IN THE MATTER OF
HAZELWOOD MANOR

Initial Decision: January 4, 1985
Final Agency Decision: February 25, 1985
Initial Decision on Remand: May 31, 1985
Final Agency Decision on Remand: September 12, 1985

Approved for Publication by the Commissioner of Health, J. Richard
Goldstein: April 15, 1986

SYNOPSIS

This matter arose out of the Commissioner of Health's denial of an application for a Certificate of Need to construct a 180-bed long-term nursing facility in Ocean County.

After a hearing before and the issuance of an initial decision by an administrative law judge, the Health Care Administration Board ordered that the matter be remanded for the receipt of additional information and the clarification of certain issues. The administrative law judge then filed a supplemental decision which concluded that petitioner should be granted a Certificate of Need. Upon review, the Board rejected that decision and ordered that the application of a Certificate of Need should be denied.

The administrative law judge had found that the methodology for determining bed need set forth in N.J.A.C. 8:33H-3.10(a)(1) was used by the Commissioner in reviewing petitioner's applications and all other applications in the July 15, 1983 batching cycle. Applying this methodology to 1985 projected population data and to the count of facilities existing and approved as of July 1983, led to a showing of a need for 651 long-term care beds in Ocean County and an excess of 440 beds in Monmouth County. The administrative law judge ruled that it was valid and proper to use 1985 projected population statistics, as they were the latest data available at the time the application was undergoing review. The administrative law judge found that the purposes of the batching regulation, N.J.A.C. 8:33-2.2, called for the freezing of statistical data as of the time of the review cycle for the batch. The administrative law judge further ruled that it was appropriate to offset the statistical bed need showings of Monmouth and Ocean counties because these counties were contiguous and served a common area for long-term care services. After offsetting the need for 651 beds in Ocean County against the excess of 440 beds in Monmouth County, there was a net need of 211 long-term care beds
in Ocean County at the time of the July 1983 review cycle for the batch.

When the Commissioner acted on the application in petitioner's batch, he approved other applications for the total addition of 240 long-term care beds in Ocean County, thereby filling the net bed need of 211 beds for the area. The administrative law judge ruled that the Commissioner's approval of these other applications could be reviewed only by the judiciary and that the 240 beds approved for the area in the July 1983 cycle must be accepted as being finally resolved. The judge rejected the view that the approval of these 240 beds obviated the need for petitioner's proposal, concluding that the bed need methodology contained in N.J.A.C. 8:33H-3.10(a)(1) was not a measure of objective need. The judge reasoned that because nursing home beds in Monmouth County were being occupied at a rate of more than 90 percent, they could not be available to address the needs of elderly Ocean County residents. Finding that the concept of bed need provided by the methodology to be illusory, the judge determined that petitioner should be granted a Certificate of Need.

The Board specifically rejected reliance upon current occupancy levels as being determinative of bed need, since such levels do not reflect the number of "paper beds", i.e., beds which have already been approved, are in various stages of construction and are likely to be available in the future to meet the demand for nursing beds.

In addition, the Board noted that the approval of petitioner's application would do nothing to satisfy present needs because of the period of lead time for new construction. The Board noted that if the number of "paper beds" is not carefully monitored at the same time beds are initially approved, the end result over time would be to have more beds constructed than the population needs or can support. The Board observed that a primary purpose of the planning process is to reverse that type of maldistribution.

The Board specifically rejected the judge's conclusion that the methodology incorporated in regulation for projecting long-term care bed needs fails to be a proper measure of objective need, finding that no reason had been offered to depart from the standard methodology. The Board did concur with the judge bed need should ordinarily be frozen in time since it would be unfair to treat any one or several of the batch in a wholly isolated manner. Thus in reviewing a certificate application, certificates already approved by the Commissioner must be regarded as conclusive.
Therefore, since petitioner showed no special need or special underserved section of the public, its application was denied.

Richard D. McLaughlin, Esq., for petitioner (Schepisi and McLaughlin, attorneys)

Michael J. Haas, Deputy Attorney General for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Initial Decision

SULLIVAN, ALJ:

This matter arises out of a denial by the Commissioner of Health of petitioner's application for a Certificate of Need to construct a 180 bed long-term care facility with an 18-slot medical day care component in Toms River, New Jersey. The application was considered in the July 15, 1983 review cycle. The closing statement of respondent succinctly sets forth the steps that were taken with respect to the application as follows:

The application was recommended for denial by the Regional Review Committee of the CJHPC (Central Jersey Health Planning Counsel), the executive committee of the CJHPC as well as by the State Review Committee and the SHCC (Statewide Health Coordinating Counsel). In his denial letter, the State Commissioner of Health found that neither the State health plan nor the long-term care component of the CJHPC Health Systems Plan indicate any need for additional beds in the area. Therefore, he found that the proposed facility was not necessary to provide required health care in the area to be served.

Following the Commissioner's denial letter of November 7, 1983, petitioner appealed. The matter was characterized as a contested case and referred to the Office of Administrative Law for determination, pursuant to the Administrative Procedure Act.¹

Before the matter was heard, petitioner and respondent cross moved for summary decision. In August 1984, a decision was rendered on the cross motions, denying both. A hearing was held on October 22, 1984, and the parties were given until November 14, 1984, to submit closing statements and arguments in support of their position. On

¹ Shortly after the transmittal of this matter to the Office of Administrative Law, it was consolidated with a cognate application for a Certificate of Need for long-term care beds in Ocean County, which, like petitioner's, had been considered in the July 15, 1983 review cycle. The consolidated matter was subsequently withdrawn.
November 20, 1984, petitioner sought to supplement the record by submitting additional written argumentation. Neither protest nor reply was offered by respondent. Under these circumstances, it was ordered *munc pro tunc* that the record be extended until the date of the latter submission, at which point it closed.

This matter arises under the Health Care Facilities Planning Act, *N.J.S.A.* 26:2H-1 *et seq.*, which governs, among other things, the entry into the marketplace of proposed health care facilities and services. The act explicitly requires that proposed facilities secure a Certificate of Need for the construction of any health care facility (*N.J.S.A.* 26:2H-7) and sets forth both the grounds for the issuance of the certificate (*N.J.S.A.* 26:2H-8) and the procedural steps to be taken in support of the Commissioner's determination whether or not to issue such a document (*N.J.S.A.* 26:2H-9). In addition, the act authorized the Commissioner to issue rules and regulations to effectuate its provisions. *N.J.S.A.* 26:2H-5(b).

In its closing argument, petitioner has addressed a number of issues (such as the propriety of batching requirements) which have been heretofore addressed in a decision denying cross motions for summary decision in August 1984. I am unpersuaded that that decision is improper in any material respect and hence reject the arguments of petitioner that would ask a determination inconsistent with that previously made.

Before turning to the factual contentions of the parties, I note the argument of petitioner that not all of the calculations were executed pursuant to a regulation. Factually, petitioner is correct. Nevertheless, while the statute authorizes the issuance of regulations, it is clear that its overall focus is on the Commissioner's responsibilities to carry out the procedural steps mainly to assure "that hospital and related health care services be of the highest quality, of demonstrated need, efficiently provided and properly utilized at a reasonable cost." *N.J.S.A.* 26:2H-1. The Commissioner and his predecessors have taken substantial steps to codify regulations designed to effectuate this goal. Nevertheless, the law has not reached the point where a Commissioner cannot take action in pursuit of a statutory goal without having previously reduced every methodology to regulation. *Merry Heart Nursing and Convalescent Home, Inc. v. Dougherty*, 131 N.J.Super. 412 (App. Div. 1974). The methodologies employed in this case are of record, their proponents were subject to cross-examination, and the only issue properly before the Board is whether or not the decision to withhold a Certificate of Need was in error.
I also note and reject petitioner's argument that respondent's activities are violative of *Metromedia, Inc. v. Director, Division of Taxation*, 97 N.J. 313 (1984). In rejecting the position taken by the Appellate Division that the activities of the Director were lawful absent agency rules because his actions were justified under the statute, Justice Handler stated for the closely divided Court:

Although *R. H. Macy and Company* supports the general proposition that an agency may make decisions with substantive effect without prior promulgation of a rule or regulation, there were two features that supported that result. One was the recognition that the determination might not be of unvarying application in all similar cases. The other was the accepted adequacy and specificity of the legislative standard in guiding the particular administrative decision. *Metromedia, supra*, at 333.

