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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

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Select Specialty Hospitals, Inc., d/b/a Select Specialty
Hospitals-Birmingham

v.

State Health Planning and Development Agency and Noland
Hospital Birmingham II, LLC

Appeal from the Certificate of Need Review Board of the
State Health Planning and Development Agency
(AL 2018-040)

DONALDSON, Judge.

Select Specialty Hospitals, Inc., d/b/a Select Specialty
Hospitals-Birmingham ("Select"), appeals the order of the

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Certificate of Need Review Board ("the CONRB") of the State Health Planning and Development Agency ("SHPDA") approving the Certificate of Need ("CON") application submitted by Noland Hospital Birmingham II, LLC ("Noland Birmingham").¹ We affirm the CONRB's order.

Facts and Procedural History

On July 24, 2018, Noland Birmingham filed an application with SHPDA seeking a CON to relocate 52 beds in a long-term acute-care hospital ("LTACH") to a new facility in Birmingham. Noland Hospital Shelby II, LLC, f/k/a Noland Hospital Shelby, LLC ("Noland Shelby"), previously had operated the 52 LTACH beds in a facility in Shelby County. The 52 LTACH beds were authorized by a CON issued in 2004 and modified in 2009 ("the Shelby CON"). The location where Noland Shelby previously had

¹In Ex Parte STV One Nineteen Senior Living, LLC, 161 So. 3d 196, 199 n.2 (Ala. 2014), our supreme court stated:

"In the health-care-services regulatory scheme, the terms 'SHPDA' and 'CONRB' are deemed synonymous and are used interchangeably. Ala. Admin. Code (SHPDA) Rule 410-1-2-.01. For ease of understanding, we generally refer to the panel of individuals that holds hearings on CON applications as the CONRB, while using the term SHPDA to refer to the agency in its more general regulatory capacity."

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operated the 52 LTACH beds and the location where Noland Birmingham sought to relocate the beds are both within Region III as defined in the State Health Plan ("the SHP").² Noland Health Services, Inc. ("NHS"), is the sole member and manager of both Noland Birmingham and Noland Shelby.

In its CON application, Noland Birmingham stated that "[i]n 2017, [NHS] made the decision to consolidate its LTACH services in Region III. As a result of that action, [NHS] ceased operating Noland Shelby effective August 1, 2017, and transferred the Noland Shelby CON assets to [Noland Birmingham]." Noland Birmingham claimed in its CON application that, "[p]ursuant to [NHS's] internal reorganization, [the Shelby CON] was transferred to [Noland Birmingham]" and that "[NHS and Noland Birmingham] have a clear and non-controvertible vested interest in the Shelby CON." Noland

²The SHP is "[a] comprehensive plan which is prepared triennially and reviewed at least annually and revised as necessary by the Statewide Health Coordinating Council, with the assistance of the State Health Planning and Development Agency, and approved by the Governor." § 22-21-260(13), Ala. Code 1975. The purpose of the SHP is to "provide for the development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of the state." Id.

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Birmingham also stated: "The proposed project does not add any new beds or services to Region III. The proposed project involves CON authorized LTACH beds that were previously operated within Region III. The proposed project will relocate the CON vested beds and place them back in service."

Select intervened in the proceeding regarding Noland Birmingham's CON application. Select opposed the project proposed by Noland Birmingham and requested a contested-case hearing. SHPDA assigned the matter to an administrative-law judge ("the ALJ"). The ALJ conducted a contested-case hearing that lasted four days.

At the contested-case hearing, several letters between Barbara Estep, director of regulatory affairs for NHS, and Alva Lambert, executive director of SHPDA, were submitted as exhibits. The letters are dated February 28, 2018, March 6, 2018, April 2, 2018, and April 27, 2018. In the letters, Estep stated that NHS had ceased operating Noland Shelby on August 1, 2017, and that, "[p]ursuant to an internal reorganization, [NHS] will transfer assets of [Noland Shelby], including the CON for ... LTACH beds, to [Noland Birmingham]." Estep announced the intention to apply for a CON to relocate the

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beds authorized by the Shelby CON and inquired whether SHPDA approval was required for the transfer of assets and whether the filing of a CON application regarding the transfer of the 52 LTACH beds would toll the period after which the Shelby CON would be deemed abandoned. In response, Lambert stated that, pursuant to Ala. Admin. Code (SHPDA), Rule 410-1-11-.09(c), the proposed internal reorganization of NHS as stated by Estep did not require SHPDA approval for the transfer of assets to Noland Birmingham. Lambert further stated that filing a CON application regarding the transfer of the 52 LTACH beds would toll the period for deeming that the Shelby CON had been abandoned and that the CON application would need to be filed by July 31, 2018, to prevent the Shelby CON from being deemed abandoned.

