

IN THE COURT OF APPEALS
STATE OF GEORGIA

NORTHEAST GEORGIA MEDICAL
CENTER, INC.,

Applicant,

v.

WINDER HMA, INC. D/B/A BARROW
REGIONAL MEDICAL CENTER

Respondent.

)
)
)
) Application No. _____
)
) Superior Court of Barrow
) County Civil Action File No. :
) 08-CV-712A
)
)
)
)
)

RECEIVED IN OFFICE
2009 JAN 14 PM 3:05
CLERK/SPORT ADMINISTRATION
COUNTY OF BARROW, GA
John R. Moore

NORTHEAST GEORGIA MEDICAL CENTER'S
APPLICATION FOR DISCRETIONARY APPEAL

**PARKER, HUDSON, RAINER &
DOBBS LLP**

**By: Armando L. Basarrate
David L. Fenstermacher, Jr.
Roberta E. Moore**

**1500 Marquis Two Tower
285 Peachtree Center Avenue, N.E.
Atlanta, Georgia 30303
(404) 523-5300
FAX: (404) 522-8409**

Attorneys for Northeast Georgia Medical Center, Inc.

I. INTRODUCTION

Applicant Northeast Georgia Medical Center, Inc, ("NGMC") seeks to reverse a December 15, 2008 Final Order (the "Barrow Final Order," attached at **Tab 1** of the accompanying Appendix) of the Barrow County Superior Court (the "Barrow Court"). The Barrow Final Order reversed the Department of Community Health's ("DCH") final decision to grant a certificate of need ("CON") to NGMC to develop a 100-bed hospital in South Hall County (the "South Hall Hospital").

DCH's final decision approving NGMC's CON application was the result of a full and thorough administrative review and appeal process, which included DCH's preliminary evaluation of the application, a full evidentiary hearing before an administrative Hearing Officer, and an administrative appeal hearing before the Health Planning Review Board ("Review Board"). DCH, the Hearing Officer, and the Review Board each reviewed NGMC's application, NGMC's amendments/additional information, and all opposition thereto, and ruled that the application merits approval.¹

¹ The Review Board's February 22, 2008 Order, which is by law the final agency decision at issue on judicial appeal, is attached at Appendix **Tab 2**. See The

Yet, the Barrow Court, acting in favor of a local Barrow County opposing hospital, reversed the results of the entire administrative review and appeal process. In so doing, the Barrow Court improperly engaged in health planning at the judicial appellate level, failed to grant the required deference to DCH, improperly ignored substantial evidence of record supporting DCH's decision, substituted its judgment for that of DCH, and committed other reversible errors.

NGMC's application for discretionary appeal falls squarely within the long line of discretionary appeals in CON cases that this Court has accepted to correct erroneous superior court decisions reversing final agency decisions. See Hughston Surgical, supra (reversing the superior court for improperly substituting its judgment for that of DCH); Global Diagnostic Dev. v. Diagnostic Imaging of Atlanta, 284 Ga.App. 66 (2007) (reversing the superior court for failing to defer to DCH and for misapplying judicial review standards); Georgia Dep't of Cmty. Health v. Satilla Health Servs., 266 Ga.App. 880 (2004) (reversing the superior

Surgery Ctr., LLC v. Hughston Surgical Inst., LLC, 293 Ga.App. 879 (2008). The Hearing Officer's December 20, 2007 decision is attached at Appendix **Tab 3**. DCH's April 27, 2007 preliminary evaluation is attached at Appendix **Tab 4**.

court and reinstating DCH's final decision); Georgia Dep't of Cmty. Health v. Gwinnett Hosp. Sys., 262 Ga.App. 879 (2003) (reversing two superior courts and reinstating DCH's final decision); St. Joseph's Hosp. v. Thunderbolt Health Care, 237 Ga.App. 454 (1999) (reversing the superior court and reinstating DCH's final decision as to both CON applications); Hospital Auth. of Gwinnett County v. State Health Planning Agency, 211 Ga.App. 407 (1993) (reversing the decision of one superior court and affirming the decision of another to uphold DCH's final decision); State Health Planning Agency v. Cribb Indus., Inc., 204 Ga.App. 285 (1992) (holding that the superior court erred in reversing the Review Board's findings and in substituting its judgment for the agency's); American Med. Int'l. Inc. v. Charter Lake Hosp., Inc., 186 Ga.App. 204 (1988) (holding that the superior court's reversal of DCH's final decision was improper and must be reversed).

