NO. COA13-1126

NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 2015

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

v.

Office of
Administrative Hearings
No. 12 DHR 8691

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

and

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

---

HILLCREST CONVALESCENT CENTER, INC.,
Petitioner,

v.

Office of
Administrative Hearings
No. 12 DHR 8666

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

OF NEED SECTION,
Respondent,

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. Office of Administrative Hearings
No. 12 DHR 8669

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

and

HILLCREST CONVALESCENT CENTER, INC.; E.N.W., LLC AND BELLAROSE NURSING AND REHAB CENTER, INC.; BRITTHAVEN, INC. AND SPRUCE LTC GROUP, LLC; AND

AH NORTH CAROLINA OWNER LLC D/B/A
THE HERITAGE OF RALEIGH,
Respondent-Intervenors.

Appeal by respondent and cross-appeals by petitioner AH North Carolina Owner LLC d/b/a The Heritage of Raleigh and respondent-intervenor from Final Decision entered 20 June 2013 by Administrative Law Judge Augustus B. Elkins, II in the Office of Administrative Hearings. Heard in the Court of Appeals 23 April 2014.

*Parker Poe Adams & Bernstein LLP, by Renee J. Montgomery, Robert A. Leandro, and Dac Cannon, for petitioner The Heritage.*

*Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Lee M. Whitman, and Tobias S. Hampson, for petitioner Liberty.*

*Roy Cooper, Attorney General, by June S. Ferrell, Special Deputy Attorney General, for respondent DHHS.*

*Smith Moore Leatherwood LLP, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for respondent-intervenor Britthaven.*

DAVIS, Judge.

North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section ("the Agency"); AH North Carolina Owner LLC d/b/a The Heritage of Raleigh ("The Heritage"); and Britthaven, Inc. and Spruce LTC Group, LLC (collectively "Britthaven") appeal from the Final

Decision of the administrative law judge awarding a certificate of need ("CON") to 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 denying Britthaven's and The Heritage's applications for a CON. After careful review, we vacate and remand for further proceedings consistent with this opinion.

**Factual Background**

In the 2011 State Medical Facilities Plan ("SMFP"), the North Carolina State Health Coordinating Council identified a need for 240 additional nursing facility beds in Wake County. In response to this need determination, The Heritage, Britthaven, Liberty, Hillcrest Convalescent Center, Inc. ("Hillcrest"), E.N.W., LLC and BellaRose Nursing and Rehab Center (collectively "BellaRose"), and 11 other applicants[1] applied for a CON with the Agency to either expand their existing facilities or build new facilities in order to provide the additional beds.

The Heritage submitted an application to expand the campus of its existing senior living community to add a 90-bed nursing

[1] These additional 11 applicants were not parties in the contested case in the Office of Administrative Hearings ("OAH") and are not relevant to the present appeal.

facility. Britthaven filed an application that proposed the development of a new 120-bed nursing facility in the Brier Creek area. Hillcrest also sought in its CON application to develop a new 120-bed nursing facility. Liberty's application proposed the development of a 130-bed nursing facility in North Raleigh, comprised of 120 new nursing care beds and 10 beds relocated from its Capital Nursing Rehabilitation Center location. BellaRose's application entailed the development of a 100-bed nursing facility on Rock Quarry Road in Raleigh.

In September 2011, the Agency began conducting a competitive review of each of the applications, and on 3 February 2012, it issued its findings and conclusions. The Agency determined that the applications of The Heritage, Hillcrest, and Liberty failed to conform to all applicable statutory review criteria and, therefore, could not be approved. The Agency approved the applications of Britthaven and BellaRose and awarded certificates of need to them for 120 and 100 nursing care beds, respectively.[2]

The Heritage, Hillcrest, and Liberty each filed a petition for a contested case hearing challenging the Agency's decision.

---

[2] The Agency also awarded a CON to Universal Properties/Fuquay Varina, LLC and Universal Health Care/Fuquay Varina, Inc. (collectively "Universal") to add 20 nursing care beds to its existing nursing care facility. The Agency's decision to approve the 20 additional beds for Universal was not at issue in the contested case and is not an issue in this appeal.

The Heritage's petition challenged the Agency's decision to disapprove its application and to approve the applications of Britthaven and BellaRose. Hillcrest's petition challenged the disapproval of its application and the approval of the applications of Britthaven and BellaRose. Liberty's petition challenged the disapproval of its application and the approval of Britthaven's application but did not challenge the approval of BellaRose's application.

Britthaven and BellaRose both intervened in the contested cases of The Heritage, Hillcrest, and Liberty. The Heritage, Hillcrest, and Liberty each intervened in the contested cases of the other petitioners. The parties filed a joint motion to consolidate the contested cases, and on 2 July 2012, Administrative Law Judge Augustus B. Elkins, II ("the ALJ") entered an order consolidating the cases for hearing.

The ALJ heard the matter beginning on 1 October 2012. On 20 June 2013, the ALJ entered a final decision ("the Final Decision") affirming the Agency's award of a CON to BellaRose, reversing the Agency's award of a CON to Britthaven, and reversing the Agency's denial of a CON to Liberty. The Final Decision also upheld the Agency's denial of a CON to The Heritage and Hillcrest. The

Agency, The Heritage, and Britthaven filed timely notices of appeal to this Court.[3]

**Analysis**

"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." *Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 276, 281, 691 S.E.2d 421, 424 (2010) (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 87, 706 S.E.2d 254 (2011). Accordingly, health care providers seeking to offer new nursing facility beds must submit an application to the Agency describing the proposed project and receive authorization from it to proceed with the development of such a project. *See* N.C. Gen. Stat. §§ 131E-176(3), 131E-178 (2013).

When deciding whether to issue a CON, a two-step process is generally applied. First, the Agency must determine whether the applications submitted meet the criteria set forth in N.C. Gen. Stat. § 131E-183(a). *Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 57, 625 S.E.2d 837, 844

[3] Hillcrest did not appeal from the Final Decision and thus is not a party to this appeal. Britthaven and The Heritage do not challenge the ALJ's conclusion that the Agency properly awarded a CON to BellaRose, and consequently, BellaRose is also not a party to this appeal.

(2006). Second, "where the Agency finds more than one applicant conforming to the applicable review criteria, it may [then] conduct a comparison of the conforming applications to determine which applicant should be awarded the CON." *Id.* at 58, 625 S.E.2d at 845.

Following the Agency's decision to issue a certificate of need to a particular applicant, the remaining applicants that were not selected are entitled to a contested case hearing in the OAH for a review of the Agency's decision. *See Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, ___, 762 S.E.2d 468, 471 (2014) ("After the Agency decides to issue, deny, or withdraw a CON . . . any affected person as defined by section 131E-188(c) shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes." (citation, quotation marks, and brackets omitted)), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (filed Mar. 5, 2015) (No. 353P14). N.C. Gen. Stat. § 150B-23 requires the party seeking a contested case hearing to file a petition stating facts which tend to establish that

> the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:
>
> (1) Exceeded its authority or

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

N.C. Gen. Stat. § 150B-23(a) (2013).

