

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

**IN RE: REQUEST FOR)
DECLARATORY RULING BY)
NOVANT HEALTH, INC., ROWAN)
HEALTH SERVICES CORPORATION) DECLARATORY RULING
AND ROWAN REGIONAL MEDICAL)
CENTER, INC.,)
Project ID No. F-4791-93)**

I, Jeff Horton, Acting Director of the Division of Health Service Regulation (the “Department”), hereby issue this declaratory ruling to Novant Health, Inc. (“Novant”), Rowan Health Services Corporation (“RHSC”) and Rowan Regional Medical Center, Inc. (“RRMC”) (collectively “Petitioners”) 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. 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 I must decline to issue the ruling requested by Rowan.

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. Noah H. Huffstetler, III of Nelson Mullins Riley & Scarborough, LLP, has requested this ruling on behalf of Petitioners. Gary S. Qualls and Colleen M. Crowley of K&L Gates LLP have filed Responsive Comments in Opposition to Request for Declaratory Ruling on behalf of The Charlotte-Mecklenburg Hospital Authority d/b/a/ Carolinas Health System (“CHS”). The

material facts as provided by counsel for Petitioners and for CHS, as well as from information in the Agency files, are set out below.

STATEMENT OF THE FACTS

Petitioners state that each Petitioner is a private, non-profit North Carolina corporation. RHSC is the sole member of RRMC. By an agreement effective 1 January 2008, Novant became the sole member of RHSC. RRMC operates a full service community hospital located in Salisbury, North Carolina. This hospital is licensed by the Department to operate 268 beds, including 10 rehabilitation beds comprising the Elizabeth C. Stanback Rehabilitation Unit ("Stanback Rehabilitation").

Effective October 29, 1998, a CON was issued to "The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System and Mercy Hospital, Inc. (a wholly owned subsidiary of CHS), (collectively referred to as "CHS") for Project ID No. F-4791-93 (the "Project CON"). The physical location was Mercy Hospital in Charlotte or Rowan Regional Medical Center in Salisbury. The Scope was defined as:

CHS shall develop no more than ten inpatient rehabilitation beds at either Mercy Hospital ("Mercy") or Rowan Regional Medical Center ("Rowan"). In the event the project is developed at Rowan and is required to be licensed and certified as part of Rowan, the CON shall be transferred to Rowan for good cause for the duration of the Management Contract with CHS. However, upon termination of the above mentioned Management Contract, this CON shall authorize development of the ten inpatient rehabilitation beds at Mercy.

The Project CON was issued pursuant to a Settlement Agreement dated 23 September 1998 among Novant, CHS, the Agency, and several other parties. The Settlement Agreement resolved a contested case appeal concerning inpatient rehabilitation beds in Health Service Area III ("HSA III").

On 21 December 1998, RRMC and CHS entered into a Management Agreement respecting the development, management and operation of the rehabilitation beds authorized by the Project CON. The Management Agreement states in a recital: “This Agreement is subject to and limited by the Certificate of Need (“CON”) issued by [the Agency] to CMHA and Mercy Hospital, Inc. (“Mercy”) for Project I.D. No. F-4791-93 for ten (10) inpatient rehabilitation beds (the “Rehabilitation Beds”).”

Paragraph 8 of the Management Agreement between CHS and RRMC states:

CON Rights. The Agency granted the Rehabilitation CON to CMHA. Pursuant to the Rehabilitation CON, CMHA agrees to transfer that CON to Rowan during the term of this Agreement. However, upon expiration of this Agreement for any reason (including termination for cause under Paragraph 19 of this Agreement), CMHA shall be entitled to remove the Rehabilitation Beds from Rowan and CMHA shall retain all CON rights to such beds. If, for any reason during the term of this Agreement, a CON is no longer required to operate the Rehabilitation Beds, and such CON requirement remains absent for a period of at least twelve (12) months, the parties acknowledge and agree that CMHA will have no further right or interest in the Rehabilitation Beds and all ownership rights and interests with respect to the beds will lie solely in Rowan.

The rehabilitation unit opened at RRMC, with CHS providing management services pursuant to the Management Agreement. The beds were licensed under RRMC’s hospital license.

The Management Agreement contains a termination clause. Petitioners contend in the Request:

Under Paragraph 19(c) of the Management Agreement between RRMC and CMHA "CMHA may elect to terminate this Agreement without prior notice if ... any change occurs in the ownership or control of [RRMC] ... which effects a transfer of a controlling interest in [RRMC]." Petitioners contend that the agreement of which Novant became the sole member of RHSC did not effect any change in the ownership or control of RRMC which would trigger this provision. Nevertheless, by its letter dated 28 April 2008, CMHA formally notified RRMC of its intent to terminate the Management Agreement pursuant to the above quoted

portion of Paragraph 19(c), effective 30 June 2008. Petitioners intend to contest that action in the appropriate Court.
(footnote omitted)

CHS's description of the termination is set out in the Comments submitted on its behalf:

By letter dated April 28, 2008 from Dennis Phillips to RRMC's Charles Elliott, CHS terminated the Rehab Bed Management Agreement, effective June 30, 2008. . . . By letter from Dennis Phillips to Lee Hoffman dated July 29, 2008, CHS notified the Agency that CHS had terminated the Rehab Bed Management Agreement at RRMC, and that CHS is now developing the Rehab Beds at Mercy pursuant to the Rehab Bed CON.

