

NORTH CAROLINA COURT OF APPEALS

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

Plaintiffs-Appellants, )

v. )

From Wake County

STATE OF NORTH CAROLINA; )  
BEVERLY EAVES PERDUE, Governor of )  
the State of North Carolina, in her official )  
capacity; NORTH CAROLINA )  
DEPARTMENT OF HEALTH AND )  
HUMAN SERVICES; LANIER M. )  
CANSLER, 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-Appellees. )

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**DEFENDANTS-APPELLEES’ BRIEF**

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DEPARTMENT OF HEALTH AND )  
HUMAN SERVICES; LANIER M. )  
CANSLER, 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-Appellees. )

**QUESTION PRESENTED**

- I. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THAT THE CREATION AND UTILIZATION OF THE 2008 STATE MEDICAL FACILITIES PLAN WAS CONSTITUTIONAL AS APPLIED TO PLAINTIFFS SUCH THAT THE GRANTING OF DEFENDANTS-APPELLEES' MOTION FOR JUDGMENT ON THE PLEADINGS WAS PROPER.**

**STATEMENT OF THE FACTS**

Plaintiffs are two medical practices providing health care services within North Carolina. They seek to acquire certain types of medical equipment and facilities that are subject to the State's certificate of need (hereafter "CON") laws. Plaintiffs contend that they have been rendered ineligible to receive CONs authorizing these proposed items because no need for them was found in the 2008 State Medical Facilities Plan (hereafter "SMFP"). Plaintiffs assert that being subjected to the need determinations in the 2008 SMFP has violated their constitutional rights. (R pp. 100-18)

**ARGUMENT**

**I. INTRODUCTION.**

For the past thirty years, North Carolina's health care system has operated under the CON laws currently codified as N.C.G.S. § 131E-175 *et seq.* A fundamental component of that system has been the annual promulgation of an SMFP

that articulates a determinative set of need determinations for health care services in North Carolina for that calendar year. The manner in which the SMFP is presently prepared and utilized has remained essentially unchanged for the past eighteen years.

Plaintiffs are both long-time health care providers in this State who have operated under the CON laws for years. Only now – based on their disagreement with two specific need determinations in the 2008 SMFP – have they filed the present lawsuit, claiming that the utilization of the SMFP in awarding CONs operates unconstitutionally (albeit solely as applied to them).

What Plaintiffs refer to in their brief as an “unholy convergence of circumstances” is, in actuality, a carefully thought out legislative process that serves to ensure the receipt of adequate health care services in a timely fashion by all citizens of this State, wherever located. Stripped of their rhetoric, Plaintiffs’ arguments ultimately amount to nothing more than *policy* arguments – which are appropriately addressed in the Legislative Branch rather than the Judicial Branch.

Having failed to make the case during the open public process for development of the 2008 SMFP that a genuine health care need exists for the specific equipment and facilities they wish to acquire, Plaintiffs now ask this Court to “overrule” a reasoned legislative policy decision as to the manner in which the SMFP is to be created and used. Such a request is clearly improper.

## **II. 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. N.C. Dep't of Human Res., Div. of Facility Servs.*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986). Pursuant to this statutory process, the SMFP is issued each year for the purpose of determining the need for various health care services across the State. *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 50, 625 S.E.2d 837, 840 (2006). See N.C.G.S. §131E-176(25).

In conjunction with the North Carolina Department of Health and Human Services (hereafter "DHHS"), an advisory body called the State Health Coordinating Council (hereafter "the SHCC") – referred to in Plaintiffs' brief as "the Council" – annually prepares a recommended SMFP for review by the Governor who is charged with authority over the final composition of the 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.G.S. §§131E-176(17) and (25); R pp. 119-20, 123-26). (App. 1) 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.

During the drafting process, a lengthy period of public hearings and public comment takes place. *See* N.C.G.S. § 131E-176(25). Once the Governor exercises her authority to issue the final SMFP, DHHS reviews CON applications and decides which of them should be approved based on the applicable review criteria. *See Living Centers-Southeast, Inc. v. N.C. Dep't of Health & Human Servs.*, 138 N.C. App. 572, 574-75, 532 S.E.2d 192, 194 (2000); N.C.G.S. § 131E-177(6); N.C.G.S. § 131E-183(a).

### **III. PLAINTIFFS HAVE NOT SUFFERED A CONSTITUTIONAL VIOLATION ARISING FROM THE CREATION AND UTILIZATION OF THE 2008 SMFP.**

There are two key legal principles governing this Court's review of Plaintiffs' constitutional claims. First, Plaintiffs' pleadings repeatedly make clear they are bringing this action solely on an "as-applied" basis. (R pp. 114-15, 117) This means that they are challenging the 2008 SMFP process *only as it has affected Plaintiffs themselves*. *See Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999) ("[A]n as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act[.]").

Second, in order to prevail, Plaintiffs must overcome the presumption of constitutionality accorded to laws enacted by the General Assembly. 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).

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 v. State*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987).

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

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

Our Supreme Court has made clear that a delegation of authority by the General Assembly is permissible where the Legislature has issued guiding standards attendant to the exercise of the delegated power. In *State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980), our Supreme Court noted North Carolina’s embrace of the modern tendency toward liberalism in upholding legislative delegations of power requiring the exercise of discretion. The Court ruled that the complex problems in our society “have led to judicial approval of broad standards for administrative action. *Detailed standards are not required . . .*” *Id.* at 402, 269 S.E.2d at 563 (emphasis added).

In accordance with this permissive view of delegation, North Carolina courts have upheld legislative delegations of power in a wide variety of different contexts. *See, e.g., Town of Spruce Pine v. Avery County*, 346 N.C. 787, 488 S.E.2d 144 (1997) (rulemaking power regarding management of watersheds); *State ex rel. Utilities Comm’n v. Carolina Util. Customers Ass’n*, 336 N.C. 657, 446 S.E.2d 332 (1994) (establishment of natural gas expansion fund); *In re Appeal from Civil Penalty*

*Assessed for Violations of Sedimentation Pollution Control Act etc.*, 324 N.C. 373, 379 S.E.2d 30 (1989) (assessment of civil penalties for violations of Sedimentation Pollution Control Act); *Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 569 S.E.2d 287, *disc. rev. denied and cert. denied*, 356 N.C. 612, 574 S.E.2d 679 (2002) (power to suspend licenses of psychologists); *Bowens v. Board of Law Exam'rs*, 57 N.C. App. 78, 291 S.E.2d 170 (1982) (evaluation of applicants seeking to practice law); *Orange County v. N.C. Dep't of Transp.*, 46 N.C. App. 350, 265 S.E.2d 890 (1980) (planning and construction of interstate highway); *Fowler v. Williamson*, 39 N.C. App. 715, 251 S.E.2d 889 (1979) (power to make rules regarding public school system).

