

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

**IN RE: REQUEST FOR)
DECLARATORY RULING BY) **DECLARATORY RULING**
DIGESTIVE HEALTH SPECIALISTS, PA)**

I, Robert J. Fitzgerald, Director of the Division of Facility Services of the North Carolina Department of Health and Human Services (the “Department”), do hereby issue this Declaratory Ruling to Digestive Health Specialists, PA (“Digestive Health Specialists”) 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. Digestive Health Specialists seeks a declaratory ruling to allow it to relocate its two (2) existing unlicensed endoscopy rooms to a new location within its service area prior to seeking accreditation and licensure of those rooms without the necessity of a certificate of need under the recently revised provisions of N.C.G.S. § 131E-178.

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. Joy H. Thomas of the Law Office of Joy H. Thomas has requested this ruling on behalf of Digestive Health and has provided the facts set out below.

STATEMENT OF THE FACTS

Effective August 31, 2005, S.L. 2005-346 amended N.C.G.S. § 131E-178(a) to read as follows:

(a) No person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department; provided, however, no person who provides gastrointestinal endoscopy procedures in one or more gastrointestinal endoscopy rooms located in a nonlicensed setting, shall be required to obtain a certificate of need to license that setting as an ambulatory surgical facility with the existing number of gastrointestinal endoscopy rooms, provided that:

- (1) The license application is postmarked for delivery to the Division of Facility Services by December 31, 2006;
- (2) The applicant verifies, by affidavit submitted to the Division of Facility Services within 60 days of the effective date of this act, that the facility is in operation as of the effective date of this act or that the completed application for the building permit for the facility was submitted by the effective date of this act;
- (3) The facility has been accredited by The Accreditation Association for Ambulatory Health Care, The Joint Commission on Accreditation of Healthcare Organizations, or The American Association for Accreditation of Ambulatory Surgical Facilities by the time the license application is postmarked for delivery to the Division of Facility Services of the Department; and
- (4) The license application includes a commitment and plan for serving indigent and medically underserved populations.

All other persons proposing to obtain a license to establish an ambulatory surgical facility for the provision of gastrointestinal endoscopy procedures shall be required to obtain a certificate of need. The annual State Medical Facilities Plan shall not include policies or need determinations that limit the number of gastrointestinal endoscopy rooms that may be approved.

As of August 31, 2005, Digestive Health Specialists had two gastrointestinal endoscopy rooms in operation at its facility location at 2025 Frontis Plaza Blvd., Winston-Salem, N.C. On or about September 14, 2005, Digestive Health sent the Division of Facility Services an affidavit attesting to Digestive Health's operation of two (2) unlicensed

endoscopy procedure rooms within its facility prior to August 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)(2).

Subsequent to the submission of the affidavit, in planning to satisfy the conditions for accreditation and licensure of its endoscopy rooms, Digestive Health determined that it would be preferable to relocate its existing endoscopy rooms within its service area prior to obtaining accreditation and filing its licensure application for those rooms. In its request for this ruling, Digestive Health notes that general guidance from the DFS Construction Section indicated that including licensed and accredited procedure rooms within space previously used for unlicensed rooms may be complicated, require major facility changes and call for the creation of separations between spaces. Digestive Health represents that it has determined that it will be more cost-effective and advantageous to relocate to a location in its existing service area with more space for its accredited procedure rooms and general office needs.

Digestive Health represents that in the new location it can more easily ensure that it has all necessary physical space to allow for accreditation and licensure of its two (2) endoscopy rooms in the most efficient manner, without having to work within the confines of its existing space. It also represents that it will not incur an obligation for capital expenditures exceeding two million dollars (\$2,000,000). Digest Health represents that the new location will be within the practice's present service area, proximate to area hospitals and other physician offices, and convenient for its new and existing endoscopy patients, its staff and physicians.

ANALYSIS

Because Digestive Health was operating its two endoscopy procedure rooms prior to August 31, 2005 and complied with N.C.G.S. § 131E-178(a)(2) by submitting a timely affidavit, it will be eligible to secure licensure of its two current endoscopy procedure rooms if it satisfies the remaining conditions set forth in the CON Law. None of these conditions relate to the precise location of the existing unlicensed endoscopy rooms, and the qualifying prerequisite under N.C.G.S. § 131E-178(a)(2) insofar as it relates to this case is the fact that a specific number of such rooms were already in operation prior to August 31, 2005.

Having considered the purpose of the certificate of need law and the intent expressed by S. L. 2005-346 concerning gastrointestinal endoscopy rooms, I find that it is appropriate to grant the declaratory ruling requested by Digestive Health, subject to the following condition:

The two gastrointestinal endoscopy rooms to be located at the new location within Digestive Health's service area are to be developed *in place of* the two gastrointestinal endoscopy rooms located at Digestive Health's current facility in Winston-Salem and *not in addition to* the current two Winston-Salem gastrointestinal endoscopy rooms. At such time as the two gastrointestinal endoscopy rooms at the new location become operational, the two gastrointestinal endoscopy rooms at the current location 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 Digestive Health may relocate its two (2) endoscopy rooms to another site within its service area and to pursue accreditation and licensure of those rooms at that

new site in accordance with the provisions of N.C.G.S. § 131E-178, without first obtaining a certificate of need, on condition that once the new site is operational, Digestive Health Specialists cannot continue to operate the two gastrointestinal endoscopy rooms at its current location in Winston-Salem, and shall not perform gastrointestinal endoscopy procedures in either a licensed or unlicensed room located at the current location.

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

This _____ day of March, 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 a first class, postage prepaid envelope addressed as follows:

CERTIFIED MAIL

Joy H. Thomas
Law Office of Joy H. Thomas
514 Daniels Street, # 182
Raleigh, NC 27605

This _____ day of March, 2006.

Jeff Horton
Chief Operating Officer