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RV2022-020
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Mar 25 2022

STATE HEALTH PLANNING AND
DEVELOPMENT AGENCY

March 24, 2022

VIA EMAIL (SHPDA.ONLINE@SHPDA.ALABAMA.GOV)

Hon. Emily T. Marsal, Executive Director
State Health Planning and Development Agency
100 North Union Street
RSA Union Building, Suite 870
Montgomery, Alabama 36130-3025

Re: Non-Reviewability Determination Request - Opening of a Radiology Physician Practice Location, including Diagnostic Services (as described herein), by the Department of Radiology of the University of South Alabama School of Medicine

Dear Ms. Marsal:

Our firm represents the physician practice operated by the Department of Radiology of the University of South Alabama College of Medicine (the "Practice"). The Practice will have a clinical location in subleased space in a POB on the campus of USA Health, where it will provide diagnostic services to its patients including CT, MRI, mammography, x-ray, and ultrasound (the "Diagnostic Services"). The diagnostic equipment will not be owned by or located in a health care facility, but instead will be owned and operated by an Alabama physician office which is exempt from Certificate of Need review under the physician office exemption codified at Ala. Code § 22-21-260(6). All Diagnostic Services performed at this location will be interpreted by radiologists affiliated with the Practice.

We are writing to submit a reviewability determination request ("Request") in accordance with Section 410-1-7-.02 of the Alabama State Health Planning and Development Agency's ("SHPDA's") certificate of need ("CON") program rules and regulations (the "Rules") with regard to the development and operation of the radiology Practice location in the POB (the "Clinic") which will include the Diagnostic Services described above.

Specifically, we request a determination of non-reviewability with respect the development and operation of the Diagnostic Services in the Clinic by the Practice (the "Project"). We note that the Clinic will be a radiology physician office and will therefore qualify for the physician's office exemption under applicable law. A description of facts relevant to the Project and an analysis of applicable CON law considerations in support of the Request follows.

1. *Description of the Project.* The Clinic shall be located at 21950 State Highway 181, Fairhope, AL 36532 on the campus of USA Health and pursuant to a building suite sublease to the Practice.

2. *Estimated Costs.* This Project will not exceed any of the CON expenditure thresholds specified in Section 410-1-2-.07 of the Regulations: of \$3,165,569 for major medical equipment, of \$1,266,226 for new annual operating costs, or of \$6,331,138 for total capital expenditures, as currently adjusted for CPI. The Practice represents that the proposed Project will not exceed the following approximate costs:

Total Non-Equipment Capital Expenditures:	\$ 175,000*
Total Equipment Cost:	\$ 2,409,682
Total Incremental Annual Operating Cost:	\$ 1,074,577

*There will not be any building construction costs associated with the purchase and installation of the equipment for the Diagnostic Services in the new leased POB suite.

3. *Legal Analysis.* We note that the Project:

- a) does not involve the establishment of a “health care facility” under CON law; *see* Ala. Code § 22-21-260(6) (“The term health care facility shall not include the offices of private physicians or dentists, whether for individual or group practices *and regardless of ownership...*”; emphasis added); *see also* Ala. Admin. r. 410-1-2-.05(2)(a): “The term ‘health care facility’ shall not include any of the following: ... The private office of any duly licensed physician, dentist, chiropractor, or podiatrist, whether for individual or group practice and regardless of ownership.”); and
- b) does not involve offering a “health service” under CON law; *see* Ala. Admin. r. 410-1-2-.06 (Defining “Health Services” as “Clinically related (i.e., diagnostic, curative or rehabilitative) services, including alcohol, drug abuse and mental health services customarily furnished on either an inpatient or outpatient basis *by health care facilities*, but not including the lawful practice of any profession or vocation conducted independently of a health care facility and in accordance with applicable licensing laws of this State”; emphasis added); and
- c) Satisfies the four requirements set forth by the Alabama Supreme Court in *Ex parte Sacred Heart Health Sys., Inc.*, 155 So. 3d 980,988, (Ala. 2012), namely:
 1. That the proposed services are to be provided, and related equipment used, exclusively by the physicians identified as owners or employees of the physicians' practice for the care of their patients. In the case of the Clinic, the services are to be provided, and related equipment used, only by physicians identified as employees of the Clinic.
 2. That the proposed services are to be provided, and related equipment used, at an office of such physicians. In the case of the Clinic, the services are to be provided, and related equipment used, at the Clinic, which serves as an office of the employed physicians.
 3. That all patient billings related to such services are through, or expressly on behalf of, the physicians' practice. In the case of the Clinic, all services shall be billed expressly on behalf of the Clinic as a physician office.
 4. That the equipment will not be used for inpatient care, nor by, through, or on behalf of a health care facility. In the case of the Clinic, none of the equipment will be used for inpatient care, nor by, through, or on behalf of a health care facility.