When determining whether adequate legislative guidelines exist, the General Assembly's own declarations constitute the primary source of guidance from the Legislature as to the policies that are to be utilized by the recipient of the delegation. *Bring v. N.C. State Bar*, 348 N.C. 655, 658, 501 S.E.2d 907, 909 (1998). These declarations must only be as specific as is permitted under the existing circumstances. *Id.* The General Assembly is not required to articulate a detailed response to every scenario that may be encountered in carrying out the delegation. *In re Guess*, 327 N.C. 46, 53, 393 S.E.2d 833, 837 (1990), *cert. denied*, 498 U.S. 1047, 112 L. Ed. 2d 774 (1991).

The creation of the SMFP is guided by the numerous legislative policies set out in N.C.G.S. § 131E-175. These guiding standards fully explain the legislative intent which underlies the CON laws and articulate the types of considerations that must be taken into account in drafting the SMFP.

Among these policy declarations are the following: (a) a desire to offset the spiraling cost of health care services which jeopardizes the health and welfare of North Carolina's citizens; (b) a fear of inevitable disparities in the geographical access to health care services throughout North Carolina if pure free market principles are allowed to govern the placement of medical facilities and services; (c) a recognition of the need for review and evaluation of the cost, need, accessibility, quality, and feasibility of proposed medical services before such services are offered; (d) an understanding of the critical necessity for access to health care in rural communities and a mandate to consider the needs of such communities; (e) a desire to avoid the proliferation of health care services that are unnecessary and serve only to engender the underuse of facilities and the expensive duplication of services; and (f) a recognition of the large economic burden placed on the public as a result of excess capacity in health care facilities and the concomitant need to prevent underutilization. N.C.G.S. § 131E-175(1)-(12).

The General Assembly has also set out detailed explanations as to the types of equipment, services, and facilities to be encompassed by the CON laws as well as a listing of the items to be exempted from mandatory CON review. *See* N.C.G.S. §§ 131E-176(16); 131E-178; 131E-184. Finally, the General Assembly has articulated how the SMFP is to be prepared, outlining the respective roles of the persons and entities charged with participating in the process as well as mandating a notice and comment process for interested parties. *See* N.C.G.S. § 131E-176(25).

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

This Court disagreed, holding that the Legislature had provided a sufficient guiding standard - “whether public convenience and necessity requires the construction of the proposed facility.” *Id.* at 274, 435 S.E.2d at 557. The court also

ruled that the decision whether to grant or deny a CPCN was also guided by a statute setting out ten state policies regarding this subject. For these reasons, the court concluded that no unlawful delegation had occurred. *Id.*

Thus, North Carolina law rejects the narrow view of delegation advocated here by Plaintiffs. *See Farber*, 153 N.C. App. at 20, 569 S.E.2d at 301 (Legislature can simply provide general policies and standards and allow recipient of delegation to apply legislative goals where expertise is called for). *See also Guess*, 327 N.C. at 54, 393 S.E.2d at 837-38 (the phrase “standards of acceptable and prevailing medical practice” constituted sufficient guiding standard to board of medical examiners in determining whether disciplinary action against physician was warranted); *In re Willis*, 288 N.C. 1, 15, 215 S.E.2d 771, 779-80 (delegation of authority to board of law examiners to determine whether bar candidates possessed “good moral character” was lawful), *appeal dismissed*, 423 U.S. 976, 46 L. Ed. 2d 300 (1975).

Inexplicably, Plaintiffs’ brief does not even mention the legislative declarations in N.C.G.S. § 131E-175. Moreover, Plaintiffs’ assertion that the General Assembly has failed to provide any procedural safeguards is erroneous. North Carolina General Statute § 150B-2(8a)k expressly contains the safeguard of requiring the North Carolina Rules Review Commission to ensure that the public notice and hearing

provisions of section § 131E-176(25) have been followed in connection with the SMFP process.

Thus, the statement in Plaintiffs' brief accusing the General Assembly of failing to provide "any meaningful or helpful guidance" regarding the SMFP (Pl. Br. at 14) is demonstrably false. Pursuant to the guidelines enunciated by the General Assembly, the SMFP is created each year in a reasoned manner which concentrates on evaluations of need, cost-effectiveness, lack of geographical disparities, avoidance of the proliferation of duplicative facilities, and increased access to historically underserved segments of the population.

Plaintiffs would presumably require the General Assembly to engage in the arduous task of collecting voluminous data and enacting comprehensive, fact-intensive statutes setting out detailed methodologies for making need determinations statewide with regard to each type of medical service and equipment encompassed by the SMFP. However, it is neither feasible for the General Assembly to embark on such an undertaking nor logical to suggest that it be required to engage in such complex and technical managing of health care issues.

The propriety of the General Assembly's delegation of authority to make determinations regarding the need for health care services was recognized over fifty years ago by our Supreme Court. In *Williamson v. Snow*, 239 N.C. 493, 80 S.E.2d

262 (1954), the plaintiff challenged the constitutionality of a statute authorizing a state agency to create a hospital district. The Supreme Court rejected the claim, holding that “to clothe the [agency] with the power to hear and determine whether a hospital is needed in a particular area and whether it is advisable to create a hospital district in the manner prescribed and authorized by [the statute] in order to meet such need, is not an unlawful delegation of legislative power, and we so hold.” *Id.* at 497, 80 S.E.2d at 265. This is the same type of power at issue in the present case.

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

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

*Id.* at 477, 204 S.E.2d at 870. The same logic applies here.

