Ex. 1).

9. Although The Heritage, Hillcrest, and Liberty were all found to be nonconforming to certain review criteria, the Agency nonetheless included them in its comparative analysis, as it did with all 16 applicants. (*See, e.g.*, Joint Ex. 1).

Petitions for Contested Case Hearing

1. On or about February 24, 2012, Heritage filed a Petition for Contested Case Hearing to appeal the denial of the Heritage Application and the conditional approvals of the BellaRose and Britthaven Applications (as well as the approval of the Universal Application). This contested case was assigned case number 12 DHR 01164, re-filed case number 12 DHR 08691.

2. On or about February 24, 2012, Hillcrest filed a Petition for Contested Case Hearing to appeal the denial of the Hillcrest Application and the conditional approvals of the BellaRose and Britthaven Applications (as well as the approval of the Universal Application). This contested case was assigned case number 12 DHR 01179, re-filed case number 12 DHR 08666.

3. On or about February 27, 2012, Liberty filed a Petition for Contested Case Hearing to appeal the denial of the Liberty Application and the conditional approval of the Britthaven Application (Liberty did not appeal the Agency's decision to conditionally approve the BellaRose Application). This contested case was assigned case number 12 DHR 01180, re-filed case number 12 DHR 08669.

4. Britthaven and BellaRose filed motions to intervene in the contested cases of The Heritage, Hillcrest and Liberty, which were granted by the Undersigned. The Heritage filed motions to intervene in the contested cases of Hillcrest and Liberty, which were granted by the Undersigned. Liberty filed motions to intervene in the contested cases of The Heritage and Hillcrest, which were granted by the Undersigned. Hillcrest filed motions to intervene in the contested cases of The Heritage and Liberty, which were granted by the Undersigned.

5. The Parties filed a Joint Petition to Consolidate, and the consolidation order was entered on or about July 2, 2012. The appeal of the approval of Universal for 20 nursing facility beds was dismissed. As a result, the maximum number of nursing facility beds which can be awarded through this contested case is 220.

6. On September 20, 2012, the Parties entered into a Consent Order and Voluntary Dismissal without Prejudice. According to the terms of the Consent Order, which was issued on September 24, 2012, the Parties were allowed to re-file their petitions within ten days from the entry of the Consent Order by the undersigned ALJ. The Consent Order also allowed for the parties to intervene as allowed previously in all three re-filed contested cases, and that the three re-filed contested cases be consolidated.

7. On September 25, 2012, Heritage re-filed its Petition for Contested Case Hearing to appeal the denial of the Heritage Application and the approvals of the BellaRose and Britthaven Applications, designated as File No. 12 DHR 08691.

8. On September 25, 2012, Hillcrest re-filed its Petition for Contested Case Hearing to appeal the denial of the Hillcrest Application and the approvals of the BellaRose and Britthaven Applications, designated as File No. 12 DHR 08666.

9. On September 25, 2012, Liberty re-filed its Petition for Contested Case Hearing to appeal the denial of the Liberty Application and the approval of the Britthaven Application, designated as File No. 12 DHR 08669.

Criteria 20

1. The General Assembly has found that to promote the general welfare and health of its citizens, CON applicants for new health services must be evaluated as to the quality of care they will provide. N.C.G.S. § 131E-175(7). Criterion 20 requires that “[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past.” (N.C. Gen. Stat. § 131E-183(20)).

2. Criterion 20 serves to benefit future residents of a proposed nursing facility by ensuring that an existing provider cannot be awarded a CON unless it can demonstrate that it is currently providing quality care at its existing facilities. Criterion 20 is especially important in nursing home reviews because the residents of nursing facilities have serious medical issues and are completely dependent on the facility to meet their care needs 24 hours a day.

3. All CON applicants are required to demonstrate how a project will promote quality in the delivery of health care services. (Agency Ex. 818). Safety and quality are the first basic principle that governs the health care planning process in the State Medical Facilities Plan. (*Id.*).

4. Criterion 20 does not specify what geographic area the Agency must consider when evaluating whether an applicant has provided quality care in the past. In other statutory criteria, the legislature has specifically limited the relevant geographic area under consideration to the “service area” at issue. (N.C. Gen. Stat. §§ 131E-183 (13)(a), (18a)).

5. It is the Agency’s practice in considering Criterion 20, to limit the geographic scope of its review of substandard quality of care deficiencies to only facilities operated in the service area where the proposed project is to be located. For nursing home reviews, the service area is a single county.

6. In this review, the Agency only considered the applicants’ history of providing quality care in Wake County. (Joint Ex. 1). The Agency ignored quality of care by an applicant in other counties.

7. The Agency’s interpretation of the geographic scope of the statute has resulted in it determining that Criterion 20 is not applicable to applicants that operate nursing facilities outside of the county where the proposed project is to be located. (Joint. Ex. 1).

8. The language of Criterion 20 does not expressly limit or even suggest that the geographic scope of the Agency’s review should be limited to only those facilities operated in the county where the proposed project is to be located. Instead, Criterion 20 makes clear that all existing providers must demonstrate that they have provided quality care in the past. (N.C.G.S. § 131E-183(a)(20)).

9. The Agency provided no reasonable basis for ignoring an applicant’s quality track record outside the county in determining conformity with Criterion 20. When asked why the Agency excluded facilities outside the county where the proposed project was to be located, the Assistant Chief of the Agency agreed that it was historical practice and that she did not know why. Mike McKillip, Project Analyst at the Agency’s CON Section, testified that he did not know why the Agency has traditionally limited its Criterion 20 analysis to the county at issue in the review.

10. Craig Smith, Chief of the CON Section, testified that it was possible that the Agency would consider quality issues in other counties when determining conformity with Criterion 20, but the Agency would only do so if the Agency determined that the applicant had severe quality issues. However, the evidence shows two examples of nursing home reviews in which the Agency looked outside the county to determine conformity with Criterion 20. (Joint Ex. 205, Heritage Ex. 24). In each instance the applicant had no quality issues that would have resulted in nonconformity with Criterion 20.

11. In kidney dialysis reviews, the Agency has created a form to request information from the Acute Care Licensure Section, which does not limit the Acute Care Section's review to only the county at issue. (Heritage Ex. 24). The service area in kidney dialysis reviews is also county specific. In at least one kidney dialysis review decision entered into the record, the Agency looked at quality issues outside the county where the proposed project was to be located. (Heritage Ex. 28).

12. When asked why the Agency had not created a form to request state-wide information in nursing facility reviews, Mr. Smith testified that the Agency did fewer nursing facility reviews than dialysis review and that the Agency might consider creating a similar form in the future.

13. Ms. Frisone stated that it was possible that employees at an existing facility within a county might transfer to the proposed facility in that same county. However, she admitted that it was just as likely that staff from other existing facilities operated by the applicant could come to work at the proposed facility and that she did not know why the Agency only reviewed a single county.

14. Britthaven's facilities are not managed on a county by county basis and all of Britthaven's nursing facilities are governed by the same quality of care policies, and procedures regardless of the county in which they are located. Britthaven's facilities are managed by the same management company and share a single corporate office in Kinston, North Carolina. (Joint Ex. 3). Similarly, all of Liberty's facilities follow the same quality of care policy and standards and there is no county-wide management of its facilities that would distinguish the management or operations of the facilities on a county by county basis.

15. N.C. Gen. Stat. § 131E-182(b) states that the Agency should create application forms to be used by applicants for CONs, and that the form may require an applicant "to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria...and with duly adopted standards, plans and criteria." The application form developed by the Agency for nursing home CONs asks for an applicant's history of providing quality care throughout the entire State. (E.g., Joint Ex. 6)

16. In determining conformity with Criterion 20, it is the Agency's practice to only consider substandard quality of care occurring eighteen (18) months prior to the issuance of the CON Section's decision. (Joint Ex. 1, p. 1976; McKillip, T. Vol. 1, p. 227).

17. N.C. Gen. Stat. § 131E-182(b) states that the Agency must create application forms to be used by applicants for CONs, and that the form may require an applicant "to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria...and with duly adopted standards, plans and criteria."

18. The language of Criterion 20 does not expressly set forth a specific time frame that the Agency must consider. (N.C.G.S. § 131E-183(a)(20)). However, the application form developed by the Agency for nursing home CONs asks for an applicant's history of providing

quality care during “the eighteen months immediately preceding the submittal of the application.” (E.g., Joint Ex. 6).

19. In this review, the Agency considered the applicant’s history of providing quality care during the eighteen (18) months immediately preceding the date of the decision, as opposed to the timeline requested and specified by the application form. (Joint Ex. 1). In doing so the Agency ignored a little over four months of quality care issues it sought in the application form.

20. Mike McKillip, Project Analyst at the Agency’s CON Section, and Martha Frisone, Assistant Chief of the Agency’s CON Section, both testified that the Agency’s practice of considering an applicant’s history of providing quality care during the eighteen (18) months is different than what is requested on the nursing home CON application form.

21. It is unreasonable and contrary to N.C.G.S. § 131E-182(b) for the Agency to implement a policy that ignores information applicants are required to provide in the application form.

22. The Agency’s consideration of quality of care events and information it obtains after an application has been filed promotes the interest of citizens of North Carolina because it allows the Agency the opportunity to consider quality of care issues that occur after the filing of the applications but prior to the issuance of the Agency decision.

23. Criterion 20 puts the burden on the applicant to prove that it has provided quality care in the past: “An applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past.” (N.C. Gen. Stat. § 131E-183(20)).

24. The plain language of Criterion 20 does not provide a specific time period that the Agency must use in determining whether an applicant has provided quality of care in the past. Unlike the geographic scope, Criterion 20 provides the Agency with flexibility to determine the look back period it will use.

25. Although the Agency has discretion to consider the appropriate look back period, N.C.G.S. § 131E-182(b) requires that applicants “shall be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. § 131E-183 and with duly adopted standards, plans and criteria.”

26. In Section II, Question 6(a) of the nursing home CON application, the Agency asks the applicant to complete a table (“Table 6”) and identify whether any of the applicant’s existing facilities statewide have experienced any of a set of specified quality-related events. (E.g., Joint Ex. 3). The specified quality-related events include “Substandard Quality of Care as Defined by [the Federal Government]” and “State and Federal Fines.” (E.g., Joint Ex. 3).

27. The CON Application form does not state whether the relevant date for purposes of the Agency’s review is the date of the “incident,” or the date of the resulting State or Federal action. Ms. Frisone testified that the application form asks for the date of the incident at the

facility that constituted substandard quality of care because this is the date that the Agency uses to determine whether an incident and the resulting deficiency falls within or outside the look back period.

28. Although Britthaven identified 46 facilities in Table 6 of the Britthaven Application, it did not disclose that any of those facilities had experienced incidents of substandard quality of care. (Joint Ex. 3). The evidence at the hearing revealed that, in fact, seven (7) Britthaven facilities had experienced eleven (11) events constituting substandard quality of care during the eighteen (18) months prior to the application date. (E.g., Joint Exs. 225, 226, 227, 229, 230, 232b, 234, 236, 240, 242, 243, 245).

29. Max Mason, who prepared the Britthaven Application, testified at the hearing that Britthaven's events of substandard quality of care were purposefully not identified in the Britthaven Application because he knew that the Agency would only evaluate whether Britthaven's Wake County facility had provided quality care in the past, and none of Britthaven's eleven (11) events of substandard quality of care occurred at Britthaven's Wake County facility.

