child are unfairly and inequitably harmed by insisting upon the requirement that a person with the consent to adopt had to have been a party to the contract. That this legal requirement is held against the child is particularly inequitable because the child, the course of whose life is forever changed by such contracts, was unable to act to insure the validity of the contract when the contract was made.

Furthermore, where there is no person with the legal authority to consent to the adoption, such as in the present case, the only reason to insist that a person be appointed the child's legal guardian before agreeing to the contract to adopt would be for the protection of the child. Yet, by insisting upon this requirement after the adopting parents' deaths, this Court is harming the very person that the requirement would protect.

For all the foregoing reasons, equity ought to intervene on the child's behalf in these types of cases, and require the performance of the contract if it is sufficiently proven. See OCGA § 23–1–8. In this case, I would thus not rule against O'Neal's claim for specific performance solely on the ground that her paternal aunt did not have the authority to consent to the adoption.

2. Moreover, basing the doctrine of equitable adoption in contract theory has come under heavy criticism, for numerous reasons. See Clark, supra, at 676–78; Rein, Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts), 37 Vand.L.Rev. 710, 770–75, 784–86 (1984). For instance, as we acknowledged in *Wilson*, supra, 139 Ga. at 659, 78 S.E. 30, the contract to adopt is not being specifically enforced as the adopting parents are dead; for equitable reasons we are merely placing the child in a position that he or she would have been in if he or she had been adopted. See Rein at 774. Moreover, it is problematic whether these contracts are capable of being enforced in all respects during the child's infancy. See Rein at 773–74; Clarke at 678. Furthermore, because part of the consideration for these contracts is the child's performance thereunder, the child is not merely a third-party beneficiary of a contract between the adults involved but is a party thereto. Yet, a child is usually too young to know of or understand the contract, and it is thus difficult to find a meeting of the minds between the child and the adopting parents and the child's acceptance of the contract. Rein at 772–73, 775. I agree with these criticisms and would abandon the contract basis for equitable adoption in favor of the more flexible and equitable theory advanced by the foregoing authorities. That theory focuses not on the fiction of whether there has been a contract to adopt but on the relationship between the adopting parents and the child and in particular whether the adopting parents have led the child to believe that he or she is a legally adopted member of their family. Rein at 785–87; Clark at 678, 682.

3. Because the majority fails to honor the maxim that "[e]quity considers that done which ought to be done," § 23–1–8, and follows a rule that fails to protect a person with superior equities, I dissent.

I am authorized to state that Justice HUNSTEIN concurs in the result reached by this dissent.

263 Ga. 798

HCA HEALTH SERVICES, INC.

v.

ROACH et al.

HCA HEALTH SERVICES, INC.

v.

STATE HEALTH PLANNING AGENCY.

Nos. S93A1898, S94A0160.

Supreme Court of Georgia.

Feb. 7, 1994.

Reconsideration Denied Feb. 18, 1994.

Health care facility's competitor brought action against State Health Planning Agency

(SHPA) and its director for mandamus relief, and action for judicial relief under Administrative Procedure Act, challenging SHPA's decisions to declare facility to be "ambulatory surgical center" which operated prior to Certificate of Need (CON) statute, to grandfather facility into CON program, and to exempt facility from CON requirements upon its sale and relocation. The Superior Court, Fulton County, Thelma Wyatt-Cummings, J., dismissed both actions, and appeals were filed. The Supreme Court, Hunt, P.J., held that: (1) petition for judicial review of SHPA's decisions was untimely; (2) SHPA did not have discretion under statute to determine whether to grandfather particular facility; and (3) neither statute nor SHPA's rules gave SHPA authority to exempt facility from CON requirements if facility was relocated.

Dismissal of action for judicial review affirmed; dismissal of action for mandamus reversed and remanded.

1. Administrative Law and Procedure ⇐723

Hospitals ⇐1

Assuming that decisions of State Health Planning Agency (SHPA) were declaratory rulings under Administrative Procedure Act, trial court properly dismissed petition for judicial review of SHPA's decisions, where petition was not filed within 30 days of those decisions. O.C.G.A. §§ 50–13–11, 50–13–19(b).

2. Mandamus ⇐63

Mandamus is personal action against public officer, not against office.