As our Supreme Court has noted, “[t]he legislative process would be completely frustrated if that body were required to appraise beforehand the myriad situations to which it wished a particular policy to be applied and to formulate specific rules for each situation. Clearly, then, we must expect the Legislature to legislate only so far as is reasonable and practical to do . . . .” *State ex rel. Comm’r of Ins.*, 300 N.C. at 402, 269 S.E.2d at 563.

Almost all of the cases invalidating delegations relied upon by Plaintiffs were handed down before 1975 and fail to reflect the more liberal approach of more recent years toward upholding legislative delegations. Moreover, those cases primarily involve instances in which virtually no guidance whatsoever was provided by the General Assembly in connection with a delegation of authority. *See, e.g., Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990) (statute gave clerk of court unfettered discretion as to whether governing board should be elected or appointed); *State v. Williams*, 253 N.C. 337, 346, 117 S.E.2d 444, 450-51 (1960) (law required solicitor of students for out-of-state private schools to obtain license from state board of education but set out no standards for board in evaluating fitness of solicitor or for reviewing practices of school); *Harvell v. Scheidt*, 249 N.C. 699, 706, 107 S.E.2d 549, 554 (1959) (statute lacked fixed standards for commissioner of motor vehicles to determine whether

driver was “habitual violator of the traffic laws”); *State ex rel. Taylor v. Carolina Racing Ass’n*, 241 N.C. 80, 95, 84 S.E.2d 390, 401 (1954) (“[T]he General Assembly cannot constitutionally provide that the qualified voters in one governmental unit . . . shall decide whether a statute shall be in force and effect elsewhere than in the territory comprising that particular governmental unit.”); *Kinston Tobacco Bd. of Trade v. Liggett & Myers Tobacco Co.*, 235 N.C. 737, 71 S.E.2d 21 (statute regulating sale of leaf tobacco contained no standards by which number of sales could be determined), *cert. denied*, 344 U.S. 866, 97 L. Ed. 671 (1952); *State v. Tenant*, 110 N.C. 609, 618, 14 S.E. 387, 390 (1892) (ordinance conferred complete discretion on town aldermen to refuse building permit application); *Revco Southeast Drug Centers, Inc. v. N.C. Bd. of Pharmacy*, 21 N.C. App. 156, 160-61, 204 S.E.2d 38, 40 (1974) (law conferring authority on pharmacy board to formulate code of professional conduct for practice of pharmacy failed to contain adequate guidelines).

Moreover, in several of the cases Plaintiffs cite in their brief, the delegations at issue were upheld as lawful. *See Adams v. N.C. Dep’t of Natural & Econ. Res.*, 295 N.C. 683, 249 S.E.2d 402 (1978); *In re Appeal of Broad & Gales Creek Cmty. Ass’n*, 300 N.C. 267, 266 S.E.2d 645 (1980); *Farlow v. N.C. State Bd. of Chiropractic Examiners*, 76 N.C. App. 202, 332 S.E.2d 696, *disc. rev. denied and appeal dismissed*, 314 N.C. 664, 336 S.E.2d 621 (1985).

**2. The Role Played by the SHCC Regarding the SMFP Is Merely Advisory.**

Plaintiffs devote much of their brief to the issue of whether a delegation of legislative authority to the SHCC would be lawful. However, their arguments are fundamentally flawed by the fact that the SHCC is merely an advisory body that has no final authority over the contents of the SMFP. As such, no final legislative authority has been delegated to it.

The purely advisory role played by the SHCC in the SMFP process was recognized by our Supreme Court in *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 510 S.E.2d 159 (1999). Based on its careful review of the applicable statutes, the Court determined that the SHCC's role was an advisory one, noting 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 43-44, 510 S.E.2d at 162-63. As such, the Court concluded that the Governor has the power to make any substantive changes she wishes with regard to the proposed SMFP submitted by the SHCC. *Id.* at 46-47, 510 S.E.2d at 164.

Plaintiffs litter their brief with inaccurate statements such as the assertion that the SHCC and its members "wield extraordinary power." (Pl. Br. at 11). *Frye* unambiguously demonstrates the falsity of such assertions. Moreover, Plaintiffs'

assertion that *Frye* “offers little useful guidance” to the present case is simply wrong; in actuality, *Frye* completely undercuts their arguments on this issue.

Plaintiffs’ contentions regarding the SHCC also fail for additional reasons. Plaintiffs assert that the potential existed for bias on the part of certain unnamed members of the SHCC in their recommendations to the Governor regarding the contents of the 2008 SMFP. Notably, however, Plaintiffs have *not* alleged that any specific SHCC members (1) actually made a recommendation regarding the 2008 SMFP intended to benefit themselves; (2) actually made a recommendation adverse to Plaintiffs’ interests; or (3) were even competitors of Plaintiffs. Given the as-applied nature of this action, these omissions are fatal to their claim. Furthermore, they have also failed to allege specific inaccuracies in the development or application of the methodologies used in the final 2008 SMFP.

Not surprisingly, Plaintiffs have also failed to cite any North Carolina case law for the proposition that the mere potential for bias by members of an advisory board constitutes an unconstitutional legislative delegation. Even more fundamentally, however, they are unable to cite any cases for the proposition that it is even possible for the work of a purely advisory board to constitute a “delegation” at all.

With regard to Plaintiffs’ arguments concerning the SHCC’s composition, it is worth noting that Executive Order No. 139 lists approximately fifteen separate

disciplines from which the SHCC's 29 members are to be drawn. These include segments of the health care, business, and academic communities and ensure the presence on the council of a wide array of viewpoints and specific areas of expertise. (R p. 120) Moreover, the geographic composition of the SHCC's members stretches from the mountains to the coast. (*Id.* at 123-26) The result is an advisory body possessing clear diversity both in areas of expertise and in geographical residence.

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

Plaintiffs also argue that a delegation of legislative power cannot be given to private citizens. However, once again, no actual delegation has been made to the SHCC because final authority for the SMFP always remains with the Governor. Accordingly, the cases cited by Plaintiffs which do, conversely, involve actual delegations of power to private parties are inapposite here. *See Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974) (portions of North Carolina's Fair Trade Act delegated legislative power to private corporation regarding setting of prices for certain commodities); *Wilcher v. Sharpe*,

236 N.C. 308, 72 S.E.2d 662 (1952) (town ordinance delegated legislative power to private parties by prohibiting erection of gin or mill without consent of neighboring property owners).