At the contested-case hearing, Noland Birmingham presented testimony from several witnesses. Nick Renda, vice president and chief financial officer of NHS, testified that NHS was a not-for-profit entity that is the sole member and manager of several entities that operate health-care facilities with CON-authorized beds. According to Renda, Noland Birmingham and the other entities are disregarded

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entities for tax purposes; only one tax return is filed regarding NHS-managed entities; and all employees of those entities are actually employed by NHS. Renda testified that NHS has been and continued to be the owner of the Shelby CON.

John Heffner, vice president of NHS's hospital division, testified that NHS had closed the facility that Noland Shelby had operated on August 1, 2017, because the facility could not survive financially. Heffner testified that notification of the pending closure of the facility had been formally announced on May 1, 2017, and that notification had been sent to terminate the lease agreement for the facility, as well as agreements with a pharmacy and for services such as lab work and X-rays, on August 1, 2017. According to Heffner, Noland Shelby sought and had been capable of admitting patients until August 1, 2017. Heffner testified that agreements with a pharmacy and for other services were in place, that staff was available to treat patients, and that equipment and furniture were still present at the facility during that period.

Heffner testified that Noland Shelby and Noland Birmingham were reorganized on August 1, 2017, that the function of operating the beds that Noland Shelby previously

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had operated was transferred to Noland Birmingham, but that NHS maintained ownership of the 52 LTACH beds. Heffner testified that physical assets such as beds, desks, and computers were transferred from Noland Shelby to Noland Birmingham but that NHS had remained the holder of the Shelby CON and the Shelby CON had never been transferred to Noland Birmingham.

Laura Wills, the administrator for Noland Birmingham, testified that she was also the administrator for Noland Shelby when the facility it operated closed on August 1, 2017. Wills testified that Noland Shelby's last patient had been discharged on May 6, 2017. According to Wills, Noland Shelby had been capable of accepting new patients up until the facility closed and that staff and medical equipment had been available until the facility closed. Wills explained that a stay in a LTACH can be lengthy, with an average stay of 25 days, that referral sources were aware of the pending closure of the facility in May 2017, and that the facility simply did not have any admissions after May 6, 2017.

Rick Harris testified as an expert in licensure and certification of health-care facilities in Alabama. According

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to Harris, a hospital is fully operational, regardless of whether it actually has patients, so long as it is capable of accepting patients. Harris testified that the LTACH facility operated by Noland Shelby closed on July 31, 2017.

Stephen Drew Preston testified as an expert in health planning and compliance with CON regulations. According to Preston, Noland Birmingham's CON application was consistent with the SHP and with SHPDA's regulations. Preston testified that Region III was overbedded with LTACH beds and that there were only two ways to establish a LTACH in accordance with the SHP: convert existing beds used for general acute care into LTACH beds or relocate existing LTACH beds. According to Preston, the relocation of LTACH beds proposed in Birmingham Noland's CON application was consistent with the SHP because the relocation did not add new LTACH beds to Region III.

Preston testified that his understanding was that Noland Birmingham was the current holder of the Shelby CON. According to Preston, NHS's reorganization of Noland Birmingham and Noland Shelby constituted a merger. Preston later testified, however, that he did not believe there had been a merger, but he then subsequently testified that there

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had been a merger and that the reorganization did not require SHPDA's approval. Preston also testified as follows:

"Q. If [Noland Birmingham] doesn't own [the Shelby CON], this application can't be approved, can it, Mr. Preston?

"A. In that scenario, no."

