

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
ON REMAND

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,)

12 DHR 08691

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.)

HILLCREST CONVALESCENT CENTER, INC.,)

Petitioner,)

v.)

N.C. DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, DIVISION OF HEALTH SERVICE)

REGULATION, CERTIFICATE OF NEED)
SECTION,)

Respondent,)

12 DHR 08666

and)

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,)

12 DHR 08669

Respondent,)

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,)
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Respondent-Intervenors)

FINAL DECISION ON REMAND

THIS MATTER comes forward as a result of the Order of the North Carolina Court of Appeals, where that Court found on remand that the Undersigned must make findings of fact and conclusions of law to support a determination as to whether 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”) and Britthaven, Inc. and Spruce LTC Group, LLC (collectively, “Britthaven”) adequately demonstrated that they conformed to Criterion 20 by providing quality care in the past.

INTRODUCTION

Pursuant to N.C. Gen. Stat. § 131E-188(a) and N.C. Gen. Stat. § 150B-22 et seq., a contested case hearing was held in this matter on October 1-5, 8-12, 15-17 and 19, 2012, November 27-30, 2012, December 3-7, 10-14, and 17-18, 2012, January 7-11, 2013 and March 15, 2013 before Administrative Law Judge Augustus B. Elkins II.

On June 20, 2013, the Undersigned issued a Final Decision in consolidated case numbers 12 DHR 08691, 12 DHR 0866, and 12 DHR 08669. The Final Decision awarded a Certificate of Need (“CON”) to Petitioners and Respondent-Intervenors Liberty, and denied the CON applications of Respondent-Intervenors Britthaven, and Petitioner and Respondent-Intervenor AH North Carolina Owner LLC d/b/a The Heritage of Raleigh (“The Heritage”).

The N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section (the “Agency”), Britthaven, and The Heritage appealed the Final Decision to the North Carolina Court of Appeals. Liberty did not appeal the Final Decision, but was automatically joined as a necessary party to the appeal.

On April 7, 2015, in a decision entitled, *AH North Carolina Owner, LLC d/b/a The Heritage of Raleigh v. N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section, et al.*, Case No. COA13-1126 (“Court of Appeals Decision”), the North Carolina Court of Appeals vacated the Final Decision and remanded to the

undersigned Augustus B. Elkins II at the North Carolina Office of Administrative Hearings for further proceedings consistent with the Court of Appeals Decision.

In accordance with the Court of Appeals Decision, the Undersigned issued a Notice of Standards on Remand on March 3, 2016 (“Notice of Standards on Remand”), which contained the factors that will be used by the Undersigned in this case to examine the quality of care provided in the past by Liberty and Britthaven to determine conformity with Criterion 20.

APPEARANCES ON REMAND

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| Lee M. Whitman | For Petitioner and Respondent-Intervenor |
| Elizabeth Frock Runyon | Liberty |
| Wyrick Robbins Yates & Ponton LLP Raleigh, North Carolina | For Respondent Agency For Respondent-Intervenor Britthaven |
| June S. Ferrell North Carolina Department of Justice Raleigh, North Carolina | |
| Marcus C. Hewitt Elizabeth Sims Hedrick Smith Moore Leatherwood Raleigh, North Carolina | |

APPLICABLE LAW

The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-1 et seq.

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 Regulations, 10A N.C. Admin. Code 14C.0101-.0209, .0401-.0403, and .1100, and the Office of Administrative Hearings Regulations, 26 N.C. Admin. Code 03.0101.0131.

ISSUES

The issues for resolution on remand are:

1. To articulate the standard to be used by the Certificate of Need Section in analyzing and assessing conformity with Criterion 20 in this case;
2. Whether Liberty’s CON application, Project I.D. No. J-8727-11, is conforming with Criterion 20 based on the quality of care Liberty has provided at its facilities statewide within the eighteen (18) months preceding the submission of Liberty’s CON application through the date of the Agency’s decision; and

3. Whether Britthaven’s CON application, Project I.D. J-8713-11, is conforming with Criterion 20 based on the quality of care Britthaven has provided at its facilities statewide within the eighteen (18) months preceding the submission of Britthaven’s CON application through the date of the Agency’s decision.

RECORD OF THE CASE

At the hearing, the following testimony was received:

| <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 |

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| Vol. 15 - Nov. 27, 2012 | Daniel Carter | The Heritage |
| Vol. 16 - Nov. 28, 2012 | Daniel Carter | The Heritage |
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| 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 |

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| 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 |

The following exhibits were admitted into evidence:

Joint Exhibits

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| 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 |

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| 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) |
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| 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 |

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| 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 |
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| 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 |

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| 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 |
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| 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 |

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| 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 |
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| 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 |

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| 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 |

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| 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 |

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| 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 |

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| 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

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| 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 |

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| 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) |

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| The 37 | Heritage | Required State Agency Findings, 2006 Durham County Nursing Home Review |
| The 38 | Heritage | Settlement Agreement in 07 DHR 0764 |
| The 39 | Heritage | Required State Agency Findings, 2010 Johnston County Nursing Home Review |
| The 42 | Heritage | Required State Agency Findings, 2008 Union County Nursing Home Review |
| The 43 | Heritage | Required State Agency Findings, 2011 Iredell County Nursing Home Review |
| The 48 | Heritage | 07/27/2011 E-mails between Ray Baker and Max Mason (CONFIDENTIAL) |
| The 49 | Heritage | Declaratory Ruling for Project I.D. No. F-7911-07 |
| The 52 | Heritage | Hillside Nursing Center of Wake Forest 2011 license (with 2011 Renewal Application attached) |
| The 53 | Heritage | Everest Long Term Care 2011 license (with 2011 Renewal Application attached) |
| The 54 | Heritage | Liberty Nursing and Rehabilitation Center of Wake County 2011 license (with 2011 Renewal Application attached) |
| The 55 | Heritage | Hillside Nursing Center of Wake Forest 2012 license (with 2012 Renewal Application attached) |
| The 56 | Heritage | Everest Long Term Care 2012 license (with 2012 Renewal Application attached) |
| The 57 | Heritage | Liberty Nursing and Rehabilitation Center of Wake County 2012 license (with 2012 Renewal Application attached) |
| The 58 | Heritage | Britthaven of North Chase CON Application |

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| The Heritage 59 | Affidavit of Randy Uzzell |
| The Heritage 64A | Medicare.gov Nursing Home Profile, Roanoke River Nursing and Rehabilitation Center |
| The Heritage 64B | Medicare.gov Nursing Home Profile, Kerr Lake Nursing and Rehabilitation Center |
| The Heritage 64C | Medicare.gov Nursing Home Profile, Barbour Court Nursing and Rehabilitation Center |
| The Heritage 64D | Medicare.gov Nursing Home Profile, Premier Nursing and Rehabilitation Center |
| The Heritage 64G | Medicare.gov Nursing Home Profile, University Place 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) |

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| 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) |

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| The Heritage 86a | Excerpt from 11/29/2010 CMS Survey, Springwood Care Center of Forsyth |
| The Heritage 87a | 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

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| 502 | Floorplan of Hillcrest's proposed facility |
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FINDINGS OF FACT

1. All the parties are properly before the Office of Administrative Hearings (“OAH”), and the OAH has jurisdiction over the parties and the subject matter. All the parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties.

