

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 7955

HOPE-A WOMEN'S CANCER CENTER,)
P.A., and RALEIGH ORTHOPAEDIC)
CLINIC, P.A.,)

Plaintiffs,)

vs.)

STATE OF NORTH CAROLINA, *et al.*,)
Defendants.)

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO MOTION TO DISMISS**

Plaintiffs Hope-A Women's Cancer Center, P.A. ("Hope") and Raleigh Orthopaedic Clinic, P.A. (the "Clinic") (collectively, the "Plaintiffs"), by and through their undersigned attorneys, submit this Memorandum in Opposition to Defendants' Motion to Dismiss and the Motion to Dismiss filed by proposed Defendant-Intervenors.

INTRODUCTION AND STATEMENT OF THE CASE

Plaintiffs filed this action to challenge the combinative effect, as applied to Plaintiffs, of certain aspects of Chapter 131E, Article 9 of the General Statutes (the "CON Law"), including without limitation sections N.C. Gen. Stat. §§ 131E-176 and -183, the State Medical Facilities Plan (the "Plan"), certain Administrative Rules, including without limitation 10A N.C.A.C. 14C.0103(b) and 10A N.C.A.C. 14C.0402, Executive Order 139 establishing the State Health Coordinating Council (the "Council"), the State Government Ethics Act at N.C. Gen. Stat. § 138A-1, *et seq.*, and certain aspects of the North Carolina Administrative Procedure Act at Chapter 150B of the General Statutes, including without limitation N.C. Gen. Stat. §§ 150B-2(8a(k), -21.9(a), -51(c).

In its Order dated 5 January 2009, the Court found in Paragraph 7 that “this case hinges on legal issues capable of resolution by the Court without any factual development of the record” Accordingly, the Court not only stayed discovery in the case but determined to hear both the Defendants’ Motion to Dismiss and Plaintiffs’ Motion for Judgment on the Pleadings concurrently at the same hearing. The Court also reminded the parties in its Order issued on 26 January 2009 that “the court has not ruled on the Defendant-Intervenors motions to intervene as of this time.”

Defendants ask the Court to dismiss Plaintiffs’ complaint, alleging the existence of grounds for dismissal under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Specifically, Defendants allege the following grounds in support of dismissal under Rule 12(b)(6): (1) Plaintiffs are estopped from raising a constitutional challenge because they purportedly accepted a benefit under the statute they are challenging and (2) Plaintiffs’ complaint purportedly fails to state a claim that the General Assembly has unconstitutionally delegated its power, violated Plaintiffs’ procedural due process rights, violated Plaintiffs’ substantive due process rights, or unconstitutionally denied Plaintiffs access to the courts.

The proposed Defendant-Intervenors incorporate by reference the grounds stated in the Defendants’ Memorandum in support of their Motion to Dismiss and separately argue that the Plaintiffs are estopped from bringing their claims before the Court; the Court has no subject matter jurisdiction and should, therefore, dismiss the Complaint under Rule 12(b)(1) because the State is sovereignly immune from suit on Plaintiffs’ constitutional challenges; that Plaintiffs’ claims are barred by laches and mootness; and that the Complaint should be dismissed under Rule 12(b)(6) or Judgment on the Pleadings should be granted against Plaintiffs because Plaintiffs have purportedly failed to allege adequately a claim that their rights to due process, to

have governmental powers properly separated, and to have access to the courts are violated under the North Carolina Constitution.

Plaintiffs submitted their Memorandum in Support of Motion for Judgment on the Pleadings on 16 January 2009, which Plaintiffs incorporate by reference and add the arguments advanced in this Memorandum of Law.

OVERVIEW

The proposed Defendant-Intervenors assert claims intertwined and coordinated with those of the State. In summary, the arguments presented are these: (1) the SMFP, the CON Law, and the cited provisions of the North Carolina Administrative Code and General Statutes individually work no harm to Plaintiffs' constitutional rights, and, therefore, do not combine to harm Plaintiffs' constitutional rights; (2) Plaintiffs at one time complied with a different statutory requirement, under which they received a benefit, and are, therefore, prohibited from raising constitutional claims regarding the presently challenged statutory complex; and (3) the Plaintiffs' complaint fails to sufficiently allege claims which, taken as true, would establish violations of their constitutional rights under the North Carolina Constitution at Article I, §§ 6, 18, 19 and Article II, § 1.

In the combination of these arguments, Defendants and/or the cooperating Defendant-Intervenors audaciously assert, though in a piece-meal fashion, that a statutory and administrative body of laws which delegate to an unaccountable body of non-elected, self-interested, profit-incentivized persons -- with no substantive statutory guidance whatsoever -- the authority to make binding, non-challengeable decisions to limit health care services in North Carolina, together work no offense to a Constitution that (1) requires that the legislative power "shall be forever separate and distinct" from the Executive branch and (2) secures to all citizens,

including Plaintiffs, the right not to be “deprived of his life, liberty, or property, but by the law of the land.” Curiously, Defendants and the cooperating proposed Defendant-Intervenors attempt in a single breath to assert that the statutory and regulatory scheme at issue here is insulated from attack because the Court is precluded from hearing a constitutional challenge, and yet, the scheme and the unchallengeable products produced by it somehow comply with a Constitution that guarantees “every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.” N.C. Const., Article I, § 18.

These arguments are without merit and seek to divert the Court’s attention from the evils propagated by the system as a whole. In short, Defendants seek to dismantle the statutory puzzle before the Court; we seek to put it together – as it exists in law – and highlight the evils it produces.

STANDARD OF REVIEW

“In ruling on a motion for dismissal under Rule 12(b)(6), the trial court considers only the pleadings.” Strickland v. Hedrick, ___ N.C. App. ___, ___, 669 S.E.2d 61, ___ (2008). Dismissal is appropriate only when “as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” Shell Island Homeowners Assoc., Inc. v. Tomlinson, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999) (citations omitted).

A motion for judgment on the pleadings pursuant to Rule 12(c) “is a summary procedure . . . which allows a trial court to enter judgment when all the material allegations of fact are admitted in the pleadings and only questions of law remain.” George Shinn Sports, Inc. v. Bahakel Sports, Inc., 99 N.C. App. 481, 486, 393 S.E.2d 580, 583 (1990), disc. review denied,

328 N.C. 571, 403 S.E.2d 511 (1991). The court's review of a motion for judgment on the pleadings is "limited to the facts properly pleaded in the pleadings before [the court], inferences reasonably drawn from such facts and matters of which the court may take judicial notice." Wilson v. Crab Orchard Development Co., Inc., 276 N.C. 198, 206, 171 S.E.2d 873, 878-79 (1970).

SUMMARY OF FACTS

The Plaintiffs

Hope is a healthcare provider located in Buncombe County, North Carolina that specializes in gynecologic and breast cancer treatment as well as the treatment of other complex breast and gynecologic disorders. (A. Comp. ¶¶ 1, 15)¹ Based on their education, training, and professional experience, the physicians at Hope have determined that a comprehensive cancer center offering diagnostic and treatment modalities, including advanced imaging, medical and radiation oncology and surgical services, in one location would enable them to provide care of the highest quality to their patients. (A. Comp. ¶ 16) In order to develop a cancer center with such integrated services, Hope wishes to provide its patients with PET, MRI, and linear accelerator services at the same location at which it now provides chemotherapy and surgical services. (A. Comp. ¶ 17)

The Clinic is an orthopaedic medical practice in Wake County, with four office locations serving patients from all of Wake County and a large region of eastern North Carolina. Id.

