



North Carolina Department of Health and Human Services
Division of Health Service Regulation

Pat McCrory
Governor

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Ambassador (Ret.)
Secretary DHHS

Drexdal Pratt
Division Director

August 5, 2015

William Shenton
Poyner Spruill
P.O. Box 1801
Raleigh, NC 27602-1801

Exempt from Review – Acquisition of Facility

Record #: 1674
Facility Name: Verra Springs at Heritage Greens
Type of Facility: Adult Care Home
FID #: 940530
Acquisition by: KC Heritage Greens, LLC
Business #: 2247
Project Description: KRC Greens Limited Partnership to transfer all assets and liabilities to KC Heritage Greens, LLC
County: Guilford

Dear Mr. Shenton:

The Healthcare Planning and Certificate of Need Section, Division of Health Service Regulation (Agency) determined that based on your letter of July 29, 2015, the above referenced proposal is exempt from certificate of need review in accordance with G.S 131E-184(a)(8). Therefore, KRC Greens Limited Partnership may proceed to acquire the above referenced health service facility without first obtaining a certificate of need. However, you need to contact the Agency’s Adult Care Licensure Section to obtain instructions for changing ownership of the existing facility. Note that pursuant to G.S. 131E-181(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.”*

Healthcare Planning and Certificate of Need Section

www.ncdhhs.gov

Telephone: 919-855-3873 • Fax: 919-715-4413

Location: Edgerton Building • 809 Ruggles Drive • Raleigh, NC 27603

Mailing Address: 2704 Mail Service Center • Raleigh, NC 27699-2704

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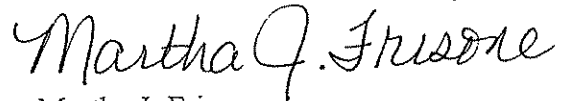
Mr. Shenton
August 5, 2015
Page 2

It should be noted that this Agency's position is based solely on the facts represented by you and that any change in facts as represented would require further consideration by this Agency and a separate determination. If you have any questions concerning this matter, please feel free to contact this office.

Sincerely,



Celia C. Inman
Project Analyst



Martha J. Frisone,
Assistant Chief, Certificate of Need

cc: Construction Section, DHSR
Adult Care Licensure Section, DHSR
Assistant Chief, Healthcare Planning

July 29, 2015

VIA HAND DELIVERY



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Martha Frisone
Asst. Chief
Certificate of Need
NC Department of Health and Human Services
2704 Mail Service Center
Raleigh, NC 27699-2704

RE: Request for No Review Determination – Corporate Reorganization - Heritage Greens/Guilford County

Dear Ms. Carraway and Ms. Frisone:

We are writing as counsel for Kisco Senior Living and some of its affiliated entities (collectively "Kisco"), regarding a proposed corporate reorganization and refinancing of Kisco's Heritage Greens campus located at 801 Meadowood Street, Greensboro, Guilford County, North Carolina. Heritage Greens is one of the campuses in North Carolina where Kisco operates assisted living facilities. On the Heritage Greens campus, there are two different licensed assisted living facilities and one multi-unit assisted housing with services ("MAHS"):

- KRC Meadowood II Limited Partnership ("KRC Meadowood II") operates a 48-bed adult care home, with a memory care unit under license HAL-041-028;
- KRC Meadowood III Limited Partnership ("KRC Meadowood III") operates a 45-bed adult care home under license HAL-041-004; and
- KRC Greens Limited Partnership ("KRC Greens") operates the building offering MAHS which consists of 136 residential units of varying sizes, and has maintained a registration with the NC Division of Health Service Regulation, Adult Care Licensure Section since October 20, 1988.

In order to secure more favorable financing for the entire Heritage Greens campus, a merger of these three entities is in the planning stage. As a result of the merger, upon closing, KRC Meadowood II and KRC Meadowood III would be merged into KRC Greens, transferring all of the assets and liabilities of the two merged partnership into KRC Greens. KRC Greens would then transfer all of its assets and liabilities to a new limited liability company, KC Heritage Greens, LLC, which would obtain financing for the entire campus, secured by all of the operating assets. As part of the due diligence in finalizing this transaction, the parties have requested that we obtain, on their behalf, a no review determination regarding this corporate reorganization related to the Heritage Greens campus.

Shelley Carraway, Chief
 Martha Frisone, Asst. Chief
 July 29, 2015
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It is important to note there will be no change in the scope of services offered, or the number of adult care home beds that are operated on the Heritage Greens campus, as a result of these transactions. Following closing of the loan transaction, all of the current day-to-day operations, including each of the licensed beds, will continue to be operated as before and will remain at the same location on the Heritage Greens campus, as will the MAHS residential units. No capital improvements will be associated with the transactions. Finally, there are no pending Certificate of Need ("CON") applications, or issued, but not yet developed CONs related to the Heritage Greens campus. Therefore, there is no issue in regard to a transfer of control of an outstanding CON under N.C. Gen. Stat. § 131E-189.

The effect of the transfers described in this letter is analogous to a transaction involving the acquisition of underlying corporate ownership in existing legal entities that own and operate existing health service facilities. As a result of these transactions, the new Kisco-affiliated entity, KC Heritage Greens, LLC will assume control of the facilities formerly operated by other Kisco-affiliated entities, and will own all of the real estate on the Heritage Greens campus. Prior declaratory rulings and no review determinations by the Department and the CON Section have consistently recognized that transactions which essentially are internal corporate reorganizations do not implicate the CON Law. These prior decisions include:¹

- A Declaratory Ruling issued on March 11, 1981 (attached as *Exhibit A*) in which the Department ruled that HP, Inc.'s acquisition of the outstanding capital stock of Brookwood Health Services, Inc., parent company to Rocky Mount Sanitarium Development, Inc., which operated the health care facility Rocky Mount Sanitarium, was not construction, development or other establishment of a new facility, or an acquisition by a new operator, and did not require a CON.
- A No-Review determination issued on November 21, 2011 (attached as *Exhibit B*) in which the CON Section determined that CSA Medical Services, LLC's ("CSA") transfer of 100% of its ownership and operations interests in eight heart-lung bypass machines to CSAMS New Bern Avenue, LLC and CSAMS Lake Boone Trail, LLC, both wholly-owned subsidiaries of CSA, was not a new institutional health services governed by the CON law, and did not require a CON.
- A No-Review determination issued on August 8, 2012 (attached as *Exhibit C*) in which the CON Section determined that Cammeby's Equity Holdings, LLC's acquisition of the ownership interests in the corporate entities that owned thirty two (32) existing nursing facilities in North Carolina along with the associated equipment located in those facilities was not a new institutional health service governed by the CON law, and did not require a CON.
- A No-Review determination issued on March 11, 2014 (attached as *Exhibit D*) in which the CON Section determined that Hugh Chatham Memorial Hospital, Inc.'s ("HCMH") transfer of 100% of its ownership interest in Hugh Chatham Nursing Center to Hugh Chatham Nursing Center, LLC, a wholly-owned subsidiary of HCMH, and license it separately from HCMH was not a new institutional health service governed by the CON law, and did not require a CON.

