

NORTH CAROLINA SUPREME COURT

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.)

**STATE OF NORTH CAROLINA'S RESPONSE TO
PETITION FOR DISCRETIONARY REVIEW AND
MOTION TO DISMISS NOTICE OF APPEAL**

INDEX

TABLE OF AUTHORITIES	iii
STATEMENT OF PROCEDURAL HISTORY	4
STATEMENT OF THE FACTS	4
REASONS WHY THE APPEAL SHOULD BE DISMISSED	5
I. THE MANNER IN WHICH THE SMFP IS CREATED DOES NOT CONSTITUTE AN UNLAWFUL DELEGATION OF AUTHORITY FROM THE GENERAL ASSEMBLY	6
A. THE ROLE PLAYED BY THE COUNCIL REGARDING THE SMFP IS MERELY ADVISORY	6
B. THE GENERAL ASSEMBLY HAS SET OUT ADEQUATE GUIDING STANDARDS REGARDING THE DEVELOPMENT OF THE SMFP	8
II. PLAINTIFFS HAVE NOT BEEN DENIED DUE PROCESS	12
III. THE APPLICATION OF THE CON LAWS TO PLAINTIFFS HAS NOT VIOLATED THEIR RIGHT OF ACCESS TO THE COURTS	16
REASONS WHY THE PETITION SHOULD BE DENIED	19
I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT	20
II. THIS CASE DOES NOT INVOLVE SIGNIFICANT PUBLIC INTEREST	21

III. THIS APPEAL DOES NOT INVOLVE PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE	22
CONCLUSION	24
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

CASES

Adams v. North Carolina Dep't of Natural & Econ. Res.,
295 N.C. 683, 249 S.E.2d 402 (1978) 20

*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) 9

Bring v. North Carolina State Bar,
348 N.C. 655, 501 S.E.2d 907 (1998) 9

In re Certificate of Need for Aston Park Hosp., Inc.,
282 N.C. 542, 193 S.E.2d 729 (1973) 14

Cox v. Kinston, 217 N.C. 391, 8 S.E.2d 252 (1940) 17

Emerald Isle v. State, 320 N.C. 640,
360 S.E.2d 756 (1987) 24

*Empire Power Co. v. North Carolina Dep't of Env't,
Health & Natural Res.*,
337 N.C. 569, 447 S.E.2d 768 (1994) 17

Frye Reg'l Med. Ctr., Inc. v. Hunt,
350 N.C. 39, 510 S.E.2d 159 (1999) 6, 7, 19

Hope-A Women's Cancer, P.A., et al v. State, et al.,
No. COA09-844 (May 4, 2010) 4, 6, 8, 11, 13, 14,
15, 17, 21

In re Guess, 327 N.C. 46, 393 S.E.2d 833 (1990),
cert. denied, 498 U.S. 1047,
112 L. Ed. 2d 774 (1991) 10

Lamb v. Wedgewood South Corp.,
308 N.C. 419, 302 S.E.2d 868 (1983) 17, 20

Peaseley v. Virginia Iron, Coal & Coke Co.,
282 N.C. 585, 194 S.E.2d 133 (1973) 20

Poor Richard's, Inc. v. Stone,
322 N.C. 61, 366 S.E.2d 697 (1988) 20

Rhyne v. K-Mart Corp.,
358 N.C. 160, 594 S.E.2d 1 (2004) 12

Standley v. Town of Woodfin,
362 N.C. 328, 661 S.E.2d 728 (2008) 12

State ex rel. Caldwell v. Wilson,
121 N.C. 425, 28 S.E. 554 (1897) 18

State ex rel. Comm'r of Ins. v. N.C. Rate Bureau,
300 N.C. 381, 269 S.E.2d 547 (1980) 8, 9, 11

*State ex rel. Utilities Comm'n v. Carolina Util.
Customers Ass'n*, 336 N.C. 657,
446 S.E.2d 332 (1994) 9, 12, 20

State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968),
cert. denied, 393 U.S. 1087,
21 L. Ed. 2d 780 (1969) 5