2. The Liberty entities are North Carolina limited liability companies. Affiliates of Liberty own and operate 19 nursing homes throughout North Carolina.

3. The Agency is the North Carolina state agency charged with implementing North Carolina’s CON law, codified at N.C. Gen. Stat. § 131E-175 et seq.

4. The Britthaven entities are a North Carolina corporation and a North Carolina limited liability company. Affiliates of Britthaven own and operate 43 nursing homes throughout North Carolina.

5. The 2011 North Carolina State Medical Facilities Plan (the “2011 SMFP”) identified a need for 240 additional nursing home beds in Wake County. Sixteen (16) certificate of need (“CON”) applications were filed with the Agency, proposing a total of 1,570 nursing home beds in Wake County. However, based upon the county need determination in the 2011 SMFP, the limit on the number of nursing home beds that could be approved by the Agency was 240.

6. The Agency issued its decisions on the applications on January 27, 2012 and issued its Required State Agency Findings on February 3, 2012. The Agency approved: (a) an application filed by Britthaven to develop a 120-bed nursing facility (the “Britthaven Application”); (b) an application filed by Respondent-Intervenors E.N.W., LLC and BellaRose Nursing Rehab Center Inc. (collectively, “BellaRose”) to develop a 100-bed nursing facility in Wake County (the “BellaRose Application”); 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.

7. Liberty filed a Petition for Contested Case Hearing pursuant to N.C. Gen. Stat. § 131E-188(a), N.C. Gen. Stat. § 150B-23(a) and 26 N.C. Admin. 3.0103(a) (the “Liberty Case”) to contest the Agency’s: (a) denial of an application filed by Liberty to develop a new 130-bed nursing facility with 120 new nursing facility beds and 10 nursing facility beds to be relocated from Liberty’s existing Wake County facility, Capital Nursing (the “Liberty Application”); and (b) approval of the Britthaven Application.

8. The Heritage filed a Petition for Contested Case Hearing pursuant to N.C. Gen. Stat. § 131E-188(a), N.C. Gen. Stat. § 150B-23(a) and 26 N.C. Admin. Code 3.0103(a) (the “Heritage Case”) to contest the Agency’s (a) denial of an application filed by The Heritage to develop a new 90-bed nursing facility (“The Heritage Application”); (b) approval of the Britthaven Application; and (c) approval of the BellaRose Application.

9. Hillcrest Convalescent Center, Inc. (“Hillcrest”) filed a Petition for Contested Case Hearing pursuant to N.C. Gen. Stat. § 131E-188(a), N.C. Gen. Stat. § 150B-23(a) and 26 N.C.

Admin. Code 3.0103(a) (the “Hillcrest Case”) to contest the Agency’s (a) denial of an application filed by Hillcrest to develop a new 120-bed nursing facility (the “Hillcrest Application”); (b) approval of the Britthaven Application; and (c) approval of the BellaRose Application.

10. As the prevailing applicants, Britthaven and BellaRose intervened in the Liberty Case, the Heritage Case, and the Hillcrest Case (the “Contested Cases”).

11. A contested case hearing was held in this matter on October 1-5, 8-12, 15-17 and 19, 2012, November 27-30, 2012, December 3-7, 10-14, and 17-18, 2012, January 7-11, 2013 and March 15, 2013 before Augustus B. Elkins II, Administrative Law Judge (“ALJ”).

12. On June 20, 2013, the Undersigned ALJ issued a Final Decision that: (a) upheld the Agency’s approval of the BellaRose Application; (b) upheld the Agency’s denials of the Heritage Application and the Hillcrest Application; (c) reversed the Agency’s decision to deny the Liberty Application; (d) reversed the Agency’s decision to approve the Britthaven Application; and (e) awarded a Certificate of Need to Liberty.

13. In the Final Decision, the Undersigned concluded that Criterion 20 requires the Agency to conduct an examination of the quality of care record of an applicant’s facilities statewide, not merely the county in which the proposed beds are to be located.

14. In addition, the Undersigned concluded that the appropriate look back period for assessing an applicant’s conformity with Criterion 20 is eighteen (18) months prior to the submission of the applicant’s CON application through the date that the Agency’s decision is issued.

15. The Agency, Britthaven, and The Heritage appealed the Final Decision to the North Carolina Court of Appeals. Neither Hillcrest nor BellaRose appealed the Final Decision.

16. On April 7, 2015, the North Carolina Court of Appeals vacated the Final Decision and remanded to the Office of Administrative Hearings for further proceedings consistent with the opinion issued by the Court of Appeals in case number COA13-1126.

17. With respect to The Heritage, the Court of Appeals reversed the original final decision, concluding that the Agency’s method of assessing conformity with Criterion 13(c) was reasonable, based on facts and inferences within the specialized knowledge of the Agency, and therefore entitled to deference. Accordingly, The Heritage’s application is nonconforming to Criterion 13(c), cannot be approved, and is not the subject of this Final Decision on Remand.

18. The Court of Appeals affirmed the Undersigned’s conclusions in the Final Decision that: (a) Criterion 20 requires the Agency to conduct an examination of the quality of care record of an applicant’s facilities statewide, not merely the facilities in the county in which the proposed beds are to be located, and as a result, the Agency erred in its application of a limited geographic scope; and (b) the appropriate look back period for assessing an applicant’s conformity with Criterion 20 is eighteen (18) months prior to the submission of the applicant’s CON application

through the date that the Agency's decision is issued, and as a result, the Agency erred in limiting the review period to only eighteen (18) months preceding the issuance of the decision.

19. The Court of Appeals remanded the case to the Office of Administrative Hearings in order for the Undersigned to set forth the "appropriate standard for assessing [] conformity [with Criterion 20]," and make a substantive determination as to whether Liberty and Britthaven each conformed with Criterion 20 under that standard based on their respective quality of care records in the past applying the principles of a statewide scope and the proper look back period. *See Court of Appeals Decision*, pp. 47, 49, 52. Specifically, the Court of Appeals directed the Undersigned on remand to "make findings of fact and conclusions of law to support [the Undersigned's] ultimate determination as to whether Liberty and Britthaven adequately demonstrated that they conformed to Criterion 20 by providing quality care in the past." *See Court of Appeals Decision*, p. 53.

