

Case No. S17X1318

IN THE SUPREME COURT OF GEORGIA

CLYDE L. REESE, III, et al.,

Cross-Appellants,

v.

WOMEN'S SURGICAL CENTER, LLC, et al.,

Cross-Appellees.

Fulton County Superior Court, Case No. 2015-CV-262659

CROSS-APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

INTRODUCTION..... 1

STATEMENT OF JURISDICTION..... 2

STATEMENT OF FACTS 3

 A. The State’s Certificate of Need (“CON”) program 3

 B. The Surgical Center Plaintiffs’ CON application..... 5

 C. The Surgical Center Plaintiffs’ constitutional challenges 6

 D. The Superior Court’s order denying the State’s motion to dismiss 7

 E. The Superior Court’s order granting the State summary judgment 8

ENUMERATION OF ERRORS..... 8

STANDARD OF REVIEW 9

ARGUMENT 9

I. THE SURGICAL CENTER PLAINTIFFS’ DECLARATORY JUDGMENT CLAIMS ARE BARRED BECAUSE THERE IS NO ACTUAL CONTROVERSY BETWEEN THE PARTIES AND NO RISK OF FUTURE UNDIRECTED ACTION..... 9

II. THE SURGICAL CENTER PLAINTIFFS’ CLAIMS ARE BARRED BECAUSE THEY DO NOT HAVE STANDING TO BRING THEM..... 12

III. THE SURGICAL CENTER PLAINTIFFS’ STATE LAW CLAIMS ARE BARRED BECAUSE THEY FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES. 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Baker v. City of Marietta, 271 Ga. 210, 214 (1999)..... 1, 10, 11

Bennett v. Spear, 520 U.S. 154 (1997)..... 12

Bobick v. Cmty. & S. Bank, 321 Ga. App. 855 (2013)..... 16

Chambers of Ga., Inc. v. Dep’t of Natural Res., 232 Ga. App. 632 (1998) . 12

City of Littleton v. Z.J. Gifts D-4, 541 U.S. 774 (2004)..... 14

Cowart v. Widener, 287 Ga. 622 (2004)..... 9

Dep’t of Public Safety v. Foreman, 130 Ga. App. 71 (1973) 16

Dep’t of Transp. v. Peach Hill Props., Inc., 280 Ga. 624 (2006)..... 12

Elend v. Basham, 471 F. 3d 1199 (11th Cir. 2006) 12

Flint River Mills v. Henry, 234 Ga. 385 (1975)..... 16

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990)..... 14

Ga. Dep’t of Cmty. Health v. Ga. Soc’y of Ambulatory Surgery Ctrs.,
290 Ga. 628 (2012)..... 17

Granite State Outdoor Adver., Inc. v. City of Roswell,
283 Ga. 417 (2008)..... 12

GSW, Inc. v. Dep’t of Natural Res., 254 Ga. App. 283 (2002)..... 16, 17

Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301 (11th Cir. 2009) .. 15

Hertz v. Bennett, 294 Ga. 62 (2013) 15

Hurst v. Grange Mut. Cas. Co., 266 Ga. 712 (1996)..... 11

Leitch v. Fleming, 291 Ga. 669 (2012) 10

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 12

Manlove v. Unified Gov’t of Athens-Clarke Cty., 285 Ga. 637 (2009) .. 13, 14

Miller v. S. Heritage Ins. Co., 215 Ga. App. 173 (1994)..... 11

Parker v. Leeuwenburg, No. S16A1505,
2017 Ga. LEXIS 166 (Mar. 6, 2017)..... 13, 14