Based on their education, training and professional experience, the physicians of the Clinic believe that single specialty operating rooms, the equipment and staff of which do not need to be changed throughout the day to accommodate different types of surgical procedures,

¹ References to "A. Comp." are to the First Amended Complaint filed by Plaintiff's on 31 December 2008.

offer significant advantages to physicians and their patients in both the quality and the cost of necessary medical care. (A. Comp. ¶ 20) In order to continue to provide high quality, cost effective medical services to its patients, the Clinic wishes to develop a licensed ambulatory surgery center with six operating rooms dedicated to the provision of orthopaedic surgery. (A. Comp. ¶ 21)

The CON Law

Chapter 131E, Article 9 of the General Statutes (the “CON Law”) requires that healthcare providers, such as Plaintiffs, obtain a CON prior to developing or offering “new institutional health services.” Pursuant to N.C. Gen. Stat. § 131E-176(16), the acquisition of a PET scanner, linear accelerator or MRI scanner, the establishment of a new ambulatory surgery facility, and the development of one or more operating rooms are all defined as new institutional health services requiring a CON.

The criteria used by the Department in determining whether or not to grant a CON for a proposed project are contained in N.C. Gen. Stat. § 131E-183. The first of these criteria essentially renders all other criteria irrelevant in Plaintiffs’ case: “[t]he proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility [or] operating rooms ... that may be approved.” N.C. Gen. Stat. § 131E-183(a)(1) (“Criterion 1”) (emphasis added).

The State Medical Facilities Plan

Pursuant to the foregoing statutory provision, the Department has consistently refused to review or consider for approval any CON application for a proposed new institutional health service if the Plan currently in force does not contain a determination that there is a need for that

project. (A. Comp. ¶ 25) As a result, Plaintiffs and similarly situated applicants for CONs have no opportunity to demonstrate in their applications that the new institutional health services they propose are needed, unless there has been a prior need determination for their proposed service area in the Plan. Id.

The Plan is annually developed by the Department “under the direction of the North Carolina State Health Coordinating Council.” (A. Comp. ¶ 26) After approval by the Governor, the Plan is annually adopted by the Department as a rule for the review of CON applications. 10A N.C.A.C. 14C.0103(b).

The Council has been established, rescinded, and re-established several times by Executive Order of the Governor. (A. Comp. ¶ 27) Most recently, Governor Michael F. Easley issued Executive Order No. 139, dated 3 March 2008, once again establishing the Council and directing it to “prepare the Annual State Medical Facilities Plan and present the plan to the Governor.” Id.

Plaintiffs are informed and believe that the Council is currently comprised of 29 private citizens, at least 25 of whom serve as officers, employees, directors or medical staff members of entities engaged in providing health care services for compensation within the State of North Carolina. Id. The entities with which those members of the Council are affiliated, as well as their existing or potential competitors, are subject to regulation under the CON Law. Id. The decisions of the Council in formulating the annual Plans therefore have a significant, direct financial impact upon those entities with which members of the Council are affiliated. Id.

Except for the following provision of N.C. Gen. Stat. § 131E-176(25), the CON Law contains no guiding standards or procedural safeguards applicable to the development of the Plan by the Department under the direction of the Council.

In preparing the Plan, the Department and the State Health Coordinating Council shall maintain a mailing list of persons who have requested notice of public hearings regarding the Plan. Not less than 15 days prior to a scheduled public hearing, the Department shall notify persons on its mailing list of the date, time, and location of the hearing. The Department shall hold at least one public hearing prior to the adoption of the proposed Plan and at least six public hearings after the adoption of the proposed Plan by the State Health Coordinating Council. The Council shall accept oral and written comments from the public concerning the Plan.

N.C. Gen. Stat. § 131E-176(25)

There is no requirement to include or consider matters raised in the public hearing. Other provisions of the Administrative Procedure Act pertaining to public notice or comment are inapplicable. The factors considered and methodology used by the Council in making the need determinations for new institutional health services are left entirely within the Council's uncommonly broad discretion.

The Plan permits the Council to decide, at the request of any individual, to treat a particular geographic area or institution differently from others similarly situated.² The Plan permits the Council to determine “whether or not to incorporate the recommended adjustments in the final [Plan] to be forwarded to the Governor.”

Nothing in the CON Law, the Administrative Procedure Act, or any other statute provides guiding standards to determine what are “unique or special attributes of a particular geographic area or institution” or otherwise directs the Council in deciding whether to grant or deny any petition “to adjust the need determination.” Likewise, nothing in the CON Law, the Administrative Procedure Act, any other statute, or any administrative rule contains procedural

² “People who believe that unique or special attributes of a particular geographic area or institution give rise to resource requirements that differ from those provided by application of the standard planning procedures and policies may submit a written petition requesting an adjustment be made to the need determination given in the Proposed [Plan].” 2009 Plan, p. 19.

safeguards to protect against the Council making decisions on such petitions that are arbitrary, unreasoned, or affected by the self-interest of its members.

Following development of the Plan by the Department under the direction of the Council, the Plan is submitted to the Governor for approval. N.C. Gen. Stat. § 131E-176(25). The CON Law provides no guidance whatsoever to the head of the Executive Branch regarding the approval, disapproval, or amendment of the Plan.

The State Government Ethics Act

The State Government Ethics Act, N.C. Gen. Stat. § 138A-1, *et seq.*, was intended in part “to ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence.” N.C. Gen. Stat. § 138A-2. The State Ethics Commission has determined that the Council and its members are not subject to any of the safeguards established by the State Government Ethics Act and that members of the Council are not “covered persons” as therein defined. Thus, members of the Council are not required to file the statements of economic interest required of other private citizens serving as part-time public officials. Neither are they required to recuse themselves in making need determinations in which they personally or an entity with which they are affiliated has an economic interest, no matter how direct or pervasive.

The Administrative Procedure Act

Chapter 150B, of the North Carolina General Statutes (the “Administrative Procedure Act”) contains comprehensive procedural safeguards applicable to the promulgation of rules having the force and effect of law by agencies of North Carolina State Government. Unlike most other administrative regulations, the consideration of which has dominated judicial review of previous separation of powers and procedural due process claims, the Plan developed by the

Council is not subject to these safeguards. It is specifically made exempt from the Administrative Procedure Act pursuant to N.C. Gen. Stat. § 150B-2(8a)k. The Administrative Procedure Act thus excises the Plan from the panoply of procedural and substantive safeguards and requires only that “the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the [Rules Review] Commission for compliance with G.S. 131E-176(25), and approved by the Governor.” N.C. Gen. Stat. § 150B-2(8a)k.

The judicial review of administrative decisions applicable to other rules under the Administrative Procedure Act is conducted upon the official record created in a contested case. See N.C. Gen. Stat. § 150B-51(c). The Department’s rule codified as 10A N.C.A.C. 14C.0402 provides that the Plan, however, is not subject to review, but rather the “correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing.”

LEGAL ANALYSIS

I. Estoppel Does Not Apply.

A. Plaintiffs Have Received No Benefit Under the Statute They are Challenging

Defendants and the proposed Defendant-Intervenors accurately quote the language of Convent v. Winston-Salem and Shell Island Homeowners Association, Inc. v. Tomlinson. But they inaccurately construe the doctrine delineated in those and related cases and misapply it to the facts of this case.

The doctrine of constitutional (or quasi-) estoppel is an equitable preclusion doctrine invoked by federal or state courts on a case-by-case basis to prevent a party from unfairly benefitting from a statute while simultaneously challenging its validity. “The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not

be heard to avoid its burdens.” Convent v. Winston-Salem, 243 N.C. 316, 324, 90 S.E.2d 879, 885 (1956). As the United States Supreme Court put it in Arnett v. Kennedy, such a litigant “must take the bitter with the sweet.” Arnett v. Kennedy, 416 U.S. 134, 154 (U.S. 1974). In this case, however, the sweet was not offered in the same statute with the bitter.

