

North Carolina Department of Health and Human Services  
Division of Health Service Regulation  
Certificate of Need Section

2704 Mail Service Center • Raleigh, North Carolina 27699-2704  
<http://www.ncdhhs.gov/dhsr/>

Drexdal Pratt, Director

Beverly Eaves Perdue, Governor  
Albert A. Delia, Acting Secretary

Craig R. Smith, Section Chief  
Phone: (919) 855-3873  
Fax: (919) 733-8139

August 8, 2012

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

RE: No Review / SVCare Holdings, LLC / Acquisition of membership interests of SVCare Holdings, LLC by Cammeby's Equity Holdings, LLC

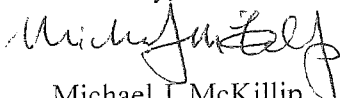
Dear Mr. Hemphill:

The Certificate of Need (CON) Section received your letter of July 13, 2012 regarding the above referenced proposal. Based on the CON law **in effect on the date of this response to your request**, the proposal described in your correspondence is not governed by, and therefore, does not currently require a certificate of need. However, please note that if the CON law is subsequently amended such that the above referenced proposal would require a certificate of need, this determination does not authorize you to proceed to develop the above referenced proposal when the new law becomes effective.

It should be noted that this determination is binding only for the facts represented by you. Consequently, if changes are made in the project or in the facts provided in your correspondence referenced above, a new determination as to whether a certificate of need is required would need to be made by the Certificate of Need Section. Changes in a project include, but are not limited to: (1) increases in the capital cost; (2) acquisition of medical equipment not included in the original cost estimate; (3) modifications in the design of the project; (4) change in location; and (5) any increase in the number of square feet to be constructed.

In addition, you should contact the Nursing Home Licensure and Certification Section to determine if they have any requirements for development of the proposed project. Please contact the CON Section if you have any questions.

Sincerely,

  
Michael J. McKillip  
Project Analyst

  
Craig R. Smith, Chief  
Certificate of Need Section

cc: Nursing Home Licensure and Certification Section, DHSR



**BODE, CALL & STROUPE, L.L.P.**

ATTORNEYS AT LAW

3105 GLENWOOD AVENUE, SUITE 300  
RALEIGH, NORTH CAROLINA 27612

TELEPHONE (919) 881-0338  
TELECOPIER (919) 881-9548

WWW.BCS-LAW.COM

JOHN T. BODE  
W. DAVIDSON CALL  
ROBERT V. BODE  
ODES L. STROUPE, JR.  
S. TODD HEMPHILL  
MATTHEW A. FISHER

JOHN V. HUNTER III  
RETIRED

MAILING ADDRESS  
POST OFFICE BOX 6338  
RALEIGH, NORTH CAROLINA  
27628-6338

July 13, 2012



**VIA HAND DELIVERY**

Mr. Craig R. Smith, Chief  
Certificate of Need Section  
Division of Health Service Regulation  
North Carolina Department of Health and Human Services  
809 Ruggles Drive  
Raleigh, North Carolina 27603

Re: Request for No Review Determination – Acquisition of ownership interest in the parent company of entities that own certain nursing facilities in North Carolina

Dear Mr. Smith:

We are submitting this letter on behalf of our client, Cammeby's Equity Holdings, LLC ("Cam Equity"), regarding its planned acquisition of the membership interests of SVCare Holdings, LLC ("SVCare"), which is the "great grandparent" (3<sup>rd</sup> tier) owner of thirty-two (32) nursing facilities in North Carolina.<sup>1</sup> The specific facilities at issue here are as follows:

Brian Center Health & Rehabilitation / Brevard  
Brian Center Health & Rehabilitation / Durham  
Brian Center Health & Rehabilitation / Goldsboro  
Brian Center Health & Rehabilitation / Hendersonville  
Brian Center Health & Rehabilitation / Hickory East  
Brian Center Health & Rehabilitation / Spruce Pine  
Brian Center Health & Rehabilitation / Statesville  
Brian Center Health & Rehabilitation / Wallace  
Brian Center Health & Rehabilitation / Weaverville  
Brian Center Health & Rehabilitation / Wilson  
Brian Center Health & Rehabilitation / Windsor

<sup>1</sup> SVCare has interests in health care facilities in other states, as well.