On July 31, 2019, the ALJ issued a "Recommended Order" in which the ALJ recommended that the CONRB approve Noland Birmingham's CON application. Among other factual findings, the ALJ found the following regarding Noland Birmingham's proposed project from the evidence presented at the hearing:

"23. The project is consistent with the latest approved revision of the appropriate State Health Plan effective at the time the application was received.

". . . .

"c. Currently there are 135 CON authorized long-term acute care beds in Region III. And, the projected need is 116 beds.

"d. The State Health Plan accounts for the 52 CON authorized beds subject to the instant applicant. Based on this fact, the undersigned finds that [Noland Birmingham] is not required to present evidence of a quantitative methodology for calculating the need for new beds. The proposed project will not affect the projected need numbers within the State Health Plan for Region III."

(Footnotes omitted.) In the recommended order, the ALJ made the following conclusions that are pertinent to this appeal:

"36. The project involves the relocation of beds authorized under [the Shelby CON].

"37. [Noland Birmingham] is the holder of [the Shelby CON]. The transfer of [the Shelby CON] from [Noland Shelby or NHS] to [Noland Birmingham] equates to a merger within the meaning of Ala. Code [1975,] § 22-21-270. To punish [Noland Birmingham] for relying on the interpretation of the executive director [of SHPDA], who is charged with making determinations as to changes of ownership under Ala. Admin. Code r. 410-1-7-.04(4), as [Select] contends, would be categorically inequitable. After all, the law values substance over form.

"38. [Noland Shelby's] facility 'suspended operations or provision of services' within the meaning of Ala. Admin. Code r. 410-1-11-.08.

"39. The abandonment provision of Ala. Admin. Code r. 410-1-11-.08 is tolled by the filing of [a] formal application of Certificate of Need Review as outlined in Ala. Admin. Code r. 410-7-.06. [SHPDA] has ruled on several occasions that the filing of a CON application tolls this abandonment provision. ... Now, [Select] urges a departure from SHPDA's long established interpretation without providing a specific reason to justify deviation from the rule. Without sufficient reason, [Select] invites arbitrary and capricious error."

Select filed exceptions to the ALJ's recommended order. Among its arguments, Select argued that Noland Birmingham's CON application was inconsistent with the SHP because, it

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asserted, Noland Birmingham did not own the Shelby CON and, thus, did not have the right to relocate the 52 LTACH beds. In support of its argument, Select attached the CONRB's order identified as its Declaratory Ruling 144 ("DR-144"). In its DR-144, the CONRB stated the following, in relevant part:

"1. On March 4, 2014, [Noland Birmingham and Noland Shelby], affiliates of Noland/NHS filed a Petition for Declaratory Ruling ('Petition'), seeking the dismissal of a pending CON application filed by [Select] to relocate a 38-bed LTACH from Trinity Medical Center ('Trinity') on the basis that the application is facially inconsistent with the State Health Plan ('SHP'). ... As set forth below, Noland's Petition is granted in part and denied in part.

"2. On February 6, 2014, Select filed a CON application to transfer a 38-bed LTACH from ... Trinity's campus in Birmingham to the campus of Brookwood Medical Center in Jefferson County. When Select obtained its original CON authority to operate the LTACH beds, it was pursuant to a lease of Trinity's acute care beds, and Select represented that [it] was not adding new beds to SHP's bed inventory because of the lease. Select's lease rights in the Trinity beds will terminate upon Trinity's relocation to its new site near Highway 280, and Select asserts the right to operate at its new location without the conversion of acute beds obtained from another source.

". . . .

"6. In its current CON application, Select does not propose to continue using the leased Trinity beds or to convert acute care beds from another provider. Its CON application is thus facially

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inconsistent with the SHP in this respect and is due to be dismissed. Select may file a new application reflecting the conversion of beds"

Select also argued that the Shelby CON was abandoned pursuant to Ala. Admin. Code (SHPDA), Rule 410-1-11-.08(2), which provides that a CON is deemed abandoned if the holder "suspends operation of the facility or provision of the service for an uninterrupted period of twelve (12) months or longer." Select asserted that the filing of Noland Birmingham's CON application did not toll the 12-month period because no statute or regulation provides for such an exception and SHPDA was required to follow procedures pursuant to § 41-22-1 et seq., Ala. Code 1975, to formally amend its regulations in order to create a tolling exception. Select further asserted that, even if a tolling exception existed, Noland Birmingham's CON application was nevertheless filed more than 12 months after Noland Shelby stopped providing services to patients and Noland Birmingham's filing of a CON application could not toll the running of the abandonment period for a CON held by NHS.