3. Mandamus ⇐64

State Health Planning Agency (SHPA), as public office, was not subject to mandamus, although its director was subject to mandamus.

4. Hospitals ⇐1

State Health Planning Agency (SHPA) does not have discretion in enforcing Certificate of Need (CON) program or in determining that CON requirements do not apply where statute or rules promulgated thereunder do not so apply. O.C.G.A. § 31–6–40 et seq.

5. Mandamus ⇐72

Mandamus does not lie to compel administrative officer or agency to change decision made within exercise of discretion vested in officer or agency by law.

6. Administrative Law and Procedure ⇐447.1

Jurisdiction of administrative agency is determined by statute, and Court of Appeals is required to construe that jurisdiction strictly to comport with legislative intent.

7. Hospitals ⇐1

State Health Planning Agency (SHPA) does not have discretion in determining whether to "grandfather" health care facilities under Certificate of Need program (CON), that is, to recognize them as facilities within CON but exempt them from CON requirements, and, thus, trial court was required on petition for mandamus to determine whether any evidence supported SHPA's decision to grandfather facility; SHPA is simply authorized to determine whether facility may be grandfathered as one which existed and performed same services prior to CON program. O.C.G.A. § 31–6–40(a).

8. Mandamus ⇐169

Trial court improperly dismissed health care facility's competitor's action for mandamus to compel State Health Planning Agency (SHPA) to require facility owner to obtain Certificate of Need (CON) for facility in order to relocate it, since nothing in statute or in SHPA's rules gave SHPA authority to exempt facility from CON requirements upon its relocation. O.C.G.A. §§ 31–6–1, 31–6–40(c)(1, 1.1), 31–6–47, 31–6–47(c).

9. Hospitals ⇐1

Nothing in statute or in rules of State Health Planning Agency (SHPA) gives SHPA authority to exempt health care facility from Certificate of Need (CON) requirements if facility is relocated. O.C.G.A. §§ 31–6–1, 31–6–40(c)(1, 1.1), 31–6–47.

10. Hospitals ⇐1

Statute allowing State Health Planning Agency (SHPA) to promulgate rules establishing procedures for waiving Certificate of Need (CON) review of certain projects where it deems nonreview compatible with purposes of State Health Planning and Development Act did not give SHPA authority to waive CON requirements upon relocation of health care facility, where SHPA had not promulgated any rule permitting nonreview of relocation of health care facilities. O.C.G.A. § 31–6–47(c).

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Dennis R. Dunn, Asst. Atty. Gen., State Law Dept., Atlanta.

HUNT, Presiding Justice.

This appeal involves the scope of the authority of the State Health Planning Agency (SHPA) in administering the Certificate of Need (CON) program, OCGA § 31–6–40 et seq. The trial court dismissed HCA Health Services of Georgia, Inc.'s action against SHPA and its executive director for mandamus relief (Case No. S93A1898), and dismissed HCA's action for judicial review under the Administrative Procedure Act (Case No. S94A0160).[1] We affirm the dismissal of the action for judicial review (Case No. S94A0160) and reverse the trial court's dismissal of the action for mandamus (Case No. S93A1898.)

HCA is a competitor of the Surgical Healthcare Corporation (SHC),[2] and brought these actions challenging two SHPA decisions regarding a health care facility owned by SHC. The facility originally was owned and operated by a dentist, Dr. Keller. In 1985 Dr. Keller requested that SHPA declare his facility to be an "ambulatory surgical center" which operated as such prior to the CON statute, and to grandfather the facility into the CON program. SHPA did so the following year. Subsequently, Dr. Keller sought, and in 1992 obtained, a SHPA declaration of exemption from CON requirements for his proposed sale of the facility to SHC, and SHC's relocation of the facility to a location within three miles of its existing location and near HCA's hospital. HCA challenged these two agency decisions by separate petitions for judicial review and mandamus relief. The trial court held, *inter alia*, that HCA had no standing to bring an action for judicial review of SHPA's decisions regarding the facility; that SHPA alone has discretion to determine whether the CON laws apply to a particular facility; that in the instances complained of SHPA had acted, rather than failed to act, and mandamus was inappropriate to compel the agency to act in a particular manner or direction; and that HCA was barred by laches for its failure to timely object to the agency's decisions.