Accordingly, in a contested case hearing, "[t]he administrative law judge must . . . determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, as well as whether the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule." *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, ___, 751 S.E.2d 244, 248 (2013) (citation, quotation marks, and emphasis omitted); *see also Surgical Care Affiliates*, ___ N.C. App. at ___, 762 S.E.2d at 471 (explaining that "[t]his Court has interpreted subsection (a) to mean that the ALJ in a contested case hearing must determine whether the petitioner has met its burden in showing that the agency substantially prejudiced the petitioner's rights. . . . [and] that the agency erred in one of the ways described above" (citation, quotation marks, and brackets omitted)).

In 2011, the General Assembly amended the Administrative Procedure Act ("APA"), conferring upon administrative law judges the authority to render final decisions in challenges to agency actions, a power that had previously been held by the agencies themselves. *See* 2011 N.C. Sess. Laws 1678, 1685-97, ch. 398, §§ 15-55. Prior to the enactment of the 2011 amendments, an ALJ hearing a contested case would issue a recommended decision to the agency, and the agency would then issue a final decision. In its final decision, the agency could adopt the ALJ's recommended decision *in toto*, reject certain portions of the decision if it specifically set forth its reasons for doing so, or reject the ALJ's recommended decision in full if it was clearly contrary to the preponderance of the evidence. *See* N.C. Gen. Stat. § 150B-36, *repealed by* 2011 N.C. Sess. Laws 1678, 1687, ch. 398, § 20. As a result of the 2011 amendments, however, the ALJ's decision is no longer a recommendation to the agency but is instead the final decision in the contested case. N.C. Gen. Stat. § 150B-34(a).

Under this new statutory framework, an ALJ must "make a final decision . . . that contains findings of fact and conclusions of law" and "decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." *Id.*

Our review of an ALJ's final decision is governed by N.C. Gen. Stat. § 150B-51, which provides, in pertinent part, as follows:

> (b) The court reviewing a final decision[4] may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the

[4] In certificate of need cases, an appeal from a final decision proceeds directly to this Court. *See* N.C. Gen. Stat. § 131E-188(b) (2013) ("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)."); N.C. Gen. Stat. § 7A-29(a) (explaining that "appeal as of right lies directly to the Court of Appeals" from final decisions issued under N.C. Gen. Stat. § 131E-188(b)).

> relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)-(c) (2013).

In the present case, the ALJ determined that the Agency erred by incorrectly applying Criterion 20 and Criterion 13(c) of N.C. Gen. Stat. § 131E-183(a) in its review of the applications for the nursing facility beds at issue. The ALJ concluded that as a result of the Agency's erroneous application of these two criteria, the Agency improperly determined that (1) The Heritage's and Liberty's applications were nonconforming with the review criteria; and (2) Britthaven's application was conforming with the review criteria. The ALJ also found that Liberty had met its burden of showing that it was substantially prejudiced by the Agency's errors.

Consequently, the ALJ reversed the Agency's award of a CON for 120 nursing facility beds to Britthaven and ordered that the CON instead be issued to Liberty. With respect to The Heritage, the ALJ concluded that it had failed to demonstrate that it was substantially prejudiced by the Agency's erroneous disapproval of its application because it was "not one of the three most effective

applications in the Review" and, therefore, would not have been approved even if the Agency had found it to be conforming. We address each of these determinations by the ALJ in turn.

**I. Criterion 20**

Criterion 20 states 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(a)(20) (2013). Because the General Assembly has not articulated with specificity how the Agency should determine an applicant's conformity with Criterion 20, the Agency was authorized to establish its own standards in assessing whether an applicant that was already involved in providing health care services had provided quality care in the past. *See* N.C. Gen. Stat. § 131E-177(1) (2013) (explaining that Agency is empowered to "establish standards and criteria or plans required to carry out the provisions and purposes of [the certificate of need statutes]").

Historically, in determining an applicant's conformity with Criterion 20, the Agency has confined its review to the applicant's facilities within the proposed service area — which, in nursing home reviews, is the county where the proposed facility is to be located. The Agency would then ascertain whether the applicant's facility (or facilities) within that county, if any, had received

any citations for substandard quality of care during the 18-month period immediately preceding the Agency's decision. If the applicant did not have any existing facilities within that county, the Agency deemed Criterion 20 "not applicable" to the applicant.

In its petition for a contested case and during the contested case hearing, Liberty contended that the Agency "exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule" in determining that its application did not conform to Criterion 20 and that Britthaven's application was, conversely, in conformity with Criterion 20. In making these assertions, Liberty argued that (1) the Agency arbitrarily limited its analysis of whether quality care had been provided in the past solely to the applicants' facilities within Wake County; and (2) Britthaven's application failed to "adequately evidence that quality care had been provided in the past as required by Criterion 20." Liberty also contended in the contested case hearing that the Agency used an incorrect "look back period" for assessing an applicant's quality of care history.

The ALJ agreed with Liberty's contentions and concluded in his Final Decision that (1) Criterion 20 requires an examination of the quality of care record of the applicant's facilities *statewide*; (2) the relevant time period when assessing an

applicant's past quality of care is the 18 months prior to the submission of the applicant's application through the date on which the Agency renders its decision; and (3) Britthaven failed to show conformity with Criterion 20 because the portion of its application addressing quality of care issues at its existing facilities was incomplete and misleading. For these reasons, the ALJ concluded that Britthaven's application was nonconforming with Criterion 20.

In their appeal to this Court, the Agency and Britthaven contend that in making these determinations, the ALJ exceeded his statutory authority and made an error of law by substituting his interpretation of Criterion 20 for the Agency's interpretation. Specifically, they contend that the ALJ failed to give any deference to the Agency's interpretation of this criterion and improperly conducted a *de novo* review in excess of his limited authority pursuant to N.C. Gen. Stat. § 150B-23(a) as interpreted by this Court in *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382-83, 455 S.E.2d 455, 459, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). Because the Agency and Britthaven assert errors under subsections (2) and (4) of N.C. Gen. Stat. § 150B-51(b), we review the ALJ's determinations regarding the scope of Criterion 20 *de novo*. N.C. Gen. Stat. § 150B-51(c) ("With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section,

the court shall conduct its review of the final decision using the de novo standard of review.").

"It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Craven Reg'l*, 176 N.C. App. at 58, 625 S.E.2d at 844; *see also Hospice at Greensboro, Inc. v. N.C. Dep't of Health and Human Servs.*, 185 N.C. App. 1, 13, 647 S.E.2d 651, 659 (explaining that "an agency's interpretation of a statutory term is entitled to deference when the term is ambiguous and the agency's interpretation is based on a permissible construction of the statute" (citation and quotation marks omitted)), *disc. review denied*, 361 N.C. 692, 654 S.E.2d 477 (2007).

Here, the statute at issue — N.C. Gen. Stat. § 131E-183(a)(20) — charges the Agency with determining whether an applicant already involved in the provision of health services has "provide[d] evidence that quality care has been provided in the past" but does not provide guidance for how the Agency is to assess compliance with this criterion. As such, in order to evaluate whether Liberty had met its burden of demonstrating that the Agency's application of Criterion 20 constituted error as defined in N.C. Gen. Stat. §

150B-23(a) that substantially prejudiced Liberty's rights, the ALJ was required to determine whether the process used by the Agency in assessing compliance with Criterion 20 was based on a permissible construction of the statute. *See Cty. of Durham v. N.C. Dep't of Env't & Natural Res.*, 131 N.C. App. 395, 397, 507 S.E.2d 310, 311 (1998) ("If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (citation, quotation marks, and brackets omitted)), *disc. review denied*, 350 N.C. 92, 528 S.E.2d 361 (1999).

