



DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF HEALTH SERVICE REGULATION

ROY COOPER
GOVERNOR

MANDY COHEN, MD, MPH
SECRETARY

MARK PAYNE
DIRECTOR

March 30, 2017

Noah H. Huffstetler III
Nelson, Mullins, Riley & Scarborough, LLP
4140 Parklake Avenue, GlenLake One, Second Floor
Raleigh NC 27612

No Review

Record #: 2217
Business Name: Private Diagnostic Clinic, PLLC
Business #: 1478
Project Description: Acquisition of an office building at 10207 Cerny Street in Raleigh
County: Wake

Dear Mr. Huffstetler:

The Healthcare Planning and Certificate of Need Section, Division of Health Service Regulation (Agency) received your letter of March 21, 2017 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.

However, you need to contact the Agency's Construction Section 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 in your correspondence. 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 this office. 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.

HEALTHCARE PLANNING AND CERTIFICATE OF NEED SECTION

WWW.NCDHHS.GOV

TELEPHONE 919-855-3873

LOCATION: EDGERTON BUILDING • 809 RUGGLES DRIVE • RALEIGH, NC 27603

MAILING ADDRESS: 2704 MAIL SERVICE CENTER • RALEIGH, NC 27699-2704

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

Sincerely,



Michael J. McKillip
Project Analyst



Martha J. Frisone
Assistant Chief, Certificate of Need

cc: Construction Section, DHSR
Paige Bennett, Assistant Chief, Healthcare Planning, DHSR

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

4140 Parklake Avenue / GlenLake One / Second Floor / Raleigh, NC 27612

Tel: 919.877.3800 Fax: 919.329.3821

www.nelsonmullins.com

Noah H. Huffstetler III

Tel: 919.329.3801

Fax: 919.329.3821

noah.huffstetler@nelsonmullins.com

March 21, 2017

Via Electronic & Certified Mail – Return Receipt Requested

Ms. Martha J. Frisone, Assistant Chief
Healthcare Planning and Certificate of Need Section
N.C. Dept. of Health & Human Services
2704 Mail Service Center
Raleigh, NC 27699-2704



Re: Private Diagnostic Clinic, PLLC *Page 5 1478*

Dear Ms. Frisone:

Our firm has been engaged to represent Private Diagnostic Clinic, PLLC (the "PDC") in connection with the matters described in this letter. Our client wishes to be in full compliance with all provisions of the North Carolina Certificate of Need ("CON") Law and the rules promulgated thereunder, and has sought our assistance in doing so. The PDC has entered into the two transactions described below, relying in each case upon experienced transactional counsel to obtain all necessary permits for the transactions. However, the PDC may have inadvertently failed to provide your Agency with timely notice of those transactions, which should in any event be exempt from CON review. Accordingly, we are writing to provide you with information about the transactions, to fully comply with any applicable CON requirements and to ensure that if mistakes have occurred in these transactions they are not repeated in the future.

Matter 1: 10207 Cerny Street, Raleigh, North Carolina.

- On April 7, 2015, 10207 Cerny Street, LLC, a North Carolina limited liability company, closed on the purchase of a multi-use office building located at 10207 Cerny Street, Raleigh, NC 27617. 10207 Cerny Street, LLC is a wholly-owned subsidiary of Private Diagnostic Clinic, PLLC ("PDC"); the entity is structured as a single-member LLC, with PDC as the sole member. The Purchase Agreement was dated February 16, 2015, between LRC-BC LLC, a Delaware limited liability company (as seller), and Hamilton Merritt, Inc., a North Carolina corporation (as buyer). Following execution of the Purchase Agreement, on March 25, 2015, Hamilton Merritt, Inc. assigned its right, title,

and interest in the Purchase Agreement to 10207 Cerny Street, LLC. The purchase price was \$7,885,000.

