

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., )  
and RALEIGH ORTHOPAEDIC )  
CLINIC, P.A. )

Plaintiffs )

v. )

STATE OF NORTH CAROLINA; MICHAEL F. )  
EASLEY, Governor of the State of North )  
Carolina, in his official capacity; NORTH )  
CAROLINA DEPARTMENT OF HEALTH )  
AND HUMAN SERVICES; 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, )

Defendants, )

and )

ASHEVILLE RADIOLOGY ASSOCIATES, )  
P.A; BLUE RIDGE DAY SURGERY CENTER )  
LIMITED PARTNERSHIP; THE )  
CHARLOTTE-MECKLENBURG HOSPITAL )  
AUTHORITY d/b/a CAROLINAS )  
HEALTHCARE SYSTEM; CHARLOTTE )  
SURGERY CENTER, LIMITED )  
PARTNERSHIP; CUMBERLAND COUNTY )  
HOSPITAL SYSTEM, INC. d/b/a CAPE FEAR )

**BRIEF IN SUPPORT OF  
DEFENDANTS' MOTION TO  
DISMISS**

VALLEY HEALTH SYSTEM; GREENSBORO )  
 SPECIALITY SURGERY CENTER, LIMITED )  
 PARTNERSHIP; HIGH POINT REGIONAL )  
 HEALTH SYSTEM; MISSION HOSPITAL, )  
 INC.; THE MOSES H. CONE MEMORIAL )  
 HOSPITAL OPERATING CORPORATION )  
 d/b/a THE MOSES CONE HEALTH SYSTEM; )  
 NORTH CAROLINA BAPTIST HOSPITAL; )  
 NORTH CAROLINA HEALTH CARE )  
 FACILITIES ASSOCIATION, INC; THE )  
 NORTH CAROLINA HOSPITAL )  
 ASSOCIATION; PITT COUNTY MEMORIAL )  
 HOSPITAL, INC.; REX HOSPITAL, INC.; )  
 SURGERY CENTER OF SOUTHERN PINES, )  
 LLC; SURGICAL CARE AFFILIATES, LLC; )  
 WAKE FOREST UNIVERSITY HEALTH )  
 SCIENCES; and WAKEMED; )  
 )  
 Defendant-Intervenors. )

**STATEMENT OF THE CASE**

Plaintiffs Hope-A Women’s Cancer Center, P.A. (“Hope-A”) and Raleigh Orthopaedic Clinic, P.A. (“the Clinic”) (collectively “Plaintiffs”) filed this action asserting an as-applied constitutional challenge to several aspects of the manner in which the State Medical Facilities Plan (“the SMFP”) is issued pursuant to North Carolina’s Certificate of Need (“CON”) laws. *See* N.C. GEN. STAT. §131E-175 *et seq.* The named Defendants (collectively “the State”) consist of the State of North Carolina, former Governor Michael F. Easley, and several other State officials involved with the implementation of the CON laws. Defendants subsequently filed a motion to dismiss this action pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure.

On or about 31 December, 2008, Plaintiffs filed an Amended Complaint which made several minor revisions to the original Amended Complaint. The State then filed a Motion to Dismiss and Answer as to the Amended Complaint. The State now submits the present memorandum of law in support of its Motion to Dismiss.

### **STATEMENT OF THE FACTS**

Hope-A and the Clinic are businesses providing health care services within North Carolina. They seek to utilize, in their operations, certain types of medical equipment and facilities that are subject to the State's CON laws. (Am. Compl. ¶¶ 15- 22) Plaintiffs allege that they cannot receive a CON to acquire certain equipment and facilities because those items are not contained in the need determinations contained in the 2008 SMFP. (*Id.* at ¶¶ 23-25, 44-46) Plaintiffs assert that being subjected to the parameters of the 2008 SMFP has violated their constitutional rights. (*Id.* at ¶¶ 47-58)

### **ARGUMENT**

#### **I. BACKGROUND REGARDING NORTH CAROLINA'S CON LAWS AND THE SMFP.**

The basic purpose of North Carolina's CON laws "is to limit the construction of health care facilities in this state to those that the public needs and that can be operated efficiently and economically for their benefit." *Humana Hosp. Corp. v. North Carolina Dep't of Human Res.*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986). The CON 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." *In re*

*Denial of Request by Humana Hospital Corp., etc.*, 78 N.C. App. 637, 646, 338 S.E.2d 139, 145 (1986). See also *State ex rel. Edmisten v. P.I.A. Asheville, Inc.*, 740 F.2d 274, 277-78 (4<sup>th</sup> Cir. 1984) (recognizing that enactment of CON laws by the General Assembly was prompted by concerns over continuous rise in health care costs and wasteful and duplicative purchases by health care providers), *cert. denied*, 471 U.S. 1003, 85 L. Ed. 2d 159 (1985).