This case is yet another example of a superior court improperly exceeding the permissible scope of judicial review of a DCH decision. The Barrow Court's reversal of the Review Board's February 22, 2008 Order (the "Final DCH Decision," attached at Appendix **Tab 2**), which by law is the final DCH agency decision at issue on judicial appeal, was in error and should be reversed.

The Final DCH Decision found that NGMC's application satisfies all of the applicable review criteria set forth in Ga. Comp. R. & Regs. 111-2-2-.20 (the "Hospital Bed Rule") and 111-2-2-.09. The Final DCH Decision determines that the South Hall Hospital will alleviate a significant portion of the unmet need for 127 additional hospital beds in the relevant service area under the Hospital Bed Rule methodology. The proposed hospital also will meet the specific needs of South Hall County residents for more accessible hospital services, particularly emergency services, and will serve as the foundation for bringing much needed new physician practices to south Hall County.

Further, the Final DCH Decision thoroughly analyzes the potential effect of NGMC's project on existing hospitals, and concludes that there will be no adverse impact. The Final DCH Decision's factual findings accept evidence establishing that: (i) the **growth** in population alone will produce more new patients than the South Hall Hospital has capacity to serve; and (ii) existing area hospitals will have higher patient volumes than they do currently even after the new South Hall Hospital commences operations. The Final DCH Decision's findings are supported by substantial evidence in the voluminous administrative record, and Georgia law

mandates that the agency's interpretation and application of the relevant rules be given great deference.

This Court should grant NGMC's application for discretionary appeal to correct reversible errors of law and to establish precedent. More specifically, in order to safeguard the integrity of and the public's confidence in final rulings of state agencies, the following errors in the Barrow Final Order should be reversed:

- The Barrow Court erred in applying an incorrect standard of judicial review to a final agency decision;
- The Barrow Court erred in failing to grant deference to DCH's final agency decision and DCH's interpretation and application of its rules;
- The Barrow Court erred by undertaking the discretionary health care planning functions that are reserved to DCH;
- The Barrow Court erred by exceeding the boundaries of its appellate review function, substituting its judgment for that of DCH, re-weighing the evidence, disregarding factual findings supported by substantial evidence of record, and relying instead on its own, unsupported observations.
- The Barrow Court erred in focusing its review on DCH's preliminary evaluation instead of on the Final DCH Decision.

Precedent is desirable in this case to clarify the role of superior courts conducting judicial review of final agency decisions and the appropriate level of deference to final agency decisions. Georgia's health care system and citizens rely on a sound health planning process administered by DCH, not an ad hoc process governed by the health planning judgment of the superior courts, which lack the technical expertise and experience of administrative agencies.

II. JURISDICTION

This Application for Discretionary Appeal is brought pursuant to O.C.G.A. § 5-6-5. This case does not involve a matter over which the Supreme Court has exclusive jurisdiction pursuant to Ga. Const. Art. VI, § VI, ¶ II.

Moreover, this Court has jurisdiction to hear NGMC's appeal of the Barrow Final Order pursuant to O.C.G.A. § 50-13-20. The Barrow Final Order reverses the Final DCH Decision, holding that the decision was "arbitrary and unreasonable." See Barrow Final Order at pp. 5, 8. Accordingly, the Barrow Final Order is a final, appealable order under O.C.G.A. § 50-13-20.

The Barrow Court's post-decision comment that the matter should be remanded to DCH does not transform the Barrow Final Order into a non-final and not appealable order. The Georgia Supreme Court has held that whether a superior

court's order on judicial review of an agency decision is final and appealable "is judged by its function and substance, rather than any 'magic language.'" Hughey v. Gwinnett County, 278 Ga. 740, 741 (2004). In Hughey, the Georgia Supreme Court held that the Court of Appeals had jurisdiction to hear an appeal of a superior court order remanding the case to the administrative law judge ("ALJ") who rendered the agency decision at issue. The Supreme Court held that the superior court's remand order was final and appealable because it reversed the ALJ's decision on legal issues and held that the ALJ had erred as a matter of law. Id. at 740-41. The Supreme Court held that the superior court's order was in function and substance a final order, and that the use of the word "remand" did not automatically render the superior court order non-final and not appealable. Id.

