

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
SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS

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 Support of their Motion for Judgment on the Pleadings, filed on January 16, 2009.

OVERVIEW

Plaintiffs are healthcare providers in Buncombe and Wake Counties, respectively, that, based on the education, training and experience of their physicians, believe they can provide higher quality medical treatment to their patients by upgrading and expanding their respective equipment and facilities. Hope seeks to provide its patients, including its gynecologic and breast cancer patients, with positron emission tomography ("PET"), magnetic resonance imaging ("MRI") and linear accelerator services at the same location at which Hope now provides chemotherapy and surgical services. The Clinic seeks to develop and open six dedicated ambulatory orthopaedic surgery operating rooms. Both Plaintiffs believe – and seek the opportunity to prove to the State in an appropriate forum – that the new services they propose to

offer would be beneficial to patients with respect to both the quality and the cost of care, offering an alternative superior to other care available in their respective markets. In short, they seek to compete more effectively with entrenched providers of similar services and to provide improved services to patients.

The State of North Carolina requires that healthcare providers obtain a certificate of need (“CON”) prior to developing or offering “new institutional health services,” such as those that the Plaintiffs seek to develop and offer. Without a CON, each of the Plaintiffs is prohibited from developing, offering, and using the medical equipment and facilities that their respective physicians have concluded would provide the best quality medical care to their patients.

In order to obtain a CON, healthcare providers must submit applications to the North Carolina Department of Health and Human Services (the “Department”), which determines whether or not to grant a CON for a proposed project based on certain statutory criteria. The first of these criteria requires, however, that the proposed project must be consistent with the “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.” (Emphasis added).

The State Medical Facilities Plan (the “Plan”) is annually developed by the Department “under the direction of the North Carolina State Health Coordinating Council” (the “Council”) and becomes effective following its approval by the Governor. At that point, under the statutory language quoted above, the Plan becomes a barrier to market entry. Indeed, unless it prospectively identifies a need for the proposed project, a CON application must be rejected even if it meets all other statutory criteria for approval. The Council and its members therefore wield

extraordinary power to determine the number, type and location of new institutional health services in North Carolina. Without a prior need determination in the Plan, healthcare providers are effectively barred from upgrading or expanding their facilities, or from offering new medical services to better treat their patients.

The Council operates without adequate guidance from the General Assembly as to the criteria and procedure used to make the need determinations set forth in the Plan. Moreover, other than stating certain requirements for public notice and hearing, the General Assembly has uniquely exempted the Council from the comprehensive procedural safeguards contained in the North Carolina Administrative Procedure Act, which are otherwise applicable to the promulgation of rules having the force and effect of law. Additionally, the need determinations promulgated by the Council in the Plan are not subject to challenge in hearings before the Office of Administrative Hearings because one of the Department's administrative rules provides that the "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.

Against this backdrop of unusually broad discretion and power vested in the Council, the Council is not comprised of neutral and independent civil servants. Instead, 25 of the Council's current 29 members also serve as officers, directors, or employees of entities engaged in providing health care services for compensation within the State of North Carolina. These members' businesses provide services which may be protected from competition by provisions of the Plan that they collectively develop. Despite their actual or apparent conflict of interests, however, the Council and its members are exempt from the State Government Ethics Act, which was enacted to ensure "that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence." Members

of the Council are therefore free to participate in the consideration of proposals to adjust the need determinations for particular health care equipment, facilities, or services in the following year's Plan, even when such proposals would directly affect the market share and financial performance of the healthcare provider with which they are affiliated, by which they are compensated, and to which they owe a duty of loyalty.

This unholy convergence of circumstances results in an unconstitutional delegation of legislative authority, unconstitutional violations of Plaintiffs' procedural and substantive due process rights, and an unconstitutional denial of access to the courts for redress of grievances. These unconstitutional acts manifest themselves in a Plan annually crafted by, and approved for the benefit of, entrenched healthcare providers in the State, either by strategically approving determinations of need in such a way that makes it more likely the entrenched providers will "win" the CON to meet those needs or that protects the entrenched providers against potential competition from other providers. Both ends work disadvantages to the North Carolina patient population. Plaintiffs have been damaged by these unconstitutional acts, and bring this action for a declaratory judgment that the current CON Law, as set forth in the Amended Complaint, is unconstitutional as applied.

STANDARD OF REVIEW

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 rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." Washburn v. Yadkin Valley

Bank and Trust Co., ___ N.C. App. ___, 660 S.E.2d 577, 583 (2008) (quoting Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)). 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)

With nineteen physicians, the Clinic is the largest orthopaedic practice in Wake County. (A. Comp. ¶ 19) The Clinic has four office locations and serves patients from all of Wake County and a large region of eastern North Carolina. Id. In 2006, the Clinic’s physicians

¹ References to “A. Comp.” are to the First Amended Complaint filed by Plaintiff’s on 31 December 2008.

performed over 7,300 orthopaedic surgical procedures; ambulatory surgery procedures comprised 76% of this total. 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, offer significant advantages to physicians and their patients in both the quality and the cost of necessary medical care. (A. Comp. ¶ 20) Currently, no facility in Wake County has any dedicated ambulatory orthopaedic surgery operating rooms. Id. 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 may render all other criteria irrelevant in a given case by providing that “[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.

As set forth on page 1 of the 2008 Plan, a copy of which is attached as Exhibit 1 to the Amended Complaint, 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, a copy of which is attached as Exhibit 3 to the Amended Complaint, which once again established the Council and directed it to “prepare the Annual State Medical Facilities Plan and present the plan to the Governor.” Id.