30. The Britthaven Application did identify several "State and Federal Fines." (Joint Ex. 3). However, in response to Question 6(b), which asked for the circumstances surrounding all disclosed quality events, the Britthaven Application stated: "The penalties against the various facilities were assessed for alleged deficiencies. Except where otherwise noted, all matters are under appeal with CMS." (*Id.* at 71). The evidence at the hearing revealed that at least some of the disclosed fines were in fact not under appeal with CMS when Britthaven filed its application. At the hearing, Mr. Mason testified that the statement in the Britthaven Application indicating that all fines were under appeal was not true and was simply boilerplate language that Britthaven used in multiple CON applications.

31. Mr. Mason testified that although he is ultimately in charge of completing CON applications on behalf of Britthaven, he relies on a paralegal, Martha McMillan, to fill out Table 6 of the application. He does not independently verify her work, nor does he know the procedure she follows in filling out Table 6. He further testified that he was not familiar with her qualifications. To his knowledge, Ms. McMillan has no clinical training or experience with CMS surveys. Britthaven did not call Ms. McMillan as a witness at the hearing. Mr. Mason also testified that based on the Agency's longstanding practice of basing conformity determinations on the survey history of facilities within the same county as the proposed facility, he generally verifies the information provided by Ms. McMillan for any facilities in the same county where the proposed facility is to be located.

32. Mike McKillip, the analyst who performed the review in this case, testified that his interpretation of Table 6 of the Britthaven Application was that no Britthaven facility in North Carolina had an episode of Substandard Quality of Care.

33. Mr. McKillip testified that Britthaven should have identified which of its facilities had experienced events constituting substandard quality of care. He further testified that had Britthaven fully identified its events of substandard quality of care, he would likely have

followed up on the disclosed issues. Craig Smith, Chief of the Agency's CON Section, testified that he expects the entire CON application to be completed in a complete and accurate manner.

34. Doug Suddreth, who was admitted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and design and how care practices and work care practices flow from such design, and who testified on behalf of Britthaven and BellaRose, opined that it was a mistake for Britthaven not to fully complete Table 6.

35. On Table 6 of the Liberty Application, Liberty identified seventeen (17) existing Liberty-affiliated nursing homes in North Carolina. (Joint Ex. 6). Several months prior to submitting its application in this case, Liberty acquired two (2) additional nursing homes in Forsyth County that were inadvertently excluded from Table 6 of the Liberty Application. However, these facilities did not experience any quality-related events after Liberty's acquisition of the facilities. Liberty also inadvertently failed to identify its Johnston County facility on Table 6. However, this facility also did not experience any quality-related events during the eighteen (18) month period prior to the application date.

36. Despite inadvertently failing to include the two (2) Forsyth County facilities and the Johnston County facility on Table 6, Liberty did identify these three (3) facilities in the Liberty Application as facilities owned, operated or managed by the Liberty entities. (Joint Ex. 6).

37. In Table 6, Liberty identified three events of substandard quality of care, one denial of payment, and four fines. (Joint Ex. 6). Liberty also completed Question 6(b) and provided the circumstances of each of these events.

38. The Agency is obligated to review applications and determine whether they are consistent with the statutory review criteria. N.C. Gen. Stat. § 131E-183(a).

39. In reviewing whether the applications submitted in this case conformed to Criterion 20, Mike McKillip, Project Analyst at the Agency's CON Section, sent an e-mail dated December 20, 2011 to Beverly Speroff, Chief of the Agency's Nursing Home Licensure and Certification Section. (Joint Ex. 1). The e-mail included a list of the applicants' existing facilities in Wake County and asked whether any of those facilities had quality of care problems since August 2010.

40. Ms. Speroff responded to Mr. McKillip's e-mail and stated which of the facilities identified by Mr. McKillip, "had certification deficiencies constituting substandard quality of care during this period." (Joint Ex. 1 pp. 1567-68). Ms. Speroff's e-mail did not contain any details about the certification deficiencies. Ms. Speroff's e-mail also did not contain any information regarding whether the applicants' remaining facilities in North Carolina had experienced any quality of care issues.

41. Mr. McKillip and Martha Frisone, Assistant Chief of the Agency's CON Section, both testified that the Agency's determination of whether the applications in this review conformed to Criterion 20 was based entirely on Ms. Speroff's e-mail.

42. During the time period relevant to this review, Britthaven operated forty-two (42) nursing facilities in North Carolina. (Joint Ex. 3). During the same time period the Licensure Section determined that Britthaven provided substandard quality of care in thirteen (13) surveys it conducted in nine (9) facilities operated by Britthaven. Twelve (12) of the thirteen (13) surveys resulted in a determination that the substandard quality of care incident had placed Britthaven's residents in immediate jeopardy. (Joint. Exs. 224-43). In total, Britthaven received twenty-three (23) substandard quality of care deficiencies during the relevant time period, twenty-one (21) of which constituted Immediate Jeopardy. (Heritage Ex. 97).

43. The Agency failed to consider any of these incidents of substandard quality of care in its review of Britthaven's application. If any of these events would have occurred within Wake County, the Agency would have found Britthaven nonconforming with Criterion 20.

41. In its application Liberty represented that it operated seventeen (17) nursing facilities in North Carolina with quality of care track records relevant to this review. Four (4) of Liberty's seventeen (17) facilities received substandard quality of care deficiency surveys during the time period relevant to this review. In these 4 surveys, Liberty received 8 substandard quality of care deficiencies. (Heritage Ex. 93). Other than Liberty's Wake County facility, the Agency failed to consider any incidents of substandard quality of care in its review of Liberty's application.

42. Neither the language of Criterion 20 nor any Agency rule or regulation specifies the data or specific source of quality-related information to be used by the Agency to determine conformity. The agency failed to consider any matters of positive quality of care provided by the applicants in this case and only sought out deficiencies in facilities in Wake County.

43. The evidence presented at the hearing showed that the Agency had additional information related to the applicants' past history of providing quality care, but this additional information did not factor into the Agency's decision regarding whether the applications conformed to Criterion 20.

44. Mr. McKillip testified that after receiving Ms. Speroff's e-mail, he obtained a copy of the survey associated with the deficiencies at Capital Nursing and placed it in the Agency file, but it did not factor in to the Agency's determination regarding an applications conforming to Criterion 20.

45. Public comments provided information regarding the Centers for Medicare and Medicaid Services Nursing Home Compare program, which provides a star-rating system for nursing home facilities. (Joint Ex. 127). The public comments provided information with the average star rating for all applicants' North Carolina facilities, as well as the detailed information for each of these facilities' star ratings. (Joint Ex. 1). Nursing Home Compare measures three

types of facility performance, each of which has its own five star rating: health inspections, staffing, and MDS quality measures. (Joint Ex. 127).

46. Mr. McKillip testified that after reviewing the public comments that referred to the Nursing Home Compare program, he printed off the Nursing Home Compare data for Liberty's and Britthaven's existing Wake County facilities and placed them in the Agency file, but they did not factor in to the Agency's determination regarding whether the Liberty Application or Britthaven Application conformed to Criterion 20.

47. The CMS Quality Score is one of several metrics reported on the CMS Nursing Home Compare website. The CMS Quality Score is calculated using self-reported data that is not verified for accuracy. (Joint Ex. 26). Nursing Home Compare data is designed to allow consumers to compare different nursing homes. As such, Mr. Suddreth testified that the Nursing Home Compare data was a comparative analysis and did not lend itself to determinations of conformity. Ms. Speroff testified that the quality measures rating itself is not necessarily instructive of the quality of care being provided at a facility, and that the population of a given facility can have an impact on the quality measures rating separate and apart from the quality of the care being provided at the facility.

48. The Heritage took the position at the hearing that the Agency should have considered the 2010 Nursing Home Data Compendium, a 166-page compilation of statistics published annually by CMS regarding nursing home ownership and certification, nursing home residents, and survey findings nationwide. The most recent data available in the 2010 Compendium was for the year 2009. (*See* Heritage Ex. 88). While Mr. Carter opined that both Britthaven and Liberty had more than their proportionate share of immediate jeopardy citations statewide, he was relying on statewide data regarding 2009. The relevant surveys for Britthaven and Liberty occurred in 2010 and 2011.

49. Both Britthaven and Liberty introduced charts comparing the number of days of care that constituted immediate jeopardy or substandard quality of care with the total number of patient days provided by their facilities. (Joint Ex. 168; Britthaven Ex. 652). Neither Britthaven or Liberty provided the Agency with any of this information in their applications, comments, or response to comments. (Joint Exs. 3 and 6). The information was not requested by the Agency as it is not used in a quality of care analysis since their sole focus was existing facilities in Wake County.

50. Other information was not considered by the Agency in analyzing quality of care. Kahlisia Tillery, a facility consultant for Principle Long-Term Care, Inc., provided testimony about the extensive measures that Britthaven uses to ensure the quality of care provided to its residents. In many instances, Britthaven's survey deficiencies were designated as past noncompliance only, meaning they were identified and corrected before state surveyors ever arrived at the facility. In one instance, Britthaven created a new full-time staff position to ensure that the mistake which led to the deficiency would not occur again.

51. Britthaven's conformity was defended by Doug Suddreth, a licensed nursing home administrator with almost forty years of experience operating nursing homes. Mr.

Suddreth disagreed with a focus on deficiencies only and opined that if a statewide analysis were conducted, it must also consider Britthaven's good surveys and facilities that Petitioners ignored. This of course would and should be true for all applicants.

52. Hillcrest operates a nursing facility located in Durham County, North Carolina. (Joint Ex. 2). Hillcrest has not received a substandard quality of care deficiency at its one facility in Durham County.

53. The Heritage's parent company Brookdale operates certified nursing facility beds in Mecklenburg County, North Carolina. (Joint Ex. 4). That facility has not received a substandard quality of care deficiency.

54. In the CON application, Question I.12.a requires applicants to list certain related facilities, and Question II.6.a requires applicants to provide regulatory history for all such facilities identified in response to Question I.12.a. The Heritage identified 38 nursing home facilities in other states in response to Question I.12.a, but provided no regulatory history for any of such out of state facilities. (Joint Ex. 4).

55. The Agency had no basis for determining that Criterion 20 was not applicable to both Hillcrest and The Heritage because both were "involved in the provision of health services" by operating nursing facilities in North Carolina. (N.C.G.S. § 131E-183(a)(20)).

56. The Agency reviews every application in its entirety to determine whether it contains sufficient information to determine conformity. The Agency has no policy or follows no rule regarding errors, mistakes, or omissions in a CON application whether intentional or not that would or would not result in a finding of non-conformity.

57. Expert witnesses for Petitioners acknowledged that the Agency may consider information throughout the application and outside the application in evaluating conformity. The Agency should seriously and thoroughly review all available information, including but not limited to competitive comments and publicly available data.

58. The Heritage and Hillcrest have argued, that if an applicant or an entity related to it received a single substandard quality of care or immediate jeopardy citation at a facility anywhere in the State, the applicant should be found non-conforming with Criterion 20. The Heritage's expert witness contended that a nonconformity should be triggered by any substandard quality of care deficiency, while the Hillcrest expert testified that nonconformity would be triggered by any immediate jeopardy deficiency. The Agency appears to have followed this single citation in reviewing the applicants in this case but only in Wake County where the facilities were to be built.

59. The Heritage's expert witness, Daniel Carter, testified that the language of Criterion 20 itself does not require such a "zero tolerance" interpretation. Instead, his opinion was based on what he believes is a consistent way the Agency has applied Criterion 20 in the past.