[1] 1. HCA's petition for judicial review of SHPA's decisions was not filed within thirty days of those decisions and, therefore, assuming those decisions were declaratory rulings under the Administrative Procedure Act, OCGA § 50–13–11, the trial court did not err by dismissing the petition. OCGA § 50–13–19(b). Accordingly, we need not reach HCA's remaining enumerations regarding the dismissal of the petition for judicial review.

[2, 3] 2. The trial court erred by dismissing HCA's action for mandamus to compel SHPA's executive director to enforce the

1. In Case No. S93A1898 the trial court also dismissed HCA's action insofar as it sought declaratory relief. HCA does not enumerate this issue on appeal, and thus we do not address it here.

2. Northlake/Tucker Ambulatory Surgery Center, Inc., d/b/a Surgicare and Surgical Health Corporation, are intervenors in this action. Collectively, they are referred to as (SHC).

CON program.[3] *Diversified Health Mgt. Svcs. v. Visiting Nurses*, 254 Ga. 500, 502(4), 330 S.E.2d 885 (1985); *Executive Committee v. Metro Ambulance Serv.*, 250 Ga. 61, 63, 296 S.E.2d 547 (1982).

[4–6] 3. Contrary to SHPA's and SHC's arguments, and the trial court's holding, SHPA does not have discretion in enforcing the CON program or in determining that the CON requirements do not apply where the statute or rules promulgated thereunder do not so provide.[4] The jurisdiction of administrative agencies, like SHPA, is determined by statute, and we are required to construe that jurisdiction strictly to comport with the legislative intent. *Natural Resources v. American & C. Co.*, 239 Ga. 740, 743, 238 S.E.2d 886 (1977). Under the State Health Planning and Development Act (the Act), SHPA is authorized and required to administer the CON program, and is directed to make rules in order to administer that program. OCGA § 31–6–21(a) and (b)(4). The detailed procedures for rule-making by SHPA generally follow those of the Georgia Administrative Procedure Act and include notice and consideration by committees of both branches of a legislature. OCGA § 31–6–21.1. The parties have not cited, and we have not discovered any provision of the Act, or any SHPA rules promulgated thereunder which provide SHPA with discretion regarding grandfathering of health care facilities or relocation of those facilities.

[7] (a) The trial court erred by dismissing HCA's challenge of SHPA's 1986 decision to grandfather the facility in question. The parties agree that SHPA has authority under the Act to "grandfather" health care facilities (that is, to recognize them as facilities within the CON but exempt them from CON requirements) when those facilities are shown to have existed prior to the enactment of the CON program. This is because the CON law applies only to new institutional health services, or health care facilities, i.e., those that did not pre-exist the CON program. OCGA § 31–6–40(a). See also *Chattahoochee Valley Home Health Care, Inc. v. Healthmaster, Inc.*, 191 Ga.App. 42, 44(2), 381 S.E.2d 56 (1989). However, the parties disagree about whether the facility was operated as SHPA determined, as an "ambulatory surgical center" (ASC)—an out-patient center where all types of surgery are performed (OCGA § 31–6–2(1))—prior to the CON program, and, therefore, whether SHPA properly exempted it from CON requirements.

Contrary to the trial court's opinion, and SHPA's arguments, nothing in the Act gives SHPA discretion in determining whether or not to grandfather a particular facility. Rather, SHPA is simply authorized to determine whether the facility may be grandfathered under the Act as one which existed and performed the same services prior to the CON program in 1979. Compare *Carnes v. Charlotte Investments & C.*, 258 Ga. 771, 772(1), 373 S.E.2d 742 (1988). The trial court was required to determine whether any evidence supported the agency's decision to grandfather the facility.

The trial court's grant of SHC's motion to quash HCA's subpoena for the deposition of the prior owner of the facility was based on the trial court's determination that it was not required to consider the evidence on this issue. Accordingly, the grant of that motion is reversed and remanded to the trial court for reconsideration in light of this opinion.