Attached as Exhibit 4 to the Amended Complaint is a current list of the members of the Council, as set forth on the Department’s website at the following internet address: <http://www.ncdhhs.gov/dhsr/ncshcc/members.html>. (A. Comp. ¶ 28) 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.² Id.

N.C. Gen. Stat. § 131E-176(25) provides in pertinent part:

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.

Except for the above quoted provisions 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. So long as the public hearing process set forth in N.C. Gen. Stat. § 131E-176(25) is followed by the Council, 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.

² For example, by not recognizing a need for a new service, a Plan can prevent competition with a member's employer. On the other hand, a Plan may declare a need for a new service only after an entity affiliated with a Council member is comparatively better prepared and equipped to meet it. Council members may, in addition, assist other members in pursuing their particular interests in return for similar assistance in matters of special concern to themselves.

The 2008 Plan on pages 8-10, a copy of which is attached as Exhibit 5 to the Amended Complaint, provides a process by which the Council can decide at the request of any individual to treat a particular geographic area or institution differently from others similarly situated, stating as follows:

“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].”

The 2008 Plan on page 10 further states that the Council will decide “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 safeguards to protect against the Council making decisions on such petitions that are arbitrary, unreasoned, or affected by the self-interest of its members. The Council thus has unbridled discretion to act arbitrarily, capriciously, or in the self-interest of its members to determine whether or not it will treat some healthcare providers who seek adjustments to the Plan as “special.”

Hope petitioned the Council to adjust the 2008 Plan to show a need determination for the acquisition of an MRI scanner to be used exclusively for imaging procedures to diagnose and treat breast cancer. (A. Comp. ¶ 44) A copy of Hope’s petition is attached as Exhibit 6 to the Amended Complaint. Similar petitions to include in the 2003 and 2006 Plans a need

determination for the same equipment were approved by the Council in response to petitions filed by Charlotte Radiology, P.A. in Charlotte and Breast MRI Clinic, LLC in Winston-Salem. Id. However, the Council disapproved Hope's petition, without opportunity for administrative or judicial review. Id.

On four occasions since 2004 the Clinic has petitioned the Council to include in the Plan a determination of need for new operating rooms in Wake County, North Carolina. (A. Comp. ¶ 45) On the most recent occasion, the Clinic petitioned the Council to find a need for six freestanding, single specialty operating rooms in Wake County. Id. A copy of that petition (without its supporting exhibits) is attached as Exhibit 7 to the Amended Complaint. All four of the Clinic's petitions were disapproved by the Council, without opportunity for administrative or judicial review. Id.

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 regarding the Governor's 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.*, contains comprehensive guiding standards and procedural safeguards applicable to “[a]ny state board, commission, council, committee, task force, authority, or similar public body, however denominated, created by statute or executive order, as determined and designated by the [State Ethics Commission], except for those public bodies who have only advisory authority.” Pursuant to N.C. Gen. Stat. § 138A-2, the “purpose of this Chapter is to ensure that elected and

appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence.”

Among the legislative findings made by the General Assembly when it enacted the State Government Ethics Act is the following:

[B]ecause many public officials serve on a part-time basis, it is inevitable that conflicts of interest and appearances of conflicts will occur. Often these conflicts are unintentional and slight, but at every turn those public officials who represent the people of this State must ensure that it is the interests of the people, and not their own, that are being served. Officials should be prepared to remove themselves immediately from decisions, votes, or processes where a conflict of interest exists....

2005 N.C. Session Laws, 2006-201.

The State Government Ethics Act establishes the following safeguards against self-interested decision-making by individuals serving part-time as public officials:

a. The State Ethics Commission is established and authorized to receive complaints alleging unethical conduct by covered persons and conduct inquiries regarding those complaints.

N.C. Gen. Stat. § 138-12(a).

b. The State Ethics Commission is directed to develop and implement an ethics education and awareness program for covered persons.

N.C. Gen. Stat. § 138-10(a)(8).

c. Every covered person subject to the State Government Ethics Act is required to file annually a statement of economic interest disclosing, among other things, the identity of any non-publicly owned business of which the person is an officer, employee or director and, for each such business whether it “has any material business dealings, contracts, or other involvement with the State, or is regulated by the State.”

N.C. Gen. Stat. § 138-24(a)(2)(i).

Despite the clear state policy against conflicts of interests by government officials, however, 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 defined therein. Thus, for example, 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. Nor are they, apparently, expected to recuse themselves in making need determinations in which 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. The development of the Plan by the Council, however, is not subject to these safeguards. Instead, it is specifically made exempt from the Administrative Procedure Act pursuant to N.C. Gen. Stat. § 150B-2(8a)k., under which it is only necessary 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.” Thus, the Plan annually evades review by the Rules Review Commission, to determine whether it is within the authority delegated to the agency by the General Assembly, is clear and unambiguous, and is reasonably necessary to implement or interpret an enactment of the General Assembly or of Congress. See N.C. Gen. Stat. § 150B-21.9(a). Because the Plan is exempted from the

provisions of the Administrative Procedure Act, the foregoing standards are not applicable to the Plan.

The judicial review of administrative decisions which is available 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 “correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing.” Because of this rule, persons adversely affected by arbitrary or erroneous need determinations made by the Council and included in the Plan are deprived of effective administrative or judicial review of those decisions.

