

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

IN RE: REQUEST FOR DECLARATORY)	
RULING BY BIO-MEDICAL APPLICATIONS)	
OF NORTH CAROLINA, INC. d/b/a)	DECLARATORY RULING
FRESENIUS MEDICAL CARE OF EASTERN)	
WAKE,)	
Project I.D. No. J-7759-06)	

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.

Bio-Medical Applications of North Carolina, Inc. d/b/a Fresenius Medical Care of Eastern Wake (“BMA”) has requested a declaratory ruling allowing for a change in address for Project I.D. No. J-7759-06 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 BMA in its Certificate of Need (“CON”) application for its 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. Jim Swann of BMA has requested this ruling on behalf of BMA and has provided the material facts upon which this ruling is based.

STATEMENT OF THE FACTS

On May 30, 2007, Bio-Medical Applications of North Carolina, Inc. d/b/a Fresenius Medical Care of Eastern Wake (“FMC-Eastern Wake”) received a certificate of need to relocate 12 dialysis stations from BMA Wake Dialysis Clinic to a new dialysis facility to be located at 4908 Vineyard Pine Road in Rolesville (Project I.D. No. J-7759-06). In correspondence dated February 8, 2008, the petitioner requested a declaratory ruling permitting a change of address within the site on Vineyard Pine Road.

In its application for a Certificate of Need, BMA explained that the proposed property for development needed to be rezoned. During the re-zoning hearing, a request was made, and approved, to establish an extensive storm drainage system. As a part of this system, a 30 foot undisturbed area was determined to be needed. This 30 foot area encroached upon the proposed development area of the new dialysis facility.

Due to the requirement for the 30 foot undisturbed area, the associated impact to the plans for the dialysis facility, BMA needs to move across the street, within the originally identified site. This will result in a new street address for the facility, still on Vineyard Pine Road.

The new site is directly across the street from the original proposed site of development. The new site provides identical access for patients. There is no additional cost for the new site of development. Development of the facility at the new street address does not constitute any significant movement of the proposed facility.

ANALYSIS

The CON law would require a full review of BMA’s 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 address for BMA's project does not constitute a material change in the physical location or the scope of the proposed project for the following reasons:

The new site is located directly across the street from the original planned location. There is essentially no change in this location as opposed to the primary site approved in the Certificate of Need Application.

The change of site will not affect BMA's ability to develop this project in a manner consistent with the representations in the CON application and with the conditions placed on the CON.

The new site will be as convenient for BMA's patients as the originally proposed site and will be beneficial to the same patient population as proposed in the Certificate of Need Application, who are currently BMA patients at the BMA Wake Dialysis facility.

The new location is appropriately zoned for dialysis.

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

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that the change of address for Project I.D. No. J-7759-06 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 the _____ day of April, 2008.

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

Jim Swann
Regional Director of Health Planning
Bio-Medical Applications of North Carolina, Inc.,
d/b/a FMC Eastern Wake
3867 Dunn Road
Fayetteville, NC 28312

This the _____ day of April, 2008.

Jeff Horton
Chief Operating Officer