Finally, while Plaintiffs appear to be arguing that the SHCC's exemption from the State Government Ethics Act (hereafter "Ethics Act") at the time the 2008 SMFP was being discussed somehow gave rise to an unlawful delegation, this contention likewise lacks merit. The Ethics Act and the Ethics Commission have only existed since 2006 while the SHCC has been in existence since 1976. It is unclear how the lawful creation of an advisory council could - after thirty years - suddenly become unlawful simply because of the subsequent unrelated enactment of an ethics law and the accompanying creation of a commission charged with enforcing it.

**B. PLAINTIFFS HAVE NOT BEEN DENIED DUE PROCESS.**

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. rev. denied*, 300 N.C. 174, 625 S.E.2d 785 (2005) (internal quotation marks omitted).<sup>1</sup> This Court has recently noted the reluctance of modern courts "to expand

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<sup>1</sup> While Plaintiffs' brief makes passing reference to *procedural* due process, their brief does not even purport to make an actual procedural due process argument. This is not surprising since by providing for *seven* public hearings, *see* N.C.G.S.

the concept of substantive due process because guideposts . . . in this uncharted area are scarce and open-ended, and courts run the risk of turning the due process clause into a personal preference policy instrument for judges.” *Standley v. Town of Woodfin*, 186 N.C. App. 134, 136, 650 S.E.2d 618, 621 (2007) (internal quotation marks and citation omitted), *aff’d*, 362 N.C. 328, 661 S.E.2d 728 (2008).

The rational basis standard of review applies to claims - like the present one - relating to the CON laws. *See Good Hope Hosp., Inc. v. N.C. Dep’t of Health & Human Servs., Div. of Facility Servs.*, 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), *dis. rev. denied and cert. denied*, 360 N.C. 480, 632 S.E.2d 172, *aff’d*, 360 N.C. 641, 636 S.E.2d 564 (2006). *See also Affordable Care, Inc. v. N.C. State Bd. of Dental Exam’rs*, 153 N.C. App. 527, 537, 571 S.E.2d 52, 60 (2002) (“The courts of this State have more recently emphasized that economic rules and regulations do not affect a fundamental right for purposes of due process . . .”) (citing cases).

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§ 131E-176(25), the General Assembly has far exceeded any procedural due process requirements that may apply to the SMFP process. *See Affordable Care, Inc. v. N.C. State Bd. of Dental Exam’rs*, 153 N.C. App. 527, 541-42, 571 S.E.2d 52, 62-63 (2002).

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 536, 535-36, 571 S.E.2d at 59 (internal quotation marks omitted). Our Supreme Court has held that “the relationship need not be a perfect one” and that the General Assembly “need only have had a reasonable basis for concluding that the measures taken would assist in the accomplishment of the goal.” *State ex rel. Utilities Comm’n v. Carolina Util. Customers Ass’n*, 336 N.C. at 682, 681-82, 446 S.E.2d at 346.

In applying this standard, it is clear that the creation and utilization of the SMFP has not violated Plaintiffs’ substantive due process rights. As shown above, 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. 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 - prepares a set of recommended need determinations for health care services after numerous opportunities for public input. At that point, the Chief Executive of North Carolina receives the benefit of the SHCC’s recommendations and then adopts a final SMFP, which is then used by DHHS in reviewing CON applications.

There is certainly nothing irrational about the Legislature's adoption of this procedure. Nor does it "shock the conscience." To the contrary, this process serves as an eminently logical mechanism to effectuate the legislative policy goals set out in the CON laws by striving to ensure a fair geographical allocation of health services statewide based on demonstrated empirical need.

**1. The General Assembly's Enactment of Criterion 1 Has Not Violated Plaintiffs' Substantive Due Process Rights.**

Just as the General Assembly had the lawful authority to establish CON laws in the first place, it likewise possessed the authority to enact criteria governing when a CON application should be granted. These criteria are set out in N.C.G.S. § 131E-183(a), and the first of these criteria (hereafter "Criterion 1") provides that a proposed project must be consistent with the need determinations contained in the SMFP in order to be approved. *See* N.C.G.S. § 131E-183(a)(1). Criterion 1 constitutes a rational policy choice well within the Legislature's discretion; by making the need determinations in the SMFP a determinative limit for approvals, the General Assembly has utilized the most efficient mechanism for facilitating decisions based on need.

Plaintiffs attack Criterion 1 by claiming that the State cannot require a provider to obtain a CON before developing a new medical service yet simultaneously impose

a plan ensuring that its CON application will be rejected. However, this argument is obviously specious. The SMFP process does not exist to ensure that applications will be rejected; rather, it is designed to use appropriate methodology and a systematic procedure to ensure that a need actually exists for a particular service in a given area before a CON is issued.

Plaintiffs have made clear that they are *not* challenging in this lawsuit the General Assembly's ability to enact CON laws as a whole. Logically, therefore, if the Legislature has the authority to implement such a statutory approach that is, by definition, premised upon making health care services available based on *need*, it likewise possesses the concomitant lesser power of establishing an SMFP process that serves to (1) determine what those needs are; and (2) treat those need determinations as determinative for that calendar year.

What Plaintiffs are actually arguing is that the substantive due process doctrine requires an *ad hoc* case-by-case evaluation of need in lieu of the SMFP process enacted by the General Assembly. This makes no sense. If the Legislature can constitutionally make need a determining factor regarding the allocation of health care services (which it certainly is allowed to do), then it likewise has the authority to implement a uniform method intended to calculate that need.

An applicant will receive a CON if its proposed project (1) is consistent with that year's SMFP; (2) satisfies all the other criteria set out in N.C.G.S. § 131E-183(a) (along with applicable administrative rules); and (3) is determined, in a competitive review process, to be a more effective alternative than the proposed projects of competing applicants (who, of course, must likewise satisfy Criterion 1 and the other review criteria). Conversely, if no demonstrated need has been found to exist for the applicant's project in that year's SMFP, Criterion 1 will not be satisfied and the application will be denied.<sup>2</sup>

These are the rules that apply to *all* health care providers - not just to Plaintiffs. Neither Plaintiffs nor any other applicant have a constitutional right to have every one of their CON applications approved - particularly where, over the course of numerous public hearings, they have failed to persuasively show a need for the project.<sup>3</sup>

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<sup>2</sup> Some projects exist - such as, for example, the relocation of existing beds - for which there are no projections of need in the SMFP. (App. 7) For such projects, there simply are no need determinations to be deemed determinative pursuant to Criterion 1.

