
NORTH CAROLINA COURT OF APPEALS

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CLERK COURT OF APPEAL
OF NORTH CAROLINA

HOPE-A WOMEN'S CANCER)
CENTER, P.A. and RALEIGH)
ORTHOPAEDIC CLINIC, P.A.,)
)
Plaintiffs-Appellants,)
)
v.)
)
STATE OF NORTH CAROLINA, et al.,)
)
Defendants-Appellees.)

From Wake County

BRIEF OF AMICI CURIAE MISSION HOSPITALS, INC., WAKEMED AND
THE MOSES H. CONE MEMORIAL HOSPITAL OPERATING
CORPORATION d/b/a THE MOSES CONE HEALTH SYSTEM

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CORPORATION d/b/a MOSES CONE HEALTH SYSTEM

Amici curiae Mission Hospitals, Inc., WakeMed, and The Moses H. Cone Memorial Hospital Operating Corporation d/b/a Moses Cone Health System (collectively, “Amici”) respectfully submit this brief pursuant to N.C. Rule of Appellate Procedure 28(i).

QUESTION PRESENTED

DID THE TRIAL COURT CORRECTLY HOLD THAT DEVELOPMENT OF THE STATE MEDICAL FACILITIES PLAN DID NOT CONSTITUTE AN IMPERMISSIBLE DELEGATION OF LEGISLATIVE AUTHORITY?

STATEMENT OF THE CASE

The *Amici* adopt and incorporate by reference the Statement of the Case from the Defendants-Appellees' Brief.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

The *Amici* adopt and incorporate by reference the Statement of Grounds for Appellate Review from the Defendants-Appellees' Brief.

STATEMENT OF FACTS

The *Amici* adopt and incorporate by reference the Statement of Facts from the Defendants-Appellees' Brief.

ARGUMENT

DEVELOPMENT OF THE STATE MEDICAL FACILITIES PLAN CONSTITUTES A PERMISSIBLE DELEGATION OF LEGISLATIVE AUTHORITY.

In complex areas such as health planning, the Legislature can and should delegate authority to administrative bodies with the expertise and ability to fully effectuate legislative policy. Plaintiffs-Appellants argue that the process of developing the State Medical Facilities Plan ("SMFP") constitutes an impermissible delegation of legislative authority and therefore the SMFP and the State health planning process should be nullified. Plaintiffs-Appellants' assertions are erroneous and contradict the clear dictates of case law. The *Amici* concur with Defendants-Appellees that no delegation of final legislative authority to the State

Health Coordinating Council (“SHCC”) has occurred. If and to the extent authority was delegated to the SHCC and the Department of Health and Human Services (the “Department”) as argued by Plaintiffs-Appellants, such delegation was proper as detailed below.

A. Case Law Delineates Criteria for Evaluating Claims of Impermissible Delegation of Legislative Authority.

North Carolina has a well-established body of case law regarding delegation of legislative authority. Among the most frequently cited is *Adams v. N.C. Department of Natural and Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978), which involved a challenge to the constitutionality of the Coastal Area Management Act and the authority of the Coastal Resources Commission (“CRC”) to develop guidelines for coastal development. The CRC, like the SHCC, is made up of individuals appointed by the Governor with expertise in the area regulated. 295 N.C. at 686, 249 S.E.2d at 404.

Adams and its progeny establish the test for determining whether a delegation of authority is appropriate. First, did the Legislature delegate authority to make policy decisions it could have easily made itself—i.e., a delegation of the power to legislate—or did the delegation involve the application of established policy to specific facts? Second, does the successful implementation of legislative policy require time and expertise that the Legislature does not possess? Third, did the Legislature provide adequate guiding standards? These factors should be

applied to Plaintiffs-Appellants' claim of impermissible delegation of legislative authority.

1. The Legislature May Delegate Authority to Carry Out Legislative Purpose.

While acknowledging that the State Constitution provides that legislative power is vested in the General Assembly, the *Adams* Court held:

if interpreted literally the Constitution would absolutely preclude any delegation of legislative power. However, it has long been recognized by this Court that the problems which a modern legislature must conform are of such complexity that strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers. [. . .] Thus, we have repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards[.]