In his Final Decision, the ALJ concluded that the geographic scope chosen by the Agency to assess compliance with Criterion 20 was not based upon a permissible interpretation of N.C. Gen. Stat. § 131E-183(a)(20). The ALJ made the following findings of fact on this issue:

> 1. The General Assembly has found that to promote the general welfare and health of its citizens, CON applicants for new health services must be evaluated as to the quality of care they will provide. N.C.G.S. § 131E-175(7). Criterion 20 requires that "[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past."
>
> 2. Criterion 20 serves to benefit future residents of a proposed nursing facility by ensuring that an existing provider cannot be awarded a CON unless it can demonstrate that it is currently providing quality care at its existing facilities. Criterion 20 is

especially important in nursing home reviews because the residents of nursing facilities have serious medical issues and are completely dependent on the facility to meet their care needs 24 hours a day.

3. All CON applicants are required to demonstrate how a project will promote quality in the delivery of health care services. Safety and quality are the first basic principle[s] that govern the health care planning process in the State Medical Facilities Plan.

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

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

6. In this review, the Agency only considered the applicants' history of providing quality care in Wake County. The Agency ignored quality of care by an applicant in other counties.

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

8. The language of Criterion 20 does not

expressly limit or even suggest that the geographic scope of the Agency's review should be limited to only those facilities operated in the county where the proposed project is to be located. Instead, Criterion 20 makes clear that all existing providers must demonstrate that they have provided quality care in the past.

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

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

. . . .

26. In Section II, Question 6(a) of the nursing home CON application, the Agency asks the applicant to complete a table ("Table 6") and identify whether any of the applicant's existing facilities statewide have experienced any of a set of specified quality-related events. The specified quality-related

> events include "Substandard Quality of Care as Defined by [the Federal Government]" and "State and Federal Fines."
>
> . . . .
>
> 38. The Agency is obligated to review applications and determine whether they are consistent with the statutory review criteria. N.C. Gen. Stat. § 131E-183(a).
>
> 39. In reviewing whether applications submitted in this case conformed to Criterion 20, Mike McKillip, Project Analyst at the Agency's CON Section, sent an e-mail dated December 20, 2011 to Beverly Speroff, Chief of the Agency's Nursing Home Licensure and Certification Section. The e-mail included a list of the applicants' existing facilities in Wake County and asked whether any of those facilities had quality of care problems since August 2010.
>
> 40. Ms. Speroff responded to Mr. McKillip's e-mail and stated which of the facilities identified by Mr. McKillip, "had certification deficiencies constituting substandard quality of care during this period." Ms. Speroff's e-mail did not contain any details about the certification deficiencies. Ms. Speroff's e-mail also did not contain any information regarding whether the applicants' remaining facilities in North Carolina had experienced any quality of care issues.
>
> 41. Mr. McKillip and Martha Frisone, Assistant Chief of the Agency's CON Section, both testified that the Agency's determination of whether the applications in this review conformed to Criterion 20 was based entirely on Ms. Speroff's e-mail.

(Certain citations omitted.)

Based on these findings, the ALJ made the following pertinent

conclusions of law:

> 24. The Agency erred and acted in contradiction of law by limiting the geographic scope of Criterion 20 to facilities located in the county where the proposed project was to be located in determining conformity with Criterion 20.
>
> 25. In considering the geographic scope of Criterion 20, the first step is to review the plain language of the statute to determine if it explicitly supports the Agency's interpretation. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574-75, 573 S.E.2d 118, 121 (2002).
>
> 26. Nothing in the plain language of Criterion 20 suggests that the General Assembly intended the Agency to limit its review of past quality of care provided by existing providers to facilities located in the county where the proposed facility would be located. Moreover, the language of Criterion 20 does not support a reading of the statute that allows the Agency to ignore existing health service providers on the basis that the services are provided outside the county where the proposed project is to be located. Instead, the plain language of Criterion 20 very explicitly states, without qualification, that if the applicant is an existing provider of health service[s], that provider must demonstrate that it has provided quality of care in the past. N.C.G.S. § 131E-183(a)(20).
>
> 27. The Agency and Britthaven contend that since the service area for the need allocation is Wake County, Criterion 20 should be interpreted to limit quality of care review to Wake County. However, a bedrock principle of statutory construction is that the court must consider a statute as a whole and presume that the legislature understood its choice of words when drafting the statute. *Housing Auth. of*

*Greensboro v. Farabee*, 284 N.C 242, 245, 200 S.E.2d 12, 15 (1973); *see also N.C. Dept. of Revenue v. Hudson*, 196 N.C. App. 763, 768, 675 S.E.2d 709, 711 (2009) (if legislation includes particular language in one section but omits it in another, it is presumed the legislature acted intentionally).

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

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

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

31. While traditionally the interpretation

of a statute by an agency created to administer the statute is accorded some deference, "those interpretations are not binding, and the weight of such an interpretation in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade. *Total Renal Care of North Carolina, LLC v. North Carolina Dept. of Health and Human Services, Div. of Facility Services, Certificate of Need Section*, 171 N.C. App. 734, 615 S.E.2d 81 (2005). The Agency's interpretation of the geographic scope of Criterion 20 is not based on thorough consideration or valid reasoning.

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

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

34. The Agency's policy of ignoring quality issues that exist outside the county under review is inconsistent with the importance

that the General Assembly has placed on quality in the CON statute and is not in the best interest of future nursing home patients.

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

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

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

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

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

. . . .

47. In order to fulfill its obligation of determining whether applications are

> consistent with statutory review criteria, the Agency must perform a meaningful analysis.
>
> 48. To perform a meaningful analysis of whether an applicant conforms to Criterion 20, the Agency must analyze and give due regard to the information available to it that is reasonably related to an applicant's history of providing quality care.
>
> 49. In this case, the Agency did not analyze or give due regard to the information available to it that is reasonably related to the applicants' history of providing quality care. Specifically, the Agency did not analyze or give due regard to the public comments regarding the quality issues at Britthaven facilities or any of the other Applicants across the State. Likewise the Agency did not analyze information available to it related to any of the Petitioners' histories of providing quality of care throughout the State.
>
> 50. By failing to analyze or give due regard to the substantial information available to the Agency that was reasonably related to the applicants' history of providing quality care, the Agency failed to perform a meaningful analysis of whether the applications conformed to Criterion 20.
>
> 51. By failing to perform a meaningful analysis of whether the applications conformed to Criterion 20, the Agency failed to fulfill its obligation of determining whether the applications were consistent with Criterion 20.

The ALJ also concluded that the Agency had utilized the incorrect time frame in its assessment of the applicants' conformity with Criterion 20. Specifically, the ALJ found that while the application form developed by the Agency required

applicants to provide quality of care information for the 18 months *immediately preceding the submittal of the application*, it was the Agency's practice "to only consider substandard quality of care occurring eighteen (18) months *prior to the issuance of the CON Section's decision*." (Emphasis added.)