20. 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 quality of care. (N.C. Gen. Stat. §131E-175). 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).

21. Upon instructions from the Court of Appeals that the ALJ articulate the standard for determining conformity with Criterion 20 on remand, the Undersigned determined in a March 3, 2016 Notice of Standards on Remand that:

[T]he following factors will be used in examining the quality of care provided in the past by Britthaven and Liberty in determining conformity to Criterion 20.

Quality of Care: Three components. No single indicator represents the overall quality of care in the past and review within the applicable time period and geographic area shall examine the evidence as it relates to the following.

1. **Structure** - Health providers and their facilities capacity to provide quality care including the following.
 - a. Oversight and involvement of central management staff to various facilities
 - b. Level, mix, education and training of staff at various facilities - patient to staff ratios, numbers and types of personnel on various shifts
 - c. Safety and appropriateness of the internal and external facility/environment for population served
 - d. Health and other inspections
 - e. Availability and use of updated health technology
 - f. Risk management and assessment structures including programs actively looking for problems and solutions
2. **Process measures** - Assess services provided or administered.
 - a. Quality of Plans of Care - what is being done, who is involved, administration of medications and use of technical expertise

- b. Use of restraints
 - c. Neglect, abuse, exploitation instances and actions to address
 - d. Deficiencies - scope and severity - current status of deficiency, correction. Deficiency citations
 - e. Penalties - dollar amounts, number of fines. - penalties other than fines
3. **Outcome of care** -Health status and conditions attributed to care provided. Desired states one would like to achieve for the resident not influenced by genetic, environment or other factors not related to care.
- a. Subjective - documented or published satisfaction with one's treatment and care, morale. Reputation for providing quality care in all areas or a specific area
 - b. Objective - documentation related to changes in functional and mental status of residents while in care of facility. Specialization in treating

22. This standard on remand developed by the Undersigned and applied to Britthaven and Liberty in this Final Decision on Remand is expressly limited to the facts of this particular case and is not intended to be applicable or binding on any future review of a nursing home CON application by the Agency.

23. As stated in the March 3, 2016 Notice of Standards on Remand, it remains the Undersigned's belief that development of rules by the North Carolina Department of Health and Human Services, with proper public hearing and comment, is the best course for future nursing home quality of care reviews and assessments and could best take into account, among other matters, statewide information sought and obtained from the Nursing Home Licensure and Certification Section which has not been sought in prior nursing home reviews.

24. In evaluating Liberty's structure, the Undersigned has considered Liberty's structure in terms of its capacity to provide quality care. Amy Fann, Vice President of Clinical Services for Liberty, testified that she works with a team of clinical consultants and goes into the Liberty facilities to conduct audits, and provide clinical and regulatory consultation. Ms. Fann personally oversees quality at 19 Liberty facilities across the state, and she is notified if there is an incident involving patient care at one of those facilities. In the event of such an incident, Ms. Fann and her team investigate the event and implement a corrective action plan.

25. Regardless of whether a survey is an annual survey or a complaint survey, Ms. Fann is personally involved in consultation with the Liberty facility being surveyed, including the nurse consultants, administrators, and director of nursing. If a survey results in a deficiency tag, Ms. Fann is personally involved in helping the facility develop a plan of correction. Based on Ms. Fann's role with Liberty and her involvement in addressing and monitoring quality issues at all Liberty facilities, Liberty presented evidence that it has a structure in place to provide quality care, particularly given the oversight and involvement of central management to all facilities.

26. Liberty implements staff training programs to provide ongoing safety and quality care. Liberty partners with Silverchair Learning Systems, which is an employee training program for senior living communities, to ensure that Liberty's staff members are continually and

consistently trained on the provision of quality care. Moreover, Liberty conducts in-service training of its employees in addition to providing staff training programs. The fact that Liberty uses various programs in its facilities to enhance patient safety and to provide consistent quality care evidences that the Liberty facilities have a structure in place for the safety and appropriateness of its facility or environment for its patient population. In addition, Liberty maintains a Long Term Care Quality Assurance Program in each of its facilities to monitor and evaluate resident care.

27. Liberty's 19 facilities use updated health technology to monitor the quality of the care and services that Liberty provides to its patients. Amy Fann, Vice President of Clinical Services for Liberty, testified that Liberty maintains an electronic health record system, which it uses along with internal metrics to monitor and track incidence prevalence rates. In addition, Ms. Fann evaluates external benchmarking data from Trend Tracker and quality measures published by CMS to monitor the quality of services provided to Liberty's patients.

28. In evaluating Liberty's process measures, the Undersigned has assessed services provided or administered by Liberty which includes quality of plans of care, including administration of medications and use of technical expertise; use of restraints; instances of neglect, abuse, or exploitation and actions to address each; deficiency citations, and penalties.

29. On Table 6 of the Liberty Application, Liberty identified seventeen existing Liberty-affiliated nursing homes in North Carolina. Joint Ex. 6. Several months prior to submitting its application in this case, Liberty acquired two 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-month period prior to the application date. Despite inadvertently failing to include the two Forsyth County facilities and the Johnston County facility on Table 6, Liberty did identify these three facilities in the Liberty Application as facilities owned, operated or managed by the Liberty entities.

30. 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. Liberty was also forthcoming about these events throughout the hearing through the testimony of its witnesses. Ms. Fann testified that she was able to provide the explanations given in the Liberty Application for each instance of substandard quality of care based on her own personal knowledge because she was involved in each of the surveys.

31. The first event of substandard quality of care occurred at Liberty's Capital Nursing facility in Wake County. An outside laboratory sent Capital Nursing a lab result containing the incorrect resident's name. A Capital Nursing employee caught the error, struck through the incorrect resident name, and handwrote the correct resident name. However, after a shift change, a different Capital Nursing employee used the incorrect resident name when discussing the lab result with a physician. As a result, the physician ordered a one-time dose of Dilantin to be given to the incorrect resident but this resident was already on a prescription for Dilantin. Nevertheless, the resident to whom the laboratory result actually belonged did not receive a dose of Dilantin, and

therefore the error affected two residents. The error did not result in any actual harm to either resident.

32. At an annual survey, the above isolated error was identified and assigned three different IJ level F-tags. Capital Nursing submitted a plan of correction which was accepted by the Licensure Section, paid the associated fine, and Capital Nursing was placed back in compliance. No similar type of error reoccurred at Capital Nursing or any other Liberty facility.