295 N.C. at 696-97, 249 S.E.2d at 410 (internal citations omitted). When assessing the constitutionality of a grant of legislative authority, the courts must ensure “that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature.” 295 N.C. at 697-98, 249 S.E.2d at 411; *see also In re Broad and Gales Creek Community Ass’n*, 300 N.C. 267, 273, 266 S.E.2d 645, 650-51 (1980); *State ex rel. Utilities Comm’n v.*

Carolina Utility Customers Ass'n, Inc., 336 N.C. 657, 675, 446 S.E.2d 332, 343 (1994).

2. The Legislature May Delegate Authority to Administrative Bodies With Expertise and Ability to Implement Legislative Purpose.

Evaluation of delegation of authority is rooted in practical considerations. The Legislature is not comprised of experts in every field, nor can it micromanage implementation of legislation; day-to-day implementation authority is properly delegated. “If the General Assembly sets a policy and gives an administrative board the power to find facts which enable the board to carry out the legislative policy this is not a delegation of legislative power.” *Farlow v. Bd. of Chiropractic Examiners*, 76 N.C. App. 202, 211, 332 S.E.2d 696, 702 (1985); *see also State ex rel. Dorothea Dix Hospital v. Davis*, 292 N.C. 147, 158, 232 S.E.2d 698, 705 (1977); *Wal-Mart Stores East, Inc. v. Hinton*, -- N.C. App. --, 676 S.E.2d 634, 648-49 (2009).

Our courts recognize numerous implementation decisions that cannot practically be made by the Legislature. For example, “it is precisely [the] need to deal with individual factual circumstances, as in the case of applications for permits to dredge and fill in the state’s estuarine resources, which make the task impossible for the legislature to manage alone,” and it is therefore proper for the Legislature to delegate authority to the agency, “with its accumulation of expertise

in this subject area, to apply the standards to varying factual circumstances.” *In re Broad and Gales Creek Community Ass’n*, 300 N.C. at 274, 266 S.E.2d at 651.

Similarly, in evaluating challenges to the Highway Commission’s selection of turnpike routes, the Supreme Court held:

[I]t would not be feasible to require more certain standards than those now prescribed. If it were necessary for the Authority to formulate specific plans . . . and then seek legislative approval thereof, there would be no purpose in creating the Authority; the legislature might just as well act itself in the entire manner. The prohibition against abdication of legislative power in favor of an agency was never intended to extend to such administrative details.

N.C. Turnpike Authority v. Pine Island, Inc., 265 N.C. 109, 116, 143 S.E.2d 319, 324 (1965), quoting *City of Newark v. N.J. Turnpike Auth.*, 12 N.J. Super. 523, 536, 79 A.2d 897, 903. See also *Bring v. N.C. State Bar*, 348 N.C. 655, 659, 501 S.E.2d 907, 910 (1998) (not practical for Legislature “to micromanage the making of rules for the Board”); *State v. Lisk*, 21 N.C. App. 474, 477, 204 S.E.2d 868, 870 (1974) (Legislature not constantly in session and its members are not trained pharmacists); *Wal-Mart Stores*, 676 S.E.2d 648 (need for expertise in implementation of tax law is obvious). In contrast, in *Northampton County Drainage District v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990), cited by Plaintiffs-Appellants, the Legislature abrogated its duty by allowing clerks of court, in their sole discretion, to make the policy choice whether drainage district

commissioners would be elected or appointed. 295 N.C. at 697-98, 249 S.E.2d at 411.

Numerous courts have stressed the importance of delegation when implementation of a legislative goal requires expertise. “When 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.” *Adams*, 295 N.C. at 698, 249 S.E.2d at 411. Rather, the Legislature must provide guiding standards that are only “as specific as the circumstances permit.” *Id.* The *Adams* Court, finding that the implementation of coastal land use guidelines “requires much expertise,” noted with approval the composition of the CRC, which was made up of individuals with expertise in coastal issues. 295 N.C. at 700, 249 S.E.2d at 412.

Given our courts’ long history of explicitly approving administrative bodies constituted of citizens and industry members, Plaintiffs-Appellants’ claim that delegation of authority to such a body constitutes an impermissible delegation to private parties is unsupported. By definition, an entity like the SHCC is made up of private individuals; any delegation of legislative authority is to the entity itself, not to individual members in their capacity as private citizens. The cases cited by Plaintiffs-Appellants in support of their claim are easily distinguishable because they involve the delegation of legislative authority to a group of private citizens or

a private corporation. *See Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974) (private corporation); *Wilcher v. Sharpe*, 236 N.C. 308, 72 S.E.2d 662 (1952) (neighboring property owners); *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 84 S.E.2d 390 (1954) (voters).