The Plaintiffs attack a confluence of statutes in this litigation. Medical facilities are prohibited from offering a new institutional health service unless they receive a CON. See N.C. Gen. Stat. § 131E-178(a). Whether or not that CON is issued by the Department is determined by whether or not the State perceives there to be a health care “need.” See N.C. Gen. Stat. § 131E-183(a)(1). The existence of a “need” is conclusively determined by whether or not it is recognized in the Plan. See id. The Plan is, of course, produced afresh each year by the Council. See Executive Order No. 139. The council is re-established every so often by the Governor, most recently on 3 March 2008 in Executive Order 139, and is not substantively guided in its decisions or subject to the rules of the State Ethics Commission. See N.C. Gen. Stat. § 138A-2. The Plan produced by the Council, unlike other administrative rules, is not subject to challenge in *de novo* hearings before the Office of Administrative Hearings. See 10A N.C.A.C. 14C.0402. It is also not subject to key provisions of the Administrative Procedure Act. See N.C. Gen. Stat. § 150B-2(8a)k The Plaintiffs challenge the combinative effect of these laws as applied to Plaintiffs. Nowhere do Plaintiffs challenge the validity of “the statute” under which they previously received a CON.

Previous cases demonstrate that to be precluded from challenging a statute under constitutional estoppel, a plaintiff must have procured a benefit under the statute they challenge as constitutionally invalid. A party “may not, in the same proceeding, seek an advantage which is authorized by a specific statute only and, at the same time, deny the constitutionality of the

statute . . .” Utilities Comm. v. Electric Membership Corp., 276 N.C. 108, 118, 171 S.E.2d 406, 413 (1970) (emphasis added). In application of such a broadly exclusive and punitive doctrine, courts have routinely limited the application of the doctrine to parties having received a benefit under the statute they challenge. The cases invoking the doctrine, including those cited by Defendants and the proposed Defendant-Intervenors, illustrate this principle.

In Convent, the plaintiffs challenged the validity of the conditions imposed in the same special use permit under which they had previously been granted an exception to operate their school. See Convent v. Winston-Salem, 243 N.C. 316, 324-26, 90 S.E.2d 879, 884-86 (1956). Similarly, in Shell Island, the plaintiffs “allege[d] that they applied for, received, and accepted a variance permit under the rules which they now challenge” Shell Island Homeowners Assoc., Inc. v. Tomlinson, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999). In Ramsey, the petitioner challenged the constitutionality of N.C. Gen. Stat. § 116-149(b); the statute under which she had previously sought a scholarship was Section 116-149(b). See Ramsey v. Veterans Commission, 261 N.C. 645, 135 S.E.2d 659 (1964). For similar reasons, the United States Supreme Court has held that receiving “some benefit” under some statute is not enough to estop a plaintiff from attacking as unconstitutional other provisions of a statutory complex. See Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457 (1988) (“we doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it.”)

Simply put, Plaintiffs did not voluntarily accept a benefit from the statutory complex they now challenge. The CON Law requires that healthcare providers, such as Plaintiffs, obtain a CON prior to developing or offering “new institutional health services.” Criterion 1, used by the Department in determining whether or not to grant a CON for a proposed project, states “[t]he

proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility [or] operating rooms ... that may be approved.” N.C. Gen. Stat. § 131E-183(a)(1) (“Criterion 1”) (emphasis added). The Plan is produced annually and applicable only to one specific year. It is adopted afresh each year by the Department as a rule for the review of CON applications. See 10A N.C.A.C. 14C.0103(b). The Council that produces the Plan was rescinded and re-established on 3 March 2008 via Executive Order 139.

Hope’s 2005 CON was procured for a diagnostic treatment center and oncology treatment center. These types of centers are not required by the CON Law to receive a “need determination” under the Plan, as required by Criterion 1. The Defendants Department and Hoffman admitted when the CON was issued that “the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, . . .” was “not applicable.” (Exh A. Attached)

ROC’s 2007 CON pertained to a mobile MRI, which unlike a fixed MRI scanner, is again not subject to a “need determination” under the Plan or to Criterion 1. The Defendant Department admitted when the CON was issued that “the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, . . . [or] operating rooms . . .” was “not applicable.” (Exh B. Attached)

In our case, the benefit of a CON, which counsel for Defendants and the proposed Defendant-Intervenors so loudly trumpet, was a benefit to which Hope and ROC were each entitled and received without the necessity of being subjected to a “need determination” under

the Plan produced by the Council established by Executive Order 139 or any other similar Executive Order. As our North Carolina Court of Appeals has stated in similar circumstances:

It is true that one who derives a benefit from exercising privileges granted by a statute or ordinance is estopped to deny the validity of terms fixed as conditions for the exercise of such privileges. See Convent of the Sisters of Saint Joseph v. City of Winston-Salem, 243 N.C. 316, 90 S.E.2d 879 (1956); Goforth Properties, Inc. v. Town of Chapel Hill, 71 N.C. App. 771, 323 S.E.2d 427 (1984). One cannot be estopped, however, due to his acceptance of a benefit to which he is entitled in any event, or where acceptance is induced by mistake as to the facts involved.

Stegall v. County of New Hanover, 87 N.C. App. 359, 365-66 (1987) (some citations omitted).

The Plaintiffs are not challenging the CON Law as a whole, and not just any benefit received under the law is relevant for estoppel purposes. Plaintiffs are challenging particular laws involving the Council established by Executive Order 139, the Plan they are authorized to produce, and the legal requirement to obtain a need determination from the Plan prior to obtaining a CON for certain new institutional health services. They are challenging the combinative effect of those and other laws as applied to Plaintiffs. The CONs alleged to be benefits that give rise to estoppel are not benefits to which they were solely entitled under the challenged statutory complex. Therefore, because Plaintiffs have merely accepted a benefit under a portion of the CON Law they are not challenging, they cannot be estopped from challenging the Plan-based features of the CON Law they are challenging.

B. Defendants Fail To Plead Their Affirmative Defense With Sufficient Particularity

It is an elementary principle of pleading that estoppel is an affirmative defense that must be pleaded with particularity. Rule 8(c) of the North Carolina Rules of Civil Procedure requires that when an affirmative defense, such as estoppel, is pleaded, “[s]uch pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense

sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved.” N.C. Gen. Stat. § 1A-1, Rule 8(c) (emphasis added).

In their Motion to Dismiss, Defendants’ reference only the following: “Defendants plead the doctrines of estoppel, quasi-estoppel, laches and/or waiver in bar of Plaintiffs’ claims.” (Answ. p. 11). No reference is made to the transactions, occurrences, or series of occurrences intended to be proved in support of “estoppel or quasi-estoppel.”

While the Defendants and proposed Defendant-Intervenors contend that the Plaintiffs should be estopped from asserting the CON law was passed in violation of the North Carolina Constitution, they have failed to apprise us, or the Court, of the specifics of their pleading. They have failed to specify with any sufficient particularity the elements of any particular doctrine of estoppel they intend to assert, much less the transactions, occurrences, or series of transactions or occurrences, intended to be proved. “‘Estoppel’ is not a single coherent doctrine, but a complex body of interrelated rules, including estoppel by record, estoppel by deed, collateral estoppel, equitable estoppel, promissory estoppel, and judicial estoppel.” Whitacre P’ship v. Biosignia, Inc., 358 N.C. 1, 13, 591 S.E.2d 870, 879 (2004) (citing 28 Am. Jur. Estoppel and Waiver § 2 (2000)). According to Rule 8(c), one must do more than merely deposit into a pleading the words “estoppel” or “quasi-estoppel,” words which the North Carolina Supreme Court recognizes as embodying a spectrum of interrelated yet distinct doctrines which have disharmonious elements and call for varying legal interpretations. See Whitacre P’ship v. Biosignia, Inc., 358 N.C. 1, 13, 591 S.E.2d 870, 879 (2004).