33. The Liberty Application stated that the survey finding associated with the error had been appealed and that Liberty was awaiting an Informal Dispute Resolution, yet this was an inadvertent misstatement, since an Informal Dispute Resolution had been issued by the time the application was filed. In making this misstatement, Liberty did not intend to mislead the CON Section as to the status of the appeal. Despite the IJ event referenced above, the Nursing Home Compare data contained in the Agency File showed that Liberty's Capital Nursing facility ranked highest of all applicants on quality measures. It received the highest rating of five out of five stars across nineteen different quality measures, despite the occurrence of this event that resulted in an IJ during the same period of time.

34. The second event occurred at Liberty's Rowan County facility and involved two separate patients. The first involved a resident who developed a bruise. Liberty contacted the physician about the bruise, but the physician took no action. When the resident developed another bruise a few days later, the facility's director of nursing contacted the physician in order to request that labs be completed. At that time, it was identified that the patient had elevated blood levels. To correct this problem and address the issue in the future, Liberty subsequently negotiated a contract with a different physician group that put in place a comprehensive standing order protocol for dealing with this type of issue.

35. The second involved a patient who had an order for a lab to be drawn on a specific date. The facility's nurse did not complete the form and the lab was not drawn. The missing lab was subsequently identified and Liberty immediately audited every single lab at the facility without identifying any other concerns. Liberty's Rowan County facility submitted a plan of correction which was accepted by the Licensure Section, paid the associated fine, and the facility was placed back in compliance. No similar type of error reoccurred at this or any other Liberty facility.

36. The third event occurred at Liberty's Mary Gran facility in Sampson County. A resident at the facility was identified as missing and facility staff immediately implemented policies and procedures for locating her. The resident was located within 45 minutes of her last being seen and was found outside. A plan of correction and investigation was implemented within minutes of her return. The resident did not encounter any harm as a result of her elopement and no similar type of errors or issues reoccurred at this or any other Liberty facility. Although the facility received an IJ citation, Liberty paid the associated fines and the facility was brought back into compliance.

37. The fourth event occurred at Liberty Commons Nursing and Rehabilitation Center ("Liberty Commons") in Johnston County. On July 30, 2011, a resident fell, sustained a head

injury, and was immediately sent to the emergency room for evaluation. The resident, who was not hospitalized, returned to Liberty Commons from the emergency room in an extremely sedated state as a result of narcotics she had received while in the emergency room. In the forty-eight hours immediately following the resident's return to Liberty Commons, the nurses who were responsible for caring for this resident documented over eleven assessments of her status during that time. These nurses reported that the resident was alert and verbal, but very groggy. The nurses, in their professional judgment, did not alert the Liberty Commons physician of the resident's grogginess during this forty-eight hour period because the patient had arrived in the same groggy state from the emergency room after having been evaluated by a physician, and they attributed the resident's grogginess to the pain medication she had received. On August 1, 2011, the resident began experiencing respiratory distress and was sent back to the emergency room for evaluation for unresponsiveness. The resident was thereafter admitted to the hospital for altered mental status. The resident died in the hospital on August 6, 2011.

38. The state surveyor, who completed the survey on September 30, 2011, disagreed with the nurses' assessment and felt that the grogginess should have been reported to the Liberty Commons physician. Liberty received an IJ citation for the assessment of the resident during the forty-eight hour period between when the resident returned from the emergency room on July 30 and was sent back to the emergency room on August 1. The IJ citation was unrelated to the resident's initial fall and nothing in the state survey clinically tied the IJ-related event at Liberty Commons to the resident's death. The survey itself described this incident as an isolated event. Ms. Fann clarified that the survey deficiency for the Johnston County facility was based on the staff's assessment of the resident's condition fall, not on the patient's fall itself or any subsequent need for the patient to visit the hospital emergency room. Liberty Commons paid the associated fine and developed and submitted a plan of correction.

39. The Liberty Application identified the "State and Federal Fines" requested in the application form. Joint Ex. 6. According to the Liberty Application, the following facilities had state or federal fines in the eighteen months preceding the submission of the application:

Mary Gran Nursing Center: \$72,930

Liberty Commons Nursing and Rehab of Rowan County: \$142,707

Three Rivers Health and Rehab Center: \$8,000

Liberty Commons Nursing and Rehab of Wake County: \$30,000

40. In addition, after the Liberty Application was filed, but before the Agency rendered its decision, Liberty incurred the following fine: Liberty Commons Nursing and Rehabilitation Johnston County: over \$222,000.

41. Unlike Britthaven, Liberty disclosed to the Agency in its application the total amount of the fines imposed.

42. Ms. Fann testified regarding the reason for the fine at the Mary Gran facility was based on the agency's view that the noncompliance was ongoing, and the agency would not consider the event as past non-compliance. As a result, the incident was considered to last from the time the resident was able to exit the facility until the date that survey was conducted and the plan of correction was accepted. Ms. Fann also testified regarding the reason for the fine for the

Liberty Commons of Rowan County facility, explaining that the survey agency would not consider this incident as one of past-noncompliance. Instead, the agency viewed the incident as an ongoing issue, from the date of the resident's first bruise until the survey was conducted and the plan of correction was accepted. The fine was assessed on a per day basis, and given the agency's interpretation of the incident as an ongoing issue, the fine was significantly higher than Liberty believed was appropriate. The fine for the Three Rivers facility was not based on any event constituting substandard quality of care. However, Liberty determined that based on the information requested in the application form, this information should be disclosed.

43. The incidents at Liberty's four facilities (Capital Nursing, Rowan County, Mary Gran and Liberty Commons) constituting immediate jeopardies each resulted from a single incident rather than a pattern of incidents. No similar type of incident recurred at either the four facilities themselves or any of Liberty's other facilities. The testimony of experts for The Heritage, Hillcrest, and Britthaven that Liberty should be found nonconforming under Criterion 20 for a single IJ in its Wake County facility (zero tolerance) is incongruent with the proper standard for applying Criterion 20 on a statewide basis as affirmed by the North Carolina Court of Appeals.

44. Kathy Platt, who was admitted as an expert in health care planning and submission of CON applications, and who testified on behalf of Liberty, testified that upon reviewing the quality information that Liberty provided in Part II, Sections 6(a) and 6(b) of the Liberty Application, Ms. Platt did not see a pattern of substandard quality of care in any Liberty facility. No Liberty facility statewide had more than one event. The Liberty facilities statewide did not have an issue of the same problem being repeated within its facilities. The Liberty facilities statewide did not have an issue of the same problem occurring across its facilities. There was no permanent patient harm nor deaths caused by any of the isolated events reported in the Liberty Application for all of Liberty's facilities in North Carolina. Based on the aforementioned factors, Liberty does not have any type of pattern of poor quality of care.