Here, the function and substance of the Barrow Final Order is to reverse the Final DCH Decision. The Barrow Court issued a final ruling that the Final DCH Decision included reversible legal errors. Accordingly, under the Hughey standard, the Barrow Final Order is a final, appealable judgment. See also Coastal Marshlands Prot. Comm. v. Ctr. for a Sustainable Coast, 286 Ga.App. 518, 520 (2007) (holding that a superior court remand order was functionally and substantively an appealable final judgment under O.C.G.A. § 50-13-20 because it

held that the agency had erred as a matter of law); Georgia Public Serv. Comm'n v. Campaign for a Prosperous Georgia, 229 Ga.App. 28, 29 (1997) (holding that a superior court remand order was an appealable final judgment under O.C.G.A. § 50-13-20 because it vacated the agency decision on the basis of illegality).

III. STATEMENT OF THE CASE

A. NGMC

NGMC is a community not-for-profit hospital with two hospital campuses (Main Campus and Lanier Park Campus) operating under a single hospital license, in Gainesville, Hall County, Georgia. (Final DCH Decision p. 3 ¶ 7; T. 313-18).²

B. HMA-Barrow

Respondent Winder HMA, Inc. d/b/a Barrow Regional Medical Center ("HMA-Barrow"), located in Winder, Barrow County, is a subsidiary of HMA, Inc., a Florida-based hospital chain. HMA-Barrow unsuccessfully opposed NGMC's application throughout the administrative review and appeal process, and

² Cites to the Review Board's February 22, 2008 decision (i.e., the Final DCH Decision, attached at Appendix **Tab 2**) are shown as "Final DCH Decision p. ___ ¶ ___." Cites to the evidentiary administrative appeal hearing testimony are shown by "T." and numbers referring to the transcript pages reflecting the testimony.

initiated the appellate judicial review in the superior court where its Barrow County hospital is located.

C. DCH & Review Board

DCH is the state agency responsible for health care planning functions, including administering the CON program. The Review Board is the state agency responsible for conducting the administrative appeal of NGMC's CON application, and its final decision is the DCH final agency decision at issue on judicial appeal. See Hughston Surgical, *supra*.

D. NGMC's Proposed South Hall Hospital

NGMC's proposed South Hall Hospital will meet a significant portion of the need for 127 more hospital beds in the applicable planning area as projected by DCH's numerical need methodology for new hospital beds (Ga. Comp. R. & Regs. 111-2-2-.20(3)(b)1). (Final DCH Decision p. 9 ¶ 24, p. 13 ¶ 40; T. 554-55). Moreover, the South Hall Hospital site is a particularly appropriate location in the planning area to develop the needed hospital facility because the south Hall County area has a large, dense, and rapidly growing population, but no hospital. (Final DCH Decision pp. 14-15, ¶¶ 42-43; T. 337; 432-33).

E. DCH's Initial Review of NGMC's CON Application

On November 15, 2006, NGMC submitted its CON application to construct a 100-bed hospital facility in south Hall County. (Final DCH Decision p. 7 ¶ 18). NGMC presented an analysis of its South Hall Hospital proposal under the general review considerations set forth in Ga. Comp. R. & Regs. 111-2-2-.09(1) and the Hospital Bed Rule's service-specific review standards. (Final DCH Decision pp. 7-8 ¶¶ 19-20). As part of its initial application, NGMC proposed replacing its Lanier Park Campus with the South Hall Hospital facility, and took the position that its project qualified for a need exception under the Hospital Bed Rule for new or replacement hospital proposals that meet certain conditions. (Id.).

HMA Barrow opposed NGMC's November 15 CON application, primarily contending that NGMC's proposal could not be considered a replacement of the Lanier Park facility and should be evaluated as a new hospital proposal. (Final DCH Decision p. 8 ¶ 22).

At the February 26, 2007 "60-day" meeting mandated by DCH's procedural rules, DCH announced that: (1) DCH did not consider the South Hall Hospital to be a "replacement," regardless whether NGMC's Lanier Park inpatient beds were closed as part of the project; and (2) DCH projected a net need for 127 additional

hospital beds in the planning area, which was more than sufficient need for a new 100-bed hospital. (Final DCH Decision pp. 8-9 ¶ 23; T. 418-20; T. 543).

On April 12, 2007, responding to the "60-day" meeting, NGMC submitted additional information and amendments in support of its application and demonstrated that its proposal satisfies the relevant Hospital Bed Rule standards, including the numerical need standard for new hospital beds. (Final DCH Decision p. 9 ¶ 26; T. 419-21). The April 12 amendments did not alter the scope of the South Hall Hospital facility or materially change the proposed project. (Final DCH Decision p. 10 ¶¶ 27-28; T. 15, 259, 292-93, 547-51).

