

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

**IN RE: REQUEST FOR DECLARATORY RULING    )**  
**BY THE CHARLOTTE-MECKLENBURG            ) DECLARATORY RULING**  
**HOSPITAL AUTHORITY d/b/a ATRIUM HEALTH   )**

I, Mark Payne, 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.

On January 17, 2019, The Charlotte-Mecklenburg Hospital Authority d/b/a Atrium Health (hereinafter, “Atrium”), requested a declaratory ruling regarding the applicability of N.C.G.S. Chapter 131E, Article 9 (Certificate of Need Law), and the Department’s rules to its proposal to relocate the Neurosciences Institute—Neurology Charlotte (the “Neurology Clinic”), a specialty neurology clinic that is provider-based to Carolinas Medical Center (“CMC”), from 1010 Edgehill Road, Charlotte, North Carolina, to a physician office building located at the intersection of Kenilworth Avenue and Harding Place in Charlotte, North Carolina. The costs associated with relocating the Neurology Clinic are projected to exceed \$2 million. 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. Gary S. Qualls, of K&L Gates, LLP, has requested this ruling on behalf of Atrium Health and has provided the material facts upon which this ruling is based.

## **STATEMENT OF THE FACTS**

Atrium Health currently operates the Neurology Clinic as a “non-licensed, provider-based outpatient department of CMC.” Atrium proposes to relocate the Neurology Clinic from 1010 Edgehill Road, Charlotte, North Carolina, to a physician office building located at the intersection of Kenilworth Avenue and Harding Place in Charlotte, North Carolina. The capital cost of the relocation is projected to exceed \$2 million. The new site is not located on the main campus of CMC.

By letter dated October 31, 2018, Atrium notified the Healthcare Planning and Certificate of Need Section (the “Agency”) of its intent to “upfit and operate a 114,000 square foot physician office building located at the intersection of Kenilworth Avenue and Harding Place (the “Kenilworth Building”).” Atrium made no mention in the letter of October 31, 2018, of the Neurology Clinic occupying space in the Kenilworth Building. By letter dated November 7, 2018, the Agency notified Atrium that the development of the Kenilworth Building was exempt from certificate of need (“CON”) review in accordance with N.C. Gen. Stat. § 131E-184(a)(9). However, the Agency’s response of November 7, 2018, expressly states that the “Agency’s position is based solely on the facts represented by [Atrium] and...any change in facts as represented would require further consideration by the Agency and a separate determination.” The representations made in this request for a Declaratory Ruling constitute a change in the facts.

Pursuant to N.C. Gen. Stat. §§ 131E-178(a) and -176(16)b, “a capital expenditure exceeding \$2 million to develop or expand a health service or a health service facility, or which relates to the provision of a health service” is a “new institutional health service” that requires a CON. Atrium seeks a Declaratory Ruling that the relocation of the Neurology Clinic would be

exempt from CON review pursuant to N.C. Gen. Stat. § 131E-184(a)(9). Pursuant to N.C. Gen. Stat. § 131E-184(a)(9),

- (a) Except as provided in subsection (b), 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:

...

- (9) To develop or acquire a physician office building regardless of cost, unless a new institutional health service other than defined in G.S. 131E-176(16)b. is offered or developed in the building.

### ANALYSIS

The issue is whether a provider-based outpatient department of a hospital is a “physician office building” for purposes of N.C. Gen. Stat. § 131E-184(a)(9). The term “physician office building” is not defined in the Certificate of Need Law, N.C. Gen. Stat. §§ 131E-175 through -192 (the “CON Law”). Therefore, the Agency must rely upon its “specialized knowledge” and “expertise” to determine how the term “physician office building” should be interpreted. *See, e.g.,* N.C. Gen. Stat. § 150B-34(a). Accordingly, “the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference....” *Total Renal Care of North Carolina, LLC v. N.C. Dep’t of Health and Human Servs.*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005). The term “physician office building” has not been interpreted by the Agency to include provider-based pediatric specialty physician clinics. Specifically, in 2018, the Agency required UNC Hospitals to obtain a CON before renovating an existing medical office building in Raleigh, North Carolina, for hospital-based pediatric specialty physician clinics. *See* Attachment A.

To distinguish between the Neurology Clinic and a “physician office building,” as the term has been interpreted by the Agency, Atrium Health’s request for a Declaratory Ruling expressly acknowledges that the Neurology Clinic meets the definition of “hospital,” as that term is defined in the CON Law at N.C. Gen. Stat. § 131E-176(13). Since the Neurology Clinic is a provider-based outpatient department of CMC, CMC is allowed to bill patients of the Neurology Clinic a facility fee. However, a physician practice that is not provider-based cannot bill patients a facility fee.

The Kenilworth Building that Atrium Health intends to upfit for the Neurology Clinic is not a “physician office building,” as that term has been interpreted by the Agency. Therefore, since the Kenilworth Building is not located on the main campus of CMC and the capital cost to relocate the Neurology Clinic will exceed \$2 million, the project is a “new institutional health service,” pursuant to N.C. Gen. Stat. § 131E-176(16)b, and there is no applicable exemption contained in N.C. Gen. Stat. § 131E-184. Accordingly, the project requires a certificate of need.

### **CONCLUSION**

For the foregoing reasons, assuming the statement of facts and representations made in the request of January 17, 2019, by Atrium Health to be true, I conclude that Atrium Health’s request to relocate the Neurosciences Institute—Neurology Charlotte, a non-licensed, provider-based outpatient department of Carolinas Medical Center, from 1010 Edgehill Road, Charlotte, North Carolina, to a physician office building located at the intersection of Kenilworth Avenue and Harding Place in Charlotte, North Carolina, without first obtaining a certificate of need is hereby denied.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2019.

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S. Mark Payne, Director  
Division of Health Service Regulation  
N.C. Department of Health and Human Services

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing Declaratory Ruling upon the PETITIONER by certified mail, return receipt requested, by causing a copy of the same to be placed in the United States Mail, first-class, postage pre-paid, and addressed as follows:

**CERTIFIED MAIL**

Gary S. Qualls  
K&L GATES, LLP  
430 Davis Drive, Suite 400  
Morrisville, North Carolina 27560  
ATTORNEY FOR THE CHARLOTTE-MECKLENBURG  
HOSPITAL AUTHORITY d/b/a ATRIUM HEALTH

This the \_\_\_\_\_ day of \_\_\_\_\_, 2019.

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Diana Barbry  
Executive Assistant to the Director  
Division of Health Service Regulation