Statutes

O.C.G.A. § 5-6-34..... 2, 3

O.C.G.A. § 9-4-2..... 9

O.C.G.A. § 9-11-25..... 6

O.C.G.A. §§ 31-6-1 *et seq.*..... 6

O.C.G.A. § 31-6-40..... 3

O.C.G.A. § 31-6-42..... 3, 4

O.C.G.A. § 31-6-43..... 4

O.C.G.A. § 31-6-44..... 4, 6, 17

O.C.G.A. § 31-6-44.1..... 4, 16

O.C.G.A. § 31-6-47..... 3

O.C.G.A. §§ 50-13-1 through 44 16

O.C.G.A. § 50-13-19..... 16

42 U.S.C. § 1983 7

Other Authorities

Ga. Comp. R. and Regs. 111-2-2-.01 *et seq.*..... 6
Ga. Comp. R. and Regs. 111-2-2-.09..... 3
Ga. Comp. R. and Regs. 111-2-2-.22..... 14
Ga. Comp. R. and Regs. 111-2-2-.26..... 14
Ga. Comp. R. and Regs. 111-2-2-.31..... 14
Ga. Comp. R. and Regs. 111-2-2-.34..... 15

Constitutional Provisions

Ga. Const. Art. I, § I, Para. I..... 6
Ga. Const. Art. I, § I, Para. VII..... 7
Ga. Const. Art. III, § VI, Para. V..... 7
Ga. Const. Art. VI, § VI, Para. II..... 2, 9
U.S. CONST. amend. XIV, § 1..... 7

INTRODUCTION

Below, the Superior Court properly granted the State's motion for summary judgment and dismissed each of the plaintiffs' five constitutional challenges to the State's certificate of need ("CON") program. The Superior Court held, rightly, that the plaintiffs' constitutional challenges are meritless. But in granting the State's motion, the Superior Court only adopted the State's arguments on the merits, and failed to address the State's procedural arguments. Accordingly, with this cross-appeal, the State challenges the Superior Court's failure to address those procedural arguments, even while acknowledging that the simplest way for the Court to dispose of this case is to hold, as the Superior Court did, that the plaintiffs' five constitutional challenges are in fact meritless.

The State focuses its cross-appeal on three procedural arguments. First, and principally, the plaintiffs' declaratory judgment claims are barred because there is no actual or justiciable controversy. A court may not issue a declaratory judgment to address "a possible or probable future contingency" or, important here, to determine "whether or not a statute, in the abstract, is valid." *Baker v. City of Marietta*, 271 Ga. 210, 214 (1999). Second, the plaintiffs lack standing to bring their constitutional challenges to the CON program because they do not allege an injury in fact. Third, to the extent that the plaintiffs are challenging the denial of their prior CON application, they are subject to the administrative exhaustion require-

ment and they were required to first raise their constitutional challenges before the Department. It is undisputed that the plaintiffs applied for a CON and failed to exhaust their administrative remedies after the Department issued an initial decision denying their application. Plaintiffs could have avoided all three of the State's procedural arguments by simply appealing the denial of their CON application (and exhausting their administrative remedies).

Accordingly, *if* the Court reverses the Superior Court's summary judgment order holding that the plaintiffs' claims are meritless, it should address the issues raised by the cross-appeal and dismiss the plaintiffs' claims as procedurally barred.

STATEMENT OF JURISDICTION

This Court has exclusive jurisdiction over this appeal because the underlying case involves "the construction of . . . the Constitution of the State of Georgia [and] of the United States" and the "constitutionality of a law . . . has been drawn in question." Ga. Const. Art. VI, § VI, Para. II (1).

The Superior Court entered its order granting the State summary judgment on the Surgical Center Plaintiffs' constitutional claims on October 31, 2016. (R-1283-1291). The Superior Court's summary judgment order is directly appealable as a final judgment pursuant to O.C.G.A. § 5-6-34(a)(1). The Surgical Center Plaintiffs filed a timely appeal of the Superior Court's summary judgment order on November 28, 2016 (R-1-3), and the State filed a timely cross-appeal on Novem-

ber 30, 2016 (R-1-3). The State’s cross-appeal is proper because with it the State challenges rulings that will affect the proceedings below—that is, rulings that will affect the proceedings below *if* the Court reverses the Superior Court’s summary judgment order and remands this case for additional proceedings. *See* O.C.G.A. § 5-6-34(d).