Defendants and the proposed Defendant-Intervenors are required to give the parties and the court notice of the facts to be proved. Responding to the blanket-terms “estoppel” or “quasi-

estoppel” is not practical or possible when the variants of estoppel are “dissimilar in critical respects.” Id. at 16, 591 S.E.2d at 880. “[A]lthough the doctrines may overlap depending on the facts of any given case, they maintain independent spheres of operation,” id. at 16, 591 S.E.2d 881, and merely mouthing the words of interrelated equitable doctrines does not provide the “sufficient particularity” necessary to give notice of the facts to be proved in support of the affirmative defense.

Further, neither the Defendants or proposed Defendant-Intervenors gave sufficiently particular notice in their pleadings of the transactions, occurrences, or series of occurrences intended to be proved. The various Motions to Dismiss merely utter the incantation of “estoppel” or “quasi estoppel.” Other than the memoranda of law in support of the pleadings and the evidence improperly introduced outside the pleadings, there is no mention whatsoever of the transaction, occurrences, series of occurrences to be proved, much less a sufficiently particular description to give notice of the matters to be proved.

As our Court of Appeals noted, under Rule 8(c) “[w]aiver and estoppel are affirmative defenses which must be pled with certainty and particularity and established by the greater weight of the evidence.” Duke University v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989). When a party fails to plead certain and particular facts in support of their affirmative defense, such failure “ordinarily result[] in its waiver.” Id. “Failure to plead an affirmative defense ordinarily results in waiver thereof.” Nationwide Mut. Ins. Co. v. Edwards, 67 N.C. App. 1, 6 (N.C. Ct. App. 1984) (citing Smith v. Hudson, 48 N.C. App. 347, 352, 269 S.E. 2d 172, 176 (1980)).

C. Defendants Improperly Invoke Evidence Outside the Pleadings

Even if Defendants or the Defendant-Intervenors properly pleaded their estoppel defense, estoppel is an affirmative defense that must be “proved.” N.C. Gen. Stat. § 1A-1, Rule 8(c) (a party must give sufficiently particular notice of the “transactions, occurrences, or series of transactions or occurrences intended to be proved”). “[W]aiver and estoppel are affirmative defenses which must be pled with certainty and particularity and established by the greater weight of the evidence.” Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989); see also Turnage Co. v. Morton, 240 N.C. 94, 98-99 (1954) (stating that “waiver or estoppel is an affirmative defense; and before the defendant can prevail he must prove facts sufficient to establish the ultimate issue raised by his plea. An affirmative finding of fact in his favor is required.”) “An affirmative defense is a defense that introduces a new matter in an attempt to avoid a claim, regardless of whether the allegations of the claim are true.” Williams v. Pee Dee Electric Membership Corp., 130 N.C. App. 298, 301-02, 502 S.E.2d 645, 647-48 (1998). “In ruling on a motion for dismissal under Rule 12(b)(6), the trial court considers only the pleadings.” Strickland v. Hedrick, ___ N.C. App. ___, ___, 669 S.E.2d 61, ___ (2008).

Defendants are required to submit evidence to support their affirmative defense; yet, such evidence is not appropriate for consideration at this stage of pleadings. Dismissal under Rule 12(b)(6) is appropriate only when “as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” Shell Island, 134 N.C. App. at 225, 517 S.E.2d at 413 (citations omitted). If a court does not exclude a matter outside the pleadings presented to it under Rule 12(b)(6), the motion “should be treated as one for summary judgment under Rule 56.” Shoffner Industries, Inc. v. Construction

Co., 42 N.C. App. 259, 262-63, 257 S.E.2d 50, 53 (1979). “[W]here a trial court reaches the question of summary judgment, the trial court has determined the complaint survives a 12(b)(6) motion.” Barbee v. Johnson, __ N.C. App. __, 665 S.E.2d 92, 95 (2008).

Defendants filed their Motion to Dismiss under Rule 12(b)(6) “for failure to state a claim upon which relief can be granted due to lack of standing; estoppel and/or quasi-estoppel” The proposed Defendant-Intervenors allege separately that (1) Plaintiffs’ claims are barred by estoppel; (2) Plaintiffs’ Complaint should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction due to sovereign immunity, the governor’s approval of the Plan, laches, and mootness; and (3) Plaintiffs’ Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted or judgment on the pleadings should be entered against Plaintiffs.

In analyzing the affirmative defense of constitutional estoppel, our courts have uniformly refused to find evidence in any other place than pleadings filed by the estopped party when ruling on a motion to dismiss. It is interesting to note that in Shell Island itself, the Court of Appeals quite specifically stated that the trial court’s dismissal under Rule 12(b)(6) on estoppel grounds was proper only because “Plaintiffs’ complaint alleges facts” sufficient to invoke and apply the doctrine of estoppel. See Shell Island, 134 N.C. App. at 413 (emphasis added). In Convent v. Winston-Salem, 243 N.C. 316, 90 S.E.2d 879 (1956), the court invoked estoppel on the basis of an agreed statement of facts submitted to the court. In Durham v. Bates, 273 N.C. 336, 160 S.E.2d 60 (1968) the court found that estoppel applied based on evidence submitted by the estopped party’s affidavits filed in the case. In Ratcliff v. County of Buncombe, the court granted estoppel claims at the judgment on the pleadings phase based on evidence submitted in

pleadings filed by the estopped party. Ratcliff v. County of Buncombe, 81 N.C. App. 153, 343 S.E.2d 601 (1986).

Courts have certainly considered evidence for estoppel located in places other than the pleadings, but not on a Motion to Dismiss or Motion for Judgment on the Pleadings. In Ramsey v. Veterans Comm'n, 261 N.C. 645, 135 S.E.2d 659 (1964), the court precluded plaintiff's constitutional challenge based on record of facts found by the Superior Court on review of an administrative decision. See also Craver v. Winston-Salem, 267 N.C. 40, 147 S.E.2d 599 (1966) (barring plaintiffs' claims under estoppel on the basis of evidence provided in the complete record of the administrative proceedings it reviewed). In Goforth Props., Inc. v. Chapel Hill, 71 N.C. App. 771, 323 S.E.2d 427 (1984), the court ruled on a motion for summary judgment that estoppel applied based on the evidence disclosed. See also Phillip Morris USA, Inc. v. Tolson, 176 N.C. App. 509, 626 S.E.2d 853 (2006) (finding facts at the motion for summary judgment phase sufficient to establish estoppel). In Westminster Homes, Inc. v. Cary, 354 N.C. 298, 554 S.E.2d 634 (2001), the court applied the doctrine of constitutional estoppel upon facts disclosed at trial. See also Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (1998) (applying estoppel to the State based on facts found at trial); River Birch Assoc. v. Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990) (applying estoppel on the basis of facts disclosed at trial); Stegall v. County of New Hanover, 87 N.C. App. 359, 361 S.E.2d 309 (1987) (applying estoppel on the basis of facts disclosed at trial).

One anomalous case was discovered in which a court discussed the application of constitutional estoppel, among a variety of other grounds, in the context of determining whether or not a county as a subdivision of the State had standing to challenge the constitutionality of a state tax statute. See In re Martin, 286 N.C. 66, 74-75, 209 S.E.2d 766, 772 (1974). That case,

however, was not decided in the context of a Rule 12(b)(1) defense and the evidence supporting the application of estoppel was nevertheless located where it would be expected, in the pleadings of the parties. Indeed, the court cited constitutional estoppel as a “general rule” and did not explicitly hold or find that constitutional estoppel was a standing doctrine. See In re Martin, 286 N.C. at 74, 209 S.E.2d at 772.