It is clear from the record in this case that the methodology used was peculiar to the Central Jersey Health Planning Council. Moreover, while it is not clear that *Merry Heart* concerned legislative standards specific enough to guide this particular administrative decision, it is clear that the statute has been found suitably specific to support agency action. In light of these realities, reliance on *Metromedia* is misplaced.

Petitioner also argues that it was misled by the existence of Health Analysis Zones (HAZ's) in the planning methodology of the Central Jersey Health Planning Council (HSA-IV). Nevertheless, despite the fact that petitioner found it prudent to take steps towards the acquisition of real property in the area of its choice, it does not argue and, on the state of the record before me, cannot argue that it was misled to its prejudice by actions taken by the Department of Health. The HAZ approach is itself uncodified in regulation by the Department and therefore can hardly give rise to an argument of estoppel.

Passing from these preliminary considerations, three substantial elements of this case are the determination of need for long-term care facilities, the appropriate definition of the boundaries of the area in which this need exists and, lastly, the calculation of a net need in the area to be served.

As to the overall perception of need for long-term care beds in Ocean County, petitioner makes reference to the fact that the standard of need set forth in *N.J.A.C. 8:33H-3.10(a)(ii)* yields a bed figure below the national average. While this is true, it is not clear how this contention alone leads to a determination in this case. The national average is an historical artifact and not dictated by any regulatory
material of which I am aware. It would appear that petitioner makes a claim that there is something inappropriate with there being fewer long term beds per unit of population in New Jersey than there are elsewhere. However, the argument is essentially a political one and bears marginal weight under the statute.

The methodology for determining need set forth in N.J.A.C. 8:33H-3.10(a)11 asserts the appropriateness of 4 LTC beds per 100 persons between ages 65 and 74 and 4.5 LTC beds for persons over that age. The respondent asserts that this methodology was promulgated after it was proposed by the Nursing Home Task Force, a subcabinet committee of various institutions and the executive branch of the government.

The next problem to arise is the determination of the area in which the need might or might not exist. The respondent, by accepting the work done by HSA-IV, has by implication adopted a methodology which analyzes geographic need on several levels. The HSA approach calculates need for HAZ's, clusters of HAZ's, counties and market areas that combine counties.

As if to illustrate just how difficult the determination of appropriate area might be, there is no dispute that the petitioner has demonstrated that there is a bed need (to the extent that concept is appropriate on the HAZ level) in HAZ-17, in which it undertakes to build, and in the county in which that zone is located. Respondent, in turn, has demonstrated that, applying the regulatory ratio, there is no need in the HAZ cluster or, if one nets bed figures across county lines, in the areas contiguous to Ocean County.

Petitioner properly noted that health statistics have from time immemorial been recorded on county lines and that the county, as both an essential political building block of the state and as a convenient area of administration, is an easily defined area of concern. Petitioner thus argued that consolidation of areas across county lines is inappropriate.

Petitioner's argument is refuted by the command of the statute, N.J.S.A. 26:2H-8, which directs attention to the "area to be served (by the proposed health care facility of service)." Hence, it would be a matter of indifference to the statute what political boundaries are used so long as the area is that which is to be served by the facility.

There was a limited analysis of the degree of flow between Monmouth and Ocean Counties. Nevertheless, Joseph Calabria, a senior employee of the Department of Health, testified that there are, by the Department's standards, even more severe overbedding problems
in Atlantic and Burlington Counties as well as in Monmouth County. Since these counties enjoy the same contiguity with Ocean that Monmouth does, netting of Ocean County with any contiguous county would produce essentially the same results. 1

Petitioner marshals a number of arguments against the viability of HSA-IV's analysis of bed need. The respondent's first line of defense to these arguments is that the Commissioner's rejection letter is self-sufficient and that therefore HSA-IV's analysis of need need not be defended as an integral part of the Commissioner's action. However, a review of the text of the Commissioner's rejection letter indicates that the decision to deny the application "was based on these (HSA-IV's) recommendations as well as an evaluation of the factors cited in N.J.S.A. 26:2H-8." Since the Commissioner has incorporated HSA-IV's analysis as his own, the viability of that analysis is an essential component of the rejection.

Petitioner argues that HSA-IV did not use the most recently available statistics. Without belaboring the point, this argument was disposed of in the decision on the motion for summary decision as it related to the proper year to which data should be projected. Hence, I reject petitioner's argument on this point.

Petitioner also argues that the showing of bed need in HAZ-17 supports its application. Nevertheless, as Mr. Peloquin testified, the function of HAZ's is not to determine areas of bed need. In any event, there has been no showing on the record that the service area of the proposed facility is or even realistically could be limited to HAZ-17. Hence, this argument fails.

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2 Mr. Calabria's testimony might give grounds to conclude that the issuance of a certificate of need to Seacrest Nursing Home on the basis that it was furthest from the bed excess of Monmouth County was improper since Seacrest's location in Southern Ocean County puts it closest to Atlantic County, whose overbedding is undisputedly even more dramatic than that of Monmouth. Similarly, the approval of a substantial number of long term care beds from Middlesex County in the same batch in which petitioner's application is denied might be suspect based on the fact that Middlesex is just as contiguous to Monmouth as Ocean is. Nevertheless, Nat. Nephrology Foundation v. Dougherty, 138 N.J. Super. 470 (App. Div. 1976) indicates that the sole route for attacking such grants of certificate of need is to intervene in the grant proceeding and appeal directly to the Appellate Division. Since that was not done in this case, speculations about the appropriateness of Seacrest are totally beside the point.
In addition, petitioner argues that the use of a mean rather than a median would have supported its position. Without disputing this contention, petitioner has not made a convincing argument that there is anything inherently wrong statistically with the use of medians. As Mr. Lackey, one of its experts, testified, the United States Public Health Service uses a median. Presumably, since at least some nursing home residents achieve an elderly age, the use of a mean would tend to obscure the central tendency of lengths of stay and hence the median is appropriate and supports respondent's assertion of a median stay of 232 days.

Petitioner further argues that HSA-IV has failed to use its own demand factor in analyzing a number of beds. As to this, Mr. Peloquin pointed out that the demand factor was created to reflect a demand which accumulated during a moratorium on long term care bed approvals for 1974 to 1977. That era is long behind us, and I accept Mr. Peloquin's argument that the demand factor is inappropriate for use in this matter.

Lastly, petitioner argues that the respondent failed to take account of immigration to Ocean County in determining need. While an analysis of present migration patterns might cast light on the respondent's assertions about bed need, arguments about future migrations are, in my judgment, but one more way of restating petitioner's claim that the decision to approve beds should be based on projections into the future rather than 1985 bed need. Thus considered, petitioner's argument is essentially an argument of law which I have already considered and rejected in the August 1984 decision.

Lastly, as to bed need, respondent argues that present migration patterns cast light on the viability of Monmouth and Ocean Counties as a common market area for long term care services. Respondent goes on to argue that the fact that a number of individuals go from Ocean to Monmouth to receive long term care services tends to prove that Monmouth beds are available to Ocean County's elderly. However, by the very same token, the fact that Monmouth County residents appear in Ocean County long term care beds equally supports the argument that the alleged excess of beds in Monmouth County are insufficient to serve the needs of Monmouth County residents themselves. All things considered, the cross-county migration patterns in the present are a wash and do not substantially support the arguments of either party.