Mr. Smith  
July 13, 2012  
Page 2

Brian Center Health & Rehabilitation / Yanceyville  
Brian Center Health & Rehabilitation / Cabarrus  
Brian Center Health & Rehabilitation / Clayton  
Brian Center Health & Rehabilitation / Monroe  
Brian Center Health & Rehabilitation / Mooresville  
Brian Center Health & Rehabilitation / Winston-Salem  
Brian Center Health & Rehabilitation / Gastonia  
Brian Center Health & Rehabilitation / Hickory Viewmont  
Brian Center Health & Rehabilitation / Charlotte  
Brian Center Health & Rehabilitation / Eden  
Brian Center Health & Rehabilitation / Hertford  
Brian Center Health & Rehabilitation / Salisbury  
Brian Center Health & Rehabilitation / Lincolnton  
Brian Center Nursing Care / Lexington  
Brian Center Nursing Care / Shamrock  
Maple Leaf Health Care  
Brian Center Health & Rehabilitation / Waynesville  
Kenansville Health & Rehabilitation Center  
Randolph Health & Rehabilitation Center  
Silver Stream Health & Rehabilitation Center  
Wilmington Health & Rehabilitation Center

An organization chart showing the current ownership interests in each of these facilities is attached as Exhibit A.<sup>2</sup> As shown therein, SVCare, through its subsidiaries, holds the membership interest in the parent companies of each of these facilities.

Cam Equity holds an option to purchase up to 99.999% of all membership units in SVCare. Cam Equity intends to exercise that option, whereby Cam Equity (or its nominee) will acquire that 99.999% membership interest.<sup>3</sup>

The acquisition by Cam Equity (or its nominee) of the membership units of SVCare shall not cause any change in the direct ownership or day-to-day operations of the licensed nursing home facilities in North Carolina. The licensed facilities will continue to have the same name,

---

<sup>2</sup> There is one additional facility, Brian Center Charlotte Retirement Apartments, referenced in that organization chart. That facility provides independent living apartments for retired persons, and is not a licensed nursing facility or adult care home facility. Therefore, its ownership is not impacted by the CON Law.

<sup>3</sup> That option agreement was the subject of a New York civil action, the result of which was a Decision and Order entered by Justice O. Peter Sherwood of the New York Supreme Court, granting Cam Equity's motion for summary judgment and requiring SVCare Holdings to comply with the terms of the option agreement and permit the acquisition of the aforementioned membership interests. A copy of Justice Sherwood's Decision and Order is attached hereto as Exhibit B.

Mr. Smith  
July 13, 2012  
Page 3

tax identification number, and provider numbers. The facilities will continue to have the same management and personnel. In short, nothing will change operationally or structurally for the licensed facilities as a result of the acquisition.

With this letter, Cam Equity is requesting a no-review determination regarding its acquisition of the membership interests in SVCare, the limited liability company which indirectly owns the above facilities in North Carolina. Consistent with the longstanding approach of the Agency in finding that purchases of corporate ownership interests are not events requiring a certificate of need, Cam Equity now seeks confirmation that its acquisition of the membership interests in SVCare (hereinafter, the "Proposed Acquisition"), may proceed without first obtaining a certificate of need.