Thompson v. Thompson,
288 N.C. 120, 215 S.E.2d 606 (1975) 5

Town of Spruce Pine v. Avery County,
346 N.C. 787, 488 S.E.2d 144 (1997) 9

OTHER AUTHORITIES

N.C. GEN. STAT. § 7A-30(1) 3, 5, 6

N.C. GEN. STAT. § 131E-175	2, 10
N.C. GEN. STAT. § 131E-176(16)	10
N.C. GEN. STAT. § 131E-176(25)	10, 11
N.C. GEN. STAT. § 131E-178	10
N.C. GEN. STAT. § 131E-183(a)(1)	13, 16
N.C. GEN. STAT. § 131E-184	10
N.C. GEN. STAT. § 150B-2(8a)	10, 11
10A N.C.A.C. 14C-0402	17

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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.

**STATE OF NORTH CAROLINA'S RESPONSE TO
PETITION FOR DISCRETIONARY REVIEW AND
MOTION TO DISMISS NOTICE OF APPEAL**

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME Defendants-Respondents (hereafter “the State”), through the undersigned counsel, and, responding to the petition for discretionary review and notice of appeal filed by Plaintiff-Petitioners (hereafter “Plaintiffs”), prays that the notice of appeal be dismissed and the petition for discretionary review be denied.

For the past thirty years, North Carolina’s health care system has operated under the Certificate of Need (hereafter “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 a State Medical Facilities Plan (hereafter “SMFP”) that articulates a determinative set of need determinations for CON-regulated health care services in North Carolina for each calendar year. The manner in which the SMFP is presently prepared and utilized has remained essentially unchanged for the past eighteen years. What Plaintiffs refer to in their petition as a system of “arcane bureaucratic procedures” is, in actuality, a carefully thought out legislative process that has, for many years, served to ensure the availability of cost-effective health care services and widespread geographic access to health care facilities for the citizens of this State, wherever located.

Plaintiffs are 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).

Having failed to make the case during the open public process for development of the 2008 SMFP that a genuine health care need existed for the specific equipment and facilities they wished 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. Stripped of its veneer, Plaintiffs’ arguments ultimately amount to nothing more than *policy* arguments – which are appropriately addressed in the Legislative Branch rather than the Judicial Branch.

In its twenty-seven page opinion, a unanimous panel of the Court of Appeals, per Chief Judge Martin, carefully and exhaustively analyzed the issues raised by Plaintiffs and correctly concluded that the SMFP process is constitutional in all respects. It is difficult to imagine a more thorough exposition of these issues. Moreover, the Court of Appeals’ opinion was founded on bedrock principles of law that are well entrenched within the jurisprudence of this Court. This case, therefore, fails to satisfy the standard for an appeal as of right under N.C.G.S. 7A-30(1) since it fails to present a substantial constitutional question which has not been the subject

of conclusive judicial determination. Plaintiffs' notice of appeal should, therefore, be dismissed.

For the same reason, this appeal also does not involve legal principles of major significance to the jurisprudence of the State. As such, Plaintiffs' petition for discretionary review should be denied.

STATEMENT OF PROCEDURAL HISTORY

Plaintiffs Hope-A Women's Cancer Center, P.A. and Raleigh Orthopaedic Clinic, P.A. 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 in connection with North Carolina's CON Laws. (R p. 100) The parties subsequently filed cross-motions for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. (R pp. 138, 635) The Honorable Howard E. Manning, Jr., granted the State's motion for judgment on the pleadings and denied Plaintiffs' motion. (R p. 637) On 4 May 2010, the Court of Appeals affirmed Judge Manning's order. *Hope-A Women's Cancer, P.A., et al v. State, et al.*, No. COA09-844, slip op. (May 4, 2010) (hereafter "Slip Op").