On April 16, 2007, DCH asked NGMC to provide: (1) a county-level adverse impact analysis; and (2) greater detail regarding NGMC's ability to fund the project. (T. 571-73). NGMC filed a supplemental amendment responding to DCH's request on April 18, 2007.

On April 27, 2007, DCH issued its preliminary evaluation approving NGMC's amended CON application to develop the South Hall Hospital project.

F. Administrative Appeal Proceedings Initiated by HMA-Barrow

HMA-Barrow appealed DCH's preliminary approval of NGMC's South Hall Hospital project to the Review Board. Thereafter, a Review Board Hearing Officer

presided over the evidentiary appeal hearing regarding this matter held September 18-20, 2007. (Final DCH Decision pp. 11-12 ¶¶ 34-35). At hearing, five NGMC witnesses testified in support of the project. (Final DCH Decision p. 12 ¶ 35; T. 309-527). Further, the individual who served as DCH's Executive Director of Health Planning during the application review period testified in support of DCH's decision. (Final DCH Decision p. 12 ¶ 35; T. 531-92). HMA-Barrow presented the testimony of five witnesses. (Final DCH Decision p. 12 ¶ 35; T. 74-300).

On December 20, 2007, after considering and weighing the evidence, the Hearing Officer issued his decision affirming the CON for the South Hall Hospital. The Hearing Officer found that NGMC's proposal satisfies all applicable review criteria. (Final DCH Decision pp. 17-19 ¶¶ 1-9).

On January 18, 2008, HMA-Barrow submitted Objections to the Hearing Officer's decision to the full Review Board. On February 18, 2008, the Review Board heard oral argument from all parties. On February 22, 2008, after considering all written submissions and oral arguments, the Review Board issued an Order unanimously affirming and adopting the Hearing Officer's decision as the Order of the Review Board, i.e., the Final DCH Decision, which is by operation of law the final agency decision at issue on judicial appeal. See [Hughston Surgical](#),

supra. Accordingly, the Final DCH Decision grants NGMC a CON to develop the 100-bed South Hall Hospital.

On March 21, 2008, HMA-Barrow filed a Petition for Judicial Review with the Barrow Court, included at Appendix **Tab 5**. NGMC and DCH filed responses challenging the Petition, included at Appendix **Tabs 6 & 7**, respectively. The parties' briefs to the Barrow Court are included at Appendix **Tabs 8, 9 & 10**. Oral argument before the Barrow Court was held on November 24, 2008.

On December 15, 2008, the Barrow Court issued its Final Order (Appendix **Tab 1**) reversing the Final DCH Decision (Appendix **Tab 2**). The Barrow Court held that the Final DCH Decision was arbitrary and unreasonable, was inconsistent with the legislative intent behind the CON Act, O.C.G.A. § 31-6-1 et seq., and failed to properly assess the potential impact of NGMC's project.

NGMC submits this Application within 30 days of the Barrow Final Order.

IV. ENUMERATIONS OF ERROR AND CITATIONS TO AUTHORITY

A. The Barrow Court Erred by Conducting an Analysis That Exceeds the Permissible Scope of Judicial Review.

The Barrow Final Order reversing the Final DCH Decision exceeds the scope of permissible judicial review, fails to give the required deference to DCH,

and improperly usurps DCH's statutorily-granted health planning responsibilities. This Court has established that a superior court reviewing a CON decision is not to engage in health planning or substitute its judgment for that of DCH, stating "the judiciary is ill-equipped to resolve the complex issues inherent in health planning." Satilla Health Serv., 266 Ga.App. at 888. The Legislature has charged DCH, not the superior courts, with administering the CON Act and creating a state health planning system. See Global Diagnostics, 284 Ga.App. at 67. For that reason, when reviewed by superior courts, DCH/Review Board final decisions are entitled to great deference because:

Agencies provide a high level of expertise and an opportunity for specialization unavailable in the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems. Thus, their decisions are not to be taken lightly or minimized by the judiciary. Review overbroad in scope would have the effect of substituting the judgment of a judge or jury for that of the agency,

thereby nullifying the benefits of legislative delegation to a specialized body.