3. The Legislature May Delegate Authority When Adequate Guiding Standards Exist.

In evaluating the adequacy of guiding standards, courts review multiple factors. One factor is whether there is a “declaration[] by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers.” *State ex rel. Utilities Comm'n*, 336 N.C. at 675, 446 S.E.2d at 343 (internal citations omitted). Procedural safeguards such as public hearings, publicly-available minutes of the administrative body’s deliberations, and specific statutory requirements that actions taken by the administrative body must be consistent with the intent of the underlying act are also considered. *See, e.g.*, 336 N.C. at 676, 443 S.E.2d at 343. The presence of procedural safeguards is merely one consideration, however, not a separate test that must be met in order for delegation to be appropriate, as argued by Plaintiffs-Appellants (“courts look to find both substantive guidance to the administrative body *and procedural safeguards*” (Plaintiffs-Appellants’ Brief p. 16, emphasis added)). *See, e.g., Adams*, 295 N.C. at 698, 249 S.E.2d at 411.

In *Turnpike Authority*, our Supreme Court found guiding standards sufficient where the Legislature authorized development of a highway system connecting all county seats and principal towns “with special view of development of agriculture, commercial and natural resources of the State” and authorized the State Highway Commission “to locate and acquire rights of way for any new roads that may be necessary for a State highway system.” With regard to the selection of routes, this statement of legislative purpose constituted “reasonable standards which are as specific as the circumstances permit.” *N.C. Turnpike Authority*, 265 N.C. at 114-15, 143 S.E.2d at 323.

In *State ex rel. Dorothea Dix Hospital*, Plaintiff argued impermissible delegation to the Board of Trustees of Dorothea Dix Hospital and denial of due process in that patients were not given an opportunity to be heard before the Board of Trustees regarding whether they were able to pay for treatment. 292 N.C. at 157-58, 232 S.E.2d at 705 (1977). The Supreme Court rejected these arguments, finding sufficient guiding standards where the Legislature established the public policy – that all persons admitted to state institutions be required to pay for the cost of their treatment – and this in turn informed the Board of Trustees of its purpose: to fix the actual cost and determine whether patients are financially able to pay. 292 N.C. at 158, 232 S.E.2d at 706.

As these and numerous other decisions establish, the Legislature need not spell out in detail each individual step an administrative body must take when implementing the legislative purpose. Indeed, as our Supreme Court has held, such a burdensome requirement would negate the benefits of establishing administrative agencies. *See N.C. Turnpike Authority*, 265 N.C. at 116, 143 S.E.2d at 324.

B. Delegation of Authority to Develop the SMFP is Appropriate and Necessary

Application of the above-referenced criteria to the development of the SMFP demonstrates that the Legislature properly delegated legislative authority. The development of the SMFP conforms to the statement of legislative goals and policies in N.C.G.S. § 131E-175 and is subject to numerous procedural safeguards.

1. The SMFP Effectuates Legislative Policy.

The Certificate of Need Act (the “Act”) contains twelve legislative findings of fact and statements of legislative purpose at N.C.G.S. § 131E-175. As articulated by the Legislature:

[T]he 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 provision of this Article or by the North Carolina Department of Health and Human Services . . . in order that only appropriate and needed institutional health services are made available in the area to be served.

N.C.G.S. § 131E-175(7). The Department is expressly empowered to “[d]evelop policy, criteria, and standards for health service facilities planning . . . and develop a State Medical Facilities Plan,” the need determinations of which are “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.G.S. §§ 131E-177(4), 183(a)(1). The SMFP is developed by the Department and the SHCC and must be approved by the Governor. N.C.G.S. §131E-176(17).

