



North Carolina Department of Health and Human Services  
Division of Health Service Regulation

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Division Director

February 1, 2013

Sarah M. Johnson  
Wyrick Robbins Yates & Ponton, LLP  
PO Drawer 17803  
Raleigh, NC 27619

**Exempt from Review – Acquisition of Facility**

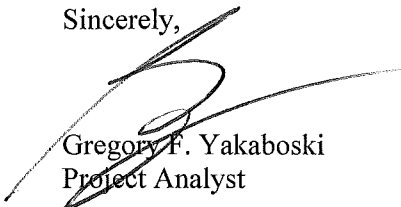
Facility: Cape Fear Center for Digestive Diseases, P.A.'s licensed ambulatory surgical center  
Acquisition by: Digestive Health Endoscopy Center, LLC of the licensed ambulatory surgical center  
County: Cumberland  
License #AS0123  
FID #: 080260


Dear Ms. Johnson:

In response to your letter of January 17<sup>th</sup>, 2013, the above referenced proposal is exempt from certificate of need review in accordance with N.C.G.S 131E-184(a)(8). Therefore, Digestive Health Endoscopy Center, LLC may proceed to acquire the above referenced health service facility without first obtaining a certificate of need. However, you need to contact the Acute and Home Care Licenser and Certification Section of the Division of Health Service Regulation to obtain instructions for changing ownership of the existing facility. Note that pursuant to N.C.G.S. §131E-181(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."*

It should be noted that this Agency's position is based solely on the facts represented by you and that any change in facts as represented would require further consideration by this Agency and a separate determination. If you have any questions concerning this matter, please feel free to contact this office.

Sincerely,

  
Gregory F. Yakaboski  
Project Analyst

  
Craig R. Smith, Chief  
Certificate of Need Section

cc: Acute and Home Care Licensure and Certification Section, DHSR



**Certificate of Need Section**

www.ncdhhs.gov

Telephone 919-855-3873 • Fax 919-733-8139

Location: Edgerton Building • 809 Ruggles Drive • Raleigh, NC 27603

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SARAH M. JOHNSON  
sjohnson@wyrick.com

January 17, 2013

**VIA HAND DELIVERY**

Mr. Craig R. Smith, Chief  
Certificate of Need Section  
Division of Health Service Regulation  
North Carolina Department of Health & Human Services  
809 Ruggles Drive  
Raleigh, NC 27603

Re: Notice of Exempt Acquisition of Cape Fear Center for Digestive Diseases, P.A.'s  
licensed ambulatory surgical center (License #AS0123)

Dear Mr. Smith:

This letter shall serve as prior written notice that Cape Fear Center for Digestive Diseases, P.A. ("CFCDD") is spinning off the ownership of its licensed ambulatory surgical center ("ASC") to a newly created entity, Digestive Health Endoscopy Center, LLC ("DHEC").<sup>1</sup> The spin-off transaction will have two steps: The first step will be for CFCDD to drop all of the assets of the ASC into DHEC in exchange for all of DHEC's equity interests. This will result in DHEC initially being a wholly-owned subsidiary of CFCDD.

The second step will be a distribution of CFCDD's equity interests in DHEC to CFCDD's shareholders. The end result will be two separate companies (CFCDD and DHEC), each owned by CFCDD's existing shareholders. Please note that this transaction is structured as a tax-free spin-off in a manner that satisfies the requirements for a nontaxable distribution under Section 355 of the Internal Revenue Code of 1986, as amended. Under N.C. Gen. Stat. § 55B-6(b), a professional corporation may temporarily have a subsidiary as part of a Section 355 spin-off.

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<sup>1</sup> CFCDD's ASC became licensed without a certificate of need because it had two gastrointestinal endoscopy rooms in operation as of August 31, 2005. Please see the enclosed December 1, 2006 Declaratory Ruling setting forth CFCDD's history.

Mr. Craig R. Smith  
January 17, 2013  
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At the conclusion of the transaction, CFCDD's shareholders will receive an equity interest in DHEC that mirrors their interests in CFCDD. Prior to the transaction, CFCDD's shareholders will have owned the endoscopy center through CFCDD. After the transaction is complete, CFCDD's shareholders will own the endoscopy center through DHEC. Thus, although DHEC will be acquiring the ASC, the effective ownership of the ASC will remain the same. In addition, there will be no changes in the location or manner of operation of the ASC. A graphical representation depicting the transaction as well as the ownership of ASC before and after the transaction is enclosed for your reference.

Under North Carolina's certificate of need ("CON") law, the acquisition of "an existing health service facility, including equipment owned by the health service facility at the time of acquisition[,] is exempt from CON review. N.C. Gen. Stat. § 131E-184(a)(8). An ASC falls within the definition of a "health service facility." See N.C. Gen. Stat. § 131E-176(9b).

Please confirm that the above-described acquisition is exempt from CON review. Once we receive such confirmation, we will contact the Licensure and Certification Section and take the necessary steps to finalize the change of ownership. Please do not hesitate to contact me with any questions or requests for further information.

With best regards.

Sincerely,

WYRICK ROBBINS YATES & PONTON LLP



Sarah M. Johnson



North Carolina Department of Health and Human Services  
Division of Facility Services  
Office of the Director

2701 Mail Service Center • Raleigh, North Carolina 27699-2701

Michael F. Easley, Governor  
Carmen Hooker Odom, Secretary

Robert J. Fitzgerald, Director  
Phone: 919-855-3750  
Fax: 919-733-2757

December 1, 2006

CERTIFIED MAIL

Rakesh Gupta, M.D.  
Cape Fear Center for Digestive Diseases, P.A.  
Post Office Box 87388  
Fayetteville, North Carolina 28304

Re: Declaratory Ruling for Cape Fear Center for Digestive Diseases, P.A.  
Cumberland County

Dear Dr. Gupta:

I am enclosing a Declaratory Ruling that you requested in your letter received on November 15, 2006. If questions arise, do not hesitate to let me know.

Sincerely,

Robert J. Fitzgerald

RJF:JH:peb

Enclosure

cc: Jeff Horton, Chief Operating Officer, DFS  
Azzie Conley, Chief, Acute and Home Care Licensure & Certification Section  
William Warren, Chief, Construction Section  
Marc Lodge, Special Deputy Attorney General, DOJ



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

**IN RE: REQUEST FOR DECLARATORY )  
RULING BY CAPE FEAR CENTER FOR )     DECLARATORY RULING  
DIGESTIVE DISEASES, P.A.         )**

I, Robert J. Fitzgerald, Director of the Division of Facility Services (the "Department"), do hereby issue this Declaratory Ruling to Cape Fear Center for Digestive Diseases, P.A. ("CFCDD") pursuant to N.C.G.S. § 150B-4 and 10A NCAC 14A .0310, and the authority granted to me by the Secretary of the Department of Health and Human Services. CFCDD is seeking a declaratory ruling that the two new gastrointestinal endoscopy rooms at the planned new CFCDD endoscopy center (the "New Facility"), which is to be located within a two-mile radius of its current facility in Fayetteville, North Carolina, be considered eligible for licensure as an ambulatory surgical facility without a certificate of need as provided in N.C.G.S. § 131E-178(a), based on the affidavit it submitted before October 31, 2005 stating that it had two endoscopy rooms in operation as of August 31, 2005.

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. Rakesh Gupta, M.D., President of CFCDD, has requested this ruling on behalf of same and has provided the facts upon which this ruling is based.

**STATEMENT OF THE FACTS**

As of August 31, 2005, CFCDD had two gastrointestinal endoscopy rooms in operation at its location at 1880 Quiet Cove in Fayetteville, North Carolina. An affidavit to that effect was

submitted to the Division of Facility Services before October 31, 2005, thus meeting the initial requirement toward qualifying a gastrointestinal endoscopy room for licensing as an ambulatory surgical facility without the issuance of a certificate of need pursuant to N.C.G.S. § 131E-178(a). CFCDD has determined the best option for the licensed facility is new construction, and it is in the planning process for construction of a new endoscopy center within a two-mile radius of its existing facility. CFCDD has submitted a schematic of the New Facility.

#### ANALYSIS

In essence, CFCDD's request for a declaratory ruling asks that, based on the affidavit submitted for the two existing gastrointestinal endoscopy rooms at the current Quiet Cove location, it be allowed to seek licensure of the two gastrointestinal endoscopy rooms at the New Facility without the issuance of a certificate of need.

In reviewing the request I have considered the purpose of the certificate of need law and the intent expressed by N.C.G.S. § 131E-178(a) concerning gastrointestinal endoscopy rooms, and I find that it is appropriate to grant the declaratory ruling that CFCDD has requested subject to the following condition:

The two gastrointestinal endoscopy rooms to be located at the New Facility are to be developed *in place of* the two existing gastrointestinal endoscopy rooms located at 1880 Quiet Cove and *not in addition to* the two existing gastrointestinal endoscopy rooms. At such time as the two gastrointestinal endoscopy rooms located at the New Facility become operational, the two gastrointestinal endoscopy rooms located at 1880 Quiet Cove will be closed and no longer used as gastrointestinal endoscopy rooms.

**CONCLUSION**

For the foregoing reasons, and assuming the statements of fact in the request to be true, I conclude that the affidavit filed by CFCDD may be used to license the New Facility, and that CFCDD may apply for an ambulatory surgical facility license for at the New Facility without the issuance of a certificate of need, subject to all other applicable conditions for that license. I also conclude that once the New Facility is operational, CFCDD cannot continue to operate the two gastrointestinal endoscopy rooms located at 1880 Quiet Cove in Fayetteville.

This ruling is not intended, and should not be interpreted, to authorize any increase in the number of gastrointestinal endoscopy rooms CFCDD owns or operates.

This is the 1<sup>st</sup> day of December, 2006.

  
Robert J. Fitzgerald, Director  
Division of Facility 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

Rakesh Gupta, M.D.  
Cape Fear Center for Digestive Diseases, P.A.  
Post Office Box 87388  
Fayetteville, NC 28304

This the 1<sup>st</sup> day of December, 2006.

  
\_\_\_\_\_  
Jeff Horton  
Chief Operating Officer