LEGAL ANALYSIS

I. AS APPLIED IN THIS CASE, THE CON LAW DELEGATES LEGISLATIVE AUTHORITY TO THE COUNCIL IN VIOLATION OF ARTICLE I, § 6 AND ARTICLE II, § 1 OF THE CONSTITUTION OF NORTH CAROLINA.

Under this State’s Constitution, the default position is that the power to legislate (*i.e.*, to make law) is vested solely in the General Assembly. In recognition of the complexities of the modern state, the North Carolina Supreme Court has allowed the General Assembly to make limited delegations of legislative authority in certain circumstances. Only where the General Assembly has provided both substantive guidance to the administrative authority and procedural safeguards against substantive abuse, however, is the Legislature’s delegation of rulemaking authority deemed to be constitutional.

Article I, § 6 of the North Carolina Constitution provides: “The legislative, executive, and supreme judicial powers of the State Government shall be forever separate and distinct from each other.” Additionally, Article II, § 1 of the North Carolina Constitution provides that “[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a

Senate and a House of Representatives.” Under these two constitutional provisions, 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 statutory delegation to the Council of authority to develop the Plan, which is in turn treated as the fixed policy of the State, not only fails to contain any meaningful or helpful guidance on the substantive issues that the Plan must address but is also accompanied by exemptions from the procedural safeguards and protections against conflicts of interests that apply to virtually every other administrative agency, board or council of the State. The delegation of legislative authority to the Council is therefore both too broad and too likely to result in substantive abuse to be consistent with the State’s constitutional plan.

A. **The North Carolina Supreme Court Requires that the Delegation of Legislative Authority to the Council Must Include Substantive Guidance to the Council and Procedural Safeguards in Order to be a Constitutional Delegation of Legislative Authority.**

The North Carolina Supreme Court has held that “the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies *provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers.*” Adams v. N.C. Dept. of Natural and Economic Resources, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978) (emphasis added) (citing Hospital v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977); Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971)). 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)).

In reviewing whether a delegation of legislative authority is constitutional, courts look to find both *substantive guidance* to the administrative body and *procedural safeguards*. 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.

B. The General Assembly Has Not Given the Council the Substantive Guidance or the Procedural Safeguards to Make its Authority a Constitutional Delegation of Legislative Authority.

In the CON Law, the General Assembly has delegated to the Department the power to review specific CON applications, and to determine whether the new facilities proposed in these applications are needed, based on the detailed criteria set forth in N.C. Gen. Stat. § 131E-183(a). However, the provisions of the CON Law at issue here convert this delegation of an appropriate administrative function -- to find facts in specific cases, and to apply substantive criteria prescribed by the General Assembly -- into an unlawful delegation of the legislative power to a group of private, self-interested individuals to determine what medical facilities are needed throughout the State. This delegation cannot withstand scrutiny under the State Constitution and the cases construing it.

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

[T]he General Assembly cannot delegate to an administrative board the power to legislate. If the General Assembly sets a policy and gives an administrative board the power to find facts which enable the board to carry out the legislative policy this is not a delegation of legislative power. 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). See, e.g., Northampton County Drainage District Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990); Bulova Watch Company, Inc. v. Brand

Distributors of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974); State v. Williams, 253 N.C. 337, 117 S.E. 2d 444 (1960); Harvell v. Scheidt, 249 N.C. 699, 107 S.E.2d 549 (1959); Taylor v. Carolina Racing Ass'n, Inc., 241 N.C. 80, 84 S.E.2d 390 (1954); Kinston Tobacco Board of Trade v. Liggett & Myers Tobacco Co., 235 N.C. 737, 71 S.E.2d 21 (1952), cert. denied, 344 U.S. 866 (1952); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940); Heritage Village Church and Missionary Fellowship, Inc. v. State, 40 N.C.App. 429, 253 S.E.2d 473 (1979), aff'd, 299 N.C. 399, 263 S.E.2d 726 (1980); Revco Southeast Drug Centers, Inc. v. N.C. Board of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

The broad, policy-making authority delegated to the Council is particularly offensive to constitutional standards in the present context 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).

The development of the Plan by the Council and its use by the Department as “a determinative limitation” on the granting of CONs converts the Department's properly delegated

authority -- to review specific proposals and determine whether they meet the criteria listed in N.C. Gen. Stat. § 131E-183(a) -- into an unconstitutional grant of authority for the Council to determine statewide policy controlling what new facilities may be established. The provisions of the CON Law at issue here permit the Council to make “need determinations,” but specify neither the factors to be considered, nor the methodologies to be used by the Council in making those determinations.³ Although the Council is directed to hold public hearings and receive public comments on its initial determinations in a Plan, no statute requires the Council to approve any meritorious change suggested by an interested party. Following approval by the Governor, the Council’s need determinations are given the force and effect of law. In a subsequent CON application, Criterion 1 prevents the applicant from rebutting a determination in the Plan that there is no need for the service it proposes. See N.C. Gen. Stat. § 131E-183(a)(1). Thus, the Council is given, in its unlimited discretion, the power to prescribe what medical facilities may be developed in North Carolina.

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. 98.⁴ The affiliation

³ The Executive Orders issued from the Governor establishing the Council provide no additional guidance to the Council regarding the criteria that should be used to make determinations of need. Even if these executive orders contained more express guidance, however, they would not save the CON Law from its unconstitutional state. Delegations of legislative authority require substantive guidance from the *legislature*; executive orders are delegations of *executive* authority, and cannot be a substitute for legislative guidance.