On August 21, 2019, the CONRB conducted a hearing in which two witnesses testified and the parties presented oral

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arguments. On September 5, 2019, the CONRB issued a final order adopting the ALJ's recommended order.

Select filed a timely notice of appeal to this court. We have jurisdiction pursuant to § 12-3-10, Ala. Code 1975, and § 22-21-275(6), Ala. Code 1975.

Standard of Review

Section 41-22-20(k), Ala. Code 1975, a part of the Alabama Administrative Procedure Act, provides the scope of judicial review regarding an order of the CONRB granting or denying a CON application:

"Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

"(1) In violation of constitutional or statutory provisions;

"(2) In excess of the statutory authority of the agency;

"(3) In violation of any pertinent agency rule;

"(4) Made upon unlawful procedure;

"(5) Affected by other error of law;

"(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

"(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."

We have further explained:

"In reviewing the decision of a state administrative agency, '[t]he special competence of the agency lends great weight to its decision, and that decision must be affirmed, unless it is arbitrary and capricious or not made in compliance with applicable law.' Alabama Renal Stone Inst., Inc. v. Alabama Statewide Health Coordinating Council, 628 So. 2d 821, 823 (Ala. Civ. App. 1993). 'The weight or importance assigned to any given piece of evidence presented in a CON application is left primarily to the [CONRB's] discretion, in light of the [CONRB's] recognized expertise in dealing with these specialized areas.' State Health Planning & Dev. Agency v. Baptist Health Sys., Inc., 766 So. 2d 176, 178 (Ala. Civ. App. 1999). ... [T]his court ... may [not] substitute its judgment for that of the administrative agency. Alabama Renal Stone Inst., Inc. v. Alabama Statewide Health Coordinating Council, 628 So. 2d 821, 823 (Ala. Civ. App. 1993). 'This holds true even in cases where the testimony is generalized, the evidence is meager, and

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reasonable minds might differ as to the correct result.' Health Care Auth. of Huntsville v. State Health Planning Agency, 549 So. 2d 973, 975 (Ala. Civ. App. 1989). Further, 'an agency's interpretation of its own rule or regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation.' Sylacauga Health Care Ctr., Inc. v. Alabama State Health Planning Agency, 662 So. 2d 265, 268 (Ala. Civ. App. 1994)."

Colonial Mgmt. Grp., L.P. v. State Health Planning & Dev. Agency, 853 So. 2d 972, 975 (Ala. Civ. App. 2002). "Our review of SHPDA's conclusions of law and its application of the law to the facts, however, are de novo." Ex Parte STV One Nineteen Senior Living, LLC, 161 So. 3d 196, 202 (Ala. 2014).

Discussion

I.

Select contends that Noland Birmingham's CON application is inconsistent with the SHP. Section 22-21-263(a), Ala. Code 1975, provides that "[n]o institutional health services ... shall be permitted which are inconsistent with the State Health Plan." See § 22-21-266(1), Ala. Code 1975 ("No certificate of need for new inpatient facilities or services shall be issued" unless SHPDA makes particular findings including "[t]hat the proposed facility or service is consistent with the latest approved revision of the

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appropriate state plan effective at the time the application was received by the state agency."). According to Select, a relocation of 52 LTACH beds within the same region could be consistent with the SHP, but, it asserts, the CONRB should not have approved Noland Birmingham's CON application because NHS was the owner of the 52 LTACH beds.

Section 22-21-265(a), Ala. Code 1975, provides, in relevant part:

"[N]o person to which this article applies shall acquire, construct, or operate a new institutional health service, as defined in this article, or furnish or offer, or purport to furnish a new institutional health service, as defined in this article, or make an arrangement or commitment for financing the offering of a new institutional health service, unless the person shall first obtain from the SHPDA a certificate of need therefor."

