NO. COA11-339
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a CAROLINAS REHABILITATION-MOUNT HOLLY and d/b/a CAROLINAS HEALTHCARE SYSTEM,

Petitioner,

v. Office of Administrative Hearings
No. 09 DHR 6116

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

Respondent,

And

CAROMONT HEALTH, INC. and GASTON MEMORIAL HOSPITAL, INC.,

Respondent-Intervenors.

Appeal by petitioner from a final agency decision entered 19 November 2010 by the Director of the Division of Health Service Regulation, North Carolina Department of Health and Human Services, Drexdal Pratt. Heard in the Court of Appeals 28 September 2011.

K&L Gates LLP, by Gary S. Qualls and William W. Stewart, Jr., for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General, June S. Ferrell, for respondent-appellee.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, Wallace C. Hollowell, III, and Elizabeth B. Frock, for respondent-intervenor-appellees.

STEELMAN, Judge.

Where this Court previously declined to take judicial notice of the CON Section's findings relating to CaroMont's 2010 CON application, we will not consider CMHA's mootness argument. Where the Agency's findings of fact were supported by substantial evidence and these findings supported the Agency's conclusions of law, the Agency did not err in holding that CaroMont satisfied all review criteria and that CMHA failed to satisfy Criterion 3. CaroMont's 2008 application was withdrawn prior to final agency review, and is not properly before this Court. The Agency has discretion to grant a CON application for less than what was originally requested. Where CaroMont satisfied all applicable review criteria and CMHA did not satisfy at least one of the criteria, we do not address the Agency's alternative comparative analysis of the two applications. The Agency properly rejected some of the ALJ's

findings pertaining to prior CON decisions as being irrelevant and having no probative value.

I. Factual and Procedural Background

In 2009, Charlotte-Mecklenburg Hospital Authority (CMHA) filed a Certificate of Need (CON) application proposing to develop a freestanding emergency department (Mount Holly Healthplex or Healthplex) in the Belmont/Mount Holly area of Gaston County. CMHA currently provides services to residents of Gaston County at its existing Mecklenburg County facilities and their corresponding emergency departments (EDs). CMHA currently operates Carolina Rehabilitation-Mount Holly (CR). The Healthplex would be located on CR's campus; but would not be physically attached to a hospital with acute care beds.

CaroMont Health, Inc. is the parent of Gaston Memorial Hospital, Inc. (collectively CaroMont), and operates an acute care hospital in Gaston County. CaroMont's ED is currently the sole provider of emergency services in Gaston County. On the same date as CMHA's application, CaroMont filed a CON application proposing to develop a satellite ED in Mount Holly (the MedPlex). The MedPlex would be operated as an outpatient department of CaroMont. The MedPlex would not be physically

attached to CaroMont. CaroMont is a licensed acute care hospital.

The Certificate of Need Section (the CON Section) is the division within the N.C. Department of Health and Human Services, Division of Health Services Regulation that reviews and approves the development of new institutional health services under CON Law. The CON Section determined that CMHA's and CaroMont's applications were competitive. By decision letters dated 9 October 2009, the CON Section informed CMHA that its application had been disapproved and CaroMont that its application had been conditionally approved. On 6 November 2009, CMHA filed a Petition for Contested Case Hearing with the Office of Administrative Hearings (OAH) appealing the disapproval of its application and contesting the approval of CaroMont's application. On 2 December 2009, CaroMont's motion to intervene was granted. On 26 July 2010, the Administrative Law Judge (ALJ) issued a recommended decision holding that the CON Section erred in holding that CMHA failed to comply with numerous CON review criteria, and that the CON Section erred in holding that CaroMont complied with certain CON review criteria. The ALJ further held that the CON Section should consider conducting new reviews of the applications in question, and

"consider whether the needs of Gaston County residents would be better served by issuing a CON to both Applicants which would provide patients with a choice of providers."

On 19 November 2010, the N.C. Department of Health and Human Services (the Agency) issued a Final Agency Decision (FAD) rejecting the recommended decision of the ALJ and affirming the CON Section's decision to "conditionally approve CaroMont to develop a freestanding emergency department in Mount Holly with 9 treatment rooms; and disapprove the CMHA Application proposing a freestanding emergency department in Mount Holly/Belmont."