A review of the record indicates that the central focus of attention was bed need with limited attention given to alternative services avail-
able in the community. Since the Commissioner does not assert in his rejection letter that the existence of alternative services was a ground for rejection, I conclude that the Commissioner does not put forth that argument. Hence, the state of the record does not include a consideration of special needs and alternative services in the community. *Irvington General Hospital v. State Dep't of Health*, 149 N.J. Super. 461 (App. Div. 1977) criticizes this approach, but, as will be discussed below, this matter does not fall within the ambit of *Irvington* since it can be decided on bed need issues alone.

I would note in passing that while there was not testimony on alternative services, the documentary material in evidence, notably the Central Jersey Health Planning Council revised 1982-1987 Health Systems Plan—LTC excerpts and the State Health Plan both emphasize that alternative services are vitally important. However, they do not exist in anywhere near an appropriate level. The chief problem in making these services come into being has to do with the fact that the reimbursement system does not deem these services sufficiently useful to provide for their payment. Hence, while the Department, the HSA and—as near as the record reveals—health care professionals in general all support the development of alternative services, these services are for the most part programs to be sought in the future rather than services currently available. While not of record, I take official notice of the existence of the State’s Community Care Program and also its limitation to a very modest number of statewide elderly service recipients. There is no evidence in the plan itself that it has in any way been specially targeted for Ocean County.

Lastly, in his letter of rejection, the Commissioner argued as a tertiary reason for rejecting the application that “the availability of additional facilities could threaten the revenues of existing providers. Diversion of patients from existing facilities would result in greater underutilization of costly resources.”

While the Commissioner’s statement with respect to potential threats to the stability of existing providers has a common sense appeal, the State Health Plan more cogently argues that the difficulty in long term care planning is what the Department characterizes as “excess demand” through the reimbursement mechanisms. Since this is the only reference in the record to the stability of revenues, the Commissioner’s argument must fail.

Similarly, in light of the evidence of 90 percent or better occupancy of Monmouth County long term care providers, it is unclear what “greater underutilization” the Commissioner is referring to. There
is no evidence whatsoever of underutilization in the record. Hence this argument, too, must be rejected.

The basic issue is what one is to make of the fact that, by the Department's regulation, there are an excess of 440 beds in Monmouth County while there is a need for 651 beds in Ocean County.

This point is critical because the respondent in its brief repeatedly asserts that the excess beds are in some sense available to Ocean County residents. In contrast, petitioner variously asserts in its brief that the Monmouth beds exhibit a 90 percent occupancy at a norm of 45 beds per thousand or that the occupancy rate in the surrounding counties is 97 percent.

Dr. Breyer testified without contradiction that Monmouth County long term care facilities enjoyed an approximate 90 percent occupancy rate, a rate he defined as essentially full, since beds will often be reserved for a resident who is spending a short stay in an acute care hospital. Therefore, the concept of netting Monmouth and Ocean to define a lower level of need in Ocean County, nets the needs (as defined by regulation) of genuine living Ocean County residents with the planner's chagrin that 440 more people than are targeted are occupying beds in Monmouth County. In short, the existence of so-called excess beds does no good to the elderly residents of Ocean County who need care of some sort and for whom no other reliable service exists. This being so, the fact that these beds are occupied represents an excess over the policy preferences of the Department and the HSA but gives no comfort to the elderly residents of Ocean County.

Based on the foregoing, I make the following FINDINGS OF FACT:

1. Using the methodology of the regulation, the negative bed need in Monmouth County reflects an excess of 440 beds.
2. Using the same methodology, there is a bed need in Ocean County for 651 beds.
3. Monmouth County long term care beds have an occupancy rate in excess of 90 percent.
4. There is no evidence that suitable programming is available to all elderly Ocean County residents who are in need of substantial rehabilitation and personal care apart from long term care beds.
5. There exists some cross migration of Monmouth residents into Ocean for long term care services and from Ocean into Monmouth for long term care services. The migration pattern is roughly equal.
6. The median length of stay in a HSA-IV long term care bed is 232 days.

DISCUSSION OF LAW

In light of the findings above, consideration need be given as to the requirement of the act (N.J.S.A. 26:2H-1 et seq.) that facilities be approved only where there is a need.

In the first instance, a question arises as to whether or not the need described in the regulation is the same as that set forth in the statute. Ordinarily, of course, interpretations of an act applied to it by administrators are worthy of serious consideration. Nevertheless, the threshold issue is whether or not the use of "need" in both the statute and the regulation is intended to be descriptive of a state of affairs existing objectively in the area to be served or, rather, an authorization of the Commissioner to create a prescriptive, that is to say normative, concept of need. I would stress that the focus of such an inquiry has little to do with the breadth of the Commissioner's implied powers under the act, which is clearly defined in the law to be wide, New Jersey Assoc. of Health Care Facilities v. Finley, 168 N.J. Super. 152 (App. Div. 1979), aff'd, 83 N.J. 67 (1980). The point at issue is not whether the regulation has overstepped a boundary, but whether it relates at all to the concept of need set forth in the statute.

A review of the Report of the Nursing Home Task Force serves to demonstrate that the derivation of the 40-45 bed per thousand ratio was not a perception of objective realities, but a prescription for an appropriate planning methodology. In the Task Force Report, the Committee on Nursing Home Bed Supply discussed the derivation of its ratio. The committee first discussed an attempt of the Statewide Health Coordinating Council to develop what appears to be a model for determining objective need. The venture failed and the model is not used extensively "primarily because of a lack of data on which it could operate." Moreover, as the Committee put it, "many observers found the model very difficult to comprehend; its very complexity discouraged its use". The Committee then explained its derivation of the ratio in these terms:

Unfortunately, the state of the art is still such that there is no definitive or generally accepted ratio, methodology, or number for measuring bed need. Nevertheless, the pressing need for a comprehensible planning target compels the committee to reach a consensus. [emphasis added]
In addition, the Task Force went on to note that the selection of its ratio was designed to induce decisions elsewhere in the government. The Task Force stated:

By selecting a target of between 40 and 45, we are acknowledging the need for additional beds, both now and in the future, but are affirming the State's policy that there will have to be greater growth in our non-institutional capacity. The suggested ratio should encourage a shift in growth towards home and community based care and towards group and protective living arrangements.

These observations are not intended in any way to criticize the efforts of the Task Force. Nevertheless, it is impossible to read the report, which Mr. Calabria indicated was the basis of the regulation, without coming to the conclusion that the report is designed to induce public change rather than to reflect current realities. Thus, the report notes in its preface:

The Departments of Human Services and Health have made the achievement of a balanced long-term case system a high priority. In doing so, a strong emphasis has been placed on the expansion at home and community based care and group and protective living arrangements. The State had made non-institutional settings a top priority due to the current imbalance of the long-term care system; these settings require comparatively more development than nursing home care.

Put differently, it would appear that the ratio is designed both to reflect an appropriate level of beds should community care later become a reality and to encourage that development. Treating the task force report as the legislative history of the regulation, however, makes it obvious that the regulation is not designed to, and indeed does not in fact reflect, objective need.

As to the statute, a review of the cases cited by the respondent does not support a normative interpretation of the statute. Indeed, *Irvington General Hospital v. N.J. Dep't of Health*, 148 N.J. Super. 461 (App. Div. 1977) supports the conclusion that need as defined in the statute is descriptive. *Id.*, at 467-468.