Global Diagnostics, 284 Ga.App. at 67-68 (citing Gwinnett Hosp. Sys., 262 Ga.App. at 882); see also Bentley v. Chastain, 242 Ga. 348, 350-51 (1978); Hospital Auth. of Gwinnett, 211 Ga.App. at 408 (holding that deference must be given to Review Board's interpretation and application of CON rules); Albany Surgical, P.C. v. Dep't of Cmty. Health, 257 Ga.App. 636 (2002) (upholding agency interpretation of ambulatory surgery CON rule); Thunderbolt Health Care, supra (reversing superior court's rejection of agency interpretation of skilled nursing beds CON rule).

Here, the Barrow Court failed to defer to DCH's health planning expertise and conducted an overbroad review that substituted its judgment for that of DCH. Instead of applying the appropriate judicial review standards, the Barrow Court conducted its own health planning to "effectuate the purpose of the [CON Act]," as such purpose was determined by the Barrow Court, and as the Barrow Court stated, to "protect the interests of the public at large." See Barrow Final Order at pp. 2, 6.

In conducting its improper review, the Barrow Court created its own health planning standards and reversed the Final DCH Decision for not applying those

fictitious standards. The Barrow Court found that DCH "did not do any analysis of whether keeping NGMC's Lanier Park facility open would result in a change in the viability of the business plans of each hospital affected." Barrow Final Order at p. 7. No provision in the CON Act or DCH's Rules mandates such an analysis of existing hospitals' "business plans."

Likewise, the Barrow Court's holding that the Final DCH Decision did not include a sufficiently thorough "analysis of need, adverse impact, economic feasibility, and public interest" inherently imposes the Barrow Court's own improper health planning standards on the Final DCH Decision. Barrow Final Order at p. 7.

Moreover, the Barrow Court improperly reweighs the record evidence and substitutes its judgment for DCH's on issues of fact. It is a fundamental principle of Georgia administrative law that a superior court reviewing an agency decision may not reweigh the evidence or substitute its judgment for the agency's regarding questions of fact. Hall v. Ault, 240 Ga. 585, 586 (1978); Georgia Pub. Serv. Comm'n v. Alltel Georgia Communication Corp., 244 Ga.App. 645, 647, (2000) (citing O.C.G.A. § 50-13-19(h)); Commissioner of Ins. v. Stryker, 218 Ga.App. 716, 717 (1996) (reinstating hearing officer's findings).

DCH's need and adverse impact assessments were properly based upon Georgia Office of Planning and Budget ("OPB") population projections that reflected expected population growth in the planning areas. The Barrow Court, however, held that DCH acted "recklessly" in relying on OPB's official population projections. The Barrow Court instead relied on alleged population-related evidence not found in the administrative record, *i.e.*, its personal observations regarding local development. See Barrow Final Order on pp. 7-8.

By substituting its judgment for that of DCH, and applying self-created health planning standards beyond those in the CON Act and DCH's rules, the Barrow Court erred. The Barrow Court failed to give proper deference to DCH on health planning matters. This Court should accept this appeal and reverse the Barrow Court to reinforce the principle that DCH, and not the superior courts, is authorized and equipped to resolve the complex state health planning issues.

**B. The Barrow Court Failed To Properly Apply the Substantial
Evidence Review Standard.**

The Barrow Court erred by rejecting the Final DCH Decision's adverse impact findings. Those findings are based on substantial evidence of record, and HMA-Barrow did not challenge the evidentiary basis supporting the findings.

Nevertheless, the Barrow Court ignored those findings completely. The Barrow Court's rejection of the Final DCH Decision's adverse impact findings exceeds the appropriate scope of judicial review and constitutes reversible error.

O.C.G.A. § 31-6-44³ prescribes a “substantial evidence” standard of judicial review, which significantly limits the scope of judicial review in CON cases:

Neither [the Georgia Court of Appeals’] review nor the trial court’s review of the [Department’s] decisions are de novo. They are reviews made with *deference to the factual findings of the hearing officer appointed by the Board* to decide the case. Only if these findings are not supported by substantial evidence, as defined by the statute, can the reviewing courts reject them, and nothing in our laws gives the reviewing courts the right to reconsider those factual findings and make factual findings of their own. Either they are supported by substantial evidence or they are not.

³ Recently enacted legislation modified some provisions of the CON Act for CON applications filed after July 1, 2008. The referenced judicial review standards are now codified at O.C.G.A. § 31-6-44.1.

Gwinnett Hosp. Sys., 262 Ga.App. at 883 (emphasis added).