60. Similarly, Mr. Legarth, Hillcrest's expert witness, based his opinion largely on historical agency practice, in which a single substandard quality of care or immediate jeopardy citation in the same county generally results in nonconformity. Unlike Mr. Carter, he believed the Agency's historical practice should be expanded to facilities statewide. Ms. Frisone, Assistant Chief of the CON Section, testified that such a statewide zero-tolerance interpretation would not be feasible because it would significantly reduce the pool of approvable applicants and encourage litigation.

61. Evidence presented in this contested case showed that the more facilities that a nursing home provider operates, and the more days of patient care that it delivers, the more likely it is to receive a substandard quality of care citation because it has more opportunities.

62. In any given period, the total days of patient care provided varies tremendously by provider. For example, during 2011 Britthaven provided 1.77 million days of patient care in its 43 facilities. (Britthaven Ex. 632). During a comparable one-year period, Liberty provided 616,417 days of patient care in all its facilities. (Liberty Ex. 302). During fiscal year 2011, The Heritage provided 11,725 days of care in a single facility in the State and Hillcrest provided 31,407 in its single facility in the State. (Hillcrest Ex. 515; Joint Ex. 105).

63. The Heritage's Vice President of Skilled Nursing Services, Linda May, testified that if a provider's IJ level deficiencies represented an extremely small percentage of the provider's total days of care, the provider had provided good quality of care.

64. Kathy Platt, who was admitted as an expert in health care planning and submission of CON applications, and who testified on behalf of Liberty, opined that the Liberty Application conformed to Criterion 20. (Joint Exs. 123 and 168).

65. Martha Frisone, Assistant Chief of the Agency's CON Section, testified:

Q Taking into account...17 facilities, a large amount of patient day[s] of] care[] over that five month review period as well as the 18 months prior to application, do you believe that Liberty in these circumstances has provided evidence of quality care?

A If I'm going to look statewide and look at all of [Liberty's] facilities--I mean I've not done it this way before, but I think the same answer, that yes, I think there is evidence of quality of care.

(Frisone, T. Vol. 35, pp. 8412-13).

66. The Agency's determination that the Liberty Application was nonconforming with Criteria 1, 4 and 18a were purely derivative of the determination that the Liberty Application was nonconforming with Criterion 20. McKillip. T. Vol. 1, pp. 205-208. No grounds other than the Agency's finding that the Liberty Application was nonconforming with Criterion 20 existed to support a finding that Liberty was nonconforming with Criteria 1, 4 or 18a. Id.

Criteria 13(c)

1. N.C.G.S. § 131E-183(a)(13)(c) (“Criterion 13(c)”) states:

The applicant shall demonstrate the contribution of the proposed service in meeting the health-related needs of the elderly and members of medically underserved groups, such as medically indigent or low income persons, Medicaid and Medicare recipients, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to the proposed services, particularly those needs identified in the State Health Plan as deserving of priority. For the purpose of determining the extent to which the proposed service will be accessible, the applicant shall show....

(c) That the elderly and the medically underserved groups identified in this subdivision will be served by the applicant’s proposed services and the extent to which each of these groups is expected to utilize the proposed services; and...

2. In applying Criterion 13(c) in a nursing facility review, the CON Section looks at the percentage of service to Medicaid and Medicare proposed by the applicant. In this case, the Agency found no issue with any of the applicants proposed services to Medicare.

3. In its review of the applicants’ proposed service to Medicaid, the CON Section compared the applicants’ projection of service to Medicaid with the State and county average service to Medicaid. The Agency considers the extent to which each applicant has projected to provide services to medically underserved groups. For the purposes of Criterion 13(c), the concern is with future projections, as opposed to Criterion 13(a), which is concerned with past practice.

4. In applying Criterion 13(c), the Agency gathers data from DMA cost reports for existing nursing facility beds to calculate both a State and county Medicaid average. There are no rules that apply to the manner in which the Agency determines to define a county Medicaid average for purposes of applying Criterion 13(c).

5. In its application, The Heritage projected that it would serve 55.4% Medicaid. (Joint Ex. 4). The Heritage’s projection was based upon the average service to Medicaid recipients in all skilled nursing facilities in Wake County, excluding continuing care retirement communities (CCRCs). The Heritage excluded CCRCs in computing the county average service to Medicaid because CCRCs are not permitted to serve Medicaid recipients. (Agency Ex. 818).

6. The Heritage calculated its projected payor mix using the actual average payor mix of existing Wake County skilled nursing facility providers (excluding continuing care retirement communities). (Joint Ex. 4). Because The Heritage proposed to be a new provider of skilled nursing facility services in Wake County, it had no history in Wake County upon which to base its expected payor mix other than the county average. (Joint Ex. 4). It was reasonable for The Heritage to project that its service to Medicaid would mirror the average Medicaid

utilization in Wake County. The Heritage application describes in detail how it arrived at its projections of patient days by payor source, including Medicaid. (Joint Ex. 4).

7. Agency witnesses agreed that projecting the county average of Medicaid service is sufficient to be conforming with Criterion 13(c). However, in this review, the Agency computed the Wake County Medicaid average by excluding hospital-affiliated nursing facilities that serve Medicaid recipients. (Joint Ex. 1).

8. Before the review began, Mr. McKillip did not know how he would compute the Wake County average percent of service to Medicaid. After the review began, Mr. McKillip was instructed by Ms. Frisone to compute the Wake County average excluding any skilled nursing facilities that are affiliated with a hospital. (Joint Ex. 1). This decision to exclude the hospital-affiliated nursing facilities resulted in The Heritage application being below the county average, as calculated by the CON Section.

9. The project analyst testified that hospital-affiliated nursing facilities were excluded from the computation of county average in this review because generally hospital-affiliated nursing facilities have different admission patterns than non-hospital-affiliated nursing facilities. However, hospital-affiliated nursing facilities are regulated in the same manner as non-hospital-affiliated nursing facilities. They must meet the same Certificate of Need and licensure and certification requirements. Hospital-affiliated nursing facilities accept Medicaid and Medicare patients. They are also included in the need methodology in the State Medical Facilities Plan.

10. In deciding to exclude the hospital-affiliated facilities in calculating the county average, the Certificate of Need Section did no analysis of the percentage of Medicaid served by hospital-affiliated nursing facilities as compared to non-hospital-affiliated facilities.

11. Mr. McKillip was unaware that some hospital-affiliated nursing facilities in Wake County provide a greater percentage of service to Medicaid than non-hospital-affiliated nursing facilities. The nursing facility on the campus of Rex Hospital has a higher percentage of Medicaid than some nursing facilities in Wake County that have no hospital affiliation. (Heritage Ex. 15). The Agency did no analysis of admission patterns in Wake County before deciding to exclude hospital-affiliated nursing facilities in computing the county average service to Medicaid.

12. The Agency also did no analysis of whether Medicaid recipients were being denied access to skilled nursing facilities in Wake County. There are under-utilized skilled nursing facilities in Wake County that have available Medicaid beds.

13. Agency witnesses testified that if a hospital-affiliated applicant had applied in the review, the Agency would have calculated the county average differently. The Agency further admitted that if a hospital-affiliated facility had applied, The Heritage would have been conforming with Criterion 13(c). It is arbitrary and unreasonable to determine if an application conforms with a statutory review criterion based upon whether or not a hospital-affiliated entity has applied.

14. The CON Section's decision to exclude hospital-affiliated nursing facilities also is contradicted by prior Wake County nursing facility decisions. In applying Criterion 13(c) to the review of an application submitted by Britthaven in 2010, the Agency accepted a calculation of the Medicaid county average, which included hospital-affiliated nursing homes. (Joint Ex. 1). In reviewing an application by Universal Health Care, the CON Section also accepted a calculation of Medicaid county average that included hospital-affiliated nursing facilities. (Joint Ex. 207).

15. The CON Section does not publish in a rule or other written communication the way in which the county average will be calculated or that the county average will be used as a threshold for determining conformity with Criterion 13(c). Agency witnesses contend that a review of prior Agency findings provides notice to applicants of the way the Agency will apply Criterion 13(c).

16. However, there are numerous inconsistencies and contradictions in the Agency's findings. As Mr. Carter testified, the Agency findings on Criterion 13(c) and calculation of county average are varied. In the two prior nursing facility reviews in Wake County, the Agency calculated the county average including hospital-affiliated nursing facilities. (Joint Ex. 1; Joint Ex. 207). When asked if The Heritage could have relied on these decisions in calculating its county average, Assistant Chief Martha Frisone responded that it could have.

17. Applicants have no way of knowing how the Agency will calculate the county average. The Agency and Respondent-Intervenors contend that The Heritage could have asked Mr. McKillip at the pre-application conference. However, Mr. McKillip, the most senior analyst at the CON Section, did not know how he would compute the county average of Medicaid until after the review began.

18. Statutory Criterion 13(c) is worded the same, regardless of whether the review is competitive or noncompetitive and regardless of whether a non-hospital-affiliated nursing facility has applied. (N.C.G.S. § 131E-183(a)(13)(c)).

19. The Heritage's calculation of the county average service to Medicaid using data from licensure renewal applications was reasonable. The Agency has frequently relied upon licensure renewal data, even to calculate the county average of Medicaid under Criterion 13(c). (*See*, Agency Exs. 214, 215; Joint Ex. 1). Licensure renewal data is more recent than cost report data. (Joint Ex. 1).

20. In calculating the county average of Medicaid service, it was reasonable for The Heritage to include hospital-affiliated nursing facilities because hospital-affiliated facilities provide services to Medicaid recipients. The Heritage's projection of 55.4% Medicaid demonstrates conformity with the requirements of Criterion 13(c).

21. The only reason that The Heritage Application was found nonconforming with Criteria 1 (Policy GEN-3), 4, and 18(a) was the Agency's determination under Criterion 13(c) that The Heritage did not project sufficient Medicaid access. (Joint Ex. 1). Because The

Heritage projected sufficient Medicaid access and conforms with Criterion 13(c), The Heritage also conforms with Policy GEN-3 and statutory Criteria 1, 4, and 18(a).

22. Hillcrest projected that its service to Medicaid would be 49% of its projected patient days. (Joint Ex. 1; Joint Ex. 2). As a basis for its projection, Hillcrest presented testimony that it arrived at its projection by calculating the Wake County Medicaid average to include nursing facility beds in continuing care retirement communities (“CCRCs”). (Joint Ex. 1).

23. It was not reasonable for Hillcrest to include in its computation of the Medicaid county average nursing facility beds in CCRCs. Most CCRCs have developed their nursing facility beds under a policy that does not permit them to serve Medicaid. (Agency Ex. 818). Therefore, CCRCs, unlike non-hospital-affiliated and hospital-affiliated nursing facilities, are not open to the public. In its computation of its county average service to Medicaid, Hillcrest included three CCRCs that provide no service to Medicaid recipients. (Joint Ex. 4; Heritage App., Ex. 25).

24. Hillcrest projected that less than 50% of its services will be to Medicaid recipients. (Joint Ex. 1; Joint Ex. 2). A projection of service to Medicaid in Wake County of less than 50% is not projecting adequate access to Medicaid when the county average service to Medicaid in Wake County is above 50%. (Joint Ex. 4; Heritage App., Ex. 25; Joint Ex. 1).

25. Hillcrest does not intend to have all of its beds certified to be able to accept Medicaid and Medicare recipients. (Joint Ex. 2). This can result in an access problem for Medicaid and a lower percentage of service to Medicaid.

