

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY FIRSTHEALTH OF THE)
CAROLINAS, INC. AND REX) DECLARATORY RULING
HOSPITAL, INC.)**

I, Drexdal Pratt, as 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.

FirstHealth of the Carolinas, Inc., and Rex Hospital, Inc. (hereinafter “Petitioners”) have requested a declaratory ruling (“Petition”) that certain actions relating to a series of agreements and transactions described below do not violate N.C.G.S. §§ 131E-181(a) and -189(c). These actions concern the development, management and eventual sale of an ambulatory surgical center (“ASC”) in Harnett County, which Petitioners propose to develop pursuant to a certificate of need (“CON”) issued to Good Hope Hospital, Inc. (“Good Hope”) in 2001.

In the alternative, Petitioners request that the Department find “good cause” for a transfer of the CON from Good Hope to Petitioners under N.C.G.S. § 131E-189(c).

For the reasons set out below, I must deny Petitioners’ request.

This ruling will be binding upon the Department and the entities 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 the firm of Nelson Mullins Riley & Scarborough LLP

has requested this ruling on behalf of Petitioners and has provided the material facts upon which this ruling is based. In addition, comments have been submitted by Benjamin N. Thompson of the firm of Wyrick Robbins Yates & Ponton LLP on behalf of Harnett Health System, Inc.; Frank S. Kirschbaum of the firm of Kirschbaum, Nanney, Keenan & Griffin, P.A., on behalf of Surgical Care Affiliates, LLC; N. Earl Jones, Jr., Chairman, on behalf of Good Hope Hospital, Inc.; and S. Todd Hemphill of the firm of Bode, Call & Stroupe, LLP, on behalf of Cumberland County Hospital System, Inc. and WakeMed. Ms. Gunter submitted a rebuttal to Mr. Thompson's comments on behalf of Petitioners. I have considered these submissions in making this ruling.

STATEMENT OF THE FACTS

Good Hope holds a CON dated December 14, 2001 ("2001 CON") that was issued pursuant to a 2001 settlement agreement. The CON for Project No. M-6394-01 authorizes Good Hope to construct a replacement hospital that, upon completion, will have no more than 34 acute care beds, including a 5-bed ICU/CCU, 14 psychiatric beds, and three shared operating rooms. Petition, Exh. B. The replacement hospital has not been built.

Good Hope initiated various forms of litigation against the Department over the years. In 2009, Good Hope and the Department entered into a settlement agreement (the "2009 settlement") that permits Good Hope to develop a 16-bed inpatient psychiatric facility at the current Good Hope location in Erwin, N.C., and to develop a replacement hospital according to the terms of the 2001 CON. The replacement hospital must be licensed, certified and operational within 48 months of the effective date of the 2009 settlement agreement. If not completed within that time frame, Good Hope is to relinquish the 2001 CON.

Petitioners assert that Good Hope has been unable to secure financing for the replacement hospital. (In his comments on behalf of Good Hope, Mr. Jones states that Good Hope received verbal assurance for funding, and if the Petition is denied, it intends to move forward with the replacement hospital.) Petitioners state that they have determined that an ASC with three operating rooms would be an effective alternative to meet local healthcare needs.

Petitioners propose the following. If approved for the ASC, Good Hope would relinquish all rights to the 34 beds approved in the 2001 CON. The Petitioners would enter with Good Hope into a “Development Agreement” pursuant to which the Petitioners would develop the ASC. Under this agreement, Petitioners would secure a contractor and provide financing for the ASC, which would be built on the site proposed in the application for the 2001 CON. Petitioners state that the Development Agreement will require Petitioners to develop the ASC in accordance with the representations made in the 2001 CON application about surgical services and with the conditions placed on the 2001 CON. They state that Good Hope will “explicitly retain ultimate control over the development and construction of the ASC.”

Petitioners also state that Good Hope will enter into a Management Agreement with the Petitioners to manage and operate the ASC upon completion. The Petitioners will procure an option to purchase the ASC, not exercisable until after it is completed and in operation. (Good Hope may retain a portion of the ASC.)

ANALYSIS

Petitioners seek a ruling that the project development described above does not violate Article 9, Chapter 131E of the General Statutes, specifically N.C.G.S. §§ 131e-181(c) and 189(c). For any one of the following reasons, as discussed more thoroughly below, Petitioners’ request must be denied:

1. Petitioners seek a ruling as to a CON in which they have no present interest, nor do they appear to have a formal agreement with the CON holder. Accordingly, Petitioners are not persons aggrieved.

2. Petitioners have not presented sufficient information to allow the ruling that they request.

3. The transactions proposed by Petitioners are outside the scope of the 2001 CON.

4. Petitioners have not shown good cause to permit transfer of the 2001 CON.

1. Petitioners are not persons aggrieved.

On the facts as presented, Petitioners have no cognizable interest in the application of the law to the 2001 CON. They merely describe, in general terms, a proposed course of events, asserting various commitments to be executed by the Petitioners and Good Hope. Good Hope, however, is not a Petitioner, and any ruling here would not be binding on Good Hope.

Declaratory Rulings may be sought by “persons aggrieved.” N.C.G.S. § 150B-4. “Person aggrieved is defined as “any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.” N.C.G.S. § 150B-2(6).

On the facts as presented by Petitioners, they are two entities with a “concrete present intention” of pursuing a potential agreement with Good Hope. The effect of a ruling here, particularly when the CON holder is not a petitioner, is far from substantial. While Mr. Jones has stated that Good Hope supports the proposal, and Petitioners state that they can add Good Hope if necessary, Good Hope has not petitioned for a ruling on the CON that it holds, and Petitioners are merely potential contractors.

2. Petitioners have not presented sufficient information to allow the ruling that they request.

Petitioners have explained that they do not want to invest the time and expense of preparing documents without knowing if they will receive approval for the proposed transactions. However, since they cannot provide details of the arrangements that they describe in general terms, they cannot show that the transactions will be within the scope of the 2001 CON. For example, Petitioners state that Good Hope will retain “ultimate control” of development of the ASC. But Petitioners also say that in exchange for financing, they will serve as developers, engage contractors, and manage the project. Petitioners will have an option to purchase upon completion. This leaves open whether Good Hope’s “ultimate control” has any substance, and whether the proposal is effectively a transfer of a CON in violation of N.C.G.S. §§ 181(a) and 189(c). Since the Petitioners and Good Hope apparently have not executed any binding documents, or even agreed on the details of the documents, they cannot provide sufficient information to support the ruling they request.

3. The proposed transactions are outside of the scope of the 2001 CON.

The 2001 CON is for a hospital with 34 acute care beds, three shared operating rooms, and a variety of other inpatient hospital functions, including an emergency department, a laboratory, a pharmacy, a physical therapy unit, and various imaging services, including radiology and fluorography, radiography and tomography, nuclear medicine, a CT scanner, ultrasound, and mammography. *See* Attachment 1 to Cumberland County Hospital System submission.

A hospital and an ambulatory surgical facility are two different and separately defined health services in the CON law.

A Hospital is defined as:

a public or private institution which is **primarily engaged in providing to inpatients, by or under supervision of physicians, diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons**, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. The term includes all facilities licensed pursuant to G.S. 131E-77 of the General Statutes, except long-term care hospitals.

N.C.G.S. § 131E-176(13) (emphasis added)

An Ambulatory Surgical Facility is defined as:

a facility designed for the provision of a specialty ambulatory surgical program or a multispecialty ambulatory surgical program. An ambulatory surgical facility **serves patients who require local, regional or general anesthesia and a period of post-operative observation. An ambulatory surgical facility may only admit patients for a period of less than 24 hours** and must provide at least one designated operating room or gastrointestinal endoscopy room, . . . and at least one designated recovery room, have available the necessary equipment and trained personnel to handle emergencies, provide adequate quality assurance and assessment by an evaluation and review committee, and maintain adequate medical records for each patient.

N.C.G.S. § 131E-176(1b) (emphasis added)

Therefore, the proposal put forward by Petitioners changes the project from an inpatient hospital to an outpatient ambulatory surgical facility. The 2001 CON was for entirely different health service facility than that proposed by the Petitioners.

Because of the change in the nature of the project, Petitioners could not comply with the representations of the 2001 CON, which are directed toward an inpatient hospital. Moreover, authorizing them to proceed with an ASC through the mechanism of this declaratory ruling would effectively eliminate the provision of the CON law that new institutional health services require a CON after meeting the criteria specified for a CON. For example, Petitioners have not

shown need, finance projections or the other factors included in the statute. *See* N.C.G.S. § 131E-183.

4. Petitioners have not shown good cause to permit transfer of the 2001 CON.

Petitioners alternatively request that the Department find “good cause” for a transfer of the CON, presumably from Good Hope to them or to some entity created by them, pursuant to N.C.G.S. § 131E-189(c). However, they have made no showing of good cause, merely asserting a generalized need for an ASC. While they state that without this project, the opportunity to develop the 2001 CON will be lost, Mr. Jones of Good Hope seems to dispute this in his letter. In any event, since the 2001 CON does not authorize an ASC, a transfer would not accomplish Petitioners’ ends.

CONCLUSION

For the foregoing reasons, I conclude that Petitioners’ request for a declaratory ruling should be, and therefore is, denied.

This the _____ day of June, 2011.

Drexdal Pratt, 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 L.L.P
380 Knollwood Street, Suite 530
Winston-Salem, NC 27103

With Courtesy Copies to:

Benjamin N. Thompson
Wyrick Robbins Yates & Ponton LLP
P.O. Drawer 17803
Raleigh, NC 27619

N. Earl Jones, Jr.
Chairman, Good Hope Hospital, Inc.
302 Cottle Lake Drive
Coats, NC 27521

Frank S. Kirschbaum
Kirschbaum, Nanney, Keenan
& Griffin, P.A
P.O. Box 19766
Raleigh, NC 27619-9766

S. Todd Hemphill
Bode, Call & Stroup, LLP
P.O. Box 6338
Raleigh, NC 27628-6338

This the _____ day of June, 2011.

Jeff Horton
Chief Operating Officer