Notwithstanding the conclusion that the statutory concept of need is descriptive, it is not necessary to resolve this issue in order to dispose of this case. The cogent issue here is whether or not the need for 651 Ocean County beds dissolves through a process of netting the so-called excess beds which, by the Commissioner's calculation, exist in Monmouth County. As I have found, more than 90 percent of all Monmouth County beds are occupied. There is not a hint in the record that these beds are specifically available to the current generation of elderly Ocean County residents.
As noted, the median length of stay for nursing home admissions was 232 days. This creates a situation where half the needful Ocean County residents will have to wait that long for half of the so-called excess Monmouth beds to be empty.

In light of this, it is appropriate to recall the conclusion of the Task Force that the average age of a nursing home resident is 84. Given this fact and an average stay as set forth above, it seems clear that the average age of one seeking admission to a nursing home is well above 80. A wait of more than one-half year for a needed service is a difficult experience in any event. This is particularly true where the needs are cogent, the age of the clientele is elderly and the community alternatives discussed above are still in the developmental stage. As the Task Force put it:

In the long run, fewer expensive nursing home beds would have to be built and operated since patients who would have been served in ICF-B settings would instead live in the proposed RSFs.

[emphasis supplied]

The material quoted above reflects both the targeting characteristics of the 40-45 ratio and the reality that the alternatives which the Task Force seeks to put in place have not been realized. Thus, while the policies proposed by the Task Force and the regulation work “in the long run,” one is constrained to recall that for 80-year-olds in particular this might be meager protection.

Thus, the alleged availability of excess beds is a statistical mirage of no practical value to the elderly and needful residents of Ocean County, even accepting the regulation’s prescriptive use of the concept of need.

Put somewhat differently, the dynamics of this case broadly invoke the twin considerations of economic policy with respect to undisciplined growth of health care costs and the interests of those who need such care (and who might be appropriately cared for in less institutional settings, did they exist).

On the State level, the considerations of cost containment and response to need are both reflected in the opening sentence of N.J.S.A. 26:2H-1, which states:

It is hereby declared to be in the public interest of the State that hospital and related health care services of the highest quality, of demonstrated need, be efficiently provided and properly utilized at a reasonable cost are a vital concern to the public health.

Despite the pairing of need and efficiency, the fact that both considerations are described as being of concern “to the public health” gener-
ally suggests that the provision of health care is primary over cost containment, although it would be impossible to determine the matter on the above-quoted text alone.

The same statute goes on to identify the goals of taking action to "contain the rising cost of health care services" but this statement exists solely in the context of setting forth the provision—undisputed in this matter—that "the State Department of Health shall have the central comprehensive responsibility for the development and administration of the State's policy with respect to health planning." N.J.S.A. 26:2H-1.

On a national level, there exists a substantial body of opinion that a draconian cutback in expensive health care is necessary. (See, New England Journal of Medicine, Volume 311, No. 24, December 13, 1984. In my view, Levinsky put it best in comments designed to illustrate the inappropriateness of allowing political and economic decisions about care to masquerade as planning decisions. In Levinsky's words: "If society decides to ration health care, political leaders must accept responsibility. David Owen, who is both a political leader in Britain and a physician, believes that "it is right for doctors to demand that politicians openly acknowledge the limitations within which medical practice has to operate." New England Journal of Medicine, Volume 311 No. 24, at 575.)

These views are reflected in administrative law as the delegation doctrine. Chief Judge J. Skelly Wright in 1972 described the values with which the doctrine is concerned as follows:

When Congress is too divided or uncertain to articulate policy, it is no doubt easier to pass an organic statute with some vague language about the "public interest" which tells the agency, in effect, to get the job done. But while this observation is no doubt correct, it seems to me to argue for a vigorous reassertion of the delegation doctrine rather than against it. An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy. The whole reason we have broadly based representative assemblies is to require some degree of public consensus before governmental action occurs. To be sure, we pay a price for awaiting such consensus. Sometimes desirable action is delayed or becomes impossible altogether because the representative organs of government are too fragmented or uncertain to formulate a coherent policy.

Ultimately, the arguments for broad delegation rest on the illusion that problems are solved by conflict avoidance. Congress
for one reason or another cannot deal with a problem, so it passes some "soft" statutes which throw the mess into the lap of an administrative agency. Such a broad delegation can yield only two possible results, both of which are unfortunate. On the one hand, if the problem is really intractable, it is unlikely that the agency, with all its expertise, will do any better with it than Congress. . . . Alternatively, it is possible that the agency will be able to deal with the problem forcefully. It may be that the agency is sufficiently insulated from political pressure so that it can take action which would have been unavailable to Congress, or that Congress is badly split while the agency is united. In this situation, a strong agency will be able to formulate prospective rules, develop a clear sense of purpose, and minimize unnecessary discretion. But these goals will have been accomplished at the expense of democratic decisionmaking. The putatively substantial portion of the electorate which opposed the agency action, or which is merely uncertain as to its wisdom, is likely to believe—and with some justification—that Congress had done through the back door what it could not accomplish in direct, democratic fashion. [81 Yale L.J. 575, 582-586 (1972)]

Obviously, these general views do not decide specific cases. As James M. Landis observed:

Generalization as to the allowable limits of administrative discretion is dangerous, for the field is peculiarly one where differences in degree become differences of substance. It is possible to say, on the one hand, that the responsibility for fashioning a policy, not only of great economic importance but also one that has divided the faiths and loyalties of classes of people, cannot appropriately be intrusted to the administrative; on the other, that the scope of administrative power should not be so narrowly defined as to take away from the administrative its capacity to achieve effectively the purposes of its creation. Such corollaries, however, are meaningless in the abstract. It is problems alone that can give them content, but the content that they should possess must have reference to situations seen in the light of the weaknesses and strength of administrative responsibility. [Landis, James M, Administrative Process, Greenwood Press, 1974, p. 55]

Thus put, the denial of the Hazelwood application for a Certificate of Need might very well assist in the control of health care costs and, demonstrably, does so at the expense of the interests of a present generation of elderly Ocean County residents for whom—in the long run—elimination of proposed nursing home beds might facilitate the creation of alternative forms of care, but for whom the foreseeable
future holds—for all the record shows—no option available to address their needs for care in the here and now.

The disposition of this matter is, of course, governed by N.J.S.A. 26:2H-8, which sets forth the grounds for issuance and denial of a Certificate of Need. The statute places prime emphasis on "the availability of facilities or services which may serve as alternatives or substitutes." This, as well as other concerns which must be resolved, has been set forth in Irvington General Hospital, which has been referred to above. As I have concluded with respect to the nonexistence of current alternatives to the facility proposed, specifically in light of the fact that the so-called excess beds are not available to the appropriately aged persons in the target area, I construe the facts found in this decision to be consistent with a need, as understood in the statute, for the development of a 180-bed facility. Hence, I ORDER that the Certificate of Need be granted.

FINAL DECISION BY THE HEALTH CARE ADMINISTRATION BOARD:

The Health Care Administration Board at its meeting on February 14, 1985, considered the initial decision of Administrative Law Judge Walter F. Sullivan in this case, which concerns the application of Hazelwood Manor for a certificate of need to build a long term care facility in Toms River, Ocean County. The Board voted to remand the matter to the administrative law judge to reopen the proceedings and receive such additional evidence as may be necessary to address certain issues, and thereafter to make a further recommendation on the disposition of the Certificate of Need application.

In voting to remand, the Board made specific reference to the use of current occupancy levels at existing facilities in the area. The initial decision of the administrative law judge relied heavily on the finding that long term care beds in Monmouth County have an occupancy rate in excess of 90 percent. However, during the Board's discussion it was noted that there is always a significant period of lead time, of at least 18 months to a few years, after the time of Certificate of Need approval, before any new long term care facility is actually constructed and ready for occupancy. In addition, the number of "paper beds" which have been approved but not yet built, can have an effect upon the occupancy rate at existing facilities. For these reasons the Board concluded that the current occupancy rate at existing facilities in the area could not adequately serve as the sole basis for determining the need for long term care beds to be constructed.
in the future. There are other factors relevant to this inquiry, including the application of the bed need methodology contained in regulations approved by the Board in 1983, N.J.A.C. 8:33H-3.10 as well as the number and status of "paper beds" in the area.