26. Hillcrest’s application fails to conform with Criterion 13(c). Because Hillcrest’s projection of Medicaid also is a factor in determining conformity with Criteria 1 (Policy GEN-3), 4, and 18(a), Hillcrest’s application also fails to conform with these criteria.

27. The Medicaid payor mix percentages for existing nursing facilities in Wake County using 2009 DMA data was available to all Applicants in this review. The data indicate that the majority of facilities offer 62 to 77 percent of total patient days for Medicaid recipients. The average Medicaid percentage for Wake County was approximately 61.8 percent.

Existing Wake County Facilities	Medicaid Days as a % of Total Days
Litchford Falls Healthcare & Rehab	77.4%
City of Oaks Health & Rehab Center (Tower Nursing)	76.0%
Capital Nursing and Rehab Center	73.7%
Raleigh Rehab & HealthCare Center	71.0%
Hillside Nursing Center	70.0%
The Laurels of Forest Glen	67.3%
Wellington Rehabilitation and Healthcare	65.6%
Cary Health & Rehab Center	64.9%
Guardian Care of Zebulon	63.6%

Universal Healthcare/North Raleigh	62.5%
Sunnybrook Healthcare & Rehab	42.3%
The Oaks of Carolina, LLC (UniHealth Post-Acute)	40.2%
Blue Ridge Health Care Center	38.5%
Mayview Convalescent Center	37.9%

(Joint Ex. 1, p. 1963)

Policy NH-8

1. To be conforming to Criterion 1, a CON applicant must demonstrate conformity with all applicable policies in the State Medical Facilities Plan (SMFP). (N.C.G.S. § 131E-183(a)(1)). Policy NH-8 is a policy in the SMFP that is applicable to nursing home projects. (Agency Ex. 818). Policy NH-8 requires that applicants proposing new nursing facilities pursue “innovative approaches in care practices, work place practices, and environmental design that address quality of care and quality of life needs of the residents.” (Agency Ex. 818).

2. In reviewing the competing applications, the CON Section found all sixteen applicants in the review were found conforming with all three innovations required under Policy NH-8. (Joint Ex. 1).

3. Daniel Carter offered the opinion on behalf of The Heritage that the Liberty Application and the Britthaven Application should have been found nonconforming to Policy NH-8 because each failed to propose an innovative environmental design. Mr. Carter further opined that the BellaRose Application was nonconforming to Policy NH-8 because it had failed to address innovative approaches in care practices and work place practices.

4. Mr. Carter’s opinion regarding environmental design was based on the testimony of Todd Kaestner, the Executive Vice President of Corporate Development for Brookdale Senior Living, The Heritage’s parent company. Mr. Kaestner is in charge of development of Brookdale facilities. In developing nursing homes for Brookdale, he assists with the concept as well as the location and the site plan, working closely with the architect in directing the design of the community. Mr. Kaestner identified several design elements in the Britthaven and Liberty proposals which he contended were not innovative.

5. Mr. Kaestner further testified that innovation is not a pass-fail standard and that he believes an innovative design must be new or cutting edge. He also testified that he believed innovation can only be judged by comparing the proposals.

6. Doug Suddreth was the only person other than Mr. Kaestner to be recognized by the Undersigned as an expert in facility design. Mr. Suddreth, expert witness for Britthaven and BellaRose, disagreed with Mr. Kaestner and testified that all of the applicants in the Review satisfied the environmental design prong of Policy NH-8. Mr. Suddreth is a Vice President of development for Autumn Corporation, a nursing care provider with 25 facilities in North Carolina and Virginia, and has expertise in nursing facility design similar to Mr. Kaestner’s expertise.

7. Whereas Mr. Kaestner was not familiar with Policy NH-8 or what the drafters of Policy NH-8 intended as a baseline for comparison in judging what constitutes an innovative design, Mr. Suddreth was personally involved with the development of Policy NH-8 in North Carolina.

8. Mr. Suddreth testified that the policy was intended to decentralize nursing functions in order to create a more homelike environment but to do so in a way that did not become cost-prohibitive and therefore inhibit access by Medicaid patients. Mr. Suddreth further testified that the Agency gives adequate regard to the importance of Policy NH-8 and that as a result, the new facilities being approved and built in the State since the adoption of Policy NH-8 are more residential in character with decentralized nursing facilities.

9. Although Mr. Kaestner identified several design aspects of the Britthaven proposal that he contended were not innovative, he also agreed that there were innovative design elements in Britthaven's proposal. Mr. Kaestner's fundamental complaint with the Britthaven design was that he did not believe it was as innovative as the Heritage design.

10. In comparing The Heritage, Britthaven, BellaRose and Liberty under Policy NH-8, there are differences in the area of innovative facility design that promotes the quality of care and quality of life needs of the residents. (Heritage Ex. 11). The proposed facility designs of Britthaven, BellaRose, and Liberty do not have the number of private rooms as the facility design proposed by The Heritage. Further, those applicants proposed approximately the same amount of space for a semi-private room as a private room. The Heritage proposed almost twice as much space for a semi-private room as a private room.

11. Both Mr. Carter and Ms. Frisone testified that the Agency cannot evaluate conformity by comparing the proposals of competing applicants. Conformity to Policy NH-8 is a pass/fail standard, and the mere fact that one applicant may propose something that is more innovative than another is not determinative.

12. Mr. Suddreth testified that Britthaven's proposed design with four distinct neighborhoods and other innovative elements promotes the purposes of Policy NH-8 by decentralizing services and creating a homelike environment where care can be effectively rendered, all while promoting consistent staffing and offering a very nice physical plant for its residents. He further testified that he has personally overseen three projects in the past two years that built the same design as Britthaven proposed in the Review, and that he has received very positive feedback from those who use the facilities.

13. In a CON Application, all of the information responsive to Policy NH-8 will not be found under the heading labeled Policy NH-8. Rather, the philosophies and approaches to be employed by the applicant will be contained within various sections of its application.

14. In this review, the Agency determined that the information furnished by BellaRose was adequate to demonstrate conformity with Policy NH-8. (McKillip, p. 317)

15. Policy GEN-4 requires, in pertinent part, that an applicant provide a written statement describing the project's plan to assure improved energy efficiency and water conservation. (Joint Ex. 1) Although not listed under a specific heading, BellaRose provided

narratives in its Application generally responsive to the requirements of Policy GEN-4. However, the Agency elected to find BellaRose conditionally conforming to Policy GEN-4 with a condition for BellaRose to provide additional information on its water conservation plan. BellaRose supplied the additional information requested by the Agency in this regard. Section 131E-186 was described by Ms. Frisone as the provision of the CON Law that provides the authority to the Agency to condition an applicant.

16. One of the focuses of Policy NH-8 is to encourage providers to develop less institutional nursing facility designs creating more residential-type settings. Historically, nursing facilities gravitated to functional designs with full centralized dining and bathing and wings of resident rooms extending from a single central area.

17. Policy NH-8 was developed to encourage more residential, home-like experiences for residents within the nursing facility. By encouraging the development of less centralized designs with neighborhoods, residents and families would be able to have recreation and dining and family visiting within an individual neighborhood.

18. One of the benefits of the neighborhood design concept is that it allows for consistency of staff assignments so that staff can regularly interact with and serve patients within an individual neighborhood, including those with Alzheimer's disease or dementia.

19. There are no rules that define facility designs so that one is more effective than the other. In prior reviews, the Agency has not undertaken to compare particular floor plans and facility designs.

20. No rules are in place to inform applicants with respect to comparisons between facility designs and practices as to which could be considered more effective. In prior reviews, the Agency has not undertaken to compare a particular care practice proposed by one applicant to a particular care practice described by another applicant. Similarly, the Agency has not attempted to draw comparisons between particular work place practices or reach conclusions as to which work place practices are more effective.

21. Based on the entirety of the testimony and exhibits regarding the requirements of Policy NH-8 and what each of the applicants involved in this case furnished in their respective Application, the Agency properly found that all parties demonstrated conformity and addressed all three parts of Policy NH-8.

Criteria 3, 4, and 6

1. The Heritage's expert witness, Daniel Carter, testified that Britthaven should have been found nonconforming with N.C. Gen. Stat. § 131E-183(a)(3), (4) and (6) ("Criterion 3," "Criterion 4," and "Criterion 6" respectively) because of the utilization rate at the Tower Nursing and Rehabilitation facility in Wake County ("Tower"). Mr. Carter suggested that, instead of proposing a new facility, Britthaven should have improved utilization at its existing facility. In addition, low utilization at Tower was raised as a criticism of the Britthaven application in competitive comments during the CON review. (*See, e.g.*, Joint Ex. 1).

2. Criterion 3 requires an applicant to “identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed” (N.C. Gen. Stat. § 131E-183(a)(3)).

3. Criterion 4 requires that “[w]here alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed.” (N.C. Gen. Stat. § 131E-183(a)(4)).

4. Criterion 6 requires an applicant to “demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.” (N.C. Gen. Stat. § 131E-183(a)(6)).

5. Tower is an existing 180-bed nursing facility which is managed by Principle Long Term Care, Inc. (Joint Ex. 3).

6. According to data in the Petition for Adjusted Need Determination that resulted in a 240-bed need determination in the 2011 State Medical Facilities Plan, Tower was operating at 74% utilization, which was below average for Wake County nursing facilities at the time. (Joint Ex. 1). Tower’s utilization was relatively low partly because the building was outdated, very large, and operationally inefficient; and partly because it was in an area of the county with a surplus of nursing home beds. (Joint Ex. 1).

7. In 2010, after the Petition for Adjusted Need Determination, but before the CON Review at issue, Britthaven applied to relocate 90 of Tower’s 180 beds to a new facility to be constructed in Holly Springs, for which it was approved in April 2011. (*See* Joint Ex. 1).

8. Britthaven’s Certificate of Need to develop a 90-bed nursing home facility in Holly Springs was projected to be completed and operational by October 2012. (Joint Ex. 3). In October 2012, Britthaven had not yet acquired property on which to build the nursing home facility. Britthaven’s underutilized facility in Wake County and its Certificate of Need for a second nursing home facility that has not yet been developed were not considered by the Agency.

9. The Agency determined as part of its analysis in this review that Britthaven had already addressed any alleged underutilization at Tower via relocation of half of its beds to a separate building in Holly Springs.

10. The CON review at issue concerns 240 new nursing beds in Wake County, for which the need was identified in the 2011 SMFP. (Joint Ex. 1). Britthaven’s proposal to develop a new 120-bed facility in the Brier Creek area of Wake County was specifically in response to the identified need for new beds, and was not proposed as a means to improve utilization at Tower or as an alternative to its previously approved Holly Springs project. (*See* Joint Ex. 3). All 180 nursing beds at the Tower facility are existing nursing home beds, including the 90 beds to be located to a new facility in Holly Springs. (*See* Joint Ex. 1). Therefore, that project would not result in the addition of any new nursing beds, and would have no effect on total nursing home bed capacity in Wake County. Consequently, that project did not and would not address the identified need for 240 new nursing beds in Wake County.

11. The Agency has promulgated a rule setting forth performance standards to notify applicants how it will determine conformity with Criteria 3 and 6 in nursing home reviews. The performance standards for nursing home reviews are set forth in 10A NCAC 14C.1102. (See Joint Ex. 1). 10A NCAC 14C.1102(a), which applies where the applicant is proposing to add new beds to an existing facility, requires applicants to show that past utilization of that existing facility reached a certain level. However, Britthaven proposed no such project. Instead, Britthaven proposed a new 120-bed facility in the Review, and was therefore subject to 10A NCAC 14C.1102(b), which requires only prospective projections of the utilization of the proposed new facility and requires no consideration of the utilization of any existing facility.

