

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

<b>IN RE: REQUEST FOR DECLARATORY</b>	)	
<b>RULING BY NASH IMAGING, L.L.C.</b>	)	<b>DECLARATORY RULING</b>
<b>AND</b>	)	
<b>NASH COMMUNITY HEALTH</b>	)	
<b>SERVICES, INC.</b>	)	
	)	

I, Jeff Horton, Acting Director of the Division of Health Service Regulation (the “Department” or the “Agency”), hereby issue this declaratory ruling to Nash Imaging, L.L.C. and Nash Community Health Services, Inc. (collectively, “Nash”) pursuant to N.C.G.S. § 150B-4, 10A NCAC 14A.0103, and the authority delegated to me by the Secretary of the North Carolina Department of Health and Human Services. Petitioners have filed a Declaratory Ruling Request (the “request”) as to the applicability of Chapter 131E, Article 9 of the North Carolina General Statutes to the facts described below. For the reasons set out herein, I conclude that relocating the magnetic resonance imaging scanner and diagnostic center approved in Project I.D. No. L-7499-06 to an alternate location is in material compliance with the certificate of need.

This ruling is binding on the Department and the person requesting it if the material facts stated in the request are accurate and no material facts have been omitted from the request. The ruling applies only to this request. Except as provided by N.C.G.S. § 150B-4, the Department reserves the right to change the conclusions which are contained in this ruling. Robert L. Wilson, Jr. and Terrill Johnson Harris, attorneys with the law firm of Smith Moore Leatherwood LLP, requested this ruling on behalf of Nash Imaging, L.L.C. and Nash Community Health Services, Inc. and have provided the statement of facts upon which this ruling is based. The material facts are set out below.

## STATEMENT OF THE FACTS

On or about February 15, 2006, Nash Imaging, L.L.C. and Nash Community Health Services, Inc. applied for a certificate of need (“CON”) to acquire a fixed open magnetic resonance imaging (“MRI”) scanner and to develop a new diagnostic center in Nash County, Project I.D. No. L-7499-06, (the “project”). The project was proposed to be located on the Community Medical Plaza campus at 1051 Noell Lane in Rocky Mount, the site of LifeCare Hospitals of North Carolina, a long-term acute care hospital. The site is owned by Nash Community Health Services, a controlled affiliate (wholly owned subsidiary) of Nash Health Care Systems, (a North Carolina Hospital Authority created by Nash County), and was proposed to be ground leased to Nash Imaging (a North Carolina limited liability company, the sole member of which is Nash Hospitals, Inc. which is also a wholly owned subsidiary of Nash Health Care Systems). Nash Imaging, L.L.C. proposed to acquire the MRI scanner, construct a modular building to house the equipment and develop the new diagnostic center. Nash Community Health Services is simply a landowner which conducts no other business, and it did not propose to be involved in operating the facility.

Nash’s application was reviewed in a competitive review in which both applications were disapproved. In settlement, a CON was issued to Nash for the project with a condition that Nash Imaging, L.L.C. would purchase a fixed open bore MRI scanner.

Nash Imaging and Nash Community Health Service now request approval to locate the project at an alternate site owned by Boice-Willis, LLC, a North Carolina limited liability company. The physical address for the new location is 921 N. Winstead Avenue, Rocky Mount, North Carolina (the “alternate site”).

The new location is adjacent to an “immediate care center” operated by the Boice-Willis Clinic, P.A. (“Boice-Willis Clinic”), a multi-specialty physician practice in Rocky Mount.

Boice-Willis, LLC owns the property on which the immediate care center is located but does not own the property on which the Boice-Willis Clinic is located. The Boice-Willis Clinic and Boice-Willis, LLC are separate legal entities. According to Nash, if the new location is approved, Boice-Willis, LLC would long term ground lease the property to Nash Imaging. Nash Imaging would construct and own a new building housing the MRI scanner on the alternate site and operate the MRI scanner as proposed in the application.

Nash represents that the new location is only 1.83 miles from the original location in a heavily populated area of Nash County that will be more easily accessible to the patients who will need MRI scans and the physicians who will order these scans. The new location is more convenient to physician offices and other health care services in the Rocky Mount area. In particular, the location is adjacent to a medical office park that includes three medical office buildings (in addition to the immediate care center) and houses approximately 100 physicians who are part of the Nash Health Care System physician community, including many who are not affiliated with the Boice-Willis Clinic. Therefore, the new location is closer to more physician offices and other health care services than the original location, and the traffic pattern there makes it more accessible.

As proposed in the application, all physicians on Nash Hospital, Inc.'s Medical Staff will be able to order scans. The project will still be accredited by the Joint Commission. The project will have the same level and nature of coordination with the existing health care system and community described in the application. The same radiology group, as well as other qualified radiologists, will be available to review scans. The new location will not alter proposed charges, operating costs, or payor mix. The lease expense will remain at fair market value as determined by an independent MAI appraiser, as contemplated in the application. No changes are expected

with regard to the payments to be made from patients who received MRI services at the approved facility as a result of the change in location.

Boice-Willis LLC, like Nash Community Health Services in Nash's CON application, would not be involved in operations of the MRI scanner or diagnostic center. It would simply be the owner of the land on which the project is located. The long term ground lease would give Nash Imaging a right of first refusal to purchase the property if Boice-Willis, LLC decides to sell it. The signage on the Nash Imaging building and advertising will distinguish the diagnostic center from the nearby "immediate care center."

Nash anticipated in its CON application that inpatients at LifeCare Hospitals would be more easily served by locating the scanner on its campus, but it only projected that four patients a year would utilize the MRI scanner. The new location would not decrease the access of those few patients, who would need to be transported to another facility for MRI scans, just as they are at the present time.

### ANALYSIS

N.C. Gen. Stat. § 131E-181 states as follows:

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

Locating Nash Imaging's approved MRI scanner and diagnostic center in the new location is consistent and materially complies with the representations in the CON application.

The proposed new location will not change the purpose or scope of the project approved by the Department and will not change the person approved to acquire the MRI scanner and develop and operate the new diagnostic center. The new location is only 1.83 miles from the

original location and will be easily accessible to the patients who will need MRI scans and the physicians who will order these scans. In fact, the new location is closer to more physician offices and other health care services than the original location. Further, the new location will not alter proposed charges, operating costs, or payor mix.

Although the owner of the two sites is different, neither landowner is required to obtain a CON to ground lease their existing property to Nash Imaging and neither landowner would be involved in facility operations. Nash Imaging will still control the site on which the building is located through a ground lease. This is the same type of ground lease arrangement proposed in the application for the original location.

Nash Imaging will still acquire an open bore fixed MRI scanner as required by one of the conditions on the CON. The diagnostic center and MRI scanner will still be located in a new, free-standing building. The project will be implemented consistent with the representations in the application for a total capital expenditure \$200,000 to \$300,000 less than the amount originally proposed.

N.C.G.S. § 131E-189(b) allows the Agency to withdraw Nash's CON if Nash fails to develop the service in a manner consistent with the representations made in the application or with any conditions that were placed on the CON. Nash will not develop its project in a manner that is materially different from the representations made in its application, nor will it develop its project in a manner that is inconsistent with any of the conditions that were placed on its CON.

### **CONCLUSION**

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that locating the MRI scanner and diagnostic center approved in Project I.D. No. L-7499-06 at 921 North Winstead Avenue in Rocky Mount will not constitute a material change in

the physical location or scope of the project, will not violate N.C.G.S. § 131E-181, and will not constitute a failure to satisfy a condition of the CON in violation of N.C.G.S. § 131E-189(b).

This ruling is not intended, and should not be interpreted, to authorize an increase in the approved capital expenditure for this project, a change in the approved timetable, a change in the conditions placed on the certificate of need, a change in the management of the diagnostic center or any other change in the approved project.

This \_\_\_\_ day of August 2009.

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Jeff Horton, Acting 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 prepaid envelope addressed as follows:

**CERTIFIED MAIL**

Robert L. Wilson, Jr.  
Terrill Johnson Harris  
SMITH MOORE LEATHERWOOD LLP  
434 Fayetteville Street, Suite 2800  
Raleigh, NC 27601

This \_\_\_\_\_ day of August, 2009.

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Jesse Goodman  
Acting Chief Operating Officer