

**NORTH CAROLINA DEPARTMENT OF HEALTH
AND HUMAN SERVICES
DIVISION OF FACILITY SERVICES
RALEIGH, NORTH CAROLINA**

IN RE: REQUEST FOR DECLARATORY)
RULING BY HANOVER MEDICAL) **DECLARATORY RULING**
SPECIALISTS, P.A.)

I, Robert J. Fitzgerald, Director of the Division of Facility Services (the “Department”), hereby issue this Declaratory Ruling pursuant to N.C. Gen. Stat. § 150B-4 and 10A NCAC 14A .0103, and the authority delegated to me by the Secretary of the Department of Health and Human Services. Hanover Medical Specialists, P.A. (“Hanover”) has filed a Declaratory Ruling Request (the “Request”) asking the Agency to issue a Declaratory Ruling as to the applicability of Chapter 131E, Article 9 of the North Carolina General Statutes and of the Department’s rules to the facts described below.

As background in this case, Hanover, by letter dated April 1, 2005, requested that the Department of Health and Human Services, Division of Facility Services, Certificate of Need Section (the “Agency”) find that Hanover qualified as a “diagnostic center” for purposes of N.C. Gen. Stat. § 131E-176(7a) and so qualified prior to March 18, 1993. The agency, by letter dated May 11, 2005, determined that Hanover, *operating at 1515 Doctors Circle, Wilmington NC*, was a diagnostic center as defined in N.C. Gen. Stat. § 131E-176(7a) immediately prior to March 18, 1993, because it owned and operated medical diagnostic equipment at that location that cost in excess of \$500,000 at the time. However, the Agency indicated that its favorable ruling did “not permit Hanover Medical Specialists, P.A. to operate more than one diagnostic center or to relocate and operate the existing single diagnostic center on more than one campus.”

Hanover requests a Declaratory Ruling that its two current locations at 1515 Doctors Circle and 1520 Physicians Drive, Wilmington, North Carolina, be recognized as one “diagnostic center,” for purposes of N.C. Gen. Stat. § 131E-176(7a). For the reasons given below, I conclude that Hanover’s two current locations at 1515 Doctors Circle and 1520 Physicians Drive, Wilmington, North Carolina, cannot be designated as one “diagnostic center,” for purposes of N.C. Gen. Stat. § 131E-176(7a).

This Declaratory Ruling is binding on the Department and the person requesting it if the material facts stated in the Request are accurate and no material facts have been omitted from the Request. The Declaratory Ruling applies only to this Request. Except as provided by N.C Gen. Stat. § 150B-4, the Department reserves the right to change the conclusions which are contained in this Declaratory Ruling. Mary Beth Johnston of Kennedy Covington Lobdell & Hickman, PLLC, has requested this Declaratory Ruling on behalf of Hanover and has provided the statement of facts on which it is based. The material facts are set out below.

STATEMENT OF FACTS

Hanover is a multi-specialty, group practice of physicians located in Wilmington, North Carolina. Hanover has been in existence since 1980, and since that time has engaged in providing medical care to patients in the Wilmington area in the specialties of gastroenterology, cardiology, endocrinology and hematology-oncology. Hanover has operated at 1515 Doctors Circle, Wilmington North Carolina, since its inception. About 1998, subsequent to establishing the diagnostic center at 1515 Doctors Circle, Hanover also opened a practice at 1520 Physicians Drive in Wilmington. Hanover represents that the two locations are approximately one-third of a mile apart. However, I take administrative notice that the two locations are .68 miles apart. *See* MapQuest distance calculation and map attached hereto. The locations are in the same service

area and serve the same patient population. They are under common ownership and corporate governance by Hanover and share a common tax identification number. The locations share a common information technology infrastructure and are linked electronically. Hanover states that the only reason for which they were located in a non-adjacent manner was due to the unavailability of space at the 1515 Doctors Circle, Wilmington, North Carolina location. The expansion to the 1520 Physicians Drive location, approximately seven years ago, was completed unrelated to the Certificate of Need law or any attempt to circumvent its requirements.

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The Agency, by letter dated May 11, 2005, determined that Hanover, *operating at 1515 Doctors Circle, Wilmington North Carolina*, was a diagnostic center as defined in N.C. Gen. Stat. § 131E-176(7a) immediately prior to March 18, 1993, because it owned and operated at that location medical diagnostic equipment for which the cost at the time was in excess of \$500,000. There is no dispute between Hanover and the Agency on this point, and the Request does not relate to this issue. However, the Agency indicated that its favorable ruling did “not permit Hanover Medical Specialists, P.A. to operate more than one diagnostic center or to relocate and operate the existing single diagnostic center *on more than one campus.*” (emphasis added).

After receiving the Agency’s favorable “no review” letter, Hanover, by way of letter dated May 27, 2005, contended that it owned and operated its diagnostic center on a “single campus,” which included buildings located at both 1515 Doctors Circle and 1520 Physicians Drive, Wilmington, North Carolina.

In response, the Agency, by letter, dated May 31, 2005, sought additional documentation in support of Hanover's position that the buildings located at 1515 Doctors Circle and 1520 Physicians Drive, Wilmington, North Carolina comprise a "campus," pursuant to the definition set forth in N.C. Gen. Stat. § 131E-176(2c).

ANALYSIS

Hanover argues that its offices, located at two different locations in Wilmington, North Carolina, constitute a single diagnostic center because they are operated as a single business unit. Consequently, Hanover contends that a Certificate of Need is not needed to establish a diagnostic center at the 1520 Physicians Drive location. I disagree.