"[N]ew institutional health services shall include ... the relocation of one or more beds from one physical facility to another" § 22-21-263(a) (3), Ala. Code 1975. Accordingly, Noland Birmingham was required to apply for a CON to relocate the 52 LTACH beds formerly operated in Shelby County and to operate those beds in a new facility in Birmingham.

A "certificate of need" is defined as follows:

"A permit required by law before which no person, except as exempted by statute, shall

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acquire, construct or operate a new institutional health service or acquire major medical equipment, or furnish or offer, or purport to furnish a new institutional health service, or make arrangement or commitment for financing the offering of the new institutional health service or acquiring the major medical equipment. ..."

Ala. Admin. Code (SHPDA), Rule 410-1-2-.19. A CON, thus, authorizes its holder to conduct certain actions including acquiring, constructing, or operating a new institutional health service. Noland Birmingham maintains on appeal that NHS has been and continues to be the owner or holder of the Shelby CON that had authorized the operation of 52 LTACH beds in a facility in Shelby County. We, therefore, pretermitt any discussion of whether NHS was permitted to transfer ownership of the Shelby CON to Noland Birmingham.

Select argues that Noland Birmingham's CON application could be approved only if Noland Birmingham was the owner of the Shelby CON. In Lloyd Noland Foundation, Inc. v. City of Fairfield Healthcare Auth., 837 So. 2d 253 (Ala. 2002), Lloyd Noland Foundation, Inc. ("the Foundation"), submitted a CON application to SHPDA seeking to reclassify and relocate beds. The Foundation did not have legal title to the beds and only had a contractual option to purchase them. The Montgomery

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Circuit Court found "that the Foundation, being the owner only of an option to purchase the disputed beds, not of the beds themselves, did not have statutory authority to apply for the CONs" and "that the applications could 'only be filed either in the name of the owner or jointly with the owner of the facility or the beds.'" Id. at 262. Our supreme court reversed the circuit court's ruling on that issue, holding that the Foundation had "standing" to apply for a CON in its own name.³ The supreme court explained that § 22-21-265(a) and Rule 410-1-2-.19 required the Foundation to seek a CON, rather than prohibiting the Foundation from seeking a CON, before acquiring a new institutional health service or major medical equipment.

As in Lloyd Noland Foundation, no statute or agency rule prohibited SHPDA from considering Noland Birmingham's CON application even if it was not the "owner" of the beds it

³Our supreme court has noted that the term "standing" has often been misused. Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 39 (Ala. 2013). The issue of "standing" addressed in Lloyd Noland Foundation, appears to refer to whether the Foundation was entitled to apply for a CON.

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sought to relocate.⁴ The Shelby CON authorized NHS, among other actions, to operate the 52 LTACH beds in the former facility in Shelby County, which NHS operated through its subsidiary, Noland Shelby. Noland Birmingham did not seek to operate the 52 LTACH beds in the facility in Shelby County. As required by the pertinent statutes and rules, Noland Birmingham applied for a CON to relocate and operate the 52 LTACH beds in a new facility in Birmingham.

Select argues that the CONRB ignored its prior decision, DR-144. Select asserts that that ruling established that an applicant cannot file a CON application to relocate LTACH beds it does not own. In DR-144, the CONRB dismissed a CON application filed by Select in which it had sought to "relocate" LTACH beds. DR-144 states that Select had previously obtained a CON to operate the beds that it sought to "relocate" in its CON application pursuant to a lease of another entity's beds and that, when Select had obtained the CON, no new beds were added to the inventory of beds in the

⁴We note that Select does not dispute that NHS has transferred physical assets from the facility in Shelby County to Noland Birmingham or that NHS could have transferred those assets.

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SHP because Select was using leased beds. Circumstances had arisen, however, that would lead to the termination of Select's lease of the beds. In its CON application to "relocate" the beds, Select did not propose to continue using the leased beds or to convert beds from another provider. Therefore, granting the CON application would have added new beds to the SHP's inventory of beds, and the CONRB ruled that the CON application was facially inconsistent with the SHP. The CONRB, however, did not state a rule that, in order to file a CON application to relocate beds, the applicant must be the owner of the beds to be relocated, and such a rule is contrary to the holding in Lloyd Noland Foundation. Whether beds identified in a CON application are available to be relocated is a determination to be made by the CONRB. In DR-144, the CONRB made a factual finding that the beds in question were not available for relocation and applied that fact in denying Select's CON application.