The “substantial evidence” standard precludes reversal of the administrative factfinder’s decision based on a superior court’s own re-assessment of the credibility and weight of the evidence. Sawyer v. Reheis, 213 Ga.App. 727, 728-29 (1994). The factfinder’s decision must be upheld if supported by evidence, such as opinions of a competent expert witness, even if there is conflicting expert testimony. Georgia Power Co. v. Georgia Pub. Serv. Comm’n, 196 Ga.App. 572 (1990). A superior court inappropriately adopts the role of expert witness and factfinder if it questions the methodology and data relied upon by the hearing officer and substitutes its own findings. See Alltel, 244 Ga.App. at 647.

The Barrow Court held that DCH abdicated its health planning responsibilities by failing to give complete and due attention to the potential adverse impact of NGMC's amended CON application proposal. See Barrow Final Order at pp. 5-6. Likewise, the Barrow Court held that DCH's grant of a CON to NGMC "was without adequate review of NGMC's application's impact on the healthcare system or the surrounding facilities." Id. at p. 7. To reach those conclusions, the Barrow Court ignores and/or rejects numerous detailed findings in

the Final DCH Decision demonstrating that NGMC's South Hall Hospital proposal will not adversely impact HMA-Barrow or any other existing provider.

The Final DCH Decision concludes that the South Hall Hospital project satisfies the Hospital Bed Rule's adverse impact standards. (Final DCH Decision p. 18 ¶ 6). That conclusion of no adverse impact is based on a thorough consideration of NGMC's South Hall Hospital proposal, including the proposal to keep Lanier Park open, and supported by the following detailed factual findings based on substantial evidence that are part of the Final DCH Decision: pp. 14-16 ¶¶ 44-48:

44. Regarding adverse impact in particular, DCH conducted two adverse impact analyses. (MF 1924-1926). In the first approach, DCH conducted a conservative analysis not taking into account future population growth. (Id.) This approach revealed that Barrow would be impacted by a 4% reduction in Barrow's inpatient totals. (Id.) In the second approach, which accounted for future growth, DCH concluded that Barrow would receive no impact. (Id.) Accordingly under both approaches, Barrow would not be adversely impacted. (Id.)

45. NGMC also presented several analyses demonstrating that its proposed South Hall Hospital will serve only a portion of the projected growth in patients from both the overall patient draw area and the rule defined TSA. (T. 449-53; NGMC Exs. 111-113). In other words, all of the existing TSA hospital providers, including Barrow, are projected to experience significantly larger patient volume than their recent experience, even after accounting for the projected South Hall patient volume. (Id.) For example, even after accounting for the projected South Hall patient volume, Barrow's total discharges are projected to grow 40.3% from 2005 to 2014 due to the expected population growth in the service area. (T. 449-50; NGMC Ex. 111).

46. The population growth in the 4-county TSA alone will generate significant additional med/surg discharges by year 2014. The med/surg discharges alone in the TSA are projected to grow from 43,044 in 2005 to 59,636 in 2014. (T. 450-51; NGMC Ex. 112). After accounting for the 3,479 med/surg TSA discharges projected for the South Hall Hospital in 2014, an additional 13,113 new med/surg

TSA discharges will be available for existing providers. (Id.) Moreover, existing providers such as Barrow will experience a population growth-driven increase in patients other than med/surg patients, such as obstetrical patients, for whom the South Hall Hospital will not be an option. (Id.) In addition, Barrow and other existing providers will also experience population growth-driven volume increases from counties outside the TSA. (T. 451).

47. It is noteworthy that the applicable Hospital Bed Rule numerical need methodology projects that all existing TSA providers, including Barrow, will experience utilization of 75% of occupancy [the Hospital Bed Rules' optimal occupancy level] before projecting an unmet need for even one bed. (Rule 272-2-.20(2)(h) and .20(3)(b)1(v)). (NGMC Ex. 90--Step E). Accordingly, the projected unmet need for 127 additional beds in the service area assumes that Barrow and the other existing providers will operate at 75% of occupancy. (T. 420-21; T. 260-61).

48. Even assuming the most extreme possible scenario in terms of the draw of patients to the South Hall Hospital, the population growth

in the area still would negate any potential adverse impact. If the South Hall Hospital were 100% utilized and drew 100% of its patients from the 4-county TSA (the most aggressive possible assumptions, and far more aggressive than NGMC projects), the population growth in the TSA still would generate 8,000 additional new med/surg patients to be treated by existing hospitals. (T. 452-53; NGMC Ex. 113). Existing providers, including Barrow, would be left with not only the remaining growth in TSA med/surg patient days, but also with (i) the growth in patient volumes for the types of cases that NGMC's South Hall hospital facility will not treat, and (ii) additional patient days from growth in other counties. (Id.) The high growth rate in the area makes it impossible for there to be any adverse impact due to the South Hall Hospital. (T. 565).