Thus, for over 30 years, transactions of this nature have been recognized as having no impact under the CON Law. While the Heritage Greens transactions involve the transfer of assets rather than the

¹ In the interest of limiting the length of this request, the prior decisions referenced above and included as exhibits with this letter contain the decision letter from the CON Section and applicable request letter, without the exhibits and/or attachments that were attached to the request letter from the given party or parties involved.

Shelley Carraway, Chief
Martha Frisone, Asst. Chief
July 29, 2015
Page 3

underlying corporate interests in the entities involved, the end result is the same—a corporate reorganization that results in a different Kisco-affiliated entity becoming the sole owner of the assets, and sole operator of the services on the Heritage Greens campus, which formerly had been operated by other Kisco-affiliated entities. Accordingly, none of the transactions described in this letter constitute the offering of a new institutional health service at all.

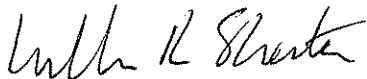
In the alternative, should the CON Section determine that the corporate reorganization contemplated is in fact subject to the CON Law, it should determine that the reorganization is exempt under N.C. Gen. Stat. § 131E-184(a)(8). Since the transactions that make up the reorganization essentially constitute the acquisition, by KC Heritage Greens, LLC, of all of the rights and liabilities of the three existing, operating entities, they amount to nothing more than the acquisition of the operating assets of existing health care facilities; and the entire series of transactions should be exempt under N.C. Gen. Stat. § 131E-184(a)(8).

At present, the plans are for these transactions to occur simultaneously with the refinancing of the property on or about August 30, 2015. We would appreciate your earliest possible attention to this matter and confirmation that the proposed corporate reorganization is either (1) not governed by the CON Law and proper for a No-Review determination; or (2) exempt under N.C. Gen. Stat. § 131E-184(a)(8).

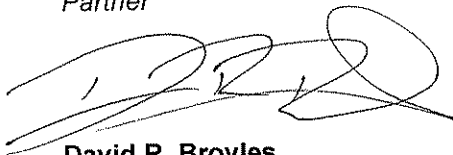
Thank you for your attention to this and please advise if you have any questions or need any additional information in order to respond.

With best wishes, we remain

Very truly yours,



William Shenton
Partner



David R. Broyles
Associate

Enclosures

Thus, HP contemplates acquiring control of a corporation whose subsidiary owns and operates a North Carolina health care facility. Mr. Casson has requested a ruling on whether this transaction is reviewable under the Certificate of Need Regulations. For the reasons set out below I conclude that it is not.

The Certificate of Need Regulations provide that "No person shall undertake new institutional health services or health care facilities without having first obtained a certificate of need." 10 NCAC 3R .0103(a). It is apparent that no new health care facilities are contemplated so the only question is whether this transaction represents new institutional health services.


The definition of this term is found at 10 NCAC 3R .0104(26) and includes "the construction, development, or other establishment" of a new facility, which is clearly not the case here. In fact, it is apparent that the bulk of the definition has no possible application since this transaction does not contemplate a change in bed capacity, the addition of new services or expansion of current services, the acquisition of equipment, the upgrading of a facility, or any expenditure for a project.

Only Subsection (b) of the definition has any possible application. It does define changes in ownership of more than 50 percent of an existing facility or more than 50 percent of the capital stock or voting rights of a corporation which is the operator of a facility as new institutional health services. Therefore, these transactions require certificate of need review. However, it must be noted that the stock ownership change mentioned in 10 NCAC 3R .0104(26)(b) refers to the stock of the corporation which is the operator of the facility. In this case, that corporation is Rocky Mount Sanitarium Development, Inc. Since Brookwood

Health Services, Inc., is not the operator of Rocky Mount Sanitarium or any other North Carolina health care facility, the acquisition of more than 50 percent of its stock would not trigger the cited change in ownership provision of the North Carolina Certificate of Need regulations.

For these reasons I conclude that the proposed transaction is not subject to certificate of need review.

This the 11 day of March, 1981.


J. O. Wilkerson, Jr.
Director



North Carolina Department of Health and Human Services
Division of Health Service Regulation
Certificate of Need Section
2704 Mail Service Center ■ Raleigh, North Carolina 27699-2704

Beverly Eaves Perdue, Governor
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Craig R. Smith, Section Chief
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December 9, 2011

William R. Shenton
Poyner Spruill
P.O. Box 1801
Raleigh, NC 27602-1801

RE: No Review:

- Transfer by CSA Medical Services, LLC (CSA) of 100% of its ownership interests in five (5) existing heart lung bypass machines in use at WakeMed to CSAMS New Bern Avenue, LLC, a wholly-owned subsidiary of CSA
 - Transfer by CSA Medical Services, LLC (CSA) of 100% of its ownership interests in three (3) existing heart lung bypass machines in use at Rex Hospital to CSAMS Lake Boone Trail, LLC, a wholly-owned subsidiary of CSA
- Wake County

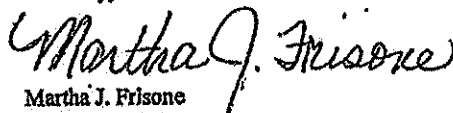
Dear Mr. Shenton:

The Certificate of Need (CON) Section received your letter of November 21, 2011 regarding the above referenced proposals. Based on the CON law in effect on the date of this response to your request, the proposals described in your correspondence are not governed by, and therefore, do not currently require a certificate of need. However, please note that if the CON law is subsequently amended such that the above referenced proposals would require a certificate of need, this determination does not authorize you to proceed to develop the above referenced proposals when the new law becomes effective.

It should be noted that this determination is binding only for the facts represented by you. Consequently, if changes are made in the proposals or in the facts provided in your correspondence referenced above, a new determination as to whether a certificate of need is required would need to be made by the Certificate of Need Section. Changes in a proposal include, but are not limited to: (1) increases in the capital cost; (2) acquisition of medical equipment not included in the original cost estimate; (3) modifications in the design of the project; (4) change in location; and (5) any increase in the number of square feet to be constructed.