The ALJ determined that the Agency's policy of ignoring approximately four months of quality of care data contained in the applications was contrary to N.C. Gen. Stat. § 131E-182(b), which provides that an application form shall require such information as the Agency "deems necessary to conduct the review" and that "[a]n applicant shall be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. 131E-183 and with duly adopted standards, plans and criteria." N.C. Gen. Stat. § 131E-182(b) (2013). As such, the ALJ concluded that the appropriate look back period for assessing an applicant's compliance with Criterion 20 extended from 18 months prior to the submission of the application up to the date that the Agency issued its decision.

As discussed above and as the ALJ noted in his Final Decision, an agency's interpretation of a statute that it is tasked with administering should be accorded some deference by the reviewing tribunal. *Good Hope Health Sys., LLC v. N.C. Dep't of Health &*

*Human Servs.*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463, *aff'd per curiam*, 362 N.C. 504, 666 S.E.2d 749 (2008). The agency's interpretation is only entitled to such deference, however, if it is both reasonable and based on a permissible construction of the statute. *Craven Reg'l*, 176 N.C. App. at 58, 625 S.E.2d at 844. The weight given to the agency's interpretation by a reviewing court depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Good Hope*, 189 N.C. App. at 544, 659 S.E.2d at 463 (citation and quotation marks omitted). Therefore, we must consider whether deference should be accorded to the Agency's interpretation of (1) the appropriate geographic scope of the quality of care assessment required under Criterion 20; and (2) the length of the look back period under Criterion 20. We address each in turn.

**A. Geographic Scope**

With regard to the geographic scope of the quality of care evaluation, we agree with the ALJ's conclusion that the Agency's interpretation of Criterion 20 was not based on a permissible construction of N.C. Gen. Stat. § 131E-183(a). "The cardinal principle of statutory construction is that the intent of the legislature is controlling. In ascertaining the legislative

intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983) (internal citations omitted); *see also Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 ("The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." (citation and quotation marks omitted)), *disc. review denied*, 363 N.C. 374, 678 S.E.2d 665 (2009).

It is clear from the testimony offered at the contested case hearing that the Agency's practice of only examining an applicant's quality of care record within the service area of the proposed project is longstanding. Assistant Chief of the CON Section Martha Frisone ("Frisone") testified that evaluating the applicant's quality of care "track record" for only those facilities within the proposed service area had been the practice of the Agency for at least the 18 years she had been employed by the Agency and that she was trained to follow this practice upon her hiring. She explained that when the Agency is "doing a review and we're looking at Criterion 20, the first question we ask is does this project involve an existing facility. And if so, we will inquire about the quality of care track record at that facility, and then we

will look at affiliated facilities in the same county." Frisone further testified that under this method of assessing conformity with Criterion 20, if an applicant does not have any existing facilities within the proposed service area, the Agency will find that Criterion 20 is "not applicable" to that applicant.

A longstanding and consistent interpretation of a statute by an administrative agency warrants greater deference than an inconsistent or novel interpretation. *See Martin*, 194 N.C. App. at 724, 670 S.E.2d at 635 (explaining that "consistently held agency view" was entitled to significantly more deference than an interpretation that conflicts with an earlier agency interpretation). However, courts will not defer to an agency's interpretation of a statute that is an impermissible construction of the statute. *Craven Reg'l*, 176 N.C. App. at 58, 625 S.E.2d at 844.

As the ALJ noted, certain review criteria in N.C. Gen. Stat. § 131E-183(a) are specifically limited to the service area of the proposed project. Criterion 18a, for example, requires the applicant to "demonstrate the expected effects of the proposed services on competition *in the proposed service area* . . . ." N.C. Gen. Stat. § 131E-183(a)(18a) (emphasis added). Criterion 20, on the other hand, contains no such geographic limitation.

It is well established that in order to determine the

legislature's intent, statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each. *Cape Hatteras Elec. Membership Corp. v. Lay*, 210 N.C. App. 92, 101, 708 S.E.2d 399, 404 (2011). Furthermore, as this Court has previously explained, "[w]hen a legislative body includes particular language in one section of a statute but omits it in another section of the same [statute], it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (citation, quotation marks, and brackets omitted).

Consequently, it is legally significant that the General Assembly made no mention of the service area of the proposed project in Criterion 20. As such, basic principles of statutory construction support the ALJ's conclusion that the General Assembly did not intend for the Agency's evaluation of an applicant's past quality of care to be limited to the service area of the proposed project.

In addition, "under no circumstances will the courts follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (citation, quotation marks, and

alteration omitted). In addition to controlling health care costs and avoiding the costly and unnecessary duplication of health service facilities, a primary reason for the existence of the CON laws is to protect the health and well-being of the citizens of North Carolina. N.C. Gen. Stat. § 131E-175(7). Indeed, the General Assembly made specific findings explaining the underlying purpose of requiring health care entities to obtain CONs and how the CON laws promote the general welfare of the public. In particular, the General Assembly stated

> [t]hat the general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria as determined by provisions of this Article . . . prior to such services being offered or developed in order that only appropriate and needed institutional health services are made available in the area to be served.

*Id.* Thus, the clear intent of the General Assembly was to ensure that the quality of care history of an existing health care provider be subject to meaningful evaluation before that provider is allowed to offer additional services within North Carolina that are subject to the CON laws.

Here, the Agency's interpretation of Criterion 20 resulted in its determination that Criterion 20 was "not applicable" to several

of the applicants simply because they did not have existing facilities in Wake County. Thus, the quality of care history of applicants such as The Heritage, which were already providing nursing care services within North Carolina but did not have any facilities in Wake County, was not assessed despite Criterion 20's mandate for the Agency to determine whether an applicant already involved in the provision of health services has shown that quality care has been provided in the past. N.C. Gen. Stat. § 131E-183(a)(20).

We see no logical basis for disregarding such information evidencing quality of care on a statewide level. Indeed, we believe that such a policy actually contravenes one of the primary purposes of the CON laws. *See O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (stating that construction of statute which impairs or defeats purpose of statute should be avoided).

Significantly, the testimony from the contested case hearing demonstrates that Agency employees were unable to identify a plausible justification for its past interpretation of the geographic scope element of Criterion 20. Michael McKillip ("McKillip"), a project analyst for the Agency, admitted that he did not know why the Agency limited its analysis to the service area at issue, simply stating that it was just "how we review

applications under Criterion 20." Likewise, Frisone testified that she did not know how the Agency initially formulated this interpretation of Criterion 20 but that it had been used for at least the past 18 years and "in that period of time, it has never been questioned that we should look statewide, nationwide, [or] worldwide when we're evaluating Criterion 20."

The inability of the Agency's own employees to provide a coherent rationale for its interpretation of the geographic scope of Criterion 20 provides additional support for our conclusion that no deference is owed to the Agency on this issue. *See Cashwell v. Dep't of State Treasurer*, 196 N.C. App. 81, 89, 675 S.E.2d 73, 78 (2009) (explaining that deference should only be accorded to agency interpretation "if the agency's interpretation of the law is not simply a 'because I said so' response . . . ." (citation, quotation marks, and alteration omitted)).