Pursuant to this statutory scheme, the SMFP is issued each year for the purpose of definitively setting out the need for certain health services and health facilities throughout the State. *Craven Reg'l Med. Auth. v. North Carolina Dep't of Health and Human Services*, 176 N.C. App. 46, 50, 625 S.E.2d 837, 839 (2006). See N.C. GEN. STAT. §131E-176(25). An advisory body called the North Carolina State Health Coordinating Council ("the SHCC")<sup>1</sup> annually submits a recommended SMFP for review by the Governor who is charged with the authority to approve the final SMFP. The SHCC - which has been in existence since 1976 - is currently composed of 29 professionals from across the State representing different segments of the health care and business communities as well as state government. See N.C. GEN. STAT. §§131E-176(17) and (25); Ex. A. Each year's SMFP contains not only the need determinations for that calendar year but also sets out a detailed explanation as to the specific methodologies upon which the need determinations were made.

Once the Governor exercises his authority to finalize and approve the SMFP, the North Carolina Department of Health and Human Services ("DHHS") reviews CON applications for that calendar year and decides which of them should be approved based on review criteria such as the needs of the applicable population, the financial and operational projections of the applicant, and

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<sup>1</sup> The SHCC is referred to in the Amended Complaint as "the Council."

resource availability. *Living Centers -Southeast, Inc. v. North Carolina Dep't of Health and Human Services*, 138 N.C. App. 572, 574-75, 532 S.E.2d 192, 194 (2000); N.C. GEN. STAT. §131E-177(6); N.C. GEN. STAT. § 131E-183(a). In order for a CON to be approved by DHHS, the application must be consistent with the need for that type of health service as set forth in the SMFP. N.C. GEN. STAT. § 131E-183(a)(1). See *Bio-Medical Applications of N.C., Inc. v. North Carolina Dep't of Health and Human Services*, 179 N.C. App. 483, 490, 634 S.E.2d 572, 577 (noting that SMFP is a "snapshot in time" which allows DHHS to formulate policies and standards related to planning for health service facilities), *disc. review denied*, 360 N.C. 644, 638 S.E.2d 463 (2006), *appeal dismissed*, 361 N.C. 350, 644 S.E.2d 4 (2007). The establishment of, and adherence to, the SMFP, therefore, serves to facilitate a consistent and unified system for determining health care needs throughout the State.

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

While the CON laws are constitutional in all respects, the State submits that this Court should not even reach the constitutional issues referenced in Plaintiffs' Amended Complaint. This Court should instead hold that Plaintiffs are estopped from asserting said claims 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 *Convent of Sisters of St. Joseph v. City of Winston-Salem*, 243 N.C. 316, 324, 90 S.E.2d 879, 885 (1956). The Court of Appeals has elaborated on this doctrine, noting that "the acceptance of benefits precludes a subsequent inconsistent position, even where acceptance is involuntary, arises by necessity, or where

... a party voluntarily accepts a benefit in order to avoid the risk of harm.” *Shell Island Homeowners Ass’n v. Tomlinson*, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999).

The decision in *Shell Island* illustrates this doctrine. In that case, the plaintiffs were coastal landowners who had previously obtained a variance permit under certain “hardened structure” rules promulgated by the North Carolina Coastal Resources Commission which enabled them to build a sandbag revetment on their property. *Id.* Later they were denied permits to construct other hardened erosion control structures intended to protect their property and were refused a variance in connection with their permit application. *Id.* at 219, 517 S.E.2d at 409. Based on these denials, they challenged the constitutionality of the hardened structure rules. *Id.* at 225, 517 S.E.2d at 413. The Court of Appeals upheld the dismissal of their constitutional claims under Rule 12(b)(6), ruling that because they had previously benefitted from a variance issued under these rules, “plaintiffs may not now assert a claim that the hardened structure rules and regulatory scheme under which the rules are promulgated are invalid and unconstitutional.” *Id.* at 226-27, 517 S.E.2d at 413-14.

In the present case, the State has attached hereto copies of CONs that have recently been awarded to both named Plaintiffs in this action. As these documents show, Hope-A was awarded a CON in 2005 allowing it to acquire a mammography unit, a stereotactic breast biopsy unit, a bone densitometry unit, and x-ray equipment resulting in the establishment of a diagnostic center and an oncology treatment center in Buncombe County. (See Ex. C) Likewise, the Clinic was awarded a CON in 2007 allowing it to acquire a mobile MRI scanner to serve sites in Wake County. (See Ex. D) Thus, both Plaintiffs have very recently sought, obtained, and benefitted in a direct and tangible way from the CON laws. Only now - because their latest desired projects are not needed under the 2008 SMFP - do they claim that North Carolina’s longstanding CON procedure is

unconstitutional as to them. This is the very type of inconsistent conduct for which this application of the estoppel doctrine has been recognized by North Carolina courts.