The Legislature established the policy and purpose of the Act: to limit the development of health services and facilities to those needed by the citizens of North Carolina and to avoid the maldistribution of resources. N.C.G.S. § 131E-175. Authority is delegated not to establish legislative policy, but to implement the specific need determinations necessary to effectuate the policy articulated in the Act. In developing the proposed SMFP to present to the Governor, the SHCC and the Department do not act in an arbitrary or unreasoned fashion, but instead apply sound mathematical principles to develop need determinations. (*See R pp. 206-603*)

2. Health Planning is a Time-Consuming Process That Requires Expertise.

Development of the SMFP, which is several hundred pages long, is the type of process for which administrative bodies were designed. Many months of work

are needed to review historical data and develop the need methodologies required to fulfill the stated legislative purpose, which are then applied by the Department. The evaluation of historical procedure data and information concerning the capacity of existing health service facilities is a task that is best effectuated by individuals with knowledge and expertise in the healthcare industry. There are approximately 25 regulated services, facilities, and equipment, and need for most of these is determined on a county-by-county basis. The Legislature does not have the time or expertise to sift through the data, develop the SMFP, and then apply the need determinations to applicants each year. (*See R pp. 206-603*)

Like the CRC in *Adams*, the SHCC is made up of individuals appointed by the Governor, many of whom have healthcare expertise. In 2008, the SHCC was comprised of twelve at-large members (six of whom were physicians or pharmacists) and representatives from the Health Care Facilities Association, the health insurance industry, the Medical Society, academic medical centers, the Long Term Care Facilities Association, the Veterans Administration, Area Health Education Centers, the Association of Local Health Directors, the Home Care Association, and the Hospital Association. The remaining members represent business, industry and state and local government, including the Legislature. (R p. 217) This abundance of expertise makes the SHCC uniquely qualified to participate in the development of need determinations for health services.

The Supreme Court previously addressed the issue of unlawful delegation within the context of health planning in *Williamson v. Snow*, 239 N.C. 493, 80 S.E.2d 262 (1954). Under the statutory scheme in place when *Williamson* was decided, the Medical Care Commission (“Commission”), “an administrative agency of the State of North Carolina,” was responsible for evaluating whether a need existed to establish a new hospital district. 239 N.C. at 494, 80 S.E.2d at 263. Following receipt of a petition and a series of public hearings, the Commission determined that a need existed to establish the Hospital District of Surry County. *Id.* at 494-95, 80 S.E.2d at 263.

Plaintiff sought to enjoin issuance of bonds for the construction of the hospital, alleging in part that the Legislature did not have the authority to delegate its power to the Commission to create a hospital district. *Id.* at 497, 80 S.E.2d at 264-65. The Court rejected Plaintiff’s unlawful delegation argument, holding that the Legislature “may make a law and delegate the power to a subordinate agency of the State, under proper guiding standards, to determine the facts or state of things upon which the law shall become effective.” *Id.*

In our opinion, to clothe the Commission 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 [by statute], in order to meet such need, is not an unlawful delegation of legislative power, and we so hold.

239 N.C. at 497, 80 S.E.2d at 265. Like the Commission, the SHCC and the Department are properly “clothe[d] . . . with the power to hear and determine” whether health services, equipment, and facilities are needed, subject to the Governor’s approval.

3. Adequate Standards Exist to Guide Development of the SMFP.

Even if Plaintiffs-Appellants’ claim that adequate “procedural safeguards” are a separate prong of the delegation test was correct, the Legislature has provided adequate guiding standards, as evidenced by its firm declaration of the legislative goals that the Department and SHCC must apply when developing the proposed SMFP and the procedural safeguards that govern the process.

As noted above, N.C.G.S. § 131E-175 establishes the purpose of the Act. Throughout the Act, the Legislature reiterates that the SMFP must be developed to effectuate the health planning goals of the Act. *See, e.g.* N.C.G.S. §§ 131E-175(7); 177(1), (4); 183(a)(1). The Department’s regulations and the SMFP itself acknowledge this requirement. *See, e.g.* 10A N.C.A.C. 14C.0103; 2008 SMFP, Ch. 1 (R pp. 213-16). This statement of legislative purpose is much more explicit than the statements of legislative purpose in the cases in Section A, *supra* and cited by Plaintiffs-Appellants.

The development of the SMFP is also subject to numerous procedural safeguards of the type recognized by our appellate courts as sufficient to refute a

claim of impermissible delegation. Plaintiffs-Appellants, much like the plaintiff in the *Dix Hospital* case, argue that because they cannot appeal the determinations in the SMFP, procedural safeguards are non-existent. Plaintiffs-Appellants also assert a lack of procedural safeguards because the SHCC is exempt from the State Government Ethics Act (“Ethics Act”). Neither argument passes muster.

The Department is required to hold at least one public hearing prior to the adoption of the draft SMFP and at least six public hearings after such adoption. N.C.G.S. § 131E-176(25). The SHCC and the Department must maintain a list of persons who have requested notice of public hearings and provide notice to these individuals no less than 15 days prior to a hearing. *Id.* The Department also posts notices of meetings of the SHCC and its component committees on the Department’s web site at <http://www.dhhs.state.nc.us/dhsr/mfp/meetings.html>.

The SHCC is required to accept both oral and written comments from the public concerning the proposed SMFP. N.C.G.S. § 131E-176(25). The SHCC also accepts petitions twice a year seeking adjustments to the need methodologies contained in the proposed SMFP. The Department publishes a schedule for accepting comments and petitions; both the schedule and the comments and petitions themselves are publicly available at <http://www.dhhs.state.nc.us/dhsr/mfp/petitions.html>. As held in *Frye Regional Medical Center, Inc. v. Hunt*, 350 N.C. 39, 510 S.E.2d 159 (1999), because

ultimate approval authority rests with the Governor, a party may also petition the Governor to amend the need determinations in the SMFP. *See also Bio-Medical Applications of North Carolina, Inc. v. N.C. Dep't of Health and Human Servs.*, 179 N.C. App. 483, 634 S.E.2d 572 (2006).

Finally, the Legislature included another procedural safeguard in the form of a requirement that the Rules Review Commission confirm that the public notice and hearing provisions of N.C.G.S. § 131E-176(25) were followed. N.C.G.S. § 150B-2(8a)k. The multiple public hearings, the notice requirements, the comment and petition process, the oversight by the Rules Review Commission, and the approval by the Governor are all important procedural safeguards.

The Ethics Act, N.C.G.S. § 138A-1, *et seq.*, applies to elected and appointed State government members, including members of boards and commissions, “except for those public bodies that have only advisory authority.” N.C.G.S. § 138A-3(1c). The SHCC is a public advisory body which advises and recommends the SMFP to the Governor. N.C.G.S. § 131E-176(25); *Frye*, 350 N.C. at 44, 510 S.E.2d at 163. As an advisory body, the SHCC is expressly excluded from Ethics Act regulation. The SHCC is not unique in this regard; many advisory bodies exist in North Carolina, and all are exempt from the Ethics Act. *See, e.g.*, N.C.G.S. §§ 113-331 (N.C. Nongame Wildlife Advisory Committee); 121-5.1 (State Historical Records Advisory Board); 143B-273.6 (State Criminal Justice Partnership

Advisory Board). Plaintiffs-Appellants are essentially asking this Court to invalidate the entire health planning process because the SHCC fails to fit within a statutory scheme developed many years after its creation and from which it has been expressly excluded by the Legislature.

Moreover, Plaintiffs-Appellants offered no evidence that any member of the SHCC acted unethically or in self-interest with respect to development of the SMFP they challenge. In *Farlow*, which was cited by Plaintiffs-Appellants, this Court noted that given the need for expertise, “[w]e do not believe we should hold that a Board composed of the members of the same profession as the person charged is disqualified because of a financial interest in the case,” where two members of the Board had chiropractic practices in the same town and stood to directly benefit if plaintiff lost his license to practice. 76 N.C. App. at 211, 332 S.E.2d at 701. Here, there is no evidence of any financial interest or any wrongdoing on the part of any SHCC member. Plaintiffs-Appellants’ complaints against the SHCC are groundless.

CONCLUSION

This Court should affirm the trial court’s decision that the Legislature properly delegated authority to the Executive Branch to carry out the legislative policies behind the Act.

This the 18th day of November, 2009.

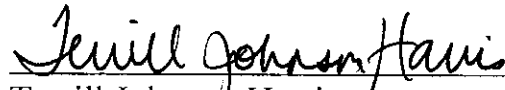
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the *amici curiae* certifies that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

This the 18th day of November, 2009.



Terrill Johnson Harris
Counsel for *amici curiae*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief of *Amici Curiae* Mission Hospitals, Inc., WakeMed, and The Moses H. Cone Memorial Hospital Operating Corporation d/b/a Moses Cone Health System was served upon all parties by placing a copy thereof in the United States mail, first class postage prepaid, addressed as follows:

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