

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

IN RE: REQUEST FOR DECLARATORY)
RULING BY HEDGEHOG LAND) **DECLARATORY RULING**
INVESTMENT, LLC AND ALAMANCE)
MANOR ASSISTED LIVING, LLC)
)

I, Drexdal Pratt, 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 N.C. Gen. Stat. § 150B-4 and 10A N.C.A.C. 14A.0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

Hedgehog Land Investment, LLC and Alamance Manor Assisted Living, LLC (the “Petitioners”) have requested a declaratory ruling allowing Petitioners to relocate twenty-five (25) adult care home (“ACH”) beds from a proposed Alamance County facility to a proposed facility owned by a related entity in Chatham County on the grounds that the change does not constitute a material change in the scope or physical location of the Petitioners’ Certificate of Need (“CON”)-approved project, does not violate N.C. Gen. Stat. § 131E-181, does not amount to a new institutional health service under N.C. Gen. Stat. §§ 131E-176(16); does not amount to a failure to materially comply with a condition in Petitioners’ CON Application for this project, and will not require full CON review. This ruling will be binding upon the Department and the entities 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. Gen. Stat. § 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. Frank Kirschbaum and Robert A.

Hamill of Nexsen Pruet, PLLC have requested this ruling on behalf of Petitioners and have provided the material facts upon which the ruling is based.

STATEMENT OF THE FACTS

Effective March 24, 2009, the CON Section issued a CON to Petitioners for Project I.D. #G-8220-08 to build a new 125 bed adult home care facility that included a thirty-two (32) bed Alzheimer's unit (the "Alamance Facility") to replace the Graham Manor facility, which closed due to bankruptcy in 2005. The proposed location of the Facility was 1325 East Main Street, Graham, North Carolina, 27253. On January 30, 2013, Petitioners received a declaratory ruling authorizing the relocation of the Alamance Facility to 2010 North Carolina 119, Mebane, North Carolina, 27302. The approved total capital expenditure amount in Petitioner's CON application (the "Alamance Application") was \$7,794,285.00.

Effective March 1, 2013, the CON Section issued a CON to Arbor Ridge at Chatham, LLC for Project I.D. #J-8772-12 to add twenty-six (26) ACH beds to the forty (40) ACH bed facility which may include a special care unit for a total of sixty-six (66) beds upon completion of that project and Project I.D. #J-8662-11 (the "Chatham Facility"). The total approved capital expenditure for both projects (the "Chatham Applications") was \$6,278,031.

In this request, Petitioners propose to relocate 25 ACH beds from the approved Alamance County location to the Chatham Facility. Petitioners represent that the Alamance Facility and Chatham Facility are related entities. Aside from relocating 25 ACH beds, Petitioners represent that they intend to comply with all terms and conditions associated with their CON. The Alamance Facility and the Chatham Facility are both being developed. Neither facility is operational. None of the beds in either of the facilities are currently licensed.

ANALYSIS

The CON law would require a full review of Petitioners' proposed relocation if that relocation were to represent a material change in the physical location or scope of the project. N.C. Gen. Stat. § 131E-181(a). The proposed relocation is the result of a settlement, does not constitute a material change to the scope of Petitioners' CON-approved project, does not violate N.C. Gen. Stat. § 131E-181, does not amount to a new institutional health service, does not result in a failure to satisfy a condition of the CON, and full review is not required for the following reasons:

Petitioners have proposed to relocate a portion of their approved ACH beds to Chatham County. This relocation will result in 25 beds being relocated 27 miles from the currently approved location. Upon relocation, the beds will be two (2) miles from the Alamance/Chatham County Line. The change in location will not affect the scope of services offered or affect the population to be served as proposed in the approved Application. Petitioners still intend to construct and operate a 100 bed adult care home facility with a thirty-two (32) bed Alzheimer's unit in Alamance County and still intend to serve the same population. The proposed change is in material compliance with the CON for this project.

The change in location will not amount to a new institutional health service. The relocation of health facility beds will not be from one licensed facility or campus to another. The relocation will not result in the redistribution of health service bed capacity or increase the combined total number of health facility beds in the two facilities.

Petitioners proposed a total capital expenditure of \$7,794,285.00 in their Alamance Application. Petitioners proposed a total capital expenditure of \$6,278,031 in the Chatham Applications. Petitioners have represented that they do not anticipate exceeding either figure by

any material amount to complete the relocation. The total capital expenditure will not exceed the proposed capital expenditure amount by greater than 15%.

Petitioners have proposed to relocate ACH beds, and not an adult care home. Petitioners, therefore, have not proposed to relocate a health service facility to a different health service area.

If Petitioners held existing licensed adult care home beds, the proposed relocation would be consistent with Policy LTC-2. The purpose of Policy LTC-2 is to ensure that the relocation of ACH beds does not cause a deficit or surplus. Petitioners have demonstrated that they are relocating ACH beds from a service area with a 134 bed surplus to a service area with a 28 bed deficit. Because Petitioners have not proposed to relocate existing licensed ACH beds and because Petitioners are not CON applicants, Policy LTC-2 is inapplicable to this specific relocation but it is instructive.

N.C. Gen. Stat. § 131E-181(a) states that a, “certificate of need shall be valid only for the defined scope, physical location and person named in the application.” However, the Department has allowed flexibility for advancement of the objective of the CON statute. N.C. Gen. Stat. § 131E-175(1) states that government regulation is necessary to control costs of health service facilities. Constructing a facility and licensing beds for the sole purpose of relocating the beds to a contiguous county, an alternative approach that would rely on Policy LTC-2, would contradict the intent of the CON statute to control costs in this situation. It is more cost effective to relocate the 25 beds before construction and licensing of the facilities and the requested ruling therefore will be consistent with the purpose of the CON statute.

N.C. Gen. Stat. § 131E-189(b) allows the Agency to withdraw Petitioners’ CON if Petitioners fail to develop the service in a manner consistent with the representations made in the Application or with any conditions that were placed on the CON. Petitioners will not be

developing their project in a manner that is materially different from the representations made in their Application, nor will they be developing their project in a manner that is inconsistent with any of the conditions that were placed on its CON, other than previously discussed.

CONCLUSION

For all of the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that the relocation of 25 ACH beds from Alamance County to a related entity in Chatham County will not constitute a material change in the scope of the Petitioners' CON-approved project, would not violate N.C. Gen. Stat. § 131E-181, would not amount to a new institutional health service under N.C. Gen. Stat. §§ 131E-176(16), would not constitute a failure to satisfy a condition of Petitioners' CON, and additional review is not required under North Carolina's CON law.

This the _____ day of July, 2013.

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:

Nexsen Pruet, PLLC
Frank Kirschbaum
Robert A. Hamill
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612

This the _____ day of July, 2013.

Cheryl Ouimet
Chief Operating Officer