This same principle has been applied on numerous occasions by North Carolina's appellate courts to bar constitutional claims. *See, e.g., Philip Morris USA, Inc. v. Tolson*, 176 N.C. App. 509, 519, 626 S.E.2d 853, 860 (2006) (because taxpayer had received and benefitted from variance allowed under tax statute, it could not later claim statute was unconstitutional), *disc. review denied*, 361 N.C. 356, 644 S.E.2d 231 (2007); *Franklin Road Properties v. City of Raleigh*, 94 N.C. App. 731, 734-35, 381 S.E.2d 487, 489-90 (1989) (plaintiffs were estopped from seeking declaratory judgment as to validity of zoning ordinance since they had previously obtained variance under said ordinance); *Ratcliff v. County of Buncombe*, 81 N.C. App. 153, 154-55, 343 S.E.2d 601, 602-03 (1986) (plaintiff could not challenge constitutional validity of statute precluding him from simultaneously serving as county commissioner and county manager where he had benefitted from statute by being elected to board of commissioners pursuant to provisions contained therein), *appeal dismissed*, 318 N.C. 417, 349 S.E.2d 599 (1986). *See also In re Appeal of Martin*, 286 N.C. 66, 74-75, 209 S.E.2d 766, 772 (1974) (county was not permitted to accept benefits of Legislature's grant of taxing power to it while simultaneously challenging constitutionality of statutory classification of property capable of being taxed); *Ramsey v. North Carolina Veterans Comm'n*, 261 N.C. 645, 648, 135 S.E.2d 659, 661 (1964) (applicant for scholarship authorized by statute was barred from challenging constitutionality of eligibility requirements contained therein).

In the present case, Plaintiffs have clearly benefitted in the past from the CON process. Thus, they are precluded from now mounting their current challenge.

### III. PLAINTIFFS CANNOT SHOW A CONSTITUTIONAL VIOLATION ARISING FROM THE APPLICATION OF THE CON LAWS TO THEM.

For the reasons set out above, this Court should not even consider the merits of Plaintiffs' claims. However, even if this Court were to reach the constitutional issues raised in the Amended Complaint, the State submits that dismissal of this action remains appropriate because Plaintiffs' constitutional arguments are meritless as a matter of law.

A bedrock principle of law in this State is the strong presumption that enactments of the General Assembly are constitutional. Courts must resolve all doubts in favor of the constitutionality of a legislative act. *In re Denial of Approval to Issue \$30,000,000.00 of Single Family Housing Bonds, etc.*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). In order for a legislative enactment to be held unconstitutional, "it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of [the General Assembly's] powers." *Emerald Isle v. State*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987).

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). "It is not the role of this Court to pass judgment on the wisdom and expediency of a statute." *Emerald Isle*, 320 N.C. at 647, 360 S.E.2d at 761.

The allegations in Plaintiff's Amended Complaint can be summarized as follows: (1) a claim that final authority over the SMFP has been unlawfully delegated to the SHCC (Am. Compl. at ¶¶ 47-49); (2) a claim that their procedural due process rights have been violated by the application of the CON laws to them (*Id.* ¶¶ 50-52); (3) a claim that their substantive due process rights have

been infringed upon by virtue of the requirement that CONs can be issued only for health services as to which a need has been identified in the SMFP (*Id.* ¶¶ 53-55); and (4) a claim that the effect of these aspects of the CON laws has been to deny them access to the courts. (*Id.* ¶¶ 56-58)

For the reasons set out below, the State submits that Plaintiffs have failed to rebut the presumption of constitutionality attaching to these laws and that they are fully constitutional.

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

In their First Claim for Relief, Plaintiffs allege that the CON laws and Governor Easley's Executive Order No. 139 impermissibly delegate to the SHCC the authority to determine what health services are needed in North Carolina. (Am. Compl. at ¶¶ 48-49) This claim is lacking in merit for several reasons.

It has long been established that the General Assembly may lawfully delegate a portion of its authority. See *North Carolina Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965).

Since legislation must often be adapted to complex conditions involving numerous details with which the Legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the Legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the Legislature shall apply. Without this power, the Legislature would often be placed in the awkward situation of possessing a power over a given subject without being able to exercise it.

*A-S-P Associates, Inc. v. City of Raleigh*, 298 N.C. 207, 218, 258 S.E.2d 444, 451 (1979) (citations omitted).

In their Amended Complaint, Plaintiffs do not appear to take issue with this well-settled proposition. Rather, they claim that it is improper for the SHCC to have been delegated authority regarding the SMFP. (Am. Compl. at ¶¶ 48-49)

The most fundamental defect regarding this claim is that it hinges on a mistaken premise regarding the role that the SHCC plays in the SMFP process. Contrary to the insinuations made throughout the Amended Complaint, the SHCC does *not* possess final authority regarding the SMFP's contents. In order to understand Plaintiffs' error, a summary of the SHCC's history within the context of the CON laws is necessary.

While the standards governing the most current composition of the SHCC were established by Governor Easley pursuant to Executive Order No. 139 (attached hereto as Ex. A), Executive Order No. 139 is simply the latest in a long series of related executive orders accomplishing the same purpose which date back over thirty years. The SHCC was originally created in 1976 by Governor James Holshouser pursuant to Executive Order No. XIX dated 1 June 1976. (A copy of Executive Order No. XIX is attached hereto as Ex. E.) This executive order was issued in response to Congress' enactment of the National Health Planning and Resource Development Act of 1974 ("NHPRDA"). (*See id.*)

In Executive Order XIX, Governor Holshouser acknowledged that the NHPRDA required the North Carolina Department of Human Resources (the predecessor of DHHS) to "seek advice from a Statewide Health Coordinating Council" and noted that no such body existed at that time under North Carolina law. (*Id.*) The executive order then proceeded to establish the SHCC and to spell out its duties as well as how it would be composed. (*Id.*)

