



NC DEPARTMENT OF
**HEALTH AND
HUMAN SERVICES**

ROY COOPER • Governor
MANDY COHEN, MD, MPH • Secretary
MARK PAYNE • Director, Division of Health Service Regulation

January 4, 2019

Mary Beth F. Johnston
K&L Gates LLP
430 Davis Drive, Suite 400
Morrisville, NC 27560

No Review

Record #: 2830
Facility Name: Fayetteville Ambulatory Surgery Center
FID #: 943168
Business Name: Cumberland County Hospital System, Inc.
Business #: 578
Project Description: Change in indirect corporate ownership
County: Cumberland

Dear Ms. Johnston:

The Healthcare Planning and Certificate of Need Section, Division of Health Service Regulation (Agency) received your correspondence regarding the above referenced proposal. Based on the CON law **in effect on the date of this response to your request**, the proposal described in that correspondence is not governed by, and therefore, does not currently require a certificate of need. If the CON law is subsequently amended such that the above referenced proposal would require a certificate of need, this determination does not authorize you to proceed to develop the above referenced proposal when the new law becomes effective.

You may need to contact the Agency's Acute and Home Care Licensure and Certification Section to determine if they have any requirements for development of the proposed project.

This determination is binding only for the facts represented in your correspondence. If changes are made in the project or in the facts provided in the correspondence referenced above, a new determination as to whether a certificate of need is required would need to be made by this office.

Please do not hesitate to contact this office if you have any questions.

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES • DIVISION OF HEALTH SERVICE REGULATION

HEALTHCARE PLANNING AND CERTIFICATE OF NEED SECTION


LOCATION: 809 Ruggles Drive, Edgerton Building, Raleigh, NC 27603
MAILING ADDRESS: 2701 Mail Service Center, Raleigh, NC 27699-2701
www.ncdhhs.gov/dhsr/ • TEL: 919-855-3750 • FAX: 919-733-2757

AN EQUAL OPPORTUNITY / AFFIRMATIVE ACTION EMPLOYER

Sincerely,



Gloria C. Hale
Team Leader



Martha J. Frisone, Chief
Healthcare Planning and Certificate of Need Section

cc: Acute and Home Care Licensure and Certification Section, DHSR
Melinda Boyette, Administrative Assistant, Healthcare Planning, DHSR

January 2, 2019

Hand Deliver

Martha Frisone
Section Chief
North Carolina Division of Health Service Regulation
Healthcare Planning and Certificate of Need Section
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Re: Change of Control of Fayetteville Ambulatory Surgery Center - No Review Letter,
Alternate Exemption Notice

Dear Ms. Frisone,

The purpose of this letter is to inform you of a proposed Transaction (defined below) involving a change of control of Fayetteville Ambulatory Surgery Center Limited Partnership, a North Carolina limited partnership ("**FASC**"), which owns the ambulatory surgical facility known as Fayetteville Ambulatory Surgery Center (the "**Facility**"). Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System, a North Carolina non-profit corporation (the "**Buyer**"), owns certain Limited Partner Units of FASC. Pursuant to the Transaction, the Buyer will become the general partner of FASC on or about February 1, 2019 (the "**Closing Date**").

NSC Fayetteville, LLC, a Delaware limited liability company ("**NSC**"), is the current general partner of FASC, holding all of the "General Partner Units" and certain of the "Limited Partner Units" in FASC. National Surgery Centers, LLC, a Delaware limited liability company (the "**Seller**"), owns all of the equity interests of NSC. The Seller, NSC and the Buyer are collectively referred to herein as the "Parties."

On the Closing Date and immediately prior to the Equity Purchase (as defined below), the Parties will enter into a Contribution Agreement, pursuant to which the Buyer will contribute all of its Limited Partner Units in FASC to NSC (the "**Contribution**"), contingent on the closing of the Equity Purchase. Immediately after the Contribution, the Buyer will purchase from the Seller all of the

equity of NSC (the “**Equity Purchase**” and, together with the Contribution, the “Transaction”), pursuant to the terms of the Parties’ Equity Purchase Agreement.