⁴ As an example, the Court should take judicial notice of an article appearing in The Charlotte Observer, dated 14 January 2008, entitled *Carolinas HealthCare Discloses its Top Pay Packages*. The

of members of the Council with existing providers, and the Council's exemption from the protections contained in the State Government Ethics Act, make any need determination made by the Council inherently subject to abuse.

Because attempted delegation of legislative authority to private citizens or entities is so much more suspect than attempted delegation to a subordinate government agency, the rule forbidding such 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."). Accord Bulova Watch Co., Inc. v. Branch Distributors, 285 N.C. 467, 475, 206 S.E. 2d 141, 147 (1974).

The constitutional problem inherent in delegating the authority to regulate an industry to members of that industry has also been addressed by the United States Supreme Court as well as numerous courts in other jurisdictions. Strong language declaring the impermissibility of such

article shows that the compensation for Carolinas HealthCare System CEO Michael Tarwater, a member of the Council and Chair of the Council's Acute Care Services Committee, was approximately \$3.5 million in 2008. Carolinas HealthCare System is an Intervenor in this matter.

Pursuant to N.C. Gen. Stat. § 131E-257.2(b1), the compensation of executives and top employees of public hospitals such as Carolinas HealthCare System are deemed public records; the data published in The Charlotte Observer was released by Carolinas HealthCare System pursuant to this statute.

According to the Council, Mr. Tarwater represents the North Carolina Hospital Association, rather than Carolinas Healthcare System, on the Council. Nevertheless, in his role as CEO of Carolinas HealthCare System, Mr. Tarwater earned \$2 million in bonuses in 2008 tied in large part to the performance of Carolinas HealthCare System. The performance of Carolinas HealthCare System is directly impacted by the decisions of the Council, both with respect to including a determination in the Plan of need for new institutional health services that Carolinas HealthCare System wishes to offer, and determining there is no additional need for services that would likely compete with services offered by Carolinas HealthCare System. Mr. Tarwater has a direct, personal financial stake in the performance of Carolinas HealthCare System. As the Council currently operates, Mr. Tarwater is not required to disclose his affiliation(s) and potential conflicts of interest, and he is not required to recuse himself from the Council's consideration of issues that would directly impact the performance of Carolinas HealthCare System.

delegation is found in Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855 (1936). In Carter Coal the Supreme Court considered a provision in the Bituminous Coal Conservation Act of 1935 which delegated the power to fix maximum hours and minimum wages to the largest coal producers and their mine workers. The Court concluded as follows:

This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.

298 U.S. at 311, 56 S.Ct. at 873 (citations omitted).

Similar delegation was also considered by the California Supreme Court in Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228, 368 P.2d 101 (1962). A provision of the Business and Professions Code pertaining to the licensing of dispensing opticians required that applicants have at least five years of experience working for a dispensing optician who is either registered in California or who has been licensed for at least five years in another state. 368 P.2d at 102. Because (among other reasons) this provision “confers upon presently licensed dispensing opticians the unlimited and unguided power to exclude from their profession any or all persons,” it was held invalid. 368 P.2d at 104.

Legislative authority cannot be delegated even to an administrative agency unless adequate guiding standards and procedural safeguards are imposed to govern the exercise of the delegated authority. See, e.g., North Carolina Turnpike Authority v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965). Even if the Council was regarded as an agency of state government,

the attempted delegation here is nevertheless clearly improper, because no guiding standards or procedural safeguards are in place to prevent arbitrary or self-serving decisions. As the North Carolina Supreme Court has explained:

A key purpose of the adequate guiding standards test is to ‘insure that the decision-making by the agency is not arbitrary and unreasoned. ...’ Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. 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.

Adams v. N.C. Dept. of N.E.R., 295 N.C. 683, 698, 249 S.E.2d 402, 410 (1978) (citation 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).

The delegation in this case is clearly improper because no guiding standards or procedural safeguards preclude arbitrary or self-interested decisions by the Council. It is clear that the Council is expected to make decisions with far-reaching consequences for the citizens of this State, with absolutely no guiding standards established by the General Assembly.

As commentators have noted, the absence of such guiding standards is particularly indefensible in the context of government regulation of the health care industry, where technology and standards of practice are inherently dynamic.

There are no adequate measures of the efficacy of many medical procedures (e.g., heart by-pass surgery) and there is therefore no defensible method of determining how many such procedures are ‘necessary.’ . . . Moreover, changing taste in medical practice means that the service to be measured is in a state of constant flux.

Rationing in this context is necessarily arbitrary. Like other forms of planning that are not shaped by intellectually coherent standards, it has tended to deteriorate into political bargaining among hospitals, bargaining that has become the hallmark of certificate-of-need regulation.

Sallyanne Payton & Rhoda M. Powsner, REGULATION THROUGH THE LOOKING GLASS: HOSPITALS, BLUE CROSS, AND CERTIFICATE-OF-NEED, 79 Mich. L. Rev. 203, 273 (1980). See also Joshua A. Newberg, IN DEFENSE OF ASTON PARK: THE CASE FOR STATE SUBSTANTIVE DUE PROCESS REVIEW OF HEALTHCARE REGULATION, 68 N.C. L. Rev. 253 (1990).