**B. Look Back Period**

With regard to the look back period applicable to Criterion 20, we likewise conclude that the ALJ correctly determined that the Agency's interpretation was not entitled to deference. On this issue (unlike the issue of the appropriate geographic scope of Criterion 20), application of principles of statutory construction to N.C. Gen. Stat. § 131E-183(a) do not provide an answer. However, it is clear that the look back period the Agency

utilizes in assessing an applicant's conformity with Criterion 20 differs from the temporal scope of the quality of care information it requires an applicant to provide in its application. By looking solely at the 18 month-period prior to its decision rather than to the 18 months preceding the submission of the application, the Agency disregarded several months of quality of care data — information that it specifically required the applicants to report.

The ALJ found that the Agency's practice of ignoring this information was improper because N.C. Gen. Stat. § 131E-182(b) "prohibits the Agency from creating an application form that requires the applicant to furnish anything more than that which is necessary to a determination of whether the application is consistent with the applicable standards, plans and criteria." N.C. Gen. Stat. § 131E-182(b) states as follows:

> An application for a certificate of need shall be made on forms provided by the Department. The application forms, which may vary according to the type of proposal, shall require such information as the Department, by its rules deems necessary to conduct the review. An applicant shall be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. 131E-183 and with duly adopted standards, plans and criteria.

The Agency's response to this finding is that N.C. Gen. Stat.

§ 131E-182(b) merely requires it to limit the information sought from applicants to that which "might be useful" in a review so as to prevent the Agency from engaging in a "fishing expedition." We agree with the ALJ's determination on this issue. Although the statute affords the Agency a measure of discretion in formulating the appropriate look back period, the Agency used that discretion by creating an application that requests information for the 18-month period preceding the submission of the application. The record is devoid of any explanation from the Agency of the basis for its practice of deviating from the time period referenced in its own application when applying Criterion 20. As such, we cannot say that the ALJ erred in his determination that the Agency is bound to utilize a look back period of 18 months preceding the date of the application's submission through the date of the Agency's decision.[5]

Having determined that the ALJ's conclusions as to the proper geographic and temporal parameters of Criterion 20 were not erroneous, we must now examine the ALJ's specific application of Criterion 20 to Britthaven and Liberty.

**C. Application of Criterion 20 to Britthaven**

[5] We also agree with the ALJ's conclusion that this longer look back period is "reasonable and consistent with" the legislative purpose underlying Criterion 20 by offering a more comprehensive evaluation of a health care provider's past history of quality care in its provision of health services.

In his Final Decision, the ALJ reversed the Agency's determination that Britthaven had demonstrated a history of quality care in conformity with Criterion 20, making the following findings of fact:

> 23. Criterion 20 puts the burden on the applicant to prove that it has provided quality care in the past: "An applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past."
>
> . . . .
>
> 26. In Section II, Question 6(a) of the nursing home CON application, the Agency asks the applicant to complete a table ("Table 6") and identify whether any of the applicant's existing facilities statewide have experienced any of a set of specified quality-related events. The specified quality-related events include "Substandard Quality of Care as Defined by [the Federal Government]" and "State and Federal Fines."
>
> . . . .
>
> 28. Although Britthaven identified 46 facilities in Table 6 of the Britthaven Application, it did not disclose that any of those facilities had experienced incidents of substandard quality of care. The evidence at the hearing revealed that, in fact, seven (7) Britthaven facilities had experienced eleven (11) events constituting substandard quality of care during the eighteen (18) months prior to the application date.
>
> 29. Max Mason, who prepared the Britthaven Application, testified at the hearing that Britthaven's events of substandard quality of care were purposefully not identified in the Britthaven Application because he knew that

the Agency would only evaluate whether Britthaven's Wake County facility had provided quality care in the past, and none of Britthaven's eleven (11) events of substandard quality of care occurred at Britthaven's Wake County facility.

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

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

> proposed facility is to be located.
>
> 32. Mike McKillip, the analyst who performed the review in this case, testified that his interpretation of Table 6 of the Britthaven Application was that no Britthaven facility in North Carolina had an episode of Substandard Quality of Care.
>
> 33. Mr. McKillip testified that Britthaven should have identified which of its facilities had experienced events constituting substandard quality of care. He further testified that had Britthaven fully identified its events of substandard quality of care, he would likely have followed up on the disclosed issues. Craig Smith, Chief of the Agency's CON Section, testified that he expects the entire CON application to be completed in a complete and accurate manner.
>
> 34. Doug Suddreth, who was admitted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and design and how care practices and work care practices flow from such design, and who testified on behalf of Britthaven and BellaRose, opined that it was a mistake for Britthaven not to fully complete Table 6.

(Internal citations omitted.)

Based on these findings of fact, the ALJ made the following conclusions of law concerning the issue of whether Britthaven had complied with Criterion 20:

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

> the CON application form was misleading and contrary to its legal requirements.
>
> 63. Even if the Agency's traditional Criterion 20 analysis was limited to the county at issue in the review, Britthaven was not excused from its obligation to fully, completely and truthfully fill out Table 6 of the CON application form.
>
> 64. By failing to fully, completely and truthfully fill out Table 6 of the CON application form, Britthaven failed to meet its burden of proving that it provided quality care in the past under Criterion 20.
>
> 65. The Agency must conduct an assessment of all relevant information in support of and indeed in opposition to an application. To do so the Agency must be able to rely on all information requested within the application. Britthaven's intentional omissions regarding quality of care prevents the Agency from conducting that independent evaluation that it must to assure itself and indeed the public of a fair and honest judgment on the issue. The failure to provide that information necessarily prevents the required evaluation and necessarily makes the Agency's decision regarding Britthaven's past quality of care arbitrary and capricious.
>
> 66. Britthaven's failure to meet its requirement of proving that it provided quality care in the past under Criterion 20 renders the Britthaven Application nonconforming and therefore unapprovable.

On appeal, Britthaven argues that (1) the ALJ's characterization of the omissions from its application as intentional is not supported by the evidence; and (2) the ALJ erred as a matter of law in concluding that the omissions from its

application necessarily rendered Britthaven nonconforming with Criterion 20. We agree.

At the contested case hearing, Maxwell Mason ("Mason") — who was responsible for overseeing CON-related matters for Britthaven, including the preparation of Britthaven's CON applications — testified that an employee, Martha McMillan ("McMillan"), prepared Table 6 in Britthaven's application. Mason stated that the table completed by McMillan appeared correct when he reviewed it but that he did not "go figure out where all the survey findings are and letters from Licensure and Certification and try to recreate the table" because McMillan was more familiar than he was with that data.

Mason further testified that he attempts to verify the accuracy of information provided to him in connection with CON applications "to the extent feasible." He further stated, however, that in light of the Agency's historical practice of examining only the facilities located in the service area of the proposed new project in its Criterion 20 review, he would personally conduct an inquiry into the quality of care history solely as to any facilities located within the particular service area at issue.

When specifically asked about whether Britthaven's omission of the "Xs" that should have been included in Table 6 to denote that a facility had been cited for substandard quality of care was

deliberate, Mason responded that it was Britthaven's intention for its application to be both complete and accurate and that the omissions were inadvertent.

> There was no intent for there not to be Xs. As best I can understand it, there was some misunderstanding on the part of Ms. McMillan about how this table should be completed. But as I said, she's done it for a while and it never came to our attention that there was a problem. So that's all I can say about it. But I mean I certainly didn't tell anyone or consciously say let's remove Xs.

