



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

Pat McCrory
Governor

Aldona Z. Wos, M.D.
Ambassador (Ret.)
Secretary DHHS

Drexdal Pratt
Division Director

May 12, 2015

S. Todd Hemphill
301 Fayetteville Street, Suite 1900
Raleigh, NC 27601

No Review

Facility: Viewmont Surgery Center
Project Description: Add multiple new indirect owners to the ownership management structure for Viewmont Surgery Center
County: Catawba
FID #: 070688

Dear Mr. Hemphill:

The Healthcare Planning and Certificate of Need Section, Division of Health Service Regulation (Agency) received your letter of April 14, 2015, regarding the above referenced proposal. Based on the CON law **in effect on the date of this response to your request**, the proposal described in your correspondence is not governed by, and therefore, does not currently require a certificate of need. However, please note that if the CON law is subsequently amended such that the above referenced proposal would require a certificate of need, this determination does not authorize you to proceed to develop the above referenced proposal when the new law becomes effective.

It should be noted that this determination is binding only for the facts represented in your correspondence. Consequently, if changes are made in the project or in the facts provided in your correspondence referenced above, a new determination as to whether a certificate of need is required would need to be made by this office. Changes in a project include, but are not limited to: (1) increases in the capital cost; (2) acquisition of medical equipment not included in the original cost estimate; (3) modifications in the design of the project; (4) change in location; and (5) any increase in the number of square feet to be constructed.

Please contact this office if you have any questions. Also, in all future correspondence you should reference the Facility ID # (FID) if the facility is licensed.

Sincerely,

Julie Halatek
Project Analyst

Martha J. Frisone
Assistant Chief, Certificate of Need

Healthcare Planning and Certificate of Need Section

www.ncdhhs.gov

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

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

Mailing Address: 2704 Mail Service Center • Raleigh, NC 27699-2704

An Equal Opportunity/ Affirmative Action Employer





Poyner Spruill^{LLP}

April 14, 2015

S. Todd Hemphill
Partner
D: 919.783.2958
F: 919.783.1075
themphill@poynerspruill.com

VIA HAND DELIVERY

Ms. Martha Frisone, Assistant Chief, Certificate of Need
Julie Halatek, Project Analyst
Healthcare Planning and Certificate of Need Section
Division of Health Service Regulation
N.C. Department of Health and Human Services
809 Ruggles Drive
Raleigh, NC 27603

RE: Request for No Review Determination – Change of ownership interest in Viewmont Surgery Center, LLC

Dear Ms. Frisone and Ms. Halatek:

We are submitting this letter on behalf of Frye Regional Medical Center, Inc. ("Frye"), Tenet Healthcare Corporation ("Tenet"), and United Surgical Partners International Inc. ("USPI"), regarding a proposed change in the ownership interests of Viewmont Surgery Center, LLC ("VSC").

VSC owns Viewmont Surgery Center, a licensed and certified ambulatory surgical facility within the meaning of N.C. Gen. Stat. §131E-176(1b) (the "Viewmont ASC"), which operates three (3) operating rooms pursuant to a certificate of need ("CON") issued November 14, 2005. See Exhibit A hereto. Frye owns a 56.7% membership interest in VSC, and Frye is in turn a wholly-owned subsidiary of Tenet. The remaining 43.3% interest in VSC is held by physician investors and the management company managing the facility. An organization chart showing the current ownership and operational interests in the Viewmont ASC is attached as Exhibit B.

The purpose of this letter is to notify you of a proposed transaction which, upon closing, will result in a change in the ownership interests of VSC. Specifically, Tenet and USPI have entered into an agreement to combine their ambulatory surgery and imaging centers nationwide. All of those facilities will be indirectly owned by BB Blue Holdings, Inc., a new joint venture entity ("BB Blue"). The Viewmont ASC will be one of the facilities included in this transaction. At closing, which is scheduled to occur on or about May 1, 2015, (1) Frye will transfer its 56.7% ownership interest in VSC to National Surgery Center Holdings, Inc. ("National Surgery"), which is currently a wholly owned subsidiary of Tenet; and (2) Tenet will contribute the interests of National Surgery into BB Blue, which will be owned 50.1 % by a separate wholly-owned subsidiary of Tenet and 49.9% by USPI. An organization chart showing the projected ownership and operational interests in the Viewmont ASC after the transaction is complete is attached as Exhibit C.

As part of their due diligence in finalizing this transaction, Frye, Tenet and USPI have requested that we obtain, on their behalves, a no review determination regarding the transfer of Frye's majority interest in VSC.

Ms. Frisone
Ms. Halatek
April 14, 2015
Page 2

The acquisition by National Surgery of Frye's membership interest in VSC will not cause any change in the direct ownership or day-to-day operations of the Viewmont ASC. VSC will continue to be the owner of the Viewmont ASC. The Viewmont ASC will continue to have the same name, tax identification number, and provider numbers. The Viewmont ASC will also continue to have the same management and personnel. In short, nothing will change operationally or structurally for the Viewmont ASC as a result of the acquisition of Frye's membership interest in VSC.

The CON Law provides that no person shall offer or develop a "new institutional health service" without first obtaining a CON. N.C. Gen. Stat. §131E-178. However, none of the components of the "new institutional health service" definition address, directly or indirectly, the acquisition of ownership interests in an organization that already is operating a health service. This type of transaction is among the activities that are "administrative and other activities that are not integral to clinical management," and which are specifically excluded from the definition of "health service" in the CON Law. N.C. Gen. Stat. §131E-176(9a). Therefore, the proposed acquisition does not involve a new institutional health service and should not be subject to CON Review.

In prior declaratory rulings and no review determinations, the Department and the CON Section have consistently recognized that transactions which are limited to an acquisition of underlying corporate membership interests in an existing legal entity which owns and operates an existing health service facility, such as the proposed acquisition, fall within the above-referenced exclusion recognized in the definition of "health service" in the CON Law. Two relatively recent determinations in this regard are discussed below.

- On August 8, 2012, the CON Section issued a no review determination letter (attached as Exhibit D)¹ finding that Cammeby's Equity Holdings, LLC's acquisition of the ownership interests in the corporate entities that owned thirty two (32) existing nursing facilities in North Carolina and the associated equipment located in those facilities was not a new institutional health service and did not require a CON.
- On January 6, 2012, the CON Section issued a no review determination letter (attached as Exhibit E) finding that North Carolina Radiation Therapy Management Services, LLC's acquisition of the ownership interests in the corporate entities that owned an existing oncology treatment center and the associated equipment located in Asheville, North Carolina, was not a new institutional health service and did not require a CON.

In the alternative, should the CON Section determine that the transfer of Frye's membership interest in VSC is a new institutional health service, such transfer nevertheless would constitute the acquisition of an existing health service facility, which would be exempt from CON review pursuant to N.C. Gen. Stat. §131E-184(a)(8). The project approved in the original CON issued to VSC was completed in 2007, and there are no pending CON applications or approved but not yet developed CONs related to the Viewmont ASC. Therefore, transfer of control of the facility does not warrant withdrawal of the CON under N.C. Gen. Stat. §131E-189, because the transfer will have occurred "after the completion of the project or the operation of the facility." 10A N.C.A.C. 14C.0502(e).

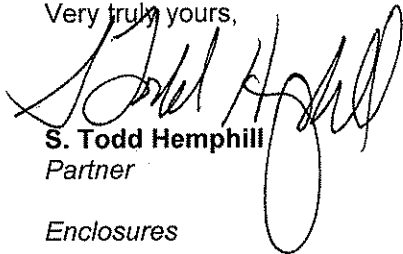
¹ The proponents' no review requests (without exhibits) are also attached to the CON Section determinations in Exhibit D and Exhibit E.

Ms. Frisone
Ms. Halatek
April 14, 2015
Page 3

Consequently, for the above reasons, we request that the CON Section either (1) issue a no review letter, determining that the proposed acquisition, as described above, is not governed by the CON Law, or (2) issue a letter confirming that the proposed acquisition is exempt from CON review pursuant to N.C. Gen. Stat. §131E-184(a)(8).

As noted, the projected closing of this transaction is May 1, 2015. Therefore, we would very much appreciate your prompt response to this letter. As always, please feel free to contact us if you should have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. Todd Hemphill". The signature is written in a cursive style with a large, looping flourish at the end.

S. Todd Hemphill
Partner

Enclosures

cc w/enc: Lane Wood, Esq. (via e-mail only)

STATE OF NORTH CAROLINA
Department of Health and Human Services

Division of Facility Services

CERTIFICATE OF NEED

for

Project Identification Number E-7051-04

FID#943182

ISSUED TO: Frye Regional Medical Center
420 North Center Street
Hickory, NC 28601

Pursuant to N.C. Gen. Stat. § 131E-175, et. seq., the North Carolina Department of Health and Human Services hereby authorizes the person or persons named above (the "certificate holder") to develop the certificate of need project identified above. The certificate holder shall develop the project in a manner consistent with the representations in the project application and with the conditions contained herein and shall make good faith efforts to meet the timetable contained herein. The certificate holder shall not exceed the maximum capital expenditure amount specified herein during the development of this project, except as provided by N.C. Gen. Stat. § 131E-176(16)e. The certificate holder shall not transfer or assign this certificate to any other person except as provided in N.C. Gen. Stat. § 131E-189(c). This certificate is valid only for the scope, physical location, and person(s) described herein. The Department may withdraw this certificate pursuant to N.C. Gen. Stat. § 131E-189 for any of the reasons provided in that law.