In 1977, the General Assembly enacted the CON statutory scheme which - as amended periodically by the Legislature over the past 31 years - is still in existence today.<sup>2</sup> Contained in these laws were two references to the existence of the SHCC - including a recognition of its role in the preparation of the SMFP. (See Ex. F)

For the next ten years, the Department of Human Resources and the SHCC were solely responsible for the SMFP. However, in its 1987 amendments to the CON laws, the General Assembly materially modified this process by providing that the Governor would have the authority to approve the SMFP. (See Ex. G) This 1987 statutory amendment was the precursor to the provision currently codified at N.C. GEN. STAT. § 131E-176(25), which defines the SMFP in pertinent part as follows: "'State Medical Facilities Plan' means the plan prepared by the Department of Health and Human Services and the State Health Coordinating Council, and approved by the Governor." N.C. GEN. STAT. § 131E-176(25) (emphasis added).<sup>3</sup>

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<sup>2</sup> Four years before the 1977 CON laws were enacted, a different set of CON laws was invalidated by *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973). However, as our Court of Appeals has recognized, the holding in *Aston Park Hospital* was subsequently mooted by the Legislature's repeal of that set of laws and subsequent enactment of the 1977 CON laws contained in N.C. GEN. STAT. §131E-175 *et seq.* See *State ex rel. Utilities Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 275, 435 S.E.2d 553, 558 (1993) (expressly noting that repeal of prior CON law and passage of 1977 CON laws "rendered moot" decision in *Aston Park Hosp.*), *disc. review denied*, 335 N.C. 564, 441 S.E.2d 125 (1994). See also *HCA Crossroads Residential Ctrs., Inc. v. North Carolina Dep't of Human Res.*, 327 N.C. 573, 584, 398 S.E.2d 466, 473 (1990) (Whichard, J., dissenting) (dissenting from majority's ruling regarding whether department's failure to rule on CON petition within statutorily designated period of time meant application was deemed approved; noting that enactment of new CON laws remedied concerns set out in *Aston Park* regarding prior CON statute).

<sup>3</sup> The current version of the CON laws also references the existence of the SHCC in N.C. GEN. STAT. § 131E-176(17) which defines the "North Carolina State Health Coordinating Council" as "the Council that prepares, with the Department of Health and Human Services, the State Medical Facilities Plan." N.C. GEN. STAT. § 131E-176(17).

The proper interpretation of this statutory provision was definitively provided by our Supreme Court in *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 510 S.E.2d 159 (1999). In *Frye*, the question before the Court was the following:

Does the Governor of North Carolina, as Chief Executive of the State and head of the Executive Branch of State Government, have the power and authority, under the North Carolina General Statutes and the North Carolina Constitution, to make and execute policy decisions in the area of health care facilities' needs, including the power to amend the State's annual SMFP, a draft of which is prepared for him by the SHCC and presented to him by the Secretary of the Department of Human Resources?

*Id.* at 41, 510 S.E.2d at 161.

The Supreme Court ruled that the Governor did, in fact, have such authority, holding that "the Governor's power to amend [the SMFP] facilitates his role in bringing closure to the statutory and regulatory process and does not suggest a circumvention of the process." *Id.* at 43, 510 S.E.2d at 162. Based on its review of the CON laws, the Court determined that the SHCC existed by virtue of executive order and that its role was an advisory one. *Id.* at 44, 510 S.E.2d at 163. The Supreme Court also rejected the notion that the Secretary of the Department of Human Resources possessed final authority over the SMFP. The Court emphasized that it was *the Governor* who was ultimately responsible for making sure that the SMFP was consistent with the health-related policies and goals of the State. *Id.* at 43, 510 S.E.2d at 162.

In its opinion, the Court acknowledged the benefits of conferring such authority on the Governor as a matter of public policy. Based on its review of the statutes referencing the SMFP as well as its recognition of the executive powers possessed by the Governor, the Court noted the need for such clear final authority to exist regarding the SMFP. *Id.* at 44, 510 S.E.2d at 163.

One can easily envision a situation where the Governor disapproves a part of the SMFP and continuously sends it back to the [SHCC], and the [SHCC] continuously makes amendments that the Governor disapproves, resulting in either no State Medical Facilities Plan or a complete stalemate. We believe the better interpretation of the statute is that the Governor has the final authority to make substantive amendments as a part of the approval process.

*Id.* at 46-47, 510 S.E.2d at 164.

The Court reasoned that absent the authority to amend or modify the recommendations made to him concerning the SMFP, the Governor's ability to approve the SMFP would essentially be rendered meaningless. The Supreme Court ruled that the plaintiff's argument to the contrary "is inconsistent with the statutory scheme and the executive powers of the Governor." *Id.* at 44, 510 S.E.2d at 163.

Thus, contrary to Plaintiffs' allegations in their Amended Complaint, the SHCC lacks final authority over the SMFP. The Governor - not the SHCC - has final authority over the contents of each year's SMFP. Thus, Plaintiffs' unlawful delegation claim is invalid.