The Board would like the administrative law judge to reconsider the matter based on the record thus far and in light of the additional information of interest to the Board. It is recognized that the ultimate conclusion of the administrative law judge may not be different from that given in the initial decision filed on January 4, 1985. Nevertheless the Board believes that in order to have a sufficient basis for its final decision, it is necessary to consider the following issues:

1. What is the status of "paper beds" in the area, i.e., the number of long term care beds approved but not yet built, the length of time the "paper beds" have been in existence, the expiration dates of their certificates, the number of certificates which have been voided, and the progress that can reasonably be expected to be taken in completing the approved "paper bed" projects or in voiding the certificates.

2. Was the latest statistical data used in determining the need for the proposed long term care facility? If not, the reasons for not doing so should be clarified. In addition, the Board is interested in having the most recent long term care bed need figures for the area, current at the time of the proceeding on remand, as determined in accordance with the bed need methodology in N.J.A.C. 8:33H-2.10.

3. How is the long term care component of the HAS's Plan related to the long term care segment of the State Health Plan? How has the State treated the HSA's particular method for determining bed need in the region?

4. It was testified that the HAZ's used by the HAS do not function to determine areas of bed need. Please clarify what is the function of the HAZ's.

5. The role of county lines in determining bed need should be clarified. County lines, although artificial, have been used by the State in determining bed need. What is the function of the county bed need figures?

6. Is there a requirement that alternative services be provided by an applicant for approval of a long term care facility. If so, has this applicant satisfactorily met the requirement.

7. This case was initially consolidated with an application from Meridian Nursing Home. Counsel for Hazelwood indicated in
a letter to the Board dated January 23, 1985 that Meridian received a certificate of need on a revised application submitted in the November 1983 batching cycle. Did Meridian submit this revised application while its previous application was still pending? If so, what is the rationale for allowing Meridian to be put ahead of Hazelwood? Has Hazelwood been treated in a procedurally fair manner?

Initial Decision on Remand

SULLIVAN, ALJ:

This matter arises out of a denial by the Commissioner of the Department of Health of petitioner's application for a Certificate of Need to construct a 180-bed long-term care facility with an 18-slot medical day-care component in Toms River, New Jersey. The denial occurred on November 7, 1983, after Hazelwood Manor (Hazelwood) had filed for consideration as part of the July 15, 1983 review cycle. Hazelwood appealed the Commissioner's determination and the Department of Health (Department) characterized the matter as a contested case, referring it to the Office of Administrative Law for disposition, pursuant to the Administrative Procedure Act. On January 4, 1985, I signed an initial decision reversing the Commissioner and ordering that the Certificate of Need be issued.

Upon review, the Health Care Administration Board identified seven issues which it determined had not been explored in sufficient detail at the hearing. These issues were:

1. What is the status of "paper beds" in the area, i.e., the number of long-term care beds approved but not yet built, the length of time the "paper beds" have been in existence, the expiration dates of their certificates, the number of certificates which have been voided, and the progress that can reasonably be expected to be taken in completing the approved "paper bed" projects or in voiding the certificates?

2. Was the latest statistical data used in determining the need for the proposed long term care facility? If not, the reasons for not doing so should be clarified. In addition, the Board is interested in having the most recent long-term care bed need figures for the area, current at the time of the proceeding on remand, as determined in accordance with the bed need methodology in N.J.A.C. 8:33H-3.10.

3. How is the long-term care component of the HSA's Plan related to the long-term care segment of the State Health Plan? How has the State treated the HSA's particular method for determining bed need in the region?
4. It was testified that the HAZ's used by the HSA do not function to determine areas of bed need. Please clarify what is the function of the HAZ's.

5. The role of county lines in determining bed need should be clarified. County lines, although artificial, have been used by the State in determining bed need. What is the function of the county bed need figures?

6. Is there a requirement that alternative services be provided by an applicant for approval of a long-term care facility? If so, has this applicant satisfactorily met the requirement?

7. This case was initially consolidated with an application from Meridian Nursing Home. Counsel for Hazelwood indicated in a letter to the Board dated January 23, 1985 that Meridian received a certificate of need on a revised application submitted in the November 1983 batching cycle. Did Meridian submit this revised application while its previous application was still pending? If so, what is the rationale for allowing Meridian to be put ahead of Hazelwood? Has Hazelwood been treated in a procedurally fair manner?

It bears noting that the matter was not remanded for complete reconsideration. For example, the remand order is silent on the initial decision's treatment of so-called excess beds. Since the parties seem to use the phrase somewhat differently than I do, I would emphasize that there has been neither approval nor disapproval of the holding that the concept of excess beds represents excess over a number generated by the application of a planning guide to general population statistics respecting the aged. It does not represent an excess of the number of beds over the number of people who need them since the record is silent as to any measurement whatsoever of objective need. Because this is so, there is no data upon which the Department's expertise could be exercised. Therefore, in this decision (as in the first initial decision) "excess" is used as a formal shorthand to describe relationships among numbers as described above rather than relationships between beds and needful people.

This point is illustrated by the fact that the Department observed on remand that 95 percent is the desired occupancy for long-term care facilities, thus implying that the 90 percent occupancy in the so-called Monmouth County excess beds was not a sign of overcrowding. I do not doubt that 90 percent occupancy does not represent overcrowding, but would rather note that it is folly to claim that all of those beds are available to serve the needs of Ocean County elderly regardless of whether their occupancy rate is 90 percent or 95 percent.
Turning to the seven issues raised by the Board on remand, it is tempting to speculate respecting the degree to which combinations of these questions might or might not give rise to departures in Board policy. For example, questions one and two (the impact of paper beds and the use of the most up-to-date planning data) jointly suggest a focus planning consideration on a future foreseeable in summer 1985 when the final administrative decision will likely be issued, rather than a state of affairs foreseeable in summer 1983 when the application was filed. Nevertheless, I am persuaded that attempting to weave the seven issues together would go beyond the remand and hence would serve no purpose. Therefore, I will address the seven issues one at a time.

ISSUE ONE

1. What is the status of "paper beds" in the area, i.e., the number of long-term care beds approved but not yet built, the length of time the "paper beds" have been in existence, the expiration dates of their certificates, the number of certificates which have been voided, and the progress that can reasonably be expected to be taken in completing the approved "paper bed" projects or in voiding the certificates.

Joseph Calabria of the Department of Health testified with respect to various exhibits touching upon bed need both as reflective of beds approved but not yet occupied and with respect to the revised (as of December 15, 1984) 1988 long-term care bed need.

The former documents concern the status of so-called paper beds, a term used in the Department and the industry to reflect the status of beds whose Certificate of Need has been approved, but which have not yet been open to actual use. The Approved Certificate of Need Long-Term Beds, Active January 1, 1984 through December 31, 1984, introduced into evidence sets forth the number of these beds throughout the State and includes such beds in both Monmouth and in Ocean Counties. As to the former, 256 beds have been the object of Certificate of Need approvals, of which 117 are now complete and four have been voided. Thus, ongoing activity is taking place in Monmouth County, notably 68 beds whose plans are being reviewed 30 under construction. The situation in Ocean County is radically different, with 2,032 beds approved since January of 1978. Of these, 240 have been completed and 120 declared void. As a practical matter, over 1,300 beds are now either preparing plans, undergoing plan review or are under construction in Ocean County.
While the Revised 1988 LTC Bed Need introduced into evidence deals chiefly with projected bed need statistics, it reflects the net status of need in light of the paper bed material shown in the Active Certificate of Need report. Simply put, the 1988 LTC Bed Need shows an excess of 222 beds in Monmouth County and a need for 393 beds in Ocean County, thus constituting a 171 bed net need in the combined area. Mr. Calabria testified that since these figures were put together, the Department had granted an approval for the project which takes away three beds. Thus, the excess in Monmouth County is 219 beds and the combined net need is 174 beds.