- Effective April 6, 2015, LRC-BC LLC assigned three leases to 10207 Cerny Street, LLC, with the following entities:
 - Brier Creek Optometry, P.A. (Suite 100)
 - State Employees Credit Union (ATM)
 - Dani Stansell, D.D.S., P.A. d/b/a Stansell Dentistry (Suite 106)
- Effective March 25, 2015, 10207 Cerny Street, LLC (as landlord) entered into a lease agreement with the PDC (as tenant) for the remainder of the building.
- One of the suites in the building, Suite 210, is licensed as an Ambulatory Surgery Center (“ASC”) (Facility ID 080038; License Number AS0115); a copy of the current license is attached. The PDC relocated its previously existing ASC (located at 10441 Moncreiff Road, Raleigh, NC) to Cerny Street, and added two endoscopy rooms, for a total of four endoscopy rooms. The PDC obtained a CON for this project (Project ID # J-11031-15; FID # 150337); a copy of the correspondence from your office transmitting that CON is attached.
- Following the purchase, 10207 Cerny Street, LLC spent approximately \$8,000,000 on improvements to the building. Neither the PDC nor Cerny Street, LLC acquired any equipment with costs that would meet the definition of “major medical equipment” at N.C. Gen. Stat. § 131E-175(14o), or that would trigger the definition of a “diagnostic center” at N.C. Gen. Stat. § 131E-175(7a). However, the PDC did not provide notice to the CON Section pursuant to N.C. Gen. Stat. § 131E-184(a)(9) in connection with the acquisition of the building.
- On January 29, 2016, 10207 Cerny Street, LLC sold the building to Harrison Street Real Estate, LLC, a Delaware limited liability company, for \$22,319,000. The Purchase Agreement was dated December 23, 2015, between 10207 Cerny Street, LLC (as seller) and Harrison Street Real Estate, LLC (as buyer). Following execution of the purchase agreement, Harrison Street Real Estate, LLC assigned the agreement to HSRE Duke at Brier Creek, LLC, a Delaware limited liability company. To the best of our client’s knowledge, HSRE Duke at Brier Creek, LLC did not file a notice of exempt acquisition with the CON Section in connection with its purchase of the building.
- Effective January 29, 2017, 10207 Cerny Street, LLC assigned the three original leases (with Brier Creek Optometry, P.A., State Employees Credit Union, and Dani Stansell, D.D.S., P.A. d/b/a Stansell Dentistry) to HSRE Duke at Brier Creek, LLC.

- Effective January 29, 2017, 10207 Cerny Street, LLC and the PDC terminated their March 25, 2015 lease agreement. The PDC then entered into a new lease agreement with HSRE Duke at Brier Creek, LLC.

As described above, the building in question is a multi-use facility, including, in addition to physicians' offices, space occupied by an optometry practice, an automatic teller machine, and a dental practice. A CON has been acquired for the only "health service facility" located in the building, the ambulatory surgical facility. *See* N.C. Gen. Stat. § 131E-176(9b). Therefore, we believe that the PDC's purchase of this building does not constitute "a capital expenditure exceeding two million dollars. . . which relates to the provision of a health service." *See* N.C. Gen. Stat. § 131E-176(16)(b). Nor do we believe that this expenditure was to "acquire a physician office building" within the meaning of N.C. Gen. Stat. § 131E-184(a)(9). However, should you deem this expenditure to be the acquisition of a physician office building for which a notice of exempt acquisition should have been given, our client seeks to correct that error.

Matter 2: New Medical Office Building at Fayetteville Road and Highway 54, Durham, North Carolina.

- On February 23, 2015, PDC Crooked Creek, LLC, a North Carolina limited liability company, closed on the purchase of a 12.3 acre tract of land at the corner of Fayetteville Road and Highway 54, in Durham. PDC Crooked Creek, LLC is a wholly-owned subsidiary of the PDC; the entity is structured as a single-member LLC, with the PDC as the sole member. The Purchase Agreement was dated January 16, 2013, between Betsy D. Hutson, Jo Ella Huston Bowling and husband, Harold Bowling, and the Brooke Family Trust B (as sellers), and Davis Moore Acquisition, LLC (as buyer). Following execution of the Purchase Agreement on February 13, 2015, Davis Moore Acquisition, LLC assigned the Purchase Agreement to PDC Crooked Creek, LLC. The purchase price was \$2,500,000.
- PDC Crooked Creek, LLC is in the process of developing a medical office building on the subject tract of land. Ground broke on construction in early June of 2016.
- The PDC anticipates that the equipment being acquired for this location will trigger the definition of a "diagnostic center" at N.C. Gen. Stat. § 131E-175(7a). Accordingly, the PDC has engaged Keystone Planning to assist in applying for a CON as a diagnostic center. The PDC anticipates that this application will be submitted on or before April 17, 2017, for review in the cycle commencing May 1, 2017.

At this point, the PDC has not provided notice to the CON Section pursuant to N.C. Gen. Stat. § 131E-184(a)(9) in connection with the development of the new medical office building.