CMHA appeals.

II. Standard of Review

> The substantive nature of each assignment of error controls our review of an appeal from an administrative agency's final decision. *North Carolina Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004). Where a party asserts an error of law occurred, we apply a *de novo* standard of review. *Id.* at 659, 599 S.E.2d at 894. If the issue on appeal concerns an allegation that the agency's decision is arbitrary or capricious or "fact-intensive issues 'such as sufficiency of the evidence to support [an agency's] decision'" we apply the whole-record test. *Id.* (citations omitted).

Craven Reg'l Med. Auth. v. N.C. Dep't. of Health & Human Servs., 176 N.C. App. 46, 51, 625 S.E.2d 837, 840 (2006).

> A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision.

Good Hope Health Sys., L.L.C. v. N.C. Dep't. of Health & Human Servs., 189 N.C. App. 534, 543, 659 S.E.2d 456, 462 (2008) (quotation omitted), *aff'd per curiam*, 362 N.C. 504, 666 S.E.2d 749 (2008).

When reviewing an agency decision for an error of law "an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 384, 455 S.E.2d 455, 460 (1995) (quotation omitted), *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).

> Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. (quotation and internal quotation marks omitted).

III. Mootness

In its first argument, CMHA contends that CaroMont's 2009 CON application is now mooted by a 2010 CON application filed by CaroMont. We disagree.

On 11 May 2011, CMHA filed a motion with this Court to take judicial notice of the 25 February 2011 CON Section findings approving CaroMont's 2010 CON application. This Court denied that motion on 26 May 2011. The motion to take judicial notice advanced the same arguments now advanced by CMHA in its brief concerning mootness:

> The [CON Section] findings relate directly to the mootness argument addressed by CMHA in its Petitioner-Appellant's Brief. As stated therein, CaroMont's 2009 Application has become moot (and thus unapprovable) due to the filing of CaroMont's 2010 Application (which expressly supersedes and supplants CaroMont's 2009 Application), and the approval thereof. The review of that 2009 Application has now been re-done in the 2010 CON review on the project that CaroMont wishes to develop.

"Without question, our review is based 'solely upon the record on appeal,' N.C.R. App. P. 9(a), and we decline to accept as part of the record herein assertions of fact in the parties'

briefs which are not sustained by record evidence." *Mohamad v. Simmons*, 139 N.C. App. 610, 613, 534 S.E.2d 616, 619 (2000) (citations omitted). This Court declined to take judicial notice of the CON Section findings relating to CaroMont's 2010 application. The information relating to CaroMont's 2010 application is not properly part of the record evidence in the instant case. We thus decline to review this argument. *See also Good Hope Health Sys., L.L.C. v. N.C. Dep't. of Health and Human Servs.*, 360 N.C. 635, 637 S.E.2d 517 (2006).

IV. CaroMont's Conformance with Review Criteria

> N.C. Gen. Stat. § 131E-183(a) charges the Agency with reviewing all CON applications utilizing a series of criteria set forth in the statute. The application must either be "consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued." N.C.G.S. § 131E-183(a) (2003).

Good Hope, 189 N.C. App. at 549, 659 S.E.2d at 466.

A. Criterion 3

In the first portion of its second argument, CMHA argues that the Agency erred in concluding that CaroMont satisfied Criterion 3 of N.C. Gen. Stat. § 131E-183(a)(3) (2009) based upon a rejected telephone survey. We disagree.

Criterion 3 states:

> (3) The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

N.C. Gen. Stat. § 131E-183(a)(3).