This lack of adequate substantive guidance for the Council's decisions is exacerbated by a corresponding lack of procedural safeguards to ensure that it acts reasonably and evenhandedly. The exemption of the Council from the State Government Ethics Act, and the exemption of the Plan from the requirements of the Administrative Procedure Act, means that no safeguards are in place to "encourage adherence to legislative standards" and prevent "arbitrary and unreasoned" decisions. See Adams, 295 N.C. at 696-98, 249 S.E.2d at 410-11.⁵ As our Supreme Court foresaw in another context, the predictable result of the unfettered discretion given to the Council to make need determinations are decisions "to give exclusive profits or privileges to particular persons." See In re Application of Ellis, 277 N.C. at 425, 178 S.E.2d at 80. Unfortunately, anticompetitive schemes such as this have become distressingly common in the CON area, and reflect the "capture" of government power to serve the interest of industry insiders, as opposed to the public they purport to serve.

⁵ Indeed, in cases in which the North Carolina courts have upheld the delegation of legislative power to administrative agencies, those delegations were made subject to the requirements of the Administrative Procedure Act. See, e.g., Adams, 295 N.C. at 701, 249 S.E.2d at 412; In re Broad and Gale Creek Comm. Ass'n, 300 N.C. at 275, 266 S.E.2d at 652; Town of Spruce Pine v. Avery County, 123 N.C. App. 704, 716, 475 S.E.2d 233, 240 (1996), rev. 346 N.C. 787, 488 S.E.2d 144 (1997) (the Supreme Court upheld the delegation of legislative authority, reversing the holding of the Court of Appeals).

The development of hospital regulation through certificate-of-need closely resembles a phenomenon familiar to observers of regulation: Industries frequently seek government regulation to prevent entry by potential competitors, to raise standards, and to place a floor under prices. Hospital planning agencies can be analogized to other regulatory agencies . . . that characteristically develop close relationships with the industries and occupations that they regulate. The metaphor of ‘capture’ has often been used to describe the process by which governmental regulatory agencies come to share the interest and viewpoint of the regulated industries.

Payton & Powsner, supra, at 262-63. See Stigler, THE THEORY OF ECONOMIC REGULATION, 2 Bell J. Econ. & Manag. Sci. 3, 3 (1971) (“as a rule regulation is acquired by industry and is designed and operated primarily for its benefit”).

Another commentator has observed:

Circumstantial evidence regarding the type of State CON regulation reviewed by the Aston Park court [the North Carolina law] suggests that such legislation is likely to fit the model of industry capture. State CON statutes do indeed create state-enforced cartels of industry incumbents. Certificate-of-need statutes establish administrative mechanisms for restricting market entry and limiting the expansion of capacity. It is also worth recalling as a historical point that the wave of State CON statutes enacted in the late 1960s and early 1970s had the enthusiastic support of the American Hospital Association and the Blue Cross. . . . It has not been established anywhere, however, that these regimes did anything to control hospital costs. A State judge, therefore, would have substantial justification for viewing State CON statutes of the type at issue in Aston Park as suspiciously indicative of industry capture.

Newberg, supra, at 271 (footnotes omitted). Given the development of the Plan by representatives of existing providers, the Plan embodies a classic case of “industry capture” of government power by incumbent providers to serve their own interests.⁶

⁶ In this regard, it is telling that there are eighteen (18) intervenors in this case seeking to preserve the present regulatory scheme. Notably absent are any of the many patient advocacy and public interest groups concerned about the cost, availability, and quality of health care services for the citizens of North

In summary, the CON Law, as applied in this case, permits the Council, in its virtually unfettered discretion, to make need determinations which have the effect of law in preventing would-be providers from developing otherwise lawful healthcare facilities to serve the citizens of North Carolina. Neither adequate guiding standards nor procedural or other safeguards are provided to prevent the Council from making arbitrary or unreasoned decisions, or determinations which benefit the self-interest of its members. Therefore, the CON Law, as applied in this case, violates the constitutional prohibition on the delegation of legislative power. Hope and the Clinic are therefore entitled to a declaratory judgment that the CON Law, as applied in this case, is unconstitutional.

II. AS IT OPERATES WITH RESPECT TO HOPE AND THE CLINIC, THE NORTH CAROLINA CON PROCESS 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 both Article I, § 1 and Article I, § 19 of 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

Carolina. Instead, each of the intervenors is an existing provider whose business is protected from competition by the current regulatory scheme, or a trade association for those providers.

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).

The constitutional right to be free from unreasonable governmental interference, which our courts have recognized as an aspect of due process of law, applies even in those areas of the economy, such as health care, that are subject to extensive government regulation. For example, in Hartford Accident & Indemnity Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976), the Supreme Court determined that a statute requiring general liability insurance carriers to offer medical malpractice insurance deprived the carriers of due process.

Of course, the business of writing insurance against liability for personal injury and property damage is such that the State may lawfully regulate it in the public interest. This is axiomatic. It does not follow, however, that one engaging in such business in this State is subject to whatever regulation thereof the State may see fit to impose.

290 N.C. at 470, 266 S.E.2d at 507. Thus, even in the highly regulated field of insurance, the Supreme Court concluded that any “interference with individual liberty, or with the right of an owner of property to use it as he sees fit, must have a reasonable relation to the accomplishment of the legislative purpose and must not be unreasonable in degree, in comparison with the probable public benefit.” 290 N.C. at 466, 266 S.E. 2d at 504.