STATEMENT OF FACTS

A. The State’s Certificate of Need (“CON”) program

Georgia’s CON program applies to a statutorily defined category of “new institutional health services.” O.C.G.A. § 31-6-40(a). Subject to certain express exemptions, a person proposing to open a “new institutional health service” in Georgia must apply for and receive a CON from the Department. O.C.G.A. §§ 31-6-40; 31-6-47 (listing exemptions).

When a CON application is received, the Department reviews and determines whether to approve it in light of seventeen statutory “considerations” and the Department’s “reasonable rules” interpreting those considerations. *See* O.C.G.A. § 31-6-42(a)(1)-(17); *see* GA. COMP. R. & REGS. 111-2-2-.09 (interpreting review “considerations”). The statutory considerations are exactly what one would expect them to be. The Department considers, for instance, whether the “population residing in the area served, or to be served, by the new institutional health service has a need for [the] service,” O.C.G.A. § 31-6-42(a)(2); whether the

proposed project “can be adequately financed and is, in the immediate and long term, financially feasible,” O.C.G.A. § 31-6-42(a)(4); whether the “costs and methods of a proposed construction project . . . are reasonable and adequate for quality health care,” O.C.G.A. § 31-6-42(a)(6); and whether the proposed service “encourages more efficient utilization of the health care facility proposing [the] service,” O.C.G.A. § 31-6-42(a)(9).

A CON application is subject to three levels of Department review. After its initial review of a CON application, the Department issues a “desk decision” that is effective and final unless an aggrieved party—*i.e.*, the CON applicant (if the application was denied) or a party that opposed the CON application (if the application was granted)—files an administrative appeal. O.C.G.A. § 31-6-43(i). If the initial desk decision is appealed, an independent hearing officer conducts a *de novo* review of the application after a full evidentiary hearing. O.C.G.A. § 31-6-44(a)-(i). The hearing officer’s decision may then be appealed to the Department’s Commissioner, whose decision is the final agency decision. O.C.G.A. § 31-6-44(m). A party aggrieved by the Department’s final agency decision can petition for judicial review, and a court may reverse or modify the Department’s decision if, among other things, it violates any “constitutional or statutory provisions.” O.C.G.A. § 31-6-44.1(a)(1).

B. The Surgical Center Plaintiffs' CON application

The case below was brought by two Georgia doctors, Hugo D. Ribot, Jr. and Malcolm Barfield (“Doctors”), and an ambulatory surgical center that they own, Women’s Surgical Center, LLC d/b/a Georgia Advanced Surgery Center for Women (“Women’s Surgical Center”) (collectively “Surgical Center Plaintiffs”). (R-5). The Surgical Center Plaintiffs currently operate Women’s Surgical Center under a letter of non-reviewability issued by the Department in 2009, which confirms that the center, as currently operated, is not subject to the CON review and approval process. (R-11-12, 21-23).

In December 2014, the Surgical Center Plaintiffs filed a CON application with the Department. (R-13, 583). In their CON application, the Surgical Center Plaintiffs proposed an additional operating room, and the ability to add non-practice member physicians as physicians authorized to offer services at Women’s Surgical Center. (R-25, 32). The Department issued an initial desk decision denying the Surgical Center Plaintiffs’ CON application on March 27, 2015, because the application, as presented, was inconsistent with the applicable review considerations, standards, and criteria. (R-24-42, 583-584). Among other factors, the Department found the Surgical Center Plaintiffs’ proposal would result in an unnecessary duplication of services given the surgical center’s “low and steadily

declining facility utilization” and “sufficient available capacity to serve” additional patients. (R-28).

The Surgical Center Plaintiffs had the right to appeal the initial desk decision of the Department to a Certificate of Need Appeal Panel hearing officer within 30 days of the date of the decision, O.C.G.A. § 31-6-44(d), but the Surgical Center Plaintiffs chose not to exercise that right. (R-15, 24, 586). The Surgical Center Plaintiffs alleged they did not appeal the denial of their CON application due to, among other reasons, “the time and cost required to engage in the appeal process” and the “improbability of success.” (R-15).

