

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY NEW HANOVER) **DECLARATORY RULING**
PERFUSIONISTS, INC.)**

I, Robert J. Fitzgerald, Director of the Division of Health Service Regulation (the “Department”), hereby issue this declaratory ruling to New Hanover Perfusionists, Inc. (“NHP”) 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. NHP has filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a declaratory ruling that it may acquire all of the stock of Coastal Perfusion Services, Inc. (“Coastal”) without certificate of need (“CON”) review.

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. Terrill Johnson Harris of Smith Moore LLP requested this ruling on behalf of NHP and has provided the statement of facts upon which this ruling is based. The material facts as provided by counsel for NHP are set out below.

STATEMENT OF THE FACTS

NHP states that it is a North Carolina corporation with its principal place of business in Wilmington, North Carolina. NHP provides perfusion services to New Hanover Regional Medical Center (“New Hanover Regional”) pursuant to a perfusion services contract. The actual heart-lung bypass equipment is owned by Coastal and by Wilmington Perfusion Company

("Wilmington"). NHP contracts with Coastal and Wilmington for the provision of perfusion services. New Hanover Regional does not own any heart-lung bypass equipment and obtains perfusion services exclusively through NHP.

Coastal is a North Carolina corporation with its principal place of business in Wilmington, North Carolina. Its sole shareholder is Charles Hunter, M.D. ("Dr. Hunter"). Dr. Hunter is a cardiothoracic surgeon who has retired from the active practice of medicine.

Wilmington Perfusion Company is a North Carolina corporation with its principal place of business in Wilmington, North Carolina. Its sole shareholder is Howard F. Marks, M.D. ("Dr. Marks"), a cardiothoracic surgeon. Both Dr. Hunter and Dr. Marks are currently shareholders in NHP.

Dr. Hunter has agreed to sell his interest in Coastal to NHP because he has retired from the active practice of medicine and no longer wishes to be involved in perfusion services. NHP plans to acquire 100 percent of the issued and outstanding stock of Coastal.

After closing the stock sale transaction, NHP represents that Coastal will remain a separate corporate entity that is a wholly-owned subsidiary of NHP. NHP will own the stock instead of Dr. Hunter, but all else will remain the same. Coastal will continue to operate the heart-lung bypass equipment at New Hanover Regional pursuant to an agreement with NHP, which in turn has a perfusion services agreement with New Hanover Regional. The manner in which the equipment is operated and the services will not change in any respect after the proposed transaction is closed.

ANALYSIS

N.C.G.S. § 131E-178 provides that no person shall offer or develop "a new institutional health service" without first obtaining a CON. N.G.C.S. § 131E-176(16) defines "new

institutional health service” to include: (1) “The acquisition by purchase, donation, lease, transfer, or comparable arrangement” of a heart-lung bypass machine “by or on behalf of any person,” N.C.G.S. § 131E-176(16)f1.5, and (2) “The obligation by any person of a capital expenditure exceeding two million dollars (\$2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service,” N.C.G.S. § 131E-176(16)b.

The transaction described by NHP does not constitute the acquisition of a heart-lung bypass machine by any person because ownership of the heart-lung bypass machine here will not change. Coastal will continue to be the owner of this equipment, and Coastal’s legal status as a corporate entity will not change.

Similarly, the transaction is not an obligation to develop or expand a health service or health service facility, since NHP represents that Coastal will continue to operate at the same location in a manner that is the same in all material respects as it operated prior to the transaction. Coastal is not within the definition of a health service facility. N.C.G.S. § 131E-176(9b).

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that the acquisition by NHP of 100% of the outstanding and issued stock of Coastal, in the manner represented by NHP in the Request, is not subject to CON review.

This ruling does not address any licensure issues, and NHP shall continue to be responsible for providing all required licensure information to the Acute and Home Care Licensure Section of the Department.

This ____ day of January, 2008.

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

Terrill Johnson Harris
Smith Moore LLP
P.O. Box 21927
Greensboro, NC 27420

This _____ day of January, 2008.

Jeff Horton
Chief Operating Officer