CaroMont forecasted both an external and internal shift of patients to its proposed MedPlex. The external shift was a shift of patients to the new MedPlex who were not currently CaroMont patients, and the internal shift was a shift of its existing patients to the MedPlex. The Agency made the following findings of fact relating to CaroMont's shift projections:

> 93. The Agency found that CaroMont's projected internal shift of 72% of its existing patients in the proposed service area to a new freestanding ED was reasonable, relying, in part, upon earlier Agency findings approving a CON application for a freestanding ED for Moses Cone Health Services ("Moses Cone") which projected a 75% internal shift based upon Moses Cone's subjective judgment. (Jt Ex 1, p 989; Tr Vol 3, pp 167-68; CMHA Ex 94) The Agency has previously approved other freestanding ED applications which projected to shift their own patients in which the percentage of shift ranged from a low of 75% to a high of 95%. (Tr Vol 13, pp 38-40, 84) Ms.

> Frisone testified that the Agency found CaroMont's 72% internal shift of [Caromont's] existing patients reasonable based on looking at all other previous Agency decisions where an applicant proposed a projected shift of its own patients. (Tr Vol 3, p 167)
>
> . . . .
>
> 95. CaroMont stated that "to validate" its assumptions about the external shift of patients, it relied on the results of a telephone survey. (Jt Ex 3, pp 72-80)
>
> 96. The Agency found that it did not have sufficient information about the InTandem survey to determine whether it was valid, so the Agency did not rely on the results of the survey in its review of the CaroMont Application. (Jt Ex 1, pp 988-89; Tr Vol 2, pp 106-08; Tr Vol 11, pp 158-59; Tr Vol 12, p 180)
>
> . . . .
>
> 103. The Agency found that CarMont did not demonstrate the need for its project for the portion of emergency visits based on the external shift. (Jt Ex 1, pp 990-92) Ms. Frisone testified that there was not enough information in the CaroMont Application for the Agency to determine that CaroMont's proposed "external shift" was reasonable and supported. (Tr Vol 12, pp 177-83; Tr Vol 13, p 45)

The Agency approved CaroMont for only nine treatment rooms as opposed to the proposed fourteen, based upon its rejection of CaroMont's external shift projections. The approval of

CaroMont's application was based solely upon the need demonstrated by its internal shift projections.

These findings were supported by substantial evidence in the record. Martha Frisone, a project analyst for the CON Section, testified as follows:

> We didn't reject the survey. We are simply saying there is not sufficient information about it. I wouldn't use the term reject.
>
> . . . .
>
> So they had come up with -- I guess they were talking about -- I thought they were talking about the whole service area, but actually, they're only talking about just that one zip code. But the effective shift was 72 percent and in looking at all of the previous decisions, where someone was proposing a projected shift in patients, the percentages range from 75 percent, which we've already discussed in the Moses Cone findings, which the applicant there said was basically a subjective judgment on their part, and we had found that acceptable. And then in some others, we've had as high as -- I think they said 5 to 7 percent wouldn't, so we're talking 92 to 95 percent would shift. And I believe there was one that said 80. And all of these have been found acceptable and they were -- I don't know about whether they were all like the Cone, but the Cone was basically subjective judgment. And Ms. Hoffman [another CON Section project analyst] and I had found that to be acceptable.
>
> So given that the effective shift here in the Gaston application, the second one, was 72 percent, we felt that that was a

> reasonable shift, even though they hadn't provided as much information as we would have liked to have had about the survey, it had nevertheless resulted in a percentage that had been found reasonable in the past.

This testimony supports findings of fact 93, 95, 96, and 103 set forth above. These findings in turn support the following conclusions of law made by the Agency:

> 31. The assumptions in the CaroMont Application were reasonable and supported. CaroMont was conservative in relying on data from outpatients only to best capture the universe of patients that would be likely to visit a freestanding facility. Additionally, CaroMont proposed a 72% shift of existing patients, which the Agency found reasonable and conservative based on its experience and expertise.
>
> . . . .
>
> 37. The Agency correctly found the CaroMont Application conditionally approved under Criterion 3.

The Agency's findings of fact relating to CaroMont's internal shift projections are supported by substantial evidence, and these findings support the Agency's conclusion of law that CaroMont's application, as approved with only nine treatment rooms, satisfied Criterion 3.

This argument is without merit.

B. CaroMont's 2008 Application

In the second portion of its second argument, CMHA argues that the Agency erred and was arbitrary and capricious in accepting CaroMont's utilization projections where the same methodology was previously rejected by the CON Section when reviewing CaroMont's 2008 application. We disagree.