**B. THE APPLICATION OF THE CON LAWS HAS NOT RESULTED IN A DENIAL OF PLAINTIFFS' PROCEDURAL DUE PROCESS RIGHTS.**

A plaintiff's possession of a legally protected liberty or property interest is a prerequisite for its assertion of a due process claim. *Norman v. Cameron*, 127 N.C. App. 44, 50, 488 S.E.2d 297, 301, *disc. review denied and appeal dismissed*, 347 N.C. 398, 401, 494 S.E.2d 416 (1997). Even assuming that Plaintiffs were able to show such an interest, the CON laws have not deprived them of procedural due process.

Plaintiffs' Amended Complaint is somewhat self-contradictory and confusing regarding the basis for their procedural due process claim. In one breath, they complain about the fact that certain portions of the CON laws are exempted from the North Carolina Administrative Procedure Act

("APA"), *see* Amended Complaint ¶¶ 38-40, while, in the next breath, they bemoan the fact that the remedies provided under the APA regarding other facets of the CON laws are not to their liking, *see id.* ¶ 37. In any event, none of their contentions even come close to showing a violation of their procedural due process rights.

"The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *In re L.D.B.*, 168 N.C. App. 206, 208, 617 S.E.2d 288, 289 (2005). The notion of what type of process is due in a given set of circumstances is flexible. The United States Supreme Court has held that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 86, 55 L. Ed. 2d 124, 132 (1978) (citation omitted).

In their Amended Complaint, Plaintiffs allege as the basis for their procedural due process claim the fact that the CON laws "require[] Plaintiffs to obtain a CON before developing the new institutional health services which they desire to establish, but deprive[] Plaintiffs of a reasonable opportunity to demonstrate the need for such services and to obtain the necessary CON . . ." (Am. Compl. at ¶ 51) This contention is unsupportable for several reasons.<sup>4</sup>

**1. Ample Procedural Due Process Exists During the SMFP Process.**

The General Assembly has provided for significant public input during the process by which the SMFP is created:

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<sup>4</sup> As an initial matter, to the extent that Plaintiffs are claiming that the General Assembly's enactment of the CON laws violated their procedural due process rights, such a claim is barred by the fact that when the Legislature enacts a specific law applicable to a general class of persons, the legislative process itself provides all the legislative process that is due. *See Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445, 60 L. Ed. 372, 375 (1915). Since the CON laws apply to such a general class, any argument by Plaintiffs along these lines would fail.

In preparing the Plan, [DHHS] and the [SHCC] 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 . . . , [DHHS] shall notify persons on its mailing list of the date, time, and location of the hearing. [DHHS] 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 [SHCC]. The [SHCC] shall accept oral and written comments from the public concerning the Plan.

N.C. GEN. STAT. § 131E-176(25).

In compliance with this legislative mandate, a lengthy period of public hearings and public comment takes place. This process is summarized on pp. 7-10 of the 2008 SMFP, which are attached hereto as Ex. B. Parties who believe that portions of the prior calendar year's SMFP are inappropriate can petition for revisions to be made to the following year's SMFP. These petitions can be divided into two types: (1) petitions seeking changes in basic policies and methodologies; and (2) petitions requesting adjustments to the need determinations. (*Id.* at 7)

Persons recommending changes in the basic policies and methodologies set out in the prior calendar year's SMFP that may have an effect statewide are requested to submit their petitions by March 5. These petitions are then considered by the SHCC during the first four months of the calendar year. During this process, petitioners receive written notification of the time and place of the public meetings in which their petition will be discussed. (*Id.* at 7-8)

With regard to petitions requesting adjustments to the need determinations contained in the current year's SMFP, a Proposed SMFP is drafted by the SHCC and made available for review by interested persons during a yearly "Public Review and Comment Period." During this process, regional public hearings are held to receive both oral and written comments as well as written petitions regarding adjustments to the need determinations contained in the Proposed SMFP.

Petitioners receive written notification of the time and place of meetings at which their petition will be discussed. (*Id.* at 8-9)<sup>5</sup> At the end of this process, the SHCC submits a recommended SMFP to the Governor.

By providing for *seven* public hearings, *see* N.C. GEN. STAT. § 131E-176(25), the Legislature has not merely met but actually exceeded any procedural due process requirements that may apply to this process. In addition, N.C. GEN. STAT. § 150B-2(8a)k contains the extra procedural safeguard of requiring that the North Carolina Rules Review Commission ensure that the public notice and hearing provisions of N.C. GEN. STAT. § 131E-176(25) have been followed in connection with the SMFP process.

Our Court of Appeals has made clear that the availability of public hearings satisfies procedural due process considerations. In *Affordable Care, Inc. v. North Carolina State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 571 S.E.2d 52 (2002), the plaintiffs asserted that their procedural due process rights had been violated in connection with the adoption of an administrative rule by the state board of dental examiners. In rejecting this argument, the Court of Appeals noted the existence of several opportunities for the plaintiffs to make their views known during the public notice and comment process, which included three public hearings and/or meetings. *Id.* at 541-42, 571 S.E.2d at 62-63.

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<sup>5</sup> The 2008 SMFP reflects the fact that the above-referenced process was, in fact, followed with regard to the formulation of the recommended SMFP. (*See* Ex. B) (letter to Governor Easley from chairman of SHCC noting that copies of SHCC's Proposed SMFP were broadly disseminated and were examined in six public hearings held throughout State with due consideration given to petitions and comments received during process).