45. On the last day of trial, 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).

46. Based on: (1) the isolated nature of the error in administration of medication to a single patient, (2) the lack of any pattern or repeated incidents involving neglect or abuse of patients either within any of Liberty's facilities or across Liberty's facilities state-wide, (3) the level of the deficiency citations imposed, and (4) the basis for calculating penalties and fines

imposed based on the substandard quality of care events, Liberty demonstrated past quality of care in terms of its process measures and the services provided to patients.

47. In evaluating Liberty's outcomes of care, the Undersigned has considered the health status and conditions attributed to the care provided, including the desired states the applicant would like to achieve for the resident not influenced by genetic, environment, or other factors not related to care. The Liberty Application contains documentation of the subjective satisfaction family members of residents at Liberty facilities have experienced with the care and attention Liberty has provided to their loved ones. Joint Ex. 6. Specifically, Exhibit 25 to the Liberty Application contains letters of support from eleven individuals who expressed their satisfaction and urged the Agency to approve the Liberty Application. Letters from residents' family members state that great care is given to residents and that Liberty brings a wealth of knowledge and experience in operating nursing facilities.

48. The CMS Nursing Home Compare data included in the Agency File reflects information on Quality Measures which comes from "*data that the nursing homes regularly report on all residents. It includes aspects of residents' health, physical functioning, mental status and general well being.*" The Nursing Home Compare data included in the Agency File indicates that the Capital Nursing and Rehabilitation Center, which is a Liberty facility in Raleigh, received five out of five stars on Quality Measures. Joint Ex. 1. The facility proposed in the Liberty Application is also proposed to be located in Raleigh.

49. Liberty did not have a single facility throughout North Carolina that was designated as a Special Focus Facility during the relevant look-back period, meaning that no Liberty facility had: (a) more problems than other nursing homes; (b) more serious problems than most other nursing homes (including harm or injury experienced by residents); and (c) a pattern of serious problems that has persisted over a long period of time (as measured over the three years before the date the facility was first designated as a special focus facility). Joint Ex. 19.

50. Based on the subjective documentation of satisfaction with care that Liberty presented with its application, and the objective evidence demonstrating that Liberty did not have a pattern of substandard quality of care within or across any of its facilities during the relevant look-back period, Liberty demonstrated past quality of care in terms of its outcomes of care.

51. At the time it submitted its application, Britthaven owned, operated, or managed forty-three nursing homes in North Carolina. Britthaven was the largest provider in the State, with more than ten percent of all facilities in the State and several times more facilities than any other applicant in the review.

52. At the time of the Review, Britthaven had a Vice President of Nursing Services who oversaw a team of seven nursing consultants tasked with ensuring each facility's compliance with state and federal regulations as well as Britthaven policies and procedures. These nursing consultants work five to six days per week, including nights and weekends. They also conduct regular reviews of facilities' policies, procedures, and care protocols, observe nursing staff as they deliver care, conduct medication administration audits, interview residents, examine environmental issues, and look for safety issues to ensure quality care is provided in each facility.

53. Britthaven had written policies and procedures for all of its departments as well as a quality improvement manual. At the time of the Review, all forty-three Britthaven facilities had the same policies and procedures for quality protocols. Britthaven's quality improvement program is an essential part of the care delivered to its residents and designates action teams responsible for a number of areas of facility operations and resident experience, including things like quality of life, resident and family satisfaction, sound care, dietary services, resident care plans, advanced directives, resident positioning, psychoactive medications, event or incident monitoring, physical restraints, laboratory monitoring, quality indicators, and wandering residents. The program consists of specific tools and procedures for the action teams that facilitate cooperation and collaboration with facility administration and staff.

54. Britthaven uses numerous consultants who specialize in operations, administrative services, human resources, accounting, nursing services, medical records, activities, census management, dietary services, marketing and other areas. At the time of the Review, twenty-six of these consultants had been with Britthaven for ten or more years.

55. Britthaven's regular in-service training programs for management staff as well as staff at all levels and disciplines are carried out by corporate training staff and on-site staff development coordinators. Joint Ex. 3. All Britthaven staff members are trained during an orientation process and must complete a skills checklist demonstrating competency before they can provide direct care to residents. Staff also have annual mandatory trainings and must complete a skills checklist each year. Staff members' competency is assessed through regular audits, and spot training occurs if facility consultants observe a specific need. Staff is also trained regularly as part of Britthaven's quality assurance program. Britthaven's Alzheimer's Care Management Program staff are specially trained to understand aging, dementia, and behavior management techniques, to maximize residents' independence, and to implement care plans designed to each individual resident's needs.

56. Limited evidence was available to the Undersigned regarding Britthaven's historical staffing ratios. Nursing Home Compare data for a single Britthaven facility, Tower Nursing in Wake County, was included in the Agency File. Joint Ex. 1. The data shows that Tower Nursing received a staffing rating of three out of five stars. Tower Nursing's total number of licensed nursing hours per patient day and its licensed practical nurse (LPN) hours per patient day were better than state and national averages, and its registered nurse (RN) hours per patient day were equal to the state average. However, its certified nursing assistant (CNA) hours per patient day were slightly below state and national averages. Joint Ex. 1.

57. Britthaven has implemented "culture change" as promoted by The National Citizens Coalition for Nursing Home Reform to develop innovative facilities that ensure the provision of quality care. Environmental enhancements incorporated into Britthaven facilities include more private rooms, private bathrooms and showers in each room, "neighborhood" configuration of rooms, discrete nursing stations, smaller and more welcoming community spaces (including solariums) for families to gather for one-on-one engagement, cafes, game rooms, salons, chapels, dedicated rooms for nail care, spa rooms with therapeutic tubs, spacious rehab gyms, homelike furnishings, and incorporation of natural elements, including porches and courtyards. Joint Ex. 3.

58. Britthaven's designs incorporate environmental enhancements to foster biological and social diversities, helping to stave off boredom, helplessness, and loneliness that can result from extended nursing facility stays. Examples of such enhancements include the presence of children, pets, and gardening areas at facilities. Joint Ex. 3. Britthaven also utilizes a wander management system to ensure maximal building security and to prevent elopement. Joint Ex. 3.

59. Britthaven has implemented an electronic medical records system called PointClickCare to help improve quality of care. The system automatically alerts administrators and Directors of Nursing when certain incidents occur to ensure proper follow-up, physician notifications, and interventions are implemented. The system's functions include MDS assessment automation, care plan production, customized interdisciplinary assessments, computerized physician orders, medication administration records, and pharmacy care integration. Among other things, the system automatically identifies changes in patients' health status and prompts staff to respond. Joint Ex. 3.