C. The Surgical Center Plaintiffs’ constitutional challenges

Instead, the Surgical Center Plaintiffs filed the underlying action on June 30, 2015.¹ In their Complaint, the Surgical Center Plaintiffs detail the denial of their CON application, and assert five constitutional challenges to the State’s CON program.² (R-5-19). Specifically, the Surgical Center Plaintiffs assert that the State’s CON program violates the Due Process (Ga. Const. Art. I, § 1, Para. I),

¹ The underlying action was filed against Clyde L. Reese, III, former Commissioner of the Department, and Rachel L. King, Executive Director of the Department’s Office of Health Planning, in both their official and individual capacities. During the pendency of the underlying action, Frank Berry succeeded Reese as the Commissioner of the Department. Consequently, Commissioner Berry is automatically substituted for Reese in the official capacity claims against Reese. *See* O.C.G.A. § 9-11-25(d)(1). Reese remains a party, however, due to the individual capacity claims against him.

² The Surgical Center Plaintiffs challenge O.C.G.A. § 31-6-1 *et seq.* and GA. COMP. R. & REGS. 111-2-2-.01 *et seq.* (R-5).

Anti-Competitive Contracts³ (Ga. Const. Art. III, § VI, Para. V(c)(2)), and Privileges and Immunities (Ga. Const. Art. I, § I, Para. VII) Clauses of the Georgia Constitution. (R-15-17). The Surgical Center Plaintiffs also assert that the CON program violates the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment to the United States Constitution (U.S. CONST. amend. XIV, § 1).⁴ (R-17-18). The Surgical Center Plaintiffs seek declaratory and injunctive relief. (R-18-19). Specifically, they seek a declaration that Georgia’s CON laws—an entire Chapter of the Georgia Code and all of the regulations promulgated thereunder—are unconstitutional, and an order enjoining the State from enforcing the CON laws. *Id.*

D. The Superior Court’s order denying the State’s motion to dismiss

The State moved to dismiss all of the Surgical Center Plaintiffs’ claims (R-79-81), but, the Superior Court denied the State’s motion to dismiss. (R-347-348). The Superior Court did not explain its reasons for denying the State’s motion, stating only that the motion was denied “for the reasons urged by [the Surgical Center Plaintiffs].” *Id.*

³ The Surgical Center Plaintiffs call the Anti-Competitive Contracts Clause the “Anti-Monopoly Clause.”

⁴ The Surgical Center Plaintiffs bring their federal claims under 42 U.S.C. § 1983.

The State petitioned this Court for interlocutory review of the Superior Court's order. *See* Case No. S16I0883. This Court denied the State's petition, as well as the State's motion for reconsideration. *Id.*

E. The Superior Court's order granting the State summary judgment

After discovery in the trial court, the parties filed cross-motions for summary judgment. (R-940-942, 943-946). The State asserted that it was entitled to summary judgment, among other reasons, because all five of the Surgical Center Plaintiffs' constitutional claims are meritless, the Surgical Center Plaintiffs lack standing to bring their constitutional challenges, and there is no actual or justiciable case or controversy appropriate for declaratory relief. (R-1115-1123, 1124-1126). On October 31, 2016, the Superior Court granted the State's motion for summary judgment, and denied the Surgical Center Plaintiffs' motion for summary judgment. (R-1283-1291). The Superior Court held that the Surgical Center Plaintiffs' constitutional claims are meritless, but the Superior Court did not address the State's procedural arguments. *Id.* The State's cross-appeal challenges the Superior Court's failure to address the State's procedural arguments.

ENUMERATION OF ERRORS

1. The Superior Court erred when it addressed the merits of the Surgical Center Plaintiffs' constitutional challenges because there is no actual controversy between the parties and no risk of future undirected action.

2. The Superior Court erred when it addressed the merits of the Surgical Center Plaintiffs' constitutional challenges because they lack standing to bring their constitutional challenges.

3. To the extent that the Surgical Center Plaintiffs are challenging the denial of their CON application, the Superior Court erred by addressing the merits of the Surgical Center Plaintiffs' constitutional challenges, because the Surgical Center Plaintiffs failed to exhaust their administrative remedies.

