

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

**IN RE: REQUEST FOR DECLARATORY )  
RULING BY NOVANT HEALTH, INC. AND )       DECLARATORY RULING  
FORSYTH MEMORIAL HOSPITAL, INC. )  
D/B/A FORSYTH MEDICAL CENTER )  
Project I.D. No. G-7412-05 )**

I, Jeff Horton, as Acting Director of the Division of Health Service Regulation (“DHSR”), 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.

Novant Health, Inc. (“Novant”) and Forsyth Memorial Hospital, Inc. d/b/a Forsyth Medical Center (“Forsyth”) have requested a declaratory ruling allowing for a relocation of two operating rooms that were approved in a CON settlement agreement for Project I.D. No. G-7412-05 on the grounds that the change does not constitute a material change in physical location or a failure to materially comply with the representations made by Novant and Forsyth in their Certificate of Need (“CON”) application for the project. N.C.G.S. §§ 131E-181(a) and (b).

This ruling will be binding upon the Department and the entity requesting it, as long as the material facts stated herein are accurate. This ruling pertains only to the matters referenced herein. Except as provided by N.C.G.S. § 150B-4, the Department expressly reserves the right to make a prospective change in the interpretation of the statutes and regulations at issue in this Declaratory Ruling. Denise M. Gunter of Nelson Mullins Riley & Scarborough LLP has requested this ruling on behalf of Novant and Forsyth and has provided the material facts upon which this ruling is based.

## STATEMENT OF THE FACTS

In October 2005, Novant and Forsyth submitted a CON application (Project I.D. No. G-7412-05) to convert two existing gastrointestinal endoscopy rooms on the first floor of Forsyth to two shared operating rooms. The Agency disapproved the application. Novant and Forsyth filed an appeal (06 DHR 2390) and the case was settled in February 2007. Pursuant to the settlement agreement, a CON was issued effective March 6, 2007. The approved capital cost for the project is \$222,667.

Throughout the application and settlement process, Novant and Forsyth believed that the two rooms that would be converted to operating rooms already met current licensure standards for operating rooms. After the CON was issued, DHSR's Construction Section informed Forsyth that these rooms would not meet current licensure requirements for operating rooms found in 10A NCAC 13B.6206, and that extensive additional construction was required to convert the space to two operating rooms.

Forsyth explored three different options for the implementation of the project. However, Novant and Forsyth estimate that the capital cost to bring existing space up to operating room standards would be between \$1,030,025 and \$2,616,508. Since any of these options involve a capital expense well over 115% of the approved capital costs, Novant and Forsyth would need to obtain a new CON for the cost overrun.

In July 2007, Novant and Forsyth were approved in a separate settlement agreement to develop Forsyth Medical Center-Kernersville ("Kernersville"), Project I.D. No. G-7604-06, a 50 bed hospital containing four shared operating rooms relocated from other campuses. The settlement agreement authorizes, among other things, the relocation of three existing operating rooms from Forsyth's Winston-Salem campus and one operating room from the Medical Park

Hospital campus. Kernersville is proposed to be licensed under Forsyth's hospital license. Neither the Kernersville application nor the settlement agreement identified which of the three shared operating rooms at Forsyth's Winston-Salem campus would be moved to Forsyth's Kernersville campus.

Novant and Forsyth request a declaratory ruling to change the location of the two new shared operating rooms authorized in Project I.D. No. G-7412-05 from Forsyth's Winston-Salem campus to Forsyth's Kernersville campus ("alternate site"). In other words, Novant and Forsyth request that the two rooms that they were approved to convert from gastrointestinal rooms to shared operating rooms become two of the three operating rooms approved in settlement for Forsyth to move from their Winston-Salem campus to their Kernersville campus. Novant and Forsyth also request a determination that development of the two new shared operating rooms on the Kernersville campus, in lieu of relocating two other existing operating rooms from the Winston-Salem campus, is in material compliance with the certificate of need issued for Project I.D. No. G-7604-06.

### **ANALYSIS**

The CON law would require a full review of Novant's and Forsyth's proposed change of site if that change were to represent a material change in the physical location or scope of the project. N.C.G.S. § 131E-181(a). The proposed change of site from Forsyth's Winston-Salem campus to its Kernersville campus for Project ID No. G-7412-05 does not constitute a material change in the physical location, the defined scope or persons named in either application. The persons named in Project I.D. No. G-7412-05 and Project I.D. No. G-7604-06 are identical, i.e., Novant and Forsyth. According to Novant and Forsyth, there will be no increases in costs or charges to the public for the provision of surgical services as a result of this declaratory ruling.

Additionally, the CON for Project I.D. No. G-7604-06 authorizes the relocation of three existing operating rooms from Forsyth's Winston-Salem campus but does not specify which shared operating rooms are to be relocated. Further, the proposed change will not alter the total number of licensed operating rooms developed under Forsyth's license or cause the number of licensed operating rooms on either the Winston-Salem or Kernersville campus to change

N. C. Gen. Stat. § 131E-189(b) allows the Agency to withdraw Petitioners' CON if Petitioners fail 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. Petitioners will not be developing their project in a manner that is materially different from the representations made in its application, nor will they be developing their project in a manner that is inconsistent with any of the conditions that were placed on their CON.

### **CONCLUSION**

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that relocation of the two new shared operating rooms approved as part of Project I.D. No. G-7412-05 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). Additionally, I conclude that development of the two new shared operating rooms on the Kernersville campus, in lieu of relocating two other existing operating rooms from the Winston-Salem campus, is in material compliance with the certificate of need issued for Project I.D. No. G-7604-06.

This ruling is not intended, and should not be interpreted, to authorize, for either project, any increases in the approved capital expenditures, any changes in the approved timetables, any

changes in the conditions placed on the certificates of need, or any other changes in the approved projects.

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

---

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

**CERTIFIED MAIL**

Denise M. Gunter  
Nelson Mullins Riley & Scarborough LLP  
380 Knollwood Street, Suite 530  
Winston-Salem, NC 27103

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

---

Jesse Goodman  
Acting Chief Operating Officer