This was for good reason. To apply estoppel as a sub-species of standing doctrine would force parties into a constitutional pickle. The standing doctrine announced by the Stanley court indicated that

"[o]nly those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights." Canteen Service v. Johnson, 256 N.C. 155, 166, 123 S.E. 2d 582, 589 (1962). See also Nicholson v. Education Assistance Authority, 275 N.C. 439, 168 S.E. 2d 401 (1969); In Re Assessment of Sales Tax, 259 N.C. 589, 131 S.E. 2d 441 (1963); Carringer v. Alverson, 254 N.C. 204, 118 S.E. 2d 408 (1961); James v. Denny, 214 N.C. 470, 199 S.E. 617 (1938). The rationale of this rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" Flast v. Cohen, 392 U.S. 83, 99, 20 L.Ed. 2d 947, 961, 88 S.Ct. 1942, 1952 (1968).

Stanley v. Dept. of Conservation & Dev., 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973).

Yet, for a party to have a genuine grievance, to have a personal stake in the outcome, and to have concrete adverseness that sharpens the presentation of the issues, a party would inevitably wander into the wide open field of estoppel advocated by opposing counsel by on some level accepting, seeking, or being forced to accept involuntarily a benefit loosely related to a challenged statute. A perfect storm of court preclusion would result, and an insoluble standing

dilemma would threaten to foreclose injured parties from a variety of state and federal constitutional rights, including their gateway constitutional protection: access to the courts. Our Constitution cannot permit Defendants or the proposed Defendant-Intervenors to tie closed the courthouse doors with a Gordian knot. For these reasons, constitutional estoppel simply is not a standing doctrine but is an affirmative defense to be asserted under Rule 12(b)(6), as specified in Rule 8(c) of the North Carolina Rules of Civil Procedure and in nearly every other case that has treated the issue.

Regardless of the proper classification of estoppel within the framework of North Carolina's jurisprudence, in this case, Defendants have raised estoppel under Rule 12(b)(6), the proper rule for doing so, but without sufficient evidence in the record to support their claim. The proposed Defendant-Intervenors have, in a somewhat unclear presentation of the grounds for dismissal, not asserted that their estoppel defense is rooted in a Rule 12(b)(1) claim and have incorporated by reference the Memorandum in Support of the Defendants' Motion to Dismiss.

Defendants' and the proposed Defendant-Intervenors' evidence on estoppel is barred at this stage of pleadings not merely because it is excluded from consideration on a Rule 12(b)(6) motion to dismiss, it is also inconsistent with this Court's Order determining that the case presented purely legal issues that could be resolved on Motions to Dismiss and Motions for Judgment on the Pleadings. On 5 January 2009 this Court issued its Order stating in Paragraph 7 that "this case hinges on legal issues capable of resolution by the Court without any factual development of the record" Accordingly, the Court not only stayed discovery in the case but determined to hear both the Defendants' Motion to Dismiss and Plaintiffs' Motion for Judgment on the Pleadings at the same time to resolve the legal issues. Defendants and the proposed Defendant-Intervenors consented to that Order.

No evidence from the pleadings supporting an estoppel defense is cited by Defendants or the proposed Defendant-Intervenors. Defendants and the proposed Defendant-Intervenors repeatedly make reference to matters outside the pleadings in support of their estoppel claims, as they must. Such evidence, however, is inappropriate at this stage of pleadings (and, as Plaintiffs have shown, insufficient at any stage). By attempting to bring before the Court evidence outside the pleadings, the parties have not only violated Rule 12(b)(6) but have also violated the Court's Order.

D. The Proposed Defendant-Intervenors Cannot Submit Evidence On Any Issue, Including an Affirmative Defense of Estoppel

As the Court stated in its Order dated 26 January 2009, "the court has not ruled on the Defendant-Intervenors motions to intervene as of this time." Thus, the proposed Defendant-Intervenors have not been admitted to participate in the case as full parties. Rather, the Court permitted them to intervene in an amicus curiae-like, limited capacity for the purpose of submitting a combined brief. In the Court's Order of 5 January 2009, to which the Defendants and proposed Defendant-Intervenors consented, the Court stated

The intervenors on behalf of Defendants shall be permitted to file one joint brief in support of their position with regard to each of the following: Defendants' and defendant-intervenors' Motions to Dismiss, Plaintiffs' Motion for Judgment on the Pleadings, and Defendants' Motion to Disqualify, and at each hearing shall select one attorney for said defendant intervenors who shall be permitted to argue in support of the defendant intervenors' position at the hearings on said motions.

The role of the proposed Defendant-Intervenors is made clear: they are limited to filing a joint brief on specified motions. They may not purport to submit evidence as a party. Yet, the proposed Defendant-Intervenors have purported to submit a Notice of Filing, supposing to introduce evidence into the case as parties.

In addition to being precluded from submitting evidence outside the pleadings at this stage of litigation (as observed above), the proposed Defendant-Intervenors are not permitted to submit evidence of any kind prior to a ruling on whether or not they will be permitted to enter the case as full parties. While we understand that the proposed Defendant-Intervenors may wish to rush to the defense of the State to protect their incumbency status, they simply must stay within the boundaries established by the Court and consented to by the proposed Defendant-Intervenors. Filing dispositive motions or submitting evidence on any issue in the case is inconsistent with the amicus-curiae role delineated by the Court.

II. Sovereign Immunity Does Not Shield The State From Application Of The Constitution To Limit Governmental Power

The proposed Defendant-Intervenors, private parties purportedly arguing on behalf of the State, attempt to assert that North Carolina citizens may not invoke the limitations of the North Carolina constitution on North Carolina public officials because North Carolina is sovereign and, therefore, immune from constitutional challenge. While some State officials would doubtless be delighted to be sovereignly free from the strictures placed upon them by the people in the North Carolina Constitution, we think the Constitution says otherwise.

North Carolina “has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights.” Corum v. University of North Carolina, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). In the case presently before the Court, the Plaintiffs have alleged that certain public officials violated N.C. Const., Art. I, §§ 6, 18, and 19, each of which is guaranteed by the Declaration of Rights, and Art. II, § 1, a provision that in the context of this suit is a consequence of Art. I, § 6. When asserting such rights, the Supreme Court has been clear:

The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights. It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.

Id. at 785-86, 413 S.E.2d at 291. Moreover, “the doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense.” Id. at 786, 413 S.E.2d at 292. “[W]here there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.” Id. “It is well established that sovereign immunity does not protect the state . . . against claims brought against them directly under the North Carolina Constitution.” Peverall v. County of Alamance, 154 N.C. App. 426, 430, 573 S.E.2d 517, 519 (2002).

The attempt of the proposed Defendant-Intervenors to bar Plaintiffs’ claims based on the doctrine of sovereign immunity fails to state correctly the relationship of North Carolina’s public officials to the North Carolina Constitution and fails to bar Plaintiffs’ challenges based on that constitution.

III. Neither The Doctrines of Laches or Mootness Apply To The Facts Of This Case

A. No Unreasonable Delay Has Occurred

The Plaintiffs contend that the interoperation of the CON Law, Executive Order 139 re-establishing the Council, the applicable Plan, the applicable administrative rules, and the exemptions from the APA and the Ethics Law collectively work to violate their constitutional rights. The combined effect of these laws, as each was created, modified, and expanded over time, has at last wandered outside the constitutional boundaries. Any analysis, therefore, of the application of the doctrine of laches, must squarely address that the constitutional injury alleged

here has been worked by the operation of concomitant laws that have slowly and independently meandered and merged to infringe the constitutional rights of Plaintiffs.

A court may apply the equitable doctrine of laches to bar an equitable claim “where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim.” Williams v. Blue Cross Blue Shield, 357 N.C. 170, 181, 581 S.E.2d 415, 424 (2003). Such a lapse of time, however, must be unreasonable: “the mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it.” Taylor v. Raleigh, 290 N.C. 608, 622-23, 227 S.E.2d 576, 584-85 (1976). Here, no unreasonable delay has occurred in bringing the action.

