

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

**IN RE: REQUEST FOR)
DECLARATORY RULING) DECLARATORY RULING
BY WHA MEDICAL CLINIC, PLLC)
PROJECT I.D. # O-3716-89)**

I, Robert J. Fitzgerald, Director of the Division of Facility Services, hereby issue this declaratory ruling to WHA Medical Clinic, PLLC (“WHA”), pursuant to N.C. Gen. Stat. § 150B-4, 10A NCAC 14A .0108, and the authority delegated to me by the Secretary of the North Carolina Department of Health and Human Services (the “Department”).

WHA seeks a declaratory ruling that the acquisition of additional diagnostic equipment by WHA for use in a licensed ambulatory surgery facility which was developed pursuant to a certificate of need (“CON”) would not constitute the development of a “diagnostic center” under N.C. Gen. Stat. § 131E-176(9b). For the reasons given below, I decline to grant WHA’s request in that its acquisition of additional diagnostic equipment would be inconsistent with N.C. Gen. Stat. § 131E-181(a) and further, would violate N.C. Gen. Stat. § 131E-189(b). This ruling will be binding on the Department and the person requesting it, as long as the material facts stated herein are accurate. This ruling pertains only to the matters referenced herein. Except as provided by N.C. Gen. Stat. § 150B-4, the Department expressly reserves the right to make a prospective change in the statutes and regulations at issue in this Declaratory Ruling. Noah H. Huffstetler, III, of Nelson Mullins Riley & Scarborough LLP has requested this ruling on behalf of WHA. Those material facts as provided by WHA and upon which this ruling is based, are provided below.

STATEMENT OF FACTS

WHA is the successor to Wilmington Health Associates, P.A. Wilmington Health Associates, P.A. was founded in 1971. On April 30, 1990, Wilmington Health Associates, P.A. as Lessee and MedServ Company as Owner received a CON (Project I.D. # O-3716-89) to develop an ambulatory surgery center used exclusively for gastroenterology procedures. Specifically, the conditions upon which the CON was issued, include:

Conversion of an existing outpatient endoscopy service to a licensed and certified ambulatory surgical facility providing only gastroenterology surgical procedures.

Wilmington Health Associates shall develop a licensed ambulatory surgical facility providing only gastroenterology surgical procedures and may not perform other types of surgical procedures without obtaining an additional certificate of need. This condition will no longer apply if ambulatory surgical facilities are exempted from certificate of need review at anytime subsequent to the signing of this agreement.

See, April 30, 1990 CON attached as Exhibit A to WHA's request.

The cost of the construction for the endoscopy center was \$349,228, in addition to the cost of the equipment at \$191,000. WHA contends that the project was developed consistent with the representations in the application and any applicable conditions. Wilmington Health Associates, P.A.¹ developed the ambulatory surgery facility on the third floor of the building that housed its physician practice.

¹ In August, 1996, in conjunction with a sale of certain assets to PhyCor, Inc., a Tennessee physician practice management company, the physicians constituting Wilmington Health Associates, P.A., reorganized into a new PLLC called WHA Medical Clinic, PLLC, which then entered into a management services agreement with a local PhyCor subsidiary. (In the fall of 2000, the physicians of WHA negotiated a termination of the relationship with PhyCor.) In 1996, WHA notified the Department of this reorganization through which WHA assumed the license to operate the ambulatory surgery facility, and at all times since, WHA has submitted the license renewal applications for the facility. WHA is the owner of the equipment operated in the facility, as well as all other equipment used by its physicians in all specialties. MedServ Company has remained the owner of the physical facility at all times.

ANALYSIS

The CON law requires a full review of WHA's requested proposal pertaining to the CON issued for Project I.D. # O-3716-89 if that proposal represents a material change in the physical location or scope of the project. *See* N.C. Gen. Stat. § 131E-181(a). WHA's request dated September 21, 2005, seeks approval for WHA to acquire additional diagnostic equipment by its licensed ambulatory surgery facility on grounds that such acquisition does not constitute the development of a diagnostic center. WHA does not provide any information as to what equipment it has already acquired or plans to acquire.

The CON issued for Project I.D. # O-3716-89 specifically and unequivocally defines the scope of the CON as: "Conversion of an existing outpatient endoscopy service to a licensed and certified ambulatory surgical facility providing only gastroenterology surgical procedures." In addition, the conditions upon which the issuance of the CON is based expressly provide:

Wilmington Health Associates shall develop a licensed ambulatory surgical facility providing only gastroenterology surgical procedures and may not perform other types of surgical procedures without obtaining an additional certificate of need. This condition will no longer apply if ambulatory surgical facilities are exempted from certificate of need review at anytime subsequent to the signing of this agreement.

WHA is not and has never been authorized to hold itself out as a diagnostic center or to acquire diagnostic equipment. In fact, WHA is limited even to the type of surgical procedures it may perform. Because the CON as issued, limits WHA to an ambulatory surgical facility, authorized to perform only gastroenterology surgical procedures, the CON does not authorize WHA to perform diagnostic procedures beyond gastroenterology procedures nor to acquire diagnostic equipment other than what is necessary to the performance of those gastroenterology procedures. Any such approval would be beyond the scope of the CON issued to WHA and would violate N.C. Gen. Stat. § 131E-181(a).

Moreover, N.C. Gen. Stat. § 131E-189(b) allows the Agency to withdraw WHA's CON if WHA either fails to develop the service in a manner consistent with the representations made in the application or with any conditions that were placed on the CON. If WHA were to acquire equipment for provision of services other than gastroenterology surgical procedures without a separately obtained CON, it would be developing its project in a manner that is materially different from the representations made in its application, as well as in a manner that is inconsistent with any of the conditions that were placed on its CON.

Because I expressly find that approval of WHA's request would violate N.C. Gen. Stat. §§ 131E-181(a) and -189(b), and denial of the request is warranted on these grounds, I need not address WHA's contention that a certificate of need is not required prior to WHA's acquisition of other diagnostic equipment simply because WHA is already a health service facility.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that the acquisition by WHA of diagnostic equipment for provision of services other than gastroenterology surgical procedures would violate N.C. Gen. Stat. § 131E-181(a) and would constitute a failure to satisfy a condition of the CON in violation of N.C. Gen. Stat. § 131E-189(b). I hereby deny WHA's request.

This ____ day of November, 2005.

Robert J. Fitzgerald, Director

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Declaratory Ruling has been served upon the nonagency party by certified mail, return receipt requested, by depositing the copy in an official depository of the United States postal service in a first class, postage prepaid envelope addressed as follows:

CERTIFIED MAIL

Noah H. Huffstetler, III
Nelson Mullins Riley & Scarborough LLP
GlenLake One
Suite 200
4140 ParkLake Avenue
Raleigh, North Carolina 27612

This the 18th day of November, 2005.

Phyllis T. Daw
Chief Operating Officer