The issue hangs upon the meaning of the term "freestanding," as that term is used in the statutory definition of "diagnostic center." "Freestanding" means "Standing independently free of support or attachment." The American Heritage Dictionary (2nd College Ed. 1982).

The term "freestanding" appears in a number of laws administered by the Division of Facility Services. See N.C. Gen. Stat. §§ 131D-4.2(e) (adult care home licensure law)¹; 131E-104(b) (Nursing Home Licensure Act); 131E-176(5a) (CON law; definition of chemical dependency treatment facility); 131E-176(9b) (CON law; definition of health service facility); 131E-176(13b) (CON law; definition of hospice inpatient facility); 131E-176(13c) (CON law; definition of hospice residential care facility); 131E-201(3a) (Hospice Licensure Act; definition of hospice inpatient facility); 131E-201(5a) (Hospice Licensure Act; definition of hospice residential care facility); 131E-214.1(2) and (4) (Medical Care Data Act). While none of these laws expressly defines the meaning of the term "freestanding," the meaning of the term can be deduced from the context in which it appears.

According to the CON law, a "chemical dependency treatment facility" may

¹ In N.C. Gen. Stat. § 131D-4.2(e), the term is rendered as "free-standing."

be “[a] unit within a general hospital or an attached or freestanding unit of a general hospital” N.C. Gen. Stat. § 131E-176(5a) (emphasis added). Because “freestanding” is used here in context with the prepositions “within” and “attached,” it appears to mean “separate from.” Thus, a chemical dependency treatment facility may be a unit that is *within* a general hospital, a unit that is *attached to* a general hospital, or a unit is *physically separate from* a general hospital.

Similarly, a “hospice inpatient facility” is defined in both the CON law and the Hospice Licensure Act as:

a freestanding licensed hospice facility or a designated inpatient unit in an existing health service facility which provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of terminally ill patients and their families in an inpatient setting.

N.C. Gen. Stat. § 131E-176(13b) and N.C Gen. Stat. § 131E-201(3a) (emphasis added). Given the juxtaposition of the phrases “freestanding licensed hospice facility” and “designated inpatient unit in an existing health service facility,” it appears that the term “hospice inpatient facility” cannotes, in contrast, both:

(a) a *physically separate* hospice facility which provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of terminally ill patients and their families in an inpatient setting; and

(b) a designated *unit within* an existing health service facility which provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of terminally ill patients and their families in an inpatient setting.

As in the first instance described above, the distinction is spatial.

Finally, the adult care home licensure law requires adult care homes with a licensed capacity of seven or more beds to periodically submit audited reports of actual costs to the Department. N.C. Gen. Stat. § 131D-4.2(a) and (b). The law specifies further that “[t]he annual report for . . . *free-standing* adult care home facilities *owned and operated* by a hospital shall be

due 15 days after the hospital's Medicare cost report is due." N.C. Gen. Stat. § 131D-4.2(e)(1998) (emphasis added). The fact that an adult care home can be owned and operated by a hospital and yet still be free-standing indicates that "free-standing" does not describe the organizational relationship between the adult care home and the hospital. Consequently, it must describe the spatial relationship between the two.

In addition, this interpretation of "freestanding" is supported by North Carolina case law. See *In re Moses H. Cone Memorial Hosp.*, 113 N.C. App. 562, 439 S.E.2d 778 (1994) (hospital opened a child care center in a *free-standing building* on the hospital's campus); see also *Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. 417, 293 S.E.2D 749 (1982) (expert testified that subject land's most profitable use would be as a *free standing* commercial establishment such as a discount store)

In its Request for a Declaratory Ruling, Hanover is seeking approval to have multiple locations recognized as one diagnostic center. However, for the foregoing reasons, Hanover's request is not permissible under the CON law.

N.C. Gen. Stat. § 131E-178(a) provides, "No person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department . . ." The definition of "new institutional health services" then includes the following activities relevant to the present situation: (a) The construction, development, or other establishment of a new health service facility. N.C. Gen. Stat. § 131E-176(16). The definition of a "health service facility" includes a "diagnostic center," see N.C. Gen. Stat. § 131E-176(9b), defined as:

[A] freestanding facility, program, or provider, including but not limited to, physicians' offices, clinical laboratories, radiology centers, and mobile diagnostic programs, in which the total cost of all the medical diagnostic equipment utilized by the facility which cost ten thousand dollars (\$10,000) or more exceeds five hundred thousand dollars (\$500,000). In determining whether the medical diagnostic equipment in a diagnostic center costs more than five hundred

thousand dollars (\$500,000), the costs of the equipment, studies, surveys, designs, plans, working drawings, specifications, construction, installation, and other activities essential to acquiring and making operational the equipment shall be included. The capital expenditure for the equipment shall be deemed to be the fair market value of the equipment or the cost of the equipment, whichever is greater.

N.C. Gen. Stat. § 131E-176(7a). (Emphasis added)

Accordingly, Hanover may not maintain that its two existing freestanding locations which are .68 miles apart are a single diagnostic center as defined in N.C. Gen. Stat. § 131E-176(7a).

CONCLUSION

For the reasons stated above, and assuming the statements of fact in the Request to be true, I conclude that Hanover cannot maintain that its two offices at 1515 Doctors Circle and 1520 Physicians Drive, Wilmington, North Carolina, constitute a single diagnostic center. Only the facility at 1515 Doctors Circle is recognized as a grandfathered “diagnostic center,” for purposes of N.C. Gen. Stat. § 131E-176(7a).

This the _____ day of September, 2005.

Robert J. Fitzgerald, Director
Division of Facility Services