

**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,)	DECLARATORY RULING
INC. d/b/a FRESENIUS MEDICAL CARE)	
OF EASTERN WAKE)	
Project I.D. No. J-7759-06)	

I, Jeff Horton, as Acting 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 the site 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, Regional Director of Health Planning for 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

Effective 30 May 2007, the CON Section issued a CON to BMA relocate 12 dialysis stations from BMA Wake Dialysis Clinic to a new dialysis facility to be located at 4908 Vineyard Pine Road in Rolesville, North Carolina (the “Original Site”). In correspondence dated 8 February 2008, BMA requested a Declaratory Ruling permitting a change of address within the site on Vineyard Pine Road. On 3 April 2008, the Department issued a Declaratory Ruling approving BMA’s request for an address change. BMA represents that subsequent to the 3 April 2008 Declaratory Ruling, the owner of the property on Vineyard Pine Road has not been willing to conclude the previously negotiated sale of the property, despite extensive site preparations by the property owner. Due to the property owner’s unwillingness to execute the sale of the property, BMA has identified another location for development of the facility (the “Proposed Site”).

The Proposed Site is identified as Lot 14, adjacent to the Sanford Creek Elementary School on Granite Falls Boulevard in Rolesville and is approximately 1.5 miles from the Original Site on Vineyard Pine Road. BMA states that the purchase price for the Proposed Site is comparable to the Original Site and that the Proposed Site can be successfully rezoned to allow development of a dialysis facility. BMA further represents that it does not contemplate any change to the scope or scale of the services proposed in its original application.

ANALYSIS

The CON law would require a full review of BMA’s proposed change of 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 BMA’s project does not constitute a material change in the physical location because of the close proximity of the Proposed Site to

the Original Site. 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 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 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 BMA's 12-bed dialysis facility (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 _____, 2008.

Jeff Horton, Acting 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
Fresenius Medical Care
3867 Dunn Road
Eastover, NC 28312

This the _____ day of _____, 2008.

Jeff Horton
Acting Director