Neither party objected to the accuracy of the Department's statistical material or to Mr. Calabria's testimony. (This was true throughout the proceeding.) Hence, the foregoing is FOUND AS FACT.

**ISSUE TWO**

2. Was the latest statistical data used in determining the need for the proposed long-term care facility? If not, the reasons for not doing so should be clarified. In addition, the Board is interested in having the most recent long-term care bed need figures for the area, current at the time of the proceeding on remand, as determined in accordance with the bed need methodology in *N.J.A.C.* 8:33H-3.10.

Respondent proposed, and I ordered, the use of 1985 statistics with respect to population and bed availability in the various counties. The reason for this determination is set forth in the Decision on Motion which was rendered on August 7, 1984. The difficulty with using increasingly future oriented need statistics as the appeal makes its way through litigation is that it creates the possibility that the litigant will be granted, in fact, the so-called multiple bites of the apple by having its case reviewed under the circumstances prevailing when the batch was considered and then having it reviewed as developments go on during the life of the controversy. Doing this undermines the batching regulation, *N.J.A.C.* 8:33-2.2 and is not, in the judgment of the Department, in aid of an orderly resolution of multiple controversies. For this reason, up-to-date statistics were not used in the ongoing course of the proceeding, and their use here will not, in my view, contribute to the consideration of appeals of batched applications.

Nevertheless, to facilitate the determination of the Board, which is, in the last analysis, the final administrative determination, the Revised 1988 LTC Bed Need clearly provides that, as revised December 15, 1984, and as discussed under the consideration of paper beds,
there is a bed need of 219 beds in Monmouth County and a need for 393 beds in Ocean County. The foregoing is **FOUND AS FACT.**

**ISSUE THREE**

How is the long-term care component of the HSA’s plan related to the long-term care segment of the State health plan?

How has the State treated the HSA’s particular method for determining bed need in the region?

The primary analysis of this issue lies in the Department’s position paper on the subject. The position paper was but little elaborated upon by Mr. Calabria in his testimony. Hazelwood asserts without contradiction that its batch was the only one in which the HSA plan was used by the Department. I **FIND** this as **FACT.** Hazelwood goes on to state that there is no basic relationship between the HSA and State plan methodologies. This statement is a bald assertion of non-relationship and does not come to grips with the discussion of that relationship offered by both Mr. Calabria and Mr. Peloquin at the initial hearing in 1984.

**ISSUE FOUR**

It was testified that the HAZ’s used by the HSA do not function to determine areas of bed need. Please clarify what is the function of the HAZ.

As with each issue, the clarification was the object of a position paper submitted by the Department of Health.

The Department quoted extensively from the testimony of Mr. Peloquin respecting the nature of Health Analysis Zones (HAZ) indicating that HAZ’s represent an area of equal population of those aged 65 and above. These areas, he stated were “drawn for compatible purposes to determine need.” The question arises, however, whether need is truly indicated. The Department takes the position that since HAZ’s represent relatively small areas, it would be inappropriate to calculate nursing home need as it incurred on a HAZ basis. More pertinently, the Department points out that a travel time factor of 60 minutes was utilized in determining access to long-term care facilities and that this travel time factor was not contested at the hearing. Hence, HAZ’s do not under any circumstances indicate need. Mr. Peloquin testified and the Department argues that the HAZ’s serve to “analyze and plan for the distribution of beds, once a need for such beds is determined to exist.”

I **FIND** that HAZ’s indicate distribution of population and beds within constricted geographical areas of equal elderly population. I
also **FIND** that a 60-minute travel time factor is appropriate, and I further **FIND** that there is no correlation between the dimensions of the HAZ and the travel time factor. Hence, while it is technically correct to state that HAZ's indicate the geographical distribution of beds, they do not indicate either bed need (as all agree) or an area in which beds should be located, since this is governed by considerations of travel time that lie totally independent of the HAZ methodology. Therefore, I **CONCLUDE** that the HAZ's, in and of themselves, serve no meaningful function in the determination of this matter.

**ISSUE FIVE**

The role of county lines in determining bed need should be clarified. County lines, although artificial, have been used by the State in determining bed need. What is the function of the County bed need figures?

In its position paper, the Department amplified the candid testimony of Mr. Calabria to the effect that county lines are useful because they are an obvious way for the Department to obtain population estimates in population projections. Counties represent the fundamental building blocks of state government and are the bases upon which the most meaningful population statistics in this case were based. The Department contended that it does not examine a county's long-term care bed need in a vacuum and, in its closing arguments, Hazelwood took the position that Ocean County should not be viewed in a vacuum.

Put differently, both of these assertions reflect the marketing and health care realities that county lines, while invaluable as a means of collecting statistics, represent permeable barriers across which individuals can seek care at no noticeable inconvenience. As with the discussion of HAZ's it would be fruitless to determine bed need methodology on any geographically bounded area of the state if another area (adjacent or nearby) could be found in which either the need or the excess was not reflected. Hence, the Department considered the fact that surrounding counties such as Atlantic or Burlington had bed excesses greater than Monmouth's. Nevertheless, the focus of this matter was on Monmouth, presumably because of the proposed location of Hazelwood Manor. In any event, I find that counties serve the purpose of a collection of statistics (both of a general demographic nature and of a bed and service nature) but that they are not the sole (or even, perhaps, significant) determinants of the market area for a proposed facility. To that extent, they are insufficient guides for
considering the question of need or excess in the area to be served by the applicant. Hence, while Monmouth and Ocean statistics are used for the basis of determining excess or need in those areas, only the overall status of the area to be served by the facility determines whether or not a need exists which the facility may legitimately serve.

In this interest, I reject the contentions of the Department in its position paper that the approval of 240 long-term care beds by the Commissioner for the July 15, 1983 cycle obviates the need for Hazelwood's proposal. In its position paper, the Department raises the argument that the large excesses in adjacent Atlantic and Burlington Counties should be considered as well as the excess in Monmouth County. I would note first of all that to the extent to which the Department is concerned in its position paper with large excesses in adjacent Atlantic County, it was somewhat regrettable that the recently approved Seacrest facility was located close to the Atlantic County border. Nevertheless, as I explained in my first initial decision, since Hazelwood has not attacked Seacrest's certificate in the Appellate Division before now, it is inopportune even to raise the issue at this time. Nevertheless, the urged consideration of excesses in Atlantic lies well beyond the scope of the remand. If it were to be considered, the issue would require consideration of relative proximity of Hazelwood to both Monmouth and Atlantic. As the record now stands, Atlantic overbedding would have no significant impact on a decision to issue a Certificate of Need.

ISSUE SIX

Is there a requirement that alternative services be provided by an applicant for approval of a long-term care facility? If so, has this applicant satisfactorily met the requirement?

Mr. Calabria testified that notwithstanding current requirements, the petitioner was not confronted with the requirement for alternative services when it filed its application. Indeed, it is evident from the Commissioner's denial letter that the variety of proposed services was not given as a reason for denial. Concededly, N.J.A.C. 8:33H-3.3(a) (4) provides as follows:

4. Standard III-04, alternatives to long-term care beds:
   Preference will be given to those Certificate of Need applicants for long-term care beds who propose the inclusion of institutional (residential health care, congregate housing, for example) and non-institutional alternatives to inpatient long-term care beds. Applicants are instructed to consult with the Department's health planning staff in regard to alternatives
appropriate to their projects, as well as the long-term care sections of the State Health Plan, prior to submission of an application.

