

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

**IN RE: REQUEST FOR DECLARATORY )  
RULING BY FORSYTH MEMORIAL )  
HOSPITAL, INC. d/b/a FORSYTH MEDICAL )       DECLARATORY RULING  
CENTER )  
Project I.D. No. G-7919-07 )**

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.

Forsyth Memorial Hospital, Inc. d/b/a Forsyth Medical Center (“Petitioner”) has requested a declaratory ruling that allows a change in location for a fixed MRI scanner, contending that the change would not constitute a change in scope for purposes of N.C. Gen. Stat. § 131E-181 and that the location change would not affect Forsyth’s material compliance with representations made in the CON application or the conditions imposed upon the CON. The CON law would require a full review of Forsyth’s proposal if it represented a material change in the physical location or scope of the project. N.C. Gen. Stat. § 131E-181(a). 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 Petitioners and has provided the material facts upon which this ruling is based.

### **STATEMENT OF THE FACTS**

On November 28, 2007, the CON Section issued a CON to Forsyth to acquire a third fixed MRI scanner, to be installed at Forsyth Medical Center, 3333 Silas Creek Parkway, Winston-Salem, NC 27103.

Since that time, Forsyth has concluded that locating a third fixed MRI scanner inside Forsyth Medical Center is not the most effective option for two reasons: (1) the existing fixed MRI scanners in Forsyth Medical Center are able to accommodate existing volumes and are projected to be able to accommodate this volume for the foreseeable future; and (2) space constraints within the hospital make installing a third MRI scanner within Forsyth Medical Center impractical.

Forsyth has determined that the best location for the MRI scanner is inside Kernersville Medical Center, which opened on March 16, 2011.

According to its request, Forsyth plans to buy the scanner and perform the necessary construction at Kernersville Medical Center to accommodate it prior to March 17, 2012.

### **ANALYSIS**

N.C. Gen. Stat. § 131E-176(16)e. states that a “new institutional health service” includes:

a change in a project that was subject to certificate of need review and for which a certificate of need was issued, if the change is proposed during the development of the project or within one year after the project was completed. For purposes of this subdivision, a change in a project is a change of more than fifteen percent (15%) of the approved capital expenditure amount or the addition of a health service that is to be located in the facility, or portion thereof, that was constructed or developed in the project.

Based on N.C. Gen. Stat. § 131E-176(16)e., the request made by Forsyth to relocate an unimplemented fixed MRI scanner from its approved location at Forsyth Medical Center to Kernersville Medical Center must be denied.

Forsyth acknowledges in its request that Kernersville Medical Center, where they propose to relocate the unimplemented fixed MRI scanner, opened on March 16, 2011.

Forsyth argues in its request that N.C. Gen. Stat. § 131E-176(16)e. is not applicable because Forsyth does not plan to implement the scanner until one year after Kernersville Medical Center is open. However, a strict reading of the statute leaves no doubt that if the change is proposed (emphasis added) during the development of the project or within one year after the project is completed (emphasis added), it constitutes a new institutional health service, for which a CON is required.

Also, Forsyth makes it clear in their Request that they plan to purchase the scanner and begin construction at Kernersville Medical Center to house it within one year of the Center's completion, which means that Forsyth proposes to purchase the scanner and start construction before March 17, 2012 (i.e., one year after Kernersville Medical Center opened). (See footnote 1 in request) N.C. Gen. Stat. § 131E-178(c) states:

No person shall incur an obligation for a capital expenditure which is a new institutional health service without first obtaining a certificate of need from the Department. An obligation for a capital expenditure is incurred when: (1) An enforceable contract, excepting contracts which are expressly contingent upon issuance of a certificate of need, is entered into by a person for the construction, acquisition, lease or financing of a capital asset; (2) A person takes formal action to commit funds for a construction project undertaken as his own contractor; or (3) In the case of donated property, the date on which the gift is completed.

The change in location of the scanner from Forsyth Medical Center to Kernersville Medical Center does by definition constitute the establishment of a new institutional health

service. Therefore, based on N.C. Gen. Stat. § 131E-178(c), Forsyth is unable to incur an obligation for a capital expenditure to begin construction at Kernersville Medical Center to accommodate the scanner, whether it enters into an agreement with a contractor to perform the work, or whether it commits funds and performs as its own contractor, without first obtaining a CON.

**CONCLUSION**

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that the proposed change in location for the approved, but unimplemented fixed MRI scanner from Forsyth Medical Center to Kernersville Medical Center would at this time constitute the creation of a new institutional health service pursuant to N.C. Gen. Stat. § 131E-176(16)e., and therefore must be denied.

This the \_\_\_\_\_ day of October, 2011.

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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 pre-paid envelope addressed as follows:

**CERTIFIED MAIL**

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

This the \_\_\_\_\_ day of October, 2011.

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Jeff Horton  
Chief Operating Officer