

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

IN RE: REQUEST FOR)	
DECLARATORY RULING BY)	DECISION TO DECLINE TO
NOVANT HEALTH, INC. AND)	ISSUE DECLARATORY RULING
FORSYTH MEMORIAL HOSPITAL, INC.)	
d/b/a FORSYTH MEDICAL CENTER AND)	
MEDICAL PARK HOSPITAL)	

Novant Health, Inc. and Forsyth Memorial Hospital, Inc. d/b/a Forsyth Medical Center and Medical Park Hospital (collectively, “Novant”) have filed a Declaratory Ruling Request (the “Request”) asking the North Carolina Department of Health and Human Services (“Department”) to issue a ruling as to the validity of Policy AC-3 of the State Medical Facilities Plan (“SMFP”). Pursuant to N.C.G.S. § 150B-4, 10A NCAC 14A.0108, and the authority delegated to me by the Secretary of the Department, and for the reasons given below, I hereby decline to issue any ruling to Novant. Noah H. Huffstetler, III and Denise M. Gunter of Nelson Mullins Riley & Scarborough LLP have requested this ruling on behalf of Novant.

STATEMENT OF THE FACTS

The North Carolina SMFP is an annual document that contains policies and methodologies used in determining need for new health care facilities and services in North Carolina. The North Carolina 2011 SMFP was developed by the North Carolina Department of Health and Human Services, Division of Health Service Regulation, under the direction of the North Carolina State Health Coordinating Council (“SHCC”), pursuant to N.C.G.S. § 131E-177. Throughout the development of the SMFP there are opportunities for public review and comment. Sections of the SMFP, including the policies and methods for projecting need, are developed with the assistance of committees of the SHCC. The committees submit their

recommendations to the SHCC for approval. A Proposed Plan is assembled and made available to the public. Public hearings on the Proposed Plan are held throughout the State during the summer. Comments and petitions received during this period are considered by the SHCC and, upon incorporation of all changes approved by the SHCC, a final draft is presented to the Governor for review and approval. With the Governor's approval, the SMFP becomes the official document for health facility and health service planning in North Carolina for the specified calendar year.

The SMFP has contained a policy related to Academic Medical Centers since 1983.

Policy AC-3 as set forth in the 2011 SMFP provides:

Projects for which certificates of need are sought by academic medical center teaching hospitals may qualify for exemption from the need determinations of this document. The Medical Facilities Planning Section shall designate as an Academic Medical Center Teaching Hospital any facility whose application for such designation demonstrates the following characteristics of the hospital:

1. Serves as a primary teaching site for a school of medicine and at least one other health professional school, providing undergraduate, graduate and postgraduate education.
2. Houses extensive basic medical science and clinical research programs, patients and equipment.
3. Serves the treatment needs of patients from a broad geographic area through multiple medical specialties.

Exemption from the provisions of need determinations of the North Carolina State Medical Facilities Plan shall be granted to projects submitted by Academic Medical Center Teaching Hospitals designated prior to January 1, 1990 provided the projects comply with one of the following conditions:

1. Necessary to complement a specified and approved expansion of the number or types of students, residents or faculty, as certified by the head of the relevant associated professional school; or
2. Necessary to accommodate patients, staff or equipment for a specified and approved expansion of research activities, as certified by the head or the entity sponsoring the research; or

3. Necessary to accommodate changes in requirements of specialty education accounting bodies, as evidenced by copies of documents issued by such bodies.

A project submitted by an Academic Medical Center Teaching Hospital under this Policy that meets one of the above conditions shall also demonstrate that the Academic Medical Center Teaching Hospital's teaching or research need for the proposed project cannot be achieved effectively at any non-Academic Medical Center Teaching Hospital provider which currently offers the service for which the exemption is requested and which is within 20 miles of the Academic Medical Center Teaching Hospital.

Any health service facility or health service facility bed that results from a project submitted under this Policy after January 1, 1999 shall be excluded from the inventory of that health service facility or health service facility beds in the North Carolina State Medical Facilities Plan.