In addition to relying on DR-144, Select refers to Preston's testimony that, if NHS is the owner of the Shelby CON, Noland Birmingham's CON application should not be approved. The record does not contain further explanation for

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that statement in Preston's testimony. "'An expert's opinion, even if uncontroverted, is not conclusive on the trier of fact; instead [the trier of fact] must look to the entire evidence and its own observations in deciding factual issues.'" Broadway v. Broadway, 184 So. 3d 376, 384 (Ala. Civ. App. 2014) (quoting G.T.F. v. U.D.R., 632 So. 2d 495, 497, (Ala. Civ. App. 1993)). Although no contractual relationship between NHS and Noland Birmingham regarding legal title of the 52 LTACH beds formerly operated in Shelby County is reflected in the record, NHS is the sole member and manager of Noland Birmingham and is listed as the owner of Noland Birmingham in the CON application. The employees of both NHS and Noland Birmingham are on the same payroll. It was evident at the contested-case hearing that Noland Birmingham's proposed relocation of beds was under NHS's direction. A transfer of ownership of the Shelby CON to Noland Birmingham was not necessary because Noland Birmingham did not seek authorization to operate the 52 LTACH beds in the facility in Shelby County and because there is no question that NHS had made available the beds Noland Birmingham sought to relocate in its CON

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application.⁵ Given the circumstances of this case, Noland Birmingham's lack of ownership over the Shelby CON was not an impediment to the approval of its CON application.

Select further argues that the finding by the ALJ, which was adopted by the CONRB, that Noland Birmingham is the current holder of the Shelby CON is clearly erroneous. In the record, letters between Estep and Lambert indicate only that NHS intended to transfer the Shelby CON to Noland Birmingham in the future. Both Renda and Heffner testified that NHS continued to be the holder of the Shelby CON. The finding that Noland Birmingham is the holder of the Shelby CON appears to lack evidentiary support. A particular erroneous finding, however, does not warrant reversal if the erroneous finding is harmless. "The doctrine that error, in order to furnish a ground for reversal, must be prejudicial is generally applied to review of a decision by an administrative board." Ferguson v. Hamrick, 388 So. 2d 981, 984 (Ala. 1980) (affirming a decision of the Board of Medical Examiners despite its specific erroneous findings because the preponderance of the

⁵We address Select's arguments regarding whether NHS abandoned the Shelby CON in our discussion in the next section.

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evidence supported the basis for the decision). Noland Birmingham was not required to be a holder of the Shelby CON to file its CON application, and Noland Birmingham's lack of legal title to the beds it sought to relocate was not an impediment to the proposed relocation. Because the proposed relocation did not add new beds to the SHP's inventory of beds, we conclude that the record supports the finding that the CON application was consistent with the SHP. Therefore, that basis for approving the CON application remains intact, and an erroneous finding regarding the holder of the Shelby CON does not warrant a reversal of the CONRB's order.

II.

Select also contends that the Shelby CON for the 52 LTACH beds Noland Birmingham sought to relocate in its CON application was abandoned and no longer existed. Ala. Admin. Code (SHPDA), Rule 410-1-11-.08(2) ("the abandonment provision"), provides that "[a] holder of a Certificate of Need will be deemed to have abandoned his certificate, if once having completed construction or inaugurated the service, he then suspends operation of the facility or provision of the service for an uninterrupted period of twelve (12) months or

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longer." The evidence in the record indicates that Noland Shelby discharged its last patient on May 6, 2017. Select argues that the 12-month period of the abandonment provision began at that time.⁶

"" "[L]anguage used in an administrative regulation should be given its natural, plain, ordinary, and commonly understood meaning, just as language in a statute." "" Wright v. City of Mobile, 170 So. 3d 656, 662 (Ala. Civ. App. 2014) (quoting Fraternal Order of Police, Lodge No. 64 v. Personnel Bd. of Jefferson Cty., 103 So. 3d 17, 25 (Ala. 2012), quoting in turn Ex parte Wilbanks Health Care Servs., Inc., 986 So. 2d 422, 427 (Ala. 2007), quoting in turn Alabama Medicaid Agency v. Beverly Enters., 521 So. 2d 1329, 1332 (Ala. Civ. App. 1987)). Select does not contest the finding that the operation of the Shelby County facility formerly housing the 52 LTACH

⁶Alabama Admin. Code (SHPDA), Rule 410-1-7-.01, provides:

"Any time period established herein shall begin on the day following the event which invokes the time period. When the last day of the period falls on a Saturday, Sunday, or state or federal holiday, the period shall be extended to the next day which is not a Saturday, Sunday, or state or federal holiday. The time period shall expire at 5:00 p.m. on the last day of the computed period."