This Court has exclusive jurisdiction over this appeal because the underlying case involves "the construction of . . . the Constitution of the State of Georgia [and] of the United States" and the "constitutionality of a law . . . has been drawn in question." Ga. Const. Art. VI, § VI, Para. II (1).

STANDARD OF REVIEW

This Court reviews the denial of a motion for summary judgment *de novo*. *Cowart v. Widener*, 287 Ga. 622, 624 (2010).

ARGUMENT

I. THE SURGICAL CENTER PLAINTIFFS' DECLARATORY JUDGMENT CLAIMS ARE BARRED BECAUSE THERE IS NO ACTUAL CONTROVERSY BETWEEN THE PARTIES AND NO RISK OF FUTURE UNDIRECTED ACTION.

The Surgical Center Plaintiffs may not seek a declaratory judgment because there is no "actual controversy" between the parties to this case and "the ends of justice" do not require a declaratory judgment. *See* O.C.G.A. § 9-4-2 (a) and (b).

A court may only issue a declaratory judgment if an actual or justiciable controversy exists. *Id.* An actual controversy is “a justiciable controversy where there are interested parties asserting adverse claims on an accrued set of facts.” *Leitch v. Fleming*, 291 Ga. 669, 670 (2012) (quotation marks omitted). A justiciable controversy exists if there are “circumstances showing a necessity for a determination to guide and protect a party from uncertainty and insecurity with regard to the propriety of some future act or conduct.” *Baker*, 271 Ga. at 214. Those limitations on the availability of declaratory judgments have teeth. A court may not, for instance, issue a declaratory judgment to address “a possible or probable future contingency” or, important here, to determine “whether or not a statute, in the abstract, is valid.” *Id.*

The Surgical Center Plaintiffs fail to show an actual or justiciable controversy here. First, there is no actual controversy here because there are no “interested parties asserting adverse claims on an accrued set of facts.” *Leitch*, 291 Ga. at 670 (quotation marks omitted). No actual case or controversy existed at the time the Surgical Center Plaintiffs filed their Complaint. The Surgical Center Plaintiffs concede that their action is not premised on the Department's denial of their CON application. (*See* R-173, 177, 181, 184, 302-303, 477). It follows that the Surgical Center Plaintiffs do not (and cannot) rely on the accrued set of facts surrounding their CON application to create an actual controversy. The Surgical Center Plain-

tiffs also cannot rely on the action on appeal itself to demonstrate an actual controversy as “one cannot create a controversy for declaratory judgment purposes by filing a lawsuit.” *See Miller v. S. Heritage Ins. Co.*, 215 Ga. App. 173, 174 (1994), overruled in part on other grounds by *Hurst v. Grange Mut. Cas. Co.*, 266 Ga. 712 (1996). Moreover, to the extent the Surgical Center Plaintiffs are challenging the very existence and constitutionality of the CON program, the decisions of this Court are clear—a court may not issue a declaratory judgment to determine “whether or not a statute, in the abstract, is valid” or to address some “possible or probable future contingency.” *Baker*, 271 Ga. at 215 (citations omitted). There is no actual controversy here.

There is also no justiciable controversy here as there are no “circumstances showing a necessity for a determination to guide and protect a party from uncertainty and insecurity with regard to the propriety of some future act or conduct.” *Baker*, 271 Ga. at 214. The Surgical Center Plaintiffs are not in a position of uncertainty. Instead, they freely admit that they are not in a position of uncertainty at all, stating “the CON laws are plain on their face, and it is clear how they operate,” and that “[t]here is no uncertainty or abstraction.” (R-486; *see also* R-488 (stating the Surgical Center Plaintiffs “understand the regulation” and “know what it requires”)). The only uncertainty here is whether the CON laws are unconstitutional. However, that uncertainty alone fails to establish a justiciable controversy. *See*

Dep't of Transp. v. Peach Hill Props., Inc., 280 Ga. 624, 626-27 (2006). Because the parties' positions on the constitutionality of the CON laws are firmly established and the Surgical Center Plaintiffs are "not walking in the dark as to what future position to take," there is no justiciable controversy. *Id.* (citing *Chambers of Ga., Inc. v. Dep't of Natural Res.*, 232 Ga. App. 632, 633-34 (1998)). An actual or justiciable controversy is required under Georgia's Declaratory Judgment Act. Neither is present here.

