

**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**
ON SLOW MEMORIAL HOSPITAL)**

I, Robert J. Fitzgerald, Director of the Division of Health Service Regulation (the “Department”), hereby issue this declaratory ruling to Onslow Memorial Hospital, Inc. (“OMH”) 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. OMH has filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a ruling as to the applicability of Article 9, Chapter 131E of the North Carolina General Statutes to the facts described below.

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. Forrest W. Campbell, Jr. and James C. Adams II of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., have requested this ruling on behalf of OMH and have provided the statement of facts upon which this ruling is based. The material facts as provided by counsel for OMH are set out below.

STATEMENT OF THE FACTS

OMH operates an acute care hospital (“Hospital”) located at 317 Western Boulevard, Jacksonville, North Carolina, that is licensed pursuant to the Hospital Licensure Act, N.C.G.S. §

131E-75 *et seq.* The Hospital is licensed for six operating rooms as defined in N.C.G.S. § 131E-176(18c).

Onslow Ambulatory Services, Inc., a North Carolina corporation, d/b/a SurgiCare of Jacksonville (“OAS”) operates an ambulatory surgical facility (“ASF”) that is licensed pursuant to the Ambulatory Surgical Facility Licensure Act, N.C.G.S. § 131E-145 *et seq.*). The ASF is licensed for four operating rooms.

The sole member in both OMH and OAS is Onslow County Hospital Authority.

In the Request, OMH states that it intends to acquire the ASF from OAS. It then desires to have the ASF placed under the Hospital’s license rather than continuing to operate under a separate license as an ambulatory surgical facility. This would give OMH a total of ten operating rooms. OMH explains that this transaction will permit it to receive enhanced reimbursement for services provided at the ASF.

OMH states the four ASF operating rooms will remain in their present physical location. They will continue to be used only as outpatient surgical facilities (and will not be used as shared outpatient and inpatient surgical facilities).

OMH seeks a declaratory ruling that neither the acquisition of the ASF or the change in licensure from OAS to OMH will require Certificate of Need (“CON”) review.

ANALYSIS

The CON law provides that no person shall offer or develop, “make an acquisition” of, or “incur an obligation for a capital expenditure” for, a “new institutional health service” without first obtaining a CON. N.C.G.S. § 131E-178. Certain transactions are exempt from this requirement pursuant to N.C.G.S. § 131E-184(a) if the Department receives prior written notice

from the entity proposing the new institutional health service, which notice must include an explanation of why the new institutional health service is required. One of the exemptions, cited by OMH in the Request, is N.C.G.S. § 131E-184(a)(8): “To acquire an existing health service facility, including equipment owned by the health service facility at the time of acquisition.” The definition of “health service facility” includes ambulatory surgical facility. N.C.G.S. § 131E-176(9b).

In the Request, OMH provided notice to the Department of its intent to acquire the ASF from OAS, and it explained that the transaction would permit it to receive enhanced reimbursement. The ASF is an existing health service facility, and therefore the acquisition is exempt from CON review pursuant to N.C.G.S. § 131E-184(a).

Once the acquisition is consummated, the transfer of operating rooms from OAS’s license to OMH’s license does not require CON review because the total number of rooms owned by OMH after the acquisition of OAS will remain the same, and none of the rooms will be physically moved. Accordingly, the transfer of the operating rooms from OAS’s license to OMH’s license does not require prior CON review.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that the transaction described in the Request does not require OMH to first obtain a CON. I make no other finding with respect to the transfer of the operating rooms from one license to the other, and such a transfer must meet all applicable licensure requirements. Nothing in this Ruling should be construed to permit a change in physical location or increase in the number of operating rooms owned by OMH after the acquisition of OAS.

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

Forrest W. Campbell, Jr.
James C. Adams II
Brooks, Pierce, McLendon, Humphrey
& Leonard, L.L.P.
Post Office Box 26000
Greensboro, NC 27420

This _____ day of _____, 2007.

Jeff Horton
Chief Operating Officer