

**STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL**

**June 11, 2015**

**Opinion No. 15-52**

**Application of Public Chapter 419**

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**Question**

Does Public Chapter 419, which amends the definition of “ambulatory surgical treatment center” in Tenn. Code Ann. § 68-11-201(3), require an existing private physician’s office practice that now falls within the terms of the amended definition—*i.e.*, is a practice that has been performing more than fifty surgical abortions annually—to obtain a certificate of need for the establishment of an ambulatory surgical treatment center before the July 1, 2015, effective date of the statutory amendments?

**Opinion**

No. We conclude that the General Assembly did not intend to require such existing office practices to obtain a certificate of need prior to becoming licensed as ambulatory surgical treatment centers.

**ANALYSIS**

In 2015, the General Assembly enacted Public Chapter 419. The legislation amends Tenn. Code Ann. § 68-11-201(3), which defines the health care facilities that must be licensed as ambulatory surgical treatment centers (ASTCs). As amended, the statute will require any private physician’s office practice where more than fifty (50) surgical abortions are performed in any calendar year to obtain a license from the Tennessee Department of Health as an ambulatory surgical treatment center:

(3) “Ambulatory surgical treatment center” means any institution, place, or building devoted primarily to the maintenance and operation of a facility for the performance of surgical procedures or any facility in which a surgical procedure is utilized to terminate a pregnancy. Such facilities shall not provide beds or other accommodations for the stay of a patient to exceed twelve (12) hours duration; provided, that the length of stay may be extended for an additional twelve (12) hours in the event such stay is deemed necessary by the attending physician, the facility medical director, or the anesthesiologist for observation or recovery, but in no event shall the length of stay exceed twenty-four (24) hours. No patient for whom a surgical procedure is utilized to terminate a pregnancy shall stay at such a facility for a period exceeding twelve (12) hours. Individual patients shall be discharged in an ambulatory condition without danger to the continued well-being of the

patients or shall be transferred to a hospital. Excluded from this definition are private physicians' office practices where a total of fifty (50) or fewer surgical abortions are performed in any calendar year.

2015 Tenn. Pub. Acts, ch. 419. The legislation was signed into law by Governor Haslam on May 8, 2015, and will take effect on July 1, "the public welfare requiring it." *Id.*, § 2. The language of Public Chapter 419 clearly requires all private physicians' office practices that meet the 51-plus-annual-abortion threshold as of July 1, 2015, to obtain licensure from the Department of Health as ambulatory surgical treatment centers.

You inquire whether any such office practice that is not already licensed as an ASTC must first obtain a certificate of need (CON) from the Health Services and Development Agency.<sup>1</sup> This question is prompted by the fact that other already-existing statutes require a certificate of need for the construction, development, other establishment, or major modification of an ambulatory surgical treatment center. Tenn. Code Ann. §§ 68-11-1602(7)(A), 68-11-1607(a)(1), 68-11-1607(a)(2). Certificates of need are granted by the Health Services and Development Agency. Tenn. Code Ann. § 68-11-1602(1). When a certificate of need is required, it must be granted before the Department of Health may issue a license. Tenn. Code Ann. § 68-11-1607(b).

Answering your question requires interpretation of statutory language of Public Chapter 419. When construing a statute, the primary goal is to give effect to the intent of the legislature without broadening or restricting the statute beyond its intended scope. *In re Estate of Davis*, 308 S.W.3d 832, 837 (Tenn. 2010). Because courts must presume that the legislature says in a statute what it means and means in a statute what it says there, the search for the meaning of statutory language begins with the statute itself. *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). The words of a statute are given their natural and ordinary meaning unless the legislature used them in a specialized, technical sense. *Id.* A statute's meaning is to be determined, not from special words in a single sentence or section, but from the act taken as a whole, and viewing the legislation in the light of its general purpose. *Loftin v. Langsdon*, 813 S.W.2d 475, 478 (Tenn. Ct. App. 1991).

In attempting to resolve a statutory ambiguity or when it is not clear what the legislature had in mind, courts may look beyond the statutory text to, among other things, public policy, historical facts preceding or contemporaneous with the enactment of the statute being construed, the background and purpose of the statute, earlier versions of the statute, the caption of the act, the legislative history of the statute, and the entire statutory scheme in which the statute appears. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 528 (Tenn. 2010). Moreover, when the terms of a statute are ambiguous or its significance is doubtful, other statutory rules of interpretation may be used. For example, legislative intent also may be ascertained through applying the principle of *expressio unius est exclusio alterius* ("to express one thing is to exclude others"). *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d 626, 633 (Tenn. 2008).