The availability of public hearings during the SMFP process likewise provides procedural due process to all interested persons. As such, Plaintiffs were given more than adequate procedural due process.

**2. The Exemption of the SMFP from the APA Rulemaking Process Does Not Violate Plaintiffs' Procedural Due Process Rights.**

As demonstrated above, the Legislature has mandated that there be seven public hearings during the process by which each new SMFP is formulated. The General Assembly has also exercised its legislative discretion by choosing to exempt the SMFP from the APA's rulemaking process. North Carolina General Statute § 150B-2(8a) 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.

Plaintiffs appear to be contending that (1) because N.C. GEN. STAT. § 131E-183(a)(1) contains a criterion prohibiting DHHS from issuing a CON for a project which is inconsistent with the need determinations contained in that calendar year's SMFP; and (2) because a party cannot directly challenge the need determinations contained in the final SMFP since it is exempt from APA procedures, they feel their right to procedural due process has been denied.<sup>6</sup> Such a position finds no support in the law.

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<sup>6</sup> Plaintiffs also complain about the effect of 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, the APA provides Plaintiffs with a mechanism for participating in the rulemaking process.

However, the Legislature's decision to exempt the SMFP from APA rulemaking does not constitute a procedural due process violation. In fact, numerous examples completely unrelated to the CON laws exist of public processes that are exempted wholly or partially from the APA. 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). In addition, the University of North Carolina is exempt from the bulk of the APA. See N.C. GEN. STAT. § 150B-1(f).

By Plaintiffs' logic, each of these exemptions would be unconstitutional. Obviously, that is not the case. The APA is not constitutionally mandated. Therefore, given that the General Assembly was not 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 coverage. Just as it was within the lawful province of the Legislature to create the above-mentioned other exemptions from the APA, it was equally permissible for it to exempt the SMFP.

Our appellate courts have enforced statutes conferring power upon the Governor that was not subject to APA (or 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 reasoning in *James* is consistent with that employed by the Supreme Court in its decision in *State ex rel. Caldwell v. Wilson*, 121 N.C. 425, 28 S.E. 554 (1897). There, the Supreme Court held that the Governor possessed the power, by statute, to suspend railroad commissioners and that his orderly exercise of this power was not reviewable by the courts. *Id.* at 472, 28 S.E. at 562.

The decision to exempt the SMFP from the APA rulemaking process was logical, recognizing 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. For this reason, the annual issuance of a document such as the SMFP is incompatible with the APA rulemaking process - which can take over eighteen months to complete.

The General Assembly has made a rational determination that rulemaking 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 utilizing the resources of the SHCC, DHHS and the Governor. 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.

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 administrative review, the entire CON process would be in a state of upheaval. Amendments, additions, and deletions to the SMFP resulting from 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 a timely and efficient allocation of health care services in this State - which is the fundamental purpose of the CON laws - would be directly undermined.

The Supreme Court's decision in *Frye* is consistent with this proposition, suggesting that the Governor's authority to approve the SMFP lends a note of needed finality to the process. See *Frye*, 350 N.C. at 46-47, 510 S.E.2d at 164. This aspect of *Frye* was recently recognized by the Court of Appeals:

The dissent seems to suggest that the [SMFP] is a fluid document . . . . We cannot agree. Instead, the enabling statute seems to suggest that the [SMFP] is a snapshot in time intended to enable the Department to "[d]evelop policy, criteria, and standards for health service facilities planning[,]" among other things. *Frye* was clear on this point.

*Bio-Medical Applications of N.C.*, 179 N.C. App. at 490, 634 S.E.2d at 577 (internal citation omitted).

In determining what level of process is due in a given case, it is appropriate to compare the public interests versus the private interests that are affected. *See Norman v. Cameron*, 127 N.C. App. 44, 50, 488 S.E.2d 297, 301 (1997). The State has an enormous interest in ensuring that medical services are available in a timely fashion to citizens who need them in all areas of the State. This interest is directly furthered by DHHS' unimpeded ability to immediately implement the need determinations contained in the SMFP - which is issued annually so as to remain abreast of new developments involving the need for health services statewide.

The State goes through a lengthy process to ensure that the need determinations are accurate. The need for finality which is provided once the Governor approves the SMFP would be severely undercut if parties were entitled to delay indefinitely the implementation of the SMFP through lengthy hearings and appeals designed to second-guess the need determinations. Any financial interest held by CON applicants such as Plaintiffs in obtaining a pecuniary advantage from the need determinations pales in comparison to the onerous administrative and fiscal burden that would be imposed on the State if potentially limitless attacks on the final Plan were permitted. *See Norman*, 127 N.C. App. at 50-51, 488 S.E.2d at 301 (determining that plaintiff's monetary interest in obtaining state residency status was less significant than State's interest in streamlined and efficient procedures for reviewing qualifications of applicants for such status). *See also McNeill v. Harnett County*, 327 N.C. 552, 566-67, 398 S.E.2d 475, 482 (1990) (holding that to require notice and opportunity for hearing to all property owners prior to enactment of ordinance requiring connection to sewer system would be unduly expensive and burdensome to local governments).