II. THE SURGICAL CENTER PLAINTIFFS' CLAIMS ARE BARRED BECAUSE THEY DO NOT HAVE STANDING TO BRING THEM.

In addition to establishing a case or controversy appropriate for declaratory relief, the Surgical Center Plaintiffs were required to have standing to bring a declaratory judgment action challenging the constitutionality of the CON laws. The Surgical Center Plaintiffs do not have standing to challenge the constitutionality of the CON laws here because they do not have an injury in fact. *See Granite State Outdoor Adver., Inc. v. City of Roswell*, 283 Ga. 417, 418 (2008) (citing *Bennett v. Spear*, 520 U.S. 154 (1997), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

A court may only hear and decide a constitutional challenge if the plaintiff has suffered an injury in fact—that is, "a harm that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Elend v. Basham*, 471 F.3d 1199, 1207 (11th Cir. 2006) (quotation marks omitted). For

instance, this Court addressed the requirement of an injury in fact for standing purposes in *Manlove v. Unified Government of Athens-Clarke County*, 285 Ga. 637 (2009).⁵ In *Manlove*, this Court upheld a trial court's dismissal of a declaratory judgment action challenging the constitutionality of a noise ordinance. 285 Ga. at 638-39. The plaintiffs had never been cited, prosecuted, or fined for a violation of the noise ordinance. *Id.* at 637. Rather, the plaintiffs asserted only that they intended to play music loudly in the future. *Id.* at 638. Ultimately, this was not enough to demonstrate an injury in fact for standing purposes as the plaintiffs' assertion "[did] not necessarily trigger a violation of the [challenged law] on its face or suggest an imminent threat of prosecution." *Id.*

Like the plaintiffs in *Manlove*, the Surgical Center Plaintiffs have only alleged an intent to engage in a particular conduct in the future. (R-12-13). The Surgical Center Plaintiffs alleged that "but for" the CON laws, they "would" allow other surgeons to operate at their surgical center, add another operating room, or sell ownership interests in their surgical center. *Id.* But these allegations do not trigger a violation of the CON laws on their face, or suggest an imminent threat of prosecution. A challenge to the constitutionality of the CON laws cannot be

⁵ This Court also recently addressed the injury in fact requirement in *Parker v. Leeuwenburg*, No. S16A1505, 2017 Ga. LEXIS 166 (Mar. 6, 2017).

“based on speculation and conjecture of such an unspecified future harm.” *Manlove*, 285 Ga. at 638. The Surgical Center Plaintiffs did not show an injury in fact.

Even more detrimental to the Surgical Center Plaintiffs’ ability to show an injury in fact, and to establish standing, is that they have challenged an entire Chapter of the Code, and all of the regulations promulgated under that Chapter. A plaintiff bringing a constitutional challenge must have standing for **each** of the statutes and regulations challenged, down to each of the provisions within those statutes and regulations. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 233-36 (1990), overruled in part on other grounds by *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004) (refusing to consider constitutional challenges to provisions of a statute where there was no evidence in the record that any party had standing to challenge those provisions); *see also Parker v. Leeuwenburg*, No. S16A1505, 2017 Ga. LEXIS 166, at *19-20 (Peterson, J., dissenting) (noting limitations as to which statutory provisions a plaintiff bringing a constitutional challenge may attack). A quick glance at the challenged statutes and regulations reveals that a number of these statutes and regulations do not apply to the Surgical Center Plaintiffs at all. *See* GA. COMP. R. & REGS. 111-2-2-.22 (specific review considerations for adult open heart surgery services); GA. COMP. R. & REGS. 111-2-2-.26 (specific review considerations for psychiatric and substance abuse inpatient programs); GA. COMP. R. & REGS. 111-2-2-.31 (specific review considera-

tions for personal care homes); GA. COMP. R. & REGS. 111-2-2-.34 (specific review considerations for traumatic brain injury facilities). The Surgical Center Plaintiffs are required to demonstrate standing to challenge each of these statutes and regulations, inclusive of the provisions therein. The Surgical Center Plaintiffs did not make such a showing.