An ever-changing legal thread is woven into the very fabric of the statutory complex challenged by the Plaintiffs. Executive Order 139, rescinding prior incarnations of the Council and forming the new Council, was made effective 3 March 2008. The unreviewable Plan created by the Council, which is cited by the Department without variance as the rule by which CON decisions are determined, is produced afresh each year.

Department rule 10A N.C.A.C. 14C.0402 that exempts CON decisions from whole-record judicial review was enacted on 1 October 1981 and amended on 1 October 1984 and 1 February 1986. 10A N.C. Admin. Code 14C.0402 (2008). The laws exempting the Plan from the normal APA rules review process were enacted on 13 July 2000 (N.C. Sess. Laws 2000-190 §§ 6, 7) and 19 June 2003 (N.C. Sess. Laws 2003-229 §§ 12, 13).

On 12 January 2001, Executive Order No. 1 established the North Carolina Board of Ethics. 15 N.C. Reg. 1553 (March 1, 2001). The Council and its members were not included in

the list of persons and boards subject to Executive Order No. 1. Id. at 1553-54. On 4 August 2006, the Governor signed the State Government Ethics Act (“The Ethics Act”), codified as N.C. Gen. Stat. 138A-1, *et. seq.* N.C. Sess. Laws 2006-201. The Ethics Act took effect on 1 January 2007. Id. On 26 January 2007, due to the passage of the Ethics Act, the Governor rescinded Executive Order No. 1, thus dissolving the North Carolina Board of Ethics. 21 N.C. Reg. 1535 (March 1, 2007).

The Ethics Act created the State Ethics Commission, see N.C. Gen. Stat. § 138A-6 (2008), and delineated its powers and duties: (a) In addition to other powers and duties specified in this Chapter, the Commission shall: ... (3) Identify and publish the following: a. A list of nonadvisory boards. N.C. Gen. Stat. § 138A-10 (emphasis added). “The Commission shall ... also identify and publish at least annually a listing of all boards to which this Chapter applies. This listing may be published electronically on a public Internet Web site maintained by the Commission.” N.C. Gen. Stat. § 138A-11 (emphasis added). The State Ethics Commission has published this listing at <http://www.ethicscommission.nc.gov/documents/coveredBoards.xls>. As of 6 May 2008, the Council was not included in the listing of boards to which the State Ethics Act applies. The State Ethics Commission is not bound by any notice requirements for publishing the list of boards, other than that it must publish the list “at least annually.” N.C. Gen. Stat. § 138A-11.

B. Mootness is Inapplicable.

The mootness argument asserted by the proposed Defendant-Intervenors is without merit. Not only have the Plaintiffs alleged a sufficiently live controversy to make the application of mootness improper, but Plaintiffs’ as-applied constitutional challenge to the body of statutory and administrative law is a nearly quintessential example of a case which is “capable of

repetition, yet evading review,” thus “present[ing] an exception to the mootness doctrine.” Crumpler v. Thornburg, 92 N.C. App. 719, 723, 375 W.E.2d 708, 711 (1989), citing Leonard v. Hammond, 804 F. 2d 838, 842 (4th Cir. 1986) (internal citations omitted). As the Crumpler court stated, even if otherwise applicable, mootness cannot be applied when: “(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.” Id. Here, the convergent body of law challenged has changed in subtle ways several times through the years. It changed once during the course of this litigation on 3 March 2008. The Plan is developed each year. The Ethics Commission refuses to include the Council as a regulated body, “at least” annually but perhaps more frequently. This very litigation may not be fully litigated prior to the expiration or cessation of laws implicated in the Plaintiffs’ complaint. As stated throughout Plaintiffs’ Complaint and this memorandum, there is at very least a reasonable expectation (if not a likelihood) that Plaintiffs rights will be subjected to the same actions again.

IV. The Plaintiffs Have a Property Right Impinged By The Challenged Statutory Complex

Defendants and the proposed Defendant-Intervenors incorrectly conclude that Plaintiffs do not have a protected property interest. In so doing, they misapprehend North Carolina constitutional law. The Plaintiffs’ property interest – the right to work and to earn a livelihood – is a protected property interest in North Carolina.

The North Carolina Constitution states, “[n]o person shall be...disseized of his freehold, liberties, or privileges ... or in any manner deprived of his life, liberty, or property, but by the law of the land.” N.C. Const., Art. I, § 19. “The right to work and to earn a livelihood is a property right[.]” North Carolina Ass’n. of Licensed Detectives v. Morgan, 17 N.C. App. 701,

704, 195 S.E.2d 357, 359 (1973) (quoting Roller v. Allen, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957)). Our state courts have carefully guarded the constitutional rights of the people from assaults against that right, such as those advanced by Defendants and the proposed Defendant-Intervenors, by repeatedly articulating that the right to work is even an elevated right under the North Carolina Constitution. “The right to conduct a lawful business or to earn a livelihood is regarded as fundamental.” Roller at 518-19, 96 S.E.2d at 854 (emphasis added) (quoting McCormick v. Proctor, 217 N.C. 23, 6 S.E.2d 870 (1940)). Federal courts have agreed with this assessment of North Carolina constitutional law in language that is rarely clearer:

[T]he concept of the right to work as liberty’s cornerstone is so ingrained in our society that [the North Carolina] [L]egislature has concluded that ‘The right to live includes the right to work.’ Moreover, a reading of the pertinent cases reveals that the courts have rarely articulated a fundamental right with more sweeping eloquence and affection than they have the right to work.

National Right to Work Legal Defense and Education Foundation, Inc. v. United States, 487 F.Supp. 801, 805-06 (E.D.N.C. 1979).

Previously, our Supreme Court declared that a former, very similar version of North Carolina’s CON Law was an invasion of property rights in violation of the North Carolina Constitution.

We hold that Article I, § 19, of the Constitution of this State does not permit the Legislature to authorize a State board or commission to forbid persons, with the use of their own property and funds, to construct adequate facilities and to employ therein a licensed professional and quasi-professional staff for the treatment of sick people, who desire the service, merely because to do so endangers the ability of other, established hospitals to keep all their beds occupied.

In re Aston Park, 282 N.C. 542, 549, 193 S.E.2d 729, 734 (1973). Defendants seek to obfuscate the Court’s decision by citing a subsequent opinion of the Court of Appeals and language penned in a later dissenting opinion of the Supreme Court.

We concede that a panel in the Court of Appeals stated nearly twenty years after the Supreme Court’s decision in In re Aston Park that the Supreme Court’s decision on this point had “rendered moot that holding” by statutory revision. See State ex rel. Utilities Comm'n v. Empire Power Co., 112 N.C. App. 265, 275, 435 S.E.2d 553, 558 (1993). That much is clear. Nevertheless, we question the ability of a lower court, stating in dicta while ruling on a wholly different legal issue, to “render[] moot the holding” of a higher court by pointing to the activity of a legislature acting in response to the settled unconstitutionality of its first legislative attempt. At best, the legislature sought to comply with the Supreme Court’s decision by repealing and revising the offending statutes. Our Supreme Court has not directly passed on the constitutionality of the CON Laws since that time.

Regardless of the present constitutional status of the CON Law as a whole in light of In re Aston Park, the Supreme Court stated in plain language that the right to practice medicine is a substantial property right. “The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State” In re Aston Park, 282 N.C. at 550, 193 S.E.2d at 735; see also State v. McCleary, 65 N.C. App. 174, 180, 308 S.E.2d 883, 888 (1983); North Carolina Association of Licensed Detectives v. Morgan, 17 N.C. App. 701, 704, 195 S.E.2d 357, 359 (1973).

Plaintiffs allege the State is exercising its police power to exclude them from engaging in otherwise lawful business activities – the practice of medicine and the offering of lawful medical services. (A. Compl. ¶ 54). The Complaint alleges that Hope wishes to “provide its patients with positron emission tomography, magnetic resonance imaging (“MRI”) and linear accelerator services” and that the Clinic wishes to “provide high quality, cost effective medical services to its patients [through the use of] a licensed ambulatory surgery center with six operating rooms

dedicated to the provision of orthopaedic surgery.” (A. Compl. ¶¶ 17, 21). Plaintiffs allege that their right to provide an otherwise lawful service is unconstitutionally infringed by the statutory complex at work in the CON Law, the Plan, the Council, and the administrative rules.

