

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

IN RE: REQUEST FOR)	
DECLARATORY RULING BY REX)	DECISION TO DECLINE TO
SURGERY CENTER OF CARY, LLC AND)	ISSUE DECLARATORY
REX HOSPITAL, INC.)	RULING

Rex Surgery Center of Cary, LLC (“RSCC”) and Rex Hospital, Inc. (“Rex Hospital”) (collectively the “Rex Entities”) has filed a Declaratory Ruling Request (the “Request”) asking the North Carolina Department of Health and Human Services (“Department”) to issue a ruling as to the applicability of 10A N.C.A.C. 14C.0502 and N.C.G.S. § 131E-189 to the facts described below. Pursuant to N.C.G.S. § 150B-4, 10A N.C.A.C. 14A.0108, and the authority delegated to me by the Secretary of the Department, and for the reasons given below, I hereby decline to issue any ruling to the Rex Entities.

Gary S. Qualls of K&L Gates has requested this ruling on behalf of the Rex Entities and has provided the statement of facts upon which this ruling is based. The material facts as provided by counsel for the Rex Entities are set out below.

STATEMENT OF THE FACTS

RSCC, Rex Hospital, and Rex Cary MOB, LLC (“Rex MOB”) were awarded a Certificate of Need (“CON”) to reorganize four of Rex Hospital’s hospital-based operating rooms into a separately licensed free-standing ambulatory surgery center (“ASC”), pursuant to CON Project I.D. No. J-7878-07. The Rex Entities are requesting a ruling approving, without a CON, an intra-corporate restructuring such that Rex Hospital will transfer its CON rights associated with the four operating rooms to its subsidiary RSCC, the entity that has, at all times, been projected to be responsible for the operation of the ASC. In the alternative, the Rex Entities

assert that even if the proposed transaction was construed to constitute a transfer, the Agency should find good cause for the transfer under N.C.G.S. § 131E-189. The Rex Entities claim that good cause exists because there would be no real change in ownership or control under the new arrangement, and nothing about the transfer would affect the ability to materially comply with any representations in the ASC Application. Other than removing Rex Hospital in favor of its controlled affiliate, RSCC who is already listed on the CON and contemplated as the long-term lessee of the operating room rights, no other change is occurring.

ANALYSIS

The North Carolina Administrative Procedure Act (“APA”) provides that:

On request of a person aggrieved, an agency shall issue a declaratory ruling . . . as to the applicability to a given state of facts of a statute administered by the agency . . . except when the agency for good cause finds issuance of a ruling undesirable.

N.C.G.S. § 150B-4. The APA also provides that an agency “shall prescribe in its rules the circumstances in which rulings shall or shall not be issued.” *Id.* Consequently, the Department has adopted a rule that provides that:

Whenever the Director [of the Division of Health Service Regulation] believes for good cause that the issuance of a declaratory ruling will not serve the public interest, he may refuse to issue one. When good cause is deemed to exist, the Director will notify the petitioner of his decision in writing stating reasons for the denial of a declaratory ruling.

10A N.C.A.C. 14A .0103.

I find that issuing a ruling under such circumstances would not serve the public interest, because the issue has already been addressed by the Chief of the Certificate of Need Section in a letter dated December 6, 2010 and attached hereto as Exhibit A.

CONCLUSION

For the reasons given above, I decline to issue any ruling in response to the Request for Declaratory Ruling filed by the Rex Entities.

This ____ day of January, 2011.

Drexdal 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 prepaid envelope addressed as follows:

CERTIFIED MAIL

With a courtesy copy to:

Gary S. Qualls
K&L Gates, L.L.P.
430 Davis Drive, Suite 400
Morrisville, NC 27560

Terrill Johnson Harris
Smith Moore Leatherwood LLP
PO Box 21927
Greensboro, NC 27420

This _____ day of January, 2011.

Jeff Horton
Chief Operating Officer