SCOPE: Frye Regional Medical Center shall develop a separately licensed ambulatory surgical facility that shall include no more than three existing ambulatory surgical operating rooms currently located at Viewmont Surgery Center, L.L.C./Catawba County

CONDITIONS: See Reverse Side

PHYSICAL LOCATION: Frye Regional Medical Center
d/b/a Viewmont Surgery Center, LLC
50-13th Avenue NE
Hickory, NC 28602

MAXIMUM CAPITAL EXPENDITURE: \$0

TIMETABLE: See Reverse Side

FIRST PROGRESS REPORT DUE: February 28, 2006

This certificate is effective as of the 14th day of November, 2005.


Gerald Hoffman
Chief, Certificate of Need Section
Division of Facility Services

EXHIBIT

A

CONDITIONS

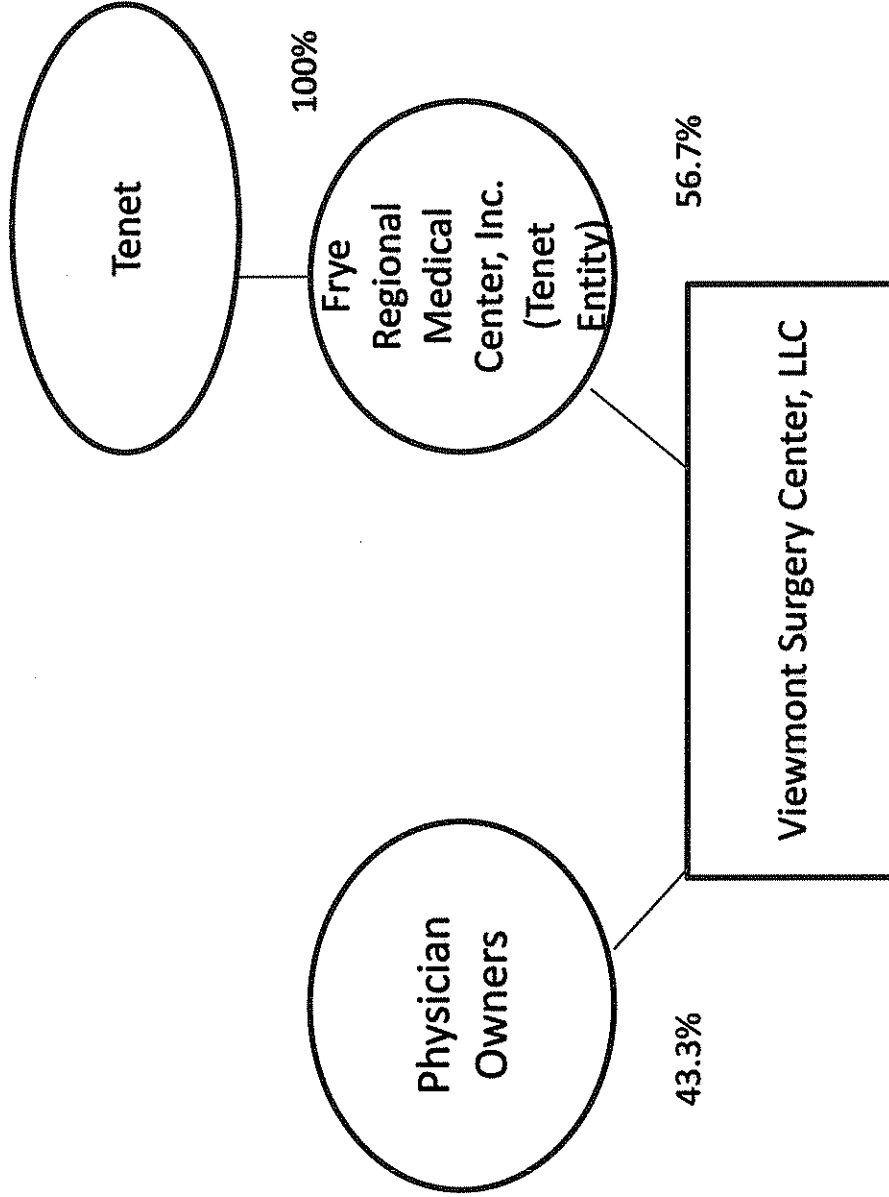
1. Frye Regional Medical Center d/b/a Viewmont Surgery Center, LLC shall materially comply with all representations made in its certificate of need application.
2. Frye Regional Medical Center d/b/a Viewmont Surgery Center, LLC shall develop a separately licensed ambulatory surgical facility that shall include no more than three existing ambulatory surgical operating rooms which are already located at 50-13th Avenue, NE in Hickory.
3. Frye Regional Medical Center d/b/a Viewmont Surgery Center, LLC shall not acquire, as part of this project, any equipment that is not included in the project's proposed capital expenditure in Section VIII of the application or that would otherwise require a certificate of need.
4. Frye Regional Medical Center d/b/a Viewmont Surgery Center, LLC shall reduce charges to its patients and third party payors by at least fifteen percent, as specified in its application.
5. Frye Regional Medical Center d/b/a Viewmont Surgery Center, LLC shall acknowledge acceptance of and agree to comply with all conditions stated herein to the Certificate of Need Section in writing prior to issuance of the certificate of need.

A letter acknowledging acceptance of and agreeing to comply with all conditions stated in the conditional approval letter was received by the Certificate of Need Section on November 24, 2004.

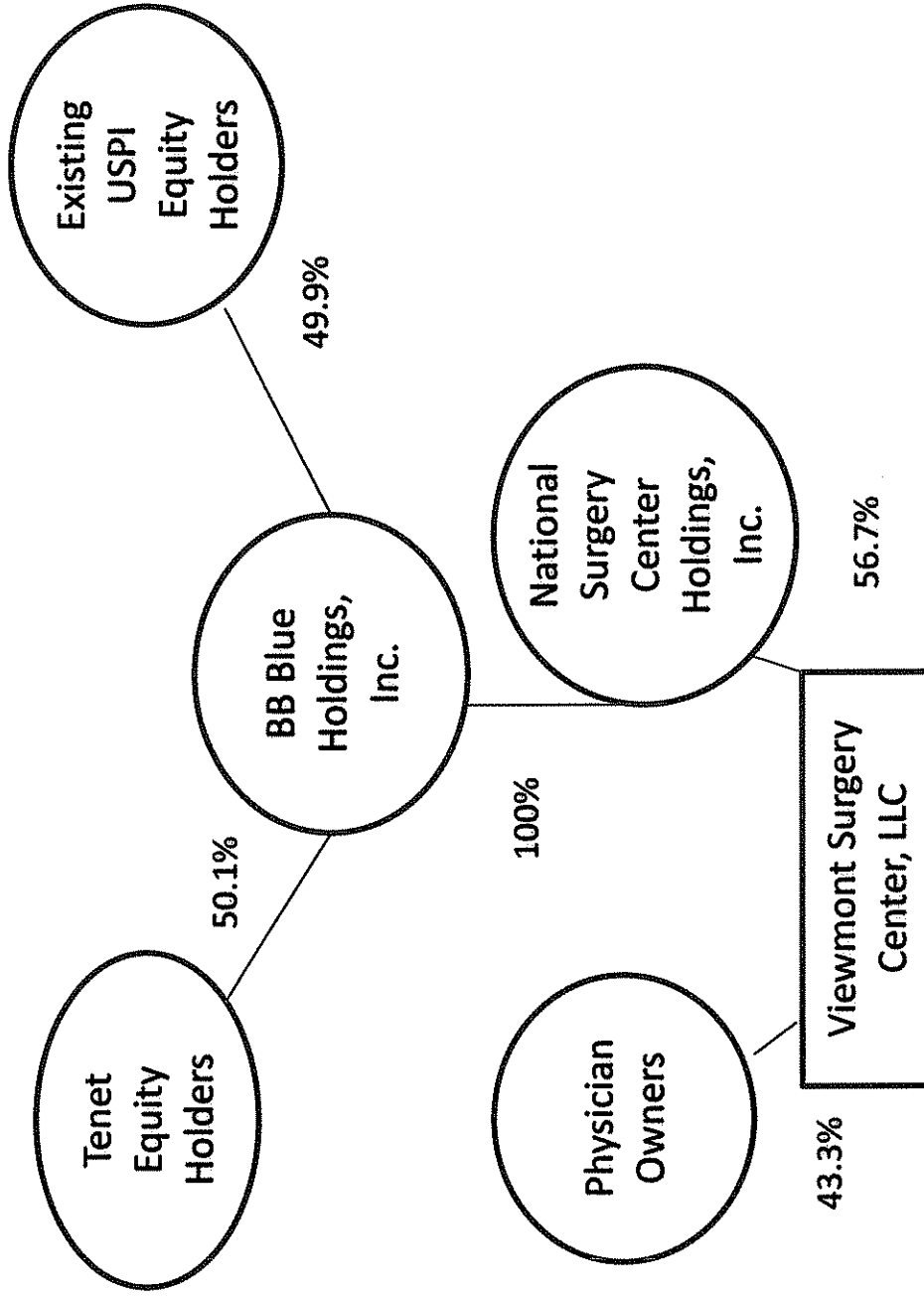
TIMETABLE

Licensure and Certification of Facility/Offering of Services _____ March 1, 2006

Prior to USPI Transaction



After USPI Transaction





North Carolina Department of Health and Human Services
Division of Health Service Regulation
Certificate of Need Section