<sup>3</sup> Plaintiffs' argument that Criterion 1 is "unnecessary" (Pl. Br. at 32) because of the existence of the additional criteria in N.C.G.S. § 131E-183(a) fails for two reasons. First, the "necessity" (or desirability) of Criterion 1 is for the General Assembly (rather than Plaintiffs) to decide. Second, the criteria set out in § 131E-183(a) all work together harmoniously to accomplish the goal of obtaining a fair distribution of health care services statewide. The SMFP's need determinations (which are made determinative via Criterion 1) establish at a "macro" level the health care needs in North Carolina for a given year. DHHS then applies the remaining

**2. *In re Certificate of Need for Aston Park Hosp. Has Been Rendered Moot by the Enactment of the Current CON Laws.***

While conceding in their brief that “the instant appeal does not address the same specific issue raised in [*In re Certificate of Need for*] *Aston Park*” (Pl. Br. at 29), Plaintiffs nevertheless attempt to rely on portions of that case. *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973). However, their reliance is misplaced.

In *Aston Park*, the predecessor statutes to the current set of CON Laws were invalidated thirty-six years ago. The court’s concern arose from the absence in the prior CON statutes (which were merely two pages long) of an adequate showing of the relationship between the goal of promoting the health and welfare of North Carolina’s citizens and the means of requiring a CON for the development of new medical facilities.

Conversely, as shown below, the current CON laws contain extensive legislative findings which set out, in full, both (1) the policies underlying these laws; and (2) the manner in which these statutes serve to further the legislative goal of ensuring equal access to timely and affordable health care for all citizens of North

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review criteria set out in N.C.G.S. § 131E-183(a) in reviewing the contents of individual CON applications to determine at a “micro” level which applications satisfy all criteria and best address the needs of the population proposed to be served in a particular area.

Carolina. As such, the General Assembly has cured the deficiency noted in *Aston Park*.

Indeed, this Court has expressly noted the mootness of *Aston Park* in light of the General Assembly's enactment of the current CON laws. *See State ex rel. Utilities Comm'n v. Empire Power Co.*, 112 N.C. App. at 275, 435 S.E.2d at 558 (stating that after *Aston Park* was decided, "the legislature repealed the statute on which the case was based and enacted N.C.G.S. §§ 131E-175 to -190, which . . . rendered moot the holding of [*Aston Park*].") (emphasis added).<sup>4</sup>

In the current CON laws, the General Assembly has carefully set out numerous legislative findings which clearly explain the goals sought to be addressed by these statutes and the manner in which those goals are actively furthered by the process contained therein. These findings may be summarized in pertinent part as follows:

(a) the manner in which health care is financed renders the free market system ineffective such that some form of governmental regulation is required in order to

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<sup>4</sup> It is also worth noting that the *Aston Park* court relied, in part, on a 1937 decision from the United States Supreme Court - *New State Ice Co. v. Liebmann*, 285 U.S. 262, 76 L. Ed. 747 (1932) - which has been judicially noted to have been "handed down during the era when the now long-discarded doctrine of substantive due process in the economic field was still in ascendance." *Colorado Springs Amusements, Ltd. v. Rizzo*, 524 F.2d 571, 576 (3<sup>d</sup> Cir. 1975), *cert. denied*, 428 U.S. 913, 79 L. Ed. 2d 1222 (1976); *see Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735.

impose a measure of control on the costs, distribution, and utilization of new health services (N.C.G.S. § 131E-175(1)); (b) the health and welfare of citizens in this State are threatened by spiraling health care costs which impede their assurance of receiving the timely provision of affordable health care (N.C.G.S. § 131E-175(2)); (c) market principles - if allowed free rein - would lead to a geographical disparity in access to health care services in which population groups historically lacking access to medical care would remain underserved (N.C.G.S. § 131E-175(3)); (d) satisfying the health care needs of persons in rural communities is vital to their welfare such that those persons' access to medical care should be taken into account in the CON process (N.C.G.S. § 131E-175(3a)); (e) costly duplication and underuse of health care facilities is a consequence of the buildup of unnecessary medical facilities (N.C.G.S. § 131E-175(4)); (f) a large economic burden (funded by North Carolina's citizens in their capacities as patients, health insurance subscribers, health insurance plan participants, and taxpayers) is created by excess capacity for health services (N.C.G.S. § 131E-175(6)); and (g) the health and welfare of North Carolina's citizens require that new institutional health services be made subject to an evaluation and review process focusing on factors such as cost, need, accessibility, quality, feasibility, and other similar criteria in order to ensure the efficient allocation of health care services (N.C.G.S. § 131E-175(7)).

These legislative findings fully explain the intent behind the CON Laws and aptly demonstrate the rational basis for the means employed therein. This Court has likewise acknowledged the policy rationale behind the CON laws, noting that these laws reflect the General Assembly's determination that "the forces of free market competition are largely absent in health care and government regulation is therefore necessary to control the cost, utilization, and distribution of health services and to assure that the less costly and more effective alternatives are made available." *In re Denial of Request by Humana Hosp. Corp. etc.*, 78 N.C. App. 637, 646, 338 S.E.2d 139, 145 (1986).

In order to achieve these goals, the General Assembly provided for the creation of an annual SMFP, which includes need determinations for the categories of health care services and facilities enumerated therein. For these same reasons, the Legislature has mandated that DHHS not award a CON for a project which is inconsistent with the applicable need determinations contained in the SMFP for that calendar year. *See* N.C.G.S. § 131E-183(a)(1). As a result, a coherent and unified approach to health services planning exists statewide - one which the General Assembly has determined is consistent with the public policy of this State.

It is difficult to imagine what more in the way of legislative findings Plaintiffs would have the General Assembly enact. Clearly, the findings articulated by the

General Assembly serve to (1) comprehensively set out the goals of the CON Laws (improved access to affordable health care by all North Carolina citizens, including those persons and regions historically underserved, and the elimination of duplicative services which undermine that result); and (2) explain the manner in which these laws are designed to further those goals (by establishing a process which ensures that health care services will be allocated throughout the State based on need - rather than based on profit motive or other considerations unrelated to need).