12. Britthaven reasonably projected to reach the utilization levels required by the performance standards, and was therefore found conforming to Criterion 3. (Joint Ex. 1). Petitioners have not demonstrated why lower utilization of one existing facility that is encumbered by an outdated, inefficient building would prevent a new facility in a new, rapidly growing and underdeveloped area from reaching its target utilization.

13. With respect to Criterion 4 (most effective alternative for meeting the need for the proposed project), the Agency reviewed the alternatives identified and discussed by Britthaven to meet the need and found Britthaven conforming. (Joint Ex. 1). Further, improved utilization at Tower and/or completion of the relocation of existing beds to Holly Springs would not address the need for the proposed project, since it would not add any bed capacity and would thus do nothing to alleviate the identified need for 240 additional beds in Wake County.

14. With respect to Criterion 6 (no unnecessary duplication), the Agency noted that Britthaven's proposal was consistent with the identified need for 240 additional nursing beds in the county, that it had demonstrated the need for its proposal (based on the required performance standards), and that Britthaven was conforming. (Joint Ex. 1). One of Britthaven's expert witnesses, Max Mason, also testified that there was no unnecessary duplication since the proposed Brier Creek facility specifically addressed the identified need for new beds and would be located in an area of the county with a shortage of nursing home beds.

Criteria 5

1. N.C.G.S. §131E-183(a)(5) ("Criterion 5") states:

Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

2. In applying Criterion 5, the CON Section 3 reviews the financial and operational projections contained in the application, including cost, revenue and charges, to determine if the projections are reasonable and demonstrate that the proposed project will be financially feasible in its second year. (Joint Ex. 1).

3. In its application, The Heritage projected, based on its projected revenue and expenses, that the proposed facility would be profitable by the second year of the project. (Joint Ex. 1).

4. BellaRose submitted written comments to the Agency stating that it believed that The Heritage's Application overstated its revenue by double counting ancillary revenue and therefore was nonconforming with Criterion 5. (Joint Ex. 1). The Heritage provided the CON Section with a written response explaining why BellaRose's criticism was unfounded. (Joint Ex. 1). The Agency considered both BellaRose's written comment and The Heritage's written response during its review and found The Heritage's projections to be reasonable and conforming with Criterion 5.

5. BellaRose's expert witness, Jim Weigard, provided testimony that he believed The Heritage had double counted its ancillary revenue. Mr. Weigard opined that The Heritage's pro forma included a line item for ancillary revenue and that the Medicare revenue line item also included ancillary revenue. Mr. Weigard could only provide an estimate of the amount of money that he believed that The Heritage would lose in year 2 of operations.

6. Mr. Weigard's opinion that The Heritage's Medicare rate included all Medicare ancillary revenue was partially based on his belief that The Heritage's Medicare rate was comparable to BellaRose's proposed Medicare rate, which included ancillary revenue. Mr. Weigard also based his opinion on financial disclosure information relating to other facilities operated by The Heritage's parent company, Brookdale.

7. BellaRose's Medicare rate was modeled on the Medicare rate received by the Hillside Nursing Facility, which is located in Wake County. (Joint Ex. 7). BellaRose's projected Medicare rate adjusted the Hillside rate downward to reflect a Medicare rate cut that was set to go into effect after the applications were filed. BellaRose also factored in an additional eight percent (8%) reduction in its proposed Medicare Rate to provide a conservative estimate of its Medicare rate to the Agency. (Joint. Ex. 7).

8. In his analysis, Mr. Weigard failed to take into account that The Heritage had not made the significant downward adjustments assumed in the BellaRose Medicare rate. (Joint. Ex. 4).

9. Doug Suddreth, BellaRose's other expert witness, testified that there is a wide variation in Medicare rates charged by different providers and that variations can even occur between facilities under the same ownership.

10. No other expert witness testified that The Heritage had double counted ancillary revenue in its application. BellaRose's other expert witness, Doug Suddreth opined that he had no issue with the Agency's decision to find The Heritage conforming with Criterion 5.

11. The Heritage's cost and charges and revenue projections were reasonable and conformed with Criterion 5. (Agency File, Ex. 1).

12. Mr. Weigard also opined that The Heritage failed to conform with Criterion 5 because its proposed Medicare rate failed to take into account a Medicare rate cut that was set to go into effect after the submission of the application.

13. However, the CON Section specifically instructed applicants that they should use the current rates when making projections. (Heritage Ex. 15). Britthaven's other expert, Doug Suddreth, testified that he understood and did not disagree with The Heritage's decision to use the current rate in light of the Agency's guidance.

14. The Heritage's use of the current Medicare rate was reasonable and consistent with the Agency's instructions and cannot serve as a basis for finding its application nonconforming with Criterion 5.

Further Findings

1. When the approval of one Application requires the disapproval of other Applications, the review is considered to be competitive. In a competitive review, following an analysis of each application under the applicable criteria and rules, the Agency conducts a comparison of the Applications to determine which Applicant is the most effective. The Agency's comparative analysis is separate and independent from the assessment of whether each applicant is conforming with the statutory review criteria. The Agency considers a range of comparative factors, looking at all the factors together in order to draw a conclusion about which applicant is the most effective alternative overall. The comparative analysis process is not a mathematical exercise of tallying the number of factors upon which an applicant is found more effective to determine the applicant which is most effective overall.

2. The Agency, in its comparative analysis, considers all of the comparative factors and makes an assessment of how the applicants compare. The Agency also considers whether the applicants have demonstrated conformity with the review criteria. In reviews in which certain applicants are determined to be unapprovable, the applicants are nonetheless included within the Agency's comparative analysis. The fact that particular applicants were non-conforming with individual review criteria did not cause the Agency to overlook those applicants in the comparative analysis. Instead, all sixteen (16) applicants, regardless of determinations of conformity, were included in the comparative analysis.

3. The Agency conducted a comparative analysis of the competing applications in this review. (Joint Ex. 1) In this review, the Agency's comparative analysis used a number of factors that have been used by the Agency in prior reviews. The comparative factors used by the Agency in this review were: geographic distribution of beds, private rooms, access by underserved groups, private pay charges, operating costs, salaries, taxes and benefits, nursing hours per patient day and conformity to statutory review criteria. (Joint Ex. 1)

4. In this review, Policy NH-8 was not used as a separate comparative factor. Policy NH-8 was not used as a comparative factor in this review because all of the applications were found conforming with Policy NH-8.

5. When Policy NH-8 has been used as a comparative factor in prior reviews, it has been applied to point out which applicants were conforming or non-conforming to the Policy. Although the Agency may have referenced Policy NH-8 within the comparative analysis in prior reviews, no Agency findings were brought forth in which the Agency found one applicant more effective than another as to Policy NH-8 when all applicants were found conforming.

6. The Heritage and Hillcrest proposals were compared to all applicants in this review notwithstanding the Agency determinations with respect to non-conformities. In this review, Mr. McKillip considered what Hillcrest and The Heritage proposed with respect to all of the comparative factors addressed within the comparative analysis.

7. Both BellaRose and The Heritage addressed plans to provide a home-like setting and a less institutional environment. Although The Heritage proposed a three-story facility design with elevators, The Heritage described its project as proposing to create a home-like living space, with a less institutional design.

8. The Agency considers cost, charges, and Medicaid access as comparative factors in every CON review. Considering the weight or significance to be placed upon various factors within the review, the Agency considers the factor of Medicaid access to be a factor that will always be important in the selection of applicants for approval. Access to medically underserved groups including the Medicaid population is a matter of significant concern and is one of the reasons why North Carolina maintains a Certificate of Need program. Generally, an applicant proposing the higher Medicaid percentage is the more effective alternative with regard to the Medicaid access comparative factor.

9. The Agency determined that BellaRose, along with Britthaven and Liberty, projected the highest percentage of total patient days to be provided to Medicaid recipients, at 72 percent. Hillcrest proposed 49.1 percent of total patient days to be provided to Medicaid recipients. BellaRose, Britthaven, and Liberty were more effective alternatives than Hillcrest under the comparative factor Access by Underserved Groups. The Heritage proposed 55.4 percent of total patient days to be provided to Medicaid recipients. BellaRose, Britthaven, and Liberty were more effective alternatives The Heritage under the comparative factor Access by Underserved Groups.

10. The Hillcrest Application was properly found nonconforming to Criteria 1, 4, 13c, and 18a as a result of its low projected days of service to Medicaid recipients. As a result, the Hillcrest Application could not have been awarded a CON regardless of the relative effectiveness of the Hillcrest Application on the various comparative factors. In addition, all of the Agency witnesses testified that the Hillcrest application was comparatively less effective than the approved applications, and that even if the Agency had found the application fully conforming to the review criteria, it would not have approved Hillcrest.

11. Mike McKillip, Project Analyst at the Agency's CON Section, and Martha Frisone, Assistant Chief of the Agency's CON Section, both testified that, as between the Liberty Application and The Heritage Application, the Liberty Application was comparatively superior.

12. Kathy Platt, who was admitted as an expert in health care planning and submission of CON applications, and who testified on behalf of Liberty, opined that as between the Liberty Application and The Heritage Application, the Liberty Application was comparatively superior. (Joint Ex. 123).

13. Daniel Carter, who was admitted as an expert in CON review and analysis and health planning, and who testified on behalf of Hillcrest, testified that as between the Liberty Application and The Heritage Application, the Liberty Application was comparatively superior.

14. Doug Suddreth, who was admitted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and design and how care practices and work care practices flow from such design, and who testified on behalf of Britthaven and BellaRose, opined that as between the Liberty Application and The Heritage Application, the Liberty Application was comparatively superior.

15. The Liberty Application was a more effective alternative than The Heritage Application on nine (9) comparative factors. (Joint Ex. 1). The Heritage Application was a more effective alternative than the Liberty Application on three (3) comparative factors. (Joint Ex. 1). The Liberty Application and The Heritage Application could not be compared on the comparative factor involving Assistant Director of Nursing salaries, since The Heritage Application did not propose an Assistant Director of Nursing position. (Joint Ex. 1).

16. The Heritage Application should have been found conforming to Criteria 1, 4, 13c, and 18a, and should therefore have been found conforming to all applicable review criteria. However, all three Agency witnesses agreed that even if the Heritage Application were fully conforming, it was comparatively less effective on the comparative factors and would not have been approved in this Review.

17. The Heritage's expert witness, Daniel Carter, acknowledged that the Heritage Application was a less effective alternative than the other approvable applicants when evaluated on the factors on which the Agency compared the applications, and would have only been found comparatively more effective by weighing the factors differently than the Agency did and by relying on comparative factors that the Agency, in its discretion, did not use.

18. Mike McKillip, Project Analyst at the Agency's CON Section, and Martha Frisone, Assistant Chief of the Agency's CON Section, testified that the Liberty Application and the Britthaven Application were comparatively close.

19. The Liberty Application was a more effective alternative than Britthaven on seven (7) comparative factors. (Joint Ex. 1). The Britthaven Application was a more effective alternative than the Liberty application on five (5) comparative factors. (Joint Ex. 1). The Liberty Application and the Britthaven Application were tied on one (1) comparative factor, geographic distribution of beds. (Joint Ex. 1).

20. Not all comparative factors are given equal weight. Ms. Frisone testified that private pay charges, Medicaid access, and operating costs can easily be determining factors.