Here, when the words of Public Chapter 419 are given their ordinary and normal meaning, it appears that the General Assembly did not intend to require that existing practices now coming

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<sup>1</sup> You are aware of at least two office practices that would come within the amended definition of an ASTC and would therefore be subject to licensure requirements as an ASTC under Public Chapter 419.

within the new ASTC definition obtain a certificate of need, since no mention is made of a certificate of need. The expression by the Legislature of a licensure requirement and the absence of any reference to a certificate of need requirement in Public Chapter 419 strongly suggests that a certificate of need requirement is not included.

To resolve any possible ambiguity as to whether the General Assembly intended that already-operating physicians' office practices performing more than fifty surgical abortions annually must, before the effective date of the new chapter, first obtain a CON before becoming licensed as an ASTC, we have also examined public policy, historical facts preceding the enactment of the statutory amendment, the background and purpose of the amendment, and the legislative history of the amendment. After doing so, and as described below, we conclude that the Legislature did not intend to impose a CON requirement upon such practices.

First, we note that a certificate of need is generally required for the construction, development, other establishment, or modification of a health care institution. Tenn. Code Ann. § 68-11-1607(a)(1), (a)(2). A practice that is already in existence would not appear to fall within the natural and ordinary meaning of these terms, which refer to the building of a new facility or the expansion of an existing facility.

Second, the legislative history of Public Chapter 419 reveals clearly that the General Assembly's concerns were directed at patient safety, sanitary conditions, and health-related inspections—matters that fall within the scope and authority of the Department of Health's licensing and regulatory functions under Tenn. Code Ann. §§ 68-11-201, *et seq.*—rather than at the issues of need, economic feasibility, and orderly development of healthcare that are considered by the Health Services and Development Agency in granting or denying certificates of need for health care facilities under Tenn. Code Ann. §§ 68-11-1601, *et seq.* See, e.g., Senate Judiciary Committee, Debate on SB1280, 109th Gen. Assembly (April 7, 2015); House Session, Debate on HB1368/SB1280, 109th Gen. Assembly (April 21, 2015). Certificates of need were not mentioned at all in the legislators' discussions.

Third, the certificate of need process, as established by statute, is often a lengthy one. For example, an application for a CON must be commenced by the filing of a letter of intent that is also published in a newspaper of general circulation. Tenn. Code Ann. § 68-11-1607(c)(1). Review cycles begin every two months. Tenn. Code Ann. § 68-11-1607(c)(5). The Department of Health must review, verify, analyze, and file a written report upon each CON application for the establishment of an ASTC. Tenn. Code Ann. § 68-11-1608. A health care institution or person who files a written objection to an application may petition for a contested case hearing before an administrative law judge. Tenn. Code Ann. § 68-11-1610(a). Thus, it would be difficult, if not impossible, for an existing, currently-operating practice that now finds itself within the new ASTC definition as of July 1, 2015, to obtain a certificate of need in time to come into compliance with the new licensure requirement if a certificate of need were deemed an implicit pre-condition to the license.

The General Assembly is presumed to be aware of its prior enactments and the state of the law when it enacts legislation. *Washington v. Robertson Cnty.*, 29 S.W.3d 466, 473 (Tenn. 2000). Furthermore, courts presume that the General Assembly did not intend to enact a useless statute.

*Lee Med., Inc., supra*, 312 S.W.3d at 527. The fact that completion of the CON process generally requires at least several months provides additional support for our conclusion that Public Chapter 419 does not require existing practices that now come within the new ASTC definition to obtain a CON as a pre-condition to licensure as an ASTC, since requiring a CON would be tantamount to requiring something that is virtually impossible. In adopting Public Chapter 419 in late April 2015, the Legislature did not intend to require existing physicians' office practices that were already performing more than fifty surgical abortions annually to obtain a certificate of need before and in addition to a license by the July 1, 2015, effective date of the enactment.

In conclusion, it is our opinion that while Public Chapter 419 clearly requires all private physicians' office practices that perform more than fifty surgical abortions annually to obtain a license as an ambulatory surgical treatment center from the Department of Health, such already-existing practices are not also required to obtain a certificate of need for the establishment of an ambulatory surgical treatment center before the July 1, 2015, effective date of the statutory amendments.

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