2704 Mail Service Center • Raleigh, North Carolina 27699-2704
<http://www.ncdhhs.gov/dhsr/>

Drexdal Pratt, Director

Beverly Eaves Perdue, Governor
Albert A. Delia, Acting Secretary

Craig R. Smith, Section Chief
Phone: (919) 855-3873
Fax: (919) 733-8139

August 8, 2012

S. Todd Hemphill
Bode, Call & Stroupe, LLP
3105 Glenwood Ave, Suite 300
Raleigh NC 27612

RE: No Review / SVCare Holdings, LLC / Acquisition of membership interests of SVCare Holdings, LLC by Cammeby's Equity Holdings, LLC

Dear Mr. Hemphill:

The Certificate of Need (CON) Section received your letter of July 13, 2012 regarding the above referenced proposal. Based on the CON law **in effect on the date of this response to your request**, the proposal described in your correspondence is not governed by, and therefore, does not currently require a certificate of need. However, please note that if the CON law is subsequently amended such that the above referenced proposal would require a certificate of need, this determination does not authorize you to proceed to develop the above referenced proposal when the new law becomes effective.

It should be noted that this determination is binding only for the facts represented by you. Consequently, if changes are made in the project or in the facts provided in your correspondence referenced above, a new determination as to whether a certificate of need is required would need to be made by the Certificate of Need Section. Changes in a project include, but are not limited to: (1) increases in the capital cost; (2) acquisition of medical equipment not included in the original cost estimate; (3) modifications in the design of the project; (4) change in location; and (5) any increase in the number of square feet to be constructed.

In addition, you should contact the Nursing Home Licensure and Certification Section to determine if they have any requirements for development of the proposed project. Please contact the CON Section if you have any questions.

Sincerely,

Michael J. McKillip
Project Analyst

Craig R. Smith, Chief
Certificate of Need Section

cc: Nursing Home Licensure and Certification Section, DHSR



BODE, CALL & STROUPE, L.L.P.

ATTORNEYS AT LAW

3105 GLENWOOD AVENUE, SUITE 300
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S. TODD HEMPHILL
MATTHEW A. FISHER

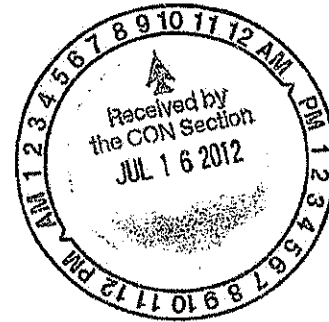
JOHN V. HUNTER III
RETIRED

MAILING ADDRESS
POST OFFICE BOX 6338
RALEIGH, NORTH CAROLINA
27628-6338

July 13, 2012

VIA HAND DELIVERY

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



Re: Request for No Review Determination – Acquisition of ownership interest in the parent company of entities that own certain nursing facilities in North Carolina

Dear Mr. Smith:

We are submitting this letter on behalf of our client, Cammeby's Equity Holdings, LLC ("Cam Equity"), regarding its planned acquisition of the membership interests of SVCare Holdings, LLC ("SVCare"), which is the "great grandparent" (3rd tier) owner of thirty-two (32) nursing facilities in North Carolina.¹ The specific facilities at issue here are as follows:

Brian Center Health & Rehabilitation / Brevard
Brian Center Health & Rehabilitation / Durham
Brian Center Health & Rehabilitation / Goldsboro
Brian Center Health & Rehabilitation / Hendersonville
Brian Center Health & Rehabilitation / Hickory East
Brian Center Health & Rehabilitation / Spruce Pine
Brian Center Health & Rehabilitation / Statesville
Brian Center Health & Rehabilitation / Wallace
Brian Center Health & Rehabilitation / Weaverville
Brian Center Health & Rehabilitation / Wilson
Brian Center Health & Rehabilitation / Windsor

¹ SVCare has interests in health care facilities in other states, as well.

Mr. Smith
July 13, 2012
Page 2

Brian Center Health & Rehabilitation / Yanceyville
Brian Center Health & Rehabilitation / Cabarrus
Brian Center Health & Rehabilitation / Clayton
Brian Center Health & Rehabilitation / Monroe
Brian Center Health & Rehabilitation / Mooresville
Brian Center Health & Rehabilitation / Winston-Salem
Brian Center Health & Rehabilitation / Gastonia
Brian Center Health & Rehabilitation / Hickory Viewmont
Brian Center Health & Rehabilitation / Charlotte
Brian Center Health & Rehabilitation / Eden
Brian Center Health & Rehabilitation / Hertford
Brian Center Health & Rehabilitation / Salisbury
Brian Center Health & Rehabilitation / Lincolnton
Brian Center Nursing Care / Lexington
Brian Center Nursing Care / Shamrock
Maple Leaf Health Care
Brian Center Health & Rehabilitation / Waynesville
Kenansville Health & Rehabilitation Center
Randolph Health & Rehabilitation Center
Silver Stream Health & Rehabilitation Center
Wilmington Health & Rehabilitation Center

An organization chart showing the current ownership interests in each of these facilities is attached as Exhibit A.² As shown therein, SVCare, through its subsidiaries, holds the membership interest in the parent companies of each of these facilities.

Cam Equity holds an option to purchase up to 99.999% of all membership units in SVCare. Cam Equity intends to exercise that option, whereby Cam Equity (or its nominee) will acquire that 99.999% membership interest.³

The acquisition by Cam Equity (or its nominee) of the membership units of SVCare shall not cause any change in the direct ownership or day-to-day operations of the licensed nursing home facilities in North Carolina. The licensed facilities will continue to have the same name,

² There is one additional facility, Brian Center Charlotte Retirement Apartments, referenced in that organization chart. That facility provides independent living apartments for retired persons, and is not a licensed nursing facility or adult care home facility. Therefore, its ownership is not impacted by the CON Law.

³ That option agreement was the subject of a New York civil action, the result of which was a Decision and Order entered by Justice O. Peter Sherwood of the New York Supreme Court, granting Cam Equity's motion for summary judgment and requiring SVCare Holdings to comply with the terms of the option agreement and permit the acquisition of the aforementioned membership interests. A copy of Justice Sherwood's Decision and Order is attached hereto as Exhibit B.

Mr. Smith
July 13, 2012
Page 3

tax identification number, and provider numbers. The facilities will continue to have the same management and personnel. In short, nothing will change operationally or structurally for the licensed facilities as a result of the acquisition.

With this letter, Cam Equity is requesting a no-review determination regarding its acquisition of the membership interests in SVCare, the limited liability company which indirectly owns the above facilities in North Carolina. Consistent with the longstanding approach of the Agency in finding that purchases of corporate ownership interests are not events requiring a certificate of need, Cam Equity now seeks confirmation that its acquisition of the membership interests in SVCare (hereinafter, the "Proposed Acquisition"), may proceed without first obtaining a certificate of need.

ANALYSIS

The CON Law was enacted to prevent the development and operation of unneeded health services, equipment and facilities. This is made explicit in the very first section of the law, where the General Assembly finds: "That, the proliferation of unnecessary health service facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services." N.C. Gen. Stat. § 131E-175(4). The CON Law essentially focuses on the development and offering of those "new institutional health services" that would create additional capacity, and which are catalogued in N.C. Gen. Stat. § 131E-176(16). In keeping with its fundamental goals, the CON Law expressly recognizes that certain activities are not subject to review. Based upon the clear terms of the CON Law and prior declaratory rulings by the Division of Health Service Regulation ("DHSR") and no review determinations by the CON Section, the Proposed Acquisition does not require a certificate of need.

I. The Proposed Acquisition Will Not Result in a New Institutional Health Service

The CON Law provides that no person shall offer or develop a "new institutional health service" without first obtaining a CON. N.C. Gen. Stat. § 131E-178. However, none of the components of the "new institutional health service" definition address, directly or indirectly, the acquisition of membership interests in an organization that already is operating a health service. This type of transaction is among the activities that are "administrative and other activities that are not integral to clinical management," and which are specifically excluded from the definition of "health service" in the CON Law. N.C. Gen. Stat. § 131E-176(9a). Therefore, an acquisition of corporate ownership interests, such as the Proposed Acquisition at issue in this request, does not involve a new institutional health service at all and should not be subject to CON Review.