### ANALYSIS

The CON Law was enacted to prevent the development and operation of unneeded health services, equipment and facilities. This is made explicit in the very first section of the law, where the General Assembly finds: "That the proliferation of unnecessary health service facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services." N.C. Gen. Stat. § 131E-175(4). The CON Law essentially focuses on the development and offering of those "new institutional health services" that would create additional capacity, and which are catalogued in N.C. Gen. Stat. § 131E-176(16). In keeping with its fundamental goals, the CON Law expressly recognizes that certain activities are not subject to review. Based upon the clear terms of the CON Law and prior declaratory rulings by the Division of Health Service Regulation ("DHSR") and no review determinations by the CON Section, the Proposed Acquisition does not require a certificate of need.

#### **I. The Proposed Acquisition Will Not Result in a New Institutional Health Service**

The CON Law provides that no person shall offer or develop a "new institutional health service" without first obtaining a CON. N.C. Gen. Stat. § 131E-178. However, none of the components of the "new institutional health service" definition address, directly or indirectly, the acquisition of membership interests in an organization that already is operating a health service. This type of transaction is among the activities that are "administrative and other activities that are not integral to clinical management," and which are specifically excluded from the definition of "health service" in the CON Law. N.C. Gen. Stat. § 131E-176(9a). Therefore, an acquisition of corporate ownership interests, such as the Proposed Acquisition at issue in this request, does not involve a new institutional health service at all and should not be subject to CON Review.

The list of new institutional health services does include "the obligation by any person of a capital expenditure exceeding two million dollars (\$2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service," N.C. Gen. Stat. § 131E-176(16)(b). However, this definition does not apply to the Proposed

Acquisition. In prior declaratory rulings and no review determinations, DHSR and the CON Section have consistently recognized that transactions which are limited to an acquisition of underlying corporate membership interests in an existing legal entity which owns and operates an existing health service facility and its associated equipment, such as the Proposed Acquisition, fall within the above-referenced exclusion recognized in the definition of "health service" in the CON Law. Accordingly, DHSR and CON Section have consistently determined that events such as the Proposed Acquisition do not trigger certificate of need review under the \$2,000,000 capital expenditure provision.

## **II. Prior Declaratory Rulings and No Review Determinations Confirm the Proposed Acquisition Does Not Require a CON**

This no-review request is consistent with prior declaratory rulings and no review determinations which have interpreted the applicability of the CON Law to the purchase of ownership interests in corporate entities that own existing health care facilities. Over the course of North Carolina's Certificate of Need program, there have been a number of declaratory rulings and at least one no review determination which confirmed that the acquisition of ownership interests in companies which own existing health care facilities that already are offering services does not constitute the offering of a new institutional health service because such transactions do not implicate the creation of additional capacity and health service facilities which might lead to the "unnecessary use and expense of resources and overutilization of healthcare services," detailed in the legislative findings. *See* N.C. Gen. Stat. § 131E-175(4). Several examples which have upheld this principle of no review for acquisitions of corporate ownership interests are discussed below.

- On January 6, 2012, the CON Section issued a no review letter (attached as *Exhibit C*) finding that North Carolina Radiation Therapy Management Services, LLC's acquisition of the ownership interests in the corporate entities that owned an existing oncology treatment center and the associated equipment located in Asheville, North Carolina, was not a new institutional health service and did not require a CON.
- On August 18, 2011, DHSR issued a declaratory ruling finding that Radiation Oncology Centers of the Carolinas, Inc.'s transfer of two CON-approved radiation oncology facilities to two wholly-owned subsidiaries did not constitute a new institutional health service or require a certificate of need. *See In re: Request for Declaratory Ruling by Radiation Oncology Centers of the Carolinas, Inc.* (attached as *Exhibit D*).
- On September 27, 2010, DHSR issued a declaratory ruling confirming that the acquisition by Cancer Centers of North Carolina, P.C. of the majority of the membership interests in Wake Radiology Oncology Services ("WROS") and the continued operation of WROS's oncology treatment center did not require a certificate of need. *See In re: Request for Declaratory Ruling by Wake Radiology*

*Oncology Services, PLLC, Cancer Centers of North Carolina, P.C., US Oncology, Inc. et al.* (attached as Exhibit E).