Although it is also heavily regulated, the business of health care, like the business of insurance in Hartford, remains a lawful enterprise that cannot be subjected to unreasonable or unnecessary burdens by the State. The leading decision in North Carolina applying due process principles to restrictions on the development of health care facilities is In re Aston Park Hospital, Inc., 282 N.C. 542, 193 S.E.2d 729 (1973), in which the Supreme Court struck down the predecessor to the current CON Law. In that instance, even though the Supreme Court found that there was a proper governmental purpose for the statute, it determined that the means chosen to effect that purpose were unreasonable.

Obviously, the police power extends to reasonable regulation of hospitals, both as to their construction and as to their operation. However, 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. . . . 'If a statute is to be sustained as a legitimate exercise of the police power, . . . it must be reasonably necessary to promote the accomplishment of the public good, or to prevent the infliction of the public harm.'

282 N.C. at 551, 193 S.E. 2d at 735 (citations omitted).

Significantly, the rationale advanced for the unconstitutional statute in Aston Park is essentially the same as the purported justification of the need determinations at issue in this case -- to ensure the full utilization of existing facilities. The Supreme Court explained:

In support of the statute and of its action thereunder, the Medical Care Commission contends that there is a shortage of doctors and of adequately trained hospital staff workers, especially nurses, that excess hospital construction will spread the available hospital employees more thinly and thus endanger adequate care of the patients, that the time of the doctors can be used more efficiently if the total bed capacity is concentrated, that excess bed capacity will result in a substantial amount of vacant rooms and beds, that there are certain overhead costs which increase with the number of beds whether occupied or vacant, that the overhead cost of vacant beds must be absorbed by the patients in the occupied beds and, consequently, the effect of excess hospital bed capacity will be less efficient service to patients at greater cost.

282 N.C. at 548, 193 S.E, 2d at 734. Likewise, in the present case, the only conceivable public purpose to be served by permitting the Council to enact a “determinative limitation on the provision of any health service, health service facility [or] operating rooms . . . that may be approved” would be to enhance the efficiency of existing medical facilities. However, the Supreme Court specifically determined that a restriction on the development of new hospital facilities is not a reasonable method to ensure the quality and efficiency of existing programs.

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 any event, 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.

282 N.C. at 549, 193 S.E, 2d at 734.

In response to the Supreme Court’s invalidation of the original CON Law, the General Assembly enacted the present statute in 1978. See 1977 N.C. Sess. Laws, Ch. 1182. In so doing, it offered as a new (and obviously sufficient) rationale the need to qualify for federal funds that the State could receive only if it had in place a CON law meeting federal requirements. Thus, in its findings supporting the new law, the General Assembly noted:

That a certificate of need law is required by P.L. 93-641 as a condition for a receipt of federal funds. If these funds were withdrawn, the State of North Carolina would lose an excess of fifty-five million dollars (\$55,000,000).

N.C. Gen. Stat. § 131E-175(5) (Supp. 1981) (repealed 1986). Before that law was passed, however, the State had sought, unsuccessfully, to have the federal law compelling it to adopt a CON law declared unconstitutional. See North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977). This sequence of events suggests that the State’s enthusiasm for its

latest CON law was mild at best. In any event, Congress in 1986, in an explicitly deregulatory move, repealed the federal mandate for states to adopt CON laws. See Pub. L. No. 99-660, Title VII, 100 Stat. 3799 (1986). See, generally, Simpson, FULL CIRCLE: THE RETURN OF CERTIFICATE OF NEED REGULATION OF HEALTH FACILITIES TO STATE CONTROL, 19 Ind. L. Rev. 1025 (Fall 1986).

In fact, far from mandating CON regulation, the federal government is now on record as encouraging those states which still have 1970's era CON laws to reconsider their wisdom. In a joint report of the Federal Trade Commission and the United States Department of Justice entitled "Improving Healthcare: A Dose of Competition," issued in July of 2004, the two agencies formally recommended that "states with certificate of need programs should reconsider whether these programs best serve their citizens' healthcare needs." The agencies clearly acknowledged the anti-competitive nature of CON programs, reflecting much of the viewpoint of the North Carolina Supreme Court in its Aston Park decision.

The Agencies believe that, on balance, CON programs are not successful in containing healthcare costs, and that they pose serious anticompetitive risks that usually outweigh their purported economic benefits. Market incumbents can too easily use CON procedures to forestall competitors from entering an incumbent's market ... Indeed, there is considerable evidence that CON programs can actually increase prices by fostering anticompetitive barriers to entry. Other means of cost control appear to be more effective and pose less significant competitive concerns.

Id. at 22. In view of this policy turnaround by the federal government, the rationale of the Aston Park decision is therefore applicable once again in judging the constitutionality of the CON Law.

The Supreme Court's analysis in Aston Park applies with even greater force to the provisions of the CON Law at issue in this case. In Aston Park, the statute which was found to be unreasonably restrictive of the constitutional right to engage in an otherwise lawful business required a new facility to obtain a CON, but did not preclude an application for a CON from

being approved. Therefore, a provider wishing to develop a new facility had at least a chance of convincing the State that the facility was needed.

By contrast, in the present case, a prospective provider is required to obtain a CON to develop “new institutional health services,” but under the need determinations of the Plan it may be impossible for that party to even apply for a CON. See, e.g., 2007 State Medical Facilities Plan, p. 145 (“It is determined that there is no need for additional units of mobile cardiac catheterization equipment anywhere in the State and no reviews will be scheduled.”) Thus, the Plan represents an even more egregious violation of the Plaintiffs’ rights than the statute declared unconstitutional in Aston Park. As the Supreme Court explained in Aston Park, the greater the degree to which governmental action interferes with fundamental rights, the greater is the showing of necessity which must be made to find it constitutional.