60. The PointClickCare EMR system includes a full medication management, monitoring, and administration function that allows a user to report on medications used, manage medication and other orders, and create standing orders on admission. This record can be securely accessed by and integrated with the facility's pharmacy provider for real-time accuracy and dependability. The system also allows the facilities to reorder medications at the touch of a button and provides facilities with alerts and reminders for things like missed doses, missed signatures, and PRNs. Joint Ex. 3.

61. It is Britthaven's policy that all medication is provided under the supervision of a pharmacist to ensure accurate acquisition, receipt, and administration of all drugs and biologics for its residents. Britthaven has specific medication policies and procedures that address delivery of intravenous therapy and aerosolized medication for respiratory care. Joint Ex. 3. In addition, all Britthaven facilities have a pharmacy review committee. This committee ensures that residents receive medications as ordered by the attending physician, ensures that all medications are stored properly as dictated by pharmacy standards, and ensures that licensed staff are properly trained in the administration of medications and observations of the side effects of those medications. The committee reviews each resident's medications and the number of psychotropic medications being used in the facility. Britthaven conducts pharmaceutical care assessments monthly for each resident to ensure safe and effective drug therapy.

62. Britthaven facilities have chemical restraints committees that assess and monitor all residents using any psychotropic medication to ensure that the resident has a clear documented need for the medication and is actually benefiting from it. The committee reviews each resident's diagnoses, behavior, cognitive status, dosage, and documented need, and then makes recommendations to the attending physician regarding dosage reductions or possible changes in medication in an effort to ensure the resident's comfort and well-being while ensuring that the resident receives the lowest possible dosage of medication. Joint Ex. 3.

63. Britthaven's application detailed its use of a physical restraints committee to assess residents using physical restraints to ensure that restraints are only used when necessary for the safety or well-being of the residents and not for the convenience of the staff. The committee

reviews the following areas: (1) decrease in appetite, (2) the development of pressure sores, (3) decrease in social activity, (4) falls during the period, (5) decrease in ADL functioning, and (6) whether the restraint being used is the least restrictive. The committee then consults with each patient's attending physician regarding the committee's findings so that the physician can decide whether to order any recommended changes in the resident's physical restraint usage. Joint Ex. 3.

64. Britthaven has restraint policies tailored to special care services. For example, the rehabilitation program includes a restraint reduction program. Likewise, it is the policy of Britthaven's Alzheimer's units to minimize physical and pharmacological restraints through the provision of a safe and secure environment as endorsed by the national Alzheimer's Association in its Guidelines for Treating Alzheimer's Disease and Related Dementia in Assisted Living Facilities and Nursing Facilities. Joint Ex. 3.

65. On or around August 15, 2011, in accordance with the review schedule set forth in the 2011 SMFP, sixteen applications were filed to develop part of the 240 nursing facility beds allocated in the 2011 SMFP. Joint Ex. 1. The Agency's application form requires an applicant disclose its history of providing quality care during the eighteen (18) months immediately preceding the submittal of the application which in this matter would be approximately February 15, 2010.

66. Although Britthaven identified some 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, Britthaven facilities had experienced events constituting substandard quality of care during the eighteen months prior to the application date. (E.g., Joint Exs. 225, 226, 227, 229, 230, 232b, 234, 236, 240, 242, 243, 245).

67. Some nine Britthaven facilities were cited, during the lookback period, for substandard quality of care deficiencies. Britthaven Ex. 652; Heritage Ex. 97. These nine facilities represent 20.9% of Britthaven's 43 facilities.

68. In a July 27, 2010 survey, Britthaven of Chapel Hill facility received an IJ citation because the facility failed to ensure residents were free from abuse in that fourteen Alzheimer's residents in the facility received narcotics they were not prescribed. Six residents tested positive for morphine and required hospitalization and another resident ultimately died as a consequence of morphine toxicity. Joint Ex. 227. On August 10, 2010, Ms. Speroff specifically advised Britthaven of Chapel Hill that as a result of the surveys dated February 18, 2010, June 15 to June 17, 2010, June 29 to July 1, 2010, and July 27, 2010, the Licensure and Certification Section concluded that the most serious deficiency was one that comprised a pattern that constituted immediate jeopardy to resident health or safety. Joint Ex. 74.

69. Britthaven of Chapel Hill, was cited as a result of a survey that was conducted during the appropriate lookback period. However, the incident that led to the citation occurred outside the lookback period. Britthaven Ex. 652; Joint Ex. 226. Ms. Frisone testified that the application form, which she drafted, 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 18-month lookback period. Viewing incidents as the measure, eight Britthaven facilities, or 18.6%, had incidents of substandard quality of care during the appropriate lookback period.

70. From July 2009 through January 2012, Britthaven of Chapel Hill was designated a “Special Focus Facility,” which means that it had: (a) more problems than other nursing homes; (b) more serious problems than most other nursing homes; and (c) a pattern of serious problems that has persisted over a long period of time. Joint Ex. 19. The events referenced in the July 27, 2010 survey of this facility (Joint Ex. 227) occurred after Britthaven of Chapel Hill had already been designated as a special focus facility.

71. Evidence was presented to show that Britthaven of Chapel Hill was designated as a Special Focus Facility sometime around June 2009. Joint Ex. 19. Thus, the events that gave rise to the Special Focus Facility designation occurred before the submittal of the applications and outside the appropriate lookback period.

72. The Britthaven of Chapel Hill facility “graduated” from the Special Focus Facility Initiative during the appropriate lookback period. A facility must sustain “significant improvement” through two standard surveys before it can “graduate” (*see* Joint Ex. 19), which Ms. Speroff testified is very difficult to achieve.

73. In a September 2, 2010 survey, Britthaven’s Chowan River Nursing & Rehab facility (formerly known as Britthaven of Edenton) was issued an IJ citation because a facility nurse yelled at a resident and grabbed the resident’s arm, causing the resident to fall to the floor. Joint Ex. 229. In a July 28, 2011 survey, Britthaven’s same Chowan River Nursing & Rehab facility received an IJ citation within the relevant look-back period because it failed to prevent a cognitively impaired resident with wandering behavior from exiting the facility without supervision. Joint Ex. 230.

74. In a March 29, 2010 survey, Britthaven’s Greenhaven Health & Rehab Center facility (formerly known as Britthaven of Guilford) received an IJ citation because the facility failed to assess, monitor and provide follow-up service for a resident with urethral erosion. Joint Ex. 234. In an April 30, 2010 survey, Britthaven’s Greenhaven Health & Rehab Center facility received an IJ citation because the facility failed to initiate emergency treatment for a resident with a medication error when that resident was given ten times (10x) the ordered dose of morphine. Joint Ex. 232b. In a July 29, 2011 survey, Britthaven’s Greenhaven Health & Rehab Center facility was issued an IJ citation because a resident was thrown from her wheelchair while she was being transported in a Britthaven van and the driver made an abrupt stop. As a result of the accident the resident hit her head, fractured her hip, and received three (3) stitches in her right thumb. Joint Ex. 236.