The list of new institutional health services does include "the obligation by any person of a capital expenditure exceeding two million dollars (\$2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service," N.C. Gen. Stat. § 131E-176(16)(b). However, this definition does not apply to the Proposed

Mr. Smith
July 13, 2012
Page 4

Acquisition. In prior declaratory rulings and no review determinations, DHSR and the CON Section have consistently recognized that transactions which are limited to an acquisition of underlying corporate membership interests in an existing legal entity which owns and operates an existing health service facility and its associated equipment, such as the Proposed Acquisition, fall within the above-referenced exclusion recognized in the definition of "health service" in the CON Law. Accordingly, DHSR and CON Section have consistently determined that events such as the Proposed Acquisition do not trigger certificate of need review under the \$2,000,000 capital expenditure provision.

II. Prior Declaratory Rulings and No Review Determinations Confirm the Proposed Acquisition Does Not Require a CON

This no-review request is consistent with prior declaratory rulings and no review determinations which have interpreted the applicability of the CON Law to the purchase of ownership interests in corporate entities that own existing health care facilities. Over the course of North Carolina's Certificate of Need program, there have been a number of declaratory rulings and at least one no review determination which confirmed that the acquisition of ownership interests in companies which own existing health care facilities that already are offering services does not constitute the offering of a new institutional health service because such transactions do not implicate the creation of additional capacity and health service facilities which might lead to the "unnecessary use and expense of resources and overutilization of healthcare services," detailed in the legislative findings. See N.C. Gen. Stat. § 131E-175(4). Several examples which have upheld this principle of no review for acquisitions of corporate ownership interests are discussed below.

- On January 6, 2012, the CON Section issued a no review letter (attached as Exhibit C) finding that North Carolina Radiation Therapy Management Services, LLC's acquisition of the ownership interests in the corporate entities that owned an existing oncology treatment center and the associated equipment located in Asheville, North Carolina, was not a new institutional health service and did not require a CON.
- On August 18, 2011, DHSR issued a declaratory ruling finding that Radiation Oncology Centers of the Carolinas, Inc.'s transfer of two CON-approved radiation oncology facilities to two wholly-owned subsidiaries did not constitute a new institutional health service or require a certificate of need. See *In re: Request for Declaratory Ruling by Radiation Oncology Centers of the Carolinas, Inc.* (attached as Exhibit D).
- On September 27, 2010, DHSR issued a declaratory ruling confirming that the acquisition by Cancer Centers of North Carolina, P.C. of the majority of the membership interests in Wake Radiology Oncology Services ("WROS") and the continued operation of WROS's oncology treatment center did not require a certificate of need. See *In re: Request for Declaratory Ruling by Wake Radiology*

Mr. Smith
July 13, 2012
Page 5

Oncology Services, PLLC, Cancer Centers of North Carolina, P.C., US Oncology, Inc. et al. (attached as Exhibit E).

- On December 21, 2007, DHSR issued a declaratory ruling finding that Rex Healthcare, Inc.'s acquisition of 100% of the membership interest of Smithfield Radiation Oncology, LLC, which owned and operated a linear accelerator, was not subject to CON review. *See In re: Request for Declaratory Ruling by Rex Healthcare, Inc. and Smithfield Radiation Oncology, LLC* (attached as Exhibit F).
- On September 14, 2007, DHSR issued a declaratory ruling confirming that certificate of need review was not required for the sale to another entity of 100% of the issued and outstanding stock of a company that owned a linear accelerator. *See In re: Request for Declaratory Ruling by Radiation Therapy Services, Inc. and North Carolina Radiation Therapy Management Services, Inc.* (attached as Exhibit G).
- On January 24, 2008, DHSR issued a similar ruling with regard to acquisition of the stock of a company that owned heart lung bypass equipment. *See In re: Request for Declaratory Ruling by New Hanover Perfusionists, Inc., January 24, 2008* (attached as Exhibit H). DHSR focused on the fundamental fact that the ownership of the equipment would not change, and that there was no purchase of equipment, in ruling that this stock acquisition did not require a Certificate of Need.

DHSR's determination in all of these rulings is firmly founded on the express terms of the CON Law.

III. The Proposed Acquisition Does Not Involve the Development or Expansion of a Health Service Facility

The Proposed Acquisition will involve expenditures by Cam Equity, but these will simply be purchases of ownership interests in existing LLC that indirectly owns the various nursing facilities. They will not entail a capital expenditure to develop or expand a health service or health service facility because the facilities will continue to be operated at the same locations, and no expansion of services is proposed.

Likewise, the Proposed Acquisition will not entail "a capital expenditure . . . which relates to the provision of a health service" under N.C. Gen. Stat. § 131E-176(16)(b). The only change that will result from the Proposed Acquisition will be in the membership composition of the LLCs, and that change in ownership is not a health service.

As DHSR and the CON Section must have determined in the prior declaratory rulings and no review determinations discussed above, the purchase of ownership interests in an existing enterprise, which already is lawfully offering the services, is not a capital expenditure that "relates to the provision of a health service" under N.C. Gen. Stat. § 131E-176(16)(b). The

Mr. Smith
July 13, 2012
Page 6

definition of "health service" in the CON Law specifically excludes "administrative and other activities that are not integral to clinical management." N.C. Gen. Stat. § 131E-176(9a). The membership composition of the LLCs is not integral to the clinical management of the above nursing facilities, and the facilities' operations will not change as a result of the Proposed Acquisition. Therefore, the purchase of membership interests in the LLCs is not an activity that is "integral to clinical management," and accordingly is not "a capital expenditure . . . which relates to the provision of a health service" within the meaning of N.C. Gen. Stat. § 131E-176(16)(b).

IV. Alternatively, the Proposed Acquisition is Exempt from CON Review, Pursuant to N.C. Gen. Stat. § 131E-184(a)(8)

In the event that the Agency determines that the Proposed Acquisition does constitute a new institutional health service, it nevertheless is not subject to CON review, because the CON Law permits the acquisition of an existing health service facility, regardless of cost, so long as prior notice is provided. Specifically, N.C. Gen. Stat. § 131E-184(a)(8) provides, in pertinent part, that:

the Department shall exempt from certificate of need review a new institutional health service if it receives prior written notice from the entity proposing the new institutional health service, which notice includes an explanation of why the new institutional health service is required, for any of the following:

(8) To acquire an existing health service facility, including equipment owned by the health service facility at the time of acquisition.

Thus, to the extent that the Proposed Acquisition is a new institutional health service, it is nevertheless exempt from CON review, because Cam Equity would be acquiring existing health service facilities.⁴

⁴ In addition, Cam Equity is not aware that any of the above nursing facilities has a pending or approved CON application to add beds. According to the June 2012 CON Monthly Report (attached hereto as *Exhibit I*), none of the listed facilities appears to have a currently-pending CON application. Thus, there does not appear to be an issue regarding the transfer of ownership or control of a certificate of need, within the meaning of N.C. Gen. Stat. § 131E-189(c). However, even if there were a pending or approved but undeveloped CON in one of these facilities, the transfer of that CON should be allowed for good cause, since the intent of the transaction is not to acquire a particular facility's CON, but to acquire 99.999% of all membership units in an LLC which has interests in multiple states. This type of transaction was previously approved by the CON Section, when it approved the stock transfer acquisition by Novant Health, Inc., of multiple diagnostic centers owned by MedQuest Associates, Inc., including several facilities which had approved but not yet developed CONs. See correspondence from Lee B. Hoffman, Chief of the CON Section, dated September 26, 2007 (attached hereto as *Exhibit J*).

CONCLUSION

The regulation of events like the Proposed Acquisition, involving existing and previously reviewed and approved facilities which do not otherwise implicate the fundamental purposes of the CON Law stated in N.C. Gen. Stat. § 131E-175, is beyond the scope of the CON Law, and should not require a CON. For that reason, we request that the Agency issue a "no review" letter determining that the Proposed Acquisition described above is not governed by the CON Law, and therefore, does not require a certificate of need. Alternatively should you determine that the Proposed Acquisition is governed by the CON Law, we request that you confirm that it is nevertheless exempt from CON review pursuant to N.C. Gen. Stat. § 131E-184(a)(8).