Liberty asserts that the ALJ's determination that Britthaven intentionally omitted this information is supported by substantial evidence because Mason also testified that Britthaven chose to provide responses with "less detail" to inquiries into the circumstances of fines that had been imposed on various Britthaven facilities. Mason's testimony on this issue was that the section of the application requesting the applicant to describe the circumstances of each fine imposed "doesn't prescribe specific expectations for the content" and that Britthaven provided "a general response" in that section "based on our experience of how the Agency reviews this information."

In our view, this testimony falls short of supporting a conclusion that Britthaven *intentionally* omitted key information from its application. Rather, it merely shows that Britthaven's answers in that section were not comprehensive explanations but

rather general responses based on its assessment of "the extent of the response that's required."

We have carefully reviewed the record and have failed to identify evidence that would warrant a finding that Britthaven "purposefully" excluded information concerning the quality of care record of its facilities outside of Wake County.[6] Indeed, we note that toward the conclusion of the hearing, the ALJ appears to have expressed agreement with Britthaven's contention that there had not been any evidence presented of intentional omissions by any applicant. During the cross-examination of Frisone, the following interchange took place:

> [Counsel for The Heritage]: Would you consider it would be an issue if an applicant intentionally omits information?
>
> A. Well I--
>
> [Counsel for Britthaven]: (interposing) I just want to object, Your Honor. At this point I don't think there's been any evidence that anybody intentionally omitted anything.
>
> The Court: ***And I agree with that***, but I think her question is fair. I'm not relating it to

[6] It is worthy of mention that the ALJ separately determined that Liberty's application also contained various errors, which included the omission of three Liberty facilities from Table 6 of its application and an erroneous statement that it was awaiting the resolution of an "appeal from the findings of the survey at Liberty's Rowan County facility" when, in fact, the appeal had already been denied. The ALJ characterized these errors as "inadvertent" without articulating any basis for this characterization.

> this specific -- it's generally if it is found to be. Do you understand, Ms. Frisone? I'm not taking it to mean this application itself at this point, but her question is in general.

(Emphasis added.)

We next turn to the ALJ's ultimate conclusion that Britthaven's application was nonconforming with Criterion 20. As evidenced by the conclusions of law quoted above, the ALJ's determination that Britthaven failed to conform to Criterion 20 was based solely on Britthaven's incomplete responses in Table 6 of its application. On appeal, Britthaven and the Agency argue that the ALJ's failure to make findings and conclusions concerning Britthaven's actual record of providing care based on the information available to the Agency and the evidence offered at the contested case hearing was an error of law, rendering his conclusion of nonconformity arbitrary and capricious. Once again, we agree.

While the ALJ noted in his Final Decision that Britthaven had received 23 substandard quality of care citations from 12 surveys that were conducted at Britthaven's facilities during the relevant time period, the ALJ did not make any findings discussing the significance of these citations nor did he expressly base his finding of nonconformity on their existence or on any other aspect of Britthaven's actual survey history. Instead, the ALJ concluded that Britthaven's inaccuracies in its completion of Table 6

"necessarily prevent[ed]" the Agency from conducting its evaluation of past quality of care, and as a result, Britthaven could not meet its burden of demonstrating pursuant to Criterion 20 that it had provided quality care in the past.

We believe this conclusion is contradicted both by the testimony of Agency officials and by the ALJ's own determinations that (1) the Agency had "substantial information" before it concerning Britthaven's statewide quality of care record; and (2) the Agency is empowered to — and should — look beyond the application itself to determine an applicant's conformity with the review criteria.

At the hearing, Frisone explained that the Agency could find an application nonconforming based on an applicant's omissions or misrepresentations in the application *if* the information at issue could not be found elsewhere in the submitted materials or was not publicly available. She testified that the Agency is not confined to the information contained in an application and instead may use whatever evidence is available to it in assessing an applicant's conformity with the review criteria. She further testified that in this particular case "the omission is in section II(6)(a), and that is an area where we are going to corroborate or document that quality of care track record for those facilities that we're going to look at by contacting the Licensure and Certification Section

for publicly available information." She stated that, for this reason, Britthaven's failure to fully complete Table 6 would not have prevented the Agency from assessing its conformity with Criterion 20 and should not be grounds for finding the Britthaven application nonconforming with Criterion 20.

Similarly, Craig Smith ("Smith"), Chief of the CON Section, testified that the Agency will examine the information provided by an applicant as well as any additional information it obtains from other sources to determine the applicant's conformity with the review criteria. He also stated that he could not envision the Agency "being so draconian that we would disqualify somebody for omitting a response" when the Agency was nevertheless able to assess the applicant's conformity through other sources.

Moreover, in spite of his conclusion that Britthaven's omissions had prevented the Agency from meaningfully reviewing its quality of care record statewide, the ALJ specifically noted that other applicants had made the Agency aware of a number of the substandard quality of care citations at Britthaven facilities during the Agency's initial review of the applications. The ALJ also found that the Agency should have analyzed such information in performing its review of Criterion 20. This Court has previously recognized that the Agency may take into account information beyond that contained within the application itself in

making its decision. *See In re Wake Kidney Clinic, P.A.*, 85 N.C. App. 639, 643-44, 355 S.E.2d 788, 790-91 (explaining that Agency can consider information not contained in CON application but otherwise made available to it in making determination of conformity with review criteria), *disc. review denied*, 320 N.C. 793, 361 S.E.2d 89 (1987).

Notably, Frisone testified that the reason she did not look into these citations was because they did not occur in Wake County and the information the Agency had received during the public comment period did not "lead me to believe that we should vary from our practice of looking only at the facilities in Wake County." Thus, while the evidence supports a finding that the Agency *did not* examine Britthaven's record of quality of care outside of Wake County, it does not support the ALJ's conclusion that the Agency *could not* examine Britthaven's history of quality of care because of the omitted information on its application. To the contrary, the Agency's failure to conduct such an examination resulted from the Agency's own practice of confining its review of Criterion 20 to the service area of the proposed project.

Our conclusion that the ALJ erred in determining that Britthaven must be found nonconforming because its omissions prevented a meaningful analysis of Criterion 20 is not a departure from the well-established principle that "[t]he burden rests with

the applicant to demonstrate that the CON review criteria are met." *Good Hope*, 189 N.C. App. at 549, 659 S.E.2d at 466. Rather, our holding is simply that the record does not support the ALJ's findings that (1) Britthaven intentionally submitted an application with misrepresentations and omissions; or (2) these misrepresentations and omissions precluded the Agency from conducting a meaningful review of Britthaven's application to assess conformity with Criterion 20.

For these reasons, we hold that the ALJ erred in summarily concluding that Britthaven was nonconforming without actually examining the quality of care provided by it in the past. As such, a remand is necessary so that the ALJ may make a substantive determination of whether Britthaven was in conformity with Criterion 20 based on its actual quality of care record.[7] *See* N.C. Gen. Stat. § 150B-51(b) ("The court reviewing a final decision may . . . remand the case for further proceedings.").

**D. Application of Criterion 20 to Liberty**

The ALJ next concluded that the Agency erred — and, in so doing, substantially prejudiced Liberty's rights — by finding that

[7] We wish to emphasize that nothing herein should be construed as suggesting that this Court condones the submission of applications containing misrepresentations or omissions. We express no opinion as to the types of circumstances that would have to exist in order for an applicant's misrepresentations or omissions to justify a finding of nonconformity on that ground.