STATEMENT OF THE FACTS

Plaintiffs are two medical practices providing health care services within North Carolina. In 2008, they sought to acquire certain types of medical equipment and

facilities that are subject to the State's CON Laws. In this lawsuit, Plaintiffs allege that they have been rendered ineligible to receive CONs regarding these items because the 2008 SMFP found that there was no need that year for the additional equipment and facilities at issue in the service areas of interest to Plaintiffs. Plaintiffs further assert that being subjected to these need determinations has violated their constitutional rights. (R pp. 100-18)

REASONS WHY THE APPEAL SHOULD BE DISMISSED

In order for a litigant to appeal to this Court as of right under N.C.G.S. §7A-30(1), it must show that the appeal contains a constitutional question that is real and substantial rather than superficial and frivolous. It must also be a constitutional question that has not already been the subject of conclusive judicial determination. *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968), *cert. denied*, 393 U.S. 1087, 21 L. Ed. 2d 780 (1969). Where, as here, a party cannot make such a showing, the appeal should be dismissed. *Thompson v. Thompson*, 288 N.C. 120, 215 S.E.2d 606 (1975).

In the present case, the Court of Appeals properly interpreted and applied the relevant decisions from this Court's jurisprudence in reaching its decision. As demonstrated below, Plaintiffs have failed to make the requisite showing under

N.C.G.S. § 7A-30(1) as the legal arguments being asserted by Plaintiffs are inconsistent with well established principles of North Carolina law.

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

A. THE ROLE PLAYED BY THE COUNCIL REGARDING THE SMFP IS MERELY ADVISORY.

The fundamental flaw permeating Plaintiffs' notice of appeal and petition for discretionary review is the incorrect assertion that the General Assembly has delegated power to a group of private individuals – the Council. As was fully explained by the Court of Appeals in its decision, and as discussed below, the Council is a purely *advisory* body and no decision-making power, at all, has been delegated to it by the General Assembly. For this reason, the rhetoric in Plaintiffs' petition about private entities being able to further their own financial interests under a veil of secrecy is nothing but a gross distortion of the statutory procedure at issue.

As the Court of Appeals' decision noted, the role played by the Council in the SMFP process is a "strictly advisory" one and, accordingly, no legislative authority has actually been delegated to it. Slip Op. at 6. The highly limited nature of the Council's role was recognized by this 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 statutory process encompassing the CON Laws, this Court determined that the Council's role is an

advisory one, ruling that it is the *Governor* (and not the Council) who is ultimately responsible for the contents of the SMFP. *Frye*, 350 N.C. at 43-44, 510 S.E.2d at 162-63. As such, this Court concluded that the Governor has the power to make any substantive changes she wishes with regard to the proposed SMFP submitted to her by the Council. *Id.* at 46-47, 510 S.E.2d at 164. While Plaintiffs barely mention *Frye* in their petition, their failure to recognize its controlling effect on this issue is puzzling, as it forecloses their argument.

It is also worth noting that the hyperbole contained in Plaintiffs' petition cannot be squared with the allegations in their own pleadings. In their Amended Complaint, Plaintiffs did *not* allege that any specific Council 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 failed to cite any case from this Court for the proposition that the mere potential for bias by members of a purely advisory board constitutes an unconstitutional legislative delegation.

Furthermore, while Plaintiffs appear to be arguing that the Council'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 for two reasons. First, as the Court of Appeals recognized, the Governor (to whom the delegation at issue here has actually been made) *is* subject to the Ethics Act. Slip Op. at 12-13. Second, the Ethics Act has only existed since 2006 while the Council 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. Slip Op. at 13.¹

B. THE GENERAL ASSEMBLY HAS SET OUT ADEQUATE GUIDING STANDARDS REGARDING THE DEVELOPMENT OF THE SMFP.

The Court of Appeals' decision in this case correctly holds that the Legislature has articulated constitutionally sufficient standards in connection with the SMFP. Slip Op. at 9-14. This Court has made clear that a delegation of authority by the General Assembly is permissible where it 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), this Court noted North Carolina's embrace of

¹ Moreover, Plaintiffs fail to mention that Executive Order No. 10, dated March 3, 2009, places ethics requirements on the members of the Council. *See* Ex. A.

the modern tendency toward liberalism in upholding legislative delegations of power requiring the exercise of discretion. This 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, this Court has 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).