While the State may regulate employment as a proper exercise of its police power in the public interest for health reasons, “the fact that the business of a hospital is, *per se*, related to the public health does not mean that every regulation of its activities falls within the scope of the police power.” In re Aston Park, at 551, 193 S.E.2d at 735. In striking down the former CON Law, the In re Aston Park court said that the North Carolina Constitution “[did] not permit the Legislature to authorize a State board or commission to forbid persons, with the use of their own property and funds, to construct adequate facilities and to employ therein a licensed professional and quasi-professional staff for the treatment of sick people.” Id. at 549, 193 S.E.2d at 734. “[T]he power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it.” Id. at 551, 193 S.E.2d at 735 (quoting State v. Harris, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940)).

Contrary to the assertions of Defendants and particularly the assertions of the proposed Defendant-Intervenors, Courts are not nearly as deferential to the legislature when the State infringes on rights contained in the North Carolina Constitution, especially those rights contained in the Declaration of Rights. “We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.” Corum, at 783, 413 S.E.2d at 290. When the State's exercise of police power denies a person, association, or corporation the right to engage in an otherwise lawful business, the North Carolina Constitution “requires a substantially greater likelihood of benefit to the public in order to enable it to survive [an action] based upon

Article I, § 19 of the Constitution of North Carolina.” In re Aston Park at 550, 193 S.E.2d at 735. In State v. Ballance, the Supreme Court held that a photography licensing law was unconstitutional, stating

It is plain that [the law] is not a valid exercise of the police power of the State,...unreasonably obstructs the common right of all men to choose and follow one of the ordinary lawful and harmless occupations of life as a means of livelihood, and bears no rational, real, or substantial relation to the public health, morals, order, or safety, of the general welfare.

Balance, 229 N.C. 764, 772, 51 S.E.2d 731, 736 (1949). In Roller v. Allen, the Court held that regulations of a tile contracting board were constitutionally impermissible because “[t]he Act unreasonably obstructs the common right of the plaintiff...to choose and follow as a means of livelihood an ordinary and harmless occupation. It tends to promote a monopoly in what is essentially a private business.” Roller, 245 N.C. 516, 525-26, 96 S.E.2d 851, 859 (1957).

A heightened level of constitutional rigor has been imposed – without contradiction – to the type of regulations most closely analogous to the statutory complex challenged in this case. “The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.” Id. (emphasis added) (quoting Lawton v. Steele, 152 U.S. 133, 137, 14 S.Ct. 499, 501, 38 L.Ed. 385 (1894)). See also State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983); North Carolina Association of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973); accord Dobbins v. City of Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169 (1904); Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E. 141 (1920); State v. Potomac Valley Coal Co. of Garrett County, 116 Md. 380, 81 A. 686 (1911); State ex rel. Laurita v. Pileggi, 154 W.Va. 514, 177 S.E.2d 29 (1970). “Compulsory curtailment of facilities for the care of the sick is not a reasonable choice of a remedy for a shortage of trained hospital

personnel, nurses, and doctors.” In re Aston Park at 549, 193 S.E.2d at 734 (emphasis added). Thus, the Supreme Court held that the then-extant CON Law violated, *inter alia*, North Carolina Constitution Article I, § 19 and Article II, § 1.

The proposed Defendant-Intervenors conflate and confuse the rights and analyses of the United States Constitution with those of the North Carolina Constitution. The assertions and conclusions of the proposed Defendant-Intervenors concerning the existence of Plaintiffs’ property rights under the North Carolina Constitution and the judicial rigor imposed on violations of those rights are incorrect as a matter of law. The Plaintiffs’ claims under the North Carolina Constitution are not merely viable against the Motions to Dismiss, they necessarily defeat any other defenses that could be raised against them.

V. The Plaintiffs Have Stated Claims Upon Which Relief Can Be Granted

Defendants and the proposed Defendant-Intervenors appear to argue in a coordinated effort that Plaintiffs cannot show a violation of the North Carolina Constitution as applied to Plaintiffs. In their view, Plaintiffs have shown no unlawful delegation of authority from the General Assembly to the Executive, no denial of Plaintiffs’ due process rights, and no denial of Plaintiffs’ right to access to the courts.

For the reasons stated in Plaintiffs’ Memorandum In Support of Motion for Judgment on the Pleadings, the provisions of the North Carolina Constitution and related case law show otherwise.

A. The Challenged Statutory Complex Is An Unlawful Delegation of Legislative Authority

The legislative power cannot be delegated without substantive standards and procedural protections. Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 442-44, 253 S.E.2d 473, 481 (1979), aff’d, 299 N.C. 399, 263 S.E.2d 726 (1980). The test of

whether a delegation of legislative authority to an administrative body is constitutional “is whether the delegation is accompanied by adequate guiding safeguards. If so, the delegation will be upheld.” In re Broad and Gales Creek Comm. Ass’n, 300 N.C. 267, 273, 266 S.E.2d 645, 650 (1980). The Supreme Court noted that:

[w]e concur in the observation that “[t]he key to an intelligent application of this [test] is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature.”

Adams, 295 N.C. at 697-98, 249 S.E.2d at 411 (quoting Glenn, THE COASTAL MANAGEMENT ACT IN THE COURTS: A PRELIMINARY ANALYSIS, 53 N.C. L. Rev. 303, 315 (1974)).

Thus, in a delegation of legislative authority there must be (1) substantive guidance issued to the administrative body and (2) procedural safeguards placed upon that substantive guidance. Adams, 295 N.C. at 698, 249 S.E.2d at 411. “We thus join the growing trend of authority which recognizes that the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards.” Id.

The delegation of legislative authority effected by the statutory complex challenged in this litigation is broad, substantively vacuous, and excepted from normal substantive guidance and procedural safeguards applicable to other rules via the Administrative Procedure Act (“APA”) and the State Government Ethics Act. The Council has nearly unfettered discretion to approve, or disapprove, or even to adjust in tailored fashion, the scope of new institutional health services or who may offer them and thus compete with the institutions represented by members

on the Council. As our Court of Appeals has explained, the delegation of broad legislative power to entities like the Council is unconstitutional.

The General Assembly must prescribe the standard for an administrative board with sufficient definiteness so that the board is bound by the legislative policy and cannot under the name of finding facts actually set the policy.

Farlow v. N.C. State Board of Chiropractic Examiners, 76 N.C. App. 202, 211, 332 S.E.2d 696, 702 (1985) (citations omitted).

Moreover, because the great majority of the members of the Council are citizens employed by private businesses, rather than officers of state government, this attempted delegation of legislative authority is void on its face. The most suspect type of legislative delegation is to private individuals or entities. “Delegations of administrative authority are suspect when they are made to private parties, particularly to entities whose objectivity may be questioned on grounds of conflict of interest.” 2 Am.Jur.2d Administrative Law § 76, p. 98. In such cases, the rule forbidding delegation is absolute: delegation to private parties is forbidden, whether or not adequate guiding standards are provided. Wilcher v. Sharpe, 236 N.C. 308, 312, 72 S.E.2d 662, 665 (1952) (“Where the effectiveness of an ordinance determining the use of property for a lawful purpose is conditioned upon the assent or permission of private persons, ... it must be held invalid, as it involves the delegation of legislative power to private individuals.”).