75. In a July 19, 2011 survey, Britthaven’s Premier Nursing & Rehab facility received an IJ citation for failing to ensure that a resident was free from unnecessary medication by giving an excessive dose of Roxanol (50mg) rather than the ordered dose of Roxanol (5mg). Joint Ex. 240.

76. In a February 22, 2011 survey, Britthaven's Barbour Court Nursing & Rehab Center facility (formerly known as Britthaven of Smithfield) received an IJ citation because a resident did not receive proper treatment for a urinary tract infection. Joint Ex. 225.

77. In a February 25, 2011 survey, Britthaven's Riverpoint Crest facility (formerly known as Britthaven of New Bern) received an IJ because a bedridden resident had slid through a gap in the bed's side-rails. Joint Ex. 242.

78. In a June 10, 2010 survey, Britthaven's University Place Nursing & Rehab Center facility (formerly known as Britthaven of Charlotte) received an IJ because it failed to ensure that two residents were free of significant medication errors. The first resident was given two *milliliters* of morphine as opposed to her prescribed dose of two *milligrams*. The second resident was administered an incorrect dose of her prescribed medication on seven consecutive days from June 1-7, 2010. Joint Ex. 243. In a December 23, 2010 survey, Britthaven's University Place Nursing & Rehab Center facility received an IJ within the relevant look-back period because it failed to supervise a cognitively impaired resident at risk for wandering who exited the building unattended by staff. Joint Ex. 245.

79. In a November 30, 2011 survey, Britthaven's Cumberland Nursing and Rehabilitation Center received an IJ when a staff member shoved a resident, pulled the resident's hands and legs, and wiped the resident's bottom roughly causing the resident's catheter to come out which had to be reinserted by a second staff member. Joint Ex. 90

80. In a December 14, 2011 survey, Britthaven's Piney Grove received an IJ based on a resident's neglect after a fall on her way into bed, which fractured both of her legs. Although she was given Tylenol during the night, the resident was not sent to the hospital for evaluation until later the following afternoon. Heritage Ex. 92

81. The evidence presented at hearing demonstrates instances of services provided during the appropriate lookback period that resulted in survey deficiencies related to safeguards against patient abuse or neglect. Three involved conduct of individual employees, each of whom was terminated for his or her mistake or misconduct. Britthaven Exs. 229, 231, 232b. Another involved a facility that failed to follow up on an appointment for a catheter to be put in for a resident and a second resident whose catheter wasn't properly anchored. Joint Ex. 234. Another deficiency resulted from staff's failure to promptly evaluate and address a resident's complaints of pain. Joint Ex. 238. In each of the instances, Britthaven corrected the problems and returned to compliance. In two cases, the deficiencies were corrected before the surveys, and were cited "past noncompliance only." Joint Ex. 229, 238. Britthaven's evidence also detailed the steps taken in response to each substandard quality of care deficiency. Corrective measures included increased monitoring of all patients for signs of similar errors, creating new processes or staff positions to prevent similar errors, terminating staff who provided substandard quality of care, and implementing new or increased training.

82. In any given period, the total days of patient care provided varies by provider. For example, during 2011 Britthaven provided 1.77 million days of patient care in all of its 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.

83. Britthaven operated the most facilities of any provider in the State and provided far more days of care, amounting to approximately 3,488,941 total patient days of care during the appropriate lookback period. Britthaven Exs. 632-33. During the same time period, state surveyors determined that 297 days of care constituted substandard quality of care. Britthaven Ex. 652. Testimony that was allowed into evidence at hearing demonstrated that it is more common for Britthaven facilities to have deficiency-free surveys (no citations whatsoever) than surveys with substandard quality of care citations.

84. The evidence demonstrates that Britthaven was fined for deficiencies arising out of services provided in the appropriate lookback period at 12 Britthaven facilities (or 28% of its total facilities). No evidence was offered as to the total amounts of these fines. Joint Ex. 3.

85. During the appropriate lookback period, Britthaven's average statewide health inspections star rating was 2.64, the fourth highest of any applicant in the review. During the appropriate lookback period, Liberty's average statewide health inspections star rating was 2.47, the fifth highest of any applicant in the review. Joint Ex. 1

86. The Britthaven application included letters of support from ancillary service providers expressing support for Britthaven's proposal. Joint Ex. 3. These providers noted things like Britthaven's "strong rehab program," its historical "willingness to work with WakeMed in accepting referrals of difficult to place patients," and their "excellent relationship" and "positive experiences" with Britthaven. Joint Ex. 3.

87. The Britthaven application shows that Britthaven staff were awarded individual awards from the North Carolina Health Care Facilities Association during the appropriate lookback period, including one nurse aide who was recognized as the Nurse Aide of the Year. Joint Ex. 3. Additionally, Britthaven employees were selected to serve on various committees as part of the North Carolina Health Care Facilities Association's "Journey to National Best" initiative to transform skilled nursing homes into facilities and services of the future, including the Leadership Committee, the Bricks and Mortar Committee, and the Direct Care Committee. Joint Ex. 3.

88. Each Britthaven facility employs a Resident Satisfaction Committee to ensure that all residents are treated with respect and that their needs are met in a professional and timely manner. Members of the committee include the facility administrator, the social worker, a licensed nurse, and the dietary manager. The committee interviews residents and forms action teams to address any problems discovered. Joint Ex. 3.

89. Evidence presented at hearing includes information that is both favorable and unfavorable to Britthaven's quality of care track record during the appropriate lookback period. Martha Frisone, Assistant Chief of the Agency's CON Section, testified in response to the Undersigned's question that if she were to look statewide and consider all of the evidence available

regarding Britthaven's quality record, she was satisfied that Britthaven had provided quality care in the past as required by Criterion 20.

90. In North Carolina, the Nursing Home Licensure and Certification Section ("Licensure and Certification") is responsible for overseeing the quality of care provided in nursing home facilities and for carrying out the federal survey process for the Centers for Medicare and Medicaid Services (CMS). The survey process conducted by Licensure and Certification consists of initial certification surveys, recertification or annual surveys which are conducted about every 12 months, complaint surveys, and follow-up or revisit surveys which are generally conducted within 45-55 days after any survey in which deficiencies were identified.

91. Each survey deficiency identified is assigned a scope and severity tag. The scope falls into one of three categories: isolated, pattern, or widespread. The severity falls into one of four categories: no actual harm with potential for minimal harm, no actual harm with potential for more than minimal harm that is not immediate jeopardy, actual harm that is not immediate jeopardy, and immediate jeopardy to resident health or safety.