In 2008 CaroMont had filed a CON application to develop a freestanding ED in Mount Holly that was very similar to the project proposed in the 2009 application. The 2008 application was denied by the CON Section. CaroMont appealed this decision. Prior to that appeal being heard by an ALJ, CaroMont dismissed its appeal.

We review final decisions by the Agency. N.C. Gen. Stat. § 131E-188(b)(2009)[1]. There was never a FAD with respect to the 2008 application. Under the provisions of Chapter 131E, we are required to review decisions properly brought before us pursuant to fixed statutory criteria, as interpreted by our case law. Our review is limited to the case before us, and whether it meets the applicable criteria, not whether a prior iteration of a CON application was properly approved or rejected by the CON Section. This argument is without merit.

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[1] This statute has been amended by the North Carolina General Assembly. However, the amendments only apply to contested cases filed on or after 1 January 2012, and therefore do not affect the instant case.

C. Downsizing

In the third part of its second argument, CMHA contends that the Agency erred in approving CaroMont's 2009 application by downsizing the proposed project. We disagree.

> The argument seems to be that the agency must either approve or disapprove of applications for certificates of need but has no authority to either require more or grant less than is applied for. In our opinion the law does not require that applications for certificates of need be approved precisely as submitted or not at all, and it would be folly if it did so. G.S. 131-182(b)[2] provides, "The Department shall issue as provided in this Article a certificate of need *with or without conditions* or reject the application within the review period." (Emphasis supplied.) The fundamental purpose of the certificate of need law is to limit the construction of health care facilities in this state to those that the public needs and that can be operated efficiently and economically for their benefit. G.S. 131-175[3]; *Schonbrun,*

[2] This statute has been repealed and CONs are now addressed in Chapter 131E, Article 9. While the exact language quoted from N.C. Gen. Stat. § 131-182(b) is no longer contained in the current statutes, sufficiently similar language can be found in N.C. Gen. Stat. § 131E-186(a), stating "the Department shall issue a decision to 'approve,' 'approve with conditions,' or 'deny,' an application for a new institutional health service."

[3] This statute was also repealed; however, the same purpose for CON law is contained in N.C. Gen. Stat. § 131E-175.

> *Making Certificate of Need Work*, 57 N.C.L.Rev. 1259 (1979). In serving that purpose adjustments are often needed and under the foregoing statute the agency has discretion to make them by granting only some of the things applied for and by imposing conditions not applied for.

In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986).

As set forth in the *Humana* decision, the Agency did not err in downsizing CaroMont's application prior to approval. The Agency has the discretion to approve CONs granting less than what was requested in the CON application and imposing conditions that were not contained in the CON application. *Id.*

This argument is without merit.

D. Lincoln County Patients and RME Bays

In the fourth part of its second argument, CMHA contends that (1) CaroMont's application overstated its ED utilization projections by counting Lincoln County patients not included in its self-defined service area; and (2) CaroMont's application failed to demonstrate a need for the six proposed RME bays. We disagree.

i. Lincoln County Patients

The Town of Stanley postal zip code (28164) contains areas in both Lincoln County and Gaston County. The Agency made the following findings of fact pertaining to the service area:

> 56. [RD FOF #58] For the Town of Stanley zip code (28164), the CaroMont Application stated that population estimates and projections included only 60% of the zip code's total population, the estimated percentage of the town's population living in Gaston County. The remainder live in Lincoln County. (Jt. Ex. 3, p. 40)
>
> 57. [RD FOF #61] In competitive comments, CMHA stated that CaroMont overstated its projected utilization because it did not use only 60% of the population of the Stanley zip code in its methodology. (Jt. Ex. 1, pp. 93-121)
>
> 58. During the review of the CaroMont application, Ms. Hutchison was aware of the comments filed by CMHA and "went back to check it . . . . [sic] (Tr Vol 2, p 141-42) She contacted the Cecil G. SHEPS Center for Health Services Research to obtain Stanley zip code ED visits by Gaston County and Lincoln County residents, separately, but was told the data was unavailable. Had the data been available it would have allowed her to recalculate CaroMont's need methodology to determine a specific ED use rate for Gaston County Stanley zip code residents, thereby eliminating the Lincoln County population. (Tr Vol __, p __) Although Ms. Hutchison began to look into the issue raised in CMHA's competitive comments, Ms. Hutchison never completed her analysis of the issue. During her deposition and at the hearing she acknowledged that she failed to complete her analysis of the Stanley zip code issue