Therefore, following the Transaction, the Buyer will:

- (1) directly own all of the equity of NSC; and
- (2) indirectly, through its ownership of NSC, own:
 - (a) all of the General Partner Units of FASC; and
 - (b) certain of the Limited Partner Units of FASC.

The Transaction does not change the ownership of FASC’s assets or change the Facility’s operator, provider, or licensee. For instance, FASC will remain the provider and licensed operator of the Facility.

We are requesting that the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section (the “Agency”) confirm that the Transaction is either: (1) not reviewable as a new institutional health service under the North Carolina Certificate of Need (“CON”) law because it is simply a member substitution; or (2) in the alternative, exempt from review under the CON law’s exemption provisions in N.C. Gen. Stat. § 131E-184(a)(8).

I. No Review for the Transaction

Buyer becoming the direct owner of all the equity of NSC and the indirect owner of all General Partner Units of FASC and certain Limited Partner Units of FASC is not a CON reviewable event because such an event is not expressly addressed in any of the new institutional health service “CON triggers” in N.C. Gen. Stat. § 131E-176(16). A change in control of an indirect owner of a health service facility is not included in the list of activities that constitute the development of a new institutional health service, requiring a CON.

Pursuant to the maxim of statutory construction *expressio unius est exclusio alterius*, those transactions not included in N.C. Gen. Stat. § 131E-176(16) -- such as this Transaction -- do not require a CON. See e.g., In re Miller, 357 N.C. 316, 325, 584 S.E.2d 772, 780 (2003) (stating that “[u]nder the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situation to which it applies, it implies the exclusion of situations not contained in the list”); see also Jackson v. A Woman’s Choice, Inc., 130 N.C. App. 590, 594, 503 S.E.2d 422, 425 (1998) (internal citations omitted) (“[W]here a statute is explicit on its face, the courts have no authority to impose restrictions that the statute does not expressly contain.”).

Therefore, we request that you confirm that the Transaction is not subject to CON review.

II. Exemption Notice for Transaction (If Deemed CON Reviewable)

However, if the Agency treats the Transaction as the acquisition of the Facility (as a health service facility), and thus CON reviewable, this letter serves as an exemption notice for FASC pursuant to the Transaction and in accordance with N.C. Gen. Stat. § 131E-184(a)(8).

The General Assembly has chosen to exempt certain, otherwise reviewable, events from CON review, including the acquisition of an existing health service facility, including the equipment owned by the health service facility at the time of the acquisition. See N.C. Gen. Stat. § 184(a)(8). Under N.C. Gen. Stat. § 131E-176(9b), the Facility constitutes a “health service facility.”

Furthermore, the proposed Transaction does not entail the acquisition of any major medical equipment or any *per se* reviewable equipment as defined in N.C. Gen. Stat. § 131E-176(14)(o) and (16)(f1), except in conjunction with the acquisition of the entire existing health service facilities. Likewise, the Transaction does not include the offering of any *per se* reviewable services except those already offered by the existing health service facilities. See N.C. Gen. Stat. § 131E-176(16)(f).

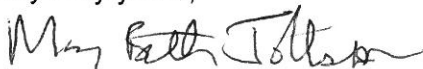
Accordingly, given that the transaction involves only the Facility, which is an existing health care facility, even if the Agency deems the Transaction to constitute a new institutional health service, the Transaction is nevertheless exempt from CON review.

III. Conclusion

Based upon the foregoing information, we hereby request the Agency’s confirmation that the Transaction: (1) does not require CON review; or alternatively; (2) is exempt from CON review under N.C. Gen. Stat § 131E-184(a)(8).

Because the effective Transaction date is currently anticipated to be February 1, 2019, we respectfully request your expedited review. Thank you for your assistance in regard to this matter. Please feel free to contact me at the number above if you have any questions or need further information.

Very truly yours,



Mary Beth F. Johnston