As previously argued in this Memorandum, the broad, policy-making authority delegated to the Council is particularly offensive to constitutional standards because it involves the power to prevent individual applicants, such as Hope and the Clinic, from exercising their fundamental right to engage in an otherwise lawful business. As the Supreme Court held in State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940):

Where such a power is left to the unlimited discretion of a board, to be exercised without the guide of legislative standards, the

statute is not only discriminatory but must be regarded as an attempted delegation of a legislative function offensive both to the State and the Federal Constitution.

While the power to make rules and regulations to carry into effect the laws confided to them for administration is often given to administrative bodies, and while in instances there may be some doubt as to whether the proposed regulation is legislative in character or in pursuance of a delegable power, *it is clear that in a statute of this kind, giving the important power of admitting or excluding persons from a business, trade, or profession, only the Legislature can create the standards and provide the reasonable limits within which the power must be exercised.*

216 N.C. at 754-55, 6 S.E.2d 860 (emphasis added) (citations omitted).

In short, delegation of legislative authority without adequate guiding standards “is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of [those] who may exercise it so as to give exclusive profits or privileges to particular persons.” State v. Tenant, 110 N.C. 609, 612, 14 S.E.2d 387, 388 (1892). See also In re Application of Ellis, 277 N.C. 419, 425, 178 S.E.2d 77, 80 (1970).

B. The Challenged Statutory Complex Denies Due Process Of Law

The freedom to contract and to engage in lawful business activity without unreasonable interference by the government is guaranteed by the North Carolina Constitution. As the North Carolina Supreme Court has explained:

Article I, Section 1 of the North Carolina Constitution provides that ‘life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness’ are among those rights of the people that are inalienable. Section 19 of the same Article provides that ‘[n]o person shall be . . . deprived of his . . . liberty, or property, but by the law of the land.’ The ‘law of the land,’ like ‘due process of law,’ serves to limit the state’s police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare.

These constitutional protections have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally

related to a proper governmental purpose. This is the test used in determining the validity of state regulation of business under both Article I, Section 1, and Article I, Section 19. Inquiry is thus twofold: (1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?

Poor Richard's, Inc. v. Stone, 322 N.C. 61, 64, 366 S.E.2d 697, 698-99 (1988) (citations omitted). Under this two-pronged test, an unreasonably restrictive statute or regulation is invalid, even if the governmental purpose is legitimate. "Although the object of particular legislation may well be within the scope of the police power, the legislation may yet deprive the individuals of due process of law if the means chosen to implement the legislative objective are unreasonable." A-S-P Associates v. City of Raleigh, 298 N.C. 207, 217, 258 S.E.2d 444, 450 (1979).

Here, the means the State has chosen to implement its legislative goals are unreasonable. The statutory complex challenged by the Plaintiffs imposes a statutory requirement to obtain a CON, which decision is determinatively restricted by an unreviewable Plan, which Plan is developed by self-interested members of the Council, all in the absence of the key procedural safeguards normally made applicable by the APA and the self-dealing safeguards imposed by the State Government Ethics Act.

Against this unholy convergence the State posits that a public hearing is sufficient to rescue the rights of North Carolina citizens from being trampled underfoot by the statutes and rules at issue. As our Court of Appeals has recognized, even if a provider does not have an absolute right to construct a new facility, it at least has "a right to a fair review of its application," In re Denial of Request by Humana Hospital Corp., 78 N.C. App. 637, 643, 338 S.E.2d 139, 143 (1986). Because the CON Law, as applied in this case, deprives Plaintiffs and other similarly situated persons of their right to due process, it clearly violates Article I, § 1 and

Article I, § 19 of our Constitution.

C. The Challenged Statutory Complex Denies The Constitutional Right To Access To The Courts

Article I, § 18 of the North Carolina Constitution states that the “courts shall be open,” and guarantees that citizens of this State, including corporate citizens such as the Plaintiffs, “shall have remedy by due course of law” for an injury to his lands, goods, person, or reputation “and right and justice shall be administered without favor, denial, or delay.” The CON Law, the APA, and the provisions of 10A N.C.A.C. 14C.0402, as applied in this case, combine to deprive the Plaintiffs of access to the courts for redress of grievances in at least two fundamental ways: 1) Plaintiffs are denied the right to a *de novo* judicial review of a contested case in which the Department does not adopt the decision of an administrative law judge; and 2) Plaintiffs are denied the right to challenge the substance of the Plan in the administrative hearing process.

The APA contains procedural safeguards normally applicable to aggrieved parties in contested cases. Such safeguards assist in providing an open court in which an aggrieved party can have remedy by due course of law.

- Pursuant to N.C. Gen. Stat. § 150B-36(b), after the administrative law judge issues a decision in a contested case, the agency makes a final decision after a review of the official record in the case. The agency must adopt the findings of fact contained in the administrative law judge’s decision, unless those findings of fact are “clearly contrary to the preponderance of the admissible evidence.”
- Pursuant to § 150B-36(b1) and (b2), the agency must separately detail the reasons for not adopting a finding of fact made by the administrative law judge, the evidence in the record relied on by the agency in making that determination, and

must fully detail any findings of fact the agency makes that were not previously made by the administrative law judge.

- Pursuant to § 150B-36(b3), the agency must adopt the decision of the administrative law judge, or must set forth its reasons for finding that such decision was “clearly contrary to the preponderance of the admissible evidence.”
- Pursuant to § 150B-36(d), the administrative law judge may grant judgment on the pleadings or summary judgment, disposing of all issues in a contested case.
- Pursuant to N.C. Gen. Stat. § 150B-51(c), in contested cases where the agency does not adopt the administrative law judge’s decision, the aggrieved party is entitled to a *de novo* review of the official record by the superior court, which shall make findings of fact and conclusions of law without deference to prior decisions in the matter.

For CON decisions, however, the previous list of constitutionally critical safeguards is erased. The General Assembly singled out CON decisions as the only type of administrative action to which these protections do not apply. See N.C. Gen. Stat. § 150B-34(c) (removing the procedural safeguards of §§ 150B-36(b), (1), (b2), (b3) and (d), and 150B-51 from “cases arising under Article 9 of Chapter 131E of the General Statutes.”)

As a result, parties aggrieved by the laws challenged in this litigation are denied effective judicial review of CON decisions. Accordingly, for CON decisions, the following critical procedural differences exist.

- The Department is not bound to adopt the findings of fact made by the administrative law judge, and is not required to explain its decision to ignore such findings of fact to the degree required under the general provisions of the APA.

- The Department is not bound to adopt the decision of the administrative law judge, and is not required to explain its decision to reject such a decision.
- Aggrieved parties are not able to receive a *de novo* superior court review of the Department's final decision that rejects the decision of the administrative law judge, but rather are only afforded a minimal review by the Court of Appeals in which the Court reviews "fact-intensive issues, such as the sufficiency of the evidence and allegations that a decision is arbitrary and capricious" under the extremely deferential whole record test. Good Hope Health System, LLC v. N.C. Dept. of Health and Human Services, ___ N.C. App. ___, 659 S.E.2d 456, 462 (2008).
- Only questions of law are reviewed *de novo* by the appellate courts. Good Hope Health System, 659 S.E.2d at 462.

By exempting CON determinations from the grievance and review provisions of the APA and eliminating by law any review of the Plan's "correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing," 10A N.C.A.C. 14C.0402, the discretion afforded to the Department is made even broader and the judicial remedies available to harmed parties are pulled even tighter. Thus, for Plaintiffs and others similarly situated and harmed in their persons and property, the right to meaningful access to the courts to obtain a remedy by due course of law is choked to death, in violation of the North Carolina Constitution.

CONCLUSION

Based on the foregoing analysis of the legal facts and circumstances applicable to this case, "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a

claim upon which relief may be granted under some legal theory.” Shell Island, 134 N.C. App. at 225, 517 S.E.2d at 413 (citations omitted). Accordingly, the Motions to Dismiss filed by the Defendants and the proposed Defendant-Intervenors should be DENIED.

This the 13th day of February, 2009.

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