- On December 21, 2007, DHSR issued a declaratory ruling finding that Rex Healthcare, Inc.'s acquisition of 100% of the membership interest of Smithfield Radiation Oncology, LLC, which owned and operated a linear accelerator, was not subject to CON review. *See In re: Request for Declaratory Ruling by Rex Healthcare, Inc. and Smithfield Radiation Oncology, LLC* (attached as Exhibit F).
- On September 14, 2007, DHSR issued a declaratory ruling confirming that certificate of need review was not required for the sale to another entity of 100% of the issued and outstanding stock of a company that owned a linear accelerator. *See In re: Request for Declaratory Ruling by Radiation Therapy Services, Inc. and North Carolina Radiation Therapy Management Services, Inc.* (attached as Exhibit G).
- On January 24, 2008, DHSR issued a similar ruling with regard to acquisition of the stock of a company that owned heart lung bypass equipment. *See In re: Request for Declaratory Ruling by New Hanover Perfusionists, Inc.*, January 24, 2008 (attached as Exhibit H). DHSR focused on the fundamental fact that the ownership of the equipment would not change, and that there was no purchase of equipment, in ruling that this stock acquisition did not require a Certificate of Need.

DHSR's determination in all of these rulings is firmly founded on the express terms of the CON Law.

### **III. The Proposed Acquisition Does Not Involve the Development or Expansion of a Health Service Facility**

The Proposed Acquisition will involve expenditures by Cam Equity, but these will simply be purchases of ownership interests in existing LLC that indirectly owns the various nursing facilities. They will not entail a capital expenditure to develop or expand a health service or health service facility because the facilities will continue to be operated at the same locations, and no expansion of services is proposed.

Likewise, the Proposed Acquisition will not entail "a capital expenditure . . . which relates to the provision of a health service" under N.C. Gen. Stat. § 131E-176(16)(b). The only change that will result from the Proposed Acquisition will be in the membership composition of the LLCs, and that change in ownership is not a health service.

As DHSR and the CON Section must have determined in the prior declaratory rulings and no review determinations discussed above, the purchase of ownership interests in an existing enterprise, which already is lawfully offering the services, is not a capital expenditure that "relates to the provision of a health service" under N.C. Gen. Stat. § 131E-176(16)(b). The

Mr. Smith  
July 13, 2012  
Page 6

definition of “health service” in the CON Law specifically excludes “administrative and other activities that are not integral to clinical management.” N.C. Gen. Stat. § 131E-176(9a). The membership composition of the LLCs is not integral to the clinical management of the above nursing facilities, and the facilities’ operations will not change as a result of the Proposed Acquisition. Therefore, the purchase of membership interests in the LLCs is not an activity that is “integral to clinical management,” and accordingly is not “a capital expenditure . . . which relates to the provision of a health service” within the meaning of N.C. Gen. Stat. § 131E-176(16)(b).

#### **IV. Alternatively, the Proposed Acquisition is Exempt from CON Review, Pursuant to N.C. Gen. Stat. § 131E-184(a)(8)**

In the event that the Agency determines that the Proposed Acquisition does constitute a new institutional health service, it nevertheless is not subject to CON review, because the CON Law permits the acquisition of an existing health service facility, regardless of cost, so long as prior notice is provided. Specifically, N.C. Gen. Stat. § 131E-184(a)(8) provides, in pertinent part, that:

*the Department shall exempt from certificate of need review a new institutional health service if it receives prior written notice from the entity proposing the new institutional health service, which notice includes an explanation of why the new institutional health service is required, for any of the following:*

....