When determining whether adequate legislative guidelines exist, the General Assembly’s own declarations constitute the primary source of guidance as to the policies that are to be utilized by the recipient of the delegation. *Bring v. North Carolina 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 – which are quoted in pertinent part on pp. 9-10 of the Slip Opinion – fully explain the legislative intent for the need determinations and articulate the types of considerations that must be taken into account in drafting the SMFP.

The General Assembly has also set out detailed explanations of 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 the public and any interested parties. *See* N.C.G.S. § 131E-176(25).

Plaintiffs' argument that the General Assembly has failed to provide any procedural safeguards regarding this process is also erroneous. North Carolina

General Statute § 150B-2(8a)k contains the express 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. *See* Slip Op. at 11-13.

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.

As this 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.

Here, the Court of Appeals ruled that the General Assembly’s guiding standards regarding the SMFP “are as specific as the circumstances permit, and thus sufficient.” Slip Op. at 10-11 (citation and internal quotation marks omitted). This ruling was correct.

II. PLAINTIFFS HAVE NOT BEEN DENIED DUE PROCESS.

A statute does not violate substantive due process principles as long as there is some rational basis for its enactment. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004). The relationship between a law and its stated goal “need not be a perfect one” and 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*, 336 N.C. at 682, 681-82, 446 S.E.2d at 346.

This Court has recently observed in the substantive due process context that “we must tread carefully before recognizing a fundamental liberty interest, which would to a great extent, place the matter outside the arena of public debate and legislative action and run the very real risk of transforming the Due Process Clause into nothing more than the policy preferences of the Members of this Court.” *Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 730 (2008).

In applying this standard, it is clear that the creation and utilization of the SMFP has not violated Plaintiffs’ substantive due process rights. The Council 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 Council, assisted by the Department of Health and Human Services (hereafter “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 Governor receives the benefit of the Council’s recommendations and then adopts a final SMFP, which is then used by DHHS in reviewing CON applications. *See Slip Op.* at 18.

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 ensuring that decisions are based on need.

Plaintiffs have made clear that they are *not* challenging in this lawsuit the General Assembly’s ability to enact CON Laws as a whole. (Pet. p. 2) 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 current 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 for identifying health care needs across the State. This makes no sense. If the Legislature can constitutionally make need a determining factor regarding the allocation of health care services (which it is certainly allowed to do), then it likewise possesses the authority to implement a uniform method intended to calculate that need. *See* Slip Op. at 20-21)

Nor does *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973), compel a different result. In *Aston Park*, the predecessor to the current set of CON Laws was invalidated almost forty years ago. The Court's concern arose from the absence in the prior CON law (which was 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, 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 on a statewide basis. As such, the General Assembly has cured the deficiency noted in *Aston Park*.

Plaintiffs make clear in their petition that they are “*not* argu[ing] that the current version of the CON Law should be declared unconstitutional on its face based on *Aston Park*” (Pet. p. 22) (emphasis added). However, Plaintiffs then claim the analysis in *Aston Park* mandates a result in their favor. (*Id.*) It is difficult to reconcile these two statements. In any event, however, Plaintiffs’ arguments fail because *Aston Park* does not mandate a ruling in their favor here.

The legislative findings in the current CON Laws are summarized on p. 17 of the Slip Opinion. The Court of Appeals correctly concluded that these legislative goals were legitimate and that the means used to achieve them (i.e. the decision to make the findings of need determinative with regard to the issuance of CON’s) was reasonable. Slip Op. at 18-20. The Court of Appeals also accurately noted precisely how the SMFP serves to further the health care goals underlying the CON Laws. Slip Op. at 20-21.

These legislative findings fully explain the intent behind the CON Laws and aptly demonstrate the rational basis for the means employed therein. 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.

III. 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. This 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. 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.

In its opinion, the Court of Appeals correctly explained that there is no constitutional right to appeal every CON-related decision. Slip Op. at 26-27. Its conclusion was consistent with this Court’s prior holdings 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 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) (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.”).²

² 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

Furthermore, it is worth noting that this 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).