Please contact the CON Section if you have any questions. Also, in all future correspondence you should reference the Facility ID.# (PID) if the facility is licensed.

Sincerely,


Martha J. Frisone
Assistant Chief


Craig R. Smith, Chief
Certificate of Need Section

cc: Medical Facilities Planning Section, DHSR



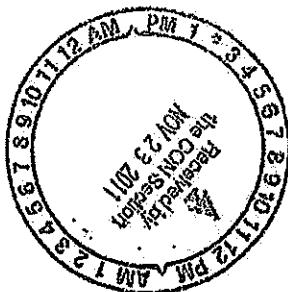
Location: 809 Ruggles Drive ■ Dorothea Dix Hospital Campus ■ Raleigh, N.C. 27603
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EXHIBIT

B

Martha



Poyner Spruill LLP

November 21, 2011

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Mr. Craig R. Smith, Chief
Ms. Martha Frison, Assistant Chief
Division of Health Service Regulation
Certificate of Need Section
2704 Mail Service Center
Raleigh, North Carolina 27696-2704

RE: CSA Medical Services, LLC; No Review Request regarding Transfer of Heart-Lung Bypass Machines to Wholly Owned Subsidiaries

Dear Mr. Smith and Ms. Frison:

This letter is submitted on behalf of CSA Medical Services, LLC ("CSA"), and two subsidiary limited liability companies to be formed and wholly owned by CSA and to be named "CSAMS New Bern Avenue, LLC" (CSA New Bern), and "CSAMS Lake Boone Trail, LLC" (CSA Lake Boone), upon receipt of your approval of this request. CSA currently owns and operates eight (8) heart-lung bypass ("HLB") machines. Five (5) of the HLB machines are operated at WakeMed and three (3) of the HLB machines are operated at Rex Hospital, Inc. ("Rex"). The purpose of this letter is to provide notice to the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section (the "Agency"), and confirm that the transfer of CSA's interests in these eight (8) HLB machines and the operation of the same to two wholly owned subsidiaries of CSA is not reviewable as a new institutional health service under the North Carolina Certificate of Need ("CON") law.

The Agency has recently approved a similar transfer in an August 18, 2011 Declaratory Ruling regarding Radiation Oncology Centers of the Carolinas, Inc. ("ROCC"). That Declaratory Ruling concerned the transfer of interests in two radiation oncology facilities from ROCC to two wholly owned subsidiaries of ROCC. Attached hereto as Exhibits 1 and 2 are the ROCC Declaratory Ruling Request and the ROCC Declaratory Ruling. The ruling requested by CSA here is directly analogous to the ROCC ruling, the only difference being that ROCC involved the *per se* reviewable items of linear accelerators and simulators and CSA's request involves the *per se* reviewable items of heart-lung bypass machines.

I. BACKGROUND AND FACTS

CSA directly owns eight (8) Terumo Corporation Series 8000 HLB machines. Five (5) of these HLB machines are located and used by CSA to provide perfusion services at WakeMed, located at 3000 New Bern Avenue, Raleigh, NC 27620. Three (3) of these HLB machines are located and used by CSA to provide perfusion services at Rex, located at 4420 Lake Boone Trail, Raleigh, NC 27607. CSA also owns

Mr. Craig R. Smith, Chief
Ms. Martha Frisone, Assistant Chief
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seven (7) cell saver machines located at WakeMed in Raleigh, and two (2) located at WakeMed-Cary. These cell saver machines are Baylor Rapid Autologous Transfusion (BRAT) machines manufactured by Sorin Corporation and are not subject to CON review. CSA does not own the BRAT machines at Rex, which are owned by the hospital. CSA also provides the hospitals with the services of seven (7) licensed perfusionists, who are employed by CSA's affiliate Carolina MSO, L.L.C. (MSO) but work for CSA pursuant to its Management Services Agreement with MSO.

The five (5) HLB machines at WakeMed are labeled A, B, C, D, and E, and the three (3) at Rex are labeled 1, 2, and 3. Each HLB machine consists of the following: (a) a four (4) or five (5) pump Terumo Base; (b) three (3) or four (4) Terumo 8000 roller pump modules (8000 roller pump modules); (c) one (1) Medtronic Bio-Medicus arterial pump series 550 (Bio pump); (d) one (1) Medtronic TX 50 Flowmeter (Flowmeter); and (e) one (1) Sechrist air/oxygen mixer (Sechrist). Similarly, the seven (7) BRAT machines at WakeMed in Raleigh are labeled A, B, C, D, E, F and G, and the two at WakeMed-Cary are labeled 1 and 2. Each HLB machine (and its components) and BRAT machine is identified by its serial numbers (SN), model numbers and the hospital where it is located, as described in Exhibit 3 to this letter.

The surgeons of Carolina Cardiovascular Surgical Associates, P.A. (Practice), started performing open heart surgery and providing their own perfusion services at WakeMed in 1979 and at Rex in 1989, through either the Practice itself or a perfusion company owned by the same physicians. Each of the eight (8) HLB machines currently owned by CSA is replacement equipment for a machine owned by CSA (or a predecessor entity) prior to the year 1993, when acquisition of an HLB machine became subject to CON review regardless of its cost. W. Charles Hellon, M.D., founded the Practice in 1979 and Cardinal Bio-Medical Associates, Inc. (Cardinal Bio-Medical), in 1980. Cardinal Bio-Medical was the perfusion company predecessor to CSA that like CSA was owned by the shareholders of the Practice. The two hospitals have never owned the HLB machines used at their facilities. Before 1989, Cardinal Biomedical had acquired and operated three (3) HLB machines at WakeMed and two (2) at Rex. Another cardiothoracic surgery practice in Raleigh, Atkinson & Zeok, M.D., P.A., had two (2) additional HLB machines at WakeMed and one (1) additional HLB machine at Rex. Atkinson & Zeok, M.D., P.A. merged with the Practice in 1993, and its two (2) surgeon shareholders, Alvan W. Atkinson, M.D., and John V. Zeok, M.D., joined the Practice. At the same time their three (3) HLB machines were acquired by Cardinal Bio-Medical, and they become shareholders of that perfusion company. Cardinal Bio-Medical or its successor company has continued to own and operate these eight (8) HLB machines (or their replacements) at their same respective locations at WakeMed and Rex since that time. In 1997, the shareholders of Cardinal Bio-Medical reorganized the company by forming CSA and transferring the operations and all eight (8) machines to CSA, which was owned by the same surgeons.