Britthaven was more effective with regard to both Medicaid access and operating costs (Joint Ex. 1). Mr. McKillip testified that salaries, taxes, and benefits generally carry less weight in the comparative analysis. The testimony reflects that the fact that one applicant may have more factors on which it is effective is not determinative.

21. Ms. Frisone stated that “if both Liberty and Britthaven were determined to be conforming on all statutory review criteria and there was [sic] only 120 beds left to award, that the applications based upon the comparative review . . . were basically too close to call as to who would have been the competitively superior or more effective alternative.” (Frisone T. Vol. 35 pp. 8187-88).

22. The need determination in the SMFP was for 240 beds. Britthaven asserts that in this case, the Agency could have approved both the Liberty Application for 120 beds and the Britthaven Application for 120 beds consistent with the determinative limit of 240 additional beds in Wake County, and disapproved all other applicants.

23. By challenging only Britthaven, Liberty offered no evidence to demonstrate how the Liberty Application would have fared in a comparative analysis including BellaRose and/or Universal, the two other applicants approved in the Agency’s decision.

24. There are multiple possible outcomes in which Liberty could be found comparatively superior to Britthaven without resulting in denial of Britthaven’s application, including: (1) Liberty and Britthaven (both of which proposed a 120-bed facility) were the two most effective applicants, in which case each would be approved for 120 beds (total of 240 beds). All other applicants would have been denied. (2) Liberty, Britthaven and BellaRose were considered equally effective, and all three are approved subject to the condition that they develop no more than 80 beds each (total of 240 beds). All other applicants would have been denied. (3) Liberty and Britthaven (both of whom filed multiple applications targeting different areas of the County) were considered the most effective applicants; the Agency approves the Britthaven Brier Creek application and the Liberty application proposing a facility in Garner (Project ID J-8723-11) or, alternatively, the Liberty North Raleigh application and the Britthaven application proposing a facility in Garner (Project ID J-8715-11). (*See* Joint Ex. 1).

25. Britthaven asserts that the evidence in the record does not establish that approval of the Liberty Application would necessitate or require disapproval of the Britthaven Application.

26. Britthaven further asserts that Liberty alleged that its application was comparatively superior to all other applicants, (Liberty Re-Filed Pet. for Contested Case Hearing) but at hearing failed to put on any evidence with respect to two applicants, BellaRose and Universal.

27. BellaRose intervened in and participated with all the rights of a party to this contested case and suffered no prejudice as a result of Liberty’s decision not to challenge the approval of the BellaRose application.

28. Liberty asserts that its decision not to challenge the approval of the BellaRose Application is not fatal to its challenge to the approval of the Britthaven Application. Liberty cites N.C. Gen. Stat. § 131E-188(a) which states that an affected party may initiate a contested case hearing “[a]fter a decision of the [Agency] to issue, deny or withdraw a [CON].” (emphasis added). Liberty further asserts that the statute then provides that in the event such a contested case hearing is initiated, “the [Agency] shall send notification of the petition to the proponent of each application that was reviewed with the application for a [CON] that is the subject of the petition.” N.C. Gen. Stat. § 131E-188(a).

29. Liberty further cites 10A N.C. Admin. Code 14C.0401(a) which states that the Agency “will not issue a [CON] to an applicant so long as any affected person has filed a petition for contested case challenging the decision to award a certificate to that applicant[.]”

30. N.C. Gen. Stat. § 131E-188 supports the finding that while multiple CON applications may have been approved in a review, a decision regarding the approval of just one of those applications may be challenged in a contested case hearing. Further 10A N.C. Admin. Code 14C.0401(a) supports and confirms that an affected person is entitled to challenge only a subset of approved CON applications.

31. Even though Liberty only filed a challenge to the approval of the Britthaven application, Liberty would be able to meet its burden of proving that it is entitled to receive a CON in this case if the preponderance of the evidence shows that: (a) the Liberty Application conformed to all statutory criteria; and (2) the Liberty Application was comparatively superior to the remaining applications (absent BellaRose) in this case that conformed to all statutory criteria.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. A court need not make findings as to every fact, which arises from the evidence, and need only find those facts that are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

3. To obtain a CON for a proposed project, a CON Application must satisfy all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a). If an Application fails to conform to any one of these criteria, then the Applicant is not entitled to a CON for the proposed project as a matter of law. *See Presbyterian-Orthopaedic Hospital v. N.C. Dept. of Human Resources*, 122 N.C. App. 529, 534-35, 470 S.E.2d 831, 834 (1996) (holding that “an application must comply with *all* review criteria” and that failure to comply with one review criteria supports entry of summary judgment against the applicant) (emphasis in original); *see also Bio-Medical Applications of North Carolina, Inc. v. N.C. Dep't of Human Res.*, 136 N.C. App. 103, 109, 523 S.E.2d 677, 681 (1999) (“[A]n application must be found consistent with the statutory criteria before a CON may be issued”)

4. In a competitive review, the Agency must first evaluate each Application on its own merits, and then perform a comparative review to determine which Applicant is the superior applicant, and should receive the CON. *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 464 (1995)

5. The Agency has statutory authority to approve an Applicant with conditions that ensure the project conforms to applicable review criteria. N.C. Gen. Stat. § 131E-186; 10A N.C.A.C. 13C .0201(a); *see also Dialysis Care of N.C., LLC v. N.C. Dep't of Health and Human Svs.*, 137 N.C. App. 638, 648-51, 529 S.E.2d 257, 263-64 (2000), *aff'd per curiam*, 353 N.C. 258, 538 S.E.2d 566 (2000) (affirming conditional approval of an Application regarding availability and commitment of portion of funding required for proposed project); *In re Humana Hosp. Corp. Inc. v. N.C. Dep't of Human Res.*, 81 N.C. App. 628, 632 345 S.E.2d 235, 237 (1986) (“the law does not require that applications for certificates of need be approved precisely as submitted or not at all, and it would be folly if it did so”).

6. The subject matter of this contested case is the Agency's decision to approve the BellaRose Application and the Britthaven Application and to disapprove the Applications of Liberty, Hillcrest and The Heritage. N.C. Gen. Stat. § 131E-188(a); *Presbyterian Hospital v. N.C. Dept. of Health and Human Services*, 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006); *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). The subject matter of this contested case is an Agency decision that, in part, properly approved BellaRose. That decision is not challenged by Liberty or Britthaven. As to the decision to approve BellaRose, only Hillcrest and The Heritage are Petitioners.

7. In CON contested cases, the ALJ is limited to considering that evidence that was presented or available to the Agency during the review period. *See, e.g., Dialysis Care of North Carolina, LLC v. N.C. Dep't of Health and Human Servs.*, 137 N.C. App. 638, 647-48, 529 S.E.2d 257, 262 (2000); *In re Wake Kidney Clinic*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 791 (1987) (“The hearing officer is properly limited to consideration of evidence which was before the Section when making its initial decision, but the hearing officer is not limited to that part of the evidence before it that the Section actually relied upon in making its decision.”)

8. Deference is owed to an Agency's interpretation of a law “so long as the Agency's interpretation is reasonable and based on permissible construction of the statute.” *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).

9. The weight of the Agency's interpretation in a particular case "will depend 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 a power to persuade, if lacking power to control." *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep't Health and Human Servs.*, 201 N.C. App. 70, 72, 685 S.E.2d 562, 565 (2009) (quoting *Total Renal Care of N.C., LLC v. N.C. Dep't of Health and Human Servs.*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005)).

10. Administrative agency decisions may be reversed as arbitrary and capricious upon a showing that they are "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment.'" *ACT-UP Triangle v. Comm'n for Health Services for the State of North Carolina*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997).

11. In a nursing home review, Criterion 1 requires each applicant to demonstrate conformity with Policy NH-8. *See* N.C. Gen. Stat. § 131E-183(a)(1); (Agency Ex. 818).

12. Policy NH-8 requires applicants proposing new facilities to demonstrate that they will pursue innovative approaches in care practices, work place practices, and environmental design that address quality of care and quality of life needs of the residents. (*See* Agency Ex. 818).

13. The Agency may not compare applications for purposes of determining conformity to the review criteria. *Britthaven, Inc. v. N.C. Dep't of Health & Human Servs.*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 461 (1995). Conformity is a pass-fail standard, and it is not material in evaluating conformity whether one applicant may have proposed a more innovative design than another.

14. As such, the Agency could not find BellaRose, Liberty and Britthaven nonconforming to Policy NH-8 (and therefore Criterion 1) based on a comparison of the relative merits of the BellaRose, Liberty and Britthaven proposed designs to the Heritage proposed design.

15. Each of the Applicants proposed design decentralizes nursing functions and promotes a more homelike environment, consistent with the purposes of Policy NH-8. The Agency therefore did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule, and when it found that all Applicants were properly conforming with Policy NH-8.

16. The Agency has adopted performance standards applicable to nursing home reviews to assist in the application of Criteria 3 and 6 to individual applications and reviews. 10A NCAC 14C.1102. The performance standards do not require any applicant who proposes a new nursing facility with new nursing beds to address past utilization for any nursing facility, nor do they require the projection of future utilization for any nursing facility other than the proposed new facility. 10A NCAC 14C.1102(a), (b).

17. Petitioners do not challenge the appropriateness of the performance standards, and indeed they cannot do so in these contested cases. *See* 10A NCAC 14C.0402 (stating that in an

appeal from a CON decision, “[t]he correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing”).

18. With respect to Criterion 3, the Agency properly found Britthaven conforming, in part based on Britthaven’s meeting the performance standard promulgated in 10A NCAC 14C.1102(b). Further, the Agency properly determined that neither the utilization level at Tower nor the status of the relocation of 90 beds to Holly Springs would have any effect on utilization of 120 new beds at a new building in the Brier Creek area. The Agency did not err in finding Britthaven conforming with Criterion 3.

19. With respect to Criterion 4, utilization of the existing Tower facility and the status of the relocation of 90 beds to Holly Springs are irrelevant. Criterion 4 requires an applicant to address alternative methods of meeting the needs of the proposed project, which in this case was for new nursing home beds in Wake County. Britthaven adequately addressed alternatives for meeting this need, and the Agency did not err in finding Britthaven conforming with Criterion 4.

20. With respect to Criterion 6, the Agency properly found Britthaven conforming, in part based on Britthaven’s meeting the performance standard promulgated in 10A NCAC 14C.1102(b). Further, the Agency properly determined that there was no unnecessary duplication of existing or approved health service capabilities or facilities because there was a need for 240 additional nursing beds in Wake County, and Britthaven proposed a facility in an area of Wake County with a shortage of nursing beds.

21. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule by finding Britthaven conforming with Criteria 3, 4 and 6.

22. Because the CON Section found that The Heritage’s Application conformed with Criterion 5, BellaRose has the burden of demonstrating that the Agency violated the standards of N.C.G.S. § 150B-23(a) when it found The Heritage conforming with Criterion 5. BellaRose did not meet its burden of showing by a preponderance of the evidence that The Heritage failed to conform with Criterion 5.

23. The Agency did not act erroneously or violate any of the other standards of N.C.G.S. § 150B-23 in determining that The Heritage’s Application conformed with Criterion 5.

24. The Agency erred and acted in contradiction of law by limiting the geographic scope of Criterion 20 to facilities located in the county where the proposed project was to be located in determining conformity with Criterion 20.

25. In considering the geographic scope of Criterion 20, the first step is to review the plain language of the statute to determine if it explicitly supports the Agency’s interpretation. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 274-75, 573 S.E.2d 118, 121 (2002).