As these detailed factual findings demonstrate, the Final DCH Decision was based on a thorough assessment of all factors pertinent to an adverse impact

analysis, such as population growth, utilization projections, etc.⁴ Relying on those factual findings, all based on substantial evidence, the Final DCH Decision holds that the South Hall Hospital satisfies the applicable adverse impact standards (Ga. Comp. R. & Reg. 111-2-2-.20(3)(d)). See Final DCH Decision p. 18 ¶ 6.

The Final DCH Decision includes a detailed and thorough review of NGMC's amended application's potential impact on the healthcare system and surrounding facilities, and its findings related thereto are supported by substantial evidence of record. The Barrow Court erred in reversing the Final DCH Decision based on its apparent reassessment of the evidence and rejection of the substantial evidence demonstrating no adverse impact. See Hospital Auth. of Gwinnett, 211 Ga.App. at 410; Sawyer, 213 Ga.App. at 728-29.

Moreover, the Barrow Court's assertion that HMA-Barrow was not given proper opportunity to study the impact of NGMC's amended application is

⁴ The administrative record includes substantial evidence and analyses addressing the adverse impact review standard, including the hearing exhibits attached at Appendix **Tab 11**, and the following hearing testimony: T 174-97, 204-28, 245-300, 442-65, 474-529.

baseless. HMA-Barrow was provided a full opportunity at the September 18-20 2007 administrative evidentiary hearing, which took place approximately five months after NGMC amended its application, to present its adverse impact analyses and evidence. HMA-Barrow's adverse impact evidence, however, confirms that planning area population growth would generate a net increase in patients to be treated by existing hospital facilities in 2014, even if NGMC's South Hall Hospital were 100% utilized and all its patients were planning area residents. (T. 285; Barrow Ex. 25). Thus, HMA-Barrow's own evidence shows that even under the most extreme possible scenario it could conjure, population growth in the planning area renders adverse impact a non-issue. (T. 285, 456). Thus, not only was HMA-Barrow provided sufficient opportunity to study the impact of NGMC's amended application, but the results of HMA-Barrow's study also support the Final DCH Decision's findings of no adverse impact.

Finally, the Barrow Court erred by failing to focus its review on the Final DCH Decision. As this Court has found, the Review Board's decision (i.e. the Final DCH Decision) is, by operation of law, the final decision of DCH. See Hughston Surgical, supra. The Final DCH Decision is the decision at issue in this appeal, and it is the decision which is to be treated with great deference. Id. The

Barrow Court erred by basing its decision to reverse on findings in DCH's preliminary evaluation of NGMC's application, which was not the Final DCH Decision before it.

This Court should accept this appeal and reverse the Barrow Court to reinforce the principle that the substantial evidence review standard prohibits superior courts from rejecting agency findings based on substantial evidence.

C. The Barrow Court Failed To Give the Required Deference to DCH's Interpretation of its Rules.

The Barrow Court erred in holding that the Review Board abused its discretion in determining that DCH acted properly in accepting NGMC's Amendments to its CON application. See Final DCH Decision p. 13 ¶ 39. The procedure for amendments to CON applications is set forth in the DCH rules, and the Barrow Court erred by failing to give "great deference" to DCH's interpretation and application of its procedural rules. See Gwinnett Hosp. Sys., 262 Ga.App. at 882; Hospital Auth. of Gwinnett, 211 Ga.App. at 410; Satilla Health Servs., 266 Ga.App. at 885.

The CON Act and DCH's Rules grant applicants broad discretion to amend their applications during the review process, and reserve to DCH the right to

determine, in its sole discretion, whether certain proposed amendments to a pending application will require the withdrawal of that application.

Pursuant to Ga. Comp. R. & Regs. 111-2-2-.07(1)(h), an applicant that submits amendments will be required to withdraw its CON application and submit a new application only if (1) **DCH determines** that an amendment constitutes a total change in the scope of a project; (2) **DCH determines** that an amendment constitutes a total change in the location of a project; or (3) **DCH determines** that an amendment constitutes a total change in the legal applicant. In all three circumstances, DCH has the sole discretion to determine whether an applicant's amendments are "total changes" requiring withdrawal of the pending application. The Rules place no other limits on the scope of permissible amendments.