By 2001, CSA needed to replace all eight (8) of its HLB machines. There was a fourth HLB machine at Rex owned by surgeons Abdul G. Chaudhry, M.D. and James H. Davis, M.D. This one (1) HLB machine had been loaned to them by the manufacturer in the late 1990's to replace one they had provided for use at Rex which had become obsolete. At that time, CSA bought this fourth loaned HLB machine, which had already been used at Rex, from the manufacturer to replace one of CSA's older machines at Rex. Thereafter, Drs. Chaudhry and Davis no longer provided perfusion services or a HLB machine for use at Rex. CSA's purchase of this machine thus resulted in a net decrease in useable HLB machines at Rex from four (4) to three (3).

The same year, CSA obtained replacement equipment for its other seven (7) HLB machines at WakeMed and Rex, at a total capital cost of \$322,695. CSA's obsolete machines were subsequently removed out of North Carolina. By letter dated June 25, 2004, the Agency approved CSA's acquisition of the seven (7)

Mr. Craig R. Smith, Chief
Ms. Martha Frisone, Assistant Chief
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new HLB machines at WakeMed and Rex as replacement equipment. The Agency's "no review" letter of that date is attached and labeled as Exhibit 4.

CSA would like to transfer its interest in the eight (8) HLB machines into two wholly owned subsidiary limited liability companies. The first wholly owned subsidiary will be named "CSAMS New Bern Avenue, LLC" and will own the five (5) HLB machines currently operated at WakeMed. The second wholly owned subsidiary will be named "CSAMS Lake Boone Trail, LLC" and will own the three (3) HLB machines currently operated at Rex. The transfer of CSA's interests in the eight (8) HLB machines into two (2) wholly owned subsidiaries is not a CON reviewable event because it will have the following results:

- (1) No increase in the HLB machine inventory in Wake County;
- (2) No physical relocation of any HLB machines in Wake County;
- (3) No creation of any new health service facilities; and
- (4) No asset purchases of any per se reviewable equipment, consistent with the ROCC Declaratory Ruling.

This letter requests your confirmation that such a proposed transfer of interests would not trigger any of the new institutional health service provisions in the CON statute, and the transaction may proceed without first acquiring a CON.

II. ANALYSIS

The CON law provides that the "acquisition by purchase, donation, lease, transfer or comparable arrangement" of an HLB machine constitutes a "new institutional health service" that is subject to CON review. N.C. Gen. Stat. § 131E-176(16)f1; § 131E-178(a). However, we believe the creation of these two wholly owned subsidiaries is not a reviewable event because CSA, the owner of the CON rights for the eight (8) HLB machines, is not undergoing any direct change in its ownership status. Rather, this is merely a type of reorganization in the nature of those which the CON rules recognize as non-reviewable.

Until 1993, the acquisition of an HLB machine was not regulated under the CON law unless it involved the obligation of a capital expenditure exceeding two million dollars (\$2,000,000), which far exceeds the cost of this equipment. See N.C. Sess. Laws 1993, c. 7, § 2 (adding the acquisition of HLB machines and any "major medical equipment" costing more than \$750,000 as "new institutional health services" requiring a CON). However, effective March 18, 1993, the General Assembly amended the CON law to make the acquisition of HLB machines constitute a "new institutional health service" requiring a CON regardless of its cost. N.C. Gen. Stat. § 131E-176(10a), (16)f1.5., as amended by N.C. Sess. Laws 1993, c. 7, § 2.

Under the CON law, transfer of ownership or control of a CON prior to completion of a project or operation of the facility constitutes grounds for withdrawal of a CON. N.C. Gen. Stat. § 131E-189. However, the Agency's rules provide that in that situation, neither ownership nor control of a CON is transferred when the holder of the certificate is a corporation and the identity of the holder changes because of corporate reorganization, including transferring ownership to wholly owned subsidiaries. 10A N.C.A.C. 14C.0502(b)(1) and (c).

Mr. Craig R. Smith, Chief
Ms. Martha Frisone, Assistant Chief
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Specifically, the provisions of N.C. Gen. Stat. § 131E-189(c) state by analogy that the Department of Health and Human Services may immediately withdraw any CON 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." Further, the Agency's rules at 10A N.C.A.C. 14C.0502(b) state as follows:

Ownership of a certificate of need is transferred when any person acquired a certificate from the holder by purchase, donation, lease, trade, or any comparable arrangement, except that ownership of a certificate of need is not transferred when:

- (1) the holder of the certificate is a corporation and the identity of the holder changes because of a corporate reorganization; or
- (2) the holder of the certificate is a partnership and the identity of the holder changes because the same partners reorganize as a new partnership.

10A N.C.A.C. 14C.0502(b) (emphasis added).

Here, CSA's right to own and operate the HLB machines is not a CON project that is not yet completed or operational. Nonetheless, if the CON law permits the transfer of a CON for an undeveloped project to a subsidiary of the applicant without a new CON or other sanction, then it would make no sense to interpret the law to prevent an existing provider from transferring a service to a wholly-owned subsidiary after the project has been developed. This principle has been affirmed by the Agency on a very similar set of facts in the ROCC Declaratory Ruling referenced above and attached as Exhibit 2.

Moreover, N.C. Gen. Stat. § 131E-189(c) acknowledges that completed projects may be transferred without CON review. It states that "[a]ny transfer after [the project is completed or becomes operational] will be subject to the requirement that the service be provided consistent with the representations made in the application and any applicable conditions." That statute does not require that a CON first be acquired before such a transfer takes place. Clearly, the reorganization of CSA's assets and CON exemption into two wholly owned subsidiaries would not constitute the "offering or development of a new institutional health service" within the definition of N.C. Gen. Stat. § 131E-178(a).

III. CONCLUSION

Based on the foregoing information, we hereby request the Agency's confirmation that the following transactions are not subject to CON review as a new institutional health service:

- (1) CSA's proposed transfer of its ownership interest in, and operation of, five (5) HLB machines, operated at WakeMed, to CSA Lake Boone, a wholly owned subsidiary of CSA; and
- (2) CSA's proposed transfer of its ownership interest in, and operation of, three (3) HLB machines, operated at Rex, to CSA New Bern, a wholly owned subsidiary of CSA.

If you require additional information to consider this request, please contact us as soon as possible. We thank you for consideration of this request.

