



NC DEPARTMENT OF HEALTH AND HUMAN SERVICES

ROY COOPER • Governor
KODY H. KINSLEY • Secretary
MARK PAYNE • Director, Division of Health Service Regulation

VIA EMAIL ONLY

August 22, 2023

Kenneth Burgess
kburgess@bakerdonelson.com

No Review

Record #: 4257
Date of Request: August 10, 2023
Facility Name: Clapp's Convalescent Nursing Home Inc.
FID #: 923103
Business Name: Grant and Danielle Hollowell
Business #: 3735
Project Description: Acquisition of all outstanding stock of the managing and operating entity
County: Randolph

Dear Mr. Burgess:

The Healthcare Planning and Certificate of Need Section, Division of Health Service Regulation (Agency) received your correspondence regarding the project described above. Based on the CON law in effect on the date of this response to your request, the project as described is not governed by, and therefore, does not currently require a certificate of need. 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.

This determination is binding only for the facts represented in your correspondence. If changes are made in the project or in the facts provided in the correspondence referenced above, a new determination as to whether a certificate of need is required would need to be made by this office.

Please do not hesitate to contact this office if you have any questions.

Sincerely,

[Handwritten signature of Ena Lightbourne]

Ena Lightbourne, Project Analyst

[Handwritten signature of Micheala Mitchell]

Micheala Mitchell, Chief

cc: Nursing Home Licensure and Certification Section, DHSR

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES • DIVISION OF HEALTH SERVICE REGULATION
HEALTHCARE PLANNING AND CERTIFICATE OF NEED SECTION

LOCATION: 809 Ruggles Drive, Edgerton Building, Raleigh, NC 27603
MAILING ADDRESS: 809 Ruggles Drive, 2704 Mail Service Center, Raleigh, NC 27699-2704
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August 10, 2023

VIA EMAIL

Micheala Mitchell, Chief  
N.C. Department of Health and Human Services  
N.C. Division of Health Service Regulation  
Healthcare Planning and Certificate of Need Section  
809 Ruggles Drive, Raleigh, N.C. 27603  
Via email to: [micheala.mitchell@dhhs.nc.gov](mailto:micheala.mitchell@dhhs.nc.gov)

RE: ***No Review Determination Request Regarding Purchase of Stock of Skilled Nursing Facilities' and Assisted Living Community Operating Company***

Dear Micheala:

This correspondence is being provided to the N.C. Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section (the "Agency") on behalf of our clients Grant and Danielle Hollowell ("Buyers") and on behalf of Denise Campbell ("Seller") (collectively the "Parties") to describe a series of related business activities (the "Transaction") between the Parties and to request that the Agency confirm in writing that the Transaction is not subject to review by the Agency and the Parties are not required to obtain a certificate of need ("CON") before proceeding with the Transaction.

### **Background**

The Transaction involves the sale of corporate stock of the operating entities of two North Carolina licensed skilled nursing facilities. Those facilities are: 1) Clapp's Nursing Center (license number NH0017), a 118-bed skilled nursing facility; and 2) Clapp's Convalescent Nursing Home, a 96-bed skilled nursing facility (license number NH0020) (collectively the "Facilities"). The Facilities are each owned by Denise Campbell. The ownership of the Facilities themselves (*i.e.*, the bricks and mortar, the underlying realty and the CON rights) will not change as part of the Transaction and Ms. Campbell will continue as owner of those interests.

Each of the Facilities is managed and operated by a related operating entity, as follows:

1. Clapp's Nursing Center is operated by Clapp's Nursing Center, Inc. ("Pleasant Garden OpCo"); and
2. Clapp's Convalescent Nursing Home is operated by Clapp's Convalescent Nursing Home, Inc. ("Asheboro OpCo").

Currently, Denise Campbell owns one hundred percent (100%) of the issued and outstanding capital stock (the "**Stock**") of each Pleasant Garden OpCo and Asheboro OpCo.

### **The Proposed Transaction**

The proposed Transaction which is the subject of this No Review Determination Request involves the purchase of all outstanding stock in the respective operating companies of Pleasant Garden OpCo and Asheboro OpCo by Grant and Danielle Hollowell (Buyers). Buyers are currently employed by and manage each of the Facilities for Ms. Campbell. As noted above, Buyers are purchasing only the stock of each of the Operating Companies and are not purchasing the Facilities themselves. As such, the Transaction does not involve the acquisition of an existing health service facility within the meaning of N.C.G.S. 131E-176(16)l or within the meaning of the statutory exemption set forth at N.C.G.S. 131E-184(a)(8).

### **The Transaction Is Not Subject To Agency Review And No CON Is Required For The Transaction**

We do not believe the Transaction qualifies as a "new institutional health service" under any provision of the CON Statute, specifically including N.C. Gen. Stat. § 131E1-17(16). The Transaction does not involve the acquisition of an existing health facility, a change in bed capacity, the construction or other development of a new health service or health service facility, the

Micheala Mitchell, Esq.  
August 10, 2023  
Page 3

acquisition of major medical equipment or any other item or service which qualifies as a new institutional health service and there are no other “new institutional health service” definitional elements that apply to the Transaction.

