

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 007955

WAKE COUNTY

HOPE-A WOMEN’S CANCER)
CENTER, P.A., et al.)
Plaintiffs)

v.)

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

and)

ASHEVILLE RADIOLOGY)
ASSOCIATES, P.A, et al.)
Defendant-Intervenors.)

**DEFENDANTS’ BRIEF IN
OPPOSITION TO MOTION FOR
JUDGMENT ON THE PLEADINGS**

INTRODUCTION

The pervasive theme running through Plaintiffs’ brief is their disagreement with the policy decision made by the General Assembly regarding the formulation of a State Medical Facilities Plan (“SMFP”) in conjunction with North Carolina’s Certificate of Need laws (“CON Laws”). However, because such policy choices in this State are reserved for the Legislature, Plaintiffs’ attempt to substitute their own views for those expressed in the laws enacted by the General Assembly must fail.

The constitutional arguments asserted by Plaintiffs are legally unsupportable. Plaintiffs have utterly failed to rebut the presumption of constitutionality afforded to the portions of the CON Laws at issue. As an even more basic proposition, however, Plaintiffs are estopped from asserting these

claims based on the fact that they have previously benefitted from the CON Laws. Finally, the doctrine of laches also bars this action.

I. THIS ACTION IS BARRED BY THE DOCTRINES OF ESTOPPEL AND LACHES.

A. PLAINTIFFS ARE ESTOPPED FROM CHALLENGING THE CONSTITUTIONALITY OF THE CON LAWS AS APPLIED TO THEM.

As discussed in detail in the State's Motion to Dismiss brief on pp. 5-7, this Court should hold that Plaintiffs are estopped from bringing this action based on the fact that they have previously benefitted from the CON Laws. Under well-established North Carolina law, parties are not permitted to seek benefits under a statutory scheme and then subsequently challenge its constitutionality. *See, e.g., Convent of Sisters of St. Joseph v. City of Winston-Salem*, 243 N.C. 316, 324, 90 S.E.2d 879, 885 (1956).

As discussed in the State's Motion to Dismiss brief, both Plaintiffs sought, obtained, and benefitted in a direct and tangible way from the CON Laws between 2005 and 2007. Moreover, within the last few weeks, the Clinic - as part of a joint venture - received approval from the North Carolina Department of Health and Human Services ("DHHS") regarding an application for four new operating rooms in Wake County. (*See Ex. C*) The need for these four operating rooms was recognized in the 2008 SMFP. The approval of this application is a perfect example of Plaintiffs benefitting from the CON Laws and aptly shows how the SMFP process works fairly for all applicants - including Plaintiffs.

This strand of the estoppel doctrine has been recognized by North Carolina courts for the very purpose of preventing litigants from "trying to have their cake and eat it too." The State, therefore, submits that Plaintiffs are estopped from bringing this action.

B. PLAINTIFFS' CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES.

The applicability of the laches doctrine on these facts is related to the above-mentioned estoppel defense. The doctrine of laches - which fully applies in the context of declaratory judgment actions - is properly invoked where the plaintiff's delay in bringing an action is unreasonable and has served to disadvantage or prejudice the party raising this defense. *Taylor v. City of Raleigh*, 290 N.C. 608, 622-23, 227 S.E.2d 576, 584-85 (1976).

Plaintiffs have been serving as medical providers in North Carolina since 1970 (the Clinic) and 1994 (Hope-A). (See Exs. A-B) Nevertheless, Plaintiffs waited to bring this lawsuit until last year - 33 years after the State Health Coordinating Council ("the SHCC") was first created and 22 years after the current statutory process governing the creation of the SMFP was enacted. Thus, for decades, Plaintiffs have operated - without complaint - under the same SMFP process that they are now claiming violates their constitutional rights.

Parties cannot indefinitely participate in a statutory scheme they believe to be unconstitutional and then suddenly bring a declaratory judgment challenging the statutes' legality at the point in time when it strategically benefits them to do so. If Plaintiffs desired to challenge the CON Laws, principles of laches required that they not be dilatory in doing so.

North Carolina courts have applied the laches doctrine in cases involving far less factually compelling circumstances than those that exist here. See, e.g., *Taylor*, 290 N.C. at 626, 227 S.E.2d at 586 (challenge to ordinance barred on laches grounds where plaintiff waited two years and 22 days to bring claim); *Save Our Schs. of Bladen County, Inc. v. Bladen County Bd. of Educ.*, 140 N.C. App. 233, 237-38, 535 S.E.2d 906, 909-10 (2000) (dismissing on laches grounds suit seeking injunctive relief barring school board from proceeding with building plan where plaintiff made tactical decision

to wait almost two years before filing action); *Capps v. City of Raleigh*, 35 N.C. App. 290, 298-99, 241 S.E.2d 527, 532 (1978) (where plaintiffs “did nothing” for approximately six years to indicate their displeasure with ordinance, their delay was unreasonable and laches barred claim).

The applicability of the laches doctrine is even more basic here. The SMFP is the mechanism through which the health care needs of the citizens of North Carolina are determined on a statewide basis. Despite Plaintiffs’ longstanding recognition of the effect of the SMFP process on their ability to obtain new equipment and facilities, they have waited until now to challenge this aspect of the CON Laws. The CON Laws have become firmly entrenched in North Carolina over the past three decades, and the laws governing the manner in which the SHCC is currently created have been in effect since 1987. During the many years in which Plaintiffs have done nothing (other than, as discussed above, actually *benefit* from the CON Laws), DHHS has relied on the continued validity of these laws in the course of ruling on thousands of CON applications affecting hundreds of millions of dollars of services, equipment and facilities in North Carolina’s health care industry.

The amount of work necessary to undo the infrastructure and processes developed by the agency and to, instead, implement (as Plaintiffs propose) an *ad hoc* system of need determinations for medical health services would be staggering. The invalidation of the SMFP process would result in a flood of CON applications which would be based *not* on what new health care services are actually *needed* throughout North Carolina but, rather, solely on which projects each individual provider deemed it to be in their economic interests to pursue. Such a result would severely impair the present orderly process of assuring equal access to health care services for all of the citizens of this State - wherever they may live.

For these reasons, doing away with the need determinative limits set out in the SMFP would be tantamount to doing away with the purpose underlying the CON Laws. Basic principles of laches preclude such a result under the present circumstances.

II. PLAINTIFFS CANNOT SHOW A DEPRIVATION OF THEIR CONSTITUTIONAL RIGHTS ARISING FROM THE APPLICATION OF THE CON LAWS TO THEM.

Plaintiffs allege an as-applied violation of the Constitution based on the operation of various aspects of the CON Laws relating to the SMFP.¹ However, as discussed below and in the State's Motion to Dismiss brief, Plaintiffs' arguments are meritless.

A. THE MANNER IN WHICH THE SMFP IS CREATED DOES NOT CONSTITUTE AN UNLAWFUL DELEGATION OF AUTHORITY FROM THE GENERAL ASSEMBLY.

1. The General Assembly Has Set out Adequate Guiding Standards Regarding the Creation of the SMFP.

Our Supreme Court has made clear that a delegation of authority by the General Assembly is permissible where the Legislature has issued guiding standards attendant to the exercise of the delegated power. In setting out such standards, the General Assembly is not required to articulate a detailed response to every scenario that may be encountered in carrying out the delegation. *In Re Guess*, 327 N.C. 46, 53, 393 S.E.2d 833, 837 (1990), *cert. denied*, 498 U.S. 1047, 112 L. Ed. 2d 774 (1991). With regard to determining whether adequate guidelines exist, the Legislature's own declarations constitute the primary source of guidance from the General Assembly as to the policies that are to be utilized by the recipient of the delegation. *Bring v. North Carolina State Bar*, 348 N.C.

¹ While Plaintiffs characterize this lawsuit as an "as-applied" challenge, they fail to allege that they have been singled out in any way. Rather, a review of their brief makes clear that, to the contrary, they simply do not like being required to abide by the same rules as every other health care provider in North Carolina.

655, 658, 500 S.E.2d 907, 909 (1968). These declarations must only be as specific as is permitted under the existing circumstances. *Id.*

In applying this standard, our appellate courts have upheld the validity of a number of delegations conferring significant discretion on the recipient. *See, e.g., Guess*, 327 N.C. at 54, 393 S.E.2d at 837-38 (holding that the phrase “standards of acceptable and prevailing medical practice” constituted sufficient guiding standard to board of medical examiners in determining whether disciplinary action against physician was warranted); *In re Willis*, 288 N.C. 1, 15, 215 S.E.2d 771, 779-80 (upholding delegation of authority to board of law examiners to determine whether bar candidates possessed “good moral character”), *appeal dismissed*, 423 U.S. 976, 46 L. Ed. 2d 300 (1975).

The ability of the General Assembly to confer discretion on the recipient in the course of delegating legislative authority was discussed at length in *State ex rel. Comm’r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980). The following language from the Supreme Court’s decision in that case applies equally here.

The Legislature can obviously not anticipate every problem which will arise before an administrative agency in the administration of an act. The legislative process would be completely frustrated if that body were required to appraise beforehand the myriad situations to which it wished a particular policy to be applied and to formulate specific rules for each situation. Clearly, then, we must expect the Legislature to legislate only so far as is reasonable and practical to do

Id. at 402, 269 S.E.2d at 563 (emphasis added and internal citations omitted).

In that case, the Supreme Court further held that North Carolina has embraced the modern view of liberalism in allowing legislative grants of discretion so as to ease the administration of statutes in light of the increasing complexity of governmental duties. The Court ruled that the

circumstances under which modern governments operate “have led to judicial approval of broad standards for administrative action. *Detailed standards are not required . . .*” *Id.* (emphasis added).

As the Supreme Court recognized in *Pue v. Hood*, 222 N.C. 310, 22 S.E.2d 896 (1942) in the context of a legislative delegation of power to issue a banking charter, “surely the Legislature cannot meet in session and determine the existence, or nonexistence, of this condition precedent which it has prescribed every time an application for a charter is received by the Secretary of State. It may, instead, create an administrative investigatory, fact-finding agency to perform this function . . .” *Id.* at 314, 22 S.E.2d at 899.

The same is true here. In arguing that the General Assembly was required to issue detailed standards regarding the contents of the SMFP, Plaintiffs are asking this Court to disregard clear rulings to the contrary from our appellate courts.

[W]hen there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

Farber v. North Carolina Psychology Bd., 153 N.C. App. 1, 20, 569 S.E.2d 287, 301, *disc. rev. denied and cert. denied*, 356 N.C. 612, 574 S.E.2d 679 (2002) (quoting *Adams v. North Carolina Dept. of Natural & Econ. Res.*, 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978)).

Nevertheless, Plaintiffs would presumably require the Legislature to engage in the arduous task of collecting voluminous data and enacting comprehensive, fact-intensive statutes setting out detailed methodologies for making need determinations statewide with regard to each type of medical service and equipment encompassed by the CON Laws. However, it is neither feasible for the General

Assembly to embark on such an undertaking nor logical to suggest that it be required to engage in such complex and technical managing of health care issues. Indeed, the SMFP process presents a perfect illustration of why the delegation doctrine was established - so that the General Assembly can delegate tasks requiring special resources and expertise to appropriate parties capable of carrying out the broad policy goals articulated by the Legislature.

Over the past thirty years, North Carolina courts have frequently upheld legislative delegations of power and have done so in a wide variety of different contexts. *See, e.g., Town of Spruce Pine v. Avery County*, 346 N.C. 787, 488 S.E.2d 144 (1997) (rulemaking power regarding management of watersheds); *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 446 S.E.2d 332 (1994) (establishment of natural gas expansion fund); *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, etc.*, 324 N.C. 373, 379 S.E.2d 30 (1989) (assessment of civil penalties for violations of Sedimentation Pollution Control Act); *Farber*, 153 N.C. App. 1, 569 S.E.2d 287 (power to suspend licenses of psychologists); *In re A Declaratory Ruling by the N.C. Comm'r of Ins.*, 134 N.C. App. 22, 517 S.E.2d 134, *disc. rev. denied and appeal dismissed*, 351 N.C. 105, 540 S.E.2d 356 (1999) (promulgation of rule prohibiting subrogation provisions in insurance policies); *Bowens v. Board of Law Examiners*, 57 N.C. App. 78, 291 S.E.2d 170 (1982) (examination of applicants seeking to practice law); *Orange County v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 265 S.E.2d 890 (1980) (planning and construction of interstate highway); *Fowler v. Williamson*, 39 N.C. App. 715, 251 S.E.2d 889 (1979) (power to make rules regarding public school system).²

² This is merely a representative list of cases in which North Carolina courts have upheld legislative delegations of authority over the past thirty years.

The lesson from these cases is that when delegating authority, the General Assembly is not required to issue a fact-intensive instruction manual for how the recipient of the delegation is to go about the task. Rather, broad expressions of legislative policy are sufficient.

The decision in *State ex rel. Utilities Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 435 S.E.2d 553 (1993), *disc. rev. denied*, 335 N.C. 564, 441 S.E.2d 125 (1994), is instructive. In that case, a power company sought review of an order from the North Carolina Industrial Commission which had dismissed its petition for a certificate of public convenience and necessity (“CPCN”) to construct an electricity generating facility. The company argued that the commission’s order was an unconstitutional exercise of legislative power and that the General Assembly had failed to provide the commission with adequate guiding standards in ruling on such petitions. *Id.* at 273, 435 S.E.2d at 557.

The Court of Appeals disagreed, holding that the Legislature had provided a sufficient guiding standard - “whether public convenience and necessity requires the construction of the proposed facility.” *Id.* at 274, 435 S.E.2d at 557. The court also ruled that the decision whether to grant or deny a CPCN was also guided by a statute setting out ten state policies regarding this subject. For these reasons, the court concluded that no unlawful delegation had occurred. *Id.*

The same is true in the present case. The creation of the SMFP is guided by the numerous legislative policies set out in N.C. GEN. STAT. § 131E-175. These guiding standards fully explain the legislative intent which underlies the CON Laws and articulate the types of considerations that must be taken into account in drafting the SMFP. Among these policy declarations are the following: (a) a desire to offset the spiraling cost of health care services which jeopardizes the health and welfare of North Carolina’s citizens; (b) a fear of inevitable disparities in the geographical access to health care services throughout North Carolina if pure free market principles are allowed to govern the placement

of medical facilities and services; (c) a recognition of the need for review and evaluation of the cost, need, accessibility, quality, and feasibility of proposed medical services before such services are offered; (d) an understanding of the critical necessity for access to health care in rural communities and a mandate to consider the needs of such communities; (e) a desire to avoid the proliferation of health care services that are unnecessary and serve only to engender the underuse of facilities and the expensive duplication of services; and (f) a recognition of the large economic burden placed on the public as a result of excess capacity in health care facilities and the concomitant need to prevent underutilization. N.C. GEN. STAT. § 131E-175(1)-(12) (2008).

In conjunction with its articulation of these policy goals and directives, the General Assembly further directed that criteria and standards be developed to govern the planning relating to health care facilities. The Legislature also mandated statewide registration and inventories regarding health service facilities and the making of need determinations for health service facilities, health services (as specified in N.C. GEN. STAT. § 131E-176(16)(f)), and equipment (as specified in N.C. GEN. STAT. § 131E-176(16)(f1)) - including consideration of the geographic location of such equipment and services. *See* N.C. GEN. STAT. § 131E-177 (2008).

The General Assembly also set out a detailed definition of the types of equipment, services, and facilities encompassed by the CON Laws as well as a listing of the items to be exempted from mandatory CON review. *See* N.C. GEN. STAT. §§ 131E-176(16); 131E-178; 131E-184 (2008). After then spelling out the process by which CON applications were to be made, *see* N.C. GEN. STAT. § 131E-182 (2008), the Legislature established the direct link between DHHS' review process and the SMFP, stating its intent that proposed project must be consistent with the need determinations contained in the SMFP. *See* N.C. GEN. STAT. §§ 131E-183(a)(1) (2008). Finally, the General

Assembly articulated how the SMFP was to be prepared, outlining the respective roles of the persons and entities charged with participating in the creation process as well as mandating a series of notice and comment procedures for interested parties. N.C. GEN. STAT. §§ 131E-176(25).

Plaintiffs' assertion that the General Assembly has failed to provide any procedural safeguards is also erroneous. North Carolina General Statute § 150B-2(8a)k expressly contains the safeguard of requiring the North Carolina Rules Review Commission to ensure that the public notice and hearing provisions of section 131E-176(25) have been followed in connection with the SMFP process.

Thus, not only are the statements in Plaintiffs' brief accusing the General Assembly of providing "absolutely no guiding standards" (Pl. Br. at 22) factually inaccurate but, in fact, the converse is true. The Legislature has articulated ample guidelines regarding the creation of the SMFP. Pursuant to these guidelines, the SMFP is created each year in a reasoned manner which concentrates on evaluations of need, cost-effectiveness, and access to historically underserved segments of the population (just as the General Assembly has directed).

Plaintiffs also appear to suggest in their brief that North Carolina courts have upheld legislative delegations only in cases where such delegations were subject to the Administrative Procedure Act ("APA"). (Pl. Br. at 22-23 n.5) However, this contention is demonstrably false for two reasons.

First, our appellate courts have upheld legislative delegations of power even in situations where the challenged action was specifically exempted from APA review. For example, in *In re Vandiford*, 56 N.C. App. 224, 227, 287 S.E.2d 912, 914 (1982), the plaintiff sought to appeal from the Industrial Commission's denial of her petition for death benefits despite the fact that proceedings in the Industrial Commission were expressly exempted from the APA. The Court of Appeals held that "[a]lthough the legislature delegated to the Commission the authority to promulgate the necessary rules and regulations

for the administration of claims under article 12A, the statute specifically made the determinations of the Commission final and conclusive and not subject to further review.” *Id.* at 226, 287 S.E.2d at 913-14. The court ruled that “the question of whether to provide appellate review of decisions by the Industrial Commission pursuant to N.C.G.S. 143-166.4 is a matter for the legislature, not the courts.” *Id.* at 227, 287 S.E.2d at 914. The same is true with regard to the General Assembly’s delegation regarding the process by which the SMFP is formulated.

Second, Plaintiffs’ argument ignores the fact that while the APA was not enacted until 1973, *see Myers v. Holshouser*, 25 N.C. App. 683, 692, 214 S.E.2d 630, 637, *cert. denied*, 28 N.C. 664, 216 S.E.2d 907 (1975), North Carolina courts first recognized the delegation doctrine as early as 1925. *See Durham Provision Co. v. Daves*, 190 N.C. 7, 11, 128 S.E. 593, 595 (1925). Thus, logically, in the numerous cases upholding delegations of authority during the intervening decades, the validity of the delegations at issue had nothing to do with the APA (which did not even exist).

Furthermore, the propriety of the Legislature’s delegation of the authority to make determinations regarding the need for medical services was recognized over fifty years ago by our Supreme Court. In *Williamson v. Snow*, 239 N.C. 493, 80 S.E.2d 262 (1954), the plaintiff challenged the constitutionality of a statute authorizing a state agency to create a hospital district. The Supreme Court rejected the claim, holding that “to clothe the [agency] with the power to hear and determine whether a hospital is needed in a particular area and whether it is advisable to create a hospital district in the manner prescribed and authorized by [the statute] in order to meet such need, is not an unlawful delegation of legislative power, and we so hold.” *Id.* at 497, 80 S.E.2d at 265. This is the same type of power that has been delegated by the General Assembly in the present case.

A similar notion was recognized by our appellate courts in *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868, *cert. denied*, 285 N.C. 666, 207 S.E.2d 759 (1974). In that case, a party claimed that a statute which empowered the North Carolina Commission of Health Services to add, delete, or reschedule drugs as controlled substances constituted an unlawful delegation of legislative authority. In dismissing this argument and upholding the delegation, the Court of Appeals stated the following:

It should be apparent that the General Assembly is not constantly in session, and, therefore, even if its members were all trained chemists and pharmacists, which they are not, it is impossible for them to keep abreast of the constantly changing drugs and medications and their inherent dangers which appear on the pharmaceutical scene.

Id. at 477, 204 S.E.2d at 870. The same is true in the present case regarding the annual need determinations contained in the SMFP.

The Supreme Court's decision in *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 510 S.E.2d 159 (1999), not only serves as the definitive interpretation of the statutory SMFP process but also supports the notion that the General Assembly's delegation of authority was proper in all respects. In *Frye*, the statutory framework regarding the SMFP was fully analyzed by the Supreme Court. Had the Court believed that any constitutional infirmity existed regarding this process, such a concern would have been expressed in its opinion. Not only is the *Frye* decision completely devoid of any such suggestion but rather, to the contrary, the Court actually took pains to point out the policy benefits inherent in the approach provided for by the General Assembly regarding the SMFP. *See Frye*, 350 N.C. at 46-47, 510 S.E.2d at 164.

Similarly, none of the numerous cases in which our appellate courts have relied upon the need determinations set out in the SMFP for a given calendar year contain any expression of doubt over the constitutional validity of the manner in which the SMFP is created. *See, e.g., Wake Forest Univ.*

Health Sciences v. North Carolina Dep't of Health and Human Services, 180 N.C. App. 327, 638 S.E.2d 219 (2006); *Craven Reg'l Med. Auth. v. North Carolina Dep't of Health and Human Services*, 176 N.C. App. 46, 625 S.E.2d 837 (2006); *In re Denial of Request for Declaratory Ruling by Total Care, Inc.*, 99 N.C. App. 517, 393 S.E.2d 338, *disc. rev. denied*, 327 N.C. 635, 399 S.E.2d 122 (1990); *Charter Pines Hosp., Inc. v. North Carolina Dep't of Human Res.*, 83 N.C. App. 161, 349 S.E.2d 639 (1986), *disc. rev. denied*, 319 N.C. 105, 353 S.E.2d 106 (1987); *Mount Olive Home Health Care Agency, Inc. v. North Carolina Dep't of Human Res.*, 78 N.C. App. 224, 336 S.E.2d 625 (1985).

It is also worth noting that the need methodologies used in the 2008 SMFP have been in place for years. While the General Assembly has tinkered with the CON Laws over the past two decades, it has expressed no dissatisfaction with the SMFP process, the need determinations contained therein, or the methodologies utilized.

The cases cited by Plaintiffs in their brief on this issue primarily involve instances in which virtually no guidance whatsoever was provided by the General Assembly in connection with a delegation of authority. These cases actually serve - by way of contrast - to show the validity of the delegation here. *See, e.g., Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990) (statute gave clerk of court discretion as to whether governing board of drainage districts should be elected or appointed); *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 95, 84 S.E.2d 390, 401 (1954) (“[T]he General Assembly cannot constitutionally provide that the qualified voters in one governmental unit . . . shall decide whether a statute shall be in force and effect elsewhere than in the territory comprising that particular governmental unit.”); *Kinston Tobacco Board of Trade v. Liggett & Myers Tobacco Co.*, 235 N.C. 737, 71 S.E.2d 21 (statute regulating sale

of leaf tobacco contained no standards by which number of sales could be determined), *cert. denied*, 344 U.S. 866, 97 L. Ed. 2d 671 (1952).

Moreover, in several of the cases Plaintiffs cite in their brief, the delegation at issue was upheld as lawful. *See Adams*, 295 N.C. 683, 249 S.E.2d 402 (General Assembly lawfully delegated authority to commission to develop guidelines for coastal area); *In re Appeal of Broad and Gales Creek Cmty. Ass'n*, 300 N.C. 267, 266 S.E.2d 645 (1980) (legislature gave department sufficient guidance regarding issuance of dredge and fill permits); *Farlow v. North Carolina State Bd. of Chiropractic Examiners*, 76 N.C. App. 202, 332 S.E.2d 696 (statute giving board power to sanction its members was permissible legislative delegation despite presence of some discretion on part of board), *disc. rev. denied and appeal dismissed*, 314 N.C. 664, 336 S.E.2d 621 (1985).

Plaintiffs also attempt to rely on *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1939), in which the court reversed, on several grounds, the conviction of a party for engaging in the dry cleaning business without first having obtained a license to do so. Plaintiffs cite *Harris* for the proposition that the General Assembly cannot delegate “broad, policy-making authority . . . to prevent individual applicants, such as Hope and the Clinic, from exercising their fundamental right to engage in an otherwise lawful business[.]” (Pl. Br. at 17) However, the 2008 SMFP has done nothing to diminish Plaintiffs’ right to continue serving as health care providers. Indeed, it is undisputed that both Plaintiffs are full-fledged participants in the health care market and have been for years. (*See Exs. A-B*)

Indeed, throughout their brief, Plaintiffs repeatedly attempt to blur the distinction between, on the one hand, licensing laws which operate to keep certain persons from *entering* a given profession and, on the other hand, laws which merely regulate industry practices within a profession. In this

lawsuit, Plaintiffs are not arguing that they are being denied the right to engage in the provision of health care but, rather, that they should be allowed to utilize certain additional types of equipment and facilities in the course of their practice (regardless of whether a need determination exists for such items in the applicable SMFP). Thus, Plaintiffs' characterization of the SMFP as "a barrier to market entry" (Pl. Br. at 2) has no basis in fact as applied to them.

The relief Plaintiffs actually seek in this case is not the ability to enter the health care market but, rather, to receive a special entitlement (applicable only to themselves) to be exempted from the need determinations contained in the 2008 SMFP - despite the fact that those need determinations are binding on their competitors. As such, they seek not equal rights in the health care market but rather special treatment so as to gain a competitive advantage over other health care providers.

2. The Role Played by the SHCC in the Formulation of the SMFP Is Merely Advisory.

As discussed on pp. 9-13 of the State's Motion to Dismiss brief, Plaintiffs' unlawful delegation argument is premised on the incorrect belief that the SHCC has final authority over the contents of the SMFP. To the contrary, the North Carolina Supreme Court has made clear that such power resides with the *Governor* - and not with the *SHCC*. The SHCC merely assists DHHS in preparing a recommended SMFP for the Governor's consideration. See *Frye Reg'l Med. Ctr.*, 350 N.C. at 41-44, 510 S.E.2d at 161-63.

Inexplicably, nowhere in Plaintiffs' brief do they even mention *Frye* - even though it is the seminal case from the North Carolina Supreme Court on the role of the SHCC regarding the SMFP process. Instead, they litter their brief with inaccurate statements such as the assertions that the SHCC has been given the authority "to determine statewide policy controlling what new facilities may be

established” and that “the [SHCC] is given, in its unlimited discretion, the power to prescribe what medical facilities may be developed in North Carolina.” (Pl. Br. at 18).

As *Frye* makes clear, such statements are simply false. The ultimate authority for deciding upon the need determinations to be contained in the final SMFP rests with the Governor. It is puzzling how Plaintiffs can represent in their brief that the SHCC has “unlimited discretion” to make the need determinations set out in the SMFP when *Frye* could not be clearer as to the fact that the Governor (1) is not bound in any way to accept the SHCC’s recommendations; and (2) has the power to make whatever substantive amendments she desires to the proposed plan that has been forwarded to her. *Id.* at 44-47, 510 S.E.2d at 162-64. Thus, while Plaintiffs spend a significant amount of space in their brief attempting to denigrate the SHCC, their efforts are legally irrelevant to the delegation issue. Plaintiffs’ argument that an improper delegation has occurred because of the membership of the SHCC is, in the final analysis, a *non sequitur* because - as *Frye* makes clear - no actual delegation of legislative power to the SHCC has actually occurred.

Plaintiffs’ primary argument appears to be that certain unnamed members of the SHCC may have been biased in their recommendations to the Governor regarding the contents of the 2008 SMFP. Not surprisingly, Plaintiffs have failed to cite any North Carolina case law for the proposition that the mere potential for bias by unknown members of a purely advisory board in making a recommendation that has no binding effect constitutes an unconstitutional legislative delegation. Nor have they cited any cases in which our appellate courts have struck down a delegation to an entity that is purely advisory.

With regard to the SHCC’s composition, Executive Order No. 139 (which was attached to the State’s Motion to Dismiss brief as Ex. A) sets out approximately fifteen separate disciplines from

which its members are to be drawn. These include segments of the health care, business, and academic communities and ensure the presence on the council of a wide array of viewpoints and specific areas of expertise. Moreover, the excerpts from the 2008 SMFP which were attached to the State's Motion to Dismiss brief as Ex. B further show that the geographic composition of the SHCC's members stretches from the mountains to the coast. The result is an advisory body possessing clear diversity both in areas of expertise and in geographical residence.

Taken to its extreme, by Plaintiffs' logic, the SHCC would presumably be precluded from containing any members of the health care community in North Carolina on the theory that they might in some way be affected by the contents of that calendar year's SMFP. Such a result would divest the SHCC of the very health care expertise that enables it serve a useful advisory function.

Plaintiffs also appear to be suggesting that it is improper for individuals in the private sector to serve on the SHCC. However, even aside from the fact that virtually all boards and commissions in this State are heavily populated by private citizens, the assistance provided to the Governor by the SHCC does not result in the delegation of the legislative power to private actors since final authority always remains with the Governor. Accordingly, the cases cited by Plaintiffs which do, conversely, involve actual delegations of power to private parties are inapposite here. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 80 L. Ed. 1160 (1936) (Bituminous Coal Conservation Act of 1935 delegated power of fixing hours of labor and minimum wages to segment of coal producers and miners); *Bulova Watch Co., v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1952) (portions of North Carolina's Fair Trade Act delegated legislative power to private corporation regarding setting of price of certain commodities offered for sale); *Wilcher v. Sharpe*, 236 N.C. 308,

72 S.E.2d 662 (1974) (town ordinance delegated legislative power to private parties by prohibiting erection of gin or mill without consent of neighboring property owners).

At the heart of Plaintiffs' argument is their disagreement, on policy grounds, with the decision by the State Ethics Commission to exempt advisory bodies (of which the SHCC is merely one of many) from the State Government Ethics Act. (*See* Defs.' Answer ¶ 34) However, Plaintiffs have not brought a declaratory judgment seeking to enjoin the Ethics Commission from exempting such advisory bodies. Indeed, the Ethics Commission is not even a defendant in this action. Thus, to the extent that Plaintiffs desire a reversal of the Ethics Commission's decision to exempt advisory bodies, this lawsuit is not an appropriate vehicle for seeking such relief.

Finally, it is also worth noting that the State Government Ethics Act and the Ethics Commission have only existed since 2006 while the SHCC has been in existence since 1976. It is unclear how the lawful creation of a council could - after thirty years - suddenly become unlawful simply because of the subsequent unrelated enactment of an ethics law and the accompanying creation of a commission charged with enforcing it.

For all of the reasons set out above, no unconstitutional delegation of authority exists regarding the SMFP. Indeed, because the SHCC is a purely advisory body, Plaintiffs' arguments attacking the SHCC are nothing more than a red herring.

B. PLAINTIFFS HAVE NOT BEEN DENIED DUE PROCESS OF LAW.

Plaintiffs' brief lumps together a procedural due process argument and a substantive due process argument without expressly differentiating between the two. However, as discussed in more detail below, Plaintiffs are not entitled to prevail on either theory.

1. The Application of the CON Laws to Plaintiffs Has Not Resulted in a Denial of Their Procedural Due Process Rights.

Plaintiffs claim that they have been denied an “appropriate forum” for demonstrating the need for the equipment and facilities they desire. (Pl. Br. at 2) However, they have not - and cannot - explain why the *seven public hearings* provided for under the CON Laws did not provide them with such a forum. See N.C. GEN. STAT. § 131E-176(25). See *Affordable Care, Inc. v. North Carolina State Bd. of Dental Examiners*, 153 N.C. App. 527, 541-42, 571 S.E.2d 52, 62-63 (2002) (holding that availability of public hearings offered plaintiff adequate opportunity for making views known, thereby satisfying procedural due process requirements).

As discussed on pp. 17-23 of the State’s Motion to Dismiss brief, it was fully rational for the General Assembly to conclude that the annual issuance of an SMFP does not easily lend itself to the lengthy rulemaking process of the APA. Its decision recognized that the health care industry is a rapidly changing one; constant transformations in the population and demographics throughout the State keep the health care needs of North Carolina in a continual state of flux and require flexibility in the formulation of need determinations. Rulemaking under the APA - with its attendant review procedure - is a slow and cumbersome process which can take over eighteen months to complete.

Because the rulemaking provisions of the APA are purely creatures of statute and are not constitutionally mandated, they apply only as directed by the Legislature. Indeed, it is worth noting that the SMFP is merely one of a number of items excluded from rulemaking pursuant to N.C. GEN. STAT. § 150B-2(8a) (2008).

The argument in Plaintiffs’ brief that the State cannot simultaneously (1) require a provider to obtain a CON before developing a new medical service; and (2) impose a plan ensuring that its CON

application will be rejected is disingenuous. Obviously, many CON applications (including ones submitted by both named Plaintiffs within the past four years) are allowed. The General Assembly had the lawful authority to enact criteria governing when a CON application should be granted. These criteria are set out in N.C. GEN. STAT. § 131E-183(a), and the first of these criteria (referred to in Plaintiffs' brief as "Criterion One") provides that a proposed project must be consistent with the need determinations contained in the SMFP in order to be eligible for approval. *See* N.C. GEN. STAT. § 131E-183(a)(1) (2008). This criterion constitutes a rational policy choice well within the Legislature's discretion.

As a result of Criterion One, an applicant will receive a CON if its proposed project is identified as needed in that year's SMFP and if the project satisfies the other criteria set out in N.C. GEN. STAT. § 131E-183(a) more fully than the proposed projects of the applicant's competitors (who, of course, must also satisfy Criterion One). Conversely, if no demonstrated need has been found to exist for the project in that year's SMFP, Criterion One will not be satisfied and the application will be denied. These are the rules that apply to all health care providers - not just to Plaintiffs). Neither Plaintiffs nor any other applicant have a constitutional right to have every one of their CON applications approved - particularly where, over the course of seven public hearings, they have failed to persuasively show a current need for the project.

It is important to note that Plaintiffs are not contending in this case that DHHS incorrectly applied the 2008 SMFP as it relates to their proposed projects. Instead, they are making the altogether separate argument that Criterion One is somehow unconstitutional and that they possess a constitutional right to have their applications considered - and potentially approved - based on compliance with the additional criteria set out in N.C. GEN. STAT. § 131E-183(a) even where the

proposed project fails under Criterion One. Such an argument is meritless. For all of the reasons set out herein, the decision to make compliance with Criterion One dispositive was a policy choice that the Legislature had the power to make.

Plaintiffs take out of context the statement in *In re Denial of Request by Humana Hospital Corp., etc.*, 78 N.C. App. 637, 643, 338 S.E.2d 139, 143 (1986), that the party in that case was entitled to “a right to a fair review of its application[.]” (Pl. Br. at 33) That language in *Humana* related to the following statement which appears several lines earlier in the opinion: “Humana had a right to apply for a certificate of need and to have its application reviewed fairly under the appropriate plans, standards, *and criteria.*” *Humana*, 78 N.C. App. at 642, 338 S.E.2d at 143 (emphasis added). Thus, *Humana* does *not* stand for the proposition that applicants such as Plaintiffs are entitled to have their CON applications reviewed without reference to the need determinations contained in the SMFP (as required by Criterion One).

Plaintiffs do not deny their ability to participate in the SMFP process by attending public hearings and utilizing the petitioning process existing under the CON Laws (as summarized on pp. 14-17 of the State’s Motion to Dismiss brief). Instead, they complain that “no statute requires the [SHCC] to approve any meritorious change suggested by an interested party.” (Pl. Br. at 18) In advancing this argument, Plaintiffs candidly reveal their true position in this lawsuit - which is not that they have been denied an opportunity to be *heard* but rather that they feel they have a constitutional right to have their views *prevail*. Obviously, however, no such constitutional right exists. It goes without saying that DHHS is not constitutionally required to substitute *Plaintiffs’* view of what is or is not “meritorious” for that which is contained in the need determinations contained in the applicable SMFP.

Plaintiffs were given the same notice and comment opportunities as all other interested parties. As such, they have received all the due process to which they were entitled. *See Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436 (4th Cir. 2002) (“[P]rocedural due process does not require certain results - it requires only fair and adequate procedural protections.”). *See also Humana*, 78 N.C. App. at 643, 338 S.E.2d at 143 (noting that applicant did not possess “absolute right” to CON).

2. The Role Played by the SMFP in the CON Process Has Not Violated Plaintiffs’ Substantive Due Process Rights.

a. The current CON Laws are rationally related to a legitimate state interest and, therefore, *In re Certificate of Need for Acton Park Hosp.* has been rendered moot.

Laws addressing economic issues are subject to the rational relation test. Under this test, such laws must be upheld if they are rationally related to a legitimate governmental interest. *Affordable Care, Inc.*, 153 N.C. App. at 536-37, 571 S.E.2d at 59-60. Our Supreme Court has held that “the relationship need not be a perfect one” and that the General Assembly “need only have had a reasonable basis for concluding that the measures taken would assist in the accomplishment of the goal.” *State ex rel. Utilities Comm’n v. Carolina Utility Customers Association, Inc.*, 336 N.C. 657, 681-82, 446 S.E.2d 332, 346 (1994).

While Plaintiffs attempt to rely in their brief on *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973), their reliance is misplaced. In *Aston Park*, the predecessor to the current set of CON Laws was invalidated on substantive due process grounds.

The court’s concern in *Aston Park* arose over the absence in the prior CON statutes of an adequate showing of the relationship between the goal of promoting the health and welfare of North Carolina’s citizens and the means of requiring a CON for the development of new medical facilities.

The prior CON laws at issue in *Aston Park* were merely two pages long and did not contain any sort of thorough explanation of the rationale behind the requirements contained therein. Conversely, the current CON Laws contain extensive legislative findings which set out, in full, both (1) the policies underlying these laws; and (2) the manner in which these statutes serve to further the legislative goal of ensuring equal access to timely and affordable health care for all citizens of North Carolina. As such, the General Assembly has cured the deficiency noted in *Aston Park*.

North Carolina's appellate courts have recognized that the holding in *Aston Park* is now moot as a result of the General Assembly's enactment of the current CON Laws.

Petitioner also cites *In Re [Aston Park] Hospital . . .* in which the Supreme Court overturned N.C. Gen. Stat. § 90-291, which required a certificate of public convenience and necessity before beginning construction of a hospital, finding that the General Assembly had not established a reasonable relationship between the regulation of private facilities for medical care and the public health. *After that opinion, however, the legislature repealed the statute on which the case was based and enacted N.C. Gen. Stat. §§ 131E-175 to -190 (1992), which . . . rendered moot the holding of In Re [Aston Park] Hospital.*

State ex rel. Utilities Comm'n v. Empire Power Co., 112 N.C. App. 265, 275, 435 S.E.2d 553, 558 (1993) (emphasis added). Justice Whichard has likewise acknowledged this result, noting the following:

Since *Aston Park*, the General Assembly has re-enacted the CON law and made the explicit findings discussed above which describe the relation between the purposes behind the CON law and the effect it has on individual property rights. Thus, the constitutional infirmity identified in *Aston Park* is not at issue here.

HCA Crossroads Residential Ctrs., v. North Carolina Dep't of Human Res., 327 N.C. 573, 584, 398 S.E.2d 466, 473 (1990) (holding that the 150-day time limit for review of CON applications was mandatory) (Whichard, J., dissenting).³

Indeed, in the years since the General Assembly's enactment of North Carolina's current CON Laws, our appellate courts have frequently adjudicated CON cases arising thereunder (including those involving the SMFP) without expressing any constitutional concerns. *See, e.g., In Re Total Care, Inc.*, 99 N.C. App. at 521, 393 S.E.2d at 341 (Parker, J.) ("The SMFP is the official statement of projected need for health services.").

In enacting the current statutory scheme comprising the CON Laws, the General Assembly carefully set out numerous legislative findings which clearly explain the goals sought to be addressed

³ Moreover, our Court of Appeals has recently noted the reluctance of modern courts "to expand the concept of substantive due process because guideposts . . . in this uncharted area are scarce and open-ended, and courts run the risk of turning the due process clause into a personal preference policy instrument for judges." *Standley v. Town of Woodfin*, 186 N.C. App. 134, 136, 650 S.E.2d 618, 621 (2007) (internal quotation marks and citation omitted), *aff'd*, 362 N.C. 328, 661 S.E.2d 728 (2008). This notion was reiterated by the Supreme Court in its opinion affirming the Court of Appeals' decision in that same case. *See Standley*, 362 N.C. at 332, 661 S.E.2d at 730 ("[W]e must tread carefully before recognizing a fundamental liberty interest, which would to a great extent, place the matter outside the arena of public debate and legislative action and run the very real risk of transforming the Due Process Clause into nothing more than the policy preferences of the Members of this Court.") (citation and internal quotation marks omitted)

Indeed, it is noteworthy that the *Aston Park* court relied, in part, on a 1937 decision from the United States Supreme Court - *New State Ice Co. v. Liebmann*, 285 U.S. 262, 76 L. Ed. 2d 747 (1932) - which has been judicially noted to have been "handed down during the era when the now long-discarded doctrine of substantive due process in the economic field was still in ascendance." *Colorado Springs Amusements, Ltd. v. Rizzo*, 524 F.2d 571, 576 (3rd Cir. 1975), *cert. denied*, 428 U.S. 913, 49 L. Ed. 2d 1222 (1976). Moreover, the dynamics of health care in this State have changed drastically in the decades since *Aston Park* was decided. Exponential increases in health care costs and changes in other facets of the ways in which health care is delivered and financed make the policy grounds set out in N.C. GEN. STAT. § 131E-175 even more compelling today than they were at the time that statute was enacted.

by these statutes and the manner in which these laws serve to further those goals. These findings may be summarized in pertinent part as follows: (a) the manner in which health care is financed renders the free market system ineffective such that some form of governmental regulation is required in order to impose a measure of control on the costs, distribution, and utilization of new health services (N.C. GEN. STAT. § 131E-175(1)); (b) the health and welfare of citizens in this State is threatened by spiraling health care costs which impede their assurance of receiving the timely provision of affordable health care (N.C. GEN. STAT. § 131E-175(2)); (c) market principles - if allowed free rein - would lead to a geographical disparity in access to health care services in which population groups historically lacking access to medical care would remain underserved (N.C. GEN. STAT. § 131E-175(3)); (d) satisfying the health care needs of persons in rural communities is vital to their welfare such that the access of medical care in rural areas should be taken into account in the CON process (N.C. GEN. STAT. § 131E-175(3a)); (e) costly duplication and underuse of health care facilities is a consequence of the buildup of unnecessary medical facilities (N.C. GEN. STAT. § 131E-175(4)); (f) a large economic burden (funded by North Carolina's citizens in their capacities as patients, health insurance subscribers, health insurance plan participants, and taxpayers) is created by excess capacity for health services (N.C. GEN. STAT. § 131E-175(6)); (g) the health and welfare of North Carolina's citizens require that institutional health services be made subject to an evaluation and review process focusing on factors such as cost, need, accessibility, quality, feasibility, and other similar criteria in order to ensure the efficient allocation of health care services (N.C. GEN. STAT. § 131E-175(7); and (h) it is in the public interest to promote efficiencies in the delivery of services to adult care homes through control and direction of their growth in order to avoid underutilization, higher costs, and geographical polarization (N.C. GEN. STAT. § 131E-175(10)).

The above-referenced legislative findings clearly explain the intent behind the CON Laws. Moreover, they aptly demonstrate the rational basis for the means employed therein. *See Adams*, 295 N.C. at 691-93, 249 S.E.2d at 407-08 (expressly quoting from legislative findings in statute at issue in response to argument made by party challenging statute's constitutionality).

In order to achieve these goals, the General Assembly provided for the creation of an annual SMFP so that need determinations could be made each year for the enumerated categories of health care services and facilities. For these same reasons, the Legislature has mandated that DHHS not award a CON for a project which is inconsistent with the applicable need determinations contained in the SMFP for that calendar year. As a result, a coherent and unified approach to health services planning exists statewide - one which the General Assembly has determined is consistent with the public policy of this State. *See In re Appeal of Philip Morris U.S.A.*, 335 N.C. 227, 230, 436 S.E.2d 828, 831 (1993) (enactment of statute is Legislature's expression of public policy on issues discussed therein), *cert. denied*, 512 U.S. 1228, 129 L. Ed. 2d 850 (1994).

As noted earlier in this brief, our appellate courts (1) have repeatedly recognized and enforced the General Assembly's mandate that CONs not be granted for projects inconsistent with the applicable SMFP; and (2) have not voiced any constitutional concerns regarding this process. The lack of any such expression of concern in *Frye* is particularly noteworthy because in that case the Supreme Court exhaustively interpreted the same provisions of the SMFP process at issue here.

Our Court of Appeals has likewise acknowledged and applied the policy rationale behind the CON without observing any hint of constitutional defects, noting that these laws reflect the General Assembly's determination that "the forces of free market competition are largely absent in health care and government regulation is therefore necessary to control the cost, utilization, and distribution of

health services and to assure that the less costly and more effective alternatives are made available.”
Humana, 78 N.C. App. at 646, 338 S.E.2d at 145.

It is difficult to imagine what more in the way of legislative findings Plaintiffs would have the General Assembly enact. Clearly, the findings articulated by the General Assembly serve to (1) comprehensively set out the goals of the CON Laws (improved access to affordable health care by all North Carolina citizens, including those persons and regions historically underserved, and the elimination of duplicative services which undermine that result); and (2) explain the manner in which these laws are designed to further those goals (by establishing a process which ensures that health care services will be allocated throughout the State based on need - rather than based purely on profit motive or other considerations unrelated to need). As such, these laws easily pass constitutional muster.

Plaintiffs then cite cases addressing laws which exclude persons from engaging in a particular profession. However, as noted earlier in this brief, these cases are not applicable here. Plaintiffs have repeatedly made clear that they are bringing this action solely as an “as-applied” challenge. (*See* Pl. First Am. Compl., Prayer for Relief ¶ 1; Pl. Br. at 4) As such, since both Plaintiffs are well-entrenched members of the health care community in North Carolina, they cannot now suddenly - because it currently suits their purposes - don the garb of a provider who has somehow been barred from entering the health care market.

While Plaintiffs cite *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 366 S.E.2d 697 (1988), and *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979), as support for the right to engage in business activity free of unreasonable governmental interference, neither case advances their legal position. In *Poor Richard's*, our Supreme Court upheld the constitutionality of the statute being

challenged, ruling that the North Carolina Constitution has “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.” *Poor Richard’s*, 322 N.C. at 64, 366 S.E.2d at 698-99. The court in *A-S-P Associates* likewise upheld the ordinance at issue on the ground that it did not violate the plaintiff’s due process rights. *A-S-P Associates*, 298 N.C. at 213-18, 258 S.E.2d at 448-51.

For all of these reasons, the SMFP need determinations are reasonably related to the State’s legitimate health planning objectives. Moreover, Plaintiffs are afforded the same treatment under the CON Laws as any other applicant. As such, their substantive due process rights have not been violated. Plaintiffs have offered no valid reason why they should be exempted from this longstanding statutory procedure.

b. Plaintiffs are not entitled to have their public policy views substituted for those of the General Assembly.

Plaintiffs’ substantive due process argument is simply a policy disagreement with the General Assembly’s CON Laws masquerading as a constitutional challenge. As evidenced by their reliance on law review articles containing policy debates on the desirability of CON Laws, Plaintiffs seek to engage this Court in a referendum on the merits of the CON Laws. Indeed, a number of excerpts from the articles quoted in Plaintiffs’ brief are precisely the sort of public policy arguments one would expect to be submitted to a legislative committee conducting a cost/benefit analysis of enacting a CON law for the first time.

However, the General Assembly has already engaged in this debate. Our Supreme Court has emphasized that courts “have no power to review a statute with respect to its political propriety as long

as it is within the legislative discretion and has a reasonable relation to the end sought to be accomplished.” *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946) See *City of Asheville v. State*, __ N.C. App. __, 665 S.E.2d 103, 133 (2008) (“[I]t is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures . . . [J]udges have not been entrusted by the people of this State to be legislators.”); *Blinson v. State*, 186 N.C. App. 328, 330, 651 S.E.2d 268, 271 (2007) (holding that to the extent plaintiffs were challenging wisdom of statute allowing corporate incentives, “they have sought relief in the wrong forum[;]” noting that “it [is] the role of the General Assembly and the Executive Branch - and not the courts - to determine whether such incentives are sound public policy.”), *disc. rev. denied and appeal dismissed*, 362 N.C. 355, 661 S.E.2d 240, 241 (2008).

Plaintiffs’ desire to engage in a policy debate is nowhere made clearer than in their assertion that the Federal Trade Commission and the United States Department of Justice have recently issued a report reversing the federal government’s prior policy of encouraging states to enact CON Laws and recommending that states “reconsider [the CON Laws] wisdom.” (Pl. Br. at 28) However, to the extent Plaintiffs are claiming that a policy recommendation from a federal agency should render a duly enacted state statute unconstitutional, such an argument is at odds with basic notions of federalism and state sovereignty. The North Carolina General Assembly - not the Federal Trade Commission or the United States Department of Justice - possesses the authority to assess the needs of North Carolina’s citizens and to enact laws articulating the public policies of this State. As such, any “reconsideration” of the policies underlying the CON Laws must come from the General Assembly.

C. THE APPLICATION OF THE CON LAWS TO PLAINTIFFS HAS NOT DENIED THEM ACCESS TO THE COURTS.

Finally, Plaintiffs claim that their right of access to the courts has been denied by the CON Laws on two grounds: (1) the lack of a right to *de novo* judicial review of a contested case in which DHHS does not adopt the recommended decision of an administrative law judge (“ALJ”); and (2) their inability to challenge the need determinations contained in the SMFP in the administrative hearing process. Neither of these claims has merit.

1. Plaintiffs do not possess a constitutional right to *de novo* judicial review over adverse agency decisions.

As an initial matter, Plaintiffs lack standing to raise the issue of whether a party who receives an adverse agency decision is constitutionally entitled to *de novo* judicial review. A court’s “jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.” *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984).

As noted earlier, Plaintiffs have made clear that they are bringing this action solely on an “as-applied” basis. This means that they are challenging the above-referenced portions of the CON Laws only as they affect Plaintiffs themselves. *See Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999) (“[A]n as-applied challenge represents a plaintiff’s protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act[.]”). Since Plaintiffs have not alleged that they received a favorable ruling from an ALJ that was reversed by DHHS, they lack standing to bring a constitutional challenge regarding this issue.

Furthermore, even if standing somehow existed, such a claim would fail on its merits. Plaintiffs' argument reflects a misunderstanding of Article I, § 18 of the North Carolina Constitution.

Article I, § 18 states as follows:

All courts shall be open; 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. art. I, § 18 (2008).

Our Supreme Court has interpreted this constitutional provision as follows:

The "remedy" constitutionally guaranteed "for an injury done" is qualified by the words "by due course of law." This means that the remedy constitutionally guaranteed must be one that is legally cognizable. *The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not.* [The General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter.

Lamb v. Wedgewood South Corp., 308 N.C. 419, 444, 302 S.E.2d 868, 882 (1983) (emphasis added and internal quotation marks and citation omitted).

Neither law nor logic supports the argument that parties have a constitutional right to *de novo* - as opposed to "whole record" - review in the appeal of an adverse agency ruling. Not surprisingly, Plaintiffs cite no legal authority for the proposition that the absence of *de novo* review is of constitutional dimension.

While Plaintiffs spend a great deal of space in their brief discussing the 2000 amendments to the APA, those amendments have no bearing whatsoever on the issues currently before this Court. Because, as discussed above, the APA is not constitutionally mandated and is, instead, a purely statutory creature, the General Assembly can choose to exempt items from the APA's scope as it

rationality sees fit. Thus, the fact that the Legislature opted to exclude the CON Laws from the scope of those amendments simply does not raise constitutional concerns.⁴

2. Plaintiffs Do Not Have a Constitutional Right to Direct Judicial Review over the Contents of the SMFP.

Next, Plaintiffs claim that their right of access to the courts has been violated because they cannot directly appeal - under the APA - the Governor's final approval of the annual SMFP. Such an argument finds no support in the law.

The basic flaw in Plaintiffs' argument is that it incorrectly assumes the existence of a constitutional right guaranteeing them the ability to directly appeal every decision made pursuant to a statutory process. No such right exists. While the APA provides for the administrative appeal of many agency decisions, the General Assembly has explicitly exempted - in whole or in part - numerous items from the APA's scope. North Carolina General Statute § 150B-1 lists seven entities/enterprises which are fully exempt from the APA, sixteen that are exempt from the provisions of the APA regarding rulemaking, and eleven that are exempt from the contested case provisions of the APA. *See* N.C. GEN. STAT. § 150B-1(c)-(e) (2008). In addition, the University of North Carolina is exempt from the bulk of the APA. *See* N.C. GEN. STAT. § 150B-1(f).

⁴ Plaintiffs' attempt to rely upon the post-enactment statements of a stray legislator fails for two reasons. (Pl. Br. at 35-36 n.7) First, it is well-settled that the statements of an individual legislator purporting to cast light on the "intent" of the General Assembly in passing a statute is inadmissible. *See, e.g., D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 582, 151 S.E.2d 241, 244 (1966) ("Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent."). Second, for the reasons stated above, the 2000 APA amendments have no legal bearing on the constitutionality of the SMFP process as applied to Plaintiffs.

The specific exemption relating to the SMFP is found in N.C. GEN. STAT. § 150B-2(8a) which contains eleven subparts referencing items that do not constitute a “rule” for purposes of the APA. One of these eleven - contained in subpart (k) - provides that the SMFP is not deemed to be a “rule” if it “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.” *See* N.C. GEN. STAT. § 150B-2(8a)k. Thus, the General Assembly has exercised its legislative discretion by choosing to exempt the SMFP from the APA’s rulemaking process. This decision was well within the legislative realm and, as such, has not run afoul of Article I, § 18.

By Plaintiffs’ logic, all eleven of these exemptions from APA rulemaking set out in § 150B-2(8a) would be unconstitutional as would the other examples of public processes that are exempted wholly or partially from the APA (as listed above). Obviously, this is not the case. If the General Assembly was not constitutionally required to enact an APA at all, then it certainly does not violate the Constitution for it to have exempted certain processes from the APA’s scope.

Indeed, our appellate courts have enforced statutes conferring power upon the Governor that were not subject to APA (or any other) review. For example, in *James v. Hunt*, 43 N.C. App. 109, 258 S.E.2d 481 (1979), *cert. denied*, 299 N.C. 121, 262 S.E.2d 6 (1980), the plaintiff challenged his suspension by the Governor from his position on the North Carolina Cemetery Commission. The suspension decision had been made pursuant to a statute which conferred upon the Governor the authority to remove members of the commission. The Court of Appeals rejected the plaintiff’s contention that the Governor was required to follow APA procedures in connection with the removal process, stating the following:

[W]e find no case nor indication by any court that the courts should bind the Governor to any statutory procedure unless the Constitution of the State or the statutory provisions giving him the power of removal specify a specific procedure therefor. Here, [the statute] gives the Governor the power to remove a member of the Cemetery Commission for cause There is no reference to the Administrative Procedure Act. . . . Had the General Assembly intended for the Governor to be bound by the provisions of the Administrative Procedure Act, it could have referred to that Act Absent a specific legislative enactment requiring removals by the Governor to be subject to the Administrative Procedure Act, we do not believe the Act is applicable to removals by the Governor, and we so hold.

Id. at 120-21, 258 S.E.2d at 488.

The General Assembly has made a rational determination that the rulemaking process under the APA is inapplicable to the formulation of the SMFP and that, instead, the SMFP is to be drafted and promulgated pursuant to an alternative procedure. As a part of this process, as noted above, provision has been made for seven public hearings to take place so as to ensure that all interested parties (including Plaintiffs) are afforded the opportunity to provide input. It was entirely proper for the Legislature to determine that, in order to ensure continuity in the application review process, the need determinations in the SMFP must be protected from constant attack once they have been approved. Otherwise, if the SMFP was subject to direct challenge, the entire CON process would be in a state of upheaval. Amendments and additions to the SMFP mandated as a result of administrative challenges would prevent an orderly CON review process by DHHS and would call into question the validity of prior decisions made by the agency for that same calendar year.

Such a scenario would result in the sort of confusion and delay that is inimical to the methodical process intended by the Legislature through its enactment of the CON Laws. As a result,

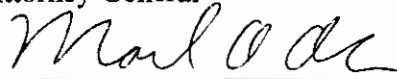
the goal of ensuring the timely and efficient allocation of health care services in this State would be directly undermined.⁵

CONCLUSION

For the reasons set out above, the State submits that its Motion to Dismiss should be granted and that Plaintiffs' Motion for Judgment on the Pleadings should be denied.

Respectfully submitted, this the 13th day of February, 2009.

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Telephone: (919) 716-6900
Fax: (919) 716-6763

⁵ Plaintiffs also complain about Title 10A N.C.A.C. 14C.0402, which provides that “[t]he correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing.” However, for all of the reasons set forth above, no constitutional right is implicated by this particular rule. Once again, the General Assembly is the sole arbiter as to which portions of the CON process are subject to direct administrative review.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **DEFENDANTS'**
BRIEF IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS in the above
titled action upon all other parties to this cause by:

Hand-delivering a copy hereof to each said party or to the attorney thereof;

Transmitting a copy hereof to each said party via email; or

Depositing a copy hereof, first-class postage pre-paid, in the United States mail, properly
addressed to:

Noah H. Huffstetler, III
Wallace C. Hollowell, III
Denise M. Gunter
Elizabeth B. Frock
NELSON. MULLINS,
RILEY & SCARBOROUGH, LLP
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612

Robert F. Orr
Executive Director & Senior Counsel
N.C. Institute for Constitutional Law
333 Six Forks Road, Suite 180
Raleigh, NC 27609

Jason B. Kay
Senior Staff Attorney
N.C. Institute for Constitutional Law
333 Six Forks Road
Raleigh, NC 27609

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Todd S. Hemphill
Diana E. Ricketts
BODE CALL & STROUPE, LLP
3105 Glenwood Avenue, Suite 300
Raleigh, North Carolina 27602

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N.C. HOSPITAL ASSOCIATION***

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Colleen M. Crowley
William W. Stewart, Jr.
Gina L. Bertolini
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430 Davis Drive, Suite 400
Morrisville, North Carolina 27560

***COUNSEL FOR CHS, PITT,
HIGH POINT REGIONAL,
REX, AND CAPE FEAR VALLEY***

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Terrill Johnson Harris
Allyson Jones Labban
SMITH MOORE, LLP
P.O. Box 29594
Greensboro, North Carolina 27420

***COUNSEL FOR MISSION,
WAKEMED, AND MOSES CONE***

Kenneth L. Burgess
Jessica Lewis
POYNER SPRUILL, LLP
301 Fayetteville St, Suite 1900
PO Box 1801
Raleigh, NC 27602-1801

***THE NORTH CAROLINA HEALTHCARE
FACILITIES ASSOCIATION***

This the 13th day of February, 2009.

Frank S. Kirschbaum
KIRSCHBAUM, NANNEY, KEENAN &
GRIFFIN, P.A.
2418 Blue Ridge Road, Suite 200
Raleigh, NC 27607

***COUNSEL FOR SURGICAL CARE AFFILIATES,
BLUE RIDGE DAY SURGERY, GREENSBORO
SPECIALITY SURGERY, EYE SURGERY
CENTER, CHARLOTTE SURGERY, AND
ASHEVILLE RADIOLOGY***



Mark A. Davis
Special Deputy Attorney General

EXHIBIT A



Elaine F. Marshall
Secretary

North Carolina

DEPARTMENT OF THE SECRETARY OF STATE

PO Box 29622 Raleigh, NC 27626-0622 (919)807-2000

CORPORATIONS

- Corporations Home
- Search By Corporate Name
- Search For New Corporation
- Search By Registered Agent
- Important Notice
- Resale of Tickets Online
- Corporations FAQ
- Homeowners' Association FAQ
- Tobacco Manufacturers
- Unincorporated Non-Profits
- Dissolution Reports
- Non-Profit Reports
- Verify Certification
- Online Annual Reports

Date: 2/2/2009

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Corporation Names

Name	Name Type
NC Raleigh Orthopaedic Clinic, P. a.	Legal

Professional Corporation Information

SOSID:	0120848
Status:	Current-Active
Date Formed:	1/1/1970
Citizenship:	Domestic
State of Inc.:	NC
Duration:	Perpetual

Registered Agent

Agent Name:	Stein, Karl F.
Registered Office Address:	3515 Glenwood Ave Raleigh NC 27612
Registered Mailing Address:	3515 Glenwood Ave Raleigh NC 27612
Principal Office Address:	No Address
Principal Mailing Address:	3515 Glenwood Ave Raleigh NC 27612-4996

Stock

Class	Shares	No Par Value	Par Value
COMMON	10000		1
PREFERRED	90000		1

LINKS & LEGISLATION

- KBBE B2B Annual Reports
- SOSID Number Correction
- 2001 Bill Summaries
- 1999 Senate Bills
- Annual Reports 1997
- Corporations 1997
- Register for E-Procurement Dept. of Revenue

ONLINE ORDERS

- Start An Order
- New Payment Procedures

CONTACT US

- Corporations Division

TOOLS

- Secretary of State Home
- Secretary of State Site Map
- Printable Page

EXHIBIT B



Elaine F. Marshall
Secretary

North Carolina

DEPARTMENT OF THE SECRETARY OF STATE

PO Box 29622 Raleigh, NC 27626-0622 (919)807-2000

CORPORATIONS

- Corporations Home
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- Corporations Division

TOOLS

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- Secretary of State Site Map
- Printable Page

Date: 2/2/2009

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Corporation Names

Name	Name Type
NC Hope - A Women's Cancer Center, PA.	Legal
NC Nathan E. Williams, M.D., P.A.	Prev Legal

Professional Corporation Information

SOSID:	0336419
Status:	Current-Active
Date Formed:	1/1/1994
Citizenship:	Domestic
Professional Service:	Medical Services
State of Inc.:	NC
Duration:	Perpetual

Registered Agent

Agent Name:	Williams, Nathan E
Registered Office Address:	100 Ridgefield Court Asheville NC 28806
Registered Mailing Address:	PO Box 16948 Asheville NC 28816
Principal Office Address:	No Address
Principal Mailing Address:	445 Biltmore Ave Ste 501 Asheville NC 28801-4526

Stock

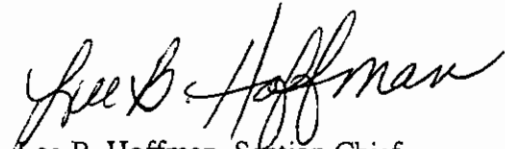
Class	Shares	No Par Value	Par Value
COMMON	100000	Yes	N/A

EXHIBIT C

CERTIFICATION OF COPIES

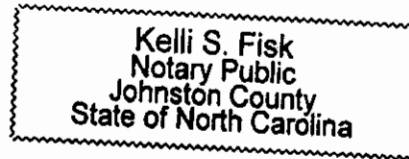
State of North Carolina

I certify that the attached document is a true and exact copy of the January 28, 2009 letter from the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section, conditionally approving the Certificate of Need Application of Orthopaedic Surgery Center of Raleigh, LLC, Group I Ventures ASC LLC, ASC JV LLC, Rex Orthopedic Ventures, LLC and Rex Hospital, Inc. to construct a freestanding ambulatory surgical facility with four surgical operating rooms in Wake County.


Lee B. Hoffman, Section Chief

Sworn to and subscribed before me
This the 14th day of February, 2009.


Notary Public Kelli S. Fisk



My commission expires: 10.22.2011



North Carolina Department of Health and Human Services
Division of Health Service Regulation
Certificate of Need Section
2704 Mail Service Center ■ Raleigh, North Carolina 27699-2704

Beverly Eavcs Perdue, Governor
Lanier M. Cansler, Secretary

www.ncdhhs.gov/dhss

Lee Hoffman, Section Chief
Phone: 919-855-3873
Fax: 919-733-8139

RESPONSE REQUIRED

January 28, 2009

Karl Stein, Executive Director
Orthopaedic Surgery Center of Raleigh, LLC
3515 Glenwood Ave.
Raleigh, NC 27612

RE: Conditional Approval/ Project I.D.#J-8170-08/ Orthopaedic Surgery Center of Raleigh, LLC/
Construct a freestanding ambulatory surgical facility with four surgical operating rooms/
Wake County
FID #080609

Dear Mr. Stein:

The Certificate of Need (CON) Section, Division of Health Service Regulation, Department of Health and Human Services has conditionally approved the above referenced certificate of need application. This decision was made after a review of the applications submitted for this cycle and after consideration of the Certificate of Need Law, G.S. 131E-175 et. seq., and regulations promulgated thereunder, the State Medical Facilities Plan, and other applicable information. Written notice of all findings and conclusions upon which the decision was based will be provided to the applicants within five business days after the date of the decision in accordance with G.S. 131E-186. The applicant shall not proceed with the construction, offering or development of this project until the certificate of need is issued. Further, the Department shall not issue the certificate of need until all applicable conditions of approval that can be satisfied before issuance of the certificate of need have been met pursuant to G.S. 131E-187(a). The conditions are as follows:

1. Orthopaedic Surgery Center of Raleigh, LLC and Group I Ventures ASC LLC and ASC JV LLC and Rex Orthopedic Ventures, LLC and Rex Hospital, Inc. shall materially comply with all representations made in its certificate of need application.
2. Orthopaedic Surgery Center of Raleigh, LLC and Group I Ventures ASC LLC and ASC JV LLC and Rex Orthopedic Ventures, LLC and Rex Hospital, Inc. shall not acquire, as part of this project, any equipment that is not included in the project's proposed capital expenditure in Section VIII of the application or that would otherwise require a certificate of need.



Mr. Stein
January 28, 2009
Page Two

3. Orthopaedic Surgery Center of Raleigh, LLC and Group I Ventures ASC LLC and ASC JV LLC and Rex Orthopedic Ventures, LLC and Rex Hospital, Inc. shall construct an ambulatory surgical facility that shall be licensed for no more than four ambulatory surgical operating rooms.
4. Orthopaedic Surgery Center of Raleigh, LLC and Group I Ventures ASC LLC and ASC JV LLC and Rex Orthopedic Ventures, LLC and Rex Hospital, Inc. shall construct no minor procedure rooms in the facility as part of the project.
5. Orthopaedic Surgery Center of Raleigh, LLC and Group I Ventures ASC LLC and ASC JV LLC and Rex Orthopedic Ventures, LLC and Rex Hospital, Inc. shall meet all criteria to receive accreditation of the ambulatory surgical facility from JCAHO, AAAHC or a comparable accreditation authority within two years following completion of the facility.
6. Orthopaedic Surgery Center of Raleigh, LLC and Group I Ventures ASC LLC and ASC JV LLC and Rex Orthopedic Ventures, LLC and Rex Hospital, Inc. shall acknowledge acceptance of and agree to comply with all conditions states herein to the Certificate of Need Section in writing prior to issuance of the certificate of need.

Response to the above conditions should be submitted to the CON Section no later than 35 days from the date of the decision. Failure to respond within this time period may result in the CON Section making a determination not to issue a certificate of need for the project referenced above.

The conditional approval is valid only for a capital expenditure of \$6,549,000.00. If a cost overrun occurs that exceeds the approved capital expenditure amount, a new certificate of need may be required as determined by G.S. 131E-176(16)(e).

The applicant should be aware that according to the Certificate of Need Law any affected person shall have thirty (30) days after the date of decision to file a petition for a contested case on this approval. Further, if you are aggrieved by the conditions of the decision you may file a petition for a contested case hearing in accordance with G.S. 150B, Article 3, as amended. This petition must be filed with the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, North Carolina 27611-7447 within thirty (30) days of the date of this decision. G.S. 150B-23 provides that a party filing a petition must also serve a copy of the petition on all parties to the petition. Therefore, if you

Mr. Stein
January 28, 2009
Page Three

file a petition for a contested case hearing, you must serve a copy of the petition on the Department of Health and Human Services by mailing a copy of your petition to:

Emery Milliken
Department of Health and Human Services,
Office of Legal Affairs,
Adams Building – Room 154
2001 MSC
Raleigh, North Carolina, 27699-2001

It is requested that a copy of the petition also be served on the Certificate of Need Section.

The certificate of need will not be issued before the completion of this 30 day period ending February 27, 2009. If a contested case request is received within the thirty (30) day period, the certificate will not be issued until the appeal is resolved (10A NCAC 14C .0208).

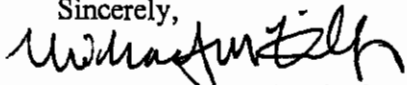
The timetable for completion of the project is the timetable outlined in the certificate of need application, unless an adjustment has been made by the CON Section because the review period was extended. The timetable for this project is as follows:

Completion of preliminary drawings	_____	May 15, 2009
Approval of site by Construction Section, DFS	_____	October 15, 2009
25% completion of construction	_____	January 30, 2010
50% completion of construction	_____	May 15, 2010
75% completion of construction	_____	October 15, 2010
Occupancy/offering of service(s)	_____	January 1, 2011

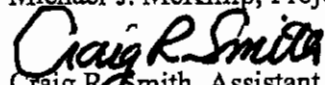
If the decision is appealed, the timetable set forth in this letter will be adjusted accordingly before the certificate of need is issued. Please contact us if any clarification of this decision is required.

Please refer to the Project I.D.# and Facility I.D.# (FID) in all correspondence.

Sincerely,



Michael J. McKillip, Project Analyst



Craig R. Smith, Assistant Chief
Certificate of Need Section

MJM:CRS:rbb
Attachment

cc: Medical Facilities Planning Section, DFS

<h:\rboger\decision\8170deca2.mjm>

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing notice of conditional approval on the following persons by placing a copy in an official depository of the United States Postal Service in a postage-paid, first class envelopes addressed as follows:

Karl Stein, Executive Director
Orthopaedic Surgery Center of Raleigh, LLC
3515 Glenwood Ave.
Raleigh, NC 27612
Project I.D.#J-8170-08
FID #080609

W. Stan Taylor, VP
WakeMed & WakeMed Property Services
P.O. Box 14465
Raleigh, NC 27620-4465
Project I.D.#J-8180-08
FID #990974

I hereby certify that I have served the foregoing notice of disapproval on the following persons by placing a copy in an official depository of the United States Postal Service in a postage-paid, first class envelopes addressed as follows:

William Pittman, Director
Rex Hospital, Inc.
Strategic Planning & Business Development
2500 Blue Ridge Rd., Suite 200
Raleigh, NC 27607
Project I.D.#J-8169-08
FID #050627

Kelli Collins, VP
Blue Ridge Day Surgery Center, LP
Operations
3812 North Elm St.
Greensboro, NC 27455
Project I.D.#J-8177-08
FID #922977

W. Stan Taylor, VP
WakeMed & WakeMed Property Services
Corporate Planning & Managed Care
P.O. Box 14465
Raleigh, NC 27620-4465
Project I.D.#J-8179-08
FID #990974

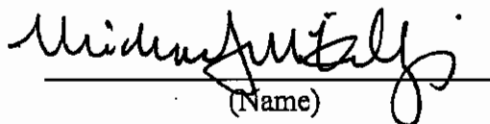
Mr. Stein
January 28, 2009
COS con't.

W. Stan Taylor, VP
WakeMed Cary Hosp.
Corporate Planning & Managed Care
P.O. Box 14465
Raleigh, NC 27620-4465
Project I.D.#J-8181-08
FID #990332

Paul L. Burroughs, III, Managing Member, MD
Southern Surgical Center, LLC
P.O. Box 12844
Raleigh, NC 27605
Project I.D.#J-8182-08
FID #080617

Laura MacFadden, Senior Director
Holly Springs Hospital, LLC
1980 S. Hawthorne Rd., Suite 200
Winston-Salem, NC 27103
Project I.D.#J-8190-08
FID #080620

This the 28th day of January, 2009.



(Name)

Project Analyst
(Position)