While Plaintiffs cite *Hartford Accident & Indem. Co. v. Ingram*, 290 N.C. 457, 226 S.E.2d 498 (1976) and *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 90 L. Ed. 108 (1945), neither case is even remotely relevant here. The issue in *Hartford* was whether general liability insurers could be statutorily required to also offer medical malpractice insurance. *Ashbacker* was not even a constitutional case; rather, it concerned the FCC's statutory duty to hold comparative hearings when presented with bona fide and mutually exclusive license applications. Nor do the other cases Plaintiffs cite – *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 366 S.E.2d 697 (1988) and *A-S-P Assoc. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979) – support their argument as in both of those cases the legislative enactments at issue were upheld.

**3. The 2008 SMFP Process Has Not Barred Plaintiffs from Entering the Health Care Profession.**

Plaintiffs' brief also cites cases addressing laws preventing a person from engaging in a particular business. *See, e.g. State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1939) (analyzing statutory prohibition against entering dry cleaning profession without first having obtained license to do so). However, in the as-applied challenge they are asserting in the present lawsuit, Plaintiffs are not arguing that they have been denied the right to practice medicine.<sup>5</sup>

This lawsuit has nothing to do with Plaintiffs' right to engage in a profession. Rather, they are making the entirely separate claim that they should be allowed to utilize certain additional types of equipment and facilities in the course of their practice. What Plaintiffs actually seek is a special, and exclusive, entitlement to be free from the same need determinations that apply to their competitors. Indeed, Plaintiffs do not even pretend that they have been singled out in any way by the SMFP process. Their brief makes clear that, to the contrary, they simply do not like

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<sup>5</sup> Nor could they make such an argument as both Plaintiffs are well-entrenched members of North Carolina's health care community. Indeed, both have received CONs in the past such that they would be estopped from challenging the CON laws. (*See R pp. 618-19, 606-11*) It is somewhat ironic that they claim in their brief the SMFP process is biased in favor of "entrenched providers" given that this label applies equally to Plaintiffs.

being required to abide by the same rules as every other health care provider in North Carolina

4. **Plaintiffs Are Not Entitled to Have Their Public Policy Views Substituted for Those of the General Assembly.**

Plaintiffs' substantive due process argument is simply a policy disagreement masquerading as a constitutional challenge. As evidenced by their reliance on law review articles containing policy debates on the desirability of CON laws (Pl. Br. at 22 n.3), Plaintiffs seek to engage this Court in a referendum on the wisdom of the SMFP process.

However, the General Assembly has already engaged in this debate. As this Court has noted, "it is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures . . . [J]udges have not been entrusted by the people of this State to be legislators." *City of Asheville v. State*, 192 N.C. App. 1, 43-44, 665 S.E.2d 103, 133 (2008), *disc. rev. denied and appeal dismissed*, 363 N.C. 123 (2009). Thus, any "reconsideration" of the SMFP process must come from the General Assembly.

**C. THE APPLICATION OF THE CON LAWS TO PLAINTIFFS HAS NOT VIOLATED THEIR RIGHT OF ACCESS TO THE COURTS.**

Plaintiffs' claim that they have been unconstitutionally denied access to the courts reflects a misunderstanding of article I, section 18 of the North Carolina Constitution, which 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 (2009) (emphasis added). 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.*

*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).

Plaintiffs appear to be primarily arguing that the General Assembly was constitutionally required to allow for direct appeals under the Administrative Procedure Act (hereafter “APA”) of need determinations contained in the SMFP. Their argument is inconsistent with well-settled principles of North Carolina law.

1. **Because the SMFP Process Is a Creature of Statute, Any Appeal Rights Therefrom Are in the Sole Discretion of the General Assembly.**
  - a. **Plaintiffs lack a constitutional right to appeal the need determinations contained in the 2008 SMFP.**

The basic flaw in Plaintiffs' argument is that it incorrectly assumes the existence of a constitutional right to directly appeal every decision made pursuant to a statutory process. No such right exists.

Our Supreme Court has made clear that “[t]here is no inherent or inalienable right of appeal.” *Cox v. Kinston*, 217 N.C. 391, 396, 8 S.E.2d 252, 257 (1940). Rather, “[i]t is a privilege granted by statute.” *Id.*; see *In re Vandiford*, 56 N.C. App. 224, 227, 287 S.E.2d 912, 914 (1982) (ruling that no constitutional right to appeal or obtain judicial review exists over an administrative decision). See also *Empire Power Co. v. N.C. Dep’t of Env’t, Health & Natural Res.*, 337 N.C. 569, 586, 447 S.E.2d 768, 778 (1994) (citation omitted) (“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.”).

This principle is illustrated by this Court’s decision in *In re Vandiford*, 56 N.C. App. at 227, 287 S.E.2d at 914. In that case, the plaintiff attempted to appeal from

the Industrial Commission's denial of her petition for death benefits despite the fact that proceedings in the Industrial Commission were expressly exempted from the APA. This Court dismissed her appeal, ruling 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." *Id.* (emphasis added).

This Court further held in *Vandiford* that in addition to delegating to the Commission the authority to issue rules and regulations regarding the administration of claims, the General Assembly had made the Commission's determinations final – without the availability of judicial review. *Id.* at 226, 287 S.E.2d at 913-14. This Court concluded that the decision whether to allow for appellate review of such determinations was for the legislature, not the courts, to decide. *Id.* at 227, 287 S.E.2d at 914. The same is true with regard to the General Assembly's decision regarding the binding effect of the need determinations in the SMFP.

**b. There is no constitutional requirement that the SMFP process be subject to the APA.**

Nor is the exemption of the SMFP process from the APA unlawful. As an initial matter, it is important to note that the CON laws and the APA provide a number of procedures by which judicial review may be obtained over CON-related

decisions. *See, e.g.*, N.C.G.S. § 131E-188; N.C.G.S. § 150B-43; N.C.G.S. § 150B-20(d).

However, the APA is not all-encompassing. The General Assembly has explicitly exempted - in whole or in part - numerous items from the APA's scope (including many that bear no relation whatsoever to the CON laws). 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.G.S. § 150B-1(c)-(e). In addition, the University of North Carolina is exempt from the bulk of the APA. *See* N.C.G.S. § 150B-1(f).