Poyner Spruill^{LLP}

Mr. Craig R. Smith, Chief
Ms. Martha Frisone, Assistant Chief
November 21, 2011
Page 5

Very truly yours,

A handwritten signature in cursive script, appearing to read "Wilson Hayman", with a long horizontal line extending to the right.

Wilson Hayman
Partner
William R. Shenton
Partner

Attachments



North Carolina Department of Health and Human Services
Division of Health Service Regulation
Certificate of Need Section
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Drexdal Pratt, Director

Beverly Eaves Perdue, Governor
Albert A. Delia, Acting Secretary

Craig R. Smith, Section Chief
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August 8, 2012

S. Todd Hemphill
Bode, Call & Stroupe, LLP
3105 Glenwood Ave, Suite 300
Raleigh NC 27612

RE: No Review / SVCare Holdings, LLC / Acquisition of membership interests of SVCare Holdings, LLC by Cammeby's Equity Holdings, LLC

Dear Mr. Hemphill:

The Certificate of Need (CON) Section received your letter of July 13, 2012 regarding the above referenced proposal. Based on the CON law in effect on the date of this response to your request, the proposal described in your correspondence is not governed by, and therefore, does not currently require a certificate of need. However, please note that if the CON law is subsequently amended such that the above referenced proposal would require a certificate of need, this determination does not authorize you to proceed to develop the above referenced proposal when the new law becomes effective.

It should be noted that this determination is binding only for the facts represented by you. Consequently, if changes are made in the project or in the facts provided in your correspondence referenced above, a new determination as to whether a certificate of need is required would need to be made by the Certificate of Need Section. Changes in a project include, but are not limited to: (1) increases in the capital cost; (2) acquisition of medical equipment not included in the original cost estimate; (3) modifications in the design of the project; (4) change in location; and (5) any increase in the number of square feet to be constructed.

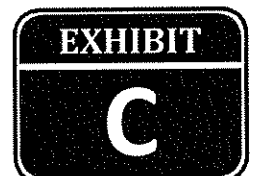
In addition, you should contact the Nursing Home Licensure and Certification Section to determine if they have any requirements for development of the proposed project. Please contact the CON Section if you have any questions.

Sincerely,


Michael J. McKillip
Project Analyst


Craig R. Smith, Chief
Certificate of Need Section

cc: Nursing Home Licensure and Certification Section, DHSR



BODE, CALL & STROUPE, L.L.P.

ATTORNEYS AT LAW

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RALEIGH, NORTH CAROLINA 27612

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July 13, 2012

VIA HAND DELIVERY

Mr. Craig R. Smith, Chief
Certificate of Need Section
Division of Health Service Regulation
North Carolina Department of Health and Human Services
809 Ruggles Drive
Raleigh, North Carolina 27603



Re: Request for No Review Determination – Acquisition of ownership interest in the parent company of entities that own certain nursing facilities in North Carolina

Dear Mr. Smith:

We are submitting this letter on behalf of our client, Cammeby's Equity Holdings, LLC ("Cam Equity"), regarding its planned acquisition of the membership interests of SVCare Holdings, LLC ("SVCare"), which is the "great grandparent" (3rd tier) owner of thirty-two (32) nursing facilities in North Carolina.¹ The specific facilities at issue here are as follows:

Brian Center Health & Rehabilitation / Brevard
Brian Center Health & Rehabilitation / Durham
Brian Center Health & Rehabilitation / Goldsboro
Brian Center Health & Rehabilitation / Hendersonville
Brian Center Health & Rehabilitation / Hickory East
Brian Center Health & Rehabilitation / Spruce Pine
Brian Center Health & Rehabilitation / Statesville
Brian Center Health & Rehabilitation / Wallace
Brian Center Health & Rehabilitation / Weaverville
Brian Center Health & Rehabilitation / Wilson
Brian Center Health & Rehabilitation / Windsor

¹ SVCare has interests in health care facilities in other states, as well.

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Brian Center Health & Rehabilitation / Yanceyville
Brian Center Health & Rehabilitation / Cabarrus
Brian Center Health & Rehabilitation / Clayton
Brian Center Health & Rehabilitation / Monroe
Brian Center Health & Rehabilitation / Mooresville
Brian Center Health & Rehabilitation / Winston-Salem
Brian Center Health & Rehabilitation / Gastonia
Brian Center Health & Rehabilitation / Hickory Viewmont
Brian Center Health & Rehabilitation / Charlotte
Brian Center Health & Rehabilitation / Eden
Brian Center Health & Rehabilitation / Hertford
Brian Center Health & Rehabilitation / Salisbury
Brian Center Health & Rehabilitation / Lincolnton
Brian Center Nursing Care / Lexington
Brian Center Nursing Care / Shamrock
Maple Leaf Health Care
Brian Center Health & Rehabilitation / Waynesville
Kenansville Health & Rehabilitation Center
Randolph Health & Rehabilitation Center
Silver Stream Health & Rehabilitation Center
Wilmington Health & Rehabilitation Center

An organization chart showing the current ownership interests in each of these facilities is attached as Exhibit A.² As shown therein, SVCare, through its subsidiaries, holds the membership interest in the parent companies of each of these facilities.

Cam Equity holds an option to purchase up to 99.999% of all membership units in SVCare. Cam Equity intends to exercise that option, whereby Cam Equity (or its nominee) will acquire that 99.999% membership interest.³

The acquisition by Cam Equity (or its nominee) of the membership units of SVCare shall not cause any change in the direct ownership or day-to-day operations of the licensed nursing home facilities in North Carolina. The licensed facilities will continue to have the same name,

² There is one additional facility, Brian Center Charlotte Retirement Apartments, referenced in that organization chart. That facility provides independent living apartments for retired persons, and is not a licensed nursing facility or adult care home facility. Therefore, its ownership is not impacted by the CON Law.

³ That option agreement was the subject of a New York civil action, the result of which was a Decision and Order entered by Justice O. Peter Sherwood of the New York Supreme Court, granting Cam Equity's motion for summary judgment and requiring SVCare Holdings to comply with the terms of the option agreement and permit the acquisition of the aforementioned membership interests. A copy of Justice Sherwood's Decision and Order is attached hereto as Exhibit B.

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tax identification number, and provider numbers. The facilities will continue to have the same management and personnel. In short, nothing will change operationally or structurally for the licensed facilities as a result of the acquisition.