[8–10] (b) The trial court erred by dismissing HCA's action for mandamus to compel SHPA to require the facility owner to obtain a certificate of need for the facility in order to relocate it as proposed. Contrary to the trial court's order, and the arguments of SHPA and SHC, nothing in the Act, or in SHPA's rules, gives SHPA authority to ex-

3. The trial court correctly noted that mandamus is a personal action against a public officer, not against the office. *Harper v. State Board of Pardons and Paroles*, 260 Ga. 132, 133, 390 S.E.2d 592 (1990). Accordingly, SHPA is not subject to mandamus, although its director, Roach, a named party in this action, is.

4. This opinion does not in any way change the long-standing rule that mandamus does not lie to compel an administrative officer or agency to change a decision made within the exercise of discretion vested in the officer or agency by law. *Wilson v. Sanders*, 222 Ga. 681, 685(2), 151 S.E.2d 703, 705 (1966). *So. Bell v. Georgia Public Serv. Comm.*, 203 Ga. 832, 872(6), 49 S.E.2d 38 (1948); OCGA § 9–6–21(a).

empt the facility from CON requirements if the facility is relocated. The Act and the CON program establish a comprehensive system of planning for the orderly development of adequate health care services throughout the state. OCGA § 31–6–1. The Act sets forth specific circumstances whereby a person offering health care services is exempt from CON requirements. OCGA §§ 31–6–40(c)(1) and (c)(1.1); 31–6–47. The relocation of a facility such as that proposed does not fall within any of the foregoing statutory exemptions. Nor does OCGA § 31–6–47(c) give SHPA authority to waive CON requirements in these circumstances. That section allows the agency to promulgate rules establishing procedures for waiving CON review of certain projects where the agency deems non-review "compatible with the purposes of this [The State Health Planning and Development Act]." SHPA has not promulgated any rule which permits non-review of the relocation of a health care facility as proposed here.[5]

(c) Contrary to the trial court's opinion, the doctrine of laches does not bar HCA's action for mandamus. *Addis v. Smith,* 226 Ga. 894, 895(1), 178 S.E.2d 191 (1970). Cf. *Corey Outdoor Advertising v. Bd. of Zoning,* 254 Ga. 221, 224(3), 327 S.E.2d 178 (1985).

Judgment affirmed in Case No. S94A0160; judgment reversed and remanded in Case No. S93A1898.

All the Justices concur.

5. SHPA Rule 272–2–.07(2) cited by SHPA and SHC is not applicable. That rule provides an appellate procedure for certain agency decisions that do not go before the Health Planning Review Board. It does not create an exemption for CON requirements for relocations.

We note that the only part of the Act pertaining to relocations of health care facilities is contained in OCGA § 31–6–45, which allows a change in location from that initially approved for a facility which has not yet been built in certain circumstances, including where the facility cannot be built in the approved location because of a subsequent rezoning. See also OCGA § 31–6–41(a), providing that a CON is valid *only* for the defined scope and location for which it is granted.

209 Ga.App. 908

ATLANTA CLASSIC CARS, INC.

v.

CHIH HUNG USA AUTO CORPORATION.

No. A93A0206.

Court of Appeals of Georgia.

June 28, 1993.

Reconsideration Denied July 30, 1993.

Certiorari Denied Dec. 3, 1993.

Automobile buyer brought suit against dealer for dealer's alleged conversion and breach of trust in allowing buyer's agent to use buyer's check to pay agent's own personal debt to dealer. The Superior Court, Fulton County, Alexander, J., entered judgment in favor of plaintiff, and defendant appealed. The Court of Appeals, McMurray, P.J., held that: (1) automobile dealer was not liable in conversion for allowing buyer's agent to use buyer's check to pay his personal debt, and (2) no constructive trust would be imposed on property of automobile dealer, given complete lack of evidence that it knew of agent's fraudulent scheme to convert buyer's money.

Reversed.

Beasley, P.J., concurred in part and dissented in part and filed opinion, in which Andrews, J., joined.

1. Trover and Conversion ⇐11

Automobile dealer was not liable in conversion for allowing buyer's agent to use buyer's check to pay agent's own personal debt to dealer; no evidence was presented that dealer was aware of agent's fraud, or that it knew that the money that agent deposited directly in dealer's account belonged to buyer.