

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

**IN RE: REQUEST FOR DECLARATORY )  
RULING BY THE PRESBYTERIAN HOSPITAL ) DECLARATORY RULING  
AND SAMEDAY SURGERY CENTER AT )  
PRESBYTERIAN, LLC )  
Project I.D. No. F-7309-05 )**

I, Robert J. Fitzgerald, Director of the Division of Health Service Regulation (“Department” or “Agency”), hereby issue this Declaratory Ruling to The Presbyterian Hospital ("TPH") and SameDay Surgery Center at Presbyterian, LLC ("SDSC Downtown")(collectively "Petitioners") pursuant to N.C.G.S. § 150B-4 and 10A N.C.A.C. 14A.0103 and the authority delegated to me by the Secretary of the North Carolina Department of Health and Human Services. Petitioners have filed a Declaratory Ruling Request (the "Request") asking the Department to issue a ruling as to the applicability of N.C.G.S. Chapter 131E, Article 9, to the facts described below. For the reasons given below, I conclude that an increase in the number of operating rooms under the license of TPH does not require a certificate of need ("CON") on the facts described below; and that good cause exists to transfer ownership of the CON that was issued to SDSC Downtown for Project I.D. No. F-7309-05.

This ruling is binding upon 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. This 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. Denise M. Gunter of Nelson Mullins Riley & Scarborough LLP has requested this ruling on

behalf of Petitioners and has provided the statement of facts upon which this ruling is based. The material facts as provided by counsel for Petitioners are set out below.

### **FACTS**

SameDay Surgery Center at Presbyterian, LLC ("SDSC Downtown") is a freestanding ambulatory surgical facility located across the street from The Presbyterian Hospital ("TPH") in Charlotte, Mecklenburg County, North Carolina. SDSC Downtown and TPH are separately licensed health service facilities. Petitioners state that Novant Health, Inc. ("Novant") is the ultimate parent entity of both facilities. In TPH's 2008 Hospital License Renewal Application, TPH reports that it is presently licensed for three dedicated open heart rooms, three dedicated C-Section rooms, four dedicated ambulatory surgery rooms, twenty-two shared operating rooms and eight endoscopy rooms.

Effective July 11, 2006, the Department issued a CON to SDSC Downtown for Project I.D. No. F-7309-05. The CON authorizes SDSC Downtown to construct a new replacement ambulatory surgical multi-story facility at its 1800 East Fourth Street location that shall be licensed for no more than three ambulatory surgical operating rooms and one gastrointestinal endoscopy procedure room.

Petitioners state that SDSC Downtown is in the process of developing the CON for Project I.D. No. F-7309-05; however, the project is not yet complete. SDSC Downtown now seeks to transfer the undeveloped CON for the SDSC Downtown replacement facility, to be known as the TPH Outpatient Surgery Center, to TPH. Petitioners represent that development of the SDSC Downtown CON will otherwise proceed according to the plans outlined in the application for the July 11, 2006 CON. The scope of services, construction plan, project site, and physical structure for CON Project I.D. No. F-7309-05 will not change. Petitioners state that

the capital costs for this project will not exceed or change from the \$9,960,455 authorized by the CON, and that patient charges will not increase as a result of this transfer.

Simultaneously, TPH has filed a Notice of Exempt Acquisition pursuant to N.C.G.S. § 131E-184(a)(8) to acquire SDSC Downtown in its entirety. The result of this acquisition will be the consolidation of SDSC Downtown's and TPH's licenses under TPH's hospital license. Although the number of operating rooms and endoscopy rooms under TPH's license will increase as a result of this consolidation, there will be no change in the total number of operating rooms or endoscopy rooms held by TPH's and SDSC Downtown's parent entity, Novant.

Petitioners offer the following rationale for the proposed transactions. Petitioners state that consolidating SDSC Downtown's license with TPH's license will improve operational efficiency. Additionally, Petitioners state that there has been a change in Medicare regulations that impacts how ambulatory surgery centers bill for their services.

Petitioners state that TPH administration currently manages surgical services at both TPH and at Midtown Medical Plaza ("Midtown"), another Presbyterian campus surgical facility. The TPH Director of Perioperative Services manages all surgical services, including scheduling, staffing, supplies, equipment, and patient billing for all Presbyterian surgical facility procedures. Petitioners state that the consolidation of SDSC Downtown's license with TPH's hospital license will facilitate the coordination of a now-separately licensed facility under the management of one individual and department. They reason that both the SDSC Downtown and TPH facilities will operate with greater efficiency and productivity if these two Novant facilities are consolidated into one license, which will lead to greater efficiency, increased productivity by the staff and physicians, and ultimately enhanced patient care at both facilities.

In addition, Petitioners note that on January 4, 2007, the Department issued a CON to TPH for Project I.D. No. F-7386-05 (“F Wing Project”) pursuant to a settlement agreement. This CON authorized TPH to construct an outpatient surgery center to be licensed and operated as a part of TPH. Petitioners state that the F Wing Project CON authorized TPH to construct nine dedicated outpatient operating rooms in the new replacement SDSC Downtown facility on the third and fourth floors of the SDSC Downtown replacement facility.

TPH now seeks to consolidate ownership of the SDSC Downtown CON and the F Wing CON under one entity. They state that consolidated ownership will provide continuity of management and oversight of the construction of the new replacement facility.

