

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY NORTH CAROLINA) DECLARATORY RULING
BAPTIST HOSPITAL)
Project I.D. No. G-2861-87)**

I, Robert J. Fitzgerald, as Director of the Division of Health Service Regulation, North Carolina Department of Health and Human Services (“Department” or “Agency”), do hereby issue this Declaratory Ruling pursuant to North Carolina General Statute § 150B-4 and 10A NCAC 14A.0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

North Carolina Baptist Hospital (“NCBH”) has requested a declaratory ruling allowing it to acquire a replacement helicopter for its air ambulance service, Project I.D. No. G-2861-87, without first obtaining a Certificate of Need (“CON”) on the grounds that the replacement is exempt from CON review pursuant to N.C.G.S. 21 131E-184(a)(5). For the reasons stated below, I must deny the request.

This ruling will be binding upon the Department and the entity requesting it, as long as the material facts stated herein are accurate. This ruling pertains only to the matters referenced herein. Except as provided by N.C.G.S. § 150B-4, the Department expressly reserves the right to make a prospective change in the interpretation of the statutes and regulations at issue in this Declaratory Ruling. S. Todd Hemphill of Bode, Call & Stroupe, L.L.P. has requested this ruling on behalf of NCBH and has provided the material facts upon which this ruling is based.

STATEMENT OF THE FACTS

Effective 7 April 1987, the CON Section issued a CON to NCBH for Project I.D. No. G-2861-87, pursuant to which NCBH replaced its air ambulance unit with a Bell-412 twin engine aircraft (the “Existing Helicopter”). It operated the Existing Helicopter under lease with Air Methods Corporation. NCBH states that on 26 July 2007, the Existing Helicopter was being transported by tractor trailer for maintenance when the main rotor mast struck a highway bridge. NCBH represents that the Existing Helicopter sustained irreparable damage and is a total loss.

NCBH has worked with the lessor of the Existing Helicopter, Air Methods, to provide a backup aircraft (the “Interim Helicopter”) to continue its air ambulance service. NCBH has not sought a declaratory ruling or other authorization from the Agency regarding the use of the Interim Helicopter.

NCBH now seeks to replace the Existing Helicopter with a Eurocopter EC-135 (the “Replacement Helicopter”). It proposes to lease the Replacement Helicopter from Air Methods. NCBH represents that the purchase price, and thus the fair market value, of the Replacement Helicopter is \$4,743,973.

ANALYSIS

Under the CON law, an “air ambulance” is an “aircraft used to provide air transport of sick or injury persons between destinations within the State.” N.C.G.S. § 131E-176(1a) The acquisition of an air ambulance is included in the definition of a “new institutional health service.” N.C.G.S. § 131E-176(16)f1.1. No person shall offer or develop a new institutional health service without first obtaining a CON, N.C.G.S. § 131E-178(a), unless exempted from the requirement by some other provision of law.

NCBH argues that its lease of the Replacement Helicopter should be exempt from the CON requirement pursuant to N.C.G.S. § 131E-184(a)(5), which provides for an exemption when a new institutional health service is to “replace or repair *facilities* destroyed or damaged by accident or natural disaster.” (emphasis added) NCBH then argues that the Existing Helicopter is a facility in the ordinary common meaning of the word.

NCBH’s argument is not convincing. While the precise term “facility” is not defined in the CON law, the term “health service facility,” as defined in N.C.G.S. § 131E-176(9b) lists categories of buildings and other physical locations. Moreover, in the subpart of the definition of new institutional health service that applies to an air ambulance, the listed items (which include air ambulances) are described as “equipment.” N.C.G.S. § 131E-176(16)f1. The facility exemption does not apply here.

The exemption from a CON requirement related to equipment applies to acquisitions to “provide replacement equipment.” N.C.G.S. § 131E-184(a)(7). “Replacement equipment” is defined in the CON law as “equipment that costs *less than two million dollars . . .*” N.C.G.S. § 131E-176(24)(emphasis added). Cost is determined to be the actual cost or the fair market value of the equipment and ancillary expenditures, whichever is greater. The Replacement Helicopter, therefore, is not “replacement equipment” for purposes of the exemption from the requirement for a CON because its cost, as identified by NCBH, is \$4,743,973. NCBH’s Replacement Helicopter is not exempt for CON review, and I must deny the requested ruling.

This ruling does not address the question of whether NCBH’s use of the Interim Helicopter complies with its CON. NCBH has not sought a ruling with respect to the Interim Helicopter. If NCBH seeks a ruling permitting it to use the Interim Helicopter pending its

application for a CON for the Replacement Helicopter, it will be determined on the facts and circumstances at the time.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the request to be true, NCBH's request for declaratory ruling is denied. This ruling is not intended and should not be interpreted to authorize NCBH to continue to operate its Interim Helicopter.

This the _____ day of _____, 2007.

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

CERTIFICATE OF SERVICE

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

CERTIFIED MAIL

S. Todd Hemphill
Bode, Call & Stroupe, L.L.P.
3105 Glenwood Avenue, Suite 300
Raleigh, NC 27612

This the _____ day of _____, 2007.

Jeff Horton
Chief Operating Officer