> raised in CMHA's competitive comments. (Tr Vol 2, pp 141-143)
>
> 59. [RD FOF #64] The Agency decision to conditionally approve the CaroMont Application would have been the same even if the Agency had reviewed this issue. (Tr. Vol. 2, p. 144)

These findings are supported by substantial evidence. Carol Hutchison, a project analyst for the CON Section, testified as follows:

> Q. You had -- at some point during the review, you had identified Gaston's overstatement of Lincoln County patients and population as an issue of Gaston's application?
>
> A. During the review, I went back to check it. I didn't know if that were true or not. I mean, I went back to see, but started out by looking to see if I could break out the ED visits. And at some point during this review, I did not go back and check the population. So, in fact, they have a -- they came out with about a number -- as I ran the numbers afterwards, that they have about 733 ED visits more than they would have had had they reduced that population. And as you know, we ran the numbers on that and we found that they did, in fact, come up with a need for 8.3 treatment rooms. So we still found that that did not reduce -- rounding up, that did not reduce the number of treatment rooms from what we had conditioned them to.

Findings discussed above support the following conclusion of law:

> 30. The Agency correctly found that the CaroMont Application identified the population to be served by its proposed MedPlex. CaroMont consistently used the entire Stanley zip code in making its utilization projections, and any inconsistency in the zip codes used in the CaroMont Application did not effect [sic] the CaroMont Application's demonstration of need.

The Agency's findings of fact relating to any overstatement by CaroMont of its ED utilization projections were supported by substantial evidence, and those findings supported the Agency's conclusion of law that CaroMont identified the population to be served by its proposed MedPlex and that any inconsistency in the zip codes did not affect the demonstration of need.

This argument is without merit.

ii. RME Bays

The Agency made the following finding of fact concerning CaroMont's RME bays, "CaroMont's witness testified that with fewer treatment rooms available based on the Agency's downsize of the facility, it would be even more important to be able to evaluate and triage patients quickly, so that more RME bays may be needed than proposed in the Application. (Tr. Vol. 8, pp. 41-42)." This finding of fact is supported by the testimony of Dr. Jayne Kendall who worked in the Gaston Memorial Hospital emergency services department:

> Q. And would the reduction of a number of treatment rooms, in this case from 14 down to nine, would that affect the amount of triage space you would need -- would that affect the need for the six RME bays?
>
> A. I mean in my opinion I'd actually think you'd need more. I think you -- because of the chances of it being more congested in the back, you're going to have less space to put people in treatment rooms and so you're going to want to get people more through the rapid medical evaluation bays in the front. That's I don't know -- I wouldn't -- I certainly don't think it should be reduced, let's put it that way. I don't think that would help anything in our -- as far as clinical perspective goes.

The finding of fact supports the following portion of contested conclusion of law thirty-seven: "The Agency correctly found that the CaroMont Application demonstrated the need for a MedPlex in Mount Holly with: . . . 6 RME bays . . . ."

This argument is without merit.

V. CMHA's Conformance with Review Criteria

CMHA next argues that the Agency erred in finding CMHA's application nonconforming with criteria 3, 4, 5, 6, 18a, and 10A N.C.A.C. 14C.2303(1). We disagree.

As discussed in section IV(A) of this opinion, Criterion 3 requires that "[t]he applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed . . . ."

N.C. Gen. Stat. § 131E-183(a)(3). The Agency made the following conclusion of law relating to CMHA's compliance with Criterion 3:

> 20. The Agency correctly found that the CMHA Application: made inconsistent representations regarding its proposed service area; amended its application at the public hearing; and made unreasonable and unsupported in-migration projections. For these reasons, the Agency correctly found that the CMHA Application did not adequately identify the population proposed to be served by CMC-Mount Holly.