Petitioners request a determination that RRMC may continue to operate the ten inpatient rehabilitation beds, notwithstanding the termination of the Management Agreement.

ANALYSIS

"No person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department" N.C.G.S. § 131E-178(a). Rehabilitation beds in the circumstances here are within the definition of "new institutional health service." See N.C.G.S. § 131E-176(16).

N.C.G.S. § 131E-181, "Nature of certificate of need," provides:

(a) 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).

(b) A recipient of a certificate of need, or any person who may subsequently acquire, in any manner whatsoever permitted by law, the service for which that certificate of need was issued, is required to materially comply with the representations made in its application for that certificate of need. The Department shall require any recipient of a certificate of need, or its successor, whose service is in operation to submit to the Department evidence that the recipient, or its successor, is in material compliance with the representations made in its application for the certificate of need which granted the recipient the right to operate that service. In determining whether the recipient of a certificate of need, or its successor, is operating a service which materially differs from the representations made in its application for that certificate of need, the

Department shall consider cost increases to the recipient, or its successor, including, but not limited to, the following:

(1) Any increase in the consumer price index;

(2) Any increased cost incurred because of Government requirements, including federal, State, or any political subdivision thereof; and

(3) Any increase in cost due to professional fees or the purchase of services and supplies.

(c) Whenever a certificate of need is issued more than 12 months after the application for the certificate of need began review, the Department shall adjust the capital expenditure amount proposed by increasing it to reflect any inflation in the Department of Commerce's Construction Cost Index that has occurred since the date when the application began review; and the Department shall use this recalculated capital expenditure amount in the certificate of need issued for the project.

(d) A project authorized by a certificate of need is complete when the health service or the health service facility for which the certificate of need was issued is licensed and certified and is in material compliance with the representations made in the certificate of need application.

(Emphasis added)

The scope of the Project CON provided that:

CHS shall develop no more than ten inpatient rehabilitation beds at either Mercy Hospital ("Mercy") or Rowan Regional Medical Center ("Rowan"). In the event the project is developed at Rowan and is required to be licensed and certified as part of Rowan, the CON shall be transferred to Rowan for good cause for the duration of the Management Contract with CHS. However, upon termination of the above mentioned Management Contract, this CON shall authorize development of the ten inpatient rehabilitation beds at Mercy.

This is the scenario that unfolded. By the clear terms of the Project CON, after termination of the Management Contract, CHS is authorized to develop the ten bed project at Mercy. The language of the Management Agreement itself recognizes the continuing effect of the Project CON.

Accordingly, were RRMC to continue to operate the ten-bed unit at RRMC, it would not be in material compliance with the scope, location or ownership of the Project CON. Such an operation would constitute a new institutional health service that requires its own CON.

Petitioners analogize a CON to a building permit, arguing that its force and effect disappears when the project is complete. The language of N.C.G.S. § 131E-181 highlighted above, however, shows that the person named in a CON (or that person's successor) have a continuing obligation to remain in material compliance with the scope and physical location of the CON. Other aspects of the CON law also support this conclusion. *See, e.g.*, N.C.G.S. §§ 131E-189, -190.

Petitioners contend that licensure, rather than the CON requirement, is the applicable regulatory mechanism for this project. However, if RRMC were to continue operation of the rehabilitation unit without an applicable CON, it would be operating a new institutional health service without a CON and therefore would be ineligible for continued licensure.

Petitioners look for support for their position in *Mooreville Hospital Management Associates, Inc. v. N.C. Dept. of Health and Human Services*, 360 N.C. 156, 622 S.E.2d 621 (2005). That opinion does not address Petitioners' argument. Moreover, *Mooreville* did not encompass a situation where a CON recipient was acting outside the scope of its CON. To the extent language in a brief in a case based on different facts may be read to support Petitioners' argument, it does not constitute binding authority for the Agency to deviate from the law.

CHS argues that the project is not "complete" because it contemplates the move of the rehabilitation beds from RRMC to Mercy. That argument is an alternative rationale for the decision to decline to issue the requested ruling.

This ruling does not address the validity or invalidity of CHS's termination of Management Agreement.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true, I decline to issue the ruling requested by Petitioners. RRMC may not continue to operate the rehabilitation beds without a CON, and it cannot remain licensed to operate the beds without meeting licensure requirements, including the requirement for a CON.

This ____ day of August, 2008.

Jeff Horton, Acting 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

Noah H. Huffstetler, III
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With a courtesy copy to:

Gary S. Qualls
Colleen M. Crowley
K&L Gates LLP
430 Davis Drive, Suite 400
Morrisville, NC 27560

This _____ day of August, 2008.

Jeff Horton
Acting Director