The General Assembly's decision that the lengthy rulemaking process under the APA is inapplicable to the formulation of the SMFP was not only permissible under 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

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 judicial review and which are not.

throughout the State require flexibility in the formulation of need determinations. Conversely, 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 create 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.

REASONS WHY THE PETITION SHOULD BE DENIED

Plaintiffs alternatively petition this court for a writ of discretionary review pursuant to N.C.G.S. § 7A-31. In so doing, Plaintiffs, in essence, merely restate to this Court the arguments made to, and properly rejected by, the Court of Appeals.

As shown herein, this appeal does not satisfy the standard for discretionary review under N.C.G.S. § 7A-31. *See Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 592, 194 S.E.2d 133, 139 (1973) (holding that Supreme Court should exercise discretionary review in “only those cases of substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by this Court”).

I. THE COURT OF APPEALS’ DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The Court of Appeals’ comprehensive analysis of the issues raised in this case is in complete harmony with the prior decisions of this Court. Indeed, every section of the Court of Appeals’ decision relied on precedents from this Court. Its analysis of the delegation claim was governed by this Court’s decisions in *Frye* and *Adams v. North Carolina Dep’t of Natural & Econ. Res.*, 295 N.C. 683, 249 S.E.2d 402 (1978). Its discussion of the substantive due process issue was guided by this Court’s rulings in *Poor Richard’s, Inc. v. Stone*, 322 N.C. 61, 366 S.E.2d 697 (1988) and *State ex rel. Utils. Comm’n v. Carolina Utility Customers Ass’n*, 336 N.C. 657, 446 S.E.2d 332 (1994). Finally, its analysis of the access to the courts claim was controlled by this Court’s holding in *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983). Thus, the “conflicts” Plaintiffs attempt to raise are either imaginary or based on their misreading of the caselaw at issue.

Plaintiffs' assertion that the Court of Appeals has attempted to "overrule" *Aston Park* is simply false. As noted above, the *Aston Park* Court struck down the CON statute that was before it based on the inadequacy of the legislative findings contained therein as to how the CON requirement furthered the public welfare. Nothing in *Aston Park* stands for the proposition that the General Assembly is powerless to enact new CON Laws that cure the deficiencies noted in that decision. Here, the Court of Appeals discussed, in detail, the holding in *Aston Park* and how the current CON Laws are materially distinguishable from the statute before the Court in 1973. Slip Op. at 21-23.

In no way did the Court of Appeals purport to "overrule" *Aston Park*. To the contrary, it simply engaged in an appropriate analysis of why a different result is compelled in the present case. By stating that *Aston Park* was moot, the Court of Appeals was simply acknowledging the fact that because the General Assembly had cured the defects noted therein when it enacted the new CON Laws, the *Aston Park* result does not attach to Plaintiffs' challenge to the current CON statutes.

II. THIS CASE DOES NOT INVOLVE SIGNIFICANT PUBLIC INTEREST.

While a public interest exists in access to health care, that broad interest is not directly implicated here by the limited nature of Plaintiffs' challenge. As their petition expressly acknowledges, Plaintiffs are not seeking to have the entire CON Laws

struck down. (Pet. p. 2) Rather, they are making the much more limited argument that the need determinations utilized in connection with the issuance of CONs should be made by DHHS on a case by case basis instead of through the SMFP process. As such, the relief Plaintiffs seek in this case – aside from being wholly unwarranted under the law – would not change the fact that the availability of statewide health care would still be based on need determinations.

Plaintiffs' assertion that the issues presented in their petition have important economic implications for North Carolina is simply meritless. They have made no allegation in this case that there were wholesale errors in the formulation of the 2008 SMFP. To the contrary, Plaintiffs are merely claiming that the 2008 SMFP incorrectly failed to find a need for a small and discrete group of facilities and equipment *they* wanted to acquire. As such, the whole focus of this litigation is on Plaintiffs' own economic interests rather than on a broader societal interest.