The question is whether or not the applicant is to be required to supply residential health care beds now that the matter approaches its second year of administrative litigation. While the constitutional issues surrounding new post-application requirements were not briefed in this case, this issue raises questions of fundamental fairness. Moreover, there are practical difficulties in terms of applying later adopted requirements to the petition already filed, since the petitioner is generally under no obligation to update its application each time the regulations change.

The Department cites the Health Care Administration Board’s adoption of the consolidated cases In the Matter of the Senior Convalescent and Rehabilitation Services for a Certificate of Need and Bergen Health Care Center, Inc. OAL DKT. NOS. HLB 2632-84 and HLB 2633-84, adopted, Health Care Administration Board, Jan. 22, 1985 for the proposition that the petitioner was forced to compete against other applicants for a specific number of beds at a specific time. The difficulty with this observation lies in the fact that it is my understanding that Hazelwood is the surviving unsuccessful applicant from the July 15, 1983 batch and hence is competing against no one.

All things considered, I FIND that there was no requirement of residential health care beds at the time Hazelwood filed its application and that the Commissioner of Health did not indicate that the lack of such beds was a reason for Hazelwood’s rejection. Hence, as a matter of fundamental fairness, I CONCLUDE that it is unlawful to attach a condition to an application which was not there when the application was filed.

ISSUE SEVEN

This case was initially consolidated with an application from Meridian Nursing Home. Counsel for Hazelwood indicated in a letter to the Board dated January 23, 1985 that Meridian had received a certificate of need on a revised application submitted in the November 1983 batching cycle. Did Meridian submit this revised application while its previous application was still pending? If so, what is the rationale for allowing Meridian to be put ahead of Hazelwood? Has Hazelwood been treated in a procedurally fair manner?

The Department has spoken to these issues in a position paper containing both discussion and argumentation of each point. Hazel-
wood does not dispute the discussion aspects of the Department's position paper. I would stress that while the Board has referred to Meridian's "revised application," the Department has indicated that the second Meridian application "was not the same application that was recommended for denial by the Commissioner." Obviously, there were certain differences between the two applications. Just as obviously, it seems clear that the only changes that took place were the redefinition of 60 long-term care beds into 60 residential long-term care beds and a reduction of total cost from 7.2 million to 5.2 million dollars. Clearly, this is a change of some substance. Nevertheless, it is troublesome since the degree of change was far from total and it is incumbent upon the Board to define a boundary beyond which gradation of minor changes is deemed sufficiently substantial that the second application is separate and apart from the original, so that the pendency of both applications does not become a cause of confusion. (In the Decision on Motion, at least, I assumed that consideration of a new application would require the withdrawal of the old.)

The issue here is whether or not Hazelwood has been treated in a procedurally fair manner. As Hazelwood points out, In Re Senior Convalescent Center states that a denied applicant cannot reapply so long as its first application is being appealed, an assumption shared by the undersigned and seemingly shared by Hazelwood. Nevertheless, the question of whether Hazelwood has been treated with procedural fairness is of limited relevancy, in light of the rule of law set forth in Irvington General Hospital 149 N.J. Super. 461 (App. Div. 1977), which provides protection to successful applicants with respect to potential erosion of bed need (or any other need) by subsequent grants of Certificates of Need. Irvington provides that should such subsequent applications be approved, they are to be treated as nullities for the purpose of calculating whether or not the earlier denied applicant still has a market should its original Certification of Need application be approved on appeal.

For this reason while it might be infelicitous for the Board to have been encouraged to approve the Meridian application, Hazelwood, by operation of law, need not be worse off—assuming successful prosecution of its appeal—no matter how many long-term care bed Certificates of Need might be granted. Thus, while the treatment accorded Meridian might confuse certain administrative and regulatory issues, Irving General Hospital provides that Hazelwood's interests are protected by treating this issue as if circumstances were frozen in time as of the date of the denial of the Certificate of Need.
(I would suggest as an aside that the Irvington methodology which preserves both the record and the interests of the parties in terms of the July 1983 status quo not only obviates any Meridian-related difficulties, but also suggests why it is difficult to follow the logic of issues one and two, namely, to update the need figures while a Certificate of Need application is proceeding.)

All things considered, in light of the findings with respect to all of these issues, I CONCLUDE that issues number three, four, and five do not bear upon the viability of the questions of whether there is need for the Hazelwood beds. The record indicates, as to issue five, that there are limitations on considering county lines in isolation: nevertheless, the Department in this case has pulled Ocean and Monmouth for a common market area, which makes as good sense now as it did at the time of the Initial Decision.

As to issue six, I conclude that there was no requirement of residential health care beds at the time the application was filed, that it would be fundamentally unfair to deny the application for reasons that were neither stated in the Commissioner’s denial letter nor were conditions when the application was filed.

As to issues one and two, I harbor doubts as to the appropriateness of rendering a decision with respect to the applicant upon bed statistics or bed needs that were not germane at the time the application was filed. Nevertheless, both for the reasons stated at the outset of this decision respecting the illusory nature of the concept of bed need or bed excess, and in light of the fact that 174 beds are “needed” under the scheme for counting apparent need, I reiterate my conclusion that the Certificate of Need should issue. As to the question of Meridian, this is governed by Irvington General Hospital and is therefore of no moment to the Board in executing its responsibility to pass upon Hazelwood’s appeal. Possible management and administrative concerns of the Board with respect to this matter are not part of the contested case and therefore play no part in our consideration.

In short, I CONCLUDE that the applicant has demonstrated a need for the beds it seeks to erect, and I therefore ORDER that the Certificate of Need be granted.

FINAL DECISION OF THE HEALTH CARE ADMINISTRATION BOARD

In accordance with N.J.S.A. 26:2H-9, the Health Care Administration Board has considered the action of the Commissioner of Health in denying a certificate of need to Hazelwood Manor for the
construction of a new long-term care facility in Ocean County. The application sought approval to build a facility of 180 beds, offering an 18-slot medical day care component, in Toms River, New Jersey. It was processed along with others in the batch for the review cycle of July 15, 1983. Hazelwood Manor's application was recommended for denial by the Health Systems Agency, the Statewide Health Coordinating Council and the Commissioner of Health. After a hearing before the Office of Administrative Law, an Initial Decision was filed on January 4, 1985 by Walter F. Sullivan, administrative law judge, recommending that a certificate of need should be granted to Hazelwood Manor.

The Board first reviewed this matter, including the Initial Decision of the administrative law judge, at its meeting of February 14, 1985. At that time the Board voted upon a remand for the receipt of additional information as well as clarification of certain issues. The administrative law judge then filed a supplement to the Initial Decision on June 3, 1985, furnishing responses to the Board's questions on remand. The supplemental decision of the administrative law judge concluded that Hazelwood Manor had demonstrated a need for its proposed project and should be granted a certificate of need.

The Board considered the entire matter again at its meeting on July 11, 1985. It determined, by a vote of 5-2, to reject the recommended conclusion of the administrative law judge, finding instead that Hazelwood Manor's application for a certificate of need should be denied. A statement of the reasons for this denial and the Board's disagreement with the recommendation of the administrative law judge follows.

The administrative law judge found that the methodology for determining bed need set forth in regulation, N.J.A.C. 8:33H-3.10(a)(1), was used by the Commissioner in reviewing Hazelwood Manor's application and in reviewing all other applications in the July 15, 1983 batching cycle. Applying this methodology to 1985 projected population data and to the count of facilities existing and approved as of July 1983, led to a showing of a need for 651 long-term care beds in Ocean County and an excess of 440 beds in Monmouth County. The administrative law judge ruled that it was valid and proper to use 1985 projected population statistics, as they were the latest data available at the time the application was undergoing review. In fact, the administrative law judge found that the purposes of the batching regulation, N.J.A.C. 8:33-2.2, called for the freezing of statistical data as of the time of the review cycle for the batch. The administrative
law judge further ruled that it was appropriate to offset the statistical bed need showings of Monmouth and Ocean counties because these counties were contiguous and served a common area for long-term care services. After offsetting the need for 651 beds in Ocean County against the excess of 440 beds in Monmouth County, there was a net need of 211 long-term care beds in Ocean County at the time of the July 1983 review cycle for the batch. The Board concurs with the above findings of the administrative law judge and hereby adopts them.