Ms. Martha J. Frisone
March 21, 2017
Page 4

Again, the PDC relied upon experienced transactional counsel to obtain all necessary permits for the development of the building in question. The PDC regrets any inadvertent failure to provide timely notice of the development of this medical office building, and wishes to correct any possible deficiency. We therefore request that the Health Planning and CON Section accept this letter as fulfilling the notice requirement for an exemption from CON review for this project.

For the foregoing reasons, we are requesting that your Agency confirm that the PDC is now in compliance with the North Carolina CON Law and the rules promulgated thereunder in connection with the foregoing transactions. Should you have any questions or need any additional information in this regard, please do not hesitate to contact us. We appreciate your consideration of these matters.

With best wishes, I am

Very truly yours,


Noah H. Huffstetler III

NHH:jb

Enclosures

Cc: June Ferrell (via electronic mail)
Guy DeCarlucci (via electronic mail)
Frederick Zufelt (via electronic mail)

State of North Carolina

Department of Health and Human Services Division of Health Service Regulation

Effective January 01, 2017, license is issued to

Private Diagnostic Clinic, PLLC

to operate an ambulatory surgical clinic known as

Duke GI at Brier Creek

located at 10207 Cerny Street; Suite 210

Raleigh, Wake County, North Carolina.

*This license is issued subject to the statutes of the
State of North Carolina, is not transferable and shall expire
midnight December 31, 2017.*

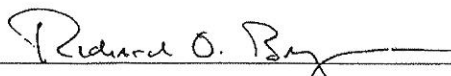
Facility ID: 080038

License Number: AS0115

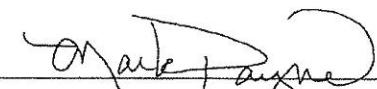
Surgical Operating Rooms: 0

Endoscopy Rooms: 4

Authorized by:


Secretary, N.C. Department of Health and
Human Services




Director, Division of Health Service Regulation



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

Pat McCrory
Governor

Richard O. Brajer
Secretary DHHS

Drexdal Pratt
Division Director

August 26, 2015

Bill Schiff
2200 W. Main Street, Suite 500
Durham, NC 27705

Transmittal of Certificate of Need

Project ID #: J-11031-15
Facility: Duke GI at Brier Creek
Project Description: Relocate the existing licensed facility and develop no more than two additional GI endoscopy rooms for a total of four GI endoscopy rooms
County: Wake
FID #: 150337

Dear Mr. Schiff:

The Healthcare Planning and Certificate of Need Section, Division of Health Service Regulation (Agency) is happy to transmit your certificate of need for the above referenced project. At this time, you should contact the Agency's Construction Section, regarding their procedures and requirements for the development of this project. This office will notify the appropriate Sections that the certificate of need has been issued. However, please note that it is the responsibility of the holder of the certificate of need to contact these Sections concerning the next steps to follow in the development of the approved project.

Please be aware that pursuant to G.S. 131E-181(b), you are required to materially comply with the representations made in your application for a certificate of need, or with any conditions the Agency placed on the certificate of need. **If you subsequently propose to develop the project on a site different from that named on this certificate, you must first seek and obtain approval from the Director of the Division of Health Service Regulation.** If you operate a service which materially differs from the representations made in your application for a certificate of need, or with any conditions the Agency placed on the certificate of need, including any increase in per diem reimbursement rates/charges, the Agency may bring remedial action against the holder of the certificate of need pursuant to G.S. 131E-189 and 131E-190.

The holder of a certificate of need is obligated to submit progress reports to this office as required by 10A NCAC 14C .0209. The applicant shall notify this office of any variations from the schedule or the projected capital cost of the project. During the development of the



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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project, this office may request any additional information pertinent to the project, including additional progress reports, to determine:

- 1) If the timetable specified on the certificate is being met;
- 2) If the amount of the capital expenditure for the development of the project is expected to exceed the maximum amount under the certificate;
- 3) If the terms and conditions of the approval are being met; and
- 4) If the project is progressing as proposed in the application.

The first progress report on this project is due December 31, 2015. Forms for the submittal of these reports are enclosed. Failure to submit any scheduled or requested progress report in a timely manner may result in the Agency withdrawing the certificate pursuant to G.S. 131E-189. If after reviewing the status of the project, the Agency determines that the holder of the certificate is not meeting the timetable and is not making a good faith effort to meet it, the Agency may withdraw the certificate in accordance with G.S. 131E-189.

Moreover, please be advised that this Agency may assess a civil penalty not to exceed \$20,000 against any person who violates the terms of a certificate of need which has been issued each time the service provided is in violation of this provision (G.S. 131E-190(f)). If for some reason, the holder of a certificate of need determines it necessary to request an increase in a per diem charge or reimbursement rate over that which was stated in the application for the certificate of need, then the holder must first contact the Agency to obtain proper instructions for initiating such a request. The request for the increase will be considered by the Agency pursuant to G.S. 131E-181(b).

Please keep us informed of the progress in the development of this project. In the future, address your Progress Reports to Mike McKillip, the Project Analyst for your county. Please refer to the Project ID # and Facility ID # (FID) in all correspondence.

Sincerely,

Gloria C. Hale

Gloria C. Hale
Project Analyst

Martha J. Frisone

Martha J. Frisone
Assistant Chief, Certificate of Need

GCH:MJF:mw

Enclosures

cc: Construction Section, DHSR
Assistant Chief, Healthcare Planning
Acute & Home Care Licensure & Certification Section, DHSR

STATE OF NORTH CAROLINA

Department of Health and Human Services
Division of Health Service Regulation

CERTIFICATE OF NEED

for

Project ID #: J-11031-15

FID #: 150337

ISSUED TO: Private Diagnostic Clinic, PLLC
2200 West Main Street, Suite 500
Durham, NC 27705

Pursuant to G.S. 131E-175, the North Carolina Department of Health and Human Services hereby authorizes the person or persons named above (the "certificate holder") to develop the certificate of need project identified above. The certificate holder shall develop the project in a manner consistent with the representations in the project application and with the conditions contained herein and shall make good faith efforts to meet the timetable contained herein, as documented by the periodic progress reports required by 10A NCAC 14C .0209. The certificate holder shall not exceed the maximum capital expenditure amount specified herein during the development of this project, except as provided by G.S. 131E-176(16)e. The certificate holder shall not transfer or assign this certificate to any other person except as provided in G.S. 131E-189(c). This certificate is valid only for the scope, physical location, and person(s) described herein. The Department may withdraw this certificate pursuant to G.S. 131E-189 for any of the reasons provided in that law.

SCOPE: Relocate the existing licensed facility and develop no more than two additional GI endoscopy rooms for a total of no more than four GI endoscopy rooms/
Wake County

CONDITIONS: See Reverse Side

PHYSICAL LOCATION: Duke GI at Brier Creek
10207 Cerny Street
Raleigh, NC 27617

MAXIMUM CAPITAL EXPENDITURE: \$1,635,993

TIMETABLE: See Reverse Side

FIRST PROGRESS REPORT DUE: December 31, 2015

This certificate is effective as of the 23rd day of August, 2015


Shelley Carraway, Chief

CONDITIONS:

1. Private Diagnostic Clinic, PLLC d/b/a Duke GI at Brier Creek shall materially comply with all representations made in the certificate of need application and supplemental information received. In those instances where representations conflict, Private Diagnostic Clinic, PLLC d/b/a Duke GI at Brier Creek shall materially comply with the last made representation.
2. Private Diagnostic Clinic, PLLC d/b/a Duke GI at Brier Creek shall not acquire, as part of this project, any equipment that is not included in the project's proposed capital expenditure in Section VIII of the application and that would otherwise require a certificate of need.
3. Private Diagnostic Clinic, PLLC d/b/a Duke GI at Brier Creek shall develop no more than two additional gastrointestinal endoscopy rooms and shall be licensed for a total of no more than four gastrointestinal endoscopy rooms at Duke GI at Brier Creek following project completion.
4. Private Diagnostic Clinic, PLLC d/b/a Duke GI at Brier Creek shall acknowledge acceptance of and agree to comply with all conditions stated herein to the Healthcare Planning and Certificate of Need Section in writing prior to issuance of the certificate of need.

A letter acknowledging acceptance of and agreeing to comply with all conditions stated in the conditional approval letter was received by the Agency on July 30, 2015.

TIMETABLE:

| | |
|--------------------------------------|-------------------|
| Contract Award _____ | October 8, 2015 |
| 50% Completion of Construction _____ | November 15, 2015 |
| Completion of Construction _____ | December 15, 2015 |
| Occupancy/Offering of Services _____ | January 1, 2016 |