26. Nothing in the plain language of Criterion 20 suggests that the General Assembly intended the Agency to limit its review of past quality of care provided by existing providers to facilities located in the county where the proposed facility would be located. Moreover, the

language of Criterion 20 does not support a reading of the statute that allows the Agency to ignore existing health service providers on the basis that the services are provided outside the county where the proposed project is to be located. Instead, the plain language of Criterion 20 very explicitly states, without qualification, that if the applicant is an existing provider of health service, that provider must demonstrate that it has provided quality of care in the past. N.C.G.S. § 131E-183(a)(20).

27. The Agency and Britthaven contend that since the service area for the need allocation is Wake County, Criterion 20 should be interpreted to limit quality of care review to Wake County. However, one bedrock principle of statutory construction is that the court must consider a statute as a whole and presume that the legislature understood its choice of words when drafting the statute. *Housing Auth. of Greensboro v. Farabee*, 284 N.C. 242, 245, 200 S.E.2d 12, 15 (1973); *see also N.C. Dept. of Revenue v. Hudson*, 196 N.C. App. 763, 768, 675 S.E.2d 709, 711 (2009) (if legislation includes particular language in one section but omits it in another, it is presumed the legislature acted intentionally).

28. Unlike Criterion 20, in enacting Criterion 13(a), the General Assembly limited the use of the comparison to be made by the Agency to the “applicant’s service area”. N.C.G.S. § 131-183(a)(13)(a). Similarly in Criterion 18, the applicant must only demonstrate the effects on competition in the proposed “service area”. N.C.G.S. § 131-183(a)(18). If the General Assembly had intended to limit the Agency’s consideration of quality to only the proposed “service area”, which in this case is Wake County, it would have included such language in Criterion 20 as it did in Criteria 13(a) and 18. *Farabee*, 284 N.C. at 245, 200 S.E.2d at 15; *N.C. Dept. of Revenue v. Hudson*, 196 N.C. App. at 768, 675 S.E.2d at 711.

29. In interpreting a statute, a court should also consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute. *O & M Industries v. Smith Engineering Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 349 (2006).

30. The General Assembly has unambiguously determined that the general welfare and protection of lives and health of the citizens of North Carolina require that proposed health services be reviewed and evaluated as to quality of care. N.C.G.S. § 131E-175(7). Criterion 20 further makes clear the General Assembly’s intent that an existing provider’s past quality of care should be considered. N.C.G.S. § 131E-183(a)(20). The CON Section’s interpretation of Criterion 20 impairs the purpose of the statute by restricting the Agency’s quality review to such a limited and arbitrary geographic area.

31. While traditionally the interpretation of a statute by an agency created to administer the statute is accorded some deference, “those interpretations are not binding, and the weight of such an interpretation in a particular case will depend 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.” *Total Renal Care Of North Carolina, LLC v. North Carolina Dept. of Health and Human Services, Div. of Facility Services, Certificate of Need Section*, 171 N.C. App. 734, 615 S.E.2d 81 (2005). The Agency’s interpretation of the geographic scope of Criterion 20 is not based on thorough consideration or valid reasoning.

32. The nursing facility application form requires applicants to provide state-wide quality of care information. N.C.G.S. § 131E-182(b) requires that applicants “be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. § 131E-183 and with duly adopted standards, plans and criteria.” By creating a policy that ignores and treats as irrelevant the state-wide quality of care information that has been requested in the application form, the Agency has erred and acted contrary to N.C.G.S. § 131E-182(b).

33. A state-wide review of all of the nursing facilities operated by an applicant is consistent with the importance that the General Assembly placed on awarding CONs to quality providers when it created the CON statute. (*See* N.C.G.S. § 131E-175(7); *see also* Agency Ex. 818, p. 2, CON Basis Principle No. 1).

34. The Agency’s policy of ignoring quality issues that exist outside the county under review is inconsistent with the importance that the General Assembly has placed on quality in the CON statute and is not in the best interest of future nursing home patients.

35. N.C.G.S. § 131E-182(b) and the CON Section’s Nursing Facility Application provides an additional justification for finding that the Agency was required to conduct a state-wide review of quality in this case.

36. N.C.G.S. § 131E-182(b) requires that the Agency only request information in its application form that is necessary to determine whether the proposed project is consistent with the review criteria.

37. The nursing facility application created by the CON Section specifically requires applicants to provide quality information for all facilities the applicant owns or operates in North Carolina and does not limit its request only to the county where the proposed project will be located. (Joint. Ex. 6).

38. Based on the language of N.C.G.S. § 131E-182(b), by requesting survey history for all facilities in the state, the Agency has determined that state-wide information is necessary to determine conformity with Criterion 20. It is unreasonable and contrary to N.C.G.S. § 131E-182(b) for the Agency to request information from applicants and ignore that information.

39. Based on the above, the Agency was required to consider quality information on a statewide basis. The Agency failed to meet this requirement by only considering quality information relating to Wake County facilities.

40. The Heritage and Hillcrest provided quality care in the past in their existing North Carolina facilities. They each established that their individual applications conformed to Criterion 20. It was error for the Agency to find that Criterion 20 (N.C. Gen. Stat. § 131E-183(20)), which requires that “[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past,” was inapplicable to them.

41. The plain language of the phrase “in the past” in N.C. Gen. Stat. § 131E-183(20) coupled with 10A N.C. Admin. Code 14C.0204’s prohibition against amending applications

leads the Undersigned to the conclusion that the relevant look-back period under Criterion 20 is the eighteen (18) months prior to the application date.

42. The Agency's creation of an application form that requires an applicant to disclose its history of providing quality care during the eighteen (18) months immediately preceding the submittal of the application mandates the conclusion that the appropriate Criterion 20 look-back period is the eighteen (18) months immediately preceding the submittal of the application, since N.C. Gen. Stat. § 131E-182(2) prohibits the Agency from creating an application form that requires the applicant to furnish anything more than that which is necessary to a determination of whether the application is consistent with the applicable standards, plans and criteria.

43. The Agency therefore acted erroneously and contrary to the law by creating a policy by which it ignores and treats as unnecessary information that is specifically requested in its application form. It is erroneous and in contradiction of the law for the Agency to implement review policies which serve to make irrelevant information specifically requested in the application form.

44. In regard to the Agency's review of quality information that arises after the application is filed but before the decision is made, it is well-settled law that the Agency is permitted to consider information not contained in the application, but nevertheless available to the Agency at the time it made its decision. *In re Wake Kidney Clinic, P.A*, 85 N.C.App. 639, 643355, S.E.2d 788, 791 (1987).

45. Criterion 20 and N.C.G.S. § 131E-182(b) do not restrict in any way the Agency's ability to consider information made available after the application is submitted but before the decision has been made. (Agency Ex. 11). The Agency's policy of reviewing quality information made available to it after the application is submitted but before the decision is made does not violate any of the standards of N.C.G.S. § 150B-23(b). It is reasonable and consistent with the requirements of the CON law for the Agency to consider also quality information for the time period between the filing of the application and the date the decision is issued.

46. Based on the above, the relevant time for the Agency's Criterion 20 review in this case should extend from eighteen months prior to the submission of the applications until the Agency issues its decision.

47. In order to fulfill its obligation of determining whether applications are consistent with statutory review criteria, the Agency must perform a meaningful analysis.

48. To perform a meaningful analysis of whether an application conforms to Criterion 20, the Agency must analyze and give due regard to the information available to it that is reasonably related to an applicant's history of providing quality care.

49. In this case, the Agency did not analyze or give due regard to the substantial information available to it that was reasonably related to the applicants' history of providing quality care. Specifically, the Agency did not analyze or give due regard to the public comments regarding the quality issues at Britthaven facilities or any of the other Applicants across the

State. Likewise the Agency did not analyze information available to it related to any of the Petitioners' histories of providing quality of care throughout the State.

50. By failing to analyze or give due regard to the substantial information available to the Agency that was reasonably related to the applicants' history of providing quality care, the Agency failed to perform a meaningful analysis of whether the applications conformed to Criterion 20.

51. By failing to perform a meaningful analysis of whether the applications conformed to Criterion 20, the Agency failed to fulfill its obligation of determining whether the applications were consistent with Criterion 20.

52. Since the Agency failed to fulfill its obligation of determining whether the applications were consistent with Criterion 20, the Agency substantially prejudiced Liberty's, The Heritage's, and Hillcrest's rights and (a) exceeded its authority or jurisdiction; (b) acted erroneously; (c) failed to use proper procedure; (d) acted arbitrarily and capriciously; and (e) failed to act as required by law or rule.

53. Given the vast disparity between providers in the size of their operations and numbers of facilities, a statewide "zero-tolerance" policy – in which a single substandard quality of care citation would result in nonconformity – would set a much higher bar for larger providers such as Britthaven and Liberty than it would for a provider like Hillcrest or The Heritage. Such an approach would set the bar for conformity unreasonably high, significantly reduce the pool of approvable applicants, and prevent good providers from serving the State.

54. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule by not applying either of Heritage's and Hillcrest's proposed "zero tolerance" standards under Criterion 20, under which an applicant would be found nonconforming if any facility owned, operated or managed by the applicant or a related entity received a "substandard quality of care" and/or an "immediate jeopardy" citation anywhere in North Carolina.

55. The plain language of Criterion 20 does not require any such zero-tolerance standard, and nothing in the text or legislative findings of the CON Act, or any other statute suggests that the General Assembly intended for the Agency's inquiry under Criterion 20 to function in such a manner. Further, no rule requires the interpretation advocated by The Heritage and Hillcrest.

56. Since a statewide "zero-tolerance" interpretation is unreasonable, inequitable, inconsistent with Agency practice, and would not effectively achieve the purposes of the CON Act, the agency acted properly and within its discretion in not adopting such interpretation.

57. Liberty identified and addressed the issues of substandard quality of care at its facilities and took steps to prevent similar problems in the future. The events constituting substandard quality of care at Liberty facilities were isolated and unrelated.

58. Since the two Forsyth County facilities acquired by Liberty did not experience any quality-related events after Liberty's acquisition of the facilities, they are not relevant to the

Criterion 20 analysis in this case and Liberty's inadvertent exclusion of them from Table 6 was harmless error. Since Liberty's Johnston County facility did not experience any quality-related events in the eighteen (18) months prior to the filing of the Liberty Application, it is not relevant to the Criterion 20 analysis in this case and Liberty's inadvertent exclusion of it from Table 6 was harmless error.

59. Liberty's erroneous statement that it was awaiting an Informal Dispute resolution for the appeal from the findings of the survey at Liberty's Rowan County facility was inadvertent and harmless error because Liberty fully disclosed in the Liberty Application the circumstances surrounding the survey.

60. Liberty met its burden at the hearing of establishing that it had provided quality care in the past in its existing North Carolina facilities. Liberty met its burden of establishing that the Liberty Application conformed to Criterion 20. Because Liberty's Application was conforming to Criterion 20, it was also conforming to Criteria 1, 4 and 18a.

61. By finding the Liberty Application nonconforming to Criteria 1, 4, 18a and 20, the Agency substantially prejudiced Liberty's rights and (a) exceeded its authority or jurisdiction; (b) acted erroneously; (c) failed to use proper procedure; (d) acted arbitrarily and capriciously; and (e) failed to act as required by law or rule.

62. Britthaven had an obligation under the CON law and Agency regulations, as well as a responsibility to the citizens of this State, to fully, completely and truthfully fill out Table 6 of the CON application form. Britthaven's intentional failure to fully, completely and truthfully fill out Table 6 of the CON application form was misleading and contrary to its legal requirements.

