

**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 REGIONAL )     DECLARATORY RULING  
MEDICAL CENTER )  
Project I.D. No. O-7432-05 )**

I, Jeff Horton, as Acting Director of the Division of Health Service Regulation, North Carolina Department of Health and Human Services (“Department” or “Agency”), do hereby issue this Declaratory Ruling pursuant to N.C.G.S. § 150B-4 and 10A NCAC 14A .0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

New Hanover Regional Medical Center (“NHRMC”) has requested a declaratory ruling allowing for changes to Project I.D. No. O-7432-05 (“the Oaks Project”) on the grounds that the changes do not violate N.C.G.S. § 131E-181 and do not constitute a failure to satisfy a condition of the Certificate of Need (“CON”) in violation of N.C.G.S. § 131E-189(b) (the “Request”). For the reasons stated below, I must deny the requested ruling. This ruling will be binding upon the Department and the entity requesting it, as long as the material facts stated herein are accurate. This ruling pertains only to the matters referenced herein. Except as provided by N.C.G.S. § 150B-4, the Department expressly reserves the right to make a prospective change in the interpretation of the statutes and regulations at issue in this Declaratory Ruling. Denise M. Gunter of Nelson Mullins Riley & Scarborough, LLP, has requested this ruling on behalf of NHRMC and has provided the material facts upon which this ruling is based. The agency files also provide additional facts bearing on this request.

## STATEMENT OF THE FACTS

The Oaks is a 62-bed psychiatric unit of NHRMC located in a separate building from the acute care beds on the NHRMC campus in Wilmington, New Hanover County, North Carolina. The Oaks is licensed under the acute care license of NHRMC. On November 15, 2005, NHRMC filed a CON application seeking to build a replacement facility for The Oaks to be located off the NHRMC main campus. Pursuant to a settlement agreement entered into on May 12, 2006, the Department issued a CON to NHRMC for the replacement and relocation of The Oaks, Project I.D. No. O-7432-05.

According to NHRMC in the Request, changes in the utilization of The Oaks' beds and the projected bed need, as well as a decrease in the number of psychiatrists on staff at NHRMC, necessitate a change in location of the approved replacement facility and a change in the scope of services to be provided at The Oaks. NHRMC proposes several changes to the Oaks Project.

NHRMC proposes to decrease the number of licensed beds to be replaced in The Oaks from 62 to 44 inpatient psychiatric beds. NHRMC states that the adult inpatient psychiatric needs of the NHRMC primary and secondary service areas will be more than adequately served if only 44 inpatient psychiatric beds are licensed and operated in The Oaks.

NHRMC also proposes that The Oaks no longer provide outpatient psychiatric services. NHRMC attributes this change to the loss of six full-time psychiatrists who left NHRMC in order to pursue private practice in an outpatient-only psychiatric setting.

Finally, NHRMC proposes to locate The Oaks' replacement beds on the second floor of the NHRMC hospital tower (the "Tower") rather than on a site one mile from the NHRMC campus.

NHRMC states it was originally authorized to spend more than \$11.2 million to replace The Oaks. In the Request, it projects the cost for the original replacement project has increased over 33%, with the lowest construction bid being \$14,937,329. NHRMC contends in the Request that the total capital cost for the revised Oaks Project is only \$5,476,733.

As NHRMC notes in the Request, the proposed change to the Oaks Project also impacts the CON issued to NHRMC for Project I.D. No. O-7283-05 (the “Master Facilities Project”). The Master Facilities Project was approved for the expansion and renovation of several departments at NHRMC, including the Patient Tower. Overall, “Upon completion of the project, New Hanover Regional Medical Center shall be licensed to operate . . . 572 acute care beds at New Hanover Regional Medical Center . . . .” The maximum capital expenditure for the Master Facilities Project was \$204,034,219.

In a letter dated 25 August 2008, counsel for NHRMC submitted a “Material Compliance Determination Request” to the Chief of the CON Section. The letter, submitted contemporaneously with the Request for this declaratory ruling, outlined the impact of the proposed changes in the Oaks Project on the Master Facilities Project. According to the letter, the Master Facilities Project included renovation of nine patient floors in the Tower, including the second floor. With the changes in the Oaks Project described in the Request, the Oaks psychiatric unit would be located on the second floor of the Tower. Therefore, instead of housing private acute care beds, the second floor would have 44 psychiatric beds. NHRMC states in its letter that the acute care beds will be allocated to other floors of the Tower such that the number of private acute care rooms in the Tower will be reduced from 372 to 320 rooms. Thus, the revised Oaks project would result in the relocation of acute care beds to other floors in order to accommodate the addition of psychiatric services in the new Tower.

## ANALYSIS

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 recipient of a CON must also materially comply with the representations made in the CON application. N.C.G.S. § 131E-181(b). NHRMC seeks to modify the CON issued to it for Project I.D. No. O-7432-05 in response to new developments since issuance of the original CON, contending that these modifications are both necessary and consistent with CON policies and goals.

The changes proposed by NHRMC constitute material changes in the location of the approved Oaks Project and in the scope of both the Oaks Project and the Master Facilities Project. As to the Oaks Project, the Request proposes a change from a 62-bed free-standing building located at a site separate from the NHRMC campus to a smaller 44-bed inpatient unit located on one floor of a multi-floor acute care bed Tower on the NHRMC campus. In addition, the proposed psychiatric unit would not provide outpatient services, as proposed in NHRMC’s CON application.

In its application for the Oaks Project, NHRMC represented that the reduction in available staffed beds in its then-existing facility from 62 to 40 (because of water damage) limited the number of psychotic patients that could be accommodated, but that the demand for inpatient psychiatric services had continued unabated. In the Request, NHRMC now states that there is a surplus of psychiatric beds in the Region and that the utilization data shows fewer beds are needed.

With respect to the Master Facilities Project, one floor of the renovated Tower would no longer be an acute care floor, but would be an inpatient psychiatric unit. Psychiatric services were not originally proposed to be located in the Tower in the Master Facility Project. Thus, the

change in the Oaks Project results in the addition of a health service to the Tower that is a new institutional health service as defined in N.C.G.S. § 131E-176(16)e.

Further, because the changes in the Oaks Project result in the addition of potentially 44 more patients per day in the Tower, both Projects might be affected by changes in the proposed infrastructure to meet the needs of those patients, such as food service and other ancillary services.

The proposed changes set forth in the Request are material changes in location and scope of the Oaks Project and in scope of the Master Facilities Project, and consequently require CON review.

I express no opinion as to whether NHRMC's proposed changes in the two projects meet the requirements or the purposes of the CON law. That is a matter to be determined in the course of the review of a new CON application for the proposed changes. Further, the changes set forth in the Request are beyond the scope of a declaratory ruling, since they constitute material changes in the scope and location of a project.

### **CONCLUSION**

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that I must deny NHRMC's request for a declaratory ruling that the proposed modifications to the CON issued for Project I.D. No. O-7432-05 are permitted by N.C.G.S. § 131E-181.

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

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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 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 October, 2008.

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Jeff Horton  
Acting Director