

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY ASSISTED LIVING GROUP OF)
BOSTIC, LLC, BOSTIC HEALTH) **DECLARATORY RULING**
HOLDINGS, LLC, and RUTHERFORDCO, LLC)
Project I.D. No. C-8626-11)**

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 North Carolina General Statutes § 150B-4 and 10A NCAC 14A .0103, under the authority granted me by the Secretary of the Department of Health and Human Services.

Petitioners Assisted Living Group of Bostic, LLC (lessor) (“ALG of Bostic”), Bostic Health Holdings, LLC (lessee) (“BHH”), and Rutherfordco, LLC (“Rutherfordco”) request that the North Carolina Department of Health and Human Services, Division of Health Service Regulation (the “Department”) issue a declaratory ruling as to whether Rutherfordco may acquire from ALG of Bostic all of ALG of Bostic’s interests in Project I.D. No. C-8626-11 (the “Project”). 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.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. Joy Heath has requested this ruling on behalf of BHH and has provided the material facts upon which this ruling is based.

STATEMENT OF THE FACTS

In January 2011, ALG of Bostic and BHH jointly applied for a certificate of need to develop Ruth Manor (“RM”) in Rutherford County by relocating 46 adult care home beds from the Haven-n-Hills (“HNNH”) facility in Bostic, Rutherford County to RM, where all 46 relocated beds would be special care unit beds (Project I.D. No. C-8626-11) (the “Project”). On June 30, 2011, the Agency disapproved the application. ALG of Bostic and BHH appealed the Agency’s action by filing an appeal on July 29, 2011 with the Office of Administrative Hearings (“OAH”). On April 4, 2012, a settlement agreement was approved and adopted and on May 11, 2012, a certificate of need authorizing the development of the Project was issued to ALG of Bostic and BHH. The CON issued for the Project defined the Scope for the Project as follows: “Assisted Living Group of Bostic, LLC (Lessor) & Bostic Health Holdings, LLC (Lessee) shall relocate 46 adult care home beds from Bostic to a new location in Rutherfordton in which all 46 beds will be special care unit beds/ Rutherford County” and included a timetable for the Project. The physical location of the replacement facility is identified in the CON for this project as “Ruth Manor, 561 Railroad Avenue, Rutherfordton, NC 28139”. On November 1, 2013, the CON Section withdrew the certificate of need for Project I.D. #C-8626-11 for failure to develop the Project in accordance with the approved timetable; a lack of good faith documentation from the holders of the certificate that they had made a good faith effort to meet the timetable; and failure to develop the Project consistent with the representations made in the application. On November 27, 2013, ALG of Bostic and BHH appealed the Section’s withdrawal of the CON by filing a petition for a contested case hearing with OAH. In the context of settlement negotiations, ALG of Bostic and BHH submitted additional information to the CON Section, allowing the CON Section to determine that ALG of Bostic and BHH were developing the Proposed Project in compliance with the

representations in the CON application and previous settlement agreement. The CON Section accepted a revised timetable submitted by ALG of Bostic and BHH and, in accordance with a settlement agreement approved and adopted on June 16, 2014, the CON Section notified ALG of Bostic and BHH on July 14, 2014 that it was rescinding its withdrawal of the CON for the Project. Thus far, the Project remains undeveloped. ALG of Bostic (Lessor), BHH (Lessee) and Rutherfordco (“Petitioners”) now request a declaratory ruling to determine whether good cause exists to allow Rutherfordco, as part of a larger transaction involving multiple adult care home facilities, to acquire ALG of Bostic’s interests in the CON issued for the Project.

Petitioners’ request for a declaratory ruling sets forth the following additional material facts and representations in support of its request. ALG of Bostic and other adult care facilities are, or were, owned by Clifford Hemingway (“Borrower”). In April 2006, Borrower entered into certain loan documents currently owned and held by DCR Mortgage VI Sub II, LLC (“Lender”). Borrower is in default of his obligations to Lender and Lender has agreed to allow Borrower to convey certain facility assets to subsidiaries of Lender (including but not limited to Rutherfordco) in lieu of Lender initiating a civil suit concerning Borrower’s default on its loan obligations. Lender’s agreement with Borrower provides that Rutherfordco (a wholly owned subsidiary of Lender) will acquire Borrower’s interests in ALG of Bostic and other subsidiaries of Lender will acquire Borrower’s interests in other adult care facilities (Concord House, Winchester House #1 and Winchester House #2).

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 by the Department, shall not result in withdrawal if the Department receives prior written notice of the transfer and finds good cause. . .

Petitioners provided prior written notice and have shown good cause for the transfer of ALG of Bostic’s interests in the CON for Project I.D. #C-8626-11 to Rutherfordco. Rutherfordco’s acquisition of ALG of Bostic’s interests is part of a larger transaction designed to help refinance facilities and will not impact Rutherfordco and Bostic’s ability to develop the Project in a manner consistent with the representations in the CON application or conditions imposed on Bostic’s CON as the result of the Settlement Agreement or otherwise. Additionally, Rutherfordco’s acquisition of ALG of Bostic’s interests in the yet to be developed Project will not result in a change in the scope of the services, the number of beds to be developed, the costs to the patients or the physical location of the facility. Petitioners further assert that there will be no change in the day-to-day operations or administration of the as yet undeveloped facility as a result of this transaction.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that Petitioners have shown good cause to transfer ALG of Bostic's interests in the CON for Project I.D. No. C-8626-11 to Rutherfordco. This transfer is subject to the condition that Rutherfordco and Bostic comply with all conditions in the CON for Project I.D. No. C-8626-11 and related settlement agreement.

This the ____ day of November, 2014.

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 a first-class, postage pre-paid envelope addressed as follows:

CERTIFIED MAIL

Joy Heath/ Ruth Levy
WILLIAMS MULLEN
Post Office Box 1000
Raleigh, North Carolina 27602

This the _____ day of November, 2014.

Cheryl Ouimet
Chief Operating Officer