Any exercise by the State of its police power is, of course, a deprivation of liberty. Whether it is a violation of the Law of the Land Clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it. To deny a person, association or corporation the right to engage in a business, otherwise lawful, is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service. Consequently, such a deprivation of his liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive his attack based upon Article I, § 19 of the Constitution of North Carolina.

282 N.C. at 550 193 S.E.2d at 735. Accord State v. Harris, 216 N.C. 746, 759, 6 S.E.2d 854 (1940) (“But the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. . . . When this field has been reached, the police power is severely curtailed.”)

The CON Law provides fifteen separate statutory criteria for the Agency’s review of CON applications. See N.C. Gen. Stat. § 131E-183(a). Criterion 1, which provides a

“determinative limitation” on the Agency’s ability to approve applications for new institutional health services, is the only one of these criteria that is written and applied in such absolute terms. See N.C. Gen. Stat. § 131E-183(a)(1). If there is no “need determination” in the Plan for particular facilities, equipment, or services, then pursuant to Criterion 1, the CON application must be disapproved. However, the other fourteen criteria set forth in the CON Law make it clear that CON applications could be reviewed on a case-by-case basis without such an unequivocal and unchallengeable limitation on the health care projects that can be considered for approval by the Agency.

For example, Criterion 3 addresses the “need” for the specific project proposed by the applicant, without the same determinative limitation imposed by Criterion 1. Criterion 3 requires:

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

N.C. Gen. Stat. § 131E-183(a)(3) (emphasis added). Even when there is a need determination in the Plan, the Agency still reviews the proposed project for compliance with this independent criterion.

In addition, Criterion 6 similarly addresses the need for a particular project by requiring the applicant to “demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.” N.C. Gen. Stat. § 131E-183(a)(6). Criterion 3a addresses the needs of the population presently being served when an applicant proposes changes to an existing service. See N.C. Gen. Stat. § 131E-183(a)(3a) (“In

the case of a reduction or elimination of a service, including the relocation of a facility or a service, the applicant shall demonstrate that the needs of the population presently served will be met adequately by the proposed relocation or by alternative arrangements . . .”).

The other statutory review criteria address numerous other aspects of a proposed project, including requiring the applicant to demonstrate:

- “the least costly or most effective alternative has been proposed” (N.C. Gen. Stat. § 131E-183(a)(4));
- “the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal” (N.C. Gen. Stat. § 131E-183(a)(5));
- “the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided” (N.C. Gen. Stat. § 131E-183(a)(7));
- “the provider of the proposed services will make available, or otherwise make arrangements for, the provision of the necessary ancillary and support services . . . [and] the proposed service will be coordinated with the existing health care system” (N.C. Gen. Stat. § 131E-183(a)(8));
- “the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons” (N.C. Gen. Stat. § 131E-183(a)(12));
- “the contribution of the proposed service in meeting the health-related needs of the elderly and of members of medically underserved groups, such as medically indigent or low income persons, Medicaid and Medicare recipients, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to the proposed services” (N.C. Gen. Stat. § 131E-183(a)(13));
- “the proposed health services accommodate the clinical needs of health professional training programs in the area” (N.C. Gen. Stat. § 131E-183(a)(14));
- “the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive

impact upon the cost effectiveness, quality, and access to the services proposed” (N.C. Gen. Stat. § 131E-183(a)(18a)); and

- “that quality care has been provided in the past [by the applicant]” (N.C. Gen. Stat. § 131E-183(a)(20));

Further, the agency has promulgated detailed administrative rules that also address the need for particular types of equipment, facilities, and services. See 10A N.C.A.C. 14C.1100 - .4000. Of these numerous statutory criteria and administrative rules, only Criterion 1 acts an unequivocal gatekeeper regarding which projects can be considered for approval by the Agency.

In summary, the State cannot both require a provider to obtain a CON before developing a new institutional health service and impose a Plan that ensures that the provider’s CON application will be rejected. Cf. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) (holding that “where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him”). 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.

III. AS APPLIED, THE CON LAW VIOLATES PLAINTIFFS’ CONSTITUTIONAL RIGHT FOR 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 injuries done to them and their property. 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 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 for aggrieved parties in contested cases, which are designed to ensure that the aggrieved party's complaint is reviewed by an independent administrative law judge, and that the final decision by the agency that has aggrieved the party in the first instance is appropriately deferential to the independent decision of the administrative law judge. Pursuant to N.C. Gen. Stat. § 150B-36(b), after the administrative law judge issues his or her decision in a contested case, the agency must make a final decision in writing after a review of the official record created before the administrative law judge. 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.

Additionally, 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.