Procedural due process simply does not require the existence of a means to directly appeal the approved SMFP. Our Court of Appeals has made clear that "[t]here is no constitutional or

inalienable right of appellate or judicial review of an administrative decision. If the statute does not provide for appeal, none exists." *In re Vandiford*, 56 N.C. App. 224, 227, 287 S.E.2d 912, 914 (1982). See *Cox v. Kinston*, 217 N.C. 391, 396, 8 S.E.2d 252, 257 (1940) ("There is no inherent or inalienable right of appeal."). See also *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Res.*, 337 N.C. 569, 586, 447 S.E.2d 768, 778 (1994) ("No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute.") (citation omitted).

In a variety of different contexts, North Carolina courts have applied this rule without raising constitutional concerns and have instead enforced the General Assembly's decision not to provide for an appeal. See *Beauchesne v. University of North Carolina*, 125 N.C. App. 457, 467-69, 481 S.E.2d 685, 692-93 (1997) (because university was exempted from administrative hearings portion of APA, its alleged failure to act on plaintiff's application for shared leave in timely fashion was not subject to review by State Personnel Commission as a contested case); *Palmer v. Wilkins*, 73 N.C. App. 171, 172-73, 325 S.E.2d 697, 698 (1985) (holding that General Assembly did not provide for right to appeal Division of Motor Vehicles' decision under N.C. GEN. STAT. § 20-4.20(b) to suspend driver's license and trial court, therefore, lacked jurisdiction to hear such an appeal); *Vandiford*, 56 N.C. App. at 227-28, 287 S.E.2d at 914 (no right to appeal from Industrial Commission's decision to deny death benefits existed under N.C. GEN. STAT. § 143-166.4; "[T]he 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.").

It is also worthy of mention that Plaintiffs' own Amended Complaint belies their contention that they have been denied the opportunity to show a need for the equipment and facilities they seek to acquire. In their Amended Complaint, they expressly state that they have, in fact, been able to petition the SHCC a number of times regarding the need for their proposed acquisitions. (Am. Compl. at ¶¶ 44-45) Furthermore, the Clinic admits that it made a similar petition to the Governor. (Am. Compl. at ¶ 46) As such, Plaintiffs' assertion that they have been prevented from attempting to demonstrate the need for their proposed projects rings hollow. *See Teleflex Info. Sys., Inc. v. Arnold*, 132 N.C. App. 689, 693-94, 513 S.E.2d 85, 88 (1999) (recognizing that the very fact that plaintiff had, in fact, asserted his claims contradicted his contention that he lacked a remedy enabling him to do so).

It is abundantly clear that what Plaintiffs really want is not a right to be *heard* (which they have received) but rather the right to have their views *prevail* (which is, obviously, nowhere guaranteed in the Constitution). *See Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436 (4<sup>th</sup> Cir. 2002) (“[P]rocedural due process does not require certain results - it requires only fair and adequate procedural protections.”).

**C. THE ROLE PLAYED BY THE SMFP IN THE CON PROCESS DOES NOT VIOLATE PLAINTIFFS' SUBSTANTIVE DUE PROCESS RIGHTS.**

Nor have Plaintiffs' substantive due process rights been violated. In asserting this claim, Plaintiffs appear once again to be focusing on the manner in which the SMFP is formulated. Their arguments are meritless.

The substantive due process doctrine protects against governmental action which “shocks the conscience, or interferes with rights implicit in the concept of ordered liberty.” *Clayton v. Branson*,

170 N.C. App. 438, 455, 613 S.E.2d 259, 271, *disc. review denied*, 300 N.C. 174, 625 S.E.2d 785 (2005). Our Court of Appeals has expressed a reluctance to recognize new substantive due process rights so as to avoid the risk of converting the due process doctrine "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), *aff'd*, 362 N.C. 328, 661 S.E.2d 728 (2008).

Where a plaintiff cannot demonstrate membership in a suspect class or implication of a fundamental right, the defendant must merely show that the law bears a rational relationship to a valid governmental interest. The rational basis standard of review applies to claims - like the present one - relating to the application of the CON laws. *See Good Hope Hosp., Inc. v. North Carolina Dep't of Health and Human Services*, 174 N.C. App. 266, 274-75, 620 S.E.2d 873, 881 (2005) (applying rational basis review to claim by hospital joint venture alleging that DHHS' failure to exempt proposed facility from CON laws violated Constitution).

Under the rational basis test, a law must be upheld "if it bears some rational relationship to a conceivable legitimate interest of government." *Affordable Care*, 153 N.C. App. at 535-36, 571 S.E.2d at 59. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004) ("[A]s long as there could be some rational basis for enacting [the statute at issue], this Court may not invoke [principles of due process] to disturb the statute.") (citation omitted).