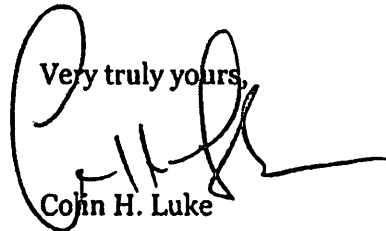
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Emily T. Marsal
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Additionally, the Practice made up of radiologists in the Department of Radiology of the University of South Alabama College of Medicine is much like the Sacred Heart Medical/Physician Group, whose physicians were all employed by the Sacred Heart Health System and not by the Sacred Heart Hospital. Here the radiologists are not employed by any of USA Health's health care facilities - USA Health Children's & Women's Hospital or USA Health University Hospital - but rather are a radiology group practice constituting a department of USA in an academic medical center environment. Further, there are no health care facilities or groups holding an interest in the Practice, it is separately a department of the University of South Alabama College of Medicine. The University of South Alabama is not a health care facility, and thus the Practice physicians are not an extension of a health care facility, but rather a private physician office operated independently of any "health care facility." Also, third party payors recognize the Practice as a private physician group practice, independent of any health care facility.

This Project will not involve the addition of inpatient beds or the conversion of one classification of beds into another classification of beds. Further, this change will not result in the provision of any new institutional health services. In light of the foregoing analysis, the Clinic qualifies for the Physician's Office Exemption.

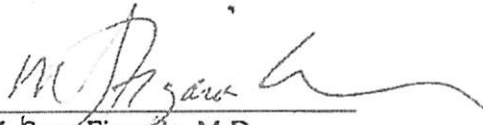
Based on the foregoing information, we respectfully request that SHPDA grant a determination of non-reviewability for the Project. An attestation from the requesting party is enclosed herein. In accordance with SHPDA Rule 410-1-7-.02, the filing fee of \$1,000.00 for this Letter of Non-Reviewability has been paid via the SHPDA electronic payment portal. Please do not hesitate to contact me at colin.luke@wallerlaw.com or (205) 226-5717 if you require any further information or have any questions.

Very truly yours,

Colin H. Luke


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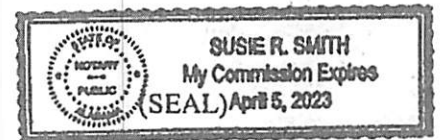
Emily T. Marsal
March 24, 2022
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The undersigned, being first duly sworn, hereby makes oath or affirms that she is the Chair for the Department of Radiology of the University of South Alabama School of Medicine, has knowledge of the facts in this request, and to the best of her information, knowledge and belief, such facts are true and correct.

Affiant: 
M. Suzy Figarola, M.D.
Chair and Professor, Department of Radiology

SUBSCRIBED AND SWORN to before me this 24th day of March, 2022.


Notary Public
My commission expires:





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STATE HEALTH PLANNING AND
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April 4, 2022

VIA EMAIL (SHPDA.ONLINE@SIIPDA.ALABAMA.GOV)

Hon. Emily T. Marsal, Executive Director
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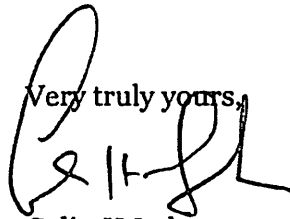
Our firm represents the physician practice operated by the Department of Radiology of the University of South Alabama College of Medicine (the "Practice").

On or around March 24, 2022, your office received a non-reviewability determination request ("Request") in accordance with Section 410-1-7-.02 of the Alabama State Health Planning and Development Agency's certificate of need program rules and regulations concerning the Practice's clinical location (the "Clinic") in a subleased space in a POB on the campus of USA Health, where the Practice will provide diagnostic services to the Practice's patients including CT, MRI, mammography, x-ray, and ultrasound.

Pursuant to our subsequent conversations with your office, we are writing to clarify the Request's description of the project. The description of the project should read as follows:

1. *Description of the Project.* The Clinic shall be located at 21950 State Highway 181, Fairhope, AL 36532 (Baldwin County) on the campus of USA Health and pursuant to a building suite sublease to the Practice.

Please do not hesitate to contact me at colin.luke@wallerlaw.com or (205) 226-5717 if you require any further information or have any questions.

Very truly yours,

Colin H Luke

CHL: