

SUPREME COURT OF NORTH CAROLINA

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

v)

STATE OF NORTH CAROLINA; BEVERLY EAVES)
PERDUE (formerly MICHAEL F.EASLEY),)
Governor of the State of North)
Carolina, in her official capacity;)
NORTH CAROLINA DEPARTMENT OF HEALTH)
AND HUMAN SERVICES; LANIER M. CANSLER)
(formerly DEMPSEY E. BENTON),)
Secretary of the North Carolina)
Department of Health and Human)
Services, in his official capacity;)
DAN A. MYERS, M.D., Chairman of the)
North Carolina State Health)
Coordinating Council, in his official)
capacity; JEFF HORTON, Acting)
Director, Division of Health Service)
Regulation, North Carolina Department)
of Health and Human Services, in his)
official capacity; and LEE B. HOFFMAN,)
Chief of the Certificate of Need)
Section, Division of Health Service)
Regulation, North Carolina Department)
of Health and Human Services, in her)
official capacity)

) From Wake County
) No. 08CVS007955
) No. COA09-844

2010 JUN 8 PM 4:14

NOTICE OF APPEAL
(Constitutional Question)
and
PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 8 June 2010)
and
MOTION TO DISMISS APPEAL
(Filed 21 June 2010)

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA

Pursuant to N.C. Gen. Stat. § 7A-30(1) and Rule 14 of the North Carolina Rules of Appellate Procedure, Appellants Hope – A Women's Cancer Center, PA and Raleigh Orthopaedic Clinic, P.A. hereby appeal to the Supreme Court of North Carolina from the 4 May 2010 Judgment of the Court of Appeals of North Carolina, the mandate for which issued on 24 May 2010, which Judgment directly involves substantial questions arising under the Constitution of the State of North Carolina as follows:

Issue 1: Said Judgment directly involves a substantial question arising under Article I, § 6 and Article II, § 1 of the Constitution of the State of North Carolina in that Chapter 131E, Article 9 of the North Carolina General Statutes (the “CON Law”) and Executive Order No. 139 of Governor Michael F. Easley establishing the North Carolina State Health Coordinating Council (the “Executive Order”), as applied to Appellants, unlawfully delegate legislative authority to the executive branch in violation of the foregoing constitutional provisions. This constitutional issue was timely raised in the trial tribunal by Appellants’ First Amended Complaint (R pp. 100-126), and Motion for Judgment on the Pleadings (R pp. 138-39), and was determined erroneously by the Court of Appeals.

Issue 2: Said Judgment directly involves a substantial question arising under Article I, § 19 of the Constitution of the State of North Carolina, in that the CON Law and the Executive Order, as applied to Appellants, deprive rights secured thereunder to Appellants by preventing them from having the opportunity to apply for a certificate of need and to demonstrate that they need the equipment and facilities which they wish to acquire or develop in order to serve their patients, thereby depriving Appellants of both procedural and substantive due process. This constitutional issue was timely raised in the trial tribunal by Appellants' First Amended Complaint (R pp. 100-26) and Motion for Judgment on the Pleadings (R pp. 138-39), and was determined erroneously by the Court of Appeals.

Issue 3: Said Judgment directly involves a substantial question arising under Article I, § 18 of the Constitution of the State of North Carolina, in that the CON Law, Chapter 150B of the North Carolina General Statutes (the "APA"), the Executive Order and 10 N.C.A.C. 14C.0402, as applied to Appellants, deprive rights secured thereunder to Appellants by foreclosing them from meaningful access to the courts for redress of the injuries done to them by the actions of Defendants under the CON Law. This constitutional issue was timely raised in the trial tribunal by Appellants' First Amended Complaint (R pp. 100-26) and Motion

for Judgment on the Pleadings (R pp. 138-39), and was determined erroneously by the Court of Appeals.

In the event the Court finds these constitutional questions to be substantial, Appellants intend to present the following issues in their brief for review:

I. Did the Court of Appeals err in ruling that the CON Law and the Executive Order, as applied to Appellants, do not unconstitutionally delegate legislative authority to the executive branch in violation of Article I, § 6 and Article II, § 1 of the North Carolina Constitution?

II. Did the Court of Appeals err in ruling that the CON Law and the Executive Order, as applied to Appellants, do not violate Appellants' rights to procedural and substantive due process in violation of Article I, § 19 of the North Carolina Constitution?

III. Did the Court of Appeals err in ruling that the CON Law, the APA, the Executive Order and 10 N.C.A.C. 14C.0402, as applied to Appellants, do not violate the rights of Appellants to access to the courts in violation of Article I, § 18 of the North Carolina Constitution?

Respectfully submitted, this the 8th day of June, 2010.

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This is to certify that the undersigned has served a copy of the foregoing Notice of Appeal on counsel of record by mailing a true copy thereof, via United States Mail, first class, postage prepaid, addressed as follows:

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This the 8th day of June, 2010.



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NO. 244P10

TENTH DISTRICT

NORTH CAROLINA SUPREME COURT

HOPE-A WOMEN'S CANCER CENTER, P.A.)
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P.A.,)

Plaintiffs-Appellants,)

v.)

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CAROLINA DEPARTMENT OF HEALTH AND)
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Secretary of the North Carolina Department of)
Health and Human Services, in his official)
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Acting Director, Division of Health Service)
Regulation, North Carolina Department of Health)
and Human Services, in his official capacity;)
and LEE B. HOFFMAN, Chief of the Certificate)
of Need Section, Division of Health Service)
Regulation, North Carolina Department of Health)
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Defendants-Appellees.)

PETITION FOR DISCRETIONARY REVIEW

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NO.

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of Need Section, Division of Health Service)
Regulation, North Carolina Department of Health)
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Defendants-Appellees.)

PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to N.C. Gen. Stat. § 7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure, Hope – A Women’s Cancer Center, P.A. (“Hope”) and Raleigh Orthopaedic Clinic, P.A. (the “Clinic”) (collectively “Appellants”) respectfully request that this Court grant discretionary review of the 4 May 2010 Judgment of the North Carolina Court of Appeals in the above-captioned case, the mandate for which issued on 24 May 2010. This Petition is filed simultaneously with Appellants’ Notice of Appeal of Right in this case pursuant to N.C. Gen. Stat. § 7A-30(1) and Rule 14 of the North Carolina Rules of Appellate Procedure. Hope and the Clinic respectfully submit that this appeal involves substantial constitutional questions as set forth in their Notice of Appeal, but file this Petition to be considered by the Court in the event the Appeal is determined not to be of right, as provided in Rule 15(b).

SUMMARY OF THE CASE

As envisioned by the General Assembly, the Certificate of Need (“CON”) Law was designed to promote “the general welfare and protection of lives, health and property of the people of this State.” N.C. Gen. Stat. § 131E-175(7). Contrary to the suggestions of some of the amici curiae below, Hope and the Clinic are not seeking in this case to invalidate the entire statute. However, the authority to make decisions about where and when new facilities can be developed and new

equipment and technology can be acquired have now been delegated by the State to a group of private individuals, comprised largely of representatives of existing healthcare providers. Further, as explained below, their deliberations and decisions have been exempted from the procedural safeguards applicable to other state government boards and commissions under the Administrative Procedure Act and State Government Ethics Act, and then shielded from administrative and judicial review.

Hope and the Clinic respectfully submit that this statutory scheme now would permit private persons to use the power of state government to benefit themselves financially by protecting their employees from lawful competition, regardless of the impact their actions have on the well-being of North Carolina citizens. Hope and the Clinic further contend that the means used to accomplish this purpose offend the constitutional provisions discussed below. Thus, this case impacts the lives of millions of North Carolinians in one of the most important ways possible, affecting the availability of vital healthcare services. Moreover, this case ultimately goes to the question of whether the business of North Carolina State government is to be conducted openly and transparently for the benefit of its citizens, rather than for the benefit of privileged special interests, under the cover of arcane bureaucratic procedures. These are, therefore, questions that deserve the attention of our highest Court.

PROCEDURAL BACKGROUND

Hope and the Clinic commenced this constitutional challenge to certain aspects of the CON Law, N.C. Gen. Stat. Chapter 131E, Article 9, and corresponding regulations in Wake County Superior Court on 6 May 2008. On 4 September 2008, the Chief Justice designated the case as exceptional under Rule 2.1 of the General Rules of Practice for Superior and District Courts and assigned the case to Superior Court Judge Howard E. Manning, Jr.

Hope and the Clinic filed a First Amended Complaint on 31 December 2008. (R pp. 100-126) On 9 January 2009, Appellees filed their Answer and Motion to Dismiss. (R pp. 127-137) On 16 January 2009, Hope and the Clinic filed a Motion for Judgment on the Pleadings. (R pp. 138-139) On 26 February 2009, Appellees filed their own Motion for Judgment on the Pleadings. (R pp. 635-636)

After a hearing on 27 February 2009, Judge Manning issued a Memorandum of Decision and Order on 26 March 2009 granting Appellees' Motion for Judgment on the Pleadings and denying Appellants' Motion for Judgment on the Pleadings. (R pp. 637-640) Appellants filed a Notice of Appeal on 17 April 2009. (R pp. 641-643) The appeal was docketed on 10 July 2009. (R p. 1)

A total of fifteen parties were permitted to file amicus curiae briefs on behalf of Defendants. The amici curiae included the North Carolina Hospital Association, the North Carolina Healthcare Facilities Association, and nine North Carolina

hospitals. On 4 May 2010, the Court of Appeals issued its decision in favor of Defendants.

STATEMENT OF THE FACTS

The Parties. Hope is a physician-owned healthcare facility in Buncombe County that, *inter alia*, specializes in gynecologic and breast cancer treatment. (R p. 103) 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. Id. To develop a cancer center with such integrated services, Hope wishes to provide its 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. Id.

The Clinic is the largest orthopaedic practice in Wake County; serving patients from Wake County and a large region of eastern North Carolina. (R p. 104) Based on their education, training and professional experience, the physicians of the Clinic believe that single specialty operating rooms offer significant advantages to physicians and their patients in both the quality and the cost of necessary medical care. Id. In order to continue to provide high quality,

cost effective medical services to its patients, the Clinic sought to develop and open six dedicated ambulatory orthopaedic surgery operating rooms. Id.

Defendants are the State of North Carolina and those officers of State government who are responsible for administering the statutes and rules challenged in this case, in their official capacities. All but one of the fifteen amici curiae below are either existing providers of healthcare services in North Carolina or trade associations representing those interests, which Hope and the Clinic contend are benefited economically by the way in which the CON Law is currently implemented.

The CON Law. The CON Law requires that healthcare providers, such as Appellants, 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 N.C. Department of Health and Human Services (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 “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 Criterion 1, the Department has consistently refused to consider for approval any CON application for a proposed new institutional health service if the Plan currently in effect does not contain a determination that there is a need for that project. (R p. 105) As a result, Appellants and similarly-situated applicants for CONs have no opportunity to demonstrate in their applications that the new institutional health services they propose are needed, unless there has been a prior need determination for their proposed service area in the Plan. Id.

The Plan is annually developed by the Department “under the direction of the North Carolina State Health Coordinating Council” (the “Council”). (R p. 206) 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. (R p. 106) On 3 March 2008, Governor Easley issued Executive Order 139 which once again established the Council and directed it to “prepare the Annual State Medical Facilities Plan and

present the plan to the Governor.”¹ (R p. 119) Although Executive Order 139 described the categories from which the 29 members of the Council will be appointed (R p. 120), upon information and belief, 25 of the 29 members of the Council that developed the 2008 Plan simultaneously served as officers, employees, directors or medical staff members of entities engaged in providing health care services for compensation within the State of North Carolina. (R pp. 106-107, 123-126) 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. (R p. 107) The decisions of the Council in formulating the Plan therefore have a significant, direct financial impact upon those entities with which members of the Council are affiliated. Id.

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

In preparing the Plan, the Department and the [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 [Council]. The Council shall accept oral and written

¹ This Court may take judicial notice, pursuant to Rule 201 of the North Carolina Rules of Evidence, that Executive Order 139 was amended and extended until 1 March 2014 by Executive Order 52 issued by Governor Perdue, and that the way in which Council members are selected and appointed remains essentially unchanged for purposes of the constitutional issues in this case.

comments from the public concerning the Plan.

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

The 2008 Plan 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].

(R p. 223) The 2008 Plan 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.” (R p. 224) Nothing in the CON Law 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.”

The State Government Ethics Act. The State Government Ethics Act (the “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 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. Sess. Laws, 2006-201.

The State Ethics Commission has determined that the Council and its members are not subject to any of the safeguards established by the Ethics Act and that the members of the Council are not “covered persons” as defined therein. (R p. 109)

Administrative Procedure Act, Chapter 150B of the General Statutes (the

“APA”) contains comprehensive procedural safeguards applicable to the promulgation of rules having the force and effect of law by agencies in the state government. The development of the Plan by the Council, however, is specifically made exempt from the APA 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), and approved by the Governor.”

Review of CON decisions is available only by a contested case hearing under Article 3 of the APA. See N.C. Gen. Stat. § 131E-188(a). However, among all of the types of agency decisions reviewable under the APA, CON decisions are singled out for unique treatment. See N.C. Gen. Stat. § 150B-34(c). Under this statute, the protections of a petitioner’s rights contained in N.C. Gen. Stat. §§ 150B-36(b), (b1), (b2), (b3), and (d) and N.C. Gen. Stat. § 150B-51 “do not apply” to CON decisions, and the ruling of an administrative law judge in a CON case is a mere recommendation. Id.

The judicial review of administrative decisions which is available under the APA is conducted upon the official record created in a contested case. See N.C. Gen. Stat. § 150B-51(c). However, 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.

Appellants' Unsuccessfully Petition the Council. Hope petitioned the Council to adjust the Plan to show a need determination in Buncombe County for an MRI scanner to be used exclusively for imaging procedures to diagnose and treat breast cancer. (R pp. 42-67) On four occasions since 2004, the Clinic petitioned the Council to include in the Plan a determination of need for new operating rooms in Wake County. (R p. 113) The Clinic's most recent petition requested the Council determine a need for six freestanding, single specialty operating rooms in Wake County. (R pp. 68-87) Hope's petition, and all four of the Clinic's petitions, were disapproved by the Council. (R p. 113)

REASONS WHY DISCRETIONARY REVIEW SHOULD BE ALLOWED

The North Carolina General Statutes set out three grounds for certification of a case for review in the Supreme Court following determination by the Court of

Appeals:

- (1) The subject matter of the appeal has significant public interest,
or
- (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
- (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

N.C. Gen. Stat. § 7A-31(c).

As explained below, all three grounds set forth in N.C. Gen. Stat. § 7A-31(c) for certification of a case for review in the Supreme Court after determination of the cause by the Court of Appeals apply in this case.

I. THE SUBJECT MATTER OF THIS APPEAL HAS SIGNIFICANT PUBLIC INTEREST.

A. Fair and impartial CON decisions are important to the public health and welfare.

In N.C. Gen. Stat. § 131E-175, the General Assembly made multiple findings regarding the importance of CON decisions to the public health and welfare of North Carolinians, and concluded:

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

N.C. Gen. Stat. § 131E-175(7).

If CON decisions are so important to the public welfare – and none of the Defendants or the fifteen amici curiae permitted to participate below have disputed this importance – it necessarily follows that the same care should be taken to ensure that those decisions are fairly and impartially made as is taken with respect

to decisions of the multiple state boards and agencies responsible for less consequential matters. Moreover, the historical record discloses in this and other states a troubling pattern of “industry capture” of CON regulatory agencies, with incumbent providers exercising their power to control the process to their advantage, rather than that of patients. See Payton and Powsner, Regulation Through the Looking Glass: Hospitals, Blue Cross, and Certificate-of-Need, 79 Mich. L. Rev. 203 (1980); Newberg, In Defense of Aston Park: The Case for State Substantive Due Process Review of Healthcare Regulation, 68 N.C. L. Rev. 253 (1990); Miller, What Were We Thinking: Legislative Intent and the 2000 Amendments to the North Carolina APA, 79 N.C. L. Rev. 1657 (2000-01).

It is therefore wholly appropriate for our highest Court to scrutinize the inexplicable exemption of the process by which the Plan is developed and implemented from the procedural safeguards applicable to so many other state boards and agencies.

B. The issues involved in this Appeal have an important impact on North Carolina’s economy.

At a time when our State is offering tax and other incentives to private enterprises to induce them to invest capital and create jobs in North Carolina, the CON decisions at issue in this case affect, and have the potential to prevent, billions of dollars of annual investments in our State’s economy. Pursuant to Rule 201 of the North Carolina Rules of Evidence, this Court may take judicial notice

that in 2008, the calendar year governed by the Plan at issue here, 232 CON applications were submitted to the Department, proposing total capital expenditures of two billion, two hundred forty-seven million, six hundred sixty-nine thousand, two hundred four dollars (\$2,247,669,204).² It is therefore important to the economic welfare of North Carolina that CON decisions are not made to prevent such investments in the development of new facilities and the acquisition of new equipment and technology merely to protect the existing market share of incumbent providers. See Constitution of North Carolina, Article I, § 34 (“Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed”).

Ironically, one important reason for the initial adoption of the CON Law was to secure “in excess of fifty-five million dollars” in available federal funds. See former N.C. Gen. Stat. § 131E-175(6), 1978 N.C. Sess. Laws, Ch. 1182. That rationale for the law was repealed after federal support for health planning was revoked. See 1987 N.C. Sess. Laws, Ch. 511. Now, to the contrary, the most recent pronouncement of the relevant federal agencies encourages states with CON programs to reconsider their economic impact.

The Agencies believe that, on balance, CON programs are not successful in containing health care costs, and

² The CON reports including this information are available on the Department’s official website at <http://www.ncdhhs.gov/dhsr/coneed/archive/conmonthly.html>.

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. As noted earlier, the vast majority of single-specialty hospitals – a new form of competition that may benefit consumers – have opened in states that do not have CON programs. 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.

Improving Healthcare, A Dose of Competition: A Report by the Federal Trade Commission and the Department of Justice, July 2004.

The concerns expressed by the Federal Trade Commission and Department of Justice, as well as numerous commentators, over the potential negative economic impact of CON decisions constitute a second way in which the issues raised in this appeal significantly affect the public interest.

II. THIS APPEAL INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE.

This case also involves legal principals of major significance to the jurisprudence of North Carolina. N. C. Gen. Stat. § 7A-31(c)(2). First, this case calls into question whether the State can: (1) delegate to a board composed primarily of representatives of private businesses the authority to make decisions which effectively protect their employers from otherwise legitimate competition, (2) relieve those private individuals from the financial disclosure and other requirements of the Ethics Act, (3) exempt their decisions from review by the

Rules Review Commission before they are adopted and have the effect of law, and (4) once adopted, immunize those decisions from administrative or judicial review. Hope and the Clinic contend that the foregoing arrangement constitutes a delegation of legislative authority to private individuals, without adequate guiding standards and procedural safeguards, in violation of Article I, § 19 of the Constitution of North Carolina. See Adams v. N.C. Dept. of Natural and Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978). Although this Court has addressed the narrow issue of whether the Governor has authority to modify the Plan, see Frye Regional Medical Center v. Hunt, 350 N.C. 39, 510 S.E.2d 159, reh'g denied, 350 N.C. 314, 534 S.E.2d 590 (1999), the more fundamental issue of unlawful delegation is one of first impression.

Second, this case presents the additional question of first impression whether the State may both require Appellants to obtain certificates of need to develop their proposed projects, and simultaneously deprive them of an opportunity even to submit applications for such certificates. The first of the review criteria set forth in the CON Law provides:

The 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, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.

N.C. Gen. Stat. § 131E-183(a)(1) (emphasis added). Under this criterion, unless the Council has predetermined that there is a need for a new service or facility within a geographic area, the proponent of a project has no opportunity to apply for a CON, or to make its case as to why its proposal is needed by the citizens of that area. Hope and the Clinic submit that this requirement deprives them of both procedural and substantive due process in violation of Article I, § 19 of the Constitution of North Carolina. See Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988); In re Certificate of Need for Aston Park Hospital, Inc., 282 N.C. 542, 193 S.E.2d 729 (1973).

Finally, the Department's rule at 10 N.C.A.C. 14C.0402 provides that "[t]he correctness, adequacy, or appropriateness of criteria, plans and standards shall not be an issue in a contested case hearing." Because, as discussed above, the need determination made by the Council and included in the Plan "constitutes a determinative limitation" on the ability of a proponent to obtain a CON, the "correctness, adequacy, or appropriateness" of such a need determination is often the only real issue which a person seeking to develop a project needs to raise. However, the foregoing rule not only prevents a proponent precluded from applying for a CON from challenging that preclusion in a contested case hearing before an administrative law judge, it also effectively denies that proponent any opportunity for judicial review. See N.C. Gen. Stat. § 131E-188(b) (an appeal

from a decision in a contested case involving a CON application is made directly to the Court of Appeals); Rule 10(a)(1), North Carolina Rules of Appellate Procedure (proposed issues on appeal must be first presented in the trial tribunal). A question of first impression, appropriate for determination by this Court, is whether the statutes and rules challenged in this case work together to deprive Hope and the Clinic of access to the Courts, in violation of Article I, § 18 of our Constitution. See Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), aff'd, 306 N.C. 364, 293 S.E.2d 415(1982).

III. THE DECISION OF THE COURT OF APPEALS APPEARS LIKELY TO BE IN CONFLICT WITH A DECISION OF THE SUPREME COURT.

To paraphrase the language of this Court in another context, it appears “that the panel of judges of the Court of Appeals to which this case is assigned has acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court.” Cannon v. Miller, 313 N.C. 324, 327 S.E.2d 888 (1985). Specifically, Hope and the Clinic argued below that the CON Law, as applied to them in this case, violated Article I, § 19 of the Constitution of North Carolina under the test laid down by the Supreme Court in Aston Park. In Aston Park, the Supreme Court, dealing with the original version of the CON Law, explained as follows:

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 attach based upon Article I, s 19 of the Constitution of North Carolina.

282 N.C. at 550, 193 S.E.2d at 735.

To make the required determination with respect to the then-current version of the CON Law, this Court adopted a two-part test which it had used in earlier cases involving different statutes.

To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

282 N.C. at 550-51, 193 S.E.2d at 735.

In the proceedings below, Hope and the Clinic conceded that the State has a legitimate interest in making affordable, high quality healthcare accessible to North

Carolinians, but contended that the aspects of the current CON Law challenged in this case are not reasonably necessary to accomplish this purpose. Specifically, based on this Court's reasoning in Aston Park, they contended that, if they are required to obtain a CON before developing their proposed projects, they must be given a fair opportunity to apply for the requisite approval and not have their application predetermined for failure by a need determination made by the Council before their applications could even be submitted.

The Court of Appeals, however, rejected this analysis, remarking that "the holding in Aston Park is moot, and Plaintiffs' reliance thereon is misplaced." Slip Op., p. 23. As the sole Supreme Court authority for holding the Aston Park decision "moot," the Court of Appeals cited the *dissent* by Justice Whichard in HCA Crossroads Residential Centers, Inc. v. N.C. Dept. of Human Resources, 327 N.C. 573, 584, 398 S.E.2d 466, 473.³ Slip Op., p. 22. However, the issues in HCA Crossroads had nothing to do with the constitutional questions posed in Aston Park, and Justice Whichard's dissent was, as noted by the Court of Appeals, on other grounds. Id. In fact, the majority decision in HCA Crossroads is consistent with the earlier analysis by this Court in Aston Park.

³ The only other authority cited by the Court of Appeals was its own decision in State ex. rel. Utils. Comm'm v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993), disc. review denied, 335 N.C. 564, 441 S.E.2d 125 (1994).

When viewed in its entirety, Article 9 of Chapter 131E of the General Statutes, the Certificate of Need Law, reveals the legislature's intent that an applicants' *fundamental right to engage in its otherwise lawful business* be regulated, but not be encumbered with unnecessary bureaucratic delay.

327 N.C. at 579, 398 S.E.2d at 470 (emphasis added).

As the Court of Appeals failed to recognize, Hope and the Clinic do not argue that the current version of the CON Law should be declared unconstitutional on its face based on Aston Park. Hope and the Clinic do assert that the *analysis* utilized by this Court in Aston Park is still valid, and that the current version of this law, as applied to Hope and the Clinic, fails to pass constitutional muster under that analysis. By presuming to hold the decision of the Supreme Court in Aston Park "moot," the Court of Appeals overstepped its role, a significant error that requires correction by this Court.

CONCLUSION

As explained above, there are multiple reasons why this Court should grant this Petition for Discretionary Review. Without question, this appeal involves matters of great interest to the public. In addition, this appeal presents legal questions of major significance to the jurisprudence of the State, and the decision of the Court of Appeals appears likely to be in conflict with this Court's prior decisions in Aston Park and other cases. As noted at the outset, Hope and the Clinic respectfully submit that this appeal involves substantial constitutional

issues, as set forth in their Notice of Appeal. However, in the event that the appeal is determined not to be of right, Hope and the Clinic respectfully request that this Court grant their Petition for Discretionary Review.

ISSUES TO BE BRIEFED

In the event the Court grants this Petition for Discretionary Review, Hope and the Clinic intend to present the following issues in their brief for review:

I. Did the Court of Appeals err in ruling that the CON Law and the Executive Order, as applied to Appellants, do not unconstitutionally delegate legislative authority to the executive branch in violation of Article I, § 6 and Article II, § 1 of the North Carolina Constitution?

II. Did the Court of Appeals err in ruling that the CON Law and the Executive Order, as applied to Appellants, do not violate Appellants' rights to procedural and substantive due process in violation of Article I, § 19 of the North Carolina Constitution?

III. Did the Court of Appeals err in ruling that the CON Law, the APA, the Executive Order and 10 N.C.A.C. 14C.0402, as applied to Appellants, do not violate the rights of Appellants to access to the courts in violation of Article I, § 18 of the North Carolina Constitution?

Respectfully submitted, this the 8th day of June, 2010.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has served a copy of the foregoing Petition for Discretionary Review on counsel of record by mailing a true copy thereof, via United States Mail, first class, postage prepaid, addressed as follows:

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