



NC DEPARTMENT OF  
**HEALTH AND  
HUMAN SERVICES**

ROY COOPER • Governor  
MANDY COHEN, MD, MPH • Secretary  
MARK PAYNE • Director, Division of Health Service Regulation

March 5, 2021

**CERTIFIED MAIL**

Terri Harris  
Fox Rothschild LLP  
230 N. Elm Street  
Greensboro, NC 27401

**RE: The Moses Cone Memorial Hospital Operating Corporation  
HeartCare-Asheboro**

Dear Ms. Harris:

I am enclosing the above referenced Declaratory Ruling that you requested. If questions arise, do not hesitate to let me know.

Sincerely,

A handwritten signature in cursive script that reads "Mark Payne".

Mark Payne

MP:pdb

Enclosure

cc: Emery E. Milliken, Deputy Director  
Kimberly Randolph, Assistant Attorney General, DOJ  
Bethany Burgon, Assistant Attorney General, DOJ  
Lisa Pittman, Acting Chief, Certificate of Need  
Azzie Conley, Chief, Acute and Home Care Licensure  
Jeff Harms, Chief, DHSR Construction Section

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

**IN RE: REQUEST FOR DECLARATORY )  
RULING BY THE MOSES H. CONE MEMORIAL )  
HOSPITAL OPERATING CORPORATION AND ) DECLARATORY RULING  
MOSES CONE AFFILIATED PHYSICIANS, INC. )**

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 N.C.G.S. § 150B-4 and 10A NCAC 14A .0103, under the authority granted me by the Secretary of the Department of Health and Human Services.

On December 16, 2020, The Moses H. Cone Memorial Hospital Operating Corporation (“Cone Health”) and Moses Cone Affiliated Physicians, Inc. (“MCAP”) (hereinafter collectively, the “Parties”), requested a declaratory ruling as to the applicability of Chapter 131E, Article 5 (Hospital Licensure Act) and Article 9 (Certificate of Need Law) of the North Carolina General Statutes, and of the Department’s rules, to the facts described below. Specifically, the Parties requested a determination that the redesignation (without relocation) of MCAP d/b/a Cone Health Medical Group HeartCare at Asheboro (“HeartCare Asheboro”) as unlicensed, provider-based space of Cone Health: 1) is permitted by the Hospital Licensure Act; and (2) does not require a Certificate of Need (“CON”). 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. Terrill Johnson Harris of Fox Rothschild LLP has requested this ruling on behalf of the Parties and has provided the material facts upon which this ruling is based.

## **STATEMENT OF THE FACTS**

Cone Health operates licensed acute care hospitals in Guilford and Rockingham Counties. In Guilford County, its main campus location is known as The Moses H. Cone Memorial Hospital located at 1200 North Elm Street, Greensboro, NC 27401, and is operated under License #H0159. MCAP currently operates a cardiology practice, HeartCare Asheboro, at 542 White Oak Street, Asheboro, Randolph County, NC 27203. HeartCare Asheboro currently occupies 9,900 square feet of space on the upper floor of the two story medical office building at 542 White Oak Street (the “HeartCare Asheboro Space”). MCAP employs the physicians practicing at HeartCare Asheboro and owns the equipment in use at that location. MCAP currently leases the HeartCare Asheboro Space from Fayetteville RE, LLC, an unrelated third party, under an operating lease.

Cone Health now wishes to designate the HeartCare Asheboro Space as unlicensed, provider-based space of The Moses H. Cone Memorial Hospital/Cone Health. The HeartCare Asheboro Space will remain in the same location, in the same building, at 542 White Oak Street, and Cone Health will become the new tenant in place of MCAP. Cone Health will become the employer for the physicians practicing at this location and the owner of the equipment used at this location. None of the equipment owned by MCAP is separately reviewable under the Certificate of Need Act. There are no capital expenditures associated with this redesignation.

## **ANALYSIS**

The redesignation entails the Parties shifting the designation of the HeartCare Asheboro Space from a provider-based cardiology practice to an unlicensed, provider-based space of Cone Health. There are no capital costs associated with the redesignation and no assets are physically moving as a result of the redesignation.

**A. Licensure Discussion**

Cone Health plans to redesignate the Business Occupancy, provider-based HeartCare Asheboro Space, and the equipment therein, to unlicensed, provider-based space of Cone Health, permitting the space to be operated as an unlicensed outpatient location under the North Carolina Hospital Licensure Act's Business Occupancy Exception, contained in N.C. Gen. Stat. § 131E-76(3).