The specific exemption relating to the SMFP is found in N.C.G.S. § 150B-2(8a) which contains eleven subparts referencing items that do not constitute a "rule" for purposes of the APA. One of these eleven - contained in subpart (k) - provides that the SMFP is not deemed to be a "rule" if it "has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the [Rules Review] Commission for compliance with G.S. 131E-176(25), and approved by the Governor." *See* N.C.G.S. § 150B-2(8a)k. Thus, the General Assembly has exercised its legislative discretion by choosing to exempt the SMFP (along with a number of other items) from APA rulemaking.

By Plaintiffs' logic, all eleven of these exemptions from APA rulemaking set out in § 150B-2(8a) would be unconstitutional as would the other examples of public processes that are exempted wholly or partially from the APA (as listed above). Obviously, this is not the case. Because the General Assembly was not constitutionally required to enact an APA at all, it certainly does not violate the Constitution for the Legislature to have exempted certain processes from the APA's scope.<sup>6</sup>

Moreover, it is also worth noting that this Court has previously refused to read an APA remedy into a statute conferring a power upon the Governor where such a remedy was not expressly mentioned therein. *See James v. Hunt*, 43 N.C. App. 109, 121, 120-21, 258 S.E.2d 481, 488 (1979) (APA did not apply to Governor's decision to suspend plaintiff from commission; "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."), *cert. denied*, 299 N.C. 121, 262 S.E.2d 6 (1980). Furthermore, our Supreme

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<sup>6</sup> Plaintiffs similarly complain about Title 10A N.C.A.C. 14C.0402, which provides that "[t]he correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing." However, for all of the reasons set forth herein, no constitutional right is implicated by this provision. Once again, the General Assembly is the sole arbiter as to which portions of the CON process are subject to review and which are not.

Court has upheld the Governor's exercise of a designated power where no appeal rights existed at all. *See State ex rel. Caldwell v. Wilson*, 121 N.C. 425, 472, 28 S.E. 554, 562 (1897) (Governor possessed power, by statute, to suspend railroad commissioners and his orderly exercise of that power was not reviewable by the courts).

Plaintiffs' disagreement with the Legislature's decision to exempt CON cases from the 2000 amendments to the APA similarly fails to invoke constitutional limits on the General Assembly's power. Just as the General Assembly possessed the discretion to exempt the SMFP process from the APA, it likewise had the authority to exempt CON cases from the 2000 amendments. In addition, Plaintiffs' argument on this subject is further undermined by the falsity of their belief that *de novo* - rather than "whole record" - review of an administrative decision is somehow constitutionally mandated in the CON context.

Even more basically, however, Plaintiffs' attempt to litigate the exemption for CON cases from the 2000 amendments is barred by their lack of standing. Given that this is an as-applied challenge, the failure of Plaintiffs to allege that they received a favorable ruling from an administrative law judge that was reversed by DHHS means they lack standing to bring a constitutional challenge to this exemption. *See State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984) (A court's

“jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.”).

**2. The General Assembly’s Decision Not to Make the Need Determinations in the SMFP Subject to the APA Rulemaking Process Was Rational.**

The General Assembly’s decision that the lengthy rulemaking process under the APA is inapplicable to the formulation of the SMFP was not only consistent with Article I, § 18 but was also logical. The General Assembly correctly realized that, in order to ensure continuity in the application review process, the need determinations in the SMFP must be protected from constant attack once they have been approved.

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 General Assembly’s approach recognizes that the health care industry is a rapidly changing one; constant transformations in the population and demographics throughout the State require flexibility in the formulation of need determinations.

Rulemaking under the APA - with its attendant review procedure - is a slow and cumbersome process that can take over eighteen months to complete.

If the SMFP were subject to direct challenge, the entire CON process would be in a constant state of upheaval. Amendments and additions to the SMFP mandated as a result of administrative challenges would prevent an orderly CON review process by DHHS and could easily conflict with prior decisions made by the agency. 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 contained therein. *See Frye*, 350 N.C. at 43, 510 S.E.2d at 162 (recognizing that Governor's role is to bring closure to SMFP process). Such a result would jeopardize the very benefits sought to be provided by the CON laws - the timely and efficient allocation of health care services throughout this State.

### **CONCLUSION**

Based on the foregoing, the trial court's ruling should be affirmed.

Respectfully submitted, this the 17<sup>th</sup> day of November, 2009.

ROY COOPER  
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Electronically submitted

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief (WordPerfect X3), the document does not exceed 8750 words, exclusive of cover, index, table of authorities, and certificate of compliance.

This the 17<sup>th</sup> day of November, 2009.

Electronically Submitted

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Special Deputy Attorney General

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this day served the foregoing **DEFENDANTS-APPELLEES' BRIEF** in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile transmittal;  
or
- Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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State of North Carolina  
EXECUTIVE DEPARTMENT



GOVERNOR JAMES E. HOLSHOUSER, JR.

EXECUTIVE ORDER NUMBER XIX

WHEREAS, the National Health Planning and Resource Development Act of 1974 (Public Law 93-641) amended the Public Health Service Act to provide for the development of a national health planning policy to augment State and area planning for health services, manpower and facilities; and

WHEREAS, the Department of Human Resources has been designated as the health planning and development agency for the State of North Carolina; and

WHEREAS, the designated State Health Planning and Development Agency is required to seek advice from a Statewide Health Coordinating Council pursuant to the provisions of Public Law 93-641; and

WHEREAS, state law does not provide for such an advisory body;

NOW, THEREFORE, I, James E. Holshouser, Jr., Governor of the State of North Carolina by virtue of the power vested in me, do hereby create and establish under the auspices of the Department of Human Resources a Statewide Health Coordinating Council to be known as the North Carolina Health Coordinating Council.

## App. 2

Section 1. The North Carolina Health Coordinating Council shall have the following functions and duties:

1. The North Carolina Health Coordinating Council shall review and approve or disapprove the State Health Plan which shall be prepared annually by the State Health Planning and Development Agency. This plan shall incorporate the Health Systems Plans from the health systems agencies, revised as necessary by the North Carolina Health Coordinating Council to achieve appropriate coordination and to deal more effectively with the statewide health needs.

