

**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)	DECLARATORY RULING
SURGERY CENTER, LLC)	
Project I.D. No. J-8616-10)	

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 _____ day of February, 2013.

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

CERTIFIED MAIL

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

This the _____ day of February, 2013.

Dr. Patsy Christian, Assistant Director
Healthcare, Quality and Safety