We have enclosed with this letter the following Exhibits:

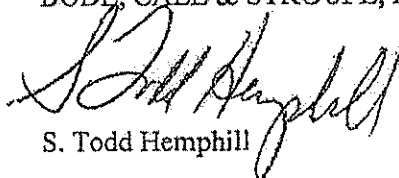
- A. Organization Chart, SVCare Holdings, LLC North Carolina facilities;
- B. Decision and Order, *Schron v. Grunstein*, Index No. 650702/2010 (Supreme Court of New York);
- C. January 6, 2012 no review letter issued to North Carolina Radiation Therapy Management Services, LLC, regarding the acquisition of the ownership interests in the existing oncology treatment center located at 20 Medical Park Drive, Asheville, North Carolina;
- D. August 18, 2011 Declaratory Ruling, *In re: Request for Declaratory Ruling by Radiation Oncology Centers of the Carolinas, Inc.*;
- E. September 27, 2010 Declaratory Ruling, *In re: Request for Declaratory Ruling by Wake Radiology Oncology Services, PLLC, Cancer Centers of North Carolina, P.C., US Oncology, Inc. et al.*;
- F. December 21, 2007 Declaratory Ruling, *In re: Request for Declaratory Ruling by Rex Healthcare, Inc. and Smithfield Radiation Oncology, LLC*;
- G. September 14, 2007 Declaratory Ruling, *In re: Request for Declaratory Ruling by Radiation Therapy Services, Inc. and North Carolina Radiation Therapy Management Services, Inc.*;
- H. January 24, 2008 Declaratory Ruling, *In re: Request for Declaratory Ruling by New Hanover Perfusionists, Inc.*;
- I. CON Section Monthly Report, June 2012; and
- J. Correspondence from Lee B. Hoffman, Chief of the CON Section, dated September 26, 2007.

Mr. Smith
July 13, 2012
Page 8

Thank you for your consideration of this request. Please feel free to contact me if you have any questions.

Very truly yours,

BODE, CALL & STROUPE, L.L.P.



S. Todd Hemphill

STH:sh
Enclosures
cc w/enc.: Brooke A. Lane, Esq.
Carol E. Bowen, Esq.



North Carolina Department of Health and Human Services
Division of Health Service Regulation
Certificate of Need Section
2704 Mail Service Center ■ Raleigh, North Carolina 27699-2704

Beverly Eaves Perdue, Governor
Lanier M. Cansler, Secretary

www.ncdhhs.gov/dhsr

Craig R. Smith, Section Chief
Phone: 919-855-3875
Fax: 919-733-8139

January 6, 2012

William R. Shenton
Poyner Spruill
P.O. Box 1801
Raleigh, NC 27602-1801

RE: No Review:

- Transfer by Cancer Centers of North Carolina – Asheville, P.C. (CCNC Asheville) of 100% of its ownership interests in the existing oncology treatment center located at 20 Medical Park Drive, Asheville (Oncology Center) to AHLC, LLC, a wholly-owned subsidiary of CCNC Asheville
- Transfer by AOR Management Company of Virginia, LLC (AOR) of 100% of its ownership interests in the Oncology Center to Asheville CC, LLC, a wholly-owned subsidiary of AOR
- Acquisition of 100% of AHLC, LLC by North Carolina Radiation Therapy Management Services, LLC (NCR TMS)
- Acquisition of 100% of Asheville CC, LLC by NCR TMS
Buncombe County

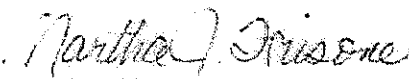
Dear Mr. Shenton:

The Certificate of Need (CON) Section received your letter of September 26, 2011 and an email dated December 28, 2011 regarding the above referenced proposals. Based on the CON law in effect on the date of this response to your request, the proposals described in your correspondence are not governed by, and therefore, do not currently require a certificate of need. However, please note that if the CON law is subsequently amended such that the above referenced proposals would require a certificate of need, this determination does not authorize you to proceed to develop the above referenced proposals when the new law becomes effective.

It should be noted that this determination is binding only for the facts represented by you. Consequently, if changes are made in the proposals or in the facts provided in your correspondence referenced above, a new determination as to whether a certificate of need is required would need to be made by the Certificate of Need Section. Changes in a proposal include, but are not limited to: (1) increases in the capital cost; (2) acquisition of medical equipment not included in the original cost estimate; (3) modifications in the design of the project; (4) change in location; and (5) any increase in the number of square feet to be constructed.

Please contact the CON Section if you have any questions. Also, in all future correspondence you should reference the Facility I.D.# (FID) if the facility is licensed.

Sincerely,


Martha J. Frisone
Assistant Chief


Craig R. Smith, Chief
Certificate of Need Section

cc: Medical Facilities Planning Section, DHSR



Location: 809 Ruggles Drive ■ Dorothea Dix Hospital Campus ■ Raleigh, N.C. 27603
An Equal Opportunity / Affirmative Action Employer



September 26, 2011

William R. Shenton
Partner
D: 919.783.2947
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wshenton@poynerspruill.com

Via Hand Delivery

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

RE: Request for No Review Determination – Acquisition of Ownership Interests in Corporate Entities that Own Cancer Centers of North Carolina's Asheville Oncology Treatment Center

Dear Mr. Smith:

We are submitting this letter on behalf of our client, Radiation Therapy Services, Inc. ("RTS"), as well as its wholly-owned subsidiary, North Carolina Radiation Therapy Management Services, LLC ("NCRTMS"). RTS is a national provider of radiation oncology services which offers services at several locations in western North Carolina.

With this letter, NCRTMS is requesting a no-review determination regarding its acquisition of the ownership interests in the corporate entities that own an existing oncology treatment center and the associated equipment located in Asheville, North Carolina. Consistent with the longstanding approach of the Agency in finding that purchases of corporate ownership interests are not events requiring a certificate of need, NCRTMS now seeks confirmation that its acquisition of membership interests in the corporate entities owning the existing Asheville oncology treatment center, including a linear accelerator and computed tomography scanner, and its continued operation of that oncology treatment center and the same equipment, at the same site, may proceed without first obtaining a certificate of need.

FACTUAL BACKGROUND

The Parties

Since 2004, Cancer Centers of North Carolina – Asheville, P.C. ("CCNC-Asheville") and AOR Management Company of Virginia, LLC (f/k/a AOR Management Company of Virginia, Inc.) ("AOR"), an indirect, wholly-owned subsidiary of US Oncology, Inc. ("USON"), together have owned and operated an oncology treatment center that is located at 20 Medical Park Drive, Asheville, North Carolina (the "Oncology Center").¹ This Oncology Center uses a Varian 2100C linear accelerator (the "Linac") and a computed tomography scanner (the "CT Scanner") to provide radiation therapy services to patients. As discussed further below, the Linac and CT Scanner were acquired, and have been used to provide radiation therapy services, under an exemption from certificate of need ("CON") review that was recognized by the Certificate of Need Section ("CON Section"). After an appeal of this determination, the CON Section's decision to grant an exemption was upheld.

¹ CCNC-Asheville was formerly known as Asheville Hematology and Oncology Associates, P.A. ("AHO"). The corporate name was changed in 2009. See Exhibit 1. AOR was formerly a corporation, but has converted to a limited liability company. See Exhibit 2.

Mr. Craig R. Smith
Chief, CON Section
September 26, 2011
Page 2

Walter Spruill

CCNC-Asheville is a professional corporation organized under the laws of the State of North Carolina with its principal place of business located at 20 Medical Park Drive, Asheville, North Carolina. It employs physicians licensed to practice medicine in the State of North Carolina, who provide oncology treatment services, including radiation oncology services through the use of the Linac and CT Scanner located at the Asheville Oncology Center on Medical Park Drive. CCNC-Asheville has served cancer patients in the Asheville area since 1982 when the practice (then AHO) was first formed and began providing medical oncology services. Its oncology treatment center is a "grandfathered" facility because it became operational before the CON Law was amended to apply to oncology treatment centers. See 2004 correspondence between AHO and CON Section (without exhibits) (Exhibit 3).

USON is a business corporation organized under the laws of the State of Delaware, with its principal place of business located at 10101 Woodloch Forest Drive, The Woodlands, Texas 77380. Through its subsidiaries, USON provides administrative support for oncology practices throughout the United States, and also furnishes medical equipment used by those practices. One of those subsidiaries is AOR, a Delaware limited liability company.

RTS (also known as 21st Century Oncology) operates several radiation therapy centers in western North Carolina, including one located in a medical office building in Asheville which was the site of a damaging fire that occurred on July 28, 2011, and which was reported to you in an earlier letter. Federal and State investigators have indicated they believe this fire may have been intentionally set, but because the investigation of the fire is still in process, RTS has not been able to access this center and assess the damage and determine when and how it might be re-opened. Once a damage assessment is completed, RTS will approach the CON Section about the status of the center, including any steps needed to repair or replace it. However, without a full assessment of the status of this site, RTS is uncertain at this point about the steps necessary to resume operations at that center.

Immediately following the fire, RTS successfully transitioned cancer patients who had been receiving treatment at its Asheville center to its other treatment centers in western North Carolina, where they are continuing to receive consultations and radiation therapy treatment. The transaction proposed in this letter would facilitate the resumption of RTS's provision of radiation therapy services to patients closer to Asheville, and accordingly RTS and NCRTMS request that the Agency expedite its consideration of this no-review request.

NCRTMS is a North Carolina limited liability company which is a wholly-owned subsidiary of RTS. NCRTMS provides management and administrative support services for RTS's radiation therapy centers in North Carolina.