We hold this conclusion of law is supported by the following unchallenged findings of fact made by the Agency or findings of fact that were supported by substantial evidence:

> 47. Ms. Hutchinson explained that the map of the proposed service area in the CMHA Application indicated that the entire zip codes of 28032 and 28098 were within the service area. However, the text of the CMHA Application stated that only 93% of zip code 28032 and 95% of zip code 28098 were within the proposed service area. (Jt Ex 1, p 953; Tr Vol 2, pp 172-173)
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> 48. [RD FOF #55] The Agency determined that CMHA was nonconforming to Criterion 3 because it did not adequately identify the population it proposes to serve. (Jt. Ex. 1, pp. 952-53)
>
> . . . .
>
> 50. At the public hearing for these applications, held on July 21, 2009 in accordance with N.C. Gen. Stat. § 131E-

185(a1)(2), Carol Lovin stated that the CMHA Application had a primary service area of a five-mile radius around the CMC-Mt. Holly site, and a secondary service area of a ten-mile radius. (Jt. Ex. 1, p. 458) The CMHA Application does not include a secondary service area. (Jt Ex 1, p 970; Tr Vol 3, p 53)

. . . .

185. CMHA proposed that 30% of patients would come to CMC-Mount Holly from "other Gaston County zip codes." CMHA referred to this 30% from other Gaston County zip codes as "inmigration." (Tr. Vol. 11, pp. 93-94)

186. "Inmigration" is a term of art that refers to the percentage of "incidental" patients that come from outside a facility's expected service area, due to travel or other unpredictable factors. Mr. Legarth testified that the level of inmigration at a facility remains fairly constant, but the areas from which those patients originate are constantly changing. (Tr Vol 9, pp 21-25; Tr Vol 4, pp 17-18)

187. Mr. Legarth testified that it was unreasonable for CMHA to project that all of its "inmigration" would come from one county. (Tr Vol 9, pp 21-29) He further testified that CMHA's reference to "inmigration" was a misnomer, because CMHA's projection that 30% of its patients would come from "other" portions of Gaston County is not reflective of the true concept of in-migration. (Tr Vol 9, pp 21-29) Mr. Legarth stated that CMHA's projection of 30% in-migration from Gaston County was extremely high, and was not supported by the CMHA Application. (Tr Vol 9, pp 29-30)

Based upon the foregoing findings of fact, the Agency did not err in concluding that CMHA failed to adequately identify the population to be served by its proposed Healthplex, and thereby failed to satisfy Criterion 3.

This argument is without merit.

For the reasons discussed below, CMHA's failure to satisfy Criterion 3 is dispositive, and we do not address CMHA's arguments relating to criteria 4, 5, 6, 18a, and 10A N.C.A.C. 14C.2303(1).

VI. Comparative Review

In its fourth and fifth arguments, CMHA contends that the Agency erred in completing its comparative analysis of the two competing CMHA and CaroMont CON applications. We disagree.

A two stage process is involved in reviewing competing CON applications.

> First, after the Agency "batches" all applications for competing proposals, the Agency must review each application independently against the criteria (without considering the competing applications) and determine whether it "is either consistent with or not in conflict with these criteria." G.S. § 131E-183(a). . . .
>
> Second, after each application is reviewed on its own merits, the Agency must decide which of the competing applications should be approved.

Britthaven, 118 N.C. App. at 385, 455 S.E.2d at 460-61. If only one of the competing applications satisfies the criteria then that application is awarded the CON. *See Craven*, 176 N.C. App. at 58, 625 S.E.2d at 845; *Parkway Urology v. N.C. Dept. of Health & Human Servs.*, ___ N.C. App. ___, ___, 696 S.E.2d 187, 199 (2010), *disc. review denied*, 365 N.C. 78, 705 S.E.2d 753 (2011).