*(8) To acquire an existing health service facility, including equipment owned by the health service facility at the time of acquisition.*

Thus, to the extent that the Proposed Acquisition is a new institutional health service, it is nevertheless exempt from CON review, because Cam Equity would be acquiring existing health service facilities.<sup>4</sup>

---

<sup>4</sup> In addition, Cam Equity is not aware that any of the above nursing facilities has a pending or approved CON application to add beds. According to the June 2012 CON Monthly Report (attached hereto as *Exhibit I*), none of the listed facilities appears to have a currently-pending CON application. Thus, there does not appear to be an issue regarding the transfer of ownership or control of a certificate of need, within the meaning of N.C. Gen. Stat. § 131E-189(c). However, even if there were a pending or approved but undeveloped CON in one of these facilities, the transfer of that CON should be allowed for good cause, since the intent of the transaction is not to acquire a particular facility’s CON, but to acquire 99.999% of all membership units in an LLC which has interests in multiple states. This type of transaction was previously approved by the CON Section, when it approved the stock transfer acquisition by Novant Health, Inc., of multiple diagnostic centers owned by MedQuest Associates, Inc., including several facilities which had approved but not yet developed CONs. See correspondence from Lee B. Hoffman, Chief of the CON Section, dated September 26, 2007 (attached hereto as *Exhibit J*).

### CONCLUSION

The regulation of events like the Proposed Acquisition, involving existing and previously reviewed and approved facilities which do not otherwise implicate the fundamental purposes of the CON Law stated in N.C. Gen. Stat. § 131E-175, is beyond the scope of the CON Law, and should not require a CON. For that reason, we request that the Agency issue a “no review” letter determining that the Proposed Acquisition described above is not governed by the CON Law, and therefore, does not require a certificate of need. Alternatively should you determine that the Proposed Acquisition is governed by the CON Law, we request that you confirm that it is nevertheless exempt from CON review pursuant to N.C. Gen. Stat. § 131E-184(a)(8).

We have enclosed with this letter the following Exhibits:

- A. Organization Chart, SVCare Holdings, LLC North Carolina facilities;
- B. Decision and Order, *Schron v. Grunstein*, Index No. 650702/2010 (Supreme Court of New York);
- C. January 6, 2012 no review letter issued to North Carolina Radiation Therapy Management Services, LLC, regarding the acquisition of the ownership interests in the existing oncology treatment center located at 20 Medical Park Drive, Asheville, North Carolina;
- D. August 18, 2011 Declaratory Ruling, *In re: Request for Declaratory Ruling by Radiation Oncology Centers of the Carolinas, Inc.*;
- E. September 27, 2010 Declaratory Ruling, *In re: Request for Declaratory Ruling by Wake Radiology Oncology Services, PLLC, Cancer Centers of North Carolina, P.C., US Oncology, Inc. et al.*;
- F. December 21, 2007 Declaratory Ruling, *In re: Request for Declaratory Ruling by Rex Healthcare, Inc. and Smithfield Radiation Oncology, LLC*;
- G. September 14, 2007 Declaratory Ruling, *In re: Request for Declaratory Ruling by Radiation Therapy Services, Inc. and North Carolina Radiation Therapy Management Services, Inc.*;
- H. January 24, 2008 Declaratory Ruling, *In re: Request for Declaratory Ruling by New Hanover Perfusionists, Inc.*;
- I. CON Section Monthly Report, June 2012; and
- J. Correspondence from Lee B. Hoffman, Chief of the CON Section, dated September 26, 2007.

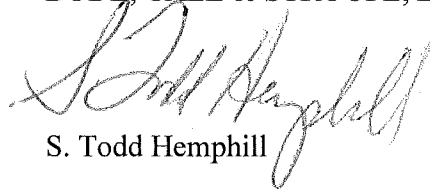


Mr. Smith  
July 13, 2012  
Page 8

Thank you for your consideration of this request. Please feel free to contact me if you have any questions.

Very truly yours,

BODE, CALL & STROUPE, L.L.P.



S. Todd Hemphill

STH:sh  
Enclosures  
cc w/enc.: Brooke A. Lane, Esq.  
Carol E. Bowen, Esq.