

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

IN RE: REQUEST FOR DECLARATORY)	
RULING BY HEALTH SYSTEMS)	
MANAGEMENT, INC. AND CLAYTON)	DECLARATORY RULING
DIALYSIS CENTER, INC)	
Project I.D. No. J-6927-03)	

I, Robert J. Fitzgerald, 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 me by the Secretary of the Department of Health and Human Services.

Health Systems Management, Inc. (Lessor) and Clayton Dialysis Center, Inc. (Lessee) (hereinafter collectively referred to as "Petitioners") have requested a declaratory ruling allowing for a change in the site for Project I.D. No. J-6927-03 on the grounds that the change does not constitute a material change in physical location or a failure to materially comply with the representations made by Petitioners in their Certificate of Need (“CON”) application for their project. N.C.G.S. §§ 131E-181(a) and (b). 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 the law firm Bode, Call & Stroupe, L.L.P., has requested this ruling on behalf of Petitioners and has provided the material facts upon which this ruling is based.

STATEMENT OF THE FACTS

On March 9, 2005, Petitioners received a CON to develop a new ten-station dialysis facility to be located on Highway 70E in the Clayton area of Johnston County (the “Original Site”). Petitioners now state that the Original Site, identified as the primary site in their CON application, is no longer available.

Petitioners have identified a new site for the proposed facility located 0.5 miles from the intersection of Barber Mill Road and Highway 42 East in Clayton (the “Proposed Site”). Petitioners state that the Proposed Site is less than three miles from the Original Site. They also state that the Proposed Site is approximately 5 minutes from the future Johnston Memorial Hospital project on Highway 42 East and is within 500 yards of an assisted living facility and a nursing home. The Proposed Site is roughly 2.67 acres and is zoned B-3, which permits the use of a dialysis facility. The Proposed Site has electricity, water and sewer services currently available. The purchase price for the Proposed Site is \$265,000, which is lower than the projected cost of the Original Site at \$435,600.

ANALYSIS

The CON law would require a full review of Petitioners’ proposed change of host site if that change were to represent a material change in the physical location or scope of the project. N.C.G.S. § 131E-181(a). The proposed change of the site for Petitioners’ project does not constitute a material change in the physical location because of the close proximity of the Proposed Site to the Original Site. Both sites are in the Clayton vicinity, consistent with Petitioners’ CON application. The change will not affect the scope of services offered or the costs and charges to the public. In addition, there is no proposed change in the person named in the application such that a violation of N.C.G.S. § 131E-181(a) would result.

N.C.G.S. § 131E-189(b) allows the Agency to withdraw Petitioners' CON if Petitioners fail to develop the service in a manner consistent with the representations made in the application or with any conditions that were placed on the CON. Petitioners will not be developing their project in a manner that is materially different from the representations made in its application, nor will they be developing their project in a manner that is inconsistent with any of the conditions that were placed on its CON.

CONCLUSION

For all the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that the substitution of the Proposed Site for the Original Site for Petitioners' dialysis facility (Project I.D. No. J-6927-03) will not constitute a material change in the physical location or scope of the project, will not violate N.C.G.S. § 131E-181, and will not constitute a failure to satisfy a condition of the CON in violation of N.C.G.S. § 131E-189(b).

This ruling is not intended, and should not be interpreted, to authorize any increases in the approved capital expenditure for this project, a change in the approved timetable, a change in the conditions placed on the certificate of need, or any other change in the approved project.

This the _____ day of _____, 2007.

Robert J. Fitzgerald, 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.
3105 Glenwood Avenue, Suite 300
Raleigh, NC 27612

This the _____ day of _____, 2007.

Jeff Horton
Chief Operating Officer