In 2000, the General Assembly amended the APA, including § 150B-51(c), to afford significant protections to petitioners in contested cases. The General Assembly, however, singled out CON decisions as the only type of administrative action to which these protections do not apply. Pursuant to N.C. Gen. Stat. § 150B-34(c), the procedural safeguard provisions of §§ 150B-36(b), (1), (b2), (b3) and (d), and 150B-51 “do not apply” to “cases arising under Article 9 of Chapter 131E of the General Statutes.”⁷

⁷ The legislative history of the 2000 amendments to the APA indicates clearly that a contested case in OAH is *not* an effective remedy for an aggrieved CON applicant. Then State Senator (now United States Congressman) Brad Miller, a principal architect of the 2000 amendments to the APA, has explained the history and purposes of this legislation. See, Brad Miller, WHAT WERE WE THINKING? LEGISLATIVE INTENT AND THE 2000 AMENDMENTS TO THE NORTH CAROLINA APA, 79 N.C. L. Rev. 1657 (2000-01). Senator Miller described the policy reasons supporting the legislation as follows:

Supporters of the bill argued that agencies routinely rejected unfavorable recommendations by the ALJs and entered final decisions upholding the agencies’ actions. As a result, the opportunity afforded aggrieved persons to challenge agency actions was often a meaningless exercise. It was incompatible with procedural fairness, the bill’s proponents contended, for one of the parties to a dispute also to act as judge.

Id., at 1660.

A concise summary of the way in which the 2000 amendments to the APA addressed the foregoing concerns was also provided by Senator Miller:

After weeks of negotiations, and at least eighteen drafts, we reached a compromise. Agencies would retain final decision-making authority, but there would be more scrutiny of final agency decisions through judicial review. Instead of the deferential substantial evidence test, final agency decisions reversing the ALJ’s decision would be subject to *de novo* review. The legislation also provided . . . more elaborate procedures for the agency to follow in rejecting findings of fact by the ALJ.

Id., at 1661.

However, as Senator Miller explained, a single type of administrative decision was exempted by the APA Reforms for purely political reasons.

As a result, aggrieved parties are denied effective judicial review of CON decisions. 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 safeguard provisions of the APA, however, the discretion afforded the Department is wide, effectively denying aggrieved parties meaningful access to the courts in violation of the North Carolina Constitution.

The most vocal opponent of the legislation was the North Carolina Hospital Association, which opposed changing procedures for certificate of need proceedings. . . . Representative [Martin] Nesbitt made a quick, quiet deal with the Hospital Association: He agreed to amend the bill to exempt certificate of need proceedings from the new procedures, and the Hospital Association agreed not to oppose it.

Id. at 1659.

Senator Miller frankly acknowledged that the exemption of CON cases from the reforms to the APA was not a principled decision by the General Assembly. "Certificate of need proceedings were not ultimately exempted from the Bill because the Legislature was convinced by the Hospital Association's arguments, but by the pragmatic calculation to get the Hospital Association out of the fight." Id., at 1659, n. 13.

Secondly, during the administrative law judge's review of the matter and the development of the record on appeal, the aggrieved party is prohibited from challenging the determinations of need set forth in the Plan or the method by which the Plan was adopted. Pursuant to the Department's rules, "[t]he 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. Quite often, the "correctness, adequacy, or appropriateness of criteria, plans, and standards" in the Plan *are* the issue in a contested case. By eliminating any consideration of these issues by rule, the Department has deprived aggrieved parties of even the limited access to the courts afforded in CON cases under the APA.

CONCLUSION

Based on the circumstances and authorities explained and discussed above, there is no genuine issue of material fact in this case, and Hope and the Clinic are entitled to the judgment they seek as a matter of law.

This the 23rd day of January, 2009.

NELSON MULLINS RILEY &
SCARBOROUGH, LLP

Noah H. Huffstetler, III
N.C. State Bar No. 7170
Denise M. Gunter
N.C. State Bar No. 16695
Wallace C. Hollowell, III
N.C. State Bar No. 24304
Stephen D. Martin
N.C. State Bar No. 28658
Elizabeth B. Frock
N.C. State Bar No. 36765

By: _____

Noah H. Huffstetler, III
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 877-3800
Facsimile: (919) 877-3799

Robert F. Orr (State Bar No. 6798)
333 Six Forks Road, Suite 180
Raleigh, North Carolina 27609
Phone: (919) 838-5313
Facsimile: (919) 838-5316

Jason B. Kay (State Bar No. 31628)
333 Six Forks Road, Suite 180
Raleigh, North Carolina 27609
Phone: (919) 838-5313
Facsimile: (919) 838-5316

ATTORNEYS FOR HOPE- A WOMEN'S
CANCER CENTER, P.A. AND RALEIGH
ORTHOPAEDIC CLINIC, P.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion for Judgment on the Pleadings was served on the persons indicated below by United States Mail, first class, postage prepaid, addressed as follows:

Mark A. Davis
Special Deputy Attorney General
Angel Gray
Assistant Attorney General
N.C. DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, North Carolina 27602

Gary S. Qualls
Colleen M. Crowley
William W. Stewart, Jr.
K&L GATES LLP
Post Office Box 14210
Research Triangle Park, NC 27709

Maureen Demarest Murray
Terrill Johnson Harris
Allyson Jones Labban
SMITH MOORE LEATHERWOOD LLP
Post Office Box 21927
Greensboro, NC 27420

Robert V. Bode
S. Todd Hemphill
Diana Evans Ricketts
BODE, CALL & STROUPE, L.L.P.
Post Office Box 6338
Raleigh, NC 27628-6338

Frank S. Kirschbaum
KIRSCHBAUM, NANNEY, KEENAN & GRIFFIN, P.A.
Post Office Box 19766
Raleigh, NC 27619

Kenneth L. Burgess
POYNER & SPRUILL, LLP
Post Office Box 1801
Raleigh, NC 27602-1801

This the 23rd day of January, 2009.

Noah H. Huffstetler, III