

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY WAYNE MEMORIAL)
HOSPITAL, INC. and WAYNE) **DECLARATORY RULING**
AMBULATORY SURGERY CENTER, LLC)
Project I.D. No. P-7554-06)**

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 North Carolina General Statute § 150B-4 and 10A NCAC 14A .0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

Wayne Memorial Hospital, Inc. (Wayne Hospital) and Wayne Ambulatory Surgery Center, LLC (Wayne ASC) have requested a declaratory ruling that would allow Wayne Memorial to retain two existing operating rooms (ORs) and develop one additional approved OR at the hospital, thereby dissolving Wayne ASC which was originally proposed to house the three ORs pursuant to the certificate of need issued for Project I.D. No. P-7723-06. Petitioners seek a ruling that this proposal is in material compliance with the certificate of need (CON) laws and related rules of the Department and would not constitute a material change of scope from the original project for purposes of N.C.G.S. § 131E-181 and N.C.G.S. § 131E-189(b). 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. Terrill Johnson Harris of Smith Moore Leatherwood LLP has requested this ruling on

behalf of Wayne Memorial and Wayne ASC and has provided the material facts upon which this ruling is based.

STATEMENT OF THE FACTS

On March 30, 2007, Wayne Memorial and Wayne ASC were approved in a certificate of need review to establish a new multi-specialty ambulatory surgical facility with three ORs. Two operating rooms were to be relocated from Wayne Memorial and one operating room was to be developed in a new building on the campus of Wayne Memorial, located at 2700 Wayne Memorial Drive, Goldsboro, North Carolina.

When the project was originally proposed, Wayne Memorial anticipated that the formation of Wayne ASC would provide the opportunity for physician ownership in the company. Changes in reimbursement rates after the CON was issued have changed the landscape with respect to operating a free-standing ambulatory surgical facility and the physicians' desire for ownership. Following the issuance of the CON, the Centers for Medicare and Medicaid Services (CMS) lowered Medicare reimbursement rates for most of the procedures performed in an ASC setting. According to Petitioners, the change in reimbursement resulted in eliminating the feasibility of physician ownership in Wayne ASC.

As represented by Petitioners, the proposal would not materially change the holder, location, or scope of the original project. Wayne Memorial would remain the holder of the CON while Wayne ASC would cease to exist. The operating rooms would remain at the originally proposed location and address, though within the hospital rather than a separate new building at the same location. In addition, the total capital expenditure for the revised project is expected to be less than the capital expenditure originally approved by the Department when the CON was issued.

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.” The recipient of the CON must also materially comply with the representations made in the CON application. N.C.G.S. § 131E-181(b). If Petitioners’ proposal were to represent a material change in the scope of the project, the CON law would require a full review of OSC’s site relocation. N.C.G.S. § 131E-181(a). For the reasons discussed below, the proposal does not constitute a material change in scope of the project.

When Wayne Memorial and Wayne ASC applied for the CON in 2006, ASC reimbursement rates were more favorable. Changes in Medicare regulations required Wayne Memorial to consider alternatives to the original project in order for the project to be financially feasible. The proposed revision to the project does not affect the type, availability or utilization of the surgical services of Wayne Memorial in the county or in its service area, nor does the proposed revision increase the cost of those services. Additionally, as described above, the proposal would not materially change the holder, location, or scope of the original project.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that Wayne Memorial’s retention of two existing ORs and the development of one additional OR within the hospital will not constitute a material change in the scope of the project, will not violate N.C.G.S. § 131E-181, and will not constitute a failure to satisfy a condition of the certificate of need in violation of N.C.G.S. § 131E-189(b).

This the _____ day of November, 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

Terrill Johnson Harris
Smith Moore Leatherwood LLP
Post Office Box 21927
Greensboro, NC 27420

This the _____ day of December, 2011.

Jeff Horton
Chief Operating Officer