92. Immediate jeopardy is defined by federal regulations as "[a] situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 489.3. A deficiency constitutes "substandard quality of care" if the requirement that has not been met falls under specified federal regulations and is of a specific scope and severity. Liberty Ex. 301. A deficiency that constitutes immediate jeopardy can but does not necessarily constitute substandard quality of care; likewise, a deficiency that constitutes substandard quality of care can but does not necessarily constitute immediate jeopardy.

93. Historically, the Agency has relied on Licensure and Certification to provide information regarding actions taken against nursing homes in the eighteen months prior to the application, including whether any deficiencies constituting substandard quality of care were imposed on the facility. Evidence presented at hearing focused on substandard quality of care citations. No evidence at hearing established the total number of surveys conducted at Liberty or Britthaven facilities during the appropriate lookback period that would allow the Undersigned to draw any meaningful conclusions about the rate of substandard quality of care citations at Liberty or Britthaven facilities.

94. The head of Licensure and Certification, Beverly Speroff, as the head of the primary agency responsible for regulating the quality of care in North Carolina nursing facilities, testified at hearing that the mere fact of deficiencies, federal penalties, and civil monetary penalties does not necessarily indicate that a facility provides poor quality of care. Ms. Speroff testified that a provider with more facilities or more days of care will generally have more deficiencies than a provider with fewer facilities or which provides less days of care. 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.

95. 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 matters of positive quality of care provided by the applicants in this case and only sought out deficiencies in facilities in Wake County.

CONCLUSIONS OF LAW

1. To the extent any of the foregoing 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. To the extent any portions of the 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.

2. In accordance with N.C. Gen. Stat. § 131E-183(a)(20), “[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past.”

3. 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 throughout the State.

4. In this case, the Agency did not analyze or give due regard to the information available to it that was reasonably related to the applicants’ history of providing quality care throughout the State. Specifically, the Agency did not analyze or give due regard to the available information regarding the applicants’ capacity to provide quality of care during the appropriate lookback period, services provided or administered in North Carolina during the appropriate lookback period, or the patient outcomes and goals the applicants achieved or attempted to achieve during the appropriate lookback period.

5. 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. N.C. Dep’t of Human Res.*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 460 (1993).

6. As set forth in the Undersigned’s Notice of Standards on Remand, it remains the Undersigned’s belief that eventual development of rules by the North Carolina Department of Health and Human Services with proper public hearing and comment will be the best course for future nursing home quality of care reviews and assessments. For this case, however, and in response to the North Carolina Court of Appeals, besides the time period for review and geographic scope already addressed by that Court, the Undersigned noticed all parties of the factors to be used in examining the quality of care provided in the past by Britthaven and Liberty in determining conformity to Criterion 20.

7. The Undersigned finds that for purposes of this case and as directed on remand from the Court of Appeals, and applying the principles of a statewide scope and the proper look back period, the factors used in determining evidence of quality care provided in the past by Liberty and Britthaven include the components of structure (health providers and their facilities

capacity to provide quality care), process measures to assess services (including plans of care, instances of neglect, abuse or exploitation, facility deficiencies, and actions for correction), and outcome of care.

8. The events constituting substandard quality of care at Liberty facilities were isolated and unrelated. The evidence in this case did not show any patterns of substandard quality of care at Liberty facilities either within Liberty's facilities or across Liberty's facilities. Liberty identified and addressed the issues of substandard quality of care at its facilities and took steps to prevent similar problems in the future.

9. Liberty met its burden of establishing that it had provided quality care in the past in its existing North Carolina facilities based on its structure, process measures, and outcomes of care.

10. Applying the standard articulated in the Notice of Standards on Remand, Liberty met its burden of establishing that it had provided quality care in the past in its existing North Carolina facilities.

11. 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.

12. 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.

13. Since the Agency failed to fulfill its obligation of determining whether the applications were consistent with Criterion 20, the Agency (a) exceeded its authority or jurisdiction; (b) acted erroneously; (c) failed to use proper procedure; and (d) failed to act as required by law or rule.

14. Liberty met its burden of establishing that it had provided quality care in the appropriate lookback period in its existing North Carolina facilities. Liberty therefore met its burden of establishing that the Agency erred in finding the Liberty application nonconforming to Criterion 20.

15. As the petitioner in this matter, Liberty 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 respondent has 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. N.C. Gen. Stat. §§ 150B-23(a), -29(a), -34(a).

16. Liberty did not meet its burden of establishing that Britthaven did not provide quality care during the appropriate lookback period in its existing North Carolina facilities. Applying the standard articulated in the Notice of Standards on Remand, Britthaven established

by a preponderance of the evidence that it provided quality care in the past in its existing North Carolina facilities and as such was conforming to Criterion 20.

17. Although the evidence shows that the records of Liberty and Britthaven were similar during the appropriate lookback period, it is not appropriate to evaluate the applications against each other for purposes of determining conformity to Criterion 20. *See, e.g., Britthaven v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 385-86, 455 S.E.2d 455, 460-61 (1995). Moreover, the remand from the Court of Appeals does not ask or direct the Undersigned to undertake a comparison of the two applicants that are the subject of the remand.

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

FINAL DECISION ON REMAND

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision on Remand, 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.

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Undersigned enters the following Final Decision on Remand pursuant to N.C. Gen. Stat. § 150B34 and § 131E-188. Based upon the preponderance of the evidence, and applying the Notice of Standards on Remand issued by the Undersigned pursuant to the Court of Appeals Decision, the Undersigned holds that Liberty's CON application, Project I.D. No. J-8727-11, is conforming with Criterion 20 based on the quality of care Liberty has provided at its facilities statewide within the eighteen months preceding the submission of Liberty's CON application through the date of the Agency's decision. Further, based upon the preponderance of the evidence, and applying the Notice of Standards on Remand issued by the Undersigned pursuant to the Court of Appeals Decision, the Undersigned holds Britthaven's CON application, Project I.D. J-8713-11, is conforming with Criterion 20 based on the quality of care Britthaven has provided at its facilities statewide within the eighteen months preceding the submission of Britthaven's CON application through the date of the Agency's decision.

The Undersigned's findings of fact and conclusions of law regarding the Agency's comparative analysis were not affected by the North Carolina Court of Appeals' remand and, therefore, stand as originally decided whereby Respondent, North Carolina Department of Health and Human Services awarded the Certificate of Need that was the subject of these cases to Britthaven.

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.” This Final Decision on Remand was served on the parties as indicated on the Certificate of Service attached to this Final Decision.

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.”

IT IS SO ORDERED.

This the 12th day of August, 2016.

Augustus B Elkins II
Administrative Law Judge