Novant has sought to challenge Policy AC-3 on at least three different fronts. First, Novant is involved in a pending case concerning a certificate of need approval for North Carolina Baptist Hospital ("NCBH"), one of the Academic Medical Center Teaching Hospitals designated prior to January 1, 1990. In its June 10, 2010 Decision and Required State Agency Findings, the CON Section applied Policy AC-3 and approved NCBH's Project I.D. No. G-8460-10 (the "Project") for the construction of a facility with eight outpatient operating rooms, two procedure rooms, one robotic surgery training room and one simulation operating room in Forsyth County. Novant petitioned for a contested case involving the Project in the Office of Administrative Hearings (Case No. 10 DHR 3788), and a two-week contested case hearing was held before ALJ Overby in January 2011. In the contested case, Novant has asked ALJ Overby to determine as a matter of law that Policy AC-3 of the 2010 SMFP – which is identical to Policy AC-3 in the 2011 SMFP – is invalid.

Second, in August 2010, Novant unsuccessfully petitioned the SHCC to amend or repeal Policy AC-3 as it was presented in the Draft 2011 SMFP. Novant's petition was disapproved by the SHCC as untimely.

Third, Novant has filed the instant declaratory ruling request. Novant seeks a declaratory ruling that invalidates Policy AC-3 in the 2011 SMFP.

ANALYSIS

The North Carolina Administrative Procedure Act (“APA”) provides that:

On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule . . . except when the agency for good cause finds issuance of a ruling undesirable.

N.C.G.S. § 150B-4. The APA defines “rule” as follows:

(8a) “Rule” means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the [Rules Review] Commission for compliance with G.S. 131E-176(25), and approved by the Governor.

N.C.G.S. § 150B-2.

The APA instructs that an agency “shall prescribe in its rules the circumstances in which rulings shall or shall not be issued.” N.C.G.S. § 150B-4. Consequently, the Department has adopted the following rule:

Whenever the Director [of the Division of Health Service Regulation] believes for good cause that the issuance of a declaratory ruling will not serve the public interest, he may refuse to issue one. When good cause is deemed to exist, the Director will notify the petitioner of his decision in writing stating reasons for the denial of a declaratory ruling.

10A NCAC 14A .0103.

The policy challenged by Novant is part of the 2011 SMFP, which was prepared with public notice and hearing as provided in N.C.G.S. § 131E-176(25), reviewed by the Rules Review Commission for compliance with N.C.G.S. § 131E-176(25), and approved by the Governor. By definition, therefore, Policy AC-3 is not a “rule” subject to a declaratory ruling. *See* N.C.G.S. §§ 150B-4 & 150B-2.

Furthermore, even if I properly could rule on the policy’s validity, I would decline to do so for good cause. Policy AC-3’s validity is currently the subject of litigation between Novant, the Department (CON Section), and NCBH. Although Novant seeks invalidation of AC-3 in the 2010 SFMP in the litigation and of the same policy in the 2011 SMFP here, the two policies are identical as are Novant’s asserted grounds for invalidation. Thus, a declaratory ruling improperly would preempt the ALJ’s role of making a recommended decision in the contested case. A ruling also is premature, as the issue may be presented to me in the context of the contested case given my role as final decision maker in the litigation. Issuing a declaratory ruling now could result in two parallel proceedings in the Court of Appeals and Superior Court seeking determinations concerning the validity of Policy AC-3, which would not serve the interest of judicial economy and could lead to inconsistent results and confusion. For these reasons, I find that issuing a ruling under such circumstances would not serve the public interest.

CONCLUSION

For the reasons given above, I decline to issue any ruling in response to the Request for Declaratory Ruling filed by Novant.

This the _____ day of March, 2011.

Drexdal Pratt, 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

Noah Huffstetler, III
Denise M. Gunter
Nelson Mullins Riley & Scarborough LLP
380 Knollwood Street, Suite 530
Winston-Salem, NC 27103

With a courtesy copy to:

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

Catherine W. Cummer
Duke University Health System, Strategic and Regulatory
Planning
DUMC 80
3100 Tower Blvd., Suite 1300
Durham, NC 27707

Gary S. Qualls
K&L Gates LLP
430 Davis Drive, Suite 400
Morrisville, NC 27560

This the _____ day of March 2011.

Jeff Horton
Chief Operating Officer