

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY UNIVERSAL PROPERTIES/)
FUQUAY-VARINA, LLC AND UNIVERSAL) DECLARATORY RULING
HEALTHCARE/FUQUAY-VARINA, INC.)**

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 Statute § 150B-4 and 10A NCAC 14A .0103 under the authority granted to me by the Secretary of the Department of Health and Human Services.

Universal Properties/Fuquay-Varina, LLC and Universal Healthcare Fuquay-Varina, Inc. (collectively, “Universal”) has requested a declaratory ruling to determine whether 10A N.C.A.C. 14C.1102(a) is applicable to a pending CON application submitted by Universal. 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 Universal and has provided the material facts upon which this ruling is based.

STATEMENT OF THE FACTS

On May 11, 2010, Universal was issued a Certificate of Need to construct a replacement nursing facility with 49 nursing facility beds and 31 adult care home beds in Fuquay-Varina, Wake County, North Carolina. The authorized capital expenditure was \$7,585,165.

The relocation of the nursing facility was necessitated because of damage caused to the current facility. That facility suffered irreparable water damage in September 2007 and was voluntarily decertified from the Medicaid and Medicare programs as of May 30, 2008. The facility has been closed and without residents since 2007.

The 2011 State Medical Facilities Plan (“SMFP”) has identified a need for 240 additional NF beds in Wake County. The CON application due date for these beds was August 15, 2011. The review of the CON applications filed to meet that need began on or about September 1, 2011. Universal filed a CON application to expand its nursing facility component by 60 beds. If approved, Universal’s facility would have 109 NF beds and 31 ACH beds, for a total of 140 beds.

The Agency is authorized by N.C. Gen. Stat. § 131E-183(b) to adopt rules for the review of particular types of applications that will be used in addition to the statutory review criteria set forth in N.C. Gen. Stat. § 131E-183(a). The Agency has adopted special Criteria and Standards for nursing facilities, which are codified at 10A N.C.A.C. 14C.1100, et seq. One of those rules, 10A N.C.A.C. 14C.1102, entitled “Performance Standards,” provides, in pertinent part as follows:

(a)n applicant proposing to add nursing facility beds to an existing facility, except an applicant proposing to transfer existing certified nursing facility beds from a State Psychiatric Hospital to a community facility, shall not be approved unless the average occupancy, over the nine months immediately preceding the submittal of the application, of the total number of licensed nursing facility beds within the facility in which the new beds are to be operated was at least 90 percent.

Because the Universal facility has been closed since 2007, it has had no patients in the facility since that time, and cannot practically fulfill the utilization requirement of the above rule.

ANALYSIS

The specific purpose of 10A N.C.A.C. 14C.1102(a) is to ensure that existing nursing facilities are operating at a sufficient capacity to justify their expansion. However, the rule assumes that all existing nursing facilities are open and operating. Universal is an existing, licensed facility, but is closed due to unavoidable damage to its roof. The Nursing Home Licensure and Certification Section recognized this fact by permitting the facility to retain its license while it filed a CON application to relocate the facility, and the CON Section has acknowledged the need to replace the facility by its approval of the prior CON application.

The purpose of the rule, to provide objective data demonstrating the need for expansion of an existing facility, therefore has no application to Universal. The facility cannot be opened, and therefore cannot serve patients, until the relocation is completed.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that 10A N.C.A.C. 14C.1102(a) is not applicable to Universal's pending CON application.

This the _____ day of October, 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

S. Todd Hemphill
Bode, Call & Stroupe, L.L.P.
Post Office Box 6338
Raleigh, NC 27628-6338

This the _____ day of October, 2011.

Jeff Horton
Chief Operating Officer