III. THE SURGICAL CENTER PLAINTIFFS' STATE LAW CLAIMS ARE BARRED BECAUSE THEY FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

Below, the Surgical Center Plaintiffs repeatedly argued that they were not challenging the denial of their CON application. (*See* R-173, 177, 181, 184, 302-303, 477). But, the Surgical Center Plaintiffs also repeatedly made reference to the denial of their application. (*See* R-12-15, 24-42, 175-177). The Surgical Center Plaintiffs' frequent references to their prior application may be explained by the fact that they are also making an as-applied challenge to the CON laws. *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009) ("An as-applied challenge . . . addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party. . . . [and] [b]ecause such a challenge asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider."); *see also Hertz v. Bennett*, 294 Ga. 62, 66 (2013) (following the aforementioned proposition from *Harris*). To the extent that the Surgical Center Plaintiffs

are in fact challenging the denial of their CON application, they are subject to the administrative exhaustion requirement.

The Georgia Administrative Procedure Act (“APA”), O.C.G.A. §§ 50-13-1 through 44, and O.C.G.A. § 31-6-44.1 establish the procedure by which challenges to decisions of the Department, including constitutional challenges, must be brought. Under the APA, a person is not entitled to judicial review unless he has “exhausted all administrative remedies available within the agency and . . . is aggrieved by a final decision in a contested case.” O.C.G.A. § 50-13-19(a). “If a party fails to pursue those [available administrative] remedies, a trial court is deprived of subject matter jurisdiction over the action.” *Bobick v. Cmty. & S. Bank*, 321 Ga. App. 855, 861 (2013). Important here, “[t]he fact that one basis, or even the sole basis, of a respondent's complaint . . . is a constitutional attack, does not eliminate the necessity for agency review as a prerequisite to judicial review.” *Dep't of Pub. Safety v. Foreman*, 130 Ga. App. 71, 72 (1973). It is well-established that a superior court can only consider a claim that a statute or regulation is unconstitutional “provided [the claim] was preserved in the administrative proceedings below.” *Gsw, Inc. v. Dep't of Natural Res.*, 254 Ga. App. 283, 285 (2002). Though it “appears futile at the time of its making,” a constitutional challenge before the agency is required. *Flint River Mills v. Henry*, 234 Ga. 385, 386 (1975).

The Surgical Center Plaintiffs had the right to appeal the initial desk decision of the Department to a Certificate of Need Appeal Panel hearing officer within 30 days of the date of the decision, O.C.G.A. § 31-6-44(d), and they could have raised any constitutional objections they had to Georgia's CON laws in an administrative appeal hearing. *Gsw, Inc.*, 254 Ga. App. at 285. To the extent that they are challenging the denial of their CON application, the Surgical Center Plaintiffs were required to raise their constitutional claims before the Department. It is undisputed that the Surgical Center Plaintiffs failed to exhaust their administrative remedies and thereby preserve their constitutional claims for judicial review. (R-15, 586).

The Surgical Center Plaintiffs argued below that they fall under the exception to the exhaustion requirement related to challenges to an agency's jurisdiction or power. (See R-182). However, per this Court, "[this] exception does not apply unless the plaintiff attacks the agency's assertion of jurisdiction on its face or in its entirety on the ground that it is not authorized by statute." *Ga. Dep't of Cmty. Health v. Ga. Soc'y of Ambulatory Surgery Ctrs.*, 290 Ga. 628, 630 (2012). The Surgical Center Plaintiffs are not attacking the Department's jurisdiction or authority under the statutes here.

CONCLUSION

For all the foregoing reasons, *if* the Court reverses the Superior Court's summary judgment order holding that the Surgical Center Plaintiffs' claims are meritless, it should address the issues raised by this cross-appeal and dismiss the Surgical Center Plaintiffs' claims as procedurally barred.

Dated: April 17, 2017

Respectfully submitted,

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