Moreover, Ga. Comp. R. & Regs. 111-2-2-.07(1)(g)2 sets forth a number of "safe harbors" that establish a non-exclusive list of application amendments that are **always** acceptable. Final DCH Decision p. 12 ¶ 36. That safe harbor list includes amendments that increase the number of proposed beds. Id.

Exercising its discretion under the applicable rules, DCH determined that NGMC's amendments were acceptable and did not fall within one of the three circumstances that would require withdrawal. (T. 551). DCH determined that

NGMC's amendments did not constitute a "total change in the scope" of the South Hall Hospital project. (Final DCH Decision p. 13 ¶ 39; T. 551).

The Final DCH Decision held that NGMC's Amendments "did not alter the scope of the South Hall Hospital facility" and did not constitute a "total change in the scope" of its CON application. (Final DCH Decision p. 10 ¶ 27, p. 13 ¶ 39). Substantial evidence in the record supports those findings, including HMA-Barrow's own admission that the amendments did not change: (1) the scope of services to be offered at the South Hall Hospital; (2) the location of the South Hall Hospital; or (3) the number of beds at the South Hall Hospital facility. (T. 157, 256-59; Barrow Ex. 22; See also T. 544-551).

The Barrow Court holds that NGMC's application amendments were improper because the proposal not to close Lanier Park would result in an increase of 100 hospital beds. See Barrow Final Order at pp. 5-6. The DCH rules are clear, however, that an amendment that increases the number of proposed beds in a project falls within a "safe harbor" of amendments that will always be accepted by DCH. See Ga. Comp. R. & Regs. Rule 111-2-2-.07(1)(g)2; Final DCH Decision p. 12 ¶ 36; T. 538-39.

The Barrow Court erred in failing to grant great deference to DCH's interpretation of its rules and DCH's finding that, based on substantial record evidence, NGMC's amendments did not constitute a total change in the scope of the South Hall Hospital project requiring withdrawal of the application. This Court should accept this appeal and reverse the Barrow Court to reinforce the principle that DCH's interpretation and application of the CON Act and its rules are entitled to great deference.

V. CONCLUSION

For the reasons set forth above, this Court should accept review of this matter and reverse the Barrow Final Order.

Respectfully submitted this 14th day of January, 2009.

**PARKER, HUDSON, RAINER &
DOBBS LLP**

By: 

Armando L. Basarrate
Georgia Bar No. 041023
David L. Fenstermacher, Jr.
Georgia Bar No. 258630
Roberta E. Moore
Georgia Bar No. 101085

1500 Marquis Two Tower
285 Peachtree Center Avenue, N.E.
Atlanta, Georgia 30303
(404) 523-5300
FAX: (404) 522-8409

**Attorneys for Northeast Georgia Medical
Center, Inc.**

CERTIFICATE OF SERVICE

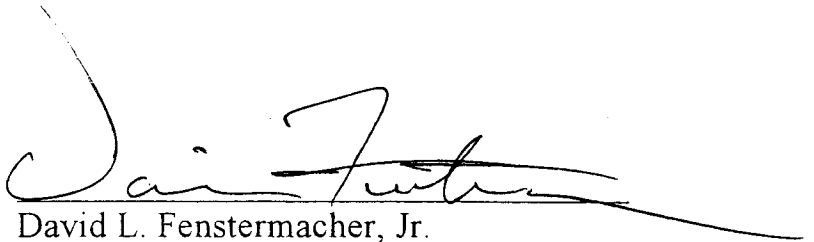
I, David L. Fenstermacher, Jr., attorney for Northeast Georgia Medical Center, Inc., certify that I have served a true and correct copy of the foregoing **NORTHEAST GEORGIA MEDICAL CENTER, INC.'S APPLICATION FOR DISCRETIONARY APPEAL** upon counsel for all parties by U.S. Mail, with adequate postage affixed thereon, addressed to:

Alex Sponseller, Esq.
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334-1300

Clyde L. Reese, III, Esq.
Director
Division of Health Planning
Department of Community Health
40th Floor
2 Peachtree Street, N.W.
Atlanta, Georgia 30303-3142

Michael J. Bowers, Esq.
T. Joshua R. Archer, Esq.
Christopher S. Anulewicz, Esq.
M. Anne Kaufold-Wiggins, Esq.
Balch & Bingham LLP
30 Ivan Allen Jr. Blvd. N.W., Suite 700
Atlanta, Georgia 30308

This 14th day of January, 2009.



David L. Fenstermacher, Jr.
Georgia Bar No. 258630