The statute defines "hospital" as follows for licensure purposes:

"Hospital" means any facility which has an organized medical staff and which is designed, used, and operated to provide health care, diagnostic and therapeutic services, and continuous nursing care primarily to inpatients where such care and services are rendered under the supervision and direction of physicians licensed under Chapter 90 of the General Statutes, Article 1, to two or more persons over a period in excess of 24 hours. The term includes facilities for the diagnosis and treatment of disorders within the scope of specific health specialties. **The term does not include** private mental facilities licensed under Article 2 of Chapter 122C of the General Statutes, nursing homes licensed under G.S. 131E-102, adult care homes licensed under Part 1 of Article 1 of Chapter 131D of the General Statutes, and **any outpatient department including a portion of a hospital operated as an outpatient department, on or off of the hospital's main campus, that is operated under the hospital's control or ownership and is classified as Business Occupancy by the Life Safety Code of the National Fire Protection Association as referenced under 42 C.F.R. § 482.41. Provided, however, if the Business Occupancy outpatient location is to be operated within 30 feet of any hospital facility, or any portion thereof, which is classified as Health Care Occupancy or Ambulatory Health Care Occupancy under the Life Safety Code of the National Fire Protection Association, the hospital shall provide plans and specifications to the Department for review and approval** as required for hospital construction or renovations in a manner described by the Department.

See N.C. Gen. Stat. § 131E-76(3) (emphasis added).

Because outpatient Business Occupancy locations are not part of a licensed hospital under the Business Occupancy Exception, they are not restricted by the "County Line Licensure Rule" at 10A NCAC 13B .3101(f), which states that a hospital license can only include facilities within a single county. Thus, the HeartCare Asheboro Space can be located in a county other than the county in which the hospital is located pursuant to the Business Occupancy Exception.

Additionally, the HeartCare Asheboro Space has at least 30 feet of separation from any hospital facility classified as Health Care Occupancy or Ambulatory Health Care Occupancy, and thus, would not have to be licensed as part of any hospital. Therefore, the HeartCare Asheboro Space (in Randolph County) currently meets the Business Occupancy Exception and can operate as a non-licensed, provider-based outpatient department of Cone Health (located in Guilford County) consistent with the Hospital Licensure Act.

The North Carolina Hospital Licensure Act's "hospital" definition in N.C. Gen. Stat. § 131E-76(3) incorporates by reference the definitions in the 2000 Life Safety Code of the National Fire Protection Association (the "Life Safety Code"). That Life Safety Code designates whether hospital space is classified as:

1. Business Occupancy (so as to meet the Business Occupancy Exception);
2. Ambulatory Care Occupancy; or
3. Health Care Occupancy.

The Life Safety Code at NFPA 101 Section 3.3.134.1 defines what functionally constitutes occupancy for Ambulatory Health Care. The Life Safety Code classifies "Ambulatory Health Care" as a "building or portion thereof used to provide services or treatment simultaneously to four or more patients that (1) provides, on an outpatient basis, treatment for patients that renders the patients incapable of taking action for self-preservation under emergency conditions without the assistance of others; or (2) provides, on an outpatient basis, anesthesia that renders the patients incapable of taking action for self-preservation under emergency conditions without the assistance of others." See NFPA 101 Section 3.3.134.1.

Because Business Occupancy classification is a functional step below Ambulatory Health Care (i.e., fewer requirements), the Department's Construction Section looks at what falls below

the Ambulatory Health Care standard to determine what is classified as Business Occupancy under the Life Safety Code. Thus, a Business Occupancy classification is appropriate when a building or portion thereof is used to provide outpatient services where treatment renders three (3) or fewer patients simultaneously incapable of self-preservation under emergency conditions without the assistance of others. The building located at 542 White Oak Street, Asheboro, NC, is classified as Business Occupancy, is unsprinklered, and the first floor is vacant. In the HeartCare Asheboro Space located on the second floor, no more than three (3) patients will be simultaneously rendered incapable of self-preservation under emergency conditions without the assistance of others.

The Parties reported there was no sedation, anesthesia, or procedures performed in the Heartcare Asheboro Space that would render more than three (3) patients simultaneously incapable of self-preservation under emergency conditions without the assistance of others. Thus, a Business Occupancy classification is currently appropriate because a portion of the building is used to provide outpatient services where treatment renders three (3) or fewer patients simultaneously incapable of self-preservation under emergency conditions without the assistance of others.

However, the first floor of the building is also designated as Business Occupancy and is currently vacant. In the future, if any occupancy in the building or portion thereof, is used to provide outpatient services where treatment renders four (4) or more patients simultaneously incapable of self-preservation under emergency conditions without the assistance of others, a determination would have to be made regarding the Construction Type of the building per NC Building Code requirements and whether the building would have to be sprinklered. See NFPA 101 2000 edition Table 20/21.3.

