

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY FOUNDATION HEALTH) DECLARATORY RULING
SYSTEMS CORPORATION D/B/A)
THE BREAST CLINIC)**

I, Robert J. Fitzgerald, Director of the Division of Facility Services (the “Department”), hereby issue this declaratory ruling to Foundation Health Systems Corporation d/b/a The Breast Clinic (“The Breast Clinic” or “Petitioner”) pursuant to N.C.G.S. § 150B-4, 10A NCAC 14A.0103, and the authority delegated to me by the Secretary of the North Carolina Department of Health and Human Services. Petitioner has filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a ruling that it may transfer ownership of the certificate of need (“CON”) that was issued for Project I.D. No. G-7601-06 (the “Project”) through the transfer of the membership interests in The Breast Clinic to Excel Imaging, LLC and to change the location of the dedicated breast MRI scanner that was approved in the Project to another location.

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. Denise M. Gunter of Nelson Mullins Riley & Scarborough has requested this ruling on behalf of The Breast Clinic and has provided the statement of facts upon which this ruling is based. The material facts as provided by counsel for The Breast Clinic are set out below.

STATEMENT OF THE FACTS

On November 27, 2006, the Department issued a CON to The Breast Clinic to acquire a dedicated breast MRI scanner (the “Scanner”) to be located at 2025 Frontis Plaza Boulevard, Winston-Salem, NC 27103 (the “Original Site”). Since that time, the architect has determined that the Scanner will not fit in the Original Site. Petitioner represents that space is available at Salem MRI Center (“Salem MRI”), located at 1701 South Hawthorne Road, Winston-Salem (the “Proposed Site”).

Petitioner has provided information from the architect that the Scanner will be easier to install at the Proposed Site for less cost. The architect has provided a revised cost estimate showing total costs to install the Scanner at the Proposed Site to be \$377,637, instead of \$550,817 at the Original Site.

Petitioner represents that the Proposed Site is 1.92 miles, about five minutes travel, from the Original Site. Petitioner also represents that the addition of the Scanner to Salem MRI’s other services will offer extended hours and the opportunity for consolidated imaging in one location.

In its CON application for the Project, The Breast Clinic stated that it anticipated that after completion of the CON review, up to forty percent (40%) of the ownership interests in The Breast Clinic MRI, LLC would be transferred to the radiology group affiliated with Forsyth Medical Center and other Novant Health Triad Region Imaging sites. The other sites included Salem MRI. Petitioner states that Novant Health, Inc.(“Novant”), which Petitioner describes as the ultimate parent of The Breast Clinic, now has formed an outpatient imaging joint venture with Forsyth Radiological Associates (“FRA”) called Excel Imaging, LLC (“Excel”). Excel will

be owned 60% by Novant and 40% by FRA. Salem MRI and The Breast Clinic are part of the joint venture.

Petitioner states that at the time of its application for the Project, the creation of Excel was still under discussion, so it would have been premature for Excel to have applied for the CON for the Project. Now, however, Petitioner states that Excel is formed and able to take ownership of various assets, including the Scanner. Petitioner asks for a ruling pursuant to N.C.G.S. §§ 131E-181(a) and 131E-189(c) approving for good cause the transfer of the CON for the Scanner to Excel and determining that locating the Scanner at the Proposed Site will be in material compliance with the representations in the CON application.

ANALYSIS

N.C.G.S. § 131E-181(a) provides that a CON “shall be valid only for the defined scope, physical location, and person named in the application. A certificate of need shall not be transferred or assigned except as provided in G.S. 131E-189(c).”

N.C.G.S. § 131E-189(c) provides:

The Department may immediately withdraw any certificate of need if the holder of the certificate, before completion of the project or operation of the facility, transfers ownership or control of the facility, the project or the certificate of need. . . . Transfers resulting from death or other good cause, as determined the Department, shall not result in withdrawal if the Department receives prior written notice of the transfer and finds good cause. . . .

Because Petitioner gave notice in its CON application for the Project of its intentions with respect to the ownership of The Breast Clinic, and because Excel, the ultimate entity described by Petitioner in its application had not then been formed, Petitioner has shown good cause for the transfer of the CON and the Project to Excel.

The proposed change of the site for the Project does not constitute a material change in the physical location or the scope of the proposed project because the Original Site has been determined unsuitable for the Project, the Proposed Site is located in close proximity to the Original Site, and the cost of the Project will be lower. The change in site should not affect the scope of services offered to the public.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that subject to the conditions set out herein, the substitution of the Proposed Site for the Original Site will not constitute a material change in the physical location or scope of the project, will not violate N.C.G.S. § 131E-181, and will not constitute a failure to satisfy a condition of the CON in violation of N.C.G.S. § 131E-189(b). I further conclude that Petitioner has shown good cause for transfer of the CON for the Project from The Breast Clinic to Excel.

This ruling is not intended, and should not be interpreted, to authorize any increases in the approved capital expenditure for this project, a change in the approved timetable, a change in the conditions placed on the certificate of need, or any other change in the approved project.

This the ____ day of May, 2007.

Robert J. Fitzgerald, Director
Division of Facility Services
N.C. Department of Health and Human Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Declaratory Ruling has been served upon the nonagency party by certified mail, return receipt requested, by depositing the copy in an official depository of the United States postal service in a first class, postage prepaid envelope addressed as follows:

CERTIFIED MAIL

Denise M. Gunter
Nelson Mullins Riley & Scarborough, LLP
380 Knollwood Street
Winston-Salem, NC 27103

This the _____ day of May, 2007.

Jeff Horton
Chief Operating Officer