It appears that both the CON Section and the Agency engaged in a comparative review of CaroMont's and CMHA's applications as an alternative analysis, despite having found that CaroMont complied with the criteria and CMHA did not. CaroMont satisfied all of the criteria, and CMHA failed to satisfy Criterion 3. Therefore, it was not necessary for the Agency to reach the second stage of the analysis and perform a comparative analysis. We therefore do not address CMHA's arguments.

These arguments are without merit.

VII. Rejection of Findings of Fact in ALJ's Recommended Decision

In its sixth argument, CMHA contends that the Agency failed to properly reject many of the ALJ's findings of fact. We disagree.

N.C. Gen. Stat. § 150B-34(c) (2009)[4] requires that:

> The final agency decision shall recite and address all of the facts set forth in the recommended decision. For each finding of fact in the recommended decision not adopted by the agency, the agency shall state the specific reason, based on the evidence, for not adopting the findings of fact and the agency's findings shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31.

CMHA argues that the Agency rejected many of the ALJ's findings "with a mere reference to the ALJ's Findings of Fact being 'irrelevant' and having 'no probative value.'" We note that the FAD is 107 pages in length, of which 52 pages deal with the Agency's rejection of 177 findings of fact by the ALJ. CMHA challenges the rejection of 15 findings of fact. We hold that the findings which CMHA challenges were in fact properly rejected by the Agency as being irrelevant and having no probative value.

All of the recommended findings challenged by CMHA as not being properly rejected dealt with prior Agency decisions in other CON reviews. These other CON decisions, with the exception of the decision addressed in finding 131, did not address sufficiently similar issues to those present in the

[4] This statute has also been amended by the General Assembly. However, the amendment only applies to contested cases filed on or after 1 January 2012.

instant case and were irrelevant. Each CON application is reviewed individually, and the determination of whether or not an applicant has complied with review criteria is made based upon the evidence presented concerning the specific area where the CON is sought and its needs. No two applications are alike, and no two applications can be assessed in exactly the same way.

Because each application is evaluated separately against review criteria, past Agency decisions on CON applications are generally irrelevant. However, as discussed in Section IV(A) of this opinion, prior decisions may be of benefit if they dealt with an issue sufficiently similar to the issue presented in the case under review. With the exception of finding 131, the remaining challenged findings dealt with CON decisions that were not sufficiently similar to the issues in the instant case to be accorded any deference. In contrast, the internal shift projections made in prior CON decisions relied upon by the Agency and discussed in Section IV(A) of this opinion dealt with the precise same internal shift of patients from an existing hospital to a new freestanding facility that is at issue in the instant case.

Rejected finding 131 addressed internal shift projections, stating that "[t]he Agency relied on past knowledge and

experience from other applications by other applicants to conclude that CaroMont's internal shift of 72% was reasonable." However, this finding was properly rejected because it failed to recognize that the Agency "relied [only] *in part* on their past knowledge and experience from other applications, but also relied on the fact that the projections in the CaroMont Application for the internal shift were reasonable and supported." (emphasis in original)

The Agency properly rejected the challenged findings of fact of the ALJ relating to prior CON decisions as irrelevant and having no probative value, because those prior decisions did not present sufficiently similar issues to the issues presented in the instant case to warrant deference.

This argument is without merit.

VIII. Conclusion

Since this Court previously refused to take judicial notice of the CON Section's findings relating to CaroMont's 2010 CON application, we do not consider CMHA's mootness argument. The Agency's findings of fact were supported by substantial evidence and these findings, in turn, supported the Agency's conclusions of law. The Agency properly concluded that CaroMont satisfied all review criteria and that CMHA failed to satisfy Criterion 3.

CaroMont's 2008 application was withdrawn prior to final agency review, and is not properly before this Court. The Agency did not err in downsizing CaroMont's proposed MedPlex, because the Agency has the discretion to authorize CONs for less than what was requested in the application. Because CaroMont satisfied all review criteria and CMHA failed to do so, it was not necessary for the Agency to conduct a comparative analysis of the two applications. The Agency correctly rejected the ALJ's findings relating to prior CON decisions as being irrelevant and having no probative value.

AFFIRMED.

Judges HUNTER, Robert C., and McCULLOUGH concur.

Report per Rule 30(e).