When the Commissioner acted on the applicants in this batch, he approved other applications for the total addition of 240 long-term care beds in Ocean County, thereby filling the net bed need of 211 beds for the area. The administrative law judge ruled that the Commissioner's approval of these other applications could be reviewed only by the courts and that the 240 beds approved for the area in the July 1983 cycle must be accepted as being finally resolved. At the same time, however, the administrative law judge rejected the view that the approval of these 240 beds obviated the need for Hazelwood Manor's proposal. He concluded that the bed need methodology contained in Departmental regulation is not a measure of "objective need" but rather a description of numbers having little relationship to the long-term beds which are essential for needful people. The administrative law judge reasoned that because the nursing home beds in Monmouth County were being occupied at a rate of more than 90 percent, they could not be regarded as available to address the needs of elderly Ocean County residents "in the here and now". Finding that the concept of bed need provided by the methodology in regulation was of an "illusory" nature, the administrative law judge decided that Hazelwood Manor demonstrated a need for the beds it seeks to erect and should be granted a certificate of need.

When the Board remanded this matter to the administrative law judge, it had specifically rejected reliance upon current occupancy levels at existing long-term care facilities as being determinative of the need for beds in the area. The Board noted that current occupancy levels do not reflect the number of so-called paper beds, i.e., beds which have already been approved, are in various stages of the construction process and are likely to be available in the future to meet the demand for nursing beds. The data submitted on the remand indicates that, as of July 1983, there were 1,000 beds previously approved for Ocean County which were in active stages of progress but had not yet actually been built. This number heightens the Board's
concern that the use of current occupancy rates is unreliable as the sole gauge of the beds required in the area.

In addition, the approval of Hazelwood Manor’s application would do nothing to satisfy the needs which the administrative law judge found “in the here and now.” A nursing home cannot be built over-night, or even in the space of a few months. As confirmed by the data presented on the remand, there is a period of lead time for new construction, ranging from many months to several years. Hazelwood Manor’s own application did not project actual construction until two years in the future. Hence, approving its application to meet some sense of need “in the here and now” will not result in the immediate existence of beds. It will only result in the addition of “paper beds” to undergo construction in the near future. And if the number of these approved “paper beds” is not carefully determined at the time these beds are initially approved, the end result over time will be to have more beds constructed than the population appropriately needs or can support. This would simply exacerbate the maldistribution of excess facilities which presently exists, as illustrated by Monmouth County where more long-term care beds currently exist than are required to serve the needs of Monmouth County residents.

One of the goals of the planning process is to reverse this maldistribution, through appropriate approvals of the new beds to serve the projected needs of people in other areas in an orderly manner, as required by the Health Care Facilities Planning Act—without draining the Monmouth County facilities of their occupancy base. Existing and approved beds cannot be ignored; to do so in a haste to add beds “in the here and now” would ultimately lead to the construction of too many beds for the region, needlessly burdening the public with millions of dollars for capital and operating costs associated with long-term care facilities. The practical realities of allowing time for approved projects to obtain zoning clearance, confirm financing commitments and undergo construction require the planning process to be based on prospective health care needs, projected into the near future when beds are actually capable of becoming available for service. It cannot realistically be based on a perception of immediate present-day needs, paying no heed to the number of approved “paper beds” in the construction pipeline which will increase access to long-term care as the new facilities are built and the new beds open.

The Board accordingly finds that the use of current occupancy rates in existing long-term care facilities, in and of itself, is not a sound
means for judging the need for any additional long-term care beds in a region. Because current occupancy rates do not themselves account for the numbers of paper beds approved for construction, they can be, as they are here, a misleading indicator of bed need in the future time when new long-term beds are likely to be built and actually available for service. The Board therefore rejects the administrative law judge’s reliance upon current occupancy rates. It also rejects the administrative law judge’s conclusion that the methodology incorporated in regulation for projecting long-term care bed needs fails to be a proper measure of objective need. That methodology was developed after intensive study and was subject to comment from a wide spectrum of interested and affected parties, including health planning agencies, the nursing home industry and members of the public. The care with which that methodological regulation was prepared and the public scrutiny which it received before and during the rule-making process lead this Board to find that the methodology is as valid and as objective a measure of long-term care bed need as can be found at the present time. The Board finds no reason to depart from the bed need methodology in the regulation and no reason to substitute any subjective impressions for the figures objectively produced by the methodology.

Application of the methodology in this case yielded a net need of 211 long-term care beds for Ocean County at the time of the July 1983 batching cycle. The Board concurs with the administrative law judge that the regulation requiring the batching of long-term care applications at a few intervals throughout the year calls for a modification of the use of up-dated information, including up-dated statistics. The batching regulation introduced the concept of uniform, comparative review of competing applications in relation to each other, towards the end of selecting the applicants which are the best qualified to meet the health care needs and advance the public interest. As the administrative law judge noted, it may be unfair to the applicant to require it to comply with new regulatory standards enacted after the time of the batching cycle, such as the requirement for provision for alternative services. So too, however, it is unfair to the public purposes of the batching regulation to treat any one or several of the batch in a wholly isolated manner, free to proceed with continuing opportunities for the limited number of certificates of need available at any given time, outside the sphere of the current batches and without having to meet the new regulatory standards expected of applicants in current on-going batches. For these reasons the Board
agrees with the administrative law judge that bed need should ordinarily be frozen in time.

In this instance the bed need was frozen as of the time the Commissioner acted on the applications in the July 1983 batched cycle. The administrative law judge, however, disregarded the Commissioner’s approval of 240 beds for other applicants in that batch, even though he had found that the Commissioner’s approval of these beds to the final and not subject to review except in the courts. The Board concurs with the administrative law judge that the certificates approved by the Commissioner must be regarded as conclusive. As such, the 240 long-term care beds approved during that cycle fill the need for 211 beds shown by the bed need methodology. The Board finds that these beds simultaneously approved in the batched cycle of July 1983 cannot be ignored any more than other “paper beds” previously approved for construction in the area can be ignored. They are among the pool of beds likely to be built and actually available to meet the area’s need for long-term care services in the near future.

Therefore, unless Hazelwood Manor can show a special need or some other special aspect of its application which addresses an underserved segment of the public or otherwise promotes an important public policy, its application does not justify approval. The Board is unable to find special circumstances to merit a certificate of need in the public interest. The Board is concerned that the Meridian Nursing Home, an applicant in the same batched cycle, may have gained a procedural advantage over Hazelwood Manor by re-applying in a current cycle without first withdrawing from the hearing process. The Board nevertheless concurs with the administrative law judge that the possible procedural irregularity is irrelevant, particularly when bed need is frozen and approvals subsequent to the batch thus will not count against Hazelwood. The Board adds that it would be hard-pressed to approve a certificate of need solely because of a procedural irregularity. Approving an application which does not itself satisfy the statutory standards, and adding beds which the public does not need, in order to cure a procedural defect would simply penalize the public and contravene the public policy of the statute.

The Board therefore has concluded that Hazelwood Manor has not demonstrated that there is a need for its new long-term care facility in the area to be served or that its application will contribute to the orderly development of adequate and effective health care services in that area. Pursuant to N.J.S.A. 26:2H-9 the Board concurs with the action of the Commissioner of Health in denying the certificates of need.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey Courts.