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beds had ceased on August 1, 2017. Select asserts that the 12-month period in the abandonment provision began with the suspension of either the "operation of the facility" or the "provision of the service." Rule 410-111-.08(2). Even if we were to adopt that interpretation, however, the evidence does not indicate that Noland Shelby suspended the provision of the service before it suspended operation of its facility. Select refers to the following definition of "suspend": "To interrupt; to cause to cease for a time." Black's Law Dictionary 1297 (5th ed. 1979)⁷. Wills and Heffner testified that staff, equipment, and medical services were available to care for patients, and that Noland Shelby sought patients, but that no patients were referred to the facility between May 6, 2017, and August 1, 2017. We do not find any evidence indicating that Noland Shelby or NHS caused the provision of services to cease on May 6, 2017. Rather, the evidence supports the finding that the operation of the facility and the provision of services were suspended by August 1, 2017.

⁷We note that the current edition Black's Law Dictionary defines "suspend" as: "To interrupt; postpone; defer." Black's Law Dictionary 1748 (11th ed. 299).

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According to the record, Noland Birmingham filed its CON application on July 24, 2018. The 12-month period after August 1, 2017, thus, did not expire until after the proceeding for the CON application had begun. Select argues that the filing of the CON application did not toll the period in the abandonment provision and that therefore the Shelby CON should have been considered abandoned after the 12-month period. We disagree with Select's view that the Shelby CON should have been considered abandoned. SHPDA is required to consider whether "the proposed facility or service is consistent with the latest approved revision of the appropriate state plan effective at the time the application was received by the state agency." § 22-21-266(1), Ala. Code 1975. See Auburn Med. Ctr., Inc. v. East Alabama Health Care Auth., 583 So. 2d 1342, 1343 (Ala. Civ. App. 1990) ("SHPDA regulations require that an application for a CON must be reviewed under the state health plan which is in effect at the time that the application is received by the state agency."). As shown in DR-144, a proposed relocation of beds is facially inconsistent with the SHP if the beds in question are not available for relocation. In order to assess the consistency of Noland Birmingham's CON

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application with the SHP in this case, SHPDA was required to determine whether the Shelby CON for the beds to be relocated was abandoned under the circumstances that existed at the time Noland Birmingham's CON application was received. Because the 12-month period in the abandonment provision had not expired at the time SHPDA received Noland Birmingham's CON application, SHPDA was not required to deem the Shelby CON to be abandoned.⁸

Select further argues that the filing of a CON application by Noland Birmingham has no bearing on the running of the 12-month period as to the Shelby CON because NHS is the holder of that CON. Select asserts that only the actions of the CON holder govern the abandonment issue. NHS, however, reorganized its subsidiaries and transferred assets to Noland Birmingham with the intent of allowing Noland Birmingham to operate the 52 beds formerly operated in the facility in Shelby County if a relocation to a Birmingham facility was approved. Therefore, NHS did act to avoid the abandonment of

⁸Based on this holding, we need not consider whether a "tolling exception" to the abandonment provision exists permitting the suspension or pausing the 12-month period and thereby extending that period.

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the Shelby CON. Nonetheless, the Shelby CON was not abandoned at the time Noland Birmingham filed its CON application regardless of NHS's role in the matter.

Conclusion

For the reasons stated, Select has not established that Noland Birmingham's CON application was inconsistent with the SHP or that the Shelby CON had been abandoned. Therefore, we affirm the CONRB's order approving Noland Birmingham's CON application.

AFFIRMED.

Thompson, P.J., and Moore and Hanson, JJ., concur.

Edwards, J., dissents, without writing.