III. THIS APPEAL DOES NOT INVOLVE PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE.

Stripped of the rhetoric contained in Plaintiffs' petition, the legal issues raised by Plaintiffs in this appeal lack significance because they are susceptible to easy resolution based on application of the decisions handed down by this Court over the past few decades. As discussed in more detail above, this Court has articulated clear legal principles on the issues of (1) when a delegation of power from the General

Assembly is appropriate; (2) when substantive due process principles are violated by a statute; and (3) how the access to the courts provision in the Constitution should be interpreted.

As the Court of Appeals' decision demonstrates, these principles are easily applied here. The delegation of authority to the Governor to develop the SMFP is permissible because the General Assembly has set out adequate guiding principles and procedural safeguards. No substantive due process concerns exist because the General Assembly has clearly set out the goals of the CON Laws and the manner in which these goals are furthered by the SMFP process. With regard to access to the courts, it was well within the General Assembly's authority to decline to authorize a direct method of appealing the contents of the final SMFP.

Moreover, as evidenced by their citation to articles containing policy debates on the desirability of CON Laws (Pet. p. 14), the issues raised by Plaintiffs are focused not on the jurisprudence of this Court but, rather, on the decisions of the Legislative Branch. Plaintiffs are seeking to engage this Court in a policy debate over the wisdom of the SMFP process. Indeed, they even cite to a report from a federal agency purporting to assess the benefits of CON Laws. (*Id.*, pp. 15-16).

However, public policy in North Carolina is not set by federal agencies or by commentators. Rather, it is set by our Legislature, and the General Assembly has

already engaged in this debate with regard to the SMFP process. This Court has repeatedly affirmed the basic principle that courts should defer to the judgment of the General Assembly regarding matters (such as this) within the legislative realm without substituting their own judgment as to the wisdom of policy decisions for that of the Legislature. *See, e.g., Emerald Isle v. State*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987) (“It is not the role of this Court to pass judgment on the wisdom and expediency of a statute.”). Thus, any “reconsideration” of the SMFP process must come from the General Assembly.

CONCLUSION

This appeal represents Plaintiffs’ attempt to disturb a reasoned and orderly process that has been in place for many years, has helped bring continuity to North Carolina’s health care industry, and has ensured the availability of access to health care statewide. As demonstrated by the well-reasoned and thorough opinion of the Court of Appeals, the legal arguments asserted by Plaintiffs are meritless. For the reasons set out above, the State of North Carolina respectfully prays that Plaintiffs’ notice of appeal be dismissed and that their petition for discretionary review be denied.

-25-

Respectfully submitted, this the 21st day of June, 2010.

ROY COOPER
Attorney General

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **STATE OF NORTH CAROLINA'S RESPONSE TO PETITION FOR DISCRETIONARY REVIEW AND MOTION TO DISMISS APPEAL** 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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This the 21st day of June, 2010.

Electronically submitted,
Mark A. Davis
Special Deputy Attorney General

EXHIBIT A

State of North Carolina



BEVERLY EAVES PERDUE
GOVERNOR

EXECUTIVE ORDER NO. 10

ETHICAL STANDARDS FOR THE STATE HEALTH COORDINATING COUNCIL

WHEREAS, the State Health Coordinating Council (SHCC) is a public advisory body established by Executive Order No. 139 (March 3, 2008) for the purpose of advising the Governor on the statewide planning of health care facilities, equipment, and services provided under the Certificate of Need Law; and

WHEREAS, the SHCC works with the Department of Health and Human Services (DHHS) to prepare and recommend the State Medical Facilities Plan (SMFP) to the Governor for approval or amendment; and

WHEREAS, the advice and collective judgment of the SHCC has proven invaluable in ensuring that quality health care services are made available broadly to all citizens of this State regardless of whether they live in rural or urban areas, whether they have the means to pay for those services or whether they are insured by public or private payors; and

WHEREAS, to provide the expertise necessary to perform its complex advisory functions, the membership of the SHCC includes persons knowledgeable about healthcare services and delivery including medical educators, researchers, physicians, and representatives of professional associations; and

WHEREAS, because of the diversity of the SHCC membership, conflicts between competing economic interests are inherent in, but also beneficial to, the development of the SMFP; and