Liberty's application was nonconforming with Criterion 20. The Agency had determined that Liberty was nonconforming and therefore unapprovable because its Wake County facility, Capital Nursing and Rehabilitation Center, "had certification deficiencies constituting substandard quality of care, including immediate jeopardy to resident health or safety." For this reason, pursuant to the Agency's historical practice of assessing conformity, it concluded that Liberty was nonconforming with Criterion 20.

In his findings, the ALJ noted that Liberty operated 17 facilities in North Carolina and had received 8 citations statewide for substandard quality of care from 4 surveys conducted during the pertinent look back period. Without addressing the particular circumstances surrounding Liberty's substandard quality of care citations or explaining his reasoning, the ALJ summarily concluded as a matter of law that "Liberty met its burden at the hearing of establishing that it had provided quality care in the past in its existing North Carolina facilities." Britthaven, The Heritage, and the Agency argue that this conclusion was erroneous and unsupported by adequate findings of fact.

As discussed above, the ALJ's Final Decision rejected the Agency's historical approach to assessing conformity with Criterion 20, concluding that the Agency's restriction of its analysis to facilities within the county of the proposed project

and utilization of a look back period consisting of only the 18 months immediately preceding the Agency's decision were incorrect. While we agree with the ALJ's analysis of the proper geographic and temporal scope of Criterion 20 in the abstract, the Final Decision is unclear as to how the ALJ actually applied these principles to Liberty and the particular information he relied upon in determining that Liberty's application was consistent with Criterion 20. Indeed, the only discernible support the Final Decision attempted to offer for its determination that Liberty met its burden of demonstrating conformity with Criterion 20 was the bare conclusion that

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

Fundamental to this Court's ability to review a final decision and analyze whether "the findings, inferences, conclusions, or decisions" of the ALJ are affected by errors of law or are arbitrary, capricious, or an abuse of discretion is the existence of adequate findings of fact. N.C. Gen. Stat. § 150B-51; *see generally, Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (explaining that lower tribunal must provide appellate court with "sufficient information in its order to reveal . . . the application of [its] review" (citation

and quotation marks omitted)).

Here, we are presently unable to determine whether the ALJ erred in concluding that Liberty's application was in conformity with Criterion 20 because the Final Decision provides no substantive explanation of how it reached this conclusion. The ALJ made multiple findings suggesting that the Agency should expand the data sources it considers in assessing an applicant's quality of care track record, noting that the Agency "failed to consider any matters of positive quality of care." The ALJ also noted the Nursing Home Compare data, the CMS Quality Score, and other evidence presented by the parties comparing the number of substandard quality of care citations an applicant has received to the total number of patient days of care provided by the applicant. However, the ALJ made no mention of whether such information factored into his assessment of Liberty's quality of care record and offered no explanation as to the actual basis for his conclusion.

Throughout the hearing, the parties raised various possible methods of assessing an applicant's conformity with Criterion 20. The Heritage advocated for a "zero tolerance" policy, whereby an applicant would be found nonconforming if it had received even one single substandard quality of care citation at any of its facilities within North Carolina during the relevant look back

period.[8] The ALJ expressly rejected this interpretation of Criterion 20, stating that "[t]he plain language of Criterion 20 does not require any such zero-tolerance standard, and nothing in the text or legislative findings of the CON Act, or any other statute suggests that the General Assembly intended for the Agency's inquiry under Criterion 20 to function in such a manner." The ALJ also relied on Frisone's testimony at the hearing that a statewide zero tolerance policy would not be feasible because it would substantially reduce the pool of approvable applicants, concluding that a statewide zero tolerance policy was "unreasonable, inequitable, inconsistent with Agency practice, and would not effectively achieve the purposes of the CON Act."

Thus, while the ALJ clearly rejected a zero tolerance policy for assessing compliance with Criterion 20, he also specifically "decline[d] to offer specific methods for the Agency" to utilize in determining conformity with Criterion 20, stating that "find[ing] another way or ways of evaluating Criterion 20. . . . is not the role of the Office of Administrative Hearings . . . or the purpose[] of a contested case hearing." The problem with the

[8] Such a policy would have incorporated the Agency's existing approach — whereby applicants were deemed nonconforming if they had a single substandard quality of care citation in the county of the proposed project during the applicable look back period — and expanded its reach so that all facilities statewide would be considered.

ALJ's reasoning is that the Final Decision simultaneously (1) stated the ALJ's belief that it was up to the Agency to formulate a standard for assessing compliance with Criterion 20; yet (2) nevertheless proceeded to conclude that Liberty had somehow met this unarticulated standard. In reaching these logically inconsistent conclusions, we believe the ALJ erred. It cannot be determined whether either Liberty or Britthaven conformed with Criterion 20 without a prior understanding of the appropriate standard for assessing such conformity.

The ALJ's Final Decision implicitly recognized that the Agency — as the entity possessing institutional expertise as to CON-related issues and tasked by the General Assembly with administering the CON statutes — is ultimately responsible for developing an appropriate standard for assessing conformity with Criterion 20 (albeit one that is consistent with the CON Laws). *See* N.C. Gen. Stat. § 131E-177(1) (giving Agency authority to "establish standards and criteria or plans . . . and to adopt rules pursuant to Chapter 150B of the General Statutes, to carry out the purposes and provisions of [the CON statutes]").

However, as a result of the General Assembly's 2011 statutory amendments to the APA, the ALJ — rather than the Agency — is entrusted with the duty of making a final decision in any CON matter that becomes the subject of a contested case, and the APA

does not provide ALJs with the authority to remand an action back to the Agency for further proceedings. N.C. Gen. Stat. § 150B-34. Accordingly, in cases where, as here, an ALJ has determined that the Agency erred, it is his responsibility to explain why the Agency's decision was erroneous and why the Final Decision he renders is a correct application of the law to the facts of the case. *See id.* ("In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law.").

Therefore, the ALJ, on remand, must make findings of fact and conclusions of law to support his ultimate determination as to whether Liberty and Britthaven adequately demonstrated that they conformed to Criterion 20 by providing quality care in the past.[9]

**II. Criterion 13(c)**

The last issue presented on appeal concerns the ALJ's finding that (1) The Heritage's application was conforming to Criterion 13(c) but that (2) the denial of a CON to The Heritage did not constitute error because its application was comparatively less effective than the applications of BellaRose, Liberty, and Britthaven (such that The Heritage would not ultimately have been selected even if the Agency had found The Heritage to be conforming

[9] In performing this task, he is, of course, free to seek input from the Agency, as well as from the other parties, before rendering a new final decision.

with Criterion 13(c)).

The ALJ's determination that The Heritage's application was comparatively less effective than the applications of Liberty and Britthaven is unchallenged by the parties. However, because we are vacating the ALJ's determination regarding the conformity of Liberty's and Britthaven's applications to Criterion 20 and remanding for new findings and conclusions on that issue, we are required to also review the ALJ's determination that The Heritage conformed with the review criteria and was, in fact, an approvable applicant. This is so because if, on remand, the ALJ determines that neither Liberty nor Britthaven was in conformity with Criterion 20, then The Heritage — if it satisfied Criterion 13(c) — would be entitled to the CON.