Given the foregoing features and the facts provided by the Parties, the Department confirms that the redesignation (without relocation) of the HeartCare Asheboro Space to unlicensed, provider-based space of Cone Health is permitted by the Business Occupancy Exception in N.C. Gen. Stat. § 131E-76(3) of the Hospital Licensure Act.

**B. CON Discussion**

The redesignation of the HeartCare Asheboro Space does not trigger any of the definitions of a “new institutional health service,” which would implicate CON review. N.C. Gen. Stat. § 131E-178(a) provides that no person shall offer or develop a “new institutional health service” without first obtaining a CON. The term “new institutional health service” is defined in numerous ways in N.C. Gen. Stat. § 131E- 176(16).

Among these definitions are N.C. Gen. Stat. § 131E-176(16)(a) and (b), which define a “new institutional health service” as:

- a. The construction, development, or other establishment of a new health service facility.
- b. ... [T]he 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 ....

See N.C. Gen. Stat. § 131E-176(16)(a), (b).

The redesignation of the HeartCare Asheboro Space as unlicensed, provider-based space of Cone Health does not constitute a “new institutional health service” under N.C. Gen. Stat. § 131E-176(16)(a) or (b), because Cone Health is not constructing, developing or establishing a new health service facility by this redesignation, and the Parties’ submission indicates there are no capital expenditures being incurred as part of this redesignation. Additionally, as a physician’s office, the HeartCare Asheboro Space does not meet the definition of a health service facility according to N.C. Gen. Stat. § 131E-176(9b).

The proposal also does not trigger any of the “acquisition-related” new institutional health service definitions in N.C. Gen. Stat. § 131E-176(16). There are no beds involved, so the redesignation does not constitute a “change in bed capacity” under N.C. Gen. Stat. § 131E-176(16)(c). The redesignation does not constitute the acquisition of major medical equipment under N.C. Gen. Stat. § 131E-176(16)(p) since none of the medical equipment in the HeartCare Asheboro Space has an individual value greater than \$750,000 to constitute “major medical equipment” under N.C. Gen. Stat. § 131E-176(7a). Similarly, the medical diagnostic equipment at the HeartCare Asheboro Space, counting each item with a value over \$10,000, totaled less than \$500,000, and therefore would not be considered a diagnostic center according to N.C. Gen. Stat. § 131E-176(14o). Because no operating rooms are involved, the redesignation does not implicate N.C. Gen. Stat. § 131E-176(16)(u). Nor does the redesignation constitute a “new institutional health service” under any other CON trigger in N.C. Gen. Stat. § 131E-176(16) since the redesignation does not involve the offering or expansion of any new facility, service or equipment.

This proposal is similar to two other proposals, a UNC Health Care proposal and a New Hanover Regional Medical Center proposal, which the Agency found to be non-reviewable. On March 12, 2015, the Agency determined that no CON review was necessary for UNC Health Care to redesignate (without relocation) Caldwell Memorial Hospital, Incorporated's (“CMHI”) Cancer Center Space, and Radiation and Medical Oncology Equipment located therein, to unlicensed, provider-based space of its sister hospital, UNC Hospitals. On December 9, 2016, the Agency also determined that no CON review was necessary for New Hanover Regional Medical Center to redesignate (without relocation) Southern Atlantic Radiation Oncology’s (“SARO”) Cancer Center Space, and Radiation and Medical Oncology Equipment located therein, to an unlicensed,

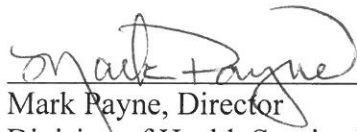


provider-based location of New Hanover Regional Medical Center. These projects involved space that housed CON-reviewable services and equipment, unlike HeartCare Asheboro.

**CONCLUSION**

For the foregoing reasons, assuming the statement of facts and representations in the request to be true, I conclude that redesignation (without relocation) of HeartCare Asheboro Space, and any equipment located therein, to unlicensed, provider-based space of Cone Health: (1) is permitted by the Hospital Licensure Act; and (2) does not require a Certificate of Need.

This the 5<sup>th</sup> day of March, 2021.

  
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Mark Payne, 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 non-agency party by certified mail, return receipt requested, by depositing the copy in an official deposit of the United States Postal Service in first-class, postage pre-paid envelope addressed as follows:

**CERTIFIED MAIL**

Terrill Johnson Harris  
Fox Rothschild LLP  
230 N. Elm Street, Suite 1200  
Greensboro, NC 27401

This the 5<sup>th</sup> day of March, 2021.



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