In applying this standard, it is clear that the method in which the SMFP is created and approved does not violate Plaintiffs' substantive due process rights as this process easily passes muster under the rational basis test. The SHCC consists of a group of highly qualified professionals located throughout the State who possess significant expertise on health care issues in North Carolina. The State has attached hereto as Ex. A a copy of Governor Easley's Executive Order

No. 139 - which is the most recent executive order on this subject and which sets out the many diverse areas within the North Carolina health care and business communities from which the members of the SHCC are to be drawn. (See Ex. A at 2) The State has also attached as Ex. B pertinent provisions from the 2008 SMFP which attest to the geographic diversity within North Carolina represented by the members of the SHCC. (See Ex. B at 4)

Pursuant to this process, the SHCC, assisted by DHHS, utilizes its expertise by gathering, processing, and summarizing the relevant data each year regarding health care needs in North Carolina and then - applying appropriate methodology - it arrives at the need determinations for health services which are set out in a recommended SMFP (following numerous opportunities for the public to provide its input). At that point, the Chief Executive of North Carolina receives the benefit of the SHCC's recommendations and reviews them to ensure that the proposed SMFP is consistent with the State's health policies and goals. See *Frye*, 350 N.C. at 43-44, 510 S.E.2d at 162-63.

There is nothing irrational about the Legislature's decision that the SMFP should be created in this manner. Nor does it "shock the conscience." To the contrary, it serves as an eminently logical mechanism to effectuate the legislative policy goals set out in the CON laws. See N.C. GEN. STAT. § 131E-175. It further serves to eliminate the sort of *ad hoc* need determinations that would have to be made absent the issuance of an annual SMFP - which would subvert the need for consistency that is inherent in the CON process.

Moreover, Plaintiffs cannot seriously deny the rationality of the SMFP process in light of the decision in *Frye*. The Supreme Court's opinion in that case clearly reveals its recognition of the sound policy reasons supporting the SMFP process. *Frye*, 350 N.C. at 43-44, 510 S.E.2d at 162-63.

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

Finally, Plaintiffs allege that they have been denied access to the courts in violation of Article I, Section 18 of the North Carolina Constitution. This claim is also meritless.

Article I, Section 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. Plaintiffs are unable to show that the CON process has deprived them of any rights guaranteed under this section of the Constitution.

There are a number of procedures by which judicial review may be obtained over CON-related actions. First, a party may challenge the denial of its application for a CON by initiating a contested case proceeding in the Office of Administrative Hearings and may then seek judicial review in the Court of Appeals of a final agency decision upholding the denial. *See* N.C. GEN. STAT. § 131E-188. Second, a party may seek review in superior court pursuant to N.C. GEN. STAT. § 150B-43 of the agency's denial of its request for declaratory relief.<sup>7</sup> Third, a party may obtain judicial review in superior court of DHHS' failure to grant its petition to adopt, amend or repeal a rule under N.C. GEN. STAT. § 150B-20(d) and N.C. GEN. STAT. § 150B-43.

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<sup>7</sup> Hope-A is clearly aware of its ability to seek declaratory relief through the above-referenced process. Attached hereto as Ex. H is a petition for judicial review which it filed challenging DHHS' denial of Hope-A's request for a declaratory ruling pursuant to N.C. GEN. STAT. § 150B-4 allowing it to acquire the same equipment referenced in its present Amended Complaint. As Ex. H shows, Hope-A did in fact receive judicial review from the Wake County Superior Court regarding its petition. This serves as an apt example of an instance in which a party can seek review of a CON-related decision in a court of law.

To the extent that Plaintiffs are basing this claim on the fact that no direct means of obtaining judicial review exists regarding the Governor's approval of the SMFP, Plaintiffs misunderstand Article I, § 18. 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.* [T]he 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).

In the present case, the General Assembly has lawfully exercised its policymaking authority by opting not to provide a means of direct appeal from the Governor's approval of the SMFP. In so doing, it has not run afoul of Article I, Section 18.

#### CONCLUSION

Despite having previously benefitted from the CON laws, Plaintiffs now profess to harbor constitutional concerns about the CON process - simply because the need determinations contained in the 2008 SMFP are adverse to their financial interests. However, their newly found disapproval of the manner in which the SMFP is created falls far short of showing that their constitutional rights have been violated.

Having failed to make the case that a genuine health care need exists for the equipment and facilities they wish to acquire, they now ask this Court to "overrule" a reasoned legislative policy decision as to the manner in which the SMFP is to be created. Such a request is clearly improper.

— *Arnold*, 147 N.C. App. 670, 673, 557 S.E.2d 119, 121 (2001) (“It is critical to our system and the expectation of our citizens that the courts not assume the role of legislatures have not been entrusted by the people of this State to be legislators.”), *aff’d per curiam*, 353 N.C. 1, 569 S.E.2d 648 (2002).

The SMFP process is fully constitutional. Moreover, it has been 22 years since the General Assembly put in place the mechanism for creating the SMFP that is currently in effect. It has been since the Supreme Court in *Frye* addressed this process - raising no constitutional concerns

As such, this procedure is well-entrenched in North Carolina and has been thoroughly by both the legislative and judicial branches.

sum, the General Assembly’s policy decisions at issue in this case lie well within the realm, are constitutional in all respects, and are, therefore, entitled to deference.

Plaintiffs are estopped from challenging the application of the CON laws as to them given have previously benefitted from those laws. Based on the foregoing, the State respectfully

that its Motion to Dismiss should be granted.