With respect to billing, Petitioners state that on January 1, 2008, the Centers for Medicare and Medicaid Services (“CMS”) modified the existing ambulatory surgery center pay structure to pay ambulatory surgery centers through the ambulatory payment category (“APC”) methodology. At the time the SDSC Downtown CON application was filed, and the CON was issued, the new CMS rule for ambulatory surgery payments had not yet been promulgated. The APC methodology pays flat rates for procedures with additional payments for specialized drugs, supplies, or implants that are identified on the bill. When the replacement facility opens, SDSC Downtown will be required to comply with the APC billing structure in order to continue treating and billing Medicare patients. SDSC Downtown's current charge system cannot support the APC methodology, and would thus require conversion to an itemized chargemaster, which Petitioners represent would be very time consuming and expensive to implement.

SDSC Downtown represents that approximately 15.81% of its surgical cases in Year 2 of the project will be performed on Medicare beneficiaries. Novant has determined that the more cost efficient and effective way to address the issue is to convert SDSC Downtown into a

department of TPH so that TPH's resources may be utilized to streamline billing, medical records, and integration with ancillary systems such as the pharmacy, across the Novant system. The conversion will move SDSC Downtown's billing and medical records systems into TPH's existing systems.

Petitioners state that they expect that the vast majority of the patients treated at SDSC Downtown will not experience any change in expenses. The majority of patients receiving services at SDSC Downtown who may experience a change in expenses possess secondary insurance coverage that is adequate to compensate for the difference in charges. Further, for those procedures performed at SDSC Downtown which are not typically performed at TPH, Petitioners represent that Novant will work to ensure those procedure charges remain price neutral, i.e., no increase in charges, after conversion.

According to Petitioners, the result of TPH's acquisition of SDSC Downtown will be the consolidation of SDSC Downtown's and TPH's licenses under TPH's consolidated hospital license. Although the number of operating rooms and endoscopy rooms under TPH's license will increase as a result of this consolidation, there will be no change in the total number of operating rooms or endoscopy rooms held by TPH's and SDSC Downtown's parent entity, Novant. Further, Petitioners state that there is no capital cost associated with the license consolidation.

### **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)u defines “new institutional health service” to include:

[t]he construction, development, establishment, increase in the number or relocation of an operating room or gastrointestinal endoscopy room in a licensed health service facility, other than the relocation of an operating room or gastrointestinal endoscopy

room within the same building or on the same grounds or grounds not separated by more than a public right-of-way adjacent to the grounds where the operating room or gastrointestinal endoscopy room is currently located.

N.C.G.S. § 131E-184 provides that the Department shall exempt from certificate of need review certain new institutional health services if the Department receives prior written notice from the entity proposing the new service with an explanation of why the new service is required. Among the enumerated reasons for exemption is for the proposing entity to “acquire an existing health service facility, including equipment owned by the health service facility at the time of acquisition.” N.C.G.S. § 131E-184(a)(8).

N.C.G.S. § 131E-184 applies to TPH’s intended acquisition of SDSC Downtown and its existing operating rooms.

N.C.G.S. § 131E-181(a) provides that “[a] certificate of need shall be valid only for the defined scope, physical location, and person named in the application. A certificate of need shall not be transferred or assigned except as provided in G.S. 131E-189(c).” A recipient of a CON must also materially comply with the representations made in the CON application. N.C.G.S. § 131E-181(b).

N.C.G.S. § 131E-189(c) provides:

The Department may immediately withdraw any certificate of need if the holder of the certificate, before completion of the project or operation of the facility, transfers ownership or control of the facility, the project or the certificate of need. . . . Transfers resulting from death or other good cause, as determined by the Department, *shall not result in the withdrawal if the Department receives prior written notice of the transfer and finds good cause.*

N.C.G.S. § 131E-189(c)(emphasis added).

Petitioners have shown good cause for the transfer of the CON because (1) the scope and physical location of the operating rooms approved in the CON for Project I.D. No. F-309-05

remain unchanged, (2) TPH's acquisition of SDSC Downtown reflects a corporate reorganization to enhance efficiency and meet the practical requirements of a change in the Medicare billing methodology, and (3) the transfer will not result in any changes in services to patients or in the ultimate number or location of operating rooms in the county or on the campus.

N.C.G.S. § 131E-181(b) requires that a recipient of a CON, or any person who may subsequently acquire the service for which a CON was granted, is required to materially comply with the representations made in its application for the CON. Petitioners must therefore ensure that the proposed transaction is price-neutral with respect to procedure charges to patients consistent with the representations of their CON application.

**CONCLUSION**

For the foregoing reasons, assuming the statements of fact in the Request to be true and subject to the condition set out below, I conclude that on the facts presented here, (1) the increase in the number of operating rooms under TPH's license resulting from the proposed transaction does not require a CON; and (2) Petitioners have shown good cause to transfer the CON for Project I.D. No. F-7309-05 from SDSC Downtown to TPH. This transfer does not violate N.C.G.S. § 131E-189(b) or any of the rules of the Department. The transfer is subject to the condition that the transfer be price neutral with respect to procedure charges to patients consistent with the representations of the CON Application for Project I.D. No. F-7309-05.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2008

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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 Services in first-class, postage pre-paid envelope addressed as follows:

**CERTIFIED MAIL**

Denise M. Gunter  
Nelson Mullins Riley & Scarborough LLP  
380 Knollwood Street  
Winston-Salem, NC 27103

This the \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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Jeff Horton  
Chief Operating Officer