Criterion 13(c) provides as follows:

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

> c. That the elderly and the medically underserved groups identified in this subdivision will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services[.]

N.C. Gen. Stat. § 131E-183(a)(13)(c).

In its decision, the Agency found that The Heritage's projection that 55.4% of its total patient days[10] would be provided to Medicaid recipients was inadequate in meeting the needs of the Medicaid population, thereby rendering it nonconforming with Criterion 13(c). In order to determine whether an applicant satisfies Criterion 13(c), the Agency's practice is to examine the applicant's projections for the services it will provide to medically underserved groups, including Medicaid recipients, and compare those projections with the state and county averages of the percentage of total patient days provided to the group in question. Because The Heritage's projection regarding Medicaid recipients was less than the Agency's calculation of the average percentage of total patient days provided to patients receiving Medicaid in nursing facilities within Wake County, the Agency found The Heritage to be nonconforming with Criterion 13(c).

---

[10] "Total patient days" is a unit of measurement utilized by health care entities. A facility's total patient days are calculated by assessing the number of patients that use the facility's services each day.

In his Final Decision, the ALJ concluded that the manner in which the Agency computed the Wake County average for services provided to Medicaid recipients was improper. Specifically, the ALJ determined that the Agency "acted erroneously and arbitrarily in ***excluding*** nursing facility beds in hospital-affiliated nursing facilities to calculate the county average and using that average to find The Heritage nonconforming with [Criterion 13(c)]." (Emphasis added.) The ALJ found that The Heritage's projection, which was based on a calculation of the county average that ***included*** hospital-affiliated nursing facilities, constituted "sufficient Medicaid access" and demonstrated conformity with Criterion 13(c).

The Agency argues on appeal that the ALJ acted in excess of his statutory authority and erred as a matter of law by affording no deference to the Agency's process for determining conformity with Criterion 13(c) despite the explanation offered by the Agency to support its practice. We agree.

As we previously noted, an agency's interpretation of the statutes it is charged with administering is due deference when its interpretation is reasonable, and the amount of deference given to the agency interpretation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those

factors which give it power to persuade . . . ." *Good Hope*, 189 N.C. App. at 544, 659 S.E.2d at 463 (citation and quotation marks omitted). Indeed, the 2011 legislative amendments to the APA preserve this concept, specifically instructing the ALJ to consider the specialized knowledge of the Agency when deciding a contested case.

> In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law. The administrative law judge shall decide the case based upon the preponderance of the evidence, *giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency*.

N.C. Gen. Stat. § 150B-34(a) (emphasis added).

Here, Agency employees testified as to the reasoning behind its exclusion of hospital-affiliated facilities from its calculation of the county average. Frisone testified that hospital-affiliated nursing facility beds typically

> have a different payor mix. They tend to have a much higher Medicare payor mix percentage and a much lower Medicaid. They typically admit the patient and then move them — they're moved to another facility or they go home. It's more likely in a hospital based facility than it is in a community nursing home.

She further explained that the Agency was particularly concerned with achieving access to nursing facilities for Medicaid recipients because "Medicaid patients have greater access problems

in 2011" and have "historically had more trouble with access to nursing facility services." McKillip, the Agency employee who analyzed and reviewed each of the applications, likewise testified that the hospital-affiliated facilities were excluded from the calculation "because they have a different payor mix pattern that is not typical or not really comparable to the types of facilities that are being proposed in this review, which were all non-hospital affiliated freestanding facilities."

The ALJ rejected this rationale in his Final Decision. He noted that the Agency did not conduct an analysis of the admission patterns in Wake County or of the percentage of Medicaid recipients served by hospital-affiliated facilities as compared to other facilities before deciding to exclude hospital-affiliated nursing facilities from its calculation.

We believe the ALJ's implication that the Agency was required to specifically analyze the admission patterns of *all* Wake County nursing facilities — both hospital-affiliated and non-hospital-affiliated — disregards the specialized knowledge and expertise of the Agency concerning the typical payor mixes of particular facilities. The evidence presented at the hearing corroborated the Agency's assertion that hospital-affiliated facilities typically have significantly fewer Medicaid patients than other skilled nursing facilities within Wake County with an average 31.6%

of the total patient days provided to Medicaid recipients at hospital-affiliated facilities compared to 61.8% at non-hospital-affiliated facilities. As such, we believe that the ALJ erred in failing to give deference to the Agency's reasonable explanation for its decision to exclude hospital-affiliated facilities from its calculation of the county average.

The ALJ further based his conclusion that the Agency's calculation of the county average was arbitrary and capricious on (1) testimony by Agency employees suggesting that the Agency might have included hospital-affiliated facilities in the county average if a hospital-affiliated nursing facility had applied for the CON; and (2) evidence of two prior Agency decisions from Wake County where the county averages appear to have included hospital-affiliated facilities.

Based on our examination of the record and the testimony of Agency employees, it appears that a number of factors are considered by the Agency when deciding whether hospital-affiliated facilities should be included in the calculation of the county average. For example, in smaller counties with fewer overall facilities, hospital-affiliated facilities are generally included in order to achieve a more balanced analysis while, conversely, in larger, more populated counties — which have many skilled nursing facilities — hospital-affiliated facilities are typically excluded

as their different payor mix tends to artificially depress the county average.

The ALJ cited Smith's testimony that if hospital-affiliated nursing facilities apply for a CON, such facilities may be added "to the mix for a more balanced comparison." Frisone noted that this would likely not be the case in Wake County, however, because of its large population and the fact that "there are enough facilities to where you can look at the distribution" without including hospitals and artificially skewing the county average.

Given the Agency's explanation of its methodology and its purpose in assessing the county average in this manner, we reject the ALJ's conclusion that the Agency was unreasonable and arbitrary simply because it might have altered its calculation if the group of applicants included one or more hospital-affiliated nursing facilities. Indeed, we find it logical for the Agency to utilize an approach allowing for some degree of flexibility in striving to capture the most accurate picture of the services provided to Medicaid recipients within a county in accordance with the specialized knowledge and expertise of the Agency.

We also disagree with the ALJ's determination that the Agency acted erroneously and arbitrarily in excluding hospital-affiliated facilities from its calculations in light of evidence pointing to two prior occasions in which the Agency apparently accepted a

calculation of the Medicaid average in Wake County that included hospital-affiliated nursing facilities. Based on our review of this evidence, it appears that these two incidents stemmed from non-competitive reviews where an individual applicant was awarded a CON to add or relocate nursing beds from existing facilities after proposing that over 70% of its total patient days would be provided to Medicaid recipients. The record does not reflect precisely why hospital-affiliated facilities were included in the county average in these two cases. However, we cannot conclude based on the mere existence of these two past cases — without more — that the Agency is no longer entitled to the deference that it would otherwise be due in its interpretation of Criterion 13(c). Indeed, the record also contains evidence of numerous decisions in which the Agency utilized the same method of determining conformity with Criterion 13(c) that it used here.

In sum, we conclude 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, we reverse the ALJ's determination that The Heritage conformed with Criterion 13(c).

**Conclusion**

For the reasons stated above, we vacate the ALJ's Final Decision and remand this case for further proceedings not

inconsistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and McCULLOUGH concur.