63. Even if the Agency's traditional Criterion 20 analysis was limited to the county at issue in the review, Britthaven was not excused of its obligation to fully, completely and truthfully fill out Table 6 of the CON application form.

64. By failing to fully, completely and truthfully fill out Table 6 of the CON application form, Britthaven failed to meet its burden of proving that it provided quality care in the past under Criterion 20.

65. The Agency must conduct an assessment of all relevant information in support of and indeed in opposition to an application. To do so the Agency must be able to rely on all information requested within the application. Britthaven's intentional omissions regarding quality of care prevents the Agency from conducting that independent evaluation that it must to assure itself and indeed the public of a fair and honest judgment on the issue. The failure to provide that information necessarily prevents the required evaluation and necessarily makes the Agency's decision regarding Britthaven's past quality of care arbitrary and capricious.

66. Britthaven's failure to meet its requirement of proving that it provided quality care in the past under Criterion 20 renders the Britthaven Application nonconforming and therefore unapprovable.

67. By finding the Britthaven Application conforming to Criterion 20, the Agency substantially prejudiced Liberty's, The Heritage's, and Hillcrest's rights and (a) exceeded its authority or jurisdiction; (b) acted erroneously; (c) failed to use proper procedure; (d) acted arbitrarily and capriciously; and (e) failed to act as required by law or rule.

68. Testimony by Agency witnesses that the Agency's computation of the county average service to Medicaid for purposes of determining conformity of Criterion 13(c) may depend upon whether a hospital-affiliated nursing facility applies is contrary to the requirement that applications must be reviewed individually against each of the statutory and regulatory review criterion as set forth in *Britthaven*.

69. Applying the requirements of Criterion 13(c) in a different manner, depending upon whether or not a hospital-affiliated applicant is involved, is arbitrary and capricious and contrary to the plain language of Criterion 13(c).

70. The Agency acted erroneously, failed to act as required by law and acted arbitrarily and capriciously in determining that The Heritage Application failed to conform with Criterion 13(c). N.C.G.S. § 131E-183(a)(13)(c). In applying this criterion to The Heritage Application, the CON Section acted erroneously and arbitrarily in excluding nursing facility beds in hospital-affiliated nursing facilities to calculate the county average and using that average to find The Heritage nonconforming with the criterion. The Heritage's calculation of service to Medicaid at 55.4% conforms with Criterion 13(c).

71. The only reason that The Heritage Application was found nonconforming with Criteria 1 (Policy GEN-3), 4, and 18(a) was the Agency's determination under Criterion 13(c) that The Heritage did not project sufficient Medicaid access. (Joint Ex. 1). Because The Heritage projected sufficient Medicaid access and conforms with Criterion 13(c), The Heritage also conforms with Policy GEN-3 and statutory Criteria 1, 4, and 18(a).

72. Hillcrest, projecting that its service to Medicaid will be less than 50%, did not demonstrate that it would provide adequate access to the medically underserved Medicaid population of Wake County. The CON Section did not err in determining that the Hillcrest Application failed to conform with Criterion 13(c). N.C.G.S. § 131E-183(a)(13)(c). Because the Hillcrest Application was properly found nonconforming to Criteria 1, 4, 13(c), and 18(a), the Agency did not err in failing to award Hillcrest a CON.

73. In a Certificate of Need review involving more than one applicant, each applicant must be reviewed individually against each of the applicable statutory and regulatory review criterion before a comparative review is conducted. *Britthaven v. NC DHHS*, 118 N.C. App. 379, 385, 456 S.E.2d 455, 460 (1993).

74. The particular factors used to compare applications in any given review are within the Agency's discretion. *Craven Reg'l Med. Aut. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006) ("There is no statute or rule which requires the Agency to utilize certain comparative factors.") *see also Total Renal Care of N.C. v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005) (affirming

Agency's use of a comparative factor because it was within the established criteria and not inconsistent with the legislative findings in the CON law).

75. The comparative factors chosen by the Agency, in its discretion, were appropriate, consistent with Agency practice, and were consistent with the language and the legislative findings of the CON law. The Agency was not required to use any additional factors, and the Agency did not err in electing not to use such factors in this Review.

76. Based on the Findings of Fact above, particularly the testimony of experts, the Liberty Application was a more effective alternative than The Heritage Application on more comparative factors, and therefore as between the Liberty Application and The Heritage Application, the Liberty Application was comparatively superior. Though The Heritage was conforming with Criteria 13(c), the stark comparison of service to Medicaid (demonstrating adequate access to the medically underserved) between it and Liberty is a determining factor in the comparatively superior finding for the Liberty Application.

77. Based on the Findings of Fact above, particularly the testimony of experts, the Britthaven Application was a more effective alternative than The Heritage Application therefore as between the Britthaven Application and The Heritage Application, the Britthaven Application was comparatively superior. Though The Heritage was conforming with Criteria 13(c), the stark comparison of service to Medicaid (demonstrating adequate access to the medically underserved) between it and Britthaven is a determining factor in the comparatively superior finding for the Britthaven Application.

78. Based on the Findings of Fact above, particularly the testimony of experts, the BellaRose Application was a more effective alternative than The Heritage Application therefore as between the BellaRose Application and The Heritage Application, the BellaRose Application was comparatively superior. Though The Heritage was conforming with Criteria 13(c), the stark comparison of service to Medicaid (demonstrating adequate access to the medically underserved) between it and BellaRose is a determining factor in the comparatively superior finding for the BellaRose Application.

79. Because the Heritage Application was conforming with all applicable review criteria, it was an approvable application in the Review. However, applying the factors used by the Agency, the Heritage Application is not one of the three most effective applications in the Review. As a result, the Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in denying the Heritage Application.

80. Although the Agency approved three applicants, Liberty appealed only the approval of Britthaven, alleging in its petition for contested case hearing that the approval of Britthaven, and no other applicant, was error and substantially prejudiced Liberty's rights. (Liberty Re-Filed Pet. for Contested Case Hearing pp. 4-5 stating that the petition "specifically challenges the CON Section's decision to approve the Britthaven-Brier Creek Application and to deny the Liberty-North Raleigh Application" and that "Liberty-North Raleigh is not appealing or

otherwise challenging the CON Section’s decisions to conditionally approve the BellaRose and Universal Applications”).

81. Liberty failed to put on evidence to show how Liberty would have fared in the comparative analysis if it were compared against all approvable applicants. Liberty put on testimony comparing Liberty against Britthaven, but omitted any comparison with the other approved applicants, BellaRose and Universal.

82. Since the Agency does not rank applicants as part of the comparative analysis, comparing Liberty against Britthaven does not indicate how either of them would compare with any other approvable applicant. Therefore, even if Liberty’s application were comparatively superior to Britthaven’s, Britthaven could still be approved if it were one of the most effective applications in the Review.

83. The evidence presented shows that a comparison between Britthaven and Liberty was and is extremely close and that Liberty, as the party with the burden of proof, did not show that it was comparatively superior to Britthaven. Unless Liberty proves that Britthaven would not have been approved, the Undersigned cannot reverse the award of a CON to Britthaven.

84. Britthaven had an obligation to fully fill out Table 6 of the CON application form. By failing to make a serious effort in completely and truthfully filling out Table 6 of the CON application form (and in fact intentionally omitting information partly under the belief the Agency would not review information outside of Wake County), Britthaven prevented the Agency from evaluating its care to patients; and as such, Britthaven failed to meet its burden of proving that it provided quality care in the past under Criterion 20. Britthaven’s failures in this renders the Britthaven Application nonconforming and therefore unapprovable.

85. On multiple occasions witnesses in this hearing and counsel in argument invited the Undersigned to find another way or ways of evaluating Criteria 20. That is not the role of the Office of Administrative Hearings (OAH) or the purposes of a contested case hearing, and thus the Undersigned declines to offer specific methods for the Agency. That is the role of rulemaking and this hearing brings forth the importance of rulemaking in offering fair and consistent evaluations in these type of Certificate of Need cases. Indeed, the manner in which the Agency determines to define a county Medicaid average for purposes of applying Criterion 13(c) was also an issue in these cases and one in which no rules were in place.

86. Like most jurisdictions, North Carolina and indeed the OAH must look to protect the integrity of its APA procedures, by not permitting “an agency to rely on its unexpressed intentions to trump the ordinary import of its regulatory language.” *Safe Air for Everyone v. U.S. E.P.A.*, 475 F.3d 1096 (9th Circuit, 2007). The Court in *Safe Air* goes on to state:

. Courts' reliance on the “plain meaning” rule in this setting [of interpreting regulations] is not a product of some fetishistic attraction to legal “formalism.” In order to infuse a measure of public accountability into administrative practices, the APA mandates that agencies provide interested parties notice and an opportunity for comment before promulgating rules of general applicability.

This right to participate in the rulemaking process can be meaningfully exercised, however, only if the public can understand proposed rules as meaning what they appear to say. Moreover, if permitted to adopt unforeseen interpretations, agencies could constructively amend their regulations while evading their duty to engage in notice and comment procedures.

Safe Air for Everyone v. U.S. E.P.A., 475 F.3d 1096, 1106 (9th Circuit, 2007)

87. Regardless of long standing interpretations of relevant statutes or administrative rules, where the reasons for some are lost in time and the ramifications of following them are contrary to the language of the applicable statutes, stakeholders must look to restore the true purposes behind those statutes. The promulgation of rules that are truly called for in these cases in certain areas would not only allow the Agency to logically set forth consistent standards but would allow the interested private parties the opportunity to comment on and assist in formulating those eventual methods by which the Agency knows, and all parties understand, future requirements that they face in applying for a Certificate of Need.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned enters the following Final Decision pursuant to N.C. Gen. Stat. § 150B-34 and N.C. Gen. Stat. § 131E-188, based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based on those conclusions and the facts in these consolidated cases, the Undersigned holds that the Petitioners, The Heritage and Hillcrest failed to carry their burden of proof by a greater weight of the evidence that each of their denial of a Certificate of Need was in error.

The Agency did not err when it approved the application filed by BellaRose to develop a 100-bed nursing facility in Wake County; and determined that a written statement describing the project's plans to assure water conservation deficiency could be conditioned. The Agency finding that BellaRose was approved subject to the condition that it submit documentation that meets the requirements of Policy GEN-4 was proper, within the Agency's authority, and in accordance with appropriate law.

Based on the evidence and Conclusions of Law in these consolidated cases, the Undersigned holds that the Petitioner, Liberty did carry their burden of proof by a greater weight of the evidence that their denial of a Certificate of Need was in error. In denying the Liberty

Application in Project I.D. No. J-8727-11, the Respondent substantially prejudiced Liberty's rights and acted erroneously, acted arbitrarily or capriciously and failed to act as required by rule or law. In approving the Britthaven Application for a Certificate of Need, the Respondent substantially prejudiced Liberty's rights and acted erroneously, acted arbitrarily or capriciously and failed to act as required by rule or law.

Reversal of the decision by the Respondent to award a Certificate of Need to Britthaven, and award a Certificate of Need to Liberty is proper and correct as set forth in the Findings of Fact and Conclusions of Law above.

NOTICE

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 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."

Pursuant to 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 N.C.A.C. 03.012 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 as indicated by the date on the Certificate of Service attached to this Final Decision.

IT IS SO ORDERED.

This is the 20th day of June, 2013.

Augustus B. Elkins II
Administrative Law Judge