Our opinion that no CON is required for the Transaction is based upon the following:

1. The Agency’s historical position that the acquisition of stock in a corporation or member interests in a limited liability company which owns CON-regulated assets does not constitute a “new institutional health service” and thus does not require that a CON be sought or obtained prior to purchase of the LLC member interests. *See Attachment A.*<sup>1</sup>
2. Buyers are purchasing only the operating rights to each Facility and are not purchasing the underlying real estate or the “bricks and mortar” of either of the two Facilities.
3. The ownership of the CONs and CON rights to each of the Facilities will remain with the individuals to whom and the entities to which those respective CONs were originally issued.

For the reasons recited herein, we request that the CON Section acknowledge in writing at its earliest opportunity that the Transaction, as described herein, is not subject to CON Section Review and that the Parties to the Transaction may proceed with the Transaction without first obtaining a CON.

Please let me know if you have questions or need further information regarding this notice.

Very truly yours,



Kenneth Lee Burgess, Shareholder

KLB:jdm

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<sup>1</sup> Please note that Attachment A is a Declaratory Ruling issued by the Division of Health Service Regulation holding that the acquisition of “member interests” in a limited liability corporation, even of a CON-regulated asset, does not constitute acquisition of an existing health service facility and is not subject to CON regulation. The Transaction described in the current No Review Determination Request involves only the purchase of stock (the equivalent of purchasing member interests in an LLC) of an operating entity, not the facility itself or the CON rights thereto.

Micheala Mitchell, Esq.  
August 10, 2023  
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Encls.

cc: Jake Farrar, JD  
Emily Strack, JD  
Grant and Danielle Hollowell

Attachment

## **Attachment A**



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

February 25, 2013

**CERTIFIED MAIL**

Mr. Charles Wilson  
Triangle Orthopaedic Associates, P.A.  
120 William Penn Plaza  
Durham, North Carolina 27704

RE: Declaratory Ruling for Triangle Orthopedics Surgery Center, LLC  
Project I.D. No. J-8616-10

Dear Mr. Wilson:

I am enclosing a Declaratory Ruling that you requested. If questions arise, do not hesitate to let me know.

Sincerely,

Drexdal Pratt

DP:CO:peb

Enclosure

cc: Cheryl Ouimet, Chief Operating Officer, DHSR  
Craig Smith, Chief, Certificate of Need Section  
Steven Lewis, Chief, Construction Section  
Azzie Conley, Chief, Acute and Home Care Licensure and Certification Section  
Nadine Pfeiffer, Branch Manager, Medical Facilities Planning Section  
Marc Lodge, Special Deputy Attorney General, DOJ



Office of the Director

<http://www.ncdhhs.gov/dhst/>

Phone: 919-855-3750 / Fax: 919-733-2757

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

**IN RE: REQUEST FOR  
DECLARATORY RULING BY  
TRIANGLE ORTHOPEDICS  
SURGERY CENTER, LLC  
Project I.D. No. J-8616-10**

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**DECLARATORY RULING**

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.

Triangle Orthopaedics Surgery Center, LLC ("TOSC") has requested a declaratory ruling for Project I.D. No. J-8616-10 to confirm that the current shareholders of Triangle Orthopaedics Associates, P.A. (TOA) may acquire all of TOA's membership interests in TOSC without first obtaining a Certificate of Need ("CON"). 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. Charles Wilson, Chief Executive Officer of TOA, has requested this ruling on TOA's behalf and has provided the material facts upon which this ruling is based.

**STATEMENT OF THE FACTS**

On June 1, 2011, TOSC received a CON to develop a single-specialty ambulatory surgery center with two operating rooms in Wake County. The legal name of the approved



applicant is TOSC. TOA is the sole member of TOSC. TOA has a 100% interest in TOSC. As such, the shareholders of TOA are currently the indirect owners of TOSC. The shareholders of TOA would now prefer to have the TOSC membership interests owned directly rather than as a subsidiary of TOA for organizational administrative reasons. Acquisition of the membership interests in TOSC by the shareholders of TOA means the shareholders will become the direct owners of TOSC.

### ANALYSIS

N.C. Gen. Stat. § 131E-181 provides:

(a) A certificate of need shall be valid only for the defined scope, Physical location, and person named in the application. A Certificate of need shall not be transferred or assigned except as provided in G.S. 131E-189(c).

(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 the certificate of need was issued, is required to materially comply with the representations made in its application for that certificate of need.

N.C. Gen. Stat. § 131E-189(c) provides:

The Department may immediately withdraw any certificate of Need 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. Any transfer after that time will be subject to the requirement that the service be provided consistent with the presentations made in the application and any applicable conditions the Department placed on the certificate of need. Transfers resulting from death or personal illness or other good cause, as determined by the Department, shall not result in withdrawal if the Department receives prior written notice of the transfer and finds good cause. Transfers resulting from death shall not result in withdrawal.