With this letter, Cam Equity is requesting a no-review determination regarding its acquisition of the membership interests in SVCare, the limited liability company which indirectly owns the above facilities in North Carolina. Consistent with the longstanding approach of the Agency in finding that purchases of corporate ownership interests are not events requiring a certificate of need, Cam Equity now seeks confirmation that its acquisition of the membership interests in SVCare (hereinafter, the "Proposed Acquisition"), may proceed without first obtaining a certificate of need.

ANALYSIS

The CON Law was enacted to prevent the development and operation of unneeded health services, equipment and facilities. This is made explicit in the very first section of the law, where the General Assembly finds: "That the proliferation of unnecessary health service facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services." N.C. Gen. Stat. § 131E-175(4). The CON Law essentially focuses on the development and offering of those "new institutional health services" that would create additional capacity, and which are catalogued in N.C. Gen. Stat. § 131E-176(16). In keeping with its fundamental goals, the CON Law expressly recognizes that certain activities are not subject to review. Based upon the clear terms of the CON Law and prior declaratory rulings by the Division of Health Service Regulation ("DHSR") and no review determinations by the CON Section, the Proposed Acquisition does not require a certificate of need.

I. The Proposed Acquisition Will Not Result in a New Institutional Health Service

The CON Law provides that no person shall offer or develop a "new institutional health service" without first obtaining a CON. N.C. Gen. Stat. § 131E-178. However, none of the components of the "new institutional health service" definition address, directly or indirectly, the acquisition of membership interests in an organization that already is operating a health service. This type of transaction is among the activities that are "administrative and other activities that are not integral to clinical management," and which are specifically excluded from the definition of "health service" in the CON Law. N.C. Gen. Stat. § 131E-176(9a). Therefore, an acquisition of corporate ownership interests, such as the Proposed Acquisition at issue in this request, does not involve a new institutional health service at all and should not be subject to CON Review.

The list of new institutional health services does include "the obligation by any person of a capital expenditure exceeding two million dollars (\$2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service," N.C. Gen. Stat. § 131E-176(16)(b). However, this definition does not apply to the Proposed

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Acquisition. In prior declaratory rulings and no review determinations, DHSR and the CON Section have consistently recognized that transactions which are limited to an acquisition of underlying corporate membership interests in an existing legal entity which owns and operates an existing health service facility and its associated equipment, such as the Proposed Acquisition, fall within the above-referenced exclusion recognized in the definition of "health service" in the CON Law. Accordingly, DHSR and CON Section have consistently determined that events such as the Proposed Acquisition do not trigger certificate of need review under the \$2,000,000 capital expenditure provision.

II. Prior Declaratory Rulings and No Review Determinations Confirm the Proposed Acquisition Does Not Require a CON

This no-review request is consistent with prior declaratory rulings and no review determinations which have interpreted the applicability of the CON Law to the purchase of ownership interests in corporate entities that own existing health care facilities. Over the course of North Carolina's Certificate of Need program, there have been a number of declaratory rulings and at least one no review determination which confirmed that the acquisition of ownership interests in companies which own existing health care facilities that already are offering services does not constitute the offering of a new institutional health service because such transactions do not implicate the creation of additional capacity and health service facilities which might lead to the "unnecessary use and expense of resources and overutilization of healthcare services," detailed in the legislative findings. *See* N.C. Gen. Stat. § 131E-175(4). Several examples which have upheld this principle of no review for acquisitions of corporate ownership interests are discussed below.

- On January 6, 2012, the CON Section issued a no review letter (attached as Exhibit C) finding that North Carolina Radiation Therapy Management Services, LLC's acquisition of the ownership interests in the corporate entities that owned an existing oncology treatment center and the associated equipment located in Asheville, North Carolina, was not a new institutional health service and did not require a CON.
- On August 18, 2011, DHSR issued a declaratory ruling finding that Radiation Oncology Centers of the Carolinas, Inc.'s transfer of two CON-approved radiation oncology facilities to two wholly-owned subsidiaries did not constitute a new institutional health service or require a certificate of need. *See In re: Request for Declaratory Ruling by Radiation Oncology Centers of the Carolinas, Inc.* (attached as Exhibit D).
- On September 27, 2010, DHSR issued a declaratory ruling confirming that the acquisition by Cancer Centers of North Carolina, P.C. of the majority of the membership interests in Wake Radiology Oncology Services ("WROS") and the continued operation of WROS's oncology treatment center did not require a certificate of need. *See In re: Request for Declaratory Ruling by Wake Radiology*

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Oncology Services, PLLC, Cancer Centers of North Carolina, P.C., US Oncology, Inc. et al. (attached as Exhibit E).

- On December 21, 2007, DHSR issued a declaratory ruling finding that Rex Healthcare, Inc.'s acquisition of 100% of the membership interest of Smithfield Radiation Oncology, LLC, which owned and operated a linear accelerator, was not subject to CON review. See *In re: Request for Declaratory Ruling by Rex Healthcare, Inc. and Smithfield Radiation Oncology, LLC* (attached as Exhibit F).
- On September 14, 2007, DHSR issued a declaratory ruling confirming that certificate of need review was not required for the sale to another entity of 100% of the issued and outstanding stock of a company that owned a linear accelerator. See *In re: Request for Declaratory Ruling by Radiation Therapy Services, Inc. and North Carolina Radiation Therapy Management Services, Inc.* (attached as Exhibit G).
- On January 24, 2008, DHSR issued a similar ruling with regard to acquisition of the stock of a company that owned heart lung bypass equipment. See *In re: Request for Declaratory Ruling by New Hanover Perfusionists, Inc., January 24, 2008* (attached as Exhibit H). DHSR focused on the fundamental fact that the ownership of the equipment would not change, and that there was no purchase of equipment, in ruling that this stock acquisition did not require a Certificate of Need.

DHSR's determination in all of these rulings is firmly founded on the express terms of the CON Law.

III. The Proposed Acquisition Does Not Involve the Development or Expansion of a Health Service Facility

The Proposed Acquisition will involve expenditures by Cam Equity, but these will simply be purchases of ownership interests in existing LLC that indirectly owns the various nursing facilities. They will not entail a capital expenditure to develop or expand a health service or health service facility because the facilities will continue to be operated at the same locations, and no expansion of services is proposed.

Likewise, the Proposed Acquisition will not entail "a capital expenditure . . . which relates to the provision of a health service" under N.C. Gen. Stat. § 131E-176(16)(b). The only change that will result from the Proposed Acquisition will be in the membership composition of the LLCs, and that change in ownership is not a health service.

As DHSR and the CON Section must have determined in the prior declaratory rulings and no review determinations discussed above, the purchase of ownership interests in an existing enterprise, which already is lawfully offering the services, is not a capital expenditure that "relates to the provision of a health service" under N.C. Gen. Stat. § 131E-176(16)(b). The

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definition of "health service" in the CON Law specifically excludes "administrative and other activities that are not integral to clinical management." N.C. Gen. Stat. § 131E-176(9a). The membership composition of the LLCs is not integral to the clinical management of the above nursing facilities, and the facilities' operations will not change as a result of the Proposed Acquisition. Therefore, the purchase of membership interests in the LLCs is not an activity that is "integral to clinical management," and accordingly is not "a capital expenditure . . . which relates to the provision of a health service" within the meaning of N.C. Gen. Stat. § 131E-176(16)(b).

IV. Alternatively, the Proposed Acquisition is Exempt from CON Review, Pursuant to N.C. Gen. Stat. § 131E-184(a)(8)

In the event that the Agency determines that the Proposed Acquisition does constitute a new institutional health service, it nevertheless is not subject to CON review, because the CON Law permits the acquisition of an existing health service facility, regardless of cost, so long as prior notice is provided. Specifically, N.C. Gen. Stat. § 131E-184(a)(8) provides, in pertinent part, that:

the Department shall exempt from certificate of need review a new institutional health service if it receives prior written notice from the entity proposing the new institutional health service, which notice includes an explanation of why the new institutional health service is required, for any of the following:

(8) To acquire an existing health service facility, including equipment owned by the health service facility at the time of acquisition.

Thus, to the extent that the Proposed Acquisition is a new institutional health service, it is nevertheless exempt from CON review, because Cam Equity would be acquiring existing health service facilities.⁴

⁴ In addition, Cam Equity is not aware that any of the above nursing facilities has a pending or approved CON application to add beds. According to the June 2012 CON Monthly Report (attached hereto as Exhibit I), none of the listed facilities appears to have a currently-pending CON application. Thus, there does not appear to be an issue regarding the transfer of ownership or control of a certificate of need, within the meaning of N.C. Gen. Stat. § 131E-189(c). However, even if there were a pending or approved but undeveloped CON in one of these facilities, the transfer of that CON should be allowed for good cause, since the intent of the transaction is not to acquire a particular facility's CON, but to acquire 99.999% of all membership units in an LLC which has interests in multiple states. This type of transaction was previously approved by the CON Section, when it approved the stock transfer acquisition by Novant Health, Inc., of multiple diagnostic centers owned by MedQuest Associates, Inc., including several facilities which had approved but not yet developed CONs. See correspondence from Lee B. Hoffman, Chief of the CON Section, dated September 26, 2007 (attached hereto as Exhibit J).

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CONCLUSION

The regulation of events like the Proposed Acquisition, involving existing and previously reviewed and approved facilities which do not otherwise implicate the fundamental purposes of the CON Law stated in N.C. Gen. Stat. § 131E-175, is beyond the scope of the CON Law, and should not require a CON. For that reason, we request that the Agency issue a "no review" letter determining that the Proposed Acquisition described above is not governed by the CON Law, and therefore, does not require a certificate of need. Alternatively should you determine that the Proposed Acquisition is governed by the CON Law, we request that you confirm that it is nevertheless exempt from CON review pursuant to N.C. Gen. Stat. § 131E-184(a)(8).

We have enclosed with this letter the following Exhibits:

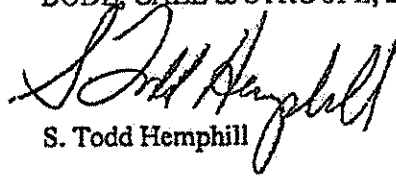
- A. Organization Chart, SVCare Holdings, LLC North Carolina facilities;
- B. Decision and Order, *Schron v. Grunstein*, Index No. 650702/2010 (Supreme Court of New York);
- C. January 6, 2012 no review letter issued to North Carolina Radiation Therapy Management Services, LLC, regarding the acquisition of the ownership interests in the existing oncology treatment center located at 20 Medical Park Drive, Asheville, North Carolina;
- D. August 18, 2011 Declaratory Ruling, *In re: Request for Declaratory Ruling by Radiation Oncology Centers of the Carolinas, Inc.*;
- E. September 27, 2010 Declaratory Ruling, *In re: Request for Declaratory Ruling by Wake Radiology Oncology Services, PLLC, Cancer Centers of North Carolina, P.C., US Oncology, Inc. et al.*;
- F. December 21, 2007 Declaratory Ruling, *In re: Request for Declaratory Ruling by Rex Healthcare, Inc. and Smithfield Radiation Oncology, LLC*;
- G. September 14, 2007 Declaratory Ruling, *In re: Request for Declaratory Ruling by Radiation Therapy Services, Inc. and North Carolina Radiation Therapy Management Services, Inc.*;
- H. January 24, 2008 Declaratory Ruling, *In re: Request for Declaratory Ruling by New Hanover Perfusionists, Inc.*;
- I. CON Section Monthly Report, June 2012; and
- J. Correspondence from Lee B. Hoffman, Chief of the CON Section, dated September 26, 2007.

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Thank you for your consideration of this request. Please feel free to contact me if you have any questions.

Very truly yours,

BODE, CALL & STROUPE, L.L.P.



S. Todd Hemphill

STH:sh
Enclosures
cc w/enc.: Brooke A. Lane, Esq.
Carol E. Bowen, Esq.



North Carolina Department of Health and Human Services
Division of Health Service Regulation

Pat McCrory
Governor

Aldona Z. Wos, M.D.
Ambassador (Ret.)
Secretary DHHS

Drexdal Pratt
Division Director

March 11, 2014

S. Todd Hemphill
3105 Glenwood Avenue, Suite 300
Raleigh, North Carolina 27612

No Review

Facility: Hugh Chatham Memorial Nursing Center
Project Description: Transfer by Hugh Chatham Memorial Hospital, Inc. (HCMH) of 100% of its ownership interests in Hugh Chatham Memorial Nursing Center to Hugh Chatham Nursing Center, LLC, a wholly-owned subsidiary of HCMH and license it separately from the hospital
County: Surry
FID #: 955375

Dear Mr. Hemphill:

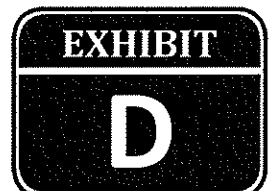
The Certificate of Need Section (CON Section) received your letter of February 18, 2014, regarding the above referenced proposal. Based on the CON law in effect on the date of this response to your request, the proposal described in your correspondence is not governed by, and therefore, does not currently require a certificate of need. However, please note that if the CON law is subsequently amended such that the above referenced proposal would require a certificate of need, this determination does not authorize you to proceed to develop the above referenced proposal when the new law becomes effective.

Moreover, you need to contact the Acute and Home Care Licensure and Certification Section and the Nursing Home Licensure and Certification Section of the Division of Health Service Regulation to determine if they have any requirements for development of the proposed project.

It should be noted that this determination is binding only for the facts represented by you. Consequently, if changes are made in the project or in the facts provided in your correspondence referenced above, a new determination as to whether a certificate of need is required would need to be made by the Certificate of Need Section. Changes in a project include, but are not limited to: (1) increases in the capital cost; (2) acquisition of medical equipment not included in the original cost estimate; (3) modifications in the design of the project; (4) change in location; and (5) any increase in the number of square feet to be constructed.



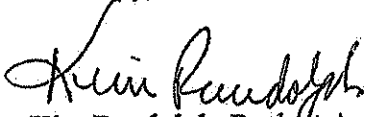
Certificate of Need Section
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Location: Edgerton Building • 809 Ruggles Drive • Raleigh, NC 27603
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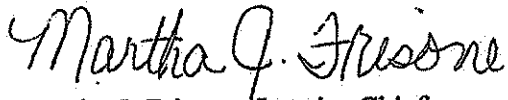
S. Todd Hemphill
March 11, 2014
Page 2

Please contact the CON Section if you have any questions. Also, in all future correspondence you should reference the Facility I.D. # (FID) if the facility is licensed.

Sincerely,



Kim Randolph, Project Analyst



Martha J. Frisone, Interim Chief
Certificate of Need Section

cc: Acute and Home Care Licensure and Certification Section, DHSR
Nursing Home Licensure and Certification Section, DHSR
Medical Facilities Planning Branch, DHSR

BODE HEMPHILL, L.L.P.

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Writer's E-mail: HEMPHILL@BCS-LAW.COM

February 18, 2014

Received by
the CCM Section
FEB 19 2014

VIA HAND DELIVERY

Martha J. Frisone, Interim Chief
Kim Randolph, Project Analyst
Certificate of Need Section
N.C. Department of Health and Human Services
Division of Health Service Regulation
809 Ruggles Drive
Raleigh, North Carolina 27603

Re: Hugh Chatham Memorial Hospital, Inc. (License No. H0049)
No review request to transfer control of Hugh Chatham Nursing Center to wholly
owned-subsiary

Dear Ms. Frisone and Ms. Randolph:

We are writing you on behalf of our client, Hugh Chatham Memorial Hospital, Inc. ("HCMH"), a North Carolina non-profit corporation. HCMH owns and operates Hugh Chatham Nursing Center (the "Nursing Center"), a combination facility with 99 nursing beds and 28 assisted living beds (20 Alzheimer's or special care unit beds and 8 general beds), under the hospital's license. HCMH has determined that it is in its best interest to transfer ownership of the Nursing Center to a wholly-owned subsidiary which it has created, Hugh Chatham Nursing Center, LLC, a North Carolina limited liability company ("HCNC"). HCMH is the sole member of HCNC. See HCNC Articles of Organization, Exhibit 1 hereto.

We also understand that as part of this transfer, the Nursing Center will need to be operated as a separately-licensed nursing facility. I have already spoken about this subject with Becky Wertz, Nurse Consultant with the Nursing Home Licensure and Certification Section, and our client is in the process of preparing the Nursing Home Licensure Application and other related documentation which she has provided. However, before that documentation can be filed, we first need to confirm with your office that this proposal is not subject to certificate of need review.

The CON law provides that transfer of ownership or control of a CON would constitute grounds for withdrawal of the CON if it occurs during the course of development of a project before the project is complete. N.C.G.S. § 131E-189. There is no CON project under development at the Nursing Center. Furthermore, Agency rules provide that neither ownership nor control of a certificate of need is transferred when the holder of the certificate is a corporation and the identity of the holder changes because of a corporate reorganization, such as transferring ownership to a wholly-owned subsidiary. 10A N.C.A.C. 14C.0502(b)(1) and (c).

In this instance, the entity that owns the Nursing Center will not change, and the same building, staff and equipment will be used to provide the same services at the same location. HCMH will continue to own the Nursing Center assets that were authorized under the CON and have been used to furnish skilled nursing care to the Nursing Center's residents. The proposed transaction does not involve the offering or expansion of any new facility, service or equipment, and the State's inventory of nursing home beds will not change. No new or additional nursing home beds will be acquired or placed in operation in the State. The Nursing Center already has its own separate NPI number and Medicare number.

This proposal is similar to other proposals involving transfer of assets to wholly owned subsidiaries that the CON Section has found in the past did not require CON review. For example, the CON Section determined that a perfusion company could hold heart-lung bypass equipment in two separate wholly owned subsidiaries without undergoing CON review. See enclosed Exhibit 2 (without exhibits to original request letter).

For these reasons, we believe that the CON law allows the transfer of the Nursing Center to a wholly-owned subsidiary of HCMH, without the requirement of a CON, because such a transfer does not constitute the development or acquisition of a new facility or services by the subsidiary, within the meaning of G.S. 131E-176(16) or 10A N.C.A.C. 14C.0502. The subsidiary has no control over those services independent of its parent entity. The ultimate ownership and control of the service does not change. The beds already exist in the inventory in the State Medical Facilities Plan and there is no new facility constructed. Thus, there has been no action which constitutes the offering or development of a new institutional health service within the meaning of G.S. 131E-178(a), and no CON is required.

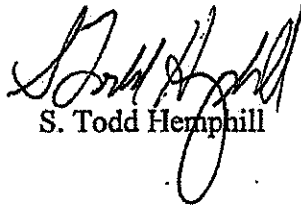
We request that you provide a letter of no review confirming that our interpretation of the CON law and applicable rules is correct and that this proposal is not subject to certificate of need review.

Ms. Frisone and Ms. Randolph
February 18, 2014
Page 3

Please let us know if you need further information or if there are questions we can answer.

Very truly yours,

BODE HEMPHILL, L.L.P.



S. Todd Hemphill

STH:sh
Enclosure
cc w/enc.:

Becky Wertz, Nurse Consultant (via hand delivery)
Paul Hammes/Don Trippel (via e-mail only)