

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

IN RE: REQUEST FOR)	
DECLARATORY RULING BY)	DECLARATORY RULING
GASTROINTESTINAL HEALTHCARE,)	
P.A. F/K/A DIGESTIVE DISEASES)	
DIAGNOSTIC CENTER, P.A.)	

I, Robert J. Fitzgerald, Director of the Division of Health Service Regulation (the “Department”), hereby issue this declaratory ruling to Gastrointestinal Healthcare, P.A. f/k/a Digestive Diseases Diagnostic Center, P.A. (“Petitioner”) pursuant to N.C.G.S. § 150B-4, 10A NCAC 14A.0103, and the authority delegated to me by the Secretary of the North Carolina Department of Health and Human Services. Petitioner has filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a ruling that Petitioner may develop two unlicensed endoscopy procedures rooms at a site other than the site previously identified to the Department prior to seeking licensure of the resulting endoscopy facility without the necessity to obtain a certificate of need (“CON”) pursuant to N.C.G.S. § 131E-178.

This 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 ruling applies only to this request. Except as provided by N.C.G.S. § 150B-4, the Department reserves the right to change the conclusions which are contained in this ruling. Robert N. Harper, President of Petitioner, and Sean A. Timmons of Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, P.A., counsel for Petitioner, have requested this ruling on behalf of Petitioner and have provided the statement of facts upon which this ruling is based. The material facts as provided by Petitioner are set out below.

STATEMENT OF THE FACTS

Petitioner is a gastroenterology practice with two board-certified owners and an office and personnel in Raleigh, Wake County, North Carolina. Prior to December 20, 2005, Petitioner was known as Digestive Diseases Center, P.A.

In August of 2005, the General Assembly amended N.C.G.S. § 131E-178(a) to read:

No person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department; provided, however, no person who provides gastrointestinal endoscopy procedures in one or more gastrointestinal endoscopy rooms located in a nonlicensed setting, shall be required to obtain a certificate of need to license that setting as an ambulatory surgical facility with the existing number of gastrointestinal endoscopy rooms, provided that:

(1) The license application is postmarked for delivery to the Division of Facility Services by December 31, 2006;

(2) The applicant verifies, by affidavit submitted to the Division of Facility Services within 60 days of the effective date of this act, that the facility is in operation as of the effective date of this act or that the completed application for the building permit for the facility was submitted by the effective date of this act;

(3) The facility has been accredited by The Accreditation Association for Ambulatory Health Care, The Joint Commission on Accreditation of Healthcare Organizations, or The American Association for Accreditation of Ambulatory Surgical Facilities by the time the license application is postmarked for delivery to the Division of Facility Services of the Department; and

(4) The license application includes a commitment and plan for serving indigent and medically underserved populations.

All other persons proposing to obtain a license to establish an ambulatory surgical facility for the provision of gastrointestinal endoscopy procedures shall be required to obtain a certificate of need. The annual State Medical Facilities Plan shall not include policies or need determinations that limit the number of gastrointestinal endoscopy rooms that may be approved.

The effective date of section (a) was August 31, 2005.

Petitioner submitted to the Department an affidavit dated September 15, 2005, stating that as of August 31, 2005, it had completed building permit applications and submitted them to the proper local authorities for a facility with 2 gastrointestinal endoscopy rooms to be located at

3803-A Computer Drive, Suite 100, Raleigh, NC (the “Original Site”). By letter dated November 2, 2006, Petitioner was awarded accreditation by the Accreditation Association for Ambulatory Health Care for a period of three years expiring August 22, 2009. Petitioner also submitted the required application for licensure prior to December 31, 2006. It has not yet received a license for an ambulatory surgical facility.

Petitioner states that it now has determined that it would be more cost-effective and advantageous to its patients, referring physicians and staff to develop the proposed facility at a different site than the Original Site. It states that the Original Site now appears to be impractical and not cost-effective from a construction perspective. By letter dated September 21, 2007 from Petitioner’s counsel to counsel for the Department, Petitioner stated that the proposed new location for its facility is 2011 Falls Valley Drive, Raleigh, NC (the “New Site”).

The New Site is approximately seven miles from the Original Site. Petitioner represents that in connection with its proposed relocation, it will not incur an obligation for capital expenditures exceeding two million dollars (\$2,000,000). It states that the New Site will more easily permit Petitioner to ensure that it has all the necessary physical space to allow for the licensure of its ambulatory surgical facility and two gastrointestinal endoscopy rooms in the most cost-effective and efficient manner, without having to work within the confines of existing space.

ANALYSIS

In essence, Petitioner’s request for a declaratory ruling asks that, based on the affidavit submitted for the two gastrointestinal endoscopy rooms at the Original location, it be allowed to seek licensure of the two gastrointestinal endoscopy rooms at the New Site without the issuance of a certificate of need. The change in location is not a material change because the New Site is located in relatively close proximity to the Original Site, and the population to be served is the same at both sites.

In reviewing the request I have considered the purpose of the certificate of need law and the intent expressed by N.C.G.S. § 131E-178(a) concerning gastrointestinal endoscopy rooms, and I find that it is appropriate to grant the declaratory ruling that Petitioner has requested subject to the following condition:

The two gastrointestinal endoscopy rooms to be located at the New Site are to be developed *in place of* the two gastrointestinal endoscopy rooms located at the Original Site and *not in addition to* any existing or proposed gastrointestinal endoscopy rooms. At such time as the two gastrointestinal endoscopy rooms located at the New Facility become operational, the two gastrointestinal endoscopy rooms located at the Original Site will be closed and no longer used as gastrointestinal endoscopy rooms.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude Petitioner may apply for an ambulatory surgical facility license at the New Site without the issuance of a certificate of need, subject to all other applicable conditions for that license. I also conclude that once the New Site is operational, Petitioner cannot continue to operate the two gastrointestinal endoscopy rooms located at the Original Site.

This ruling is not intended, and should not be interpreted, to authorize any increase in the number of gastrointestinal endoscopy rooms Petitioner owns or operates.

This ____ day of _____, 2007.

Robert J. Fitzgerald, Director,
Division of Health Service Regulation
N.C. Department of Health and Human Services

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

Sean A. Timmons
Smith, Anderson, Blount, Dorsett,
Mitchell & Jernigan, P.A.
P.O. Box 2611
Raleigh, NC 27602-2611

This 1st day of October, 2007.

Jeff Horton
Chief Operating Officer