The Department has previously determined that the acquisition of membership interests in a limited liability company does not require a CON. *See, e.g.,* Declaratory Ruling issued to

Same Day Surgery Center New Hanover, LLC et al.; Declaratory Ruling issued to Wake PET Services, LLC, et al.; Declaratory Ruling issued to Wake Radiology Oncology Services, PLLC; Declaratory Ruling issued to Alliance Oncology; Declaratory Rulings issued to the Charlotte Mecklenburg Hospital Authority; Declaratory Ruling issued to JRH Ventures, LLC.

In this case, the TOA shareholders will be acquiring all of the membership interests in TOSC, and there is no change in entity. The planned surgery center in Wake County will remain intact as the same LLC with the membership interest now being owned directly by the TOA shareholders. The planned surgery center in Wake County will remain intact as the same LLC, but with a different membership composition. The entity to which the CON was issued (TOSC) does not change as a result of this transaction. TOSC will be the entity that develops the surgery center. The current shareholders of TOA will hold all of the membership interests in TOSC and the transfer of membership interests will not cause there to be any new owners of any membership other than the current TOA shareholders.

The scope or scale of services of the project will not change as a result of this transaction. TOSC will serve the same population, with the same charges, staffing, and operating expense structure as described in the November 2010 CON application. TOSC plans to develop the facility within the timeframe, and will adhere to the annual reposting requirements, included in the CON conditions. TOSC will continue to have 100% physician ownership after the membership acquisition. The transaction will not change the number of operating rooms for the surgery center. The membership change will have no impact on the project capital cost. The proposed physical location will not change from the original approved site identified in the CON application. TOSC agrees to materially comply with all of the requirements and representations made in its original CON application.

10A NCAC 14C .0502(b) provides:

(b) Ownership of a certificate of need is transferred when any person acquires 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.

The holder of the CON for Project I.D. No. J-8616-10 is TOSC, LLC which is registered as a corporation. The identity of the holder, TOSC, is reorganizing such that the shareholders of TOA will become the direct, rather than the indirect, owners of TOSC. Therefore, the ownership by TOSC of the CON will not be transferred because of the reorganization of the corporation. The acquisition of the membership interests in TOSC by the shareholders of TOA will not violate N.C. Gen. Stat. § 131E-189(c) because ownership of the CON is not being transferred.

#### CONCLUSION

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that the TOA shareholders do not require a certificate of need in order to proceed with the purchase of TOA's membership interests in TOSC. This proposed change does not constitute a change in the scope of the project, would not violate N.C. Gen. Stat. § 131E-181, or N.C. Gen. Stat. § 131E-189, or any of the rules of the Department.

This the 25<sup>th</sup> day of February, 2013.



Drexel Pratt, Director

Division of Health Service Regulation

N.C. Department of Health and Human Services

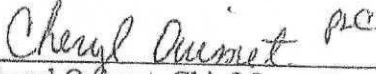
**CERTIFICATE OF SERVICE**

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 a first-class, postage pre-paid envelope addressed as follows:

**CERTIFIED MAIL**

Charles Wilson  
Triangle Orthopaedic Associates, P.A.  
120 William Penn Plaza  
Durham, North Carolina 27704

This the 25<sup>th</sup> day of February, 2013.

  
\_\_\_\_\_  
Cheryl Oummet, Chief Operating Officer

**From:** [Mitchell, Micheala L](#)  
**To:** [Stancil, Tiffany C](#)  
**Subject:** FW: [External] Notice of Exemption  
**Date:** Thursday, August 10, 2023 3:46:26 PM  
**Attachments:** [4861-1286-1046 v.1 SNF Exemption Notice.pdf](#)

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Hey Tiffany,

Would you mind logging this as a no review and assigning to Ena?

Micheala Mitchell, JD  
[NC Department of Health and Human Services](#)  
[Division of Health Service Regulation](#)  
Section Chief, Healthcare Planning and CON Section  
809 Ruggles Drive, Edgerton Building  
2704 Mail Service Center  
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[Micheala.Mitchell@dhhs.nc.gov](mailto:Micheala.Mitchell@dhhs.nc.gov)

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**From:** Burgess, Ken <[kburgess@bakerdonelson.com](mailto:kburgess@bakerdonelson.com)>  
**Sent:** Thursday, August 10, 2023 11:30 AM  
**To:** Mitchell, Micheala L <[Micheala.Mitchell@dhhs.nc.gov](mailto:Micheala.Mitchell@dhhs.nc.gov)>  
**Subject:** [External] Notice of Exemption

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Hi again Micheala, attached please find a No Review Determination Request I am filing on behalf of our clients who are purchasing the stock in two companies that own the operating rights to two N.C. licensed skilled nursing facilities. The transaction, as described in the attached, does not involve the purchase of the actual facilities themselves but, as noted, only the operating entities and operating rights. Please advise if you need additional information. Thank you, Ken Burgess

***PLEASE NOTE NEW ADDRESS***

Kenneth (Ken) L. Burgess  
Shareholder  
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC  
2235 Gateway Access Point

Suite 220  
Raleigh, N.C. 27607  
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