2. To review and approve or disapprove the Medical Facilities Plan as being consistent with and a part of the State Health Plan.

3. To review annually and coordinate the health plans of the health systems agencies, and report to the Secretary of the Department of Health, Education and Welfare its comments on all health systems plans and annual implementation plans.

4. To advise the Department of Human Resources and the Secretary generally in their role as the State Health Planning and Development Agency.

5. To review annually and comment to the Secretary of the U. S. Department of Health, Education and Welfare on the budget of the respective Health Systems Agencies.

6. To review and make comment and recommendations to the Governor, through the Secretary of the Department of Human Resources, on any and all applications for designation of the health systems agencies.

7. To review and approve or disapprove state plans and applications for funding to include grants, as specified in P.L. 93-641 and as may be specified for its review by other pertinent federal health legislation.

Section 2. The North Carolina Health Coordinating Council shall consist of forty (40) members which shall be appointed by the Governor as follows:

A. No fewer than four (4) members will be appointed from a list of at least eight nominees submitted to the Governor by each of the health systems agencies designated for health services areas which fall, in whole or in part, within the State:

- (1) Each health systems agency shall be entitled to the same number of representatives on the North Carolina Health Coordinating Council.
- (2) Of the four representatives of any health systems agency, not less than two shall be individuals who are consumers of health care and who are not providers of health care.
- (3) Each health systems agency shall submit to the Governor a list of nominees numbering at least twice the number of representatives to which the health systems agency is entitled.
- (4) Each person nominated for or appointed to the North Carolina Health Coordinating Council shall have his principal place of residence in the state of North Carolina.

B. In addition to appointments made under paragraph A of this Section, the Governor may appoint such persons (including State officials, public elected officials, and other representatives of governmental authorities within the State) to serve on the North Carolina Health Coordinating Council as he deems appropriate; except that

- (1) the number of persons appointed to the NCHCC under this paragraph may not exceed forty percentum (40%) or sixteen (16) members of the total membership of the NCHCC; and
- (2) a majority of the persons appointed by the Governor under this paragraph shall be consumers of health care who are not providers of health care.

C. Not less than fifty-one percent (twenty-one members) nor more than sixty percent of the members on the NCHCC shall be consumers of health care who are not providers of health care.

D. Not less than one-third of the providers of health care who are members of the NCHCC shall be direct providers of health care.

E. The NCHCC shall, in addition to the other members appointed pursuant to this Section, include, as an ex-officio member, an individual whom the Chief Medical Director of the Veterans Administration shall have designated as a representative of the Veterans Administration facilities in North Carolina.

Section 3. Terms of Membership: The terms of membership of the North Carolina Health Coordinating Council shall be staggered so that the terms of not more than one-third of the forty members shall expire in a single calendar year. Terms shall be staggered in the following manner for the first three years:

- 13 serving one year
- 13 serving two years
- 14 serving three years

After which time, membership shall be for a term of three years.

No member shall serve a term exceeding three years, and no member shall serve more than two consecutive terms or more than six years.

Section 4. Vacancies: The Governor shall have the power to remove from office any member of the NCHCC for misfeasance, malfeasance, or nonfeasance. A vacancy occurring during a term or appointment is filled in the same manner as the original appointment and for the balance of the unexpired term.

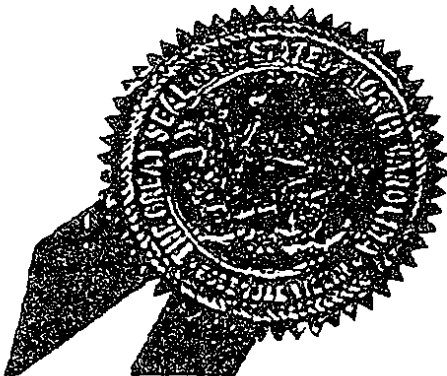
Section 5. Per diem and travel expense: Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the Provisions of G.S. 136-5.

Section 6. Chairman: The Council shall elect annually from among its members a chairman and such other officers as it deems necessary. The term of office for the chairman shall be one calendar year, and the chairman may not succeed himself more than once.

Section 7. Meetings: The Council shall meet quarterly and at other times at the call of the chairman or upon written request of at least twenty-one of its members. All business meetings of the Council, its committees and subcommittees or special task forces shall be open to the public.

Section 8. Staff Assistance: The Department of Human Resources shall provide clerical and other services required by the Council.

Done at Raleigh, North Carolina, this the 1st day of June, in the year of our Lord, one thousand nine hundred seventy-six.



  
Governor of North Carolina

STATE HEALTH COORDINATING COUNCIL

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# STATE MEDICAL FACILITIES PLAN



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**CHAPTER 1  
OVERVIEW OF THE FINAL 2008 STATE MEDICAL FACILITIES PLAN**

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**Purpose**

The North Carolina 2008 State Medical Facilities Plan ("Plan") was developed by the North Carolina Department of Health and Human Services, Division of Health Service Regulation, under the direction of the North Carolina State Health Coordinating Council, pursuant to G.S. §131E-177. The major objective of the Plan is to provide individuals, institutions, state and local government agencies, and community leadership with policies and projections of need to guide local planning for specific health care facilities and services. Projections of need are provided for the following types of facilities and services:

- ◆ acute care hospitals
- ◆ operating rooms
- ◆ inpatient rehabilitation facilities
- ◆ technology services
- ◆ nursing care facilities
- ◆ adult care facilities
- ◆ Medicare-Certified home health agencies
- ◆ end-stage renal disease dialysis facilities
- ◆ hospice home care and hospice inpatient beds
- ◆ psychiatric hospital units and specialty hospitals
- ◆ substance abuse hospital units, specialty hospitals, and residential facilities
- ◆ intermediate care facilities for mentally retarded persons

Chapters dealing with specific facility/service categories contain summaries of the supply and the utilization of each type of facility or service, a description of changes in the projection method and policies from the previous planning year, a description of the projection method, and other data relevant to the projections of need.

The projections of need for the various facilities and services are used in conjunction with other statutes and rules in reviewing certificate of need applications for establishment, expansion, or conversion of health care facilities and services. All parties interested in health care facility and health services planning should consider this Plan a key resource.