RTS, NCRTMS, CCNC-Asheville and AOR (collectively, the "Parties") have discussed and reached agreement on a transaction that would involve the transfer of the membership interests in the corporate entities that own the Oncology Center and the equipment used to provide treatment for patients at the Oncology Center, including the Linac and CT Scanner (collectively, the "Equipment"). The transaction would be limited to a transfer of the underlying ownership interests in the corporate entities that own the Oncology Center and the Equipment (the "Proposed Transaction"). The Oncology Center and its Equipment will continue to serve patients at the same location, and there will be no change in the scope of services provided by the Oncology Center as part of the Proposed Transaction. The Proposed Transaction does not involve the offering or expansion of any new facility, service or equipment, and the State's inventory of linear accelerators will not change as a result of the transaction. Based upon prior

declaratory rulings and "no review" determinations that have been issued by the Office of the Director of the Division of Health Services Regulation and by the CON Section, it is clear that the Proposed Transaction agreed upon by the Parties is not a "New Institutional Health Service," and should be permitted to proceed without first obtaining a certificate of need.

This letter describes the Proposed Transaction and identifies the grounds for a determination that the transaction is not subject to CON review.

Background on the Oncology Center and Equipment

In 2005, AHO (now CCNC-Asheville) relocated its Asheville offices to establish the current Oncology Center. AHO acquired the Linac and CT Scanner to provide radiation therapy services to patients. The Linac that has been operated at the Oncology Center is recognized in the Linac Inventory in the State Medical Facilities Plan. See Draft 2012 State Medical Facilities Plan, p. 147 (Exhibit 4). As you will recall, the present Oncology Center was developed under an exemption from CON review recognized by the CON Section. In February 2005, AHO sought "no review" determinations for a proposed relocation and expansion of its oncology treatment center and acquisition of medical equipment that would allow AHO to provide radiation therapy. See AHO No-Review Requests and Related Correspondence (without exhibits) (Exhibit 5). AHO presented four proposals: (1) acquisition of a linear accelerator, (2) acquisition of a CT scanner, (3) acquisition of treatment planning equipment, and (4) relocation of its oncology treatment center. On August 2, 2005, the CON Section issued four "no review" letters, confirming that none of the proposals required a certificate of need. See CON Section No-Review Determinations (Exhibit 6).

The CON Section's determinations were challenged and following a lengthy contested case and appeal, the North Carolina Court of Appeals ultimately affirmed the Final Agency Decision, entered by the Acting Director of the Division of Faculty Services (the "Division") that AHO's acquisition of the Linac and CT scanner and expansion of the oncology treatment center did not require a CON. See *Mission Hospitals, Inc. v. N.C. DHHS*, 696 S.E.2d 163 (N.C. Ct. App. 2010) (Exhibit 7).

At the heart of the appeal challenging the CON Section's no-review determinations were amendments to the CON Law which took effect in late August 2005. Before late August 2005, oncology treatment centers were among the services regulated by the CON Law, and a certificate of need was required to develop an oncology treatment center. But on August 26, 2005, the CON Law was amended by deleting the term "oncology treatment center" from the group of facilities defined as a "health service facility" under N.C. Gen. Stat. § 131E-176. Along with this change, the list of new institutional health services for which a certificate of need is required was amended to add any acquisition of a linear accelerator occurring on or after the effective date of the amendment. AHO's no-review requests and the CON Section's subsequent no-review determinations preceded the August 26, 2005 amendment that eliminated the concept of oncology treatment centers and established a requirement for a certificate of need to acquire a linear accelerator.

In its decision, the Court of Appeals recognized that AOR provided substantial administrative support for AHO's day-to-day operations under a Management Services Agreement which also authorized AOR to acquire equipment for AHO. The Court of Appeals concluded that: (1) AHO's February 2005 requests seeking CON determinations regarding its proposals were made in good faith reliance on the CON Law then in existence, (2) AHO had acquired vested rights to develop its proposed services under the prior version of the CON Law because of the building lease entered into by AHO's managing agent, and AHO's acquisition by comparable arrangement of the Linac through a purchase contract entered into by AOR; and (3) the CON Section had issued its no-review determinations prior to

Craig R. Smith

the effective date of the amendment to the CON Law. Accordingly, the Court of Appeals held that the CON Section and the Division in its Final Agency Decision properly applied the CON Law as it existed when AHO submitted its no-review requests. The Court of Appeals also affirmed the Final Agency Decision's determinations that AHO's acquisition of the CT Scanner did not require a CON because the total costs to buy the CT Scanner and make it operational were below the threshold dollar amount for a diagnostic center, and that the relocation and expansion of AHO's oncology treatment center did not require a CON because the costs related to such relocation and expansion did not exceed \$2,000,000. Thus, the Court of Appeals conclusively determined that the relocation and expansion of AHO's (now CCNC-Asheville's) oncology treatment center and AHO's acquisition of the Linac and CT Scanner did not require a certificate of need.

The Proposed Transaction

The Proposed Transaction to transfer the ownership interests in the corporate entities that own the Oncology Center and Equipment will proceed in two steps. First, CCNC-Asheville will transfer its interest in the Oncology Center and Equipment to a wholly-owned subsidiary ("CCNC Sub"), and AOR will transfer its interest in the Oncology Center and Equipment to a wholly-owned subsidiary (collectively with CCNC Sub, the "LLCs"). The transaction will be completed with NCRTMS purchasing all of the membership interests in those two LLCs as a second step.

After the Proposed Transaction is complete, the LLCs will continue to exist as legal business entities, and will continue to own the Oncology Center and Equipment, including the Linac and CT Scanner that the CON Section (and the Court of Appeals) determined were not subject to CON review. The Oncology Center and its Equipment will continue to serve patients at the same location at 20 Medical Park Drive in Asheville. There will be no purchase of additional equipment, nor will any new services be offered, as a result of the Proposed Transaction. The only change will be the membership composition of the corporate entities that own the Oncology Center and Equipment, with CCNC-Asheville and AOR initially transferring their ownership interests to the wholly-owned subsidiary LLCs, followed by a separate transaction in which NCRTMS will acquire all of the membership interests in the LLCs.

The LLCs will not offer any medical services. All medical services associated with oncology treatment at the center will be furnished by licensed physicians. The Parties anticipate that the radiation oncologists who have been practicing with CCNC-Asheville and have supervised the care of a significant majority of the patients receiving treatment at the Oncology Center in the past will continue to supervise and direct the treatment of patients under their care. Under an agreement that preserves the physicians' authority over all clinical and medical decisions, the LLCs will make the Linac and CT Scanner available for treatment of patients by the CCNC-Asheville radiation oncologists and other licensed physicians authorized to care for patients at the Oncology Center.

Based upon the long-standing approach that the Division and the CON Section have taken to the purchase of equity interests in existing North Carolina health care facilities when there is no change in the services offered or the equipment employed to offer the services, NCRTMS respectfully submits that none of these steps relating to the Proposed Transaction constitutes a New Institutional Health Service that requires a certificate of need.

ANALYSIS

The CON Law was enacted to prevent the development and operation of unneeded health services, equipment and facilities. This is made explicit in the very first section of the law, where the General Assembly finds: "That the proliferation of unnecessary health service facilities results in costly

duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services." N.C. Gen. Stat. § 131E-175(4). The CON Law essentially focuses on the development and offering of those "new institutional health services" that would create additional capacity, and which are catalogued in N.C. Gen. Stat. § 131E-176(16). Each of these new institutional health services entails in some way the acquisition or establishment of a *new* health service, *new* equipment, *new* facilities, or expansions and relocations of existing facilities or services (which also would have an impact on how health services are deployed and utilized). In keeping with its fundamental goals, the CON Law expressly recognizes that certain activities are not subject to review. Based upon the clear terms of the CON Law and prior declaratory rulings by the Department, the Proposed Transaction does not require a certificate of need.

The Proposed Transaction Will Not Result in a New Institutional Health Service

The CON Law provides that no person shall offer or develop a "new institutional health service" without first obtaining a CON. N.C. Gen. Stat. § 131E-178. However, none of the components of the "new institutional health service" definition address, directly or indirectly, the acquisition of membership interests in an organization that already is operating a health service. This type of transaction is among the activities that are "administrative and other activities that are not integral to clinical management," and which are specifically excluded from the definition of "health service" in the CON Law. N.C. Gen. Stat. § 131E-176(9a). Therefore, an acquisition of corporate ownership interests, such as the Proposed Transaction at issue in this request, does not involve a new institutional health service at all and should not be subject to CON Review.

The list of new institutional health services does include "the acquisition by purchase, donation, lease, transfer or comparable arrangement" of a linear accelerator "by or on behalf of any person," N.C. Gen. Stat. § 131E-176(16)(f1)5a, 9, and "the obligation by any person of a capital expenditure exceeding two million dollars (\$2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service," N.C. Gen. Stat. § 131E-176(16)(b). However, neither of these definitions applies to the Proposed Transaction. In prior declaratory rulings and no review determinations, the Department and CON Section have consistently recognized that transactions which are limited to an acquisition of underlying corporate membership interests in an existing legal entity which owns and operates an existing oncology center and its associated equipment, such as the Proposed Transaction, fall within the above-referenced exclusion recognized in the definition of "health service" in the CON Law. Accordingly, the Department and CON Section have consistently determined that events such as the Proposed Transaction do not trigger certificate of need review under either the linear accelerator acquisition or the \$2,000,000 capital expenditure provision.

The Department's Prior Declaratory Rulings Confirm the Transaction Does Not Require a CON

This No-Review Request is consistent with the Department's prior declaratory rulings which have interpreted the applicability of the CON Law to the purchase of ownership interests in corporate entities that own existing health care facilities. Over the course of North Carolina's Certificate of Need program, there have been a number of declaratory rulings which confirmed that the acquisition of ownership interests in companies which own existing health care facilities that already are offering services does not constitute the offering of a new institutional health service because such transactions do not implicate the creation of additional capacity and health service facilities which might lead to the "unnecessary use and expense of resources and overutilization of healthcare services," detailed in the legislative findings. See N.C. Gen. Stat. § 131E-175(4). Several examples of declaratory rulings which have upheld this principle of no review for acquisitions of corporate ownership interests are discussed below.

In at least four rulings that were issued after the enactment of the August 2005 amendment to the CON Law, the Department has determined specifically that the transfer of ownership interests in organizations that own linear accelerators does not require a certificate of need.

- On August 18, 2011, the Department issued a declaratory ruling finding that Radiation Oncology Centers of the Carolinas, Inc.'s transfer of two CON-approved radiation oncology facilities to two wholly-owned subsidiaries did not constitute a new institutional health service or require a certificate of need. See *In re: Request for Declaratory Ruling by Radiation Oncology Centers of the Carolinas, Inc.* (Exhibit 8).
- On September 27, 2010, the Department issued a declaratory ruling confirming that the acquisition by Cancer Centers of North Carolina, P.C. of the majority of the membership interests in Wake Radiology Oncology Services and the continued operation of WROS's oncology treatment center did not require a certificate of need. See *In re: Request for Declaratory Ruling by Wake Radiology Oncology Services, PLLC, Cancer Centers of North Carolina, P.C., US Oncology, Inc. et al.* (Exhibit 9).
- On December 21, 2007, the Department issued a declaratory ruling finding that Rex Healthcare, Inc.'s acquisition of 100% of the membership interest of Smithfield Radiation Oncology, LLC, which owned and operated a linear accelerator, was not subject to CON review. See *In re: Request for Declaratory Ruling by Rex Healthcare, Inc. and Smithfield Radiation Oncology, LLC* (Exhibit 10).
- On September 14, 2007, the Department issued a declaratory ruling confirming that certificate of need review was not required for the sale to another entity of 100% of the issued and outstanding stock of a company that owned a linear accelerator. See *In re: Request for Declaratory Ruling by Radiation Therapy Services, Inc. and North Carolina Radiation Therapy Management Services, Inc.* (Exhibit 11).

At issue in the August 2011 declaratory ruling involving Radiation Oncology Centers of the Carolinas, Inc. ("ROCC"), was the proposed transfer of two existing oncology facilities owned by ROCC to two wholly-owned subsidiaries of ROCC. The two oncology facilities each operated a linear accelerator and CT simulator, the acquisition of which had previously been approved by the CON Section. The Department concluded that this transaction was not subject to CON review. As the Declaratory Ruling explained, "The entity that owns the linear accelerator and simulator will not change, and the same equipment will be used to provide the same radiation oncology services, in the same location. . . . The Proposed Transaction does not involve the offering or expansion of any new facility, service or equipment, and the state's inventory of linear accelerators and simulators will not change." The transaction at issue in the ROCC declaratory ruling is very similar to the first step of the Proposed Transaction at issue in this request, under which CCNC-Asheville and AOR will transfer their interests in the existing Oncology Center and its associated Equipment to two wholly-owned subsidiary LLCs.

In the September 2010 declaratory ruling involving Wake Radiology Oncology Services, the Department reviewed a proposed transaction under which WROS would be converted from a professional limited liability company to a limited liability company, followed immediately by the sale of the ownership interests in WROS to Cancer Centers of North Carolina, P.C. Subsequently, in a separate transaction, WakeMed proposed purchasing a minority membership interest in the renamed WROS entity. After the two transactions, the resulting LLC would continue to exist as a legal and business entity and would continue to own the oncology center and equipment that was authorized by a previously issued CON. The Department concluded that these proposed transactions did not require a certificate of need. In its

Mr. Craig R. Smith
Chief, CON Section
September 26, 2011
Page 7

Rayner Spruiell

Declaratory Ruling, the Department noted that the entity which owned the Linac and Simulator would not change and the same equipment would continue to be used to provide the same radiation oncology services at the same location. The Declaratory Ruling explained that although the proposed transaction involved expenditures by CCNC and WakeMed, "these will be purchases of ownership interests in an existing limited liability company that owns the oncology treatment center. There will be no capital expenditure to develop or expand a health service or health service facility because the same equipment will continue to be operated at the same location, and no expansion of services is proposed." The transactions involved in the WROS declaratory ruling are analogous to the second step of the Proposed Transaction at issue in this request, under which NCRTMS will acquire ownership interests in two existing LLCs which own the Oncology Center and its associated Equipment which will continue to provide the same services to patients at the same location following the transaction.

In its September 2007 declaratory ruling involving NCRTMS, the Department reviewed a request that involved the purchase of all of the stock of Carolina Radiation and Cancer Treatment Center, Inc. ("CRTC"). In its declaratory ruling request, CRTC stated that it was operating one linear accelerator and simulator that were in the Department's equipment inventory reports, as well as an additional linear accelerator that was not listed in the inventory. After reviewing the proposed transaction, the Department concluded, as to the one linear accelerator and simulator that were in the equipment inventory reports, that the proposed stock purchase could proceed without a CON. The Declaratory Ruling stated: "The transaction described by Petitioners does not constitute the acquisition of a linear accelerator or a simulator by any person because ownership of the one reported linear accelerator and one reported simulator here will not change. CRTC will continue to be the owner of these two pieces of equipment, and CRTC's legal status as a corporate entity will not change." The Department's ruling permitted all of the stock of CRTC, which owned the linear accelerator and simulator, to be purchased without a certificate of need.

The purchase of LLC interests proposed by the Parties in this Request is analogous to the stock purchase that was proposed by CRTC. The Proposed Transaction will entail acquisition by NCRTMS of all of the ownership interests in the LLCs. Ownership of the Oncology Center and its associated Equipment, including the Linac and CT Scanner, will remain with the LLCs following the second step of the Proposed Transaction.

In the December 2007 declaratory ruling involving Smithfield Radiation Oncology, the Department reached a similar conclusion. In that situation, Rex Healthcare already had a 25% ownership interest in Smithfield Radiation Oncology, LLC ("SRO"), and proposed to acquire the remaining 75% of the ownership interests from the physician owners. The Department concluded that "[t]he transaction described by Petitioners does not constitute the acquisition of a linear accelerator by any person because ownership of the linear accelerator here will not change." Thus, the Department concluded that these purchases of the ownership interests of companies which own an operating linear accelerator did not require a CON.

The Department also issued a similar ruling with regard to acquisition of the stock of a company that owned heart lung bypass equipment. See *In re: Request for Declaratory Ruling by New Hanover Perfusionists, Inc.*, January 24, 2008 (Exhibit 12). Heart-lung bypass machines are another type of medical equipment for which a certificate of need is required under N.C. Gen. Stat. § 131E-176 (16) (f1), the same portion of the definition of new institutional health services that applies to purchases of linear accelerators. The Department focused on the fundamental fact that the ownership of the equipment would not change, and that there was no purchase of equipment, in ruling that this stock acquisition did not require a Certificate of Need. The Department's determination in these rulings is firmly founded on the express terms of the CON Law.

Mr. Craig R. Smith
Chief, CON Section
September 26, 2011
Page 8

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The Proposed Transaction Is Not an Acquisition of a Linear Accelerator

The proposed acquisition of 100% of the membership interests in the LLCs by NCRTMS does not constitute the acquisition of a linear accelerator. As explained above, the transaction is limited to the acquisition of the underlying ownership interests in the corporate entities that own the existing Oncology Center and its associated equipment. The Linac will continue to be used to provide the same radiation oncology services, in the same location, and the entity that owns the Linac will not change as a result of Step 2 of the Proposed Transaction. The LLCs will continue to own the Linac and the CT Scanner as well as all the Oncology Center assets that were found to be exempt from CON review and have been used to furnish oncology treatments to patients. The LLCs' membership composition will change to a single member, NCRTMS, but their legal status as existing business entities will not change.

Since the LLCs will remain the same legal entities, the same "person" will own the equipment and operate the Oncology Center and its Equipment following the Proposed Transaction's second step. See N.C. Gen. Stat. §§ 131E-176(19) and 178. There will be no change in the operation of the Oncology Center. Accordingly, and consistent with the rulings issued since the August, 2006 amendment, there is no basis to require CON review of the Proposed Transaction as an acquisition of a linear accelerator under the provisions of N.C. Gen. Stat. § 131E-176(16)(f)5a.