WHEREAS, the General Assembly has concluded that the State Government Ethics Act does not cover public entities that only have advisory authority, and the State Ethics Commission has determined that the SHCC only has advisory authority; and

WHEREAS, it is nevertheless important that the SHCC exercise its advisory responsibilities in a transparent manner so that the Governor and citizens will have full knowledge of the professional and economic interests that the members of the SHCC have as the

Governor evaluates their expert advice in adopting or amending the SMFP recommended by the SHCC; and

WHEREAS, the members of the SHCC in the past have voluntarily followed ethical standards; and

WHEREAS, this is a salutary practice, which should be formalized by Executive Order;

NOW, THEREFORE, by the power vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**:

1. The members of the SHCC shall always act in the best interests of the public and shall bring their particular knowledge and experience to the SHCC to serve the public interest as identified in the Certificate of Need Law, Chapter 131E, Article 9 of the General Statutes;
2. The following process shall be observed for all meetings of the SHCC and SHCC subcommittees at which the SHCC or SHCC subcommittee takes any action:
 - a. At the beginning of each meeting, the Chair shall remind all members of their duty to act always in the best interest of the public without regard for their own professional, institutional or financial interests and that they should recuse themselves from voting on any matter on which they cannot meet this standard.
 - b. Prior to conducting any business, each member shall disclose any professional or institutional interest he or she may have in any matter coming before the SHCC or SHCC subcommittee for action at that meeting. The Chair will determine if the member needs to recuse himself or herself from voting on the matter in order to ensure the integrity of the actions of the SHCC or SHCC subcommittee.
 - c. Prior to conducting any business, each member shall also disclose any financial benefit he or she may derive from any matter coming before the SHCC or SHCC subcommittee for action at that meeting. A member derives a financial benefit from a matter under consideration if the person or his/her spouse (i) has an ownership interest in an entity that is a party to the matter under consideration; (ii) will derive any income or commission as a direct result of action on the matter under consideration; or (iii) will acquire property as a direct result of action on the matter under consideration. When any member indicates that he or she will derive a financial benefit from a matter coming before the SHCC or any subcommittee, the member shall recuse himself or herself from voting on the matter.
 - d. A member who has recused himself or herself from voting is not prohibited from deliberating on the matter unless the Chair determines, after review, that participation by the member in deliberations would impair the integrity of the actions of the SHCC or SHCC subcommittee.

- e. The minutes of the SCHCC and its subcommittees will reflect all disclosures and recusals made pursuant to this section, and such minutes will be provided to the Governor for review with the SMFP.
 - f. A challenge to a member's participation in a vote on issues under this Executive Order may be raised only by a member of the SHCC or an employee of the Division of Health Services Regulation of DHHS. In such case where a challenge is made, the Chair, in consultation with the DHHS legal counsel, shall determine whether the challenge is valid and the action that should be taken.
 - g. For the purposes of this Executive Order, the term "Chair" means the Chair of the SHCC or the Chair of any SHCC subcommittee. In the absence of the Chair or if the professional, institutional, or financial interests of the Chair must be reviewed pursuant to this section, then the Vice-Chair of the SHCC or SHCC subcommittee shall make the determinations required by this section.
3. Members of the SHCC are expected to and should confer with DHHS on any matters that come before them in development of the SMFP. No member of the SHCC, however, shall improperly influence or attempt to influence DHHS in performing its role in developing the SMFP as to any provision in which the member has a direct, conflicting professional, institutional or financial interest;
 4. This Executive Order is for the Governor's purposes in reviewing and approving or amending the proposed SMFP submitted by the SHCC and DHHS. This Order does not and shall not be construed to create any rights, nor create claims, under the Certificate of Need Law, State Government Ethics Act, or otherwise.

This Executive Order is effective immediately and shall remain in effect until rescinded in writing.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this third day of March in the year of our Lord two thousand and nine, and of the Independence of the United States of America the two hundred and thirty-third.



Beverly Eaves Perdue

Beverly Eaves Perdue
Governor

ATTEST:

Elaine F. Marshall

Elaine F. Marshall *by and through*
Secretary of State *Rodney Mackay*
Chief Deputy Secretary
of State