The Proposed Transaction Does Not Involve the Development or Expansion of a Health Service Facility

The Proposed Transaction will involve expenditures by NCRTMS, but these will simply be purchases of ownership interests in existing LLCs that own the Oncology Center. They will not entail a capital expenditure to develop or expand a health service or health service facility because the same equipment will continue to be operated at the same location, and no expansion of services is proposed.

Likewise, the Proposed Transaction will not entail "a capital expenditure . . . which relates to the provision of a health service" under N.C. Gen. Stat. § 131E-176(16)(b). The only change that will result from the Proposed Transaction will be in the membership composition of the LLCs, and that change in ownership is not a health service.

As the Department must have determined in the prior declaratory rulings discussed above, the purchase of ownership interests in an existing enterprise, which already is lawfully operating the equipment and offering the services, is not a capital expenditure that "relates to the provision of a health service" under N.C. Gen. Stat. § 131E-176(16)(b). The definition of "health service" in the CON Law specifically excludes "administrative and other activities that are not integral to clinical management." N.C. Gen. Stat. § 131E-176(9a). The membership composition of the LLCs is not integral to the clinical management of the Oncology Center, and the Center's operations will not change as a result of the Proposed Transaction. Therefore, the purchase of membership interests in the LLCs is not an activity that is "integral to clinical management," and accordingly is not "a capital expenditure . . . which relates to the provision of a health service" within the meaning of N.C. Gen. Stat. § 131E-176(16)(b).

Issuance of the No-Review Determination Is Consistent with the Purposes of the CON Law

The CON Law is intended to regulate new institutional health services and is not intended to impede routine business transactions such as an acquisition of a limited liability company's ownership interests. The only point when the CON Law does limit changes in ownership is "before completion of the project or operation of the facility" N.C. Gen. Stat. § 131E-189(c). CCNC-Asheville and AOR have operated the Oncology Center for more than a year², so this restriction in the CON Law clearly does not apply.

The Proposed Transaction does not involve the offering or expansion of any new facility, service or equipment, and the State's inventory of linear accelerators will not change. The Oncology Center and its Equipment have been established and operating for years. No new, or additional equipment will be acquired or placed in operation in the State. No new facility will be established nor new services offered. As a result, the Proposed Transaction does not implicate the fundamental objective of the CON Law -- to control the development and expansion of health service facilities. Although not applicable to the Parties' Proposed Transaction, in keeping with this overarching objective, the CON Law actually contains a provision, in N.C. Gen. Stat. § 131E-184(a)(8), which recognizes that an outright purchase of all the assets of an entire health service facility is exempt from the requirement of obtaining a CON, even if the purchased facility contains equipment that would otherwise be subject to CON review.

The purposes for which the CON Law was enacted are not served by regulating the purchase and sale of the underlying membership interests in corporate entities that own existing health service facilities or equipment which the CON Section has already determined to be needed. If membership interests in companies that own an existing health service facility are purchased, without any accompanying addition, expansion, reduction, or relocation of the services offered, then none of the underlying policy concerns that are the basis for the CON Law come into play.

CONCLUSION

For all of the foregoing reasons, the regulation of events like the Proposed Transaction, involving existing and previously reviewed and approved facilities and their associated equipment which do not otherwise implicate the fundamental purposes of the CON Law stated in N.C. Gen. Stat. § 131E-175, is beyond the scope of the CON Law, and should not require a CON. As stated above, since the expansion of the Oncology Center pursuant to the exemption recognized by the CON Section, the Linac, CT Scanner, and related equipment have been operated as part of an ongoing health care facility and that will continue after completion of the Proposed Transaction.

The North Carolina courts have recognized that because the CON Law interferes with the normal right to do business, it must be narrowly construed. See *HCA Crossroads Residential Centers, Inc. v. N.C. Dep't of Human Resources*, 327 N.C. 573, 579, 398 S.E.2d 466, 470 (1990) ("When viewed in its entirety, Article 9 of Chapter 131E of the General Statutes, the Certificate of Need Law, reveals the

² As you may be aware, AHO (now CCNC-Asheville) operated the Oncology Center in 2006, but the operation of the Equipment was stayed after the initial Final Agency Decision on AHO's no review request reversed the CON Section's initial determination and the Recommend Decision. CCNC-Asheville was not able to fully reinstate operation of the Equipment until after the Court of Appeals' decision in 2010 affirming the second Final Agency Decision which upheld the CON Section's initial determination.

Mr. Craig R. Smith
Chief, CON Section
September 26, 2011
Page 10

Armed Spruill

legislature's intent that an applicant's fundamental right to engage in its otherwise lawful business be regulated but not be encumbered with unnecessary bureaucratic delay.") Failure to issue the requested no-review determination would delay and impede the Parties that are requesting this determination in proceeding with a lawful business transaction.

We have enclosed a copy of the materials referenced in this letter (see attached Index). We request your earliest possible attention to this request and look forward to your confirmation that the Proposed Transaction is not a new institutional health service and may proceed without a certificate of need. Thank-you for your attention to this and if there is any additional information you may require, it will be expedited upon receipt of your request.

Sincerely,

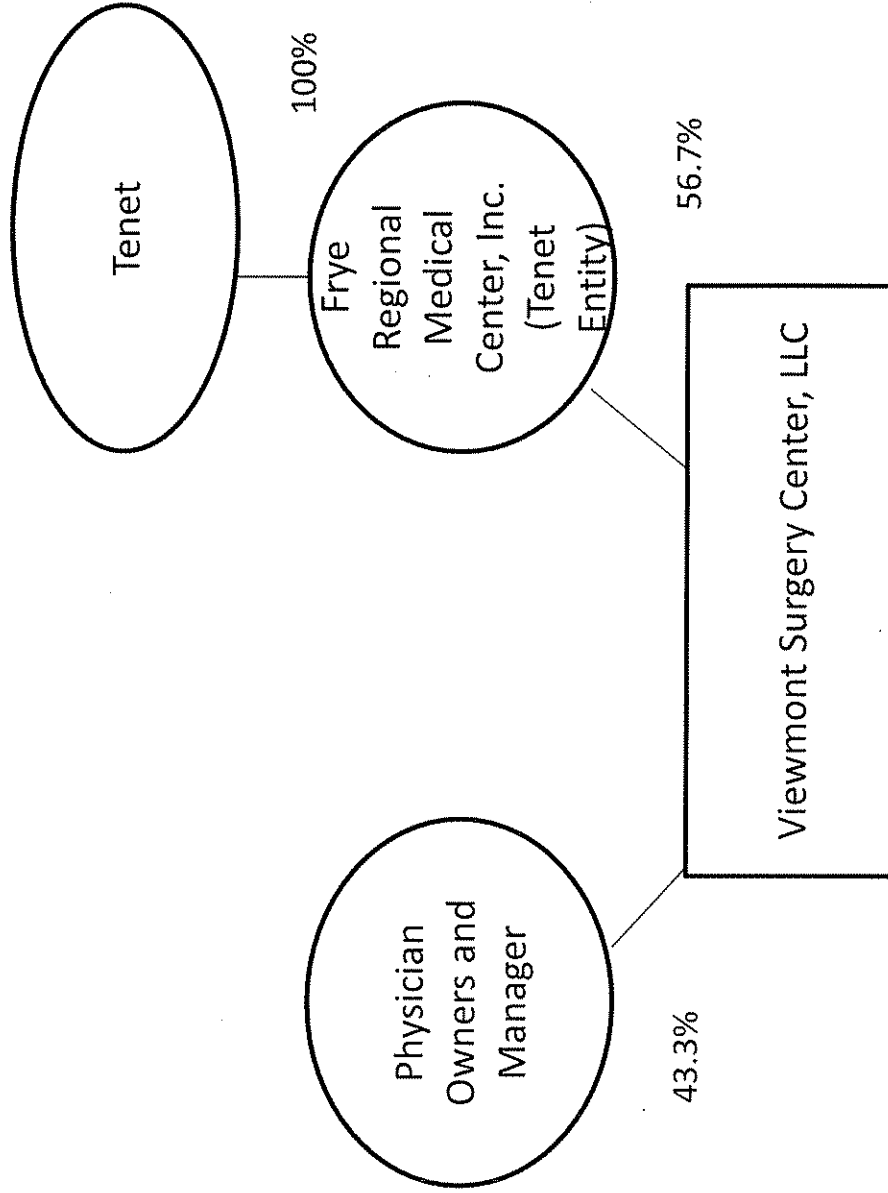


William R. Shenton
Partner

Enclosures

cc: Martha Frisone, Assistant Chief, CON Section
Norton L. Travis, General Counsel for RTS
S. Todd Hemphill, Counsel for CCNC-Asheville and AOR
Jeremy C